S. HRG. 108–135, PT. 8

CONFIRMATION HEARINGS ON FEDERAL APPOINTMENTS

HEARINGS

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED EIGHTH CONGRESS

SECOND SESSION

JULY 7, SEPTEMBER 8, SEPTEMBER 22, AND NOVEMBER 16, 2004

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WEDNESDAY, JULY 7, 2004

STATEMENTS OF COMMITTEE MEMBERS

PRESENTER

STATEMENT OF THE NOMINEE

QUESTIONS AND ANSWERS

SUBMISSION FOR THE RECORD

WEDNESDAY, SEPTEMBER 8, 2004

STATEMENTS OF COMMITTEE MEMBERS

PRESENTERS

WEDNESDAY, SEPTEMBER 22, 2004

QUESTIONS AND ANSWERS

SUBMISSIONS FOR THE RECORD

TUESDAY, NOVEMBER 16, 2004

STATEMENTS OF COMMITTEE MEMBERS

PRESENTERS

STATEMENTS OF THE NOMINEES

QUESTIONS AND ANSWERS

SUBMISSIONS FOR THE RECORD

ALPHABETICAL LIST OF NOMINEES

NOMINATION OF MICHAEL H. SCHNEIDER, SR., OF TEXAS, NOMINEE TO BE DISTRICT JUDGE FOR THE EASTERN DISTRICT OF TEXAS

WEDNESDAY, JULY 7, 2004

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 10:03 a.m., in room SD–226, Dirksen Senate Office Building, Hon. John Cornyn, presiding.

Present: Senator Cornyn.

OPENING STATEMENT OF HON. JOHN CORNYN, A U.S. SENATOR FROM THE STATE OF TEXAS

Senator CORNYN. This hearing of the Senate Judiciary Committee will come to order.

Today, we have the privilege of considering the nomination of an exceptional Texas jurist to serve on the Federal district bench for the Eastern District of Texas. I want to start by thanking the Chairman of the Committee, Senator Hatch, for scheduling today's hearing and giving me the honor of chairing it. I look forward to moving this nomination through the Committee and through the Senate over the next few weeks.

I also want to thank the Ranking Member, Senator Leahy, and his staff for working so cooperatively to make today's hearing possible. One thing you learn in the United States Senate is cooperation is critical to getting anything done, and that is true in this case as well.

After a few brief introductory remarks, I will turn the floor over to Senator Leahy, if he is able to attend, for any remarks he might wish to make; if not, then certainly any written statements any Senator would like to be made part of the record will be made part of the record, without objection. And I know that Senator Hutchison, the senior Senator from Texas, will be here, who knows the nominee and his family quite well, is on her way and would like to make some remarks.

The vacancy we hope to fill with the nomination before us today was created by the untimely passing of Judge John H. Hannah, Jr. Judge Hannah was a good man and a distinguished jurist. His family's loss was also a great loss to the State of Texas and to the Federal judiciary.

I had the chance to work with Judge Hannah when he was Secretary of State for Texas and also when he was on the Federal bench. Also, in a brief interim between the time I left public service and was a private practitioner, I also actually appeared before him as a practicing lawyer. And I can tell you that he unerringly treated everyone with respect and dignity.

Senator Hutchison and I worked with Judge Hannah closely just last year on legislation to authorize the Eastern District of Texas to hold court in the city of Plano. That bill was important to Judge Hannah, who always worked hard to serve the citizens of the Eastern District. He passed away the day after the President signed that legislation into law.

The death of Judge Hannah leaves some big shoes to fill, but President Bush could not have filled them better than with the nomination of Texas Supreme Court Justice Michael Haygood Schneider. Justice Schneider will bring to the Federal district court the wisdom, judgment, and experience of over a quarter of a century's service on the bench. He understands, as any good judge must, that the duty of a judge is to interpret the law, not to legislate from the bench.

Justice Schneider has held virtually every position in the State court system that Texas has to offer. From 1978 to 1990, he served on the West University Place Municipal Court. Then he served on the 157th District Court of Texas, located in Houston, until 1996. Next, he became Chief Justice of the First Court of Appeals in Houston. He served there until 2002, when he was appointed Justice of the Supreme Court of Texas, where I once had the honor of serving.

He has been honored both as Trial Judge of the Year and Appellate Judge of the Year by the Texas Association of Civil Trial and Appellate Specialists. In addition to this extraordinary record of judicial service, Justice Schneider also served the people of Texas in the role of assistant district attorney for Harris County.

Justice Schneider is a graduate of Stephen F. Austin State University in Nacogdoches in East Texas, the University of Houston Law School, and more recently the LL.M. program of the University of Virginia Law School. And he has a distinguished record of civic involvement.

Justice Schneider's reputation as an exceptional jurist and a true gentleman is well known throughout the State of Texas. It is also well known by the American Bar Association, which recently gave him its highest ranking, when its Standing Committee on the Federal Judiciary unanimously certified him as "Well Qualified" for the Federal bench.

His nomination enjoys broad bipartisan support throughout the State of Texas. For example, Susan Hayes, who chairs the Dallas County Democratic Party, has written a strong letter of support, and without objection, I would like to submit that letter for the record.

I will break my remarks there, and since Senator Hutchison has been able to join us, I know she has some remarks she would like to make about this exceptionally well qualified nominee, and I would be pleased to recognize her for that purpose at this time.

Senator HUTCHISON. You may finish your comments if you want to.

Senator CORNYN. I would be happy for you to proceed, Senator Hutchison, because I am going to be here for a while, and I know you have a number of other assignments that are going to take you away. So, please, go ahead.

PRESENTATION OF MICHAEL H. SCHNEIDER, SR., NOMINEE TO BE DISTRICT JUDGE FOR THE EASTERN DISTRICT OF TEXAS, BY HON. KAY BAILEY HUTCHISON, A U.S. SENATOR FROM THE STATE OF TEXAS

Senator HUTCHISON. Thank you very much. I appreciate that, and I apologize for being late. But it is not because I am not really excited about the support of a friend for a Federal bench, Mike Schneider. I cannot think of anyone who has had all of the right qualifications—well, except for you, Mr. Chairman—but other than you, for this type of bench. He has been a judge for 25 years and has performed in an excellent way in all of his positions. This is an East Texas judgeship, so the cities would be Beaumont, Texarkana, Tyler, and Sherman.

He has served as a Justice on our Supreme Court since 2002, elected statewide for that position. Prior to that, he was Chief Justice of the First Court of Appeals for Texas, and prior to that, a district judge in Houston, as well as a municipal judge in West University Place. So he has truly known all the levels of our court system, which I think really speaks well for him.

He earned his bachelor's degree from Stephen F. Austin State University in 1965, a law degree from the University of Houston in 1971, and a master of law degree from the University of Virginia School of Law in 2001. He has been honored as Judge of the Year twice by the Texas Association of Civil Trial and Appellate Specialists. I cannot think of anyone who has the respect that he does who is seeking a permanent position on the court.

As you and I know, Mr. Chairman, these lifetime appointments are very carefully regarded because once someone has a lifetime appointment, we know that they no longer face the people. But it really gives me pleasure to nominate someone who has gone to the people, who has won elections, who has shown judicial temperament, as well as the ability to excel and be totally, overwhelmingly supported by the people of our State at every level—district, civil, and Supreme Court, all of which are elective in the State of Texas.

So I recommend him highly. We all know that this is late in an election year, so my question will be to the Committee: Will you move as swiftly as possible to try to get this nomination ready for the floor? There should not be a controversy, and this East Texas bench needs the seats filled. So it would be helpful if you can move expeditiously.

And, with that, I will—well, before I leave, let me also introduce his wife, who is here, Mary Schneider. I have known Mary also for at least 25 years. She has been a family friend. She is wonderful. And his son also, Michael, Jr., is here.

So we welcome all of them from Texas and look forward to having a swift confirmation, if possible.

Senator CORNYN. Thank you, Senator Hutchison. Knowing that usually when you and I have the honor of introducing a Texan who has been nominated for public office like the Federal bench, I know we sometimes go over the same credentials, and that makes sense. But in an effort to try to come up with something new and different, I went to the website of the Supreme Court, and we know that Justice Schneider is humble not because he has to be—that is just the kind of person he is—but he points out he held a variety of jobs during college and law school, including searching titles at a major oil company, managing apartments, driving ambulances, operating a school bus for disabled children, working at a funeral home, teaching at school, delivering milk, clerking for a law firm, managing a college cafeteria, serving as a waiter, bell-hopping at a hotel, and serving as an intern at the U.S. Attorney's Office. I may ask him which of those has best prepared him to serve on the Federal bench in the questioning.

Senator HUTCHISON. Well, Mr. Chairman, I would just respond to that saying that when you are giving this lifetime appointment and having met many Federal judges who do not seem to have the common touch, we can be assured with that addition to his background that he is a man of the people.

Senator CORNYN. I agree. Thank you very much, Senator Hutchison, for joining us and for those fine remarks.

I will just conclude my remarks by saying I am pleased that the President has nominated Justice Schneider to serve on the Eastern District of Texas, and I am honored to chair today's hearing. I look forward to hearing from him today, and I look forward to what I, too, will hope will be a swift confirmation process.

As I mentioned earlier, other Senators may come during the course of the hearing. Those who are unable to attend because of conflicting hearings, or for any other reason, of course, their statements will be made part of the record, without objection.

But now I would like to invite Justice Schneider to take a seat at the table, but first, if you will raise your right hand and take the oath, please, Judge? You can just do it from there. If you will just raise your right hand, do you swear that the testimony you are about to give before this Committee is the truth, the whole truth, and nothing but the truth, so help you God?

Judge SCHNEIDER. I do.

Senator CORNYN. Thank you. Please have a seat. I know Senator Hutchison acknowledged members of your family, but I wonder if you would like to just have them maybe stand so we can all get a good look at them. And I know they are relishing this day as much as you are, and we want them to share in the attention and the congratulations, too.

STATEMENT OF MICHAEL H. SCHNEIDER, SR., NOMINEE TO BE DISTRICT JUDGE FOR THE EASTERN DISTRICT OF TEXAS

Judge SCHNEIDER. Well, my wife, Mary, of course; and my son, Michael, Jr. And I am going to introduce a surprise visitor here today. A young man that was my briefing attorney at the Court of Appeals in Houston found out about this and showed up: John Murdoch.

Senator CORNYN. Very good.

Judge SCHNEIDER. And then we have three other daughters that are not able to be here, and just to acknowledge them: My daughter, Dr. Heidi Schneider, who is an internal medicine doctor in San Antonio. We have got Shelley, who is going to be finishing—Shelley Toomey, who will be finishing or actually has started teaching in the Houston Independent School District. And then last, and certainly not least, Christine, who is in her last year as an education major at Texas State University.

Senator CORNYN. Well, I know they all must be very proud of you and your accomplishment and share in your sense of accomplishment and also gratitude at being nominated for this position.

I wonder if, Judge Schneider, since it looks like it is just you and me for the time being, I would be glad to recognize you for any opening remarks you would like to make at this time.

Judge SCHNEIDER. Thank you, Senator. Thank you, Mr. Chairman. I want to continue and say, in introducing people, to express my thanks to the Senate, the Judiciary Committee, Senators Hatch and Leahy, especially the Chairman, Senator Cornyn, and Senator Hutchison who came over this morning. I also want to thank the President for having confidence in me to make this nomination.

[The biographical information of Judge Schneider follows:]

PART 1 - BIOGRAPHICAL INFORMATION (PUBLIC) 1

1. Full name: (include any former names used.)

Michael Haygood Schneider, Sr.

2. Address: List current place of residence and office addresses

OFFICE	RESIDENCE
Supreme Court Building P.O. Box 12248 Austin, Texas 78711 Phone: (512) 463-1336	Houston, Texas

3. Date and place of birth: January 6, 1943; San Antonio, TX

4. Marital Status: (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es)

Married to:	Mary Fite Schneider
Maiden Name:	Mary Esther Fite
Occupation:	Self-Employed Government Relations Consultant
Business Address:	Works from residence

5 Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted

Law Schools	Degree	Start	End	Degree Date
University of Virginia	LLM	06/99	05/01	05/01
University of Houston	JD	06/69	12/70	12/70
South Texas College of Law	no	06/68	06/69	n/a
Post Baccalaureate	**Degree**	**Start**	**End**	**Degree Date**
University of Houston	n/a	09/67	06/68	n/a
Sam Houston State University	n/a	06/67	07/67	n/a
University of Houston	n/a	01/66	09/66	n/a
Undergraduate	**Degree**	**Start**	**End**	**Degree Date**
Stephen F. Austin State Univ.	BS	01/64	06/65	06/65
University of Houston	n/a	09/63	01/64	n/a

PART 1 - BIOGRAPHICAL INFORMATION (PUBLIC)

Lon Morris College	AA	09/61	06/63	06/63

6. **Employment Record:** List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

Began	Until	Employer Name	Position
09/02	Present	The Supreme Court of Texas	Justice
05/02	Present	Lon Morris College	Board Member
09/97	09/00	St. Luke's United Methodist Church (Houston)	Board Member
02/96	09/02	TX First Court of Appeals at Houston	Chief Justice
01/90	02/96	157th District, Harris County	Presiding Judge
08/78	09/90	City of West University Place	Municipal Judge
06/89	09/90	McFall & Sartwelle (no longer exists)	Of Counsel
01/86	02/89	Union Pacific Railroad Company	General Solicitor
11/80	02/86	Bawden Drilling, Inc. (no longer exists)	General Counsel
09/76	11/80	Dresser Industries, Inc.	General Attorney
08/75	08/76	Parks & Moss (no longer exists)	Of Counsel
08/71	08/75	Harris County District Attorney	Assistant District Attorney
04/71	08/71	Self-employed Attorney	(Interim. Until DA vacancy)
02/71	04/71	Houston Independent School District	Bus driver, special education kids
01/70	06/70	U.S. Attorney, Southern District of TX	Appellate Intern (Law school)
06/69	12/69	Nagle & Barr (no longer exists)	Law Clerk (Part time)
09/68	11/68	Humble Oil (now EXXON USA)	Division Order Clerk (Part time)
09/65	09/68	Galveston Independent School District	Civics teacher/coach
06/65	09/65	J. Levy & Co., Funeral Directors	Funeral Assistant/ Ambulance Crew

7. **Military Service:** Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

PART 1 - BIOGRAPHICAL INFORMATION (PUBLIC) 3

None.

8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

Honor	Group/Association/Entity
2001 Texas Appellate Judge of the Year	TX Association of Civil Trial & Appellate Specialists
2000 Houston Appellate Judge of the Year	Houston Police Officers Association
1994 Texas Trial Judge of the Year	TX Association of Civil Trial & Appellate Specialists
2004 Commencement Address	Lon Morris College
2003 Commencement Address	Stephen F. Austin State University
1967 Most Effective Teacher	Elected by Ball High School Student Body

9. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and date of any offices which you have held in such groups.

Bar Associations/Professional Societies	Committees/Position/Status
America Law Institute	Elected Member
American Bar Association	Member
State Bar of Texas (SBOT)	Liaison, The Supreme Court of Texas
SBOT, Judicial Section	Liaison, The Supreme Court of Texas
SBOT, TX Young Lawyer's Association	Liaison, The Supreme Court of Texas
SBOT, Board of Disciplinary Appeals	Liaison, The Supreme Court of Texas
SBOT, Judicial Section	Legislative Committee
SBOT, Judicial Section	Judicial Ethics Committee
Supreme Court Rules Advisory	Representative, Council of Chief Justices
Grievance Oversight Committee	Liaison, The Supreme Court of Texas
Texas Bar Foundation, Life Fellow	Invited Member
Houston Bar Association	Member
Houston Bar Association	Appellate Practice Committee
Houston Bar Association	Bench Bar Planning Committee
Houston Bar Association	Administration of Justice Committee
Houston Bar Association	Pictorial Roster Committee
Houston Bar Association	Judicial Evaluation Committee
Houston Bar Association	Habitat for Humanity Project Committee
Houston Bar Foundation, Life Fellow	Invited Member
Harris County Civil District Judge's Board	Chairman, Mass Torts Committee (Managed Asbestos, Silicone Breast Implant Dockets)
Harris County Civil District Judge's Board	Rules Committee
Dallas Bar Association	Member
Travis County Bar Association	Member

PART 1 - BIOGRAPHICAL INFORMATION (PUBLIC) 4

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.

A. Memberships in organizations active in lobbying before public bodies.

I do not belong to any organization active in lobbying before public bodies. I have contributed to the Texas Alliance for Judicial Funding.

B. All other organizations to which you belong.

I belong to St. Luke's United Methodist Church, Houston, Texas.

11. Court admissions: List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

	Court Admissions		
Court	Admitted	Lapsed	Reason
All Texas Courts	04/71	no	n/a
U.S. District Court, Southern District of Texas	06/71	06/76	Practice did not require at the time
U.S. District Court, Southern District of Texas	10/89	10/94	On State District Court bench

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.

I have no book publications, article publications, or other published material. The speeches I make typically fall into the following categories: 1) "Update" speeches giving practitioners an update on the recent opinions that have been issued from my court; 2) "Practice Point" speeches to practitioners or law students (e.g., explaining how to give a good closing argument, or how not to alienate the jury in voir dire); or 3) "Ceremonial" speeches at graduations or weddings.

With my Update and Practice Point speeches, I generally handwrite a brief outline, speak

extemporaneously, and do not keep my notes. I have not made it a practice to save my outlines. In the chart below, I have listed as many of the Update and Practice Point speeches as I can recall, and have provided as many details about the date and the audience as I could. I am omitting the Ceremonial speeches as they generally do not touch upon any aspect of the law.

	Date	Title of Speech	Audience
1.	March 2, 1992	"Texas Summary Judgments"	The Rutter Group
2.	March 20, 1992	"Texas Discovery"	The Rutter Group
3.	March 9, 1993	"Advanced Problems in Civil Litigation"	Texas Center for the Judiciary, Austin
4.	March 8, 1994	"Voir Dire"	American Inns of Court XV (Garland Walker Inn), Houston
5.	March 23, 1994	"Texas Discovery"	The Rutter Group
6.	March 21, 1995	"Breast Implant Litigation"	Houston Bar Association
7.	May 19, 1995	"Jury Selection"	The Rutter Group
8.	June 14, 1996	"Effective Appellate Representation"	Brazoria County Bar Association, Angleton
9.	October 18, 1996	"Courtroom Evidence"	The Rutter Group
10.	October 25, 1997	Appellate Bench Bar Conference	Panel Member, Houston Bar Association, Del Lago
11.	March 5, 1999	"Practicing Before the First and Fourteenth Court of Appeals"	Houston Bar Association
12.	April 23, 1999	"Legal Writing and Appellate Writing"	Houston Bar Association
13.	February 23, 2000	"What Trial Lawyers Need from Appellate Lawyers"	Houston Bar Association
14.	November 3, 2000	"Settling the Appellate Case"	Panel Member, Resolution Forum, Inc./Center for Legal Responsibility, Houston
15.	April 28, 2001	2001 Civil and Appellate Bench Bar Conference	Panel Member, Houston Bar Association, Galveston
16.	May, 2001	"Practicing Before the First Court of Appeals"	Appellate Practice Institute, sponsored by the South Texas College of Law, Houston
17.	June 27, 2001	"Litigating Appeals for the State: A Review of Recent Cases"	Panel Member, Houston Bar Association
18.	September 7, 2001	"Selection of Candidates for Judicial Appointments"	Panel Member, Houston Bar Association

PART 1 - BIOGRAPHICAL INFORMATION (PUBLIC) 6

19.	October 25, 2001	"Responsible Dispute Resolution"	Panel Member, Resolution Forum, Inc./Center for Legal Responsibility, Houston
20.	May, 2002	"Practicing Before the First Court of Appeals"	Appellate Practice Institute, sponsored by the South Texas College of Law, Houston
21.	October 25, 2002	"Litigation Skills"	State Bar of Texas Labor and Employment Law Section, Dallas
22.	March, 2003	"Presenting Evidence"	Texas Association of Car Dealers
23.	March 7, 2003	"Appellate Issues in Asbestos Litigation"	South Texas College of Law CLE
24.	May 15, 2003	"Conversations with our Newest Justices"	Panel Member, Travis County Bar Association, Appellate Section Meeting
25.	May 23, 2003	"My Experiences on the Texas Supreme Court"	Pasadena Rotary Club
26.	May 29, 2003	"Spring Judges Panel: Trying Cases to Survive on Appeal"	Panel Member, Panel Discussion sponsored by InteCap, Inc.
27.	June 6, 2003	"Practice Before the Texas Supreme Court"	Panel Member, Conference on State and Federal Appeals, UT CLE
28.	August 28, 2003	"Texas Supreme Court Update"	Advanced Civil Trial Course, Texas Bar Continuing Legal Education Seminar, Austin
29.	October 10, 2003	"Texas Supreme Court Update"	Advanced Civil Trial Course, Texas Bar Continuing Legal Education Seminar, Dallas
30.	October 20, 2003	"Texas Supreme Court Update"	Dallas Bar Association
31.	October 23, 2003	"Texas Supreme Court Update"	Houston Bar Association
32.	November 7, 2003	"Texas Supreme Court Update"	Advanced Civil Trial Course, Texas Bar Continuing Legal Education Seminar, Houston
33.	November 13, 2003	"Practice in Texas Supreme Court and Ethical Aspects of Practice"	North Harris County Bar Association, Houston

PART 1 - BIOGRAPHICAL INFORMATION (PUBLIC)

34.	November 14, 2003	"Supreme Court Administrative Status Report"	Texas Young Lawyers Association Board Meeting
35.	December 5, 2003	"Texas Supreme Court Practice"	Civil Appeals for Trial Lawyers, CLE sponsored by the South Texas College of Law, Houston
36.	January 23, 2004	"Texas Supreme Court Update"	State Bar of Texas Board of Directors Meeting, Lakeway
37.	April 15, 2004	"Texas Supreme Court Update"	State Bar of Texas Board of Directors Meeting, Corpus Christi, Texas

13. Health: What is the present state of your health? List the date of your last physical examination.

A **Health**. I have no medical conditions that could in any way interfere with my ability to fulfill my duties as a United States District Judge.

B **Date of Last Physical Examination**. My last physical examination occurred on March 9, 2004.

14. Judicial Office: State (chronologically) any judicial offices you have held, and a description of the jurisdiction of each such court.

Court	Position	From	To	Selection Method
The Supreme Court of Texas	Justice	09/02	n/a	Partisan election
First Court of Appeals, Houston	Chief Justice	02/96	09/02	Partisan Election
State District Court, Houston	District Judge	01/91	02/96	Partisan Election
First Court of Appeals, Houston	Justice	09/90	12/90	Appointed Interim
Municipal Court, West University	Judge	08/78	09/90	Appointed

The Supreme Court of Texas. The Supreme Court of Texas is the highest appellate court in the state, although it does not hear criminal appeals. The Court hears civil and juvenile cases. Its jurisdiction is discretionary. Justices are selected by partisan election, as are all other judges except municipal judges. But, the Governor appoints vacancies occurring before the end of a term. Presently, three of the nine judges on the Court initially took office by appointment. I was initially appointed to the Court, but I was elected two months later.

Courts of Appeals. These courts are intermediate appellate courts and have mandatory jurisdiction. They must rule and write opinions on all cases appealed to them. There are 14 courts of appeals, the largest being located in Houston and Dallas. I was initially appointed by the Governor, then elected, and ran unopposed for a second term. I was

PART 1 - BIOGRAPHICAL INFORMATION (PUBLIC) 8

Chief Justice of a nine-judge court serving the Houston metropolitan area.

District Courts. Texas district courts are courts of general jurisdiction. They are the highest level trial courts. These judges must stand for election every four years. I was elected for a four-year term in 1990 and was unopposed in my next election.

Municipal Courts. These courts hear city ordinance and minor criminal cases (case not involving potential jail time). Most municipal courts have heavy traffic dockets. A substantial majority of municipal judges are appointed by mayors along with city councils. In the community where I served as municipal judge, I was appointed by the city council for six consecutive two-year terms. Although all our judges sat part time and at night, it was this position that influenced my decision to make the judiciary my full-time profession.

15. Citations: If you are or have been a judge, provide: (1) citations for the ten most significant opinions you have written; (2) a short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions.

A. **Ten Most Significant Opinions**

1. Goldberg v. State, 95 S.W.3d 345 (Tex. App.--Houston [1st Dist.] 2002, pet. ref'd), cert. denied, 2004 WL 323541 (Feb. 23, 2004).

2. John Wood Group USA, Inc. v. ICO, Inc., 26 S.W.3d 12 (Tex. App.--Houston [1st Dist.] 2000, pet. denied)

3. Young Refining Corp. v. Pennzoil Co., 46 S.W.3d 380 (Tex. App.--Houston [1st Dist.] 2001, pet. denied).

4. Honeycutt v. Billingsley, 992 S.W.2d 570 (Tex. App.--Houston [1st Dist.] 1999, pet. denied).

5. Ex parte Robinson, 80 S.W.3d 709 (Tex. App.--Houston [1st Dist.] 2002, affirmed, 116 S.W.3d 794 (Tex. Crim. App. 2003).

6. In re Bass, 113 S.W.3d 735 (Tex. 2003).

7. Attorney General v. Stevens, 84 S.W.3d 720 (Tex. App.--Houston [1st Dist.] 2002, no pet.)

8. Greathouse v. State, 33 S.W.3d 455 (Tex. App.-Houston [1st Dist.] 2000, pet. ref'd).

9. Robinson v. Budget Rent A Car, 51 S.W.3d 425 (Tex. App.--Houston [1st Dist.] 2001, no pet.)

10. Fort Bend County Wrecker Ass'n v. Wright, 39 S.W.3d 421 (Tex. App.--Houston [1st Dist.] 2001, no pet.)

B. Short Summary of Reversals and Affirmances with Criticisms

Opinions I wrote as a Court of Appeals Judge, which were later reversed or criticized:

1. Willis v. State, No. 01-00-01087, 2001 Tex. App. LEXIS 4653 (Tex. App.--Houston [1st Dist.] July 12, 2001), reversed, 121 S.W.3d 400 (Tex. Crim. App. 2003).
My opinion held that the defendant's waiver of the right to appeal in a plea bargain precluded appellate review of his complaints, but the Court of Criminal Appeals reversed this holding, with a dissent by Chief Judge Keller.

2. Davis v. State, No. 01-96-00243-CR, 1996 Tex. App. LEXIS. 5424 (Tex. App.--Houston [1st Dist.] Nov. 27, 1996).
In this case, I held that a guilty plea waived the right to complain about a ruling on a motion to suppress, following *Helms v. State*, 484 S.W.2d 925 (Tex. Crim. App. 1972). However, the Court of Criminal Appeals reversed its decision in Helms in *Young v. State*, 8 S.W.3d 656 (Tex. Crim. App. 2000), and remanded *Davis v. State* so the First Court of Appeals could reconsider its holding in light of Young.

3. Trahan v. State, 991 S.W.2d 936 (Tex. App.--Houston [1st Dist.] 1999), remanded.
My opinion held that the trial court erred in refusing to allow a defendant a jury trial in the absence of evidence of a written waiver in the record stating that she waived her right to a jury trial, as I believed was required by statute. The Court of Criminal Appeals vacated my judgment in a per curiam decision without a published opinion and remanded to my court for further proceedings.

4. Lorton v. Dolcefino, 986 S.W.2d 69 (Tex. App.--Houston [1st Dist.], overruled in part by Turner v. KTRK TV, Inc., 38 S.W.3d 103 (Tex. 2000).
This case involves a defamation claim by the city building inspector brought against various media defendants. The trial court denied summary judgment, and my opinion reversed, holding that because the media broadcast allegedly libeling the plaintiff was substantially true, he could not maintain an action against the defendants. The Supreme Court did not reverse my opinion, but in a subsequent opinion it expressly overruled the language in my previous opinion, holding that a plaintiff can bring a claim for defamation if discrete facts, literally or substantially true, are published in such a way that they create a substantially false and defamatory impression by omitting material facts or juxtaposing facts in a misleading way.

Opinions which reversed or criticized rulings I had made as a trial judge:

1. Duggan v. Marshall, 7 S.W.3d 888 (Tex. App.—Houston [1st Dist] 1999, no pet.).

Affirmed in part and reversed in part. Held that the trial court had incorrectly held that forfeiture of principal was the proper remedy for usury: "Forfeiture of principal is a statutory penalty. See TEX. FIN. CODE §§ 305.001, 305.002. Because statutory penalties did not survive Marshall's death, Marshall's estate is not entitled to a forfeiture of the $ 232,500 in value for goods received that the jury determined Marshall owed on the account with Duggan." *Id.* at 89.

2. Home Sav. of Am. FSB v. Harris County Water Control & Improvement Dist. # 70, 928 S.W.2d 217 (Tex. App.—Houston [14th Dist.] 1996, no writ).
Reversed. The court reversed the trial court default judgment in favor of appellees, county water control and improvement district, the state, the county, and a school district, in an action to recover unpaid ad valorem and other delinquent taxes. The court held that a letter by appellant corporation disclaiming any interest in the land allegedly in tax default satisfied the minimum threshold requirement necessary to prevent a default judgment.

3. Alexander v. Sturkie, 909 S.W.2d 166 (Tex. App.—Houston [14th Dist.] 1995, writ denied).
Reversed. The court reversed the entry of partial summary judgment in favor of appellee officers in the shareholder derivative suit because a question of fact existed as to the existence of a corporate opportunity.

4. Vannerson v. Klevenhagen, 908 S.W.2d 37 (Tex. App.—Houston [1st Dist] 1995, writ denied).
Affirmed in part and reversed in part. The court affirmed the judgment of the trial court regarding defendant sheriff's immunity from suit on the ground that he was merely carrying out an order of the commissioners' court. The court reversed and remanded with respect to defendant county finding it had no legislative immunity and had not demonstrated sovereign immunity.

5. Vinmar, Inc. v. Harris County Appraisal Dist., 890 S.W.2d 493 (Tex. App.—El Paso 1994) *rev'd by* Vinmar, Inc. v. Harris County Appraisal Dist., 947 S.W.2d 554 (Tex. 1997).
Affirmed, holding that a state property tax levied on goods in a warehouse awaiting foreign shipment did not violate the "dormant" Commerce Clause as the tax did not implicate of any of the six factors applicable to this determination; but later reversed by *Vinmar, Inc. v. Harris County Appraisal Dist.*, 947 S.W.2d 554 (Tex. 1997). The Supreme Court reversed a judgment that assessed petitioner corporation property taxes on goods awaiting export in violation of the U.S. Constitution. The tax interfered with the federal government's ability to speak with one voice in its regulation of commercial relations with foreign governments.

6. Manahan v. Meyer, 862 S.W.2d 130 (Tex. App.—Houston [1st Dist] 1993, writ denied).
Affirmed in part and reversed in part. Claims of children--whose father switched beneficiary on his life insurance to fiance just prior to his death--against employer and insurer were preempted by ERISA, but undue influence claim against fiance should not have been preempted. The court therefore affirmed the judgment that dismissed claims against appellees employer and insurer when those claims were preempted because they alleged improper administration and there was no concurrent jurisdiction. The court reversed judgment notwithstanding the verdict in favor of appellee fiance when undue influence claims did not relate to employee benefit plan and were not preempted. The court ordered jury verdict reinstated.

7. Kassay v. Schneider, NO. 01-92-01170-CV, 1993 Tex. App. LEXIS 1028 (Tex. App.--Houston [1st Dist.] 1993).
Mandamus granted. The court granted relator's writ of mandamus, and ordered respondent judge to vacate his orders compelling relator to answer the certified questions and denying her motion for protection. The court held that the respondent abused his discretion in requiring relator to answer the questions.

8. Sanford v. Liberty Mut. Fire Ins. Co., 845 S.W.2d 354 (Tex. App.—Houston [1st Dist] 1992, writ denied).
Reversed. Summary judgment in favor of insurance company was reversed; an insurance exclusion conflicting with statutory public policy was declared invalid because it made drivers uninsured for claims against them by their own family members.

9. Bonner v. United Services Auto. Ass'n, 841 S.W.2d 504 (Tex. App.—Houston [14th Dist] 1992, writ denied).
Reversed. Court reversed and remanded trial court's decision, finding insurer's policy excluding coverage for acts in connection with premises, other than as defined, controlled by an insured was susceptible of two interpretations and construed against the insurer.

10. Enchanted Estates Community Ass'n v. Timberlake Improv. Dist., 832 S.W.2d 800 (Tex. App.—Houston [1st Dist] 1992, no writ).
Reversed. The summary judgment for appellee in appellant's suit for breach of contract suit was reversed because appellant raised a fact issue about its status as a legal successor to the joint venture party to the contract.

C. Opinions With Significant Constitutional Issues

1. Ex parte Robinson, 80 S.W.3d 709 (Tex. App.--Houston [1st Dist.] 2002, affirmed, 116 S.W.3d 794 (Tex. Crim. App. 2003).

2. Johnson v. State, 0-99-00829-CR, 2001 Tex. App. LEXIS 6990 (Tex. App.-Houston [1st Dist.] 2001, no pet.).

3. In re RDY, 51 S.W.3d 314 (Tex. App.--Houston [1st Dist.] 2001, pet. denied).

4. Scott v. State, 36 S.W.3d 240 (Tex. App.--Houston [1st Dist.] 2001, pet. ref'd.).

5. Harrison v. State, 01-95-00785-CR, 2000 Tex. App. LEXIS 8315 (Tex. App.-Houston [1st Dist.] 2000, no pet.).

16. **Public Office:** State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful

candidacies for elective public office.

A. Assistant District Attorney, Harris County, Texas
B. Appointed to serve at the will of the elected District Attorney
C. August 1971 to August 1976
D. No unsuccessful candidacies for elective public office.

17. Legal Career:

a. Describe chronologically your law practice and experience after graduation from law school including:

1. Whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk:
I did not serve as clerk to a judge.

2 Whether you practiced alone, and if so, the addresses and dates:
I did not practice law alone aside from handling small, court - referral work while waiting for a vacancy at the Harris County District Attorney's Office.

3. The dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each:

Professional Experience (Non-Judicial)

08/71 until 08/75 **Harris County District Attorney's Office**, Houston, Harris County, Texas, 201 Fannin, Houston, Texas 77002. Began legal career as Assistant District Attorney for the Harris County District Attorney's Office in Houston. Heavy litigation caseload. Became specialized in economic crime handling fraud, organized and other "white collar" crime cases. Presented cases to grand juries and served as chief of the Consumer Fraud Division. Also represented the State in juvenile and child protection matters.

08/75 until 08/76 **Parks & Moss** (Law firm no longer exists), 3120 Southwest Freeway, Houston, Texas 77098. Private practice with real estate-related "boutique" law firm. Litigated real estate and commercial transactions, and performed transactional work involving joint ventures.

08/76 until 11/80 **Dresser Industries, Inc. Oilfield Products Group**, 601 Jefferson, Houston, Texas. (Company no longer exists) Served as General Attorney for Dresser Industries, Inc.

Duties included litigation management and business transactions. Developed expertise in international business transactions related to oil and gas exploration. Traveled to and worked in diverse international venues. For example, in 1978, negotiated one of the first American oilfield supply contracts in People's Republic of China since the Communist takeover in 1949.

11/80 until 01/86 **Bawden Drilling**, Inc. 12200 Richmond Avenue, Houston, Texas 77042. (Company no longer in existence; assets acquired by Noble Drilling). Served as Vice-President and General Counsel for Bawden Drilling Inc., (later acquired by Noble Drilling), a Canadian-owned, international drilling contractor. As top legal officer, negotiated drilling contracts and joint ventures, as well as qualified company to do business in many foreign countries.

01/86 until 02/89 **Union Pacific Railroad Company**, Region Law Office Address: 801 Travis, Houston, Texas 77002; Corporate Law Office, 1416 Dodge, Omaha, NE 68179. Served as General Solicitor (General Counsel) for the southern region of Union Pacific Railroad (i.e., generally, same territory as Missouri Pacific Railroad). Headed law department and responsible for all legal matters for states of Texas, Louisiana, Mississippi, Arkansas, Oklahoma and New Mexico. (Also served as general counsel for Houston's Port Terminal Railroad.) Developed in-house litigation capacity for Texas.

05/89 until 09/90 **McFall & Sartwelle, LLP,** Two Houston Center, Houston, Texas 77010. Of Counsel. Served as trial attorney handling products liability defense, commercial torts and commercial fraud.

b. **1.** What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

Four areas of practice define its characteristics: (1) appellate law; (2) trial judge; (3) corporate counsel; and (4) litigation.

The most valuable experience I had in preparing me to be a judge came from two very different types of practices. I started my career as a criminal prosecutor in 1971. Almost 100% of my in-court litigation experience occurred as an assistant district attorney in Harris County, but the knowledge and experience I gained as a trial lawyer gave me a foundation in evidence and court room procedures that has proved to be invaluable.

What may come as a surprise to some is that my heavy trial experience gained from trying criminal cases has been beneficial to me not only as a

civil trial judge, but also as a corporate counsel. From 1976 to 1989, in my job as a corporate counsel, I practiced law not only in many different parts of the country, but also in foreign countries. My knowledge of evidence helped me evaluate what facts would sell to a fact finder in evaluating contract provisions, management of lawsuits and evaluating risks.

Listed below is an outline of the various stages of my practice, together with the procedural and substantive aspects in my professional development from a prosecutor to a state supreme court judge. Hopefully, this will be helpful in seeing the progression of my career.

(a) Stage 1 – 08/71 to 08/75 Assistant DA (Trial)

(1) Procedural Aspect:
- Trial motions and courtroom practice
- Extensive jury trial experience
- Interaction with law enforcement personnel

(2) Substantive Aspect:
- Criminal Law
- Criminal Procedure
- Constitutional Law
- Evidence

(b) Stage 2 - 08/75 to 08/76 Private Practice

(1) Procedural Aspect:
- Trial to lesser degree, and exclusively civil
- Discovery and motion practice
- Developing true attorney-client relationship
- Billable hours
- Business Development
- Represent plaintiffs and defendants
- After-the-fact legal advice

(2) Substantive Aspect:
- Real Property
- Titles and conveyances
- Commercial law
- Business organizations
- Landlord-Tenant issues

(c) Stage 3 - 08/76 to 12/77 01/86 to 02/89 Domestic Corporate

(1) Procedural Aspect
- Domestic travel, clients all over USA and Canada
- One client, with single, albeit broad, goal
- Developing in-house clients
- Business transactions
- On-site legal advice
- Advice freely given over telephone
- Action often taken immediately, requiring quick, decisive action
- Litigation management rather than primary litigation
- Negotiating settlements, disputes with third parties
- Negotiating business deals or settlements with clients
- Negotiating business deals or settlements with customers
- Evaluating and retaining high quality outside counsel
- Advising client of legal risks/rewards and, how to make deal work
- Input, when requested, re: financial and business advice

PART 1 - BIOGRAPHICAL INFORMATION (PUBLIC)

(2) Substantive Aspect:
All substantive areas in Stage 2
Employment and labor law
Working knowledge of ERISA
Tort (traditional)
Products Liability
FELA
"Railroad Torts" (premises liability, crossing cases)
Federal/state preemption (constitutional law)
Advertising
Intellectual property
Insurance and Indemnity law
State and local taxation with occasional federal taxation
Anti-trust (mostly identifying potential problems)
State transportation, safety, weights and measures
Maritime
Hazardous materials transportation
Environmental

(d) Stage 4 - 01/78 to 12/85 International Business Transactions

(1) Procedural Aspect
Continue all procedural aspects of Stage 3
International travel, anywhere in the world client has a presence
Negotiating settlements, disputes with foreign third parties
Negotiating deals, settlements with foreign private business clients
Negotiating deals/ settlements with foreign private business customers
Negotiating deals/settlements with foreign governments
Familiarization with local customs, cultures
Finding, evaluating and giving input on bank selection
Finding, evaluating/hiring competent/trustworthy foreign counsel
Assist in Finding/evaluating/hiring foreign accounting firms
Finding, evaluating, investigating foreign business partners
Obtaining permission to do business
Determining proper form of business entity for conducting business
Determining the viability and consistency of legal system
Determining stability of political institutions

(2) Substantive Aspect:
Formal vs. informal laws regarding foreign business within a country
Formal vs. informal rules of commerce peculiar to the country
Foreign exchange and expatriation of earnings' laws
Laws prohibiting contracts in English
Labor laws re: terminating national employees
Immigration, visa requirements
Taxation of American employee income
Contract registration laws
Peculiar criminal/personal injury laws (e.g., extensive jail time)
Restrictions on repatriating US dollars

2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

As can be seen from above, the typical client depended on what stage my practice was in. For example, as an Assistant District Attorney, the

state was my client, but I took special care to meet the needs of victims and police officers.

While working for corporate legal departments, the client was, properly, the corporate entity, and that was foremost in my consideration. But corporations do not exist in a vacuum, they are made up of people. I reported to the president and financial officers. While with the Railroad, I reported to Vice-President of Law for the corporation. While in a foreign country or at a domestic field office, I worked with local managers and retained counsel.

c. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.

Most of my litigation career was "front-loaded," meaning that most of my trial experience occurred early in my career.

There was a period of time, while heavily involved in international work (1978 to 1986) that my court appearances were rare. But, it was at that time I began working as a part-time municipal judge in the small enclave community I lived in.

Also, most, if not all the civil cases I was responsible for, were either farmed out, in the case of retained counsel, or tried by attorneys who worked in-house for me. It should be noted that when I went to work for the railroad in 1986, one of my charges was to create in-house litigation capacity. The plan I implemented was to hire good litigators from the Harris County District Attorney's Office and turn them into FELA railroad crossing defense lawyers. The project turned out to be successful, in that we reduced our outside attorney costs, we won important cases, and the program remains in place today.

2. What percentage of these appearances was in:

a Federal court:
None, as the primary litigator. Of the litigation I managed or engaged in discovery, approximately 10 to 15%

b State courts of record:
Almost 100%.

c Other courts:
Almost none.

3. What percentage of your litigation was:

a. Civil: Approximately 80%

All litigation management, supervision and training was civil.

b. Criminal: Approximately 20%

All of my jury trial experience occurred as an assistant district attorney.

4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

a. Tried to verdict: Approximately 150

b. Sole Counsel: Approximately 25

c. Chief Counsel: Approximately 50

d. Associate counsel: Approximately 75

5. What percentage of these trials was:

a. jury: Approximately 40 to 45%

b. non-jury: Approximately 55-60%

18. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

(1.) Litigation Description:

(a) The date of representation;

(b) the name of the court and the name of the judge or judges before whom the case was litigated;

(c) The individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

Case 1 Wallace v. State, 524 S.W.2d 722 (Tex. Crim. App. 1975).

Capsule summary:

Assault with intent to commit rape and robbery. Because brain-damaged victim could not identify defendant, case was proved by circumstantial evidence. Jury convicted and sentenced defendant to 150 years in prison.

Identify the party or parties whom you represented:
The State of Texas.

Describe in detail the nature of your participation in the litigation:
As an assistant district attorney, I tried this case to verdict.

Final disposition of the case:
Affirmed on appeal.

(a) The date of representation;
Summer, 1973.

(b) the name of the court and the name of the judge or judges before whom the case was litigated;
176th District Court of Harris County Texas, Judge Louis T. Holland (deceased).

(c) The individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.
I have no independent recollection due to length of time that has passed, but records reflect that the defense attorney was Walter Boyd. The Internet reflects that Mr. Boyd's office phone number is 713-622-3505.

Case 2 Crooks v. State, 529 S.W.2d 323 (Tex. Crim. App. 1975).

Capsule summary:
Burglary with intent to commit theft case where circumstantial evidence used to prove defendant entered building.

Identify the party or parties whom you represented:
The State of Texas.

Describe in detail the nature of your participation in the litigation:
As an assistant district attorney, I tried this case to verdict.

Final disposition of the case:
Defendant found guilty by jury and sentenced to prison. Affirmed

on appeal.

(a) The date of representation;
1973.

(b) the name of the court and the name of the judge or judges before whom the case was litigated;
176th District Court of Harris County Texas, visiting judge from Fairfield, Texas (deceased); I do not recall name.

(c) The individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.
Do not recall due to length of time that has passed.

Case 3 Stephens v. State, 522 S.W.2d 924 (Tex. Crim. App. 1975).

Capsule summary:
Sale of heroin jury trial where defense of entrapment was attempted by defense but denied by trial judge.

Identify the party or parties whom you represented:
State of Texas.

Describe in detail the nature of your participation in the litigation:
I have no independent recollection of my role; however, the opinion reflects my participation. Most likely, I either tried the case first chair or sat second chair. Because of the volume of cases, the length of time involved and the lack of record keeping by the Harris County District Attorney's Office, I could not locate this information.

Final disposition of the case:
Affirmed on appeal where the Court held that defendant could not raise an entrapment defense after offering evidence of alibi.

(a) The date of representation;
1973.

(b) the name of the court and the name of the judge or judges before whom the case was litigated;
182nd Judicial District, Harris County, Lee Duggan, Jr.

(c) The individual name, addresses, and telephone numbers of co-counsel and of principal counsel

for each of the other parties.
Defense counsel: C.C. Devine (deceased).

Case 4 Shane v. State, 513 S.W.2d 579 (Tex. Crim. App. 1974).

Capsule summary:
Defendant was charged with performing lewd acts on premises where liquor was sold in violation of state liquor laws. A jury found her guilty and punishment was assessed by the trial judge.

Identify the party or parties whom you represented:
The State of Texas.

Describe in detail the nature of your participation in the litigation:
As an assistant district attorney, I tried this case to verdict.

Final disposition of the case:
The Texas Court of Criminal Appeals found that the statute was unconstitutionally vague and reversed the trial court.

(a) The date of representation;
1971.

(b) the name of the court and the name of the judge or judges before whom the case was litigated;
Harris County Criminal Court No. 1 Texas, Judge Billy Ragan.

(c) The individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.
The opinion reflects the defense attorney was Ronald A. Monshaugen, although due to length of time and lack of public records, I have no independent recollection. Mr. Monshaugen's address and phone number are listed on the Internet as follows: 1225 North Loop West, Suite 640, Houston, Texas, 77008, (713) 880-2992.

Case 5 Fields v. State, 527 S.W.2d 317 (Tex. Crim. App. 1975).

Capsule summary:
Felony theft and fraud case where defendant was accused of swindling a 92-year old widow out of her life savings. The widow signed a number of blank checks which, the evidence showed, were cashed at the complainant's bank. All evidence was circumstantial, in that the complainant could not identify the

defendant.

Identify the party or parties whom you represented:
The State of Texas.

Describe in detail the nature of your participation in the litigation:
As an assistant district attorney, I tried this case to verdict.

Final disposition of the case:
Jury found defendant guilty and judged assessed 7-year prison sentence. Case affirmed on appeal.

(a) The date of representation;
1974.

(b) the name of the court and the name of the judge or judges before whom the case was litigated;
180th Judicial District Court, Harris County; Judge Fred M. Hooey (deceased).

(c) The individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.
Defense attorney was Clyde Gordon (deceased).

Case 6 Miquel Tostado Rodriquez, et. al v. Union Pacific Railroad, Filed in El Paso State District Court. (Newspaper story attached).

Capsule summary:
Eighteen Mexican citizens, who entered the United States without documentation, suffocated in a railroad box car. Their survivors sued the railroad for wrongful death.

Identify the party or parties whom you represented:
Union Pacific Railroad Company.

Describe in detail the nature of your participation in the litigation:
I was the attorney of record. As head of the law department in Texas for the railroad, I managed an in-house litigation component. I, along with an in-house attorney under my supervision, was able to obtain a court-approved, pre-suit deposition of the only survivor.

Final disposition of the case:

The case was settled for a reasonable amount before any other discovery was taken.

(a) The date of representation;
June 1987.

(b) the name of the court and the name of the judge or judges before whom the case was litigated;
I negotiated with plaintiff's counsel. I do not have an independent recollection; nor do I have the name of the trial judge. See attached news story regarding the incident.

(c) The individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.
Brad Beers was the attorney who worked for me and actually took the pre-suit deposition. His address is 1415 Louisiana, Suite 3200, Beers & Associates, Houston, Texas, 77002-7353; (713) 654-0700. I do not have information regarding other counsel.

Case 7 Litigation in connection with San Antonio train derailment and chemical spill. See attached news story.

Capsule summary:
A Missouri Pacific Railroad freight train derailed, exploded and dumped hazardous chemicals in a creek within miles of heavily-populated San Antonio neighborhoods. Two trespassers (stowaways) were killed and one of the train crew members was seriously injured.

Identify the party or parties whom you represented:
Missouri Pacific Railroad Company, in my capacity as head of the law department for its owner, Union Pacific.

Describe in detail the nature of your participation in the litigation:
I went to the scene immediately and opened an emergency claims office so that hundreds of people could pay for temporary housing. I employed local counsel, Tom Sharpe (deceased) and Ricardo Cedillo to represent the railroad in potential lawsuits. Claims were paid for people who had suffered breathing problems or other tangible injuries. Although a few business interruption lawsuits were brought, through the able representation of Mr. Sharpe and Mr. Cedillo, no class action or other mass tort was filed and prosecuted against the railroad. My main goal was to render quick assistance to those in need as

well as avoid unnecessary litigation.

Final disposition of the case:
As mentioned, several lawsuits were brought in state district courts in San Antonio (Bexar County). All lawsuits were settled without trial.

(a) The date of representation;
June 1986.

(b) the name of the court and the name of the judge or judges before whom the case was litigated;
Numerous state district courts in Bexar County, Texas.

(c) The individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.
I retained and was responsible for managing outside counsel. Ricardo Cedillo handled all litigation matters. His address and phone number as follows: 755 E Mulberry Avenue, Suite 500, San Antonio, Texas 78212-3149 (210) 822-6666. Mr. Sharp and Mr. Cedillo were the only counsel I worked directly with.

Case 8 Scurlock Oil Company v. Smithwick, 724 S.W.2d 1 (Tex. 1986).

Capsule summary:
Two railroad employees were killed when an oil truck struck their vehicle. The heirs of each employee filed separate wrongful death actions in separate counties against the railroad and the oil company, In the first case, the heirs entered into a "Mary Carter" Agreement with the Oil Company. The jury found the railroad 90 percent at fault. In the second case, in the other county, the heirs entered into a Mary Carter agreement with the railroad. The trial judge admitted the Mary Carter agreement from the prior trial as impeachment evidence in the second case. The jury found the oil company 100 percent at fault.

Identify the party or parties whom you represented:
Missouri Pacific Railroad Company was represented by retained counsel. The law department of Union Pacific Railroad, of which I headed, was responsible for managing retained counsel.

Describe in detail the nature of your participation in the litigation:
My involvement was indirect. An attorney in the law department I headed and supervised was directly involved with managing

retained counsel.

Final disposition of the case:
Reversed and remanded by the Texas Supreme Court.

(a) The date of representation;
1986.

(b) the name of the court and the name of the judge or judges before whom the case was litigated;
On appeal from the Court of Appeals for the 13th District of Texas.

(c) The individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.
Lev Hunt, now retired, was with the law firm known at the time as Hunt, Hermansen, McKibben & Barger in Corpus Christi. Mr. Chris Cox was directly responsible for managing the litigation for the railroad. His address and phone are listed as follows: Chris D. Cox, 201 E 15th St, Plano, TX 75074 (972) 398-6159. Mr. Hunt was the only attorney Mr. Cox worked with.

Case 9 Kennedy v. Missouri Pacific, 778 S.W.2d 552 (Tex. App. - Beaumont 1989).

Capsule summary:
Lawsuit arose out of a car-train collision. The railroad company was sued along with Parks, the owner and operator of the car, by the passengers and parents of children-passengers. The main allegation against the railroad was that it maintained an "extrahazardous" crossing and negligence in failing to have automatic gates.

Identify the party or parties whom you represented:
Missouri Pacific Railroad Company was represented by retained counsel. The law department of Union Pacific Railroad, of which I headed in Texas, was responsible for managing retained counsel.

Describe in detail the nature of your participation in the litigation:
My involvement in the case was to retain and manage outside counsel. I attended trial and consulted with counsel during the trial.

Final disposition of the case:
Railroad found not negligent.

(a) The date of representation;
1988.

(b) the name of the court and the name of the judge or judges before whom the case was litigated;
District Court of Montgomery County, Texas.

(c) The individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.
The case was tried by William Worthington, now with the law firm Strasburger & Price LLP. His address and phone number are as follows: 1401 McKinney, Suite 2200, Houston, Texas, 77010, (713) 951-5600. He was the only counsel I worked with.

Case 10 Courtemanche v. State, 507 S.W.2d 545 (Tex. Crim. App. 1974).

Capsule summary:
Club owner found guilty of violations of the liquor laws.

Identify the party or parties whom you represented:
The State of Texas.

Describe in detail the nature of your participation in the litigation:
As an assistant district attorney, I tried this case to verdict.

Final disposition of the case:
Jury found defendant guilty. The Court of Criminal Appeals reversed, finding the statute unconstitutional.

(a) The date of representation;
Summer, 1971.

(b) the name of the court and the name of the judge or judges before whom the case was litigated;
Harris County Criminal Court No. 1 Texas, Judge Billy Ragan.

(c) The individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.
The opinion reflects the defense attorney was Ronald A. Monshaugen, although due to length of time and lack of public

records, I have no independent recollection. Mr. Monshaugen's address and phone number are listed on the internet as follows: 1225 North Loop West, Suite 640, Houston, Texas, 77008, (713) 880-2992.

2. Overall Courtroom Experience

It is has been difficult for me to list litigated cases that accurately reflect the depth of my trial experience.

All of my cases as a first-chair litigator go back to my days as a prosecutor at the Harris County District Attorney's Office (left in 1975). A few cases ended up in Lexis and Westlaw when an appellate court issued a later opinion, and I have included these cases. The vast majority of cases I worked on, however, were either never appealed, or, if appealed, were summarily affirmed without a published opinion. The records of those cases are neither computerized nor cross-referenced. Consequently, many of the details of these cases are lost to history.

Between 1975 and 1990, I primarily worked as in-house counsel. Accordingly, while I managed a fair amount of litigation, I spent less time actually inside the courtroom. I have also included some of the more significant cases that I managed during these years. Furthermore, not every case went all the way to trial; as in-house counsel, I was responsible for negotiating settlements in cases where litigation was not in the best interest of the client. In 1990, of course, I ceased practicing as a lawyer in order to ascend to the bench.

Therefore, to facilitate a more accurate evaluation of my legal experience and the quality of my "judging" abilities, I have included a list of lawyers that I have worked with over the years as a judge. I believe that the attorneys listed below and their diverse backgrounds will give a fair and well-rounded assessment of my career.

David Beck
Beck, Redden & Secrest, L.L.P.
One Houston Center,
1221 McKinney Street, Suite 4500
Houston, Texas 77010
Telephone: 713-951-3700
Fax: 713-951-3720
DBeck@brsfirm.com

Susan Bickley
Abrams Scott & Bickley, L.L.P.
700 Louisiana, Suite 1800
Houston, Texas 77002-2727

Telephone: 713-228-6601
Fax: 713-228-6605
SBickley@asbtexas.com

Vicki Birenbaum
Gardere Wynne Sewell LLP
1000 Louisiana, Suite 3400
Houston, Texas 77002-5007
Telephone: 713-276-5500
Fax: 713-276-5555
vbirenbaum@gardere.com

Candelario Elizondo
Elizondo & Elizondo
909 Fannin Street, Suite 3050
Two Houston Center
Houston, Texas 77010
(713) 655-8085
elizondo12@aol.com

Larry Finder
Haynes and Boone, LLP
1000 Louisiana Street
Suite 4300
Houston, Texas 77002-5012
Telephone: 713-547-2000
Fax: 713-547-2600
finderl@haynesboone.com

Wayne Fisher
Fisher, Boyd, Brown, Boudreaux & Huguenard LLP
Riviana Building, 2777 Allen Parkway, 14th Floor
Houston, Texas 77019
Telephone: 713-400-4000
Fax: 713-400-4050
wfisher@fisherboyd.com

Roland Garcia, Jr.
Locke Liddell & Sapp LLP
600 Travis Street
3400 JP Morgan Chase Tower
Houston, Texas 77002
Telephone: 713-226-1200
Fax: 713-223-3717
rgarcia@lockeliddell.com

PART 1 - BIOGRAPHICAL INFORMATION (PUBLIC)

Jarvis V. Hollingsworth
Bracewell & Patterson, LLP.
711 Louisiana Street
Suite 2900
Houston, Texas 77002-2781
Telephone: 713.223.2900
Fax: 713.221.1212
jhollingsworth@bracepatt.com

Richard Josephson
Baker Botts L.L.P.
One Shell Plaza, 910 Louisiana
Houston, Texas 77002
Telephone: 713-229-1234
Fax: 713-229-1522
richard.josephson@bakerbotts.com

Richard Mithoff
Mithoff & Jacks, L.L.P.
3450 One Allen Center
Houston, Texas 77002
Telephone: 713-654-1122
Fax: 713-739-8085
Can be e-mailed through http://www.martindale.com
See also http://www.mithoffandjacks.com

Kent W. ("Rocky") Robinson
Andrews Kurth LLP
600 Travis, Suite 4200
Houston, Texas 77002
Telephone: 713-220-4200
Fax: 713-220-4285
rrobinson@andrewskurth.com

Jim Sales
Fulbright & Jaworski L.L.P.
1301 McKinney, Suite 5100
Houston, Texas 77010-3095
Telephone: 713-651-5151
Fax: 713-651-5246
jsales@fulbright.com

PART 1 - BIOGRAPHICAL INFORMATION (PUBLIC)

S. Shawn Stephens
Locke Liddell & Sapp LLP
3400 Chase Tower
600 Travis
Houston, Texas 77002
Telephone: 713-226-1200
Fax: 713-223-3717
sstephens@lockeliddell.com

Macey Reasoner Stokes
Baker Botts L.L.P.
One Shell Plaza, 910 Louisiana
Houston, Texas 77002
Telephone: 713-229-1234
Fax: 713-229-1522
macey.stokes@bakerbotts.com

Martin A. Wicliff, Jr.
Epstein Becker & Green P.C.
Wells Fargo Plaza
1000 Louisiana, Suite 5400
Houston, Texas 77002-5013
Telephone: 713-750-3100
Facsimile: 713-750-3101

19. Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question; please omit any information protected by the attorney-client privilege (unless the privilege has been waived.)

(a) Representing the railroad for claims resulting from the tragic suffocation in a railroad box car of more than 30 undocumented workers. Important evidence was obtained absolving the client from liability and a reasonable settlement was negotiated.

(b) Negotiating and closing a drilling equipment sale in Beijing in 1978 before diplomatic recognition was effected by the United States.

PART 1 - BIOGRAPHICAL INFORMATION (PUBLIC)

(c) Managing the Harris County Mass Tort docket, which, in 1994, included approximately half of the breast implant cases in Texas (over 7,000). I presided over the three-month jury trial determining whether Dow Chemical, the parent of Dow Corning, had liability.

(d) Establishing in-house litigation capacity for corporate law department. I interviewed, hired and trained trial attorneys to try railroad-related cases. By successfully establishing litigation component, we were able to contain costs not only by saving attorney fees but also providing healthy competition for our retained counsel.

(e) Establishing the first consumer fraud division in a district attorney's office in Texas. We put in place an organization that was able not only process complaints, but also able to investigate and prosecute sophisticated frauds.

Senator CORNYN. Well, thank you very much, Justice Schneider. Since you and I know each other very well, I think we are going to—I am going to ask a few questions for the record, and I think I already know what your responses in a general fashion are likely to be. But you, as we have heard, have served at all levels of the Texas judiciary, starting at the municipal court level and now serving on the Texas Supreme Court. Your job as a Federal district judge, a trial judge in the Eastern District of Texas will be somewhat different from what you have been doing, at least lately.

Have you had a chance to look into the docket of that court to which you will be confirmed to see sort of the nature of the caseload? And give us your ideas and thoughts about how you would expect to manage that docket.

Judge SCHNEIDER. Well, Mr. Chairman, I'm glad you asked that question. Actually, I had a chance back in January to look at their docket, and anything I would tell you now would relate back to that. But at that time, it appeared that this docket was almost evenly split between civil and criminal work. A number of those in the civil cases are those cases that are routine type cases. So that most of the docket, though, most of the time, as I understand, in trial is spent in civil cases.

Moving to this bench is one of, I guess, the parts of life that you see as serendipity. My good friend, John Hannah, whom all of you heard a while ago, he and I were of different political parties. We met in law school, and we became close friends. And we found that we agreed on more things than we disagreed. And on those things we did disagree, we had good conversations.

When John Hannah passed away, I had some Republican and Democrat judges come to me and ask me if I would consider applying, and I had never done—given it any thought before. I had never had an opportunity to file, really. I have been so busy in my judicial career. But I did it. I look forward. I think that this particular judicial Federal district bench is a perfect fit for someone who has had not only trial experience but also has experience writing opinions. I've written over 400 opinions, and as we all know, district courts publish opinions. They go in law books that are published that people have to buy.

Also, another thing I think that uniquely qualifies me for this job is that I've had experience in the law in so many different places—criminal and civil. I started out as a district attorney, and then civil, and further went to the court of appeals. We had criminal and civil cases.

In addition to that, I've had litigation experience, tried hundreds of cases. And then, of course, last, not least—it's not even last. As a trial attorney, I've tried well into 100 cases. I know what it's like to try a case, and so that won't be new to me. And that's part of the reason—I know that was a long answer, but you seem to want to hear it, so there you go.

Senator CORNYN. Thank you, Judge. You answered part of my next question, and that is about criminal law. Of course, you are going to have a docket of criminal cases, and we all know that in your current job, you hear only civil cases on the Texas Supreme Court. But you have had extensive experience both as a judge and a lawyer handling criminal cases as well, haven't you?

Judge SCHNEIDER. Yes, sir. Our docket was about 60 percent criminal cases.

Senator CORNYN. And this court, of course, Judge Hannah sat in Tyler, but we know the Eastern District covers a large section of the State. Could you talk a little bit about your roots in that part of the State? I think members of the Committee and others listening might be interested in that since you are currently working in Austin, wondering how you were plucked out of Austin and are going to be put in a court over in the Eastern District.

Judge SCHNEIDER. Well, I'm glad you asked that. I have to put it in context. My father was a Methodist minister, and years ago, in places like Texas—they may well have changed this, but the young ministers moved from community to community about every 2 years. If you were really good, you might stay 2–1/2 years someplace.

What happened to me was that by the time I finished school, I'd attended eight different schools in East Texas, and in this particular district we're talking about here, I have physically lived in ten of the counties that are there.

In addition to that, my grandfather and all my distant relatives on my mother's side settled in Smith County in the 1860's. My mother lives in Lufkin, and that is a very big reason for me even being more excited about the possibility, if I'm fortunate enough to be confirmed to this position.

Senator CORNYN. Could you talk a little bit about your judicial approach, judicial philosophy? In particular, I would be interested to hear you discuss briefly your approach to interpreting statutes written by the legislative branch and how you approach that responsibility as a judge.

Judge SCHNEIDER. That is another good question, Senator, Chairman Cornyn. Let me say that I think the very first rule I always start out with when I look at a statute is to start out with the presumption that it's going to be constitutional. I think once you start there, sometimes your battle is—you have moved the ball a good distance. So if you start with that premise and then go to the next, look to the literal meaning, the words of the document, if it happens to be a contract or a statute itself. And you look and you interpret them and use and apply their ordinary meaning, not something absurd.

You do that only, of course, if the words are not clear that you would go to any other sources. I know that some judges who are into legislative history that that is a matter that has to be—you have to set the standards on those things, and usually when I interpret cases, we do it basically on what the four corners of the documents are and what the legislature said they wanted. Because we have to keep in mind the laws are drafted by a law-making group that has more practice and more experience as to what the law should be. And keeping that in mind, I try to apply what the legislature intended.

Senator CORNYN. Well, I know from your long experience as a judge that you have done that a lot. You recognize the role of the legislature as the representative branch of Government to say what the law is, and it is your job, if it is called into doubt or if there

are conflicting provisions or statutes raised, to interpret what the legislature's true intent was.

I would like to ask you, though, there are some people who think that Federal judges' main job is to do justice. And I would agree with that myself, but I would also say that you are tethered by laws that have been written, whether it is the Constitution or by statutes that have been written by the legislature. How do you approach a case where your sense of justice is that maybe a case ought to come out in a particular way—in other words, a result ought to attach—but there is a statute or a constitutional provision that would appear to prevent you from reaching that particular result? How do you see the role of a judge relative to the legislature and relative to other branches of Government in determining that just results occur?

Judge SCHNEIDER. Well, Mr. Chairman, the system we have doesn't always produce a perfect result, and that's why we have all our systems built in to make sure that the procedures that to some people seem ridiculous, but the purpose of it is to make sure that people get a fair trial.

Judges faced with an issue as you described must first apply the law, and there are areas in equity, so to speak, that you can take that into account. And I see it done every day, both from being an appellate judge and watching trial judges, and you will do that because I guess I'll get over in the area of judicial discretion, because there are so many rulings that would be incidental to other people, but it's very important to the people in the courtroom. In that particular situation, you do get to use your judgment on a lot of cases, and you can give some flexibility.

The thing we have to watch out about, justice is a fine word, and we're all for justice. But it has to be—we have to know that justice also means that we have a fair trial and that everyone was heard that needed to be heard.

Senator CORNYN. Well, I agree with your response. I would say that, you know, one of the things that I think some people have a difficult time comprehending is the importance that everyone's conduct be judged by the same rules, by the same laws, regardless of whether they are a sympathetic party to a lawsuit or an unsympathetic party. Sometimes we hear people talk about how corporations maybe should not be judged the same way an individual is. But, of course, under our laws, they are both judged by exactly the same rules, with some minor exception in terms of the way corporations are formed and that sort of thing.

And, of course, the rules by which evidence is admitted and the like apply the same to everybody, and indeed, I am reminded of the phrase over the Supreme Court of the United States building that says, "Equal justice under law." And that is, of course, what we strive for. We strive for justice, but we also strive to make sure that that justice is equal and applied across the board regardless of how much money you have or where you came from or whether you are popular or unpopular. And I know your record of judicial service and your long experience has well prepared you to do justice, but to make sure that you do your job, and that is to apply the law as the legislature has written and not just substitute your own personal sense of justice for what the law actually is. But it

is, as you know, a struggle that every judge goes through in any given case, but certainly there is no greater position from the standpoint of seeing that justice is done in each individual case than that of a Federal district judge.

Some have said that the most powerful public official in America is a single Federal district judge because of the great discretion and authority that you do have in a given case to see that the correct result is reached consistent with the law.

I know we could talk for much longer, but as I say, I know you well as a friend and somebody whom I respect and admire professionally. And I know, as I said, that other Senators may have questions for you, but were not able to attend here today. And we will leave the record open until 5 o'clock next Wednesday for any other Senators who may have additional questions they would like to ask you in writing to submit those to you. And I would, of course, urge you to respond as promptly as you can.

It is my hope that your nomination will be promptly marked up before the full Committee and then will be voted out onto the floor. And because you do enjoy support from both sides of the docket, from both major political parties, as we have seen, because of your record of fairness and distinguished service as a judge, it is my hope and certainly my expectation that your nomination will not be controversial and that you will be quickly confirmed. That is my hope and certainly my expectation.

But I want to say finally, thanks to you for being here today, for making yourself available to serve in this important position. It is not everyone who is willing to make the changes in their life, whether it is to move from place to place or changes in salary, or whatever it may be, to serve in public office. And you are to be commended for this logical conclusion to the service you have already provided in our judicial branch of Government. And we are better for having that service and people like you willing to serve in these important positions.

But, with that, this hearing will be concluded, and as I said, the record will remain open until 5 o'clock next Wednesday for any other materials, any other statements, any other questions to be submitted for the record.

Thank you very much.

Judge SCHNEIDER. Senator, may I say just one thing?

Senator CORNYN. Certainly.

Judge SCHNEIDER. You know, when you get to these things, all the work of what you see here is 5 minutes of the work, and I know that I have a staff at home at the Supreme Court, and I just want to tell the staff people here, give you some credit for your hard work that you do. I know how hard you do it, and I know it is for the big bucks you are doing it. But—that was a joke, folks.

[Laughter.]

Judge SCHNEIDER. But just to tell you that—and I'm saying this word from my clerks back home, too, how much that is appreciated in putting these things together.

Thank you.

Senator CORNYN. Well, I think those are very appropriate remarks. We know the staff works very hard to make sure that when we come to these hearings that things move very quickly and expe-

ditiously, and we appreciate their efforts to make sure that this hearing could occur promptly, and hopefully your nomination will be marked up and then voted out of the Senate as soon as possible.

With that, this hearing is concluded.

[Whereupon, at 10:35 a.m., the Committee was adjourned.]

[Questions and answers and submissions for the record follow.]

QUESTIONS AND ANSWERS

MICHAEL HAYGOOD SCHNEIDER

JUSTICE
THE SUPREME COURT OF TEXAS

July 12, 2004

Chairman Orrin G. Hatch
Chairman, United States Senate Committee on the Judiciary
104 Hart Office Building
Washington, DC 20510

RE: Follow-Up Questions for Nominee to the U.S. District Court for the Eastern District of Texas, Michael H. Schneider, Jr.

Dear Chairman Hatch:

I have received the Follow-Up Questions your office submitted to me as part of my Senate Confirmation Hearing. Enclosed please find my responses.

Thank you very much.

Sincerely,

Michael H. Schneider / by permission F. Fagl.

Michael H. Schneider
Justice, Texas Supreme Court

MHS:fff

CC: Senator Patrick J. Leahy
433 Russell Senate Office Building
United States Senate
Washington, DC 20510

P.O. BOX 12248 • AUSTIN, TEXAS 78711 • (512) 463-1336 • FAX (512) 463-1365

Responses of Michael H. Schneider,
Nominee to the U.S. District Court for the Eastern District of Texas,
to Written Follow-Up Questions submitted by
Chairman Orrin G. Hatch, United States Senate Committee on the Judiciary

1. **In general, Supreme Court precedents are binding on all lower federal courts and Circuit Court precedents are binding on the district courts within the particular circuit. Are you committed to following the precedents of higher courts faithfully and giving them full force and effect, even if you personally disagree with such precedents?**

   I am fully committed to following the precedents of all higher courts faithfully even if I personally disagree with them. Consistency and predictability in the law are two important principles that instill confidence in our judicial system.

2. **What would you do if you believed that the Supreme Court or the Court of Appeals had seriously erred in rendering a decision? Would you nevertheless apply that decision or your own best judgment of the merits?**

   Because I believe in the principle of *stare decisis*, I would follow the decisions of the Supreme Court or the relevant federal Circuit Court of Appeals even if I believed the higher courts erred in their decision.

3. **You have stated that you would be bound by the Supreme Court precedent, and where applicable, the rulings of the federal Circuit Court of Appeals for your district. There may be times, however, when you will be faced with cases of first impression. What principles will guide you, or what methods will you employ, in deciding cases of first impression?**

   When faced with an issue of first impression, one would look to prior cases from the U.S. Supreme Court and the Circuit Courts of Appeals to determine how broadly the higher courts have interpreted the law.

   Courts must exercise measured and restrained judgment where existing precedent does not fit the facts and law of the case at bar. The first place courts should look for guidance in such instances is prior case law. Courts must rely on well-established legal decisions to show that the present decision rests firmly on those of the past.

   In the case of a new statute, a judge must first look to the plain meaning of the language. If there is no ambiguity, the analysis would end there. In the case of an ambiguity, a judge can look to, among other things, caselaw from other circuits, the surrounding statutory language, and legislative history.

4. Given your background and prior experience, could you speak for a moment about the role and significance of judicial temperament, and indicate what elements of judicial temperament you consider to be the most important?

I believe one of the most important things a judge can do is to maintain a positive judicial temperament. Among other things, an ideal judicial temperament is characterized by courtesy, patience, and a fair, but firm, demeanor. Of these characteristics, the most important is being fair, but firm. Above all things, a judge must be seen to be fair, neutral and balanced in conducting the business of the court.

MICHAEL HAYGOOD SCHNEIDER
JUSTICE
THE SUPREME COURT OF TEXAS

July 14, 2004

Chairman Orrin G. Hatch
Chairman, United States Senate Committee on the Judiciary
104 Hart Office Building
Washington, DC 20510

RE: Follow-Up Questions for Nominee to the U.S. District Court for the Eastern District of Texas, Michael H. Schneider, Sr.

Dear Chairman Hatch:

I have received the Follow-Up Questions that Senator Patrick Leahy submitted to me as part of my Senate Confirmation Hearing. Enclosed please find my responses.

Thank you very much.

Sincerely,

Michael H. Schneider, Sr.
Justice, Texas Supreme Court

MHS:fff

CC: Senator Patrick J. Leahy
433 Russell Senate Office Building
United States Senate
Washington, DC 20510

Responses of Michael H. Schneider,
Nominee to the U.S. District Court for the Eastern District of Texas,
to Written Follow-Up Questions submitted by
Senator Patrick Leahy, United States Senate Committee on the Judiciary

1. **In 1991, the Texas Lawyer published an article regarding the use of excess campaign contributions by Texas judicial candidates. At the time, you were a trial judge on the 157th District, and the article quoted you as saying, "The real world is that you are running a campaign all the time, notwithstanding the fact that you're not up for election. The real world is that we're political officials. . . ." I understand that, in Texas, judges are elected and must run political campaigns, but federal judges are not supposed to be political. In fact, one of the most fundamental underpinnings of our democracy is our independent judiciary. The system of lifetime appointments allows judges to be free from the influence that political interference can bring and to base their decisions on merit alone. If confirmed, how will you make the transition from being a "political official" to an independent, nonpartisan member of the federal judiciary? What assurances can you give the Committee that you will fairly apply the law based on the merits of a particular case regardless of your political views?**

   I have always applied the law in a fair and neutral manner and decided cases on their merits, irrespective of my own personal beliefs. I began my judicial career as a municipal judge and had the good fortune of being appointed by city council for six successive two-year terms. I am the only person in Texas history to be appointed by three different governors to three different judicial positions. And after winning a judicial position, I have never had an opponent. I am proud of the fact that the public has accepted me as being a fair and impartial judge. If I have the good fortune of becoming a federal district judge, I would continue to maintain the high standards I have set for myself in state court.

2. **You indicate on your Senate Questionnaire that you gave a speech to the Pasadena Rotary Club in May of 2003 titled, "My Experiences on the Texas Supreme Court." Please share with the Committee the content of that speech and what your experiences have been on the Texas Supreme Court. In particular, what lessons have you learned on the court that you will bring with you to the federal district court, if confirmed? Given your experiences on this important court, what criteria do you think are most important for federal judges to possess?**

   My speech to the Pasadena Rotary Club compared and contrasted my experiences on the Texas Supreme Court with my time as Chief Justice of the First Court of Appeals. For instance, I explained the differences between convincing a three judge panel that my opinion was correctly decided and well written as compared with convincing a court of nine judges of the merits of an opinion I had written. I also discussed some of the

differences in the internal operating procedures of the two courts. For example, I explained that after an oral argument, the First Court of Appeals' panel would meet immediately to discuss cases in post-submission. However, on the Texas Supreme Court, post-submission discussions take place at the next scheduled conference.

I have truly enjoyed my time on the Texas Supreme Court. Specifically, I have enjoyed hearing cases from all over the state and observing trends in the various Courts of Appeals. In each opinion I write, I have learned to be precise and succinct because I have eight other judges that I respect reviewing my work. Moreover, attorneys across the state rely on the language in the Court's opinions when advising clients. This precise manner of writing is one of the biggest lessons I have learned on the Texas Supreme Court, and it is one that I would take with me if confirmed to the federal district court.

In addition to a precise and careful writing style, one of the most important characteristics a federal judge can possess is the ability to listen to both sides of an argument with an open mind. On the Texas Supreme Court, as I try to build consensus for a unanimous opinion or as I decide whether I am going to join the majority or dissent in an opinion, it is critical that I listen to the oral advocates during the argument and my colleagues as we discuss the case after the argument. I believe a judge should always actively strive to remain neutral before making a decision, and I would do so if I am confirmed the federal district court.

3. **I know that Texas is one of the few states in which individuals still run for election to the state's highest court. In your 2002 election campaign, you accepted almost one million dollars in contributions from law firms, lawyers and litigants, many of whom regularly appear, or have interests, before you in Court.**

   a. **Did you ever hear a case in which your past contributors were parties? If so, did you make a full disclosure to the parties of any campaign contributions that you received related to interests in the particular case?**

      I, like almost every other Texas judge who has campaigned for office, have heard cases in which my campaign contributors were parties. All judicial officers are required to make public disclosures of campaign contributions and I followed all applicable disclosure rules.

   b. **In how many cases, if any, in which your past contributors were parties did you disqualify or recuse yourself? For what reasons did you recuse yourself in these cases?**

      I have not disqualified myself in cases where my past contributors were parties.

   c. **In any of the cases in which your past contributors were parties, did a litigant ever make a motion to recuse you? If so, did you recuse yourself, and why or why not?**

I have never been presented with a motion for recusal based on the fact that a past contributor was a party.

d. I understand that, according to the Texas Code of Judicial Conduct and interpretive case law, the receipt of political contributions by a judge does not create bias necessitating recusal, or even appearance of impropriety, in a case in which a contributor is a party. However, while there may be no legal authority that requires disqualification in such cases, as a judge entrusted with the responsibility to promote fairness and public confidence in the impartiality of the judicial system, do you think there is ever a time where a judge has a common sense or ethical obligation to disqualify himself or herself? Please explain.

Neutrality and impartiality of the judiciary is necessary to ensure the due process rights of all litigants. Thus, there are times when a judge may choose to disqualify himself or herself from a case even if not legally obligated to do so. Certainly, a judge should recuse himself in any case where his impartiality might reasonably be questioned.

4. If confirmed to the district court, what analysis would you use if presented with a motion to recuse yourself from cases involving litigants, law firms or parties who contributed to your 2002, or earlier, election campaigns?

a. Please explain the specific steps you would take to comply with 28 U.S.C. §455, which governs disqualification of federal justices, judges and magistrates.

The most effective way to assure compliance with the judicial disqualification statute will be to have a organized system that checks each party to a proceeding against a list of all parties over which I cannot hear claims due to statutory disqualification. In order to do this I will need to make a list of those parties and schedule a regular screening to assure that no party has a case before me that is on that list. Additionally, because it may be difficult to include all such parties on a list, I will review my docket on a regular basis to be sure that I am not disqualified from hearing any of the cases before me.

b. Please explain the specific steps you would take to comply with Canon 2(A) of the Code of Conduct for United States Judges and any other applicable provisions of the Code and related commentary regarding financial interests and conduct that creates the appearance of impropriety.

Avoiding any appearance of impropriety is essential to maintaining the credibility of the judiciary, and therefore it is wise to err on the side of caution in deciding when, as a judge, I should recuse myself from a case due to personal, financial or familial interests. When it would appear to a reasonable person that my own

interests could influence a decision, even if I know that they would not, I would recuse myself to avoid this appearance of impropriety.

c. **What assurances can you give the Committee that you would follow the Code of Conduct and laws and related regulations regarding disclosure and disqualification? For example, if one of your campaign contributors, such as Vinson & Elkins, were to appear before the district court in a particular case, do you think that, as stated in 28 U.S.C. §455, your "impartiality might be reasonably questioned"? Do you think that presiding over such a case would create in reasonable minds a perception that your ability to carry out judicial responsibilities with integrity, impartiality and competence would be impaired? What specific actions would you take in such a case, including any disclosure, and would you identify the grounds for disqualification and disqualify yourself?**

I can assure the Committee that I will follow the Code of Conduct and other applicable laws. I have always held myself to the highest ethical standards. If a campaign contributor appeared before me, I would follow all applicable recusal laws. Past contributions have not and would not influence my decisions or affect my impartiality.

5. **In a recent case, Progressive County Mutual Insurance. Co. v. Sink, 107 S.W.3d 547 (Tex. 2003), Justice Owen wrote the majority opinion, which held that an insurance company did not have to cover an employee who used a borrowed car because the car did not fit the definition of "temporary substitute" under the policy. You joined a dissent with Justice Phillips and Justice O'Neill, which concluded that the borrowed car clearly fit the policy's description of a temporary substitute and that an employee using a vehicle at work would have a reasonable belief that they are covered under the policy. Please explain the basis for your dissent in this case.**

Progressive County Mutual Insurance Company v. Sink involved an Alamo car rental employee that had borrowed an Alamo car while his was in disrepair and had been involved in a car accident with another individual. That individual sought recovery under the Alamo employee's personal insurance policy. The relevant question in that case asked whether the vehicle borrowed by the Alamo employee was a "temporary substitute" under the policy. Justice Owen, writing for the majority, held that because the employee had not sought permission from Alamo to use the vehicle, it was not a temporary substitute as defined by the insurance agreement.

I joined Chief Justice Phillip's dissent in this case because, as the dissent explained, the plaintiff was driving a "covered auto" as defined in the plain language of the policy, and thus, any damages resulting from an accident in that auto should have been covered under the policy.

SUBMISSIONS FOR THE RECORD

U.S. Senate Committee on the Judiciary
U.S. Senator John Cornyn

Judicial Nominations

Michael H. Schneider, Sr.
to be United States District Judge for the Eastern District of Texas

Wednesday, July 7, 2004, 10 a.m.
Dirksen Senate Office Building Room 226

Today the Committee will consider the nomination of an exceptional Texas jurist to serve on the federal district court in the Eastern District of Texas.

I want to begin by thanking the Chairman of the committee, Senator Hatch, for scheduling today's hearing. I look forward to moving this nomination through the committee – and through the Senate – over the next few weeks.

I also want to thank Senator Leahy and his staff for working so cooperatively to make today's hearing possible. After a few brief introductory remarks, I will turn the floor over to him for any remarks that he might have, and then we will be very pleased to hear from the senior senator from Texas – who knows the nominee quite well and who I know is personally very supportive of him.

The vacancy we hope to fill with the nomination before us today was created by the untimely passing of Chief Judge John H. Hannah, Jr. Judge Hannah was a good man and a distinguished jurist. His family's loss was also a great loss to the state of Texas.

I enjoyed working with Judge Hannah. Senator Hutchison and I worked closely with him just last year on legislation to authorize the Eastern District of Texas to hold court in the city of Plano. That bill (S. 1720) was important to Judge Hannah, who always worked hard to serve the citizens of the Eastern District. He passed away the day after the President signed that legislation into law.

The death of Judge Hannah leaves some big shoes to fill, but President Bush could not have filled them better than with the nomination of Texas Supreme Court Justice Michael Haygood Schneider.

Justice Schneider will bring to the federal district court the wisdom, judgment, and experience of over a quarter century of service on the bench. He understands – as any good judge must – that the duty of a judge is to interpret the law, not legislate from the bench.

Justice Schneider has held virtually every position in the state court system that Texas has to offer. From 1978 to 1990, he served on the West University Place Municipal Court. Then, he served on the 157th District Court of Texas, located in Houston, until 1996. Next, he became

Chief Justice of the First Court of Appeals in Houston. He served there until 2002, when he was appointed Justice of the Supreme Court of Texas, where I once served.

He has been honored as both "Trial Judge of the Year" and "Appellate Judge of the Year" by the Texas Association of Civil Trial and Appellate Specialists.

In addition to this extraordinary record of judicial service, Justice Schneider also served the people of Texas in the role of Assistant District Attorney for Harris County. Justice Schneider is a graduate of Stephen F. Austin State University, the University of Houston College of Law, and – more recently – the LL.M. program of the University of Virginia Law School. And he has a distinguished record of civic involvement.

Justice Schneider's reputation as an exceptional jurist and a true gentleman is well known throughout the state of Texas. It is also well known by the American Bar Association, which recently gave him its highest rating, when its Standing Committee on the Federal Judiciary unanimously certified him as "well qualified" for the federal bench. His nomination enjoys broad bipartisan support across the state of Texas. For example, Susan Hays, who chairs the Dallas County Democratic Party, has written a strong letter of support, and without objection, I'd like to submit that letter for the record.

I also happen to know that Justice Schneider is a humble man. His profile on the Texas Supreme Court's website points out that "[h]e held a variety of jobs during college and law school," including "searching titles at a major oil company, managing apartments, driving ambulances, operating a school bus for disabled children, working at a funeral home, teaching school, delivering milk, clerking for a law firm, managing a college cafeteria, serving as a waiter, bell hopping at a hotel, and serving as an intern at the United States Attorney's Office." I may ask him which of those jobs best prepared him to become a federal judge.

I am pleased that the President has nominated Justice Schneider to serve on the Eastern District of Texas, and I am honored to chair today's hearing. I look forward to hearing from him today, and I look forward to what I hope will be a swift confirmation process.

Statement of Senator Orrin G. Hatch, Chairman

Before the Committee on the Judiciary
United States Senate

on

The Nomination of
Michael H. Schneider to be United States District Court Judge for the Eastern District of Texas

July 7, 2004

Michael H. Schneider, nominated to be U.S. District Judge for the Eastern District of Texas, is a sitting Texas Supreme Court Justice and an extremely experienced attorney.

Justice Schneider began his legal career in the Harris County District Attorney's Office in 1971. After four years of a varied docket with a particular emphasis on economic crimes, Justice Schneider entered the private sector where he remained until 1990 when he became the Presiding Judge of the 157th District Court in Harris County, Texas. From 1996 until 2002, Justice Schneider served as the Chief Justice of the Texas First Court of Appeals at Houston. In September of 2002, Governor Perry appointed him to the Supreme Court of Texas and Justice Schneider was elected two months later to a term which expires in 2008. This nominee, in addition to his distinguished career on the bench, has tried approximately 150 cases to a verdict.

The ABA has unanimously recognized Justice Schneider's ability and competence with its highest rating of well qualified and I look forward to hearing from him today. He brings a wealth of experience to the federal bench and he will make an excellent addition to the Eastern District of Texas.

Dallas County Democratic Party

Susan Hays, Chair

July 6, 2004 - VIA FACSIMILE

Chairman Orrin G. Hatch
Sen. Patrick J. Leahy
Sen. John Cornyn
Members of the Senate Committee on the Judiciary

RE: Nomination of **Michael H. Schneider, Sr.** for the United States District Judge for the Eastern District of Texas

To the Members of the Committee,

I write to encourage you to confirm the nomination of Justice Schneider. As the Dallas County Democratic Chair, I supported Justice Linda Yañez, Justice Schneider's opponent in his 2002 race for the Texas Supreme Court. During that election season I learned a great deal about Justice Schneider, namely how well-regarded and well-respected he is by the bench and the bar in Texas. Even the plaintiffs' bar in Houston, Justice Schneider's home base, supported his race out of respect for his dedication to following the law.

During his tenure on the Texas Supreme Court I have followed his performance closely. (I served as a law clerk on the court during the 1997-1998 term, and specialize in civil appellate work in my law practice.) While on the Court he has been a voice of moderation and judicial conservatism. In the many conversations I have had with Texas appellate lawyers - of all political persuasions — the overwhelming consensus is that Justice Schneider has done a wonderful job on the Court and fully deserves to be elevated to the federal bench. Justice Schneider is dedicated to the rule of law and the integrity of the judicial system. The only reservation I have about his nomination is that I hate to lose his influence on the Texas Supreme Court. In addition to being a Democrat, I am a member of the Texas Trial Lawyers Association and the Dallas Trial Lawyers Association. Speaking both as a Democrat and as a plaintiffs' lawyer, I urge the Committee to confirm Justice Schneider.

While much has been made in the press about partisan gridlock over judicial nominations, as a partisan leader and as a lawyer I know there are times the parties should come together to support a nominee. This is such a time. I urge the Committee to vote on Justice Schneider's nomination at Wednesday's hearing. A quick vote is critical this late in an election year. If you have any questions about my support of his nomination, please call me at 214-557-4819.

Sincerely,

Susan Hays

Susan Hays

4209 Parry Avenue, Dallas, TX 75223 • (214) 821-8331 • FAX (214) 821-0995
Email: mail@DallasDemocrats.org • Website: www.DallasDemocrats.org

Statement of Senator Patrick Leahy
Ranking Member, Senate Judiciary Committee
Hearing on Judicial Nominations
July 7, 2004

Today, the Judiciary Committee is holding its 12th judicial nominations hearing of 2004. We will now have held hearings for 26 judicial nominees, nine for the circuit courts of appeals and 17 for the district courts.

This is double the number of hearings for judicial nominees that were held in all of 1996 when President Clinton was in the White House. Indeed, by this date in 1996, the last year of that presidential term, the Committee had held only four hearings to consider judicial nominees. The comparison to the number of hearings in 2000, another presidential election year, is also striking. That year, only eight nominations hearings were held all year, and by this date in 2000, the Committee had held only six hearings to consider judicial nominees. Thus, we have now tripled the number of hearings held by this date in 1996 and doubled the number of hearings held by this date in 2000.

The Judiciary Committee has now held considerably more hearings for judicial nominees this year than were held by this date in any of the past six years of Republican control of the Committee during the Clinton Administration. By this date in 1995, the Republican majority had held only six hearings; in 1996, only four hearings; in 1997, only three hearings; in 1998, only seven hearings; in 1999, only one hearing; and, in 2000, only six hearings. Furthermore, we have now held more hearings than were held in all of five of the past six years of Republican control under President Clinton. In fact, the Republican majority averaged nine hearings per year during their past six years in control. We have now exceeded that average by 33 percent.

Senate Democrats have been much more cooperative with this President than Republicans were when President Clinton was in the White House. Democrats on this Committee and in the Senate have shown great restraint and extensive cooperation in the confirmation of 198 of this President's judicial nominations. We have reduced circuit court vacancies to the lowest level since the Republican Senate leadership irresponsibly doubled those vacancies in the years 1995 through 2001 by obstructing President Clinton's moderate and qualified nominees.

Today we are considering the nomination of Michael Schneider to the U.S. District Court for the Eastern District of Texas. He currently serves on the Supreme Court of Texas, where he has served since September 2002. Prior to serving on the Texas Supreme Court, he spent 12 years on the State bench as a trial and appellate judge. He has a

reputation as a conservative, but fair-minded judge. On the Texas Supreme Court, he has only authored a few opinions to date, but they lay out the facts and the law with no hint of a personal bias. Justice Schneider shows a willingness to listen to all litigants and to be fair. Unlike some of his more conservative colleagues on the court, Justice Schneider has not been a judicial activist and has not distorted the law to benefit corporations at the expense of consumers and injured individuals. In contrast, his opinions have focused on statutory interpretation, proper trial procedures, and the rule of law.

I would note that, like his colleagues on the court, Justice Schneider campaigned for his seat on the high court and received campaign donations from a number of lawyers, including employees at large defense firms. However, in contrast to Justice Owen, who received 17 percent of her total campaign contributions in 1994 from the two leading business tort political action committees and consistently ruled in their favor, Justice Schneider received only 1 percent of his total contributions from such groups with self-employed donors constituted the largest share of his donations.

Throughout his career, Justice Schneider has demonstrated a commitment to serving those less fortunate, by developing a mock trial program at a school in an impoverished neighborhood, participating in Habitat for Humanity projects, establishing alternative dispute resolution programs, and working with the State Bar of Texas to increase access to justice.

Justice Schneider makes the 16th district court nominee of President Bush's from the State of Texas that has received a hearing before the Senate Judiciary Committee. To date, President Bush has had 15 of his nominees to the district courts in Texas confirmed. Mr. Schneider is nominated to the only current vacancy remaining in the Texas federal courts.

This is in great contrast to the fate of many of President Clinton's nominees from Texas, who were blocked and delayed by the Republican majority, including Enrique Moreno, nominated to the Fifth Circuit Court of Appeals who never got a hearing, never got a vote; Jorge Rangel, nominated to the Fifth Circuit Court of Appeals who never got a hearing, never got a vote; Hilda Tagle to the District Court, whose confirmation was delayed nearly two years without any legitimate reason ; and Michael Schattman to the District Court, who withdrew his nomination after waiting for more than two and a half years without getting a hearing or a vote.

Judge Jorge Rangel was a former Texas state judge and a dedicated attorney in private practice in Corpus Christi, Texas when President Clinton nominated him to the United States Court of Appeals for the Fifth Circuit in 1997. Mr. Rangel is a graduate of the University of Houston and the Harvard Law School and earned a rating of "Well Qualified" by the American Bar Association. Yet, under Republican leadership, he never received a hearing on his nomination, let alone a vote by the Committee or by the full Senate. His nomination languished without action for 15 months.

After Judge Rangel, disappointed with his treatment at the hands of the Republican majority, asked the President not to resubmit his nomination, President Clinton nominated Enrique Moreno, a distinguished attorney in private practice in El Paso, Texas and a native of Mexico. Mr. Moreno is a graduate of Harvard University and the Harvard Law School. He was given the highest rating of unanimous "Well Qualified" by the ABA. Mr. Moreno also waited 15 months, but was never given the courtesy of a hearing before the Senate Judiciary Committee. President Clinton re-nominated him at the beginning of 2001, but President Bush, missing an opportunity for bi-partisanship, withdrew the nomination after a short time and later sent Justice Owen's name in its place.

The Republican majority did not show half as much courtesy to President Clinton's district court nominees in Texas as it has now to President Bush's. For example, Judge Hilda Tagle waited for more than two a half years before she was given a hearing and subsequently confirmed to the District Court for the Southern District of Texas. Michael Schattman, a well-qualified Catholic nominee of President's Clinton from Texas, also waited for more than two and a half years without being given a hearing or a vote on his nomination to the District Court for the Northern District of Texas.

In contrast, Justice Schneider was nominated on May 17, 2004 and is receiving a hearing less than two months later. I look forward to hearing from Justice Schneider today.

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NOMINATIONS OF SUSAN B. NEILSON, OF MICHIGAN, NOMINEE TO BE CIRCUIT JUDGE FOR THE SIXTH CIRCUIT; MICAELA ALVAREZ, OF TEXAS, NOMINEE TO BE DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF TEXAS; KEITH STARRETT, OF MISSISSIPPI, NOMINEE TO BE DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF MISSISSIPPI; AND RAYMOND L. FINCH, OF THE VIRGIN ISLANDS, NOMINEE TO BE JUDGE FOR THE DISTRICT COURT OF THE VIRGIN ISLANDS FOR A TERM OF TEN YEARS [REAPPOINTMENT]

WEDNESDAY, SEPTEMBER 8, 2004

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 10:02 a.m., in Room SD–226, Dirksen Senate Office Building, Hon. Orrin G. Hatch, Chairman of the Committee, presiding.

Present: Senators Hatch, Cornyn, and Leahy.

Chairman HATCH. We are happy that you are all here. I will reserve my remarks until after my colleagues make theirs, but I will make some remarks in the end. So we will begin with Senator Lott—oh, excuse me. I guess Senator Cochran first. I didn't notice you there.

Senator Cochran, we will take you first and then Senator Lott.

PRESENTATION OF KEITH STARRETT, OF MISSISSIPPI, NOMINEE TO BE DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, BY HON. THAD COCHRAN, A U.S. SENATOR FROM THE STATE OF MISSISSIPPI

Senator COCHRAN. Mr. Chairman, thank you very much. It is a great pleasure for me to be before the Judiciary Committee today to endorse and recommend to the Committee the confirmation of Keith Starrett, a circuit court judge in our State who has distinguished himself by his excellence, in terms of professional competence and innovation as a trial judge dealing with first offenders, establishment of drug courts, and in general elevating the quality

of judicial administration in our State over a period of 15 years, during which he has served as a circuit court judge.

He has experience as a prosecuting attorney, an assistant district attorney, as the office is called in our State. He has bene in private practice as a lawyer in our State. He graduated from the University of Mississippi Law School, Mississippi State University undergraduate school. He has a lovely family, a wife and three grown children. They have been a credit to their community, and it is really, with a sense of pride and expectation of his excellence of service as a United States district judge that I recommend him to the Committee.

I hope the Committee can act expeditiously to report the nomination to the Senate, and we will be glad to work as hard as we can with the distinguished Chairman and other members of the Committee to get this nomination approved by the full Senate.

Thank you very much.

Chairman HATCH. Thank you, Senator Cochran. That is great praise for Judge Starrett, and we have nothing but high regard for him, and we will do everything we can to get him through following this hearing. We appreciate you appearing here. We know how busy you are. So, whenever you need to leave, that would be fine.

Senator Lott, we will turn to you now.

PRESENTATION OF KEITH STARRETT, OF MISSISSIPPI, NOMINEE TO BE DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, BY HON. TRENT LOTT, A U.S. SENATOR FROM THE STATE OF MISSISSIPPI

Senator LOTT. Thank you, Mr. Chairman, and my colleagues, Senator Cochran, Senator Cornyn. I must say, Mr. Chairman, we appreciate you moving forward with these hearings and continuing to act confirm judges as we did just yesterday in the full Senate. I think it is very important that we continue that effort.

I do not want to repeat everything my colleague from Mississippi has said. I just want to heartily endorse the nomination and hopefully the confirmation of Judge Keith Starrett to the Southern District of Mississippi. He is truly one of the most respected and experienced trial court judges in the State court system in Mississippi, and I want to take just a moment before going any further to recognize the fact that his lovely wife Barbara is here with him today. And we all know that the spouses have to put up with a lot of things to support our careers in Congress and the Federal judiciary, also.

Senator Cochran noted his educational background. he has got the type of educational experience obviously he needs. He has completed a number of courses at the National Judicial College. He has been very active and understanding in doing his job on the circuit court there in Southwest Mississippi.

He practiced law for 17 years, was an assistant D.A. and has been on the bench for 12 years. The most impressive thing though that I have seen, he has not been content just to be a presiding circuit court judge, he has been an innovator, an activist in trying to deal with some of the serious problems that we have in our State and across this country. He established the first felony level drug court in Mississippi in his State judicial district. The court has

been used as a model for the creation of other drug courts in the State. Judge Starrett's experience and involvement in this area has been critical and a driving force as Mississippi works to implement the drug court system for the entire State, and he has been recognized for that effort throughout the State and in the profession.

He is active in his church and his community. He helped found the Mission Pike County, which is a racial and denominational reconciliation organization and the Southwest Mississippi Child Protection, a child advocacy group in two counties in his circuit district. He also received the 2003 Judicial Excellence Award given by the Mississippi Bar Association, which is a great honor.

I do want to note one additional thing, and that is that this position is considered to be one of the 14 judicial emergencies in the country, and this one has the highest rating in terms of case load. It is weighted/adjusted filings per judge of all of the 14 judicial emergencies. There is a lot of activity here, and they are sinking under the volume. They need the help of a judge being a confirmed and an active judge sitting in the Southern District of Mississippi. I hope that will weigh on the consideration of the Committee and the full Senate. When we have what is identified as judicial emergencies, and then we recognize that this is the tops of that list of 14 emergencies, I hope we could move this nomination expeditiously and before the Senate finishes for the year. So I heartily endorse this nomination. He is a good man, a good judge. He will make an excellent Federal judge.

And I thank the Committee for this opportunity to be here today.

[The prepared statement of Senator Lott appears as a submission for the record.]

Chairman HATCH. Well, thank you both. He has the highest rating from the American Bar Association as well—

Senator LOTT. Yes.

Chairman HATCH. —which is much to his credit, and we appreciate both of you showing up here today. We will let you go so you do not have to sit around and listen to me, but we are going to turn to Senator Hutchison at this time and then to Senator Cornyn, and then we will go to our delegates.

PRESENTATION OF MICAELA ALVAREZ, OF TEXAS, NOMINEE TO BE DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF TEXAS, BY HON. KAY BAILEY HUTCHISON, A U.S. SENATOR FROM THE STATE OF TEXAS

Senator HUTCHISON. Well, thank you very much, Mr. Chairman. I am here today to introduce a fellow Texan, Micaela Alvarez, who is being nominated for the Southern District of Texas, and it is most certainly one of the emergency districts as well. It has one of the highest caseloads. It is one of the areas where we have added judges because of the high caseload on the border with Mexico. So we are very hopeful that we can get Micaela Alvarez approved expeditiously, so that we can get the help that we greatly need on the border.

She has a number of her family with her today—Evencio Alvarez, her father.

Chairman HATCH. I am so happy to welcome you here.

Senator HUTCHISON. And Gloria Johnson, her sister.

Chairman HATCH. Gloria, nice to have you with us.
Senator HUTCHISON. Michael Johnson, her nephew.
Chairman HATCH. Michael, good to see you.
Senator HUTCHISON. First Sergeant Maria Marty, her sister.
Chairman HATCH. We are really proud to have you here.
Senator HUTCHISON. Miranda Marty, her niece.
Chairman HATCH. Miranda.
Senator HUTCHISON. And Olivia Olmos, her niece.
Chairman HATCH. Olivia, nice to have you.

Senator HUTCHISON. And she also has three children who were not able to make it, but Senator Cornyn and I were very pleased to nominate Micaela for this vacancy. Her familiarity with the region and her years of experience in public and private sector are very impressive.

Since 1997, she has been in private practice in McAllen, Texas. Prior to serving as a partner in her own firm, she was appointed by then-Governor Bush to serve as the presiding judge for the 139th District Court in Hidalgo County from 1995 to 1996. In addition to her distinguished legal career, she has been a case manager for a State school in Gonzalez, Texas, and a social worker in Lockhart. She has served as a board member of the State Office of Risk Management, as a member of the Presidential Commission of Educational Excellence for Hispanic Americans appointed by President Bush in 2001. She earned her bachelor's degree from the University of Texas at Austin in social work in 1980 and her law degree from the University of Texas in 1989.

Her qualifications, her knowledge of and commitment to South Texas and her experience combine to make her a fine candidate for the Federal bench, and we hope that we can have an expeditious hearing and confirmation so that she can go down to the Southern District, which is just overloaded right now by its position on the boarder, and we definitely need to give that area help, which they deserve to have justice and their area served.

Thank you, Mr. Chairman, and I am very pleased to be here for Micaela.

Chairman HATCH. Thank you, Senator Hutchison. I think it is terrific that you can take the time to show up and speak for Micaela. We are grateful to have you here. We know how busy you are, so we will let you go, if you would like, but we will turn to Senator Cornyn for his remarks.

PRESENTATION OF MICAELA ALVAREZ, OF TEXAS, NOMINEE TO BE DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF TEXAS, BY HON. JOHN CORNYN, A U.S. SENATOR FROM THE STATE OF TEXAS

Senator CORNYN. Thank you, Mr. Chairman, and I want to join in the remarks of Senator Hutchison in saying how delighted we are that you have seen fit to schedule this important appointment for a hearing. Senator Hutchison has already covered much of what I would like to have said, but what I would like to do is ask that my complete remarks be made part of the record.

Chairman HATCH. Without objection, we will put all of the remarks in as fully delivered.

Senator CORNYN. Let me just briefly read an excerpt from a book that was written by Governor Bush in 1999 before he became President of the United States, where he spoke specifically about the appointment that Senator Hutchison alluded to earlier when he appointed Micaela as judge of the 139th Judicial District in Hidalgo County. He wrote, "Micaela's parents were migrant farmworkers who traveled from job to job on farms throughout Texas and the Southern United States. For them, Micaela was not just a success story. She was living proof of what they had lived for and promised their children; that in Texas and America, if you work hard, get a good education, make good choices in life, you can be whatever you want to be."

And I can assure you that when her mother held the Bible for Micaela to take the oath of office to serve the State of Texas as a district judge there was not a dry eye in the packed house.

So the appearance of Judge Alvarez before this Committee today is just another inspiring example of the American Dream becoming a reality, and she deserves this Committee's support. And I am pleased that the President has seen fit to nominate her for this important bench and that Senator Hutchison and I have had the opportunity to recommend her for this important position.

Thank you very much.

[The prepared statement of Senator Cornyn appears as a submission for the record.]

Chairman HATCH. Well, thank you, Senator.

We are very happy to have our two Senators from Texas appear on behalf of this nominee. I think it weighs very, very heavily in your behalf, Ms. Alvarez.

I do not know if Representative McCotter is here, but if he is not, we are going to turn to you, Delegate Donna Christensen.

PRESENTATION OF RAYMOND L. FINCH, OF THE VIRGIN ISLANDS, NOMINEE TO BE JUDGE FOR THE DISTRICT COURT OF THE VIRGIN ISLANDS FOR A TERM OF TEN YEARS [REAPPOINTMENT], BY HON. DONNA CHRISTENSEN, A DELEGATE TO CONGRESS FROM THE VIRGIN ISLANDS

Delegate CHRISTENSEN. Thank you. Good morning, Chairman Hatch, Senator Cornyn, Senator Durbin. It is a pleasure to be before the Committee today.

Chairman HATCH. We are happy to have you here.

Delegate CHRISTENSEN. And it is a very special privilege and honor for me to present a friend, a son of my home island of St. Croix and also the son of a very distinguished Virgin Islands' family, the matriarch of which is one of my dearest former patients and role models, the son of Wilfred and Merrill Finch, Hon. Raymond L. Finch, has been a judge of the District Court of the U.S. Virgin Islands since September 1st, 1994. He is currently serving as the Chief Judge of our district, having assumed that position in August of 2000.

We are pleased at this outstanding individual, who has served the law and the bench so faithfully and so well, Judge Raymond Finch, is again before the Committee today having been nominated to serve a second 10-year term by President George W. Bush.

Today, harkens back to one of my very first efforts as a community activist when I returned home in the late seventies, a coalition I spearheaded to have a local lawyer fill a vacancy in the District Court. Judge Finch was one of those we sought to have seated at that time. Indeed, the road to his actually being confirmed was a relatively long and circuitous one. President Jimmy Carter first nominated him in 1990, but that nomination expired when the Senate adjourned without taking action and President Carter was not reelected.

His second nomination by President George Herbert Walker Bush in 1992 suffered a similar fate. Finally, Judge Finch's third nomination by President William Jefferson Clinton succeeded, and he began his active service on the Federal bench in 1994. The fact that both Republican and Democratic Presidents have nominated Judge Finch speaks volumes to his character and his testament to his sterling judicial qualifications.

Let me also use this opportunity and digress somewhat from my presentation of the nominee for a brief moment to say, on behalf of my constituents and both Judge Finches before us today, and Attorney Curtis Gomez, who was reported out of the Committee several months ago, that I would not only ask for a timely vote on this nominee, but also respectfully request that the Committee use its influence to have both of our outstanding nominees confirmed by this body before it adjourns so that the history that I have shared with you does not repeat itself and in order that the District Court of the Virgin Islands can have the stability and the continuity it needs to optimally serve both our territory and our Nation.

Ray is a product of the Virgin Islands public school system, where my grandmother found him one of her best students. And he is a graduate of the distinguished Howard University, where he received both his undergraduate degree in political science and economics and his juris doctorate. Judge Finch's notable written legacy is contained in a prolific collection of memoranda, opinions and decisions which eloquently blend interpretations of law with relevant Virgin Islands' cultural nuances, likely found their origins during his tenure as the assistant editor of the famous Hilltop campus newspaper at Howard.

Judge Finch is a Vietnam veteran, who served this Nation with distinction in the U.S. Army, attaining the rank of captain. He was awarded the Army Commendation Medal, the Bronze Star, and a Certificate of Appreciation from then-Army Chief of Staff General Westmoreland.

Prior to his appointment to the Federal judiciary, Judge Finch served in the Territorial Court of the Virgin Islands and distinguished himself there for his reliable impartiality, his consistent judicial temperament, and as one of the few judges who could explain the complexities of juris prudence in a manner that could be easily understood by anyone who came before him. He is also known for well for his wry sense of humor that often catches one by surprise.

Judge Finch has not only lent his judicial experience and expertise as an instructor at our own University of the Virgin Islands, but has furthered and expanded his own knowledge and judicial acumen through seminars and short courses taken through his legal and judicial career.

He is a member of a Virgin Islands family that has made impressive and outstanding generational contributions in various capacities through their exemplary and impeccable service to the local Virgin Islands Government, the Federal Government and in the private sector.

He is the father of five, and he is married to Anne Marie, who, with his daughter Jennifer, joins him this morning. He is also accompanied by former Senator Malloy and two young attorneys whom he mentored, Robert Malloy and Jeffrey Moorehead, also from the Virgin Islands.

On behalf of the people of the Virgin Islands, I am exceptionally proud to reintroduce to the Senate Committee on the Judiciary one of our brightest and one of our best, our chief district court judge, Hon. Raymond L. Finch.

Thank you, Mr. Chairman.

Chairman HATCH. Well, thank you so much. We are exceptionally proud to have you here today.

Delegate CHRISTENSEN. Thank you.

Good morning, Senator Leahy.

Chairman HATCH. I think that speaks well for the judge that you would appear, and thank you for being here.

Unless Congressman McCotter is here—is Congressman McCotter? We would love to take your statement at this time.

Thank you. Glad to have you here. Welcome.

PRESENTATION OF SUSAN B. NEILSON, OF MICHIGAN, NOMINEE TO BE CIRCUIT JUDGE FOR THE SIXTH CIRCUIT, BY HON. THADDEUS MCCOTTER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

Representative MCCOTTER. Thank you. I am new to this, so the first time is always the most painful is what I am told.

Chairman HATCH. Just take it easy. You will be just fine. We are glad to have you here.

Representative MCCOTTER. Mr. Chairman, distinguished Committee members,thank you for holding this hearing and for allowing me the privilege of introducing Susan B. Neilson.

Judge Neilson is a graduate of the University of Michigan, the Wayne State University School of Law, and was formerly a partner at Dickinson Wright. She was appointed to the Third Judicial Circuit Court of Michigan in June 1991 and was reelected three more times in 1992, 1996 and 2002.

Now, she will stand before you today for your esteemed consideration for a seat on the U.S. Circuit Court of Appeals for the Sixth Circuit. Here are a few words from those who have looked at her qualifications and have held her in high regard.

Mark Corrigan, the chief justice of the Michigan Supreme Court has said, "Judge Susan B. Neilson has earned the reputation of being one of the most dedicated and knowledgeable trial court jurists in the State of Michigan. I believe her experience as a trial court judge, coupled with her legal writing abilities, will make her an outstanding addition to the U.S. Court of Appeals for the Sixth Circuit."

Mr. Roger Winkelman, treasurer of the Michigan Democratic Party, "I have known Judge Neilson for many years. She is well de-

served of her reputation as a fair-minded judge who treats all parties who appear before her with a high degree of respect and dignity. Her knowledge of the law and dedication to rendering rulings in conformity with controlling legal authority will make her an excellent addition to the Court of Appeals."

Finally, from Thomas G. Kienbaum, past president of the State Bar of Michigan, "I know Judge Neilson as a fellow lawyer, a law partner, and more recently as a trial judge when I appeared before her. She brought unique qualities to the bench, a quick, perceptive mind, and a tremendous work ethic which she applies evenly to all matters that come before her, when appropriate, with a degree of good humor. She has an unbridled enthusiasm for the law, even with respect to the most tedious aspects of the work required of judicial officers."

Mr. Chairman, Judge Susan Neilson is an exceedingly learned, profoundly fair, morally fit, and professionally qualified person who would make an excellent addition to the U.S. Court of Appeals for the Sixth Circuit.

I thank you, Mr. Chairman, and all of the members of your Committee for holding this hearing.

Chairman HATCH. Well, thank you, Representative McCotter. We are grateful that you would take time to come over from the House to give us this understanding. And of course the ABA agrees with you. She is unanimously Well Qualified—the highest rating they can have or they can give anybody.

So thank you, and thank you both for appearing. We appreciate all who have appeared here today. So we will release you and move from here.

I think we will make our statements, and then we will turn to Judge Neilson.

OPENING STATEMENT OF ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

Chairman HATCH. I want to welcome members of the Committee and express my, and all of the folks in the audience, and the nominees and their friends and families, express my appreciation for the cooperation we had yesterday in confirming three additional judges. I know there may be some resistance to continuing the work of the Committee, but we simply must do our duty to advice and consent on judicial nominations. I would repeat what I have stated on earlier occasions—our constitutional duty is not on a mythical time line or time clock.

The judicial nominations process does not shut down during presidential election years. For example, when Senator Thurmond chaired this Committee during a presidential election year, the Senate confirmed six circuit judges after August 1st—one in August and five in October. In addition, 12 district judges were confirmed in September and October of that year as well.

I will follow that approach and continue to bring the President's nominees to the Committee for action and to the Senate for consideration.

On today's agenda are four nominees to various positions with the Federal judiciary. I welcome each one of you, your family members, your guests and friends. We are also privileged, as we have

noticed, to have had members of the Senate and House welcome each of you as well.

The nominees we will hear from today are Susan B. Neilson, nominated to be United States Circuit Judge for the Sixth Circuit; Micaela Alvarez, to be United States District Judge for the Southern District of Texas; Keith Starrett, to e United States District Judge for the Southern District of Mississippi; and Raymond L. Finch, to be Judge for the District Court of the Virgin Islands for a term of 10 years. It would be a reappointment.

Judge Neilson is an outstanding candidate who received a unanimous Well Qualified rating, the highest rating, from the American Bar Association. She graduated with high distinction from the University of Michigan Honors College in 1977 and was elected to Phi Beta Kappa. Judge Neilson received her J.D. degree cum laude from Wayne State University School of Law in 1980 and was a member of its law review. Following her graduation, Judge Neilson began her legal career in 1980 as an associate at the Detroit law firm of Dickinson Wright PLLC, one of the oldest and most prestigious law firms in Michigan. She became a partner in the firm in 1986 and continued to practice there until 1991. While in private practice, Judge Neilson appeared in court on a regular basis and handled hundreds of cases at both the trial and the appellate levels.

She was appointed to her current judgeship on the Third Judicial Circuit, the trial court bench in Michigan's State court system, in 1991 by Governor John M. Engler, and was reelected in 1992, and 1996 and 2002. She presently is assigned to the Criminal Division of the Court. And during her tenure on the Court, she has served in the Civil and Family Divisions and on several Court administrative committees.

Micaela Alvarez, nominated to be United States District Judge for the Southern District of Texas, is an experienced attorney and trial judge. She began her legal career in 1989 as an associate litigation attorney at the law firm of Atlas & Hall, L.L.P., in McAllen, Texas, where she handled all types of litigation, but primarily insurance defense, employment defense and wrongful discharge defense.

Four years later, Judge Alvarez joined the law offices of Ronald G. Hole, where she maintained her initial practice and expanded it to include medical malpractice defense and products liability. In 1995, Judge Alvarez served as the presiding judge to the 139th Judicial District Court, Hidalgo County, Texas. After a little more than a year on that court of general jurisdiction, Judge Alvarez rejoined the law offices of Ronald G. Hole and was promptly made a partner. She has remained at the firm since 1997.

A majority of the ABA Committee has recognized this seasoned nominee with a Qualified rating, and I look forward to hearing from her today. Judge Alvarez brings a wealth of experience to the Federal bench and will make an excellent addition to the Southern District of Texas.

Keith Starrett is our nominee for the U.S. District Court for the Southern District of Mississippi. Judge Starrett is an experienced and accomplished jurist, having served as a Circuit Court Judge for the State of Mississippi since 1992. Since 1995, he has retained his

seat on the bench via election. The American Bar Association unanimously gave him its highest rating of Well Qualified. The Mississippi Bar Association awarded him with the Judicial Excellence Award in 2003. Undoubtedly, he will be a wonderful addition to the Federal bench, so welcome him as well this morning.

Raymond Finch has been renominated to a second term as United States District Court for the Virgin Islands. This Committee has seen few nominees with as much experience as Judge Finch. As an attorney, he tried approximately 200 cases to verdict or judgment. In addition to his litigation experience, he has been a judge for nearly 30 years, having first been appointed to the Territorial Court of the Virgin Islands in 1976. He was confirmed as a U.S. District Judge for the Virgin Islands in 1994 and was promoted to Chief Judge of that District in 1998. The ABA has recognized the extensive experience of this fine nominee by awarding him a Majority Qualified/Minority Well–Qualified rating.

So it is our privilege to welcome all of these distinguished nominees to the Committee, and I do look forward to their testimony and appreciate those who have testified for them up to now.

With that, we will turn to our distinguished Democratic leader on the Committee, Senator Leahy.

[The prepared statement of Chairman Hatch appears as a submission for the record.]

STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Senator LEAHY. Well, thank you, Mr. Chairman.

Mr. Chairman, as I have expressed to you privately and I will express publicly, I am concerned about the Republican majority's disregard for the rules and the traditions and precedents of the United States Senate and of the Judiciary Committee. It really is something to behold, and I think this hearing marks yet another milestone in Republicans' break from their adherence to the so-called Thurmond rule and their own prior practices. In many ways—and the reason I came by this hearing is to point out in many ways this hearing joins a long list of double standards imposed by the Senate Republicans—the double standard from the way that home-State Senators are treated, to the way hearings are scheduled, to the way the Committee questionnaire was unilaterally altered, to the way our Committee's historic protection of Committee Rule IV has been violated. In all these areas, Senate Republicans have destroyed virtually every custom and courtesy that used to help create and enforce cooperation and civility in the confirmation process.

In addition to holding yet another hearing for a Sixth Circuit nominee without the approval of her home-State Senators, the majority is openly ignoring another longstanding practice by holding a nominations hearing after Labor Day in a Presidential election year. Now, this was a Republican-imposed rule not to hold such hearings after Labor Day in a Presidential election year. It was enforced very rigidly when Democratic Presidents occupied the White House, that certainly after the political parties' Presidential nominating conventions, they would not proceed with judicial nominations hearings or votes, unless there was consent of both sides.

Now, as long as the Democrats were in the White House, the Republicans insisted this had to be the rule. It always had been the rule, always will be the rule. Oops, all of a sudden there is a Republican President with the Republicans in charge in the Senate, and the rule that they followed for 50 years or more is out the window.

Now, we have done a lot by consent. Earlier this year we proceeded with consideration of 25 judicial appointments to lifetime nominations. Many, many of them were people that Democrats would not have nominated. But in trying to help the President and the Republicans in the Senate, we agreed to that and fulfilled our understanding. Now, these hearings and these nominees are not part of the agreement we made with the White House and with the Republican leadership.

It has long been acknowledged that absent the consent of the minority, the Senate awaits the results of the election and the inauguration of a new President before acting on additional judicial lifetime appointments. The Thurmond rule, as I said, always applied when there was a Democratic President. It was waived during a Republican President, as Senator Hatch has referred to, but that was done with the consent of the Democrats. The Thurmond rule was waived by the Republicans for a Republican President, but with the consent of the Democrats. It was not waived for a Democratic President.

Now, certainly with vacancies at an historic low level, that practice, insisted upon by Republicans with Democratic Presidents, would be followed. If President Bush is re-elected, he can always renominate these people. But this hearing is clear indication that Senate Republicans have no such intention of maintaining a consistent practice. In another blatant double standard, they have demonstrated their efforts to breach that practice as well.

In 1996, when we had a Democratic President, President Clinton, seeking re-election, the Republican-controlled Senate Committee held only one hearing to consider one district court nominee after the August recess. Of course, they then never allowed that nominee to have a Committee vote. Indeed, that nominee, Judge Ann Aiken of Oregon, was obstructed so severely by the Republican majority that she was not confirmed to her position until nearly a year and a half later, and then after President Clinton had been overwhelmingly re-elected.

In 2000, a Presidential election year, the Republican-controlled Committee followed the Thurmond rule to the letter. After the August recess, work on judicial nominations came to a halt. At that time, there were over 30 nominees pending after July 25, 2000, but they were told, Tough, no more hearings, we have always followed the Thurmond rule, we will always follow the Thurmond rule, and so we are going to follow the Thurmond rule. Well, that was then. After all, it was 4 years ago.

But now we have the "by any means necessary" approach that has characterized this Republican leadership. Their approach to our rules and precedents continues to follow their own partisan version of the golden rule that he with the gold rules. Today, after July 4th, after the Presidential nominating conventions, and after Labor Day, the Republican majority has scheduled a hearing for

four judicial nominees, including one to a circuit court opposed by both home-State Senators and done so in a Presidential election year. In contrast to the stalling that dominated Republican treatment of President Clinton's nominees, now the Senate Republicans want to proceed to fill judicial vacancies that have not even yet occurred. They want to start nominating and putting through people for vacancies not yet there and actually aren't going to occur until after the election. Apparently they are somewhat concerned how the Presidential elections may turn out.

Now, when you had a Democratic President's judicial nominees, if one Republican home-State Senator objected, that was it. The Committee would taken them no further. And as we have seen so many times over the last 3 and a half years, the Republican Senate perspective is far different when Democratic home-State Senators object to a nomination. Before, if one Republican objected, President Clinton's nominations would go no further. Now, as we saw with the line that was crossed, a line that Chairman Hatch said he would never cross, we held a hearing for Henry Saad, a Michigan nominee to the Sixth Circuit who was opposed by both his home-State Senators. I think it may have been the first time that any Chairman, Republican or Democratic, and any Senate Judiciary Committee proceeded with a hearing on a judicial nominee over the objection of both home-State Senators. It was certainly the only time in the last 50 years, and I know it has been the only time in the 30 years I have been here. And having broken that longstanding practice with Henry Saad, it has now been repeated again and again.

The Michigan Senators have come to the Committee time and again to articulate their very real grievances with the White House and their honest desire to work toward a bipartisan solution to filling vacancies in the Sixth Circuit. Bipartisan solutions have worked all the way around the country, but not here. We should respect their views, as the views of home-State Senators have been respected for decades. I have urged the White House to work with them. I have proposed reasonable solutions to the impasse with the White House, reasonable solutions supported by many of the leading Republicans in Michigan. The Michigan Senators have proposed reasonable solutions, including a bipartisan—Republican and Democratic—commission, which the White House continues to reject. This is not the time to press ahead with yet another Sixth Circuit nomination without a resolution to this impasse.

At that point, I would like, Mr. Chairman, to put in the record letters from Senator Levin, the senior Senator from Michigan.

Chairman HATCH. Without objection.

Senator LEAHY. Also at the appropriate place, one from the Magnolia Bar Association.

Chairman HATCH. Without objection.

Senator LEAHY. I have also heard concerns about the President's decision to nominate Keith Starrett to the vacancy created when this President bypassed the Senate to appoint Charles Pickering to the Fifth Circuit without seeking the consent of the Senate. The letter that I have just put in the record from the Magnolia Bar Association, a primarily African-American bar association in Mississippi, is now part of the record.

The Magnolia Bar's president, Crystal Wise Martin, expresses the group's strong opposition to proceeding with Judge Starrett's nomination, not only because it is so late in the session, but also because, as she writes: "[I]t fails to remedy the egregious problem concerning the lack of diversity on Mississippi's Federal bench." She points out that Mississippi has the highest percentage of African-Americans of any State, but so far has had only one African-American Federal judge. She explains that the Magnolia Bar and the National Bar Association have both made direct requests of the President that he appoint at least one African-American to this seat. During the consideration of Charles Pickering's nomination, his son, Congressman Chip Pickering, reportedly expressed his willingness to advocate for an African-American nominee if his father received support from the Magnolia Bar. But the administration did not honor that intention of proceeding with a qualified African-American nominee for this judgeship.

As I said before, on the agenda we have a nominee for a vacancy that does not occur until after President Bush's election. One has to think that perhaps people are concerned that the President is not going to be re-elected. Now, it could be argued that for purposes of efficiency nominees can and should be confirmed shortly in advance of the time the vacancy they are filling actually arises, it is amazing that we are going to start appointing people before there even is a vacancy. It is astounding that the partisans who assiduously followed the Thurmond rule and shut down consideration of judicial nominees in the last 6 months of Presidential terms—President Carter's, President Clinton's, for example—have now reversed themselves to insist that vacancies, which will not even arise until after the Presidential election, be filled now. You know, I think about 10 years from now we are going to have a couple other vacancies then. Maybe we ought to just fill those, too, while we are at it. We could actually fill for the next 30 years, go through all the things, just fill everybody right now, and we would not have to do any more work.

Now, this President has seen more than 200 of his nominees confirmed. There are more active judges sitting on the bench than at any time in the Nation's history. Democrats have voted for 98 percent of those judges. And I contrast that to what happened when the Republicans were in charge and President Clinton was President. They blocked so many nominees that we ended up having vacancies exceeding 100 across this country. In the 1996 session, when he was up for re-election, they blocked 17 judges from going forward.

Now, under our Constitution, the Senate does have an important role in the selection of our judiciary. The brilliant design of our Founders established that the first two branches of Government would work together to equip the third branch to serve as an independent arbiter of justice. They never said we would be rubber stamps. I use two examples. The most popular President in this Nation's history, George Washington, had the Senate reject some of his judges. Franklin Roosevelt, when he had an overwhelming Democratic majority in the Senate, the Senate rejected his court-packing plan. We are supposed to be independent, not a rubber stamp of the White House.

Conservative Republican columnist George Will recently wrote: "A proper constitution distributed power among legislative, executive, and judicial institutions so that the will of the majority can be measured, expressed in policy and, for the protection of minorities, somewhat limited." The structure of our Constitution and our own Senate rules of self-governance are designed to protect minority rights and to encourage consensus. Despite the razor-thin margins of recent elections, Senate Republicans are not acting in a measured way, but in complete disregard for the traditions of bipartisanship that are the hallmark of the Senate.

We were able to have a variant on the Thurmond rule when President Reagan was here because we worked on consensus, and Democrats agreed to that. Now nobody even seeks consensus. I think it is because Senate Republicans have acted to ignore precedents, reinterpret longstanding rules to their advantage, and when they cannot reinterpret them, they simply break them. This practice of might makes right is wrong. It is also unfair to the nominees who are here because, of course, it signals what their chances are.

Mr. Chairman, I will put my full statement in the record.

Chairman HATCH. Well, thank you. We will put it in the record.

[The prepared statement of Senator Leahy appears as a submission for the record.]

Chairman HATCH. But I feel like I have to take just a few seconds to answer. I hate to take time from this hearing, but I think it is important to set a few things straight in the record.

There are grievances on both sides of this Committee. No question through the years this is a hard-fought Committee. We have lots of disagreements. There is a lot of partisanship on the Committee, which I wish did not exist but it does from time to time. Both sides have felt aggrieved from time to time, and both sides have been right from time to time. Not always, but from time to time.

But just to make sure the record is straight, there have been approximately 78 judges confirmed—78—in the late summer and fall of Presidential election years since 1980. That fact alone demonstrates the illusory nature of what some call the "Thurmond rule." I do not believe there is a Thurmond rule and it never has been followed, as far as I am concerned, and should not be followed now. But be that as it may, Senator Thurmond did think he had a rule. But he himself broke it continuously.

In 1980, this body confirmed one circuit judge currently and nine district judges in the months of September and beyond. I helped facilitate the confirmation of Stephen Breyer, currently of the U.S. Supreme Court, to the First Circuit Court of Appeals. That would not have happened had I not been on this Committee as a Republican facilitating the nomination of Stephen Breyer after President Reagan was elected. That confirmation took place after the November 1980 Presidential election. Now, that nomination was made by President Carter, who had just been defeated by President Reagan, and yet we acted on it.

I have a note that Senator Thurmond was the Ranking Member of the Committee at that time. Now, 4 years later—and, by the way, the others were Carter appointees, the other nine district judges that were confirmed in September and beyond.

Four years later, when Senator Thurmond chaired the Judiciary Committee, the Senate confirmed six circuit judges after August 1st—one in August and five in October. Twelve district judges were confirmed in September and October of that year. Of course, President Reagan was the President, and the Republicans had control of the Committee.

In 1988, when Senator Thurmond was the Ranking Member, two circuit judges were confirmed in October and 12 district judges were confirmed between the period of July 26th through October 14th of that year.

In 1992, the last year Senator Thurmond was Ranking Member, the Judiciary Committee held a hearing for two circuit judges on July 29th; two more hearings on circuit judges in August; and another one in September. Five circuit judges were confirmed between July 29, 1992, and October 8, 1992.

Let me reiterate that point: five circuit judges were confirmed after July 29th. There were three in August, one in September, and one in October. That is in addition to the 18 district judges who were confirmed in that same 3-month span.

So in 1992 alone, there were 18 district judges and five circuit judges who were confirmed in the months of August, September, and October. Now, that is a total of 23 judges who were confirmed in the days and months leading up to a Presidential election.

Indeed, one of my Democratic colleagues on the Judiciary Committee acknowledged on the record a few years ago that, "We were confirming them"—that is, judicial nominees—"right up almost to the last week we were in session." Well, my Democratic colleague was absolutely correct.

In 1996, four district judges were confirmed in late July. In 2000, nine judges, including one circuit judge, were confirmed between July 21st and October 3rd. In all, since 1980 approximately 78 judges have been confirmed in the closing weeks of the Congress during a Presidential election year. The numbers speak for themselves. There is no Thurmond rule.

Again, when Senator Thurmond was Chairman of the Judiciary Committee in 1984, there were 18 judges confirmed between August 9th and October 11th. I think that Senator Thurmond's record of confirming judges carries more weight and is more convincing than some imaginary rule that has been attributed to him.

Now, I reject the notion of this purported rule and would hope that the service of the longest-serving and oldest member to have served in this body would have been used in the manner that I have heard repeated over and over in the Committee and the Senate floor would not have been used in that way. But be that as it may, even if there was a Thurmond rule set by one person who did not control the whole Committee—and with which many of the Committee would have disagreed, anyway, and still do—our job is to confirm judges on this Committee, and we ought to do that unless there is a reason not to. And that means whether it is a Republican President or a Democrat President. And I have always tried to do that.

Now, I have to say that the people who are nominees here today are exceptional people. They deserve our efforts as a Committee, our honest efforts to not only hold this hearing but to have a mark-

up for them and to have votes on the floor up and down. I hope we can do that, and I intend to do that. And I suspect that should the Democrats take over this Committee next year or in the future, they will do the same for their President, whenever he comes in. I certainly did what I could for President Clinton. He was the second all-time champion in confirmed judges, second only to Reagan, who has 6 years of how own party to help him. Clinton only had 2 years. But he had me as Chairman of the Committee, and I helped him. And he knows it and I know it.

You can talk statistics both ways all day long, and I have to say both sides of this Committee have been right many times and both sides have been wrong many times. I would like to see us do a better job on judges than we have done in the past, and so far we are. And I want to thank my colleague Senator Leahy for his cooperation throughout at least my chairmanship of this Committee in helping us to confirm good people like the one we have here today.

Now, with that, we will call on Judge Neilson—

Senator LEAHY. Mr. Chairman, if I might, I will be very brief.

Chairman HATCH. Sure.

Senator LEAHY. An easy statistic to remember is that over 60 of President Clinton's nominations were blocked by the Republicans, usually if only one Republican objected. It made no difference what the other 99 might feel, but if one Republican objected, they were blocked. The Thurmond rule, of course—you know, Senator Strom Thurmond said, "Today, Ronald Reagan has agreed to ask Republican Members of the Senate to block Presidential appointments to Federal posts until after the November 4th election." That was on July 17th of 1980.

The fact of the matter is everybody in the Senate who served during that time knows when exceptions were made to that, it was made because both sides agreed, because the Democratic and the Republican leadership agreed. And there were exceptional cases where such agreements were made with both Republican Presidents and Democratic Presidents—but only with the consent of both sides.

Now we are told that consent is immaterial, past precedents are immaterial, the fact that we blocked President Clinton's nominations if just one of us objected, that is immaterial, we are going to go forward with these. It is not the best way to fulfill our advise and consent. Instead of being advise and consent, the Senate turns into advise and rubber stamp.

Chairman HATCH. Well, it certainly is not the best way, and I hope we can have some cooperation from your side so we can do exactly what you have been saying. I remember your remarks made a while back. Here there are: "There is a myth that judges are not traditionally confirmed in Presidential election years. That is not true." You are right. That is not true.

Senator LEAHY. That was in February—

Chairman HATCH. I think I made the case, 78—and, look, the greatest case really was the confirmation of Judge Breyer, and I was the one who helped bring that to pass, after President Reagan was elected.

Well, so much for this argument. We are going to argue it, I guess, forever. But to make a long story short, there are two sides

to it, I am sure. But I think the record speaks for itself. And I just hope we will have some cooperation because what we are trying to do is fill these positions with good people. And some of these positions are absolute emergencies as well. And what I am trying to do as Chairman of this Committee is my job. And I would appreciate cooperation from the other side if they care to give it.

So, with that, we are going to turn to Judge Neilson at this point. Judge, we welcome you to the Committee. We know you have waited a long time to have this hearing. We also know you have gone through some very difficult times, and we are very grateful to have you here. If you could raise your right arm, do you swear that the testimony you are about to give before this Committee shall be the truth, the whole truth, and nothing but the truth, so help you God?

Judge NEILSON. I do.

Chairman HATCH. Well, thank you, Judge.

Senator LEAHY. I know you are not interested in what I have to say, so I am going to leave.

Chairman HATCH. Judge, you can—I am interested in what you have to say.

Judge I am happy to welcome you here. If you have family or friends here you would like to introduce, we would certainly like you to do that.

STATEMENT OF SUSAN B. NEILSON, OF MICHIGAN, NOMINEE TO BE CIRCUIT JUDGE FOR THE SIXTH CIRCUIT

Judge NEILSON. I would like to introduce my husband, Jeff, who is with me. Our two daughters—

Chairman HATCH. Please stand as you are—

Judge NEILSON. Oh, I'm so sorry.

Chairman HATCH. We are so happy to have you with us. No, not you. Them. No, no, I want you to relax as much as you can.

Judge NEILSON. Our two daughters started school today, so they are not with us.

Chairman HATCH. We understand.

Judge NEILSON. But I would like to thank and recognize in absentia my wonderful parents and especially my sister, who has been an incredible support for me over the past year. And I want to thank you and, in his absence, Senator Leahy for coming here today and allowing me to speak.

Chairman HATCH. Well, thank you. Would you care to make any other statement? Would you care to make any other statement?

Judge NEILSON. I am happy to answer any questions that you may have, Senator.

[The biographical information of Judge Neilson follows:]

QUESTIONNAIRE FOR NOMINEES BEFORE THE COMMITTEE ON THE JUDICIARY, UNITED STATES SENATE

1 **Name**. Full name (include any former names used)

SUSAN BIEKE NEILSON (nee SUSAN MARY BIEKE)

2. **Position**. State the position for which you have been nominated

JUDGE FOR THE 6TH CIRCUIT COURT OF APPEALS

3 **Address**. List current office address and telephone number. If separate office addresses for each place of employment should be listed. Indicate whether you will provide these addresses.

OFFICE: 1607 COLEMAN A. YOUNG MUNICIPAL CENTER
DETROIT, MICHIGAN [illegible]

TELEPHONE: 313.224.7[illegible]

4 Birthplace.

AUGUST 27, 1956
ANN ARBOR, MICHIGAN

5 **Marital Status**. [illegible] Spouse's occupation, name, business address and telephone number.

HUSBAND - JEFFREY THOMAS NEILSON - ATTORNEY
LIPSON, NEILSON, COLE, SELTZER & GARIN, P.C.
2301 W. BIG BEAVER #525
TROY, MICHIGAN 48084

TWO DEPENDENT CHILDREN

6 **Education**. List in reverse chronological order, starting with most recent first, each college, law school, and any other institutions of higher education attended, and indicate for each the dates of attendance, whether a degree was received, and the date each degree was received.

WAYNE STATE UNIVERSITY LAW SCHOOL
AUGUST 1977 - APRIL 1980
J.D. (CUM LAUDE) - APRIL 1980

UNIVERSITY OF MICHIGAN HONORS COLLEGE
SEPTEMBER 1974 - AUGUST 1977
A.B. DEGREE (WITH HIGH DISTINCTION) - AUGUST 1977
PHI BETA KAPPA

7. **Employment Record**: List in reverse chronological order, listing most recent first, all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, non-profit or otherwise, with which you have been affiliated as an officer, director, partner, proprietor, or employee since graduation from college, whether or not you received payment for your services. Include the name and address of the employer and job title or job description where appropriate

COMPENSATION BASED EMPLOYMENT:

7/1991 - **PRESENT**
3RD JUDICIAL CIRCUIT COURT, MI (JUDGE)
ADDRESS: COLEMAN A YOUNG MUNICIPAL CENTER
DETROIT, MICHIGAN 48226

1. 1986 - 7. 1991
DICKINSON WRIGHT PLLC (PARTNER)
ADDRESS: 500 WOODWARD AVENUE #4000
DETROIT, MICHIGAN 48226

5 1980 - 8 1985
[illegible]

5 1979 - 8 1979
DICKINSON WRIGHT PLLC (SUMMER CLERK)

5 1978 - 8 1978
HARVEY, KRUSE & WESTEN, P.C. (SUMMER CLERK)
ADDRESS: 1050 WILSHIRE DRIVE #320
TROY, MICHIGAN 48084

COMMUNITY SERVICE ACTIVITIES (UNPAID):

1995- PRESENT
CATHOLIC LAWYERS SOCIETY
(BD OF DIRECTORS MEMBER CURRENTLY TREASURER)

1995- PRESENT
SOROPTIMIST INTERNATIONAL OF GROSSE POINTE
(BOARD OF DIRECTORS PRESIDENT IN 1997-1999)

DICKINSON WRIGHT PLLC IS THE CURRENT NAME OF THE LAW FIRM. IT HAD VARIOUS PRIOR NAMES BUT THE PREDOMINANT NAME DURING MY TENURE WAS DICKINSON WRIGHT MOON VANDUSEN & FREEMAN

8. **Military Service**: Identify any service in the U.S. Military, including dates of service, branch of service, rank or rate, serial number and type of discharge received.

NO MILITARY SERVICE

9. **Honors and Awards**: List any scholarships, fellowships, honorary degrees, academic or professional honors, honorary society memberships, military awards, and any other special recognition for outstanding service or achievement

PHI BETA KAPPA

MEMBER, WAYNE STATE UNIVERSITY LAW REVIEW (1978-79)

INSTITUTE FOR CONTINUING EDUCATION LITIGATION ADVISORY BOARD (ORIGINALLY APPOINTED 1999, REAPPOINTED TO A SECOND TERM 2001)

SOROPTIMIST INTERNATIONAL WOMAN OF DISTINCTION 1995

MSGR. JOHN HACKETT HIGH SCHOOL DISTINGUISHED ALUMNI AWARD 1999

10. **Bar Associations**: [illegible]

MODEL CIVIL STANDARD JURY INSTRUCTIONS COMMITTEE
[2001-PRESENT]

MICHIGAN BAR ASSOCIATION
[1980 - PRESENT]

INSTITUTE FOR CONTINUING LEGAL EDUCATION - LITIGATION ADVISORY BOARD
[1999-PRESENT]

FEDERALIST SOCIETY
[1997 - PRESENT]

CATHOLIC LAWYERS SOCIETY
[1990 - PRESENT; BOARD MEMBER SINCE 1995; CURRENTLY TREASURER]

METROPOLITAN DETROIT BAR ASSOCIATION
[1980 - PRESENT]

WOLVERINE BAR ASSOCIATION
[1995 - PRESENT]

MICHIGAN JUDGES ASSOCIATION
[1991 - PRESENT]

WOMEN LAWYERS ASSOCIATION OF MICHIGAN
[1991 - PRESENT]

INCORP. SOCIETY OF IRISH AMERICAN LAWYERS
[1982 - PRESENT]

I HAVE ALSO SERVED ON A NUMBER OF INTERNAL COMMITTEES FOR THE WAYNE COUNTY CIRCUIT COURT, INCLUDING (1) DOCKET REVIEW COMMITTEE (APPOINTED BY CHIEF JUDGE TO OVERSEE DOCKETS FOR THE ENTIRE CIVIL DIVISION); (2) COMMITTEE TO AMEND LOCAL COURT RULES; (3) JURY DIVERSITY COMMITTEE; (4) PERSONAL PROTECTION ORDER COMMITTEE.

11 **Bar and Court Admission** [illegible] including dates of [illegible] of membership. [illegible]

STATE OF MICHIGAN COURTS [1980 - PRESENT]
FEDERAL DISTRICT COURT - E.D. OF MICHIGAN [1980 - PRESENT]
U.S. COURT OF APPEALS - 6TH CIRCUIT

12 **Memberships** [illegible] those listed in response to Question 11. Please indicate whether any of these organizations formerly discriminated or currently discriminates on the basis of race, sex, or religion - either through formal membership requirements or the practical implementation of membership policies. If so, describe any action you have taken to change these policies and practices.

SOROPTIMIST INTERNATIONAL OF GROSSE POINTE MICHIGAN
ST. PHILOMENA CATHOLIC CHURCH (CHAIR OF WORSHIP COMMISSION AND BAPTISM EDUCATION PROGRAM)
NAACP (SILVER LIFE)

NONE OF THESE ORGANIZATIONS DISCRIMINATES AS SUGGESTED.

13 **Published Writings.** List the titles, publishers and dates of books, articles, reports or other material you have written or edited including material published on the Internet. Please supply to the Committee four (4) copies of all published material unless the Committee has advised you that a copy has been obtained from another source. Also, please supply four (4) copies of all speeches delivered by you, in written or videotaped form over the past ten years, including the date and place where they were delivered, and readily available press reports about the speech.

MICHIGAN CIVIL PROCEDURE **(1999),** ***Institute for Continuing Legal Education (ICLE),*** **Co-Editor and chapter author. This work is an exhaustive two-volume treatise providing an overview of Michigan law of civil procedure. It was awarded the distinction of being purchased by the Michigan Judicial Institute on behalf of every trial judge in the State. It was also awarded the "Plain English" award by the State Bar of Michigan.**

DAUBERT AND ITS AFTERMATH: NEW DEVELOPMENTS IN SCIENTIFIC EVIDENCE, ICLE Civil Litigation Institute, **June 1999 (materials prepared in connection with lecture). See Exhibit A - Tab 1.**

DAUBERT AND ITS PROGENY, ICLE Civil Litigation Institute,
April 1995 (materials prepared in connection with lecture).

SURVEY OF THE LAW OF TORTS, 35 Wayne Law Review, 1989.

DISCOVERY IN MICHIGAN; THE JUDGE'S ROLE IN STATUTE OF LIMITATIONS LAW, 66 Michigan Bar Journal 992 (1987 (co-author). See Exhibit A - Tab 2.

CASENOTE: RIGHT OF [illegible] MAY BE USED AS ASPECT OF HIS CHARACTER USED AS FACTORS MITIGATING OR AFFIRMING, 25 Wayne Law Review, 1979

AS A MEMBER OF ICLE'S LITIGATION ADVISORY COMMITTEE I HAVE SERVED AS A MEMBER ON A NUMBER OF PANEL DISCUSSIONS CONCERNING TRIAL PROCEDURE AND DISCOVERY ISSUES.

14 **Congressional Testimony** [illegible] subcommittee of the Congress [illegible] the name of the committee or subcommittee, the date of the testimony and a brief description [illegible] In addition, please supply four (4) copies of any written statement submitted as testimony and the transcript of the testimony, if in your possession

NO OCCASIONS.

15 **Health** Describe the present state of your health and provide the date of your last physical examination

MY HEALTH IS EXCELLENT. MY LAST PHYSICAL EXAMINATION WAS IN JULY, 2001.

16 **Citations:** If you are or have been a judge, provide:

(a) a short summary and citations for the ten (10) most significant opinions you have written.

(b) a short summary and citations for all rulings of yours that were reversed or significantly criticized on appeal, together with a short summary of and citations for the opinions of the reviewing court, and

(c) a short summary of and citations for all significant opinions on federal or state constitutional issues, together with the citation for appellate court rulings on such opinions

If any of the opinions or rulings listed were in state court or were not officially reported, please provide copies of the opinions

(a) BECAUSE I AM A STATE COURT TRIAL JUDGE AND NONE OF FOLLOWING OPINIONS WERE PUBLISHED IN OFFICIAL REPORTERS, I HAVE PROVIDED COPIES OF THE OPINIONS (ATTACHED AS EXHIBIT B, TABS 1 - 10).

1. *Leddy, et al v Phipps, et al* (WCCC No. 01-116171CZ)

This case concerned the rights of a neighborhood group to bring suit under various Michigan statutes to stop the sale of certain government property. I found that the group did not have standing under any of the relevant statutes.

2. *Piskow v Gallagher-Kaiser, et al* (WCCC No. 99-918128NI)

This case concerned interpretation of various provisions of several policies of insurance allegedly covering a construction project, the general contractor and [illegible] parties.

3. *Callahan v University of Michigan* (WCCC No. 98-825337CZ)

This case concerned claims of retaliation under the Elliott-Larsen Civil Rights Act. I held that while plaintiff may have engaged in protected activity under the Act, there was no evidence that defendant had knowledge of the protected activity, and thus plaintiff could not demonstrate that any adverse employment action was caused by the allegedly protected activity.

4. *Arcega v Ohio Industries, Inc.* (WCCC No. 99-913988NP)

This case concerned the question of whether the Michigan borrowing statute for statutes of limitation "borrowed" the Florida statute of repose. I held that a statute of repose is by definition a statute of limitation, and thus the Florida statute of repose applied.

5. *Shrinco v The Flint Journal* (WCCC No. 99-649978CA)

This case concerned claims brought by a discharged journalist of wrongful termination, violations of the Whistleblower's Protection Act, and defamation. I ruled that under Michigan law, the employer could discharge the journalist for failing to comply with the terms of a "satisfaction contract", and that the allegedly defamatory statements could not be proven true or false, thus barring a defamation claim based on such statements.

6. *Burnett v Nationwide Mutual* (WCCC No. 96-626674CK)

This case concerned claims of misrepresentation, breach of contract, breach of legitimate business expectations, violation of the Federal Fair Housing Act, violations of Public Policy under the Michigan Insurance Code, violations of the Michigan Elliott-Larsen Civil Rights Act, and promissory estoppel, all in the context of the transfer of a license to sell insurance in a certain geographic area (defendant had been accused by plaintiff and others of "redlining" insurance policies).

7. *Arold v Michigan Bell* (WCCC No. 93-334262CZ)

This case concerned claims that defendant discriminated against plaintiff on the basis of her age and sex in connection with a corporate restructuring, in which plaintiff claimed discrimination in connection with fifteen independent positions

8. *Michigan National Bank v Rite Aid* (WCCC No. 98-835046CK)

This case concerned specific performance of a contract to purchase real estate, which defendant sought to set aside based upon the doctrines of mutual mistake, various claimed zoning violations, and failure of consideration.

9. *John O'Hair v Dep't of Correction* (WCCC No. 92-225848CZ)

This case concerned the effect of a Michigan statute, concerning new felonies committed while on parole, on the maximum sentences which could be served on the original felony.

10. *Kasky v Wayne County Community College* (WCCC No. 98-807435NO)

This case concerned claims by a male of reverse race and gender discrimination, as well as age discrimination, under the Elliott-Larsen Civil Rights Act. I found that plaintiff could not put forth a prima facie case of gender discrimination as a matter of law.

(b) WITH THE EXCEPTION OF THOSE CASES FOR WHICH CITATIONS ARE NOTED, ALL OF THESE OPINIONS WERE UNPUBLISHED. COPIES OF THESE UNPUBLISHED OPINIONS ARE ATTACHED. PLEASE NOTE THAT THE FOLLOWING LIST IS THE RESULT OF A DILIGENT EFFORT TO OBTAIN ALL THE REQUESTED OPINIONS; HOWEVER, NEITHER MY COURT NOR THE MICHIGAN COURT OF APPEALS HAS ANY METHOD BY WHICH UNPUBLISHED OPINIONS ARE CATALOGED BY JUDGE'S NAME, AND I HAVE BEEN FORCED TO RELY ON MY OWN (POSSIBLY IMPERFECT) RECORDS. THE OPINIONS ARE PRESENTED IN REVERSE CHRONOLOGICAL ORDER.

1. *Austin v Wayne State* (CA No. 22019) Reversed in part on a finding that one of several defendants was immune from suit (upon information and belief, leave to appeal is pending). See Exhibit C - Tab 1.

2. *Frankenmuth Mutual v Anolick* (WCCC No. 218392) Reversed on a finding that no coverage was afforded under the policy at issue as a matter of law. See Exhibit C - Tab 2.

3. *Tecorp v Heartbreakers* (CA No. 209861) Reversed in part on whether corporate defendant had ownership interest in property at issue. See Exhibit C - Tab 3.

4. *Berry v Berry* (CA No. 213488) Affirmed on all issues except calculation of appropriate attorney fee. See Exhibit C - Tab 4.

5. *French v Gowda* (CA No. 204786) Affirmed on all issues except award of expert witness fees to prevailing party. See Exhibit C - Tab 5.

6. *Gerings v Gerings* (CA No. 211415) Reversed on finding that mental deficiency at time of judgment was grounds for setting aside divorce settlement. See Ex. C - Tab 6

7. *Tasker v Tasker* (CA No. 204895) Affirmed on all issues except calculation of net income available for child support. See Exhibit C - Tab 7.

8. *Spikes v Banks* (published at 231 Mich App 341). Reversed on whether foster care facility was immune from suit as a matter of law.

9. *Brousseau v Daykin Electric Corp* (CA No.195259) Reversed on whether danger to plaintiff was "open and obvious" as a matter of law. See Exhibit C - Tab 8.

10. *Singerman v Municipal Service Bureau* (Court of Appeals opinion published at 211 Mich App 678; Supreme Court opinion published at 455 Mich 135). Court of Appeals reversed original order of summary disposition on "open and obvious" danger of hockey; Supreme Court affirmed in part and reversed in part, reinstating award of summary disposition.

11. *Tennille v Action Distributing* (published at 225 Mich App 66). Reversed award of summary disposition on whether "licensee" in dramshop statute applied to all licensees or only retail licensees; court of appeals held statute applies only to retail licensees (despite the fact that the word "retail" does not appear in the statute).

12. *Randles v City of Detroit* (CA No. 186200) Reversed on denial of summary disposition on "negligent operation" exception to governmental immunity. See Exhibit C - Tab 9.

13. *Ross v Glaser (*published at 220 Mich App 183) Reversed on award of summary disposition on the ground that defendant had no duty to protect plaintiff from the criminal acts of third parties. Now Justice Stephen Markman dissented, and the third judge concurred in the result only.

14. *Kondzer v Wayne County Sheriff* (published at 219 Mich App 632) Reversed on issue of whether defendant who raped complaining witness while out on bond forfeited that bond (the Court of Appeals ruled that he did not)

15. *People v Young (O'Hair v Dep't of Corrections)* (Court of Appeals decision published at 220 Mich App 420; Supreme Court decision published at 451 Mich 569). Court of Appeals affirmed my decision that the plain language of the statute in question required parolees who commit a crime on parole would be required to serve their maximum sentence; the Supreme Court found that the intent of the legislature was to the contrary.

16. *Cantrell v City of Detroit* (C A No. 179873) Reversed on whether officers engaged in chase were immune from suit (I would be affirmed today pursuant to the subsequent decision in *Hou[illegible]*). See Exhibit C - Tab 10.

17. *White v Allstate* (C A No. [illegible]) Reversed in part on issue of adequacy of personal service. See Exhibit D - Tab 1.

18. *Lane v P&P Cycle* (C A No. 156801) Reversed on dismissal of earlier action without prejudice where the history of the action may not have given dismissed parties adequate notice. See Exhibit D - Tab 2.

19. *Spivey v Universal Supermarkets* (C A 185067) Reversed on issue of qualified privilege held by employer in a defamation case when investigating a crime. See Exhibit D - Tab 3.

20. *Bolden v Michigan Career Institute* (C A No. 167297) Reversed on issue of whether issue of fact existed that defendant caused the dangerous condition which injured plaintiff. See Exhibit D - Tab 4.

21. *Miller v Fink* (CA No. 156347) Reversed on whether issue of fact existed concerning knowledge that would constitute breach of a fiduciary relationship. See Exhibit D - Tab 5.

22. *Kieselbach v Lochinvar Corp* (C A No. 153825) Reversed on the nature of accomodation required under the Handicappers Civil Rights Act. See Ex. - Tab 6.

23. *People v McKenzie* (published at 205 Mich 466) Reversed on issue of whether counsel was required during custodial lineup (following decision by Supreme Court in related case).

PLEASE NOTE THAT I WAS ORIGINALLY REVERSED IN TWO PUBLISHED COURT OF APPEALS DECISIONS WHICH WERE THEMSELVES REVERSED BY THE SUPREME COURT:

24. *Mina v General Star* (published at 218 Mich App 678) was peremptorily reversed by the Supreme Court in an order of 7/22/97.

25. *Robinson v City of Detroit* (published at 225 Mich App 14) was reversed by the Supreme Court at 462 Mich 439.

(c) VIRTUALLY ALL OF THE DECISIONS SET FORTH IN SUBSECTION 16(a) CONCERNED MATTERS UNDER THE STATE OR FEDERAL CONSTITUTIONS. IN ADDITION, THE FOLLOWING PUBLISHED COURT OF APPEALS DECISIONS CONCERN SIGNIFICANT CONSTITUTIONAL/STATUTORY INTERPRETATION ISSUES ON WHICH I RULED FROM THE BENCH, WITHOUT A FORMAL WRITTEN OPINION (MY FINDINGS ARE SUMMARIZED WITHIN THE PUBLISHED OPINIONS).

1. *Robinson v City of Detroit* (published at 225 Mich App 14 and 462 Mich 439) concerned whether officers engaged in chases with fleeing felons were entitled to governmental immunity. I had ruled that they were immune, and was ultimately affirmed.

2. *Harville v State Plumbing and Heating* (published at 218 Mich App 302) concerned whether the method of jury selection employed by the Wayne County Circuit Court violated the equal protection provision of the Michigan constitution. I had ruled that it did not, and was affirmed.

3. *Stevenson v Reese* (published at 239 Mich App 513) concerned whether the section of the automobile no-fault act barring uninsured motorists from recovering noneconomic damages violated the equal protection or due process clauses of the Michigan Constitution. I ruled that it did not and was affirmed.

17 Public Office, Political Activities and Affiliations

(a) List chronologically any public offices you have held, federal, state or local, other than judicial offices, including the terms of service and whether such positions were elected or appointed. If appointed, please include the name of the individual who appointed you. Also, state chronologically any unsuccessful candidacies you have had for elective office or unsuccessful nominations for appointed office for which were not confirmed by a state or federal legislative body.

NO PUBLIC OFFICES HELD OTHER THAN MY CURRENT PUBLIC OFFICE. IN 1998, I SOUGHT ELECTION TO THE MICHIGAN COURT OF APPEALS AGAINST INCUMBENT JUDGES HELENE WHITE AND MYRON WAHLS BUT WAS UNSUCCESSFUL. IT IS WORTH NOTING THAT NO INCUMBENT MICHIGAN COURT OF APPEALS JUDGE HAS EVER BEEN DEFEATED FOR RE-ELECTION.

(b) Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities

THE ONLY CAMPAIGNS I HAVE BEEN INVOLVED WITH WERE MY RE-ELECTION CAMPAIGN FOR 1996 AND THE CAMPAIGN DESCRIBED FOR THE MICHIGAN COURT OF APPEALS IN 1998. MY RESPONSIBILITIES WERE LIMITED TO PERSONAL CAMPAIGN APPEARANCES, ENDORSEMENT INTERVIEWS, AND APPROVAL OF CAMPAIGN LITERATURE.

18 **Legal Career**: Please answer each part separately.

(a) [illegible] since graduation from law school including:

(1) whether you [illegible] so the name for the judge, the court and the dates [illegible]

I DID NOT SERVE AS CLERK TO A JUDGE

[illegible]

I NEVER PRACTICED LAW AS A SOLO PRACTIONER.

(2) the dates, names and addresses of law firms or companies or governmental agencies with which you have been affiliated, and the nature of your affiliation with each

MY ENTIRE LEGAL CAREER PRIOR TO MY APPOINTMENT AS A CIRCUIT COURT JUDGE WAS AS AN ATTORNEY FOR DICKINSON WRIGHT PLLC [AUGUST 1980 - JULY 1991]. ITS CURRENT ADDRESS IS 500 WOODWARD AVENUE, DETROIT, MICHIGAN 48226. I WAS AN ASSOCIATE FROM 1980 TO 1985; AN INCOME PARTNER FROM 1986 TO 1989, AND AN EQUITY PARTNER FROM 1990 TO 1991 (WHEN I LEFT TO ASSUME THE BENCH).

(b) (1) Describe the general character of your law practice and indicate by date if and when its character has changed over the years.

DURING MY ENTIRE CAREER AS AN ATTORNEY (AUGUST 1980 - JULY 1991), I PRACTICED IN THE AREA OF CIVIL LITIGATION (PRETRIAL, DISCOVERY, MOTION PRACTICE AND TRIAL) INCLUDING DEFENSE OF (1) PRODUCT LIABILITY CLAIMS; (2) MEDICAL MALPRACTICE CLAIMS; (3) DEFENSE OF INSURANCE CLAIMS, AND (4) GENERAL COMMERCIAL LITIGATION. AS A TRIAL COURT JUDGE SINCE JULY 1991, I HAVE SERVED IN ALL DIVISIONS OF THE CIRCUIT COURT (CIVIL, CRIMINAL AND FAMILY / DOMESTIC). SINCE APRIL OF 1998, MY INVOLVEMENT HAS BEEN EXCLUSIVELY IN THE CIVIL DIVISION.

(2) Describe your typical former clients, and mention the areas, if any, in which you have specialized.

I REPRESENTED THE LARGEST HOSPITAL IN OAKLAND COUNTY MICHIGAN (BEAUMONT HOSPITAL) AS WELL AS INSURANCE COMPANIES AND PUBLICLY TRADED COMPANIES SUCH AS SQUARE D COMPANY, ELI LILLY AND MONSANTO.

AS NOTED ABOVE, MY TRIAL COURT PRACTICE INVOLVED PRODUCT LIABILITY CLAIMS (AUTOMOTIVE, PHARMACEUTICAL AND INDUSTRIAL COMPONENTS), DEFENSE OF GENERAL NEGLIGENCE CLAIMS, MEDICAL MALPRACTICE DEFENSE, INSURANCE DEFENSE, AND COMMERCIAL LITIGATION. IN ADDITION, I SPENT A SIGNIFICANT AMOUNT OF TIME ON APPELLATE PRACTICE, BOTH ON MY OWN FILES AND THOSE OF MY PARTNERS.

[illegible] of your appearances in court [illegible]

AS AN ACTIVE TRIAL ATTORNEY, MY APPEARANCES IN COURT WERE FREQUENT THROUGHOUT MY CAREER.

(2) Indicate the percentage of these appearances in

(A) federal courts;
(B) state courts of record,
(C) other courts.

FEDERAL COURTS - 20%
STATE COURTS - 80%

(3) Indicate the percentage of these appearances in

(A) civil proceedings,
(B) criminal proceedings

CIVIL - 100%
CRIMINAL - 0%

(3) State the number of cases in courts of record you tried to verdict or judgment rather than settled, indicating whether you were sole counsel, chief counsel, or associate counsel.

MY BEST ESTIMATE IS THAT I TOOK APPROXIMATELY FIVE CASES TO A TRIAL VERDICT AS SOLE OR CHIEF COUNSEL, AND AN ADDITIONAL FIVE TO TEN CASES TO A TRIAL VERDICT AS ASSOCIATE COUNSEL. THIS DOES NOT INCLUDE A SUBSTANTIAL NUMBER OF CASES WHERE I OBTAINED A SUMMARY JUDGMENT ON BEHALF OF MY CLIENTS WITHOUT A TRIAL.

(4) Indicate the perc[illegible] were decided by a jur[illegible]

EIGHTY PERCENT (80%)

(c) Desc[illegible] supp[illegible] appl[illegible] practice

NONE

(c)(1) Describ[illegible] *pro bono* basis, and st[illegible] devoted to each

AS A SITTING JUDGE, I AM ETHICALLY PROHIBITED FROM PRACTICING LAW. CONSEQUENTLY, I HAVE BEEN INVOLVED WITH THE FOLLOWING PUBLIC SERVICE ACTIVITIES:

1. I AM IMMEDIATE PAST-PRESIDENT AND CURRENT SERVICE COMMITTEE CHAIR OF SOROPTIMIST INTERNATIONAL OF GROSSE POINTE, THE LOCAL BRANCH OF AN INTERNATIONAL ORGANIZATION DEVOTED TO IMPROVING THE LIVES OF WOMEN AND CHILDREN. I HAVE BEEN A MEMBER OF THIS ORGANIZATION FOR EIGHT YEARS, AND HAVE ALSO SERVED AS CHAIR OF ITS SERVICE COMMITTEE. OUR GROUP PERFORMS HANDS-ON SERVICE AT SUCH INSTITUTIONS AS THE POSITIVE IMAGES DRUG REHABILITATION CENTER AND THE CHILDREN'S HOME OF DETROIT. I ESTIMATE THAT I SPEND AN AVERAGE OF AT LEAST TEN HOURS PER MONTH ON SOROPTIMIST RELATED ACTIVITIES.

2. I HAVE BEEN ON THE BOARD OF THE CATHOLIC LAWYERS SOCIETY FOR FIVE YEARS. OUR ACTIVITIES INCLUDE PROVIDING CATHOLIC LAWYERS WITH PRAYER OPPORTUNITIES DURING THE YEAR, SERVICE PROJECTS FOR CATHOLIC SCHOOLS IN DETROIT, AND FAMILY SOCIAL ACTIVITIES. I ESTIMATE THAT I SPEND AN AVERAGE OF AT LEAST EIGHT HOURS PER MONTH ON CATHOLIC LAWYERS SOCIETY ACTIVITIES.

3. I SERVE AS WORSHIP COMMISSION CHAIR AND CHAIR OF THE BAPTISM EDUCATION PROGRAM AT ST. PHILOMENA CHURCH, WHICH INCLUDES TEACHING ALL BAPTISM PREPARATION CLASSES. I ESTIMATE I SPEND AT LEAST EIGHT HOURS PER MONTH ON THESE ACTIVITIES.

4. GROSSE POINTE ANIMAL ADOPTION SOCIETY, RACE FOR THE CURE, MARCH OF DIMES, FOCUS HOPE; EACH ORGANIZATION HOLDS ANNUAL EVENTS SUCH AS A RACE, WALK-A-THON, ETC. IN WHICH I PARTICIPATE YEARLY.

5. PRIOR TO MY APPOINTMENT TO THE BENCH, I SERVED ON THE ST. JOHN HOSPITAL OF DETROIT, MICHIGAN) ETHICS COMMITTEE FROM 1989 - 1991. MY DUTIES WERE TO ASSIST HOSPITAL STAFF WITH DECISIONS CONCERNING MEDICAL ETHICAL ISSUES. BECAUSE ST. JOHN HOSPITAL HAS GENERALLY HAD LEGAL MATTERS PENDING IN WAYNE COUNTY CIRCUIT COURT, I RESIGNED UPON MY APPOINTMENT TO THE BENCH.

19 **Litigation** Describe the ten (10) most significant litigated matters which you personally handled, and for each provide the date of representation, the name of the court, the name of the judge or judges before whom the case was litigated and the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties. In addition, please provide the following:

(a) the citations, if the cases were reported, and the docket number and date if unreported;

(b) a brief synopsis of the nature of each case outlining briefly the factual and legal issues involved;

(c) the party or parties whom you represented; and

(d) describe in detail the nature of your participation in the litigation and the final disposition of the case.

1. *Skinner v Square D Co.*
1988 - 1991
Oakland County Circuit Court, Hon. Fred Mester
Plaintiff was represented by Lawrence P. Nolan, 239 S. Main St., Eaton Rapids MI 48827-1291 (301) 469-7437)

(a) Michigan Court of Appeals (reported 195 Mich App 664). Also affirmed by the Michigan Supreme Court after I left my law firm to become a judge (reported 445 Mich 153)

(b) This was a products liability action involving the electrocution death of plaintiff's decedent, allegedly due to a defective switch manufactured by Square D.

(c) I represented defendant Square D. Plaintiff.

(d) I obtained a summary disposition on the ground that there was an insufficient factual foundation for the opinions of plaintiff's experts on causation. I also handled the appeal (until my appointment). The final Supreme Court case is considered the controlling case on the issue of legal causation under Michigan law.

Cubbedy v Ethicon Inc.
1988-1991
Calhoun County Circuit Court Hon. Stephen B. Miller
Plaintiff was represented by Millard N. Mayhall, 203 E. Michigan Ave., Marshall MI 49068-1545 (616) 781-9851).

(a) No. 88-2675NP

(b) This was a products liability action involving claims that sutures manufactured by Ethicon failed, resulting in significant injuries.

(c) I represented defendant Ethicon (a division of Johnson & Johnson).

(d) I obtained a summary disposition on behalf of Ethicon under the "sophisticated user" doctrine. While that order was subsequently reversed on appeal (in a 2-1) decision, following remand I was able to settle the case for a nominal amount.

3 *Robinson v William Beaumont Hospital*
1987-1990
Oakland County Circuit Court, Hon. David Breck.
Plaintiff was represented by Gary Fletcher (522 Michigan St., Port Huron MI 48060-3893 (810) 987-8444); co-defendant doctors were represented by William Buesser (38505 Woodward Ave.#1000, Bloomfield Hills 48304 (248) 642-7880) and Ray Morganti (One Towne Square #1400, PO Box 5068, Southfield MI 48086-5068 (248) 357-1400).

(a) No. 87-328060 NM

(b) This was a medical malpractice action in which it was alleged that blood products given during a heart bypass operation resulted in the plaintiff contracting AIDS. Not only was the propriety of the operation and the giving of the blood at issue, but also the foreseeability of the disease given that the surgery took place in 1980.

(c) I represented defendant Beaumont.
(d) The case was settled on the second day of trial.

4. *Martin v Johnson & Johnson*
1985-1988
Wayne County Circuit Court, Hon. Lucille Watts
Plaintiff was represented by Louis Demas (13305 Reeck Road, Southgate MI 48195 (734) 283-1777).

(a) No. 82-228875NP
(b) This was a products liability action in which it was alleged that a woman died as a result of toxic shock syndrome (TSS) caused by tampons manufactured by Johnson & Johnson. At issue was whether the deceased had in fact died of TSS or a rare infection, and the state of knowledge of TSS at the time of death.
(c) I represented defendant Johnson & Johnson.
(d) Johnson & Johnson obtained a no cause for action

5. *Meinberg v William Beaumont Hospital*
1988-1990
Oakland County Circuit Court, Hon. David Breck
Plaintiff was represented by Mark Dame ([illegible] Main St., Ann Arbor MI 48104-1945 (734) 662-3326); co-defendant Dr. Jaffe was represented by Melvin R. Schwartz (24400 Northwestern Hwy #200, Southfield MI 48[illegible] (248) [illegible]).

(a) No. 88-344562NH
(b) This was a medical malpractice action in which it was alleged that a lupus patient received improper care for the healing of wounds on her feet and legs. At issue was the standard of care for plastic surgeons and physical therapists, as well as issues of causation and comparative negligence.
(c) I represented defendant Beaumont.
(d) The case was settled on the first day of trial.

6. *Denman v Square D Co*
1985-1990
Wayne County Circuit Court, Hon. John Hausner
Plaintiff was represented by Robert Riley (19853 W. Outer Dr. #100, Dearborn MI 48124 (313) 565-1330); co-defendant Heim Corp was represented by Alvin Rutledge (4000 Penobscot Bldg. Detroit MI 48226 (313) 965-6100); co-defendant Ford Motor Co was represented by Kathleen Lang (500 Woodward Ave Suite 4000, Detroit MI 48226 (313) 223-3771).

(a) No. 85-500402
(b) This was a products liability action in which it was alleged that a defective foot switch manufactured by Square D resulted in plaintiff's amputation injury. At issue was the "component part defense", that is, the argument that the manufacturer of a product not defective in and of itself is not liable for the incorporation of that product into an otherwise unsafe product.

(c) I represented defendant Square D Company.
(d) Summary disposition was obtained on behalf of Square D.

7. *Reisig v William Beaumont Hospital*
1988-1990
Oakland County Circuit Court, Hon. Barry Howard
Plaintiff was represented by Lynn Foley (15510 Farmington Rd. Livonia MI 48154 (734)425-2400.

(a) No. 87-341181NH
(b) This was a medical malpractice action in which it was alleged that the failure to treat properly decedent's liver disease resulted in her death. At issue was the standard of care of both nurses and physicians, and whether the decedent's life could have been saved had care been appropriate.
(c) I represented defendant Beaumont.
(d) While Beaumont ultimately lost the case at trial, the verdict was extremely low given the nature of the case.

8. [illegible]
1988-1990
Wayne County Circuit Court, Hon. Lucille Watts
Dennis Bila (321 S. Spring St. P.O. Harbor Springs MI 49740-1524; (231)526-2685) and David Tyler (25800 Northwestern Hwy. Southfield MI 48037 (248) 340-2850) represented the defendants.
(a) No. 88-829340CK
(b) This was a declaratory judgment action brought by an insured under a policy to obtain coverage for a products liability claim. At issue were disclaimers in the policy concerning product liability actions, as well as the claimed failure of plaintiffs to comply with certain policy conditions.
(c) I represented the plaintiff Amsted.
(d) Amsted prevailed in total at trial, including being awarded actual costs and attorneys fees.

9. *Stamat v William Beaumont Hospital*
1988-1990
Oakland County Circuit Court, Hon. David Breck
Plaintiff was represented by Milton Greenman (1000 Town Center #500, Southfield MI 48075 (248) 948-0000); Co-Defendant Dr. Hollander was represented by Mark Torigian (30903 Northwestern Hwy. PO Box 3040, Farmington Hills MI 48333-3040 (248) 539-2841).

(a) No. 88-355318NH
(b) This was a medical malpractice action in which it was alleged that the decedent died of lung failure following premature discharge after surgery; at issue was not only the standard of care of the physicians but whether death was caused by some act of foul play by his widow, and the paternity of their purported children.

(c) I represented defendant Beaumont.
(d) After plaintiff took discovery of Beaumont, plaintiff agreed to dismiss Beaumont.

10. *Binder v William Beaumont Hospital*
1981-1985
Wayne County Circuit Court, Hon. Irwin Burdick
Plaintiff was represented by Stephen Leuchman (718 Notre Dame St, Grosse Pointe MI 48230-1240 (313) 884-6600).

(a) No. 81-112567NP
(b) This was a medical malpractice action in which it was alleged that Beaumont failed to diagnose and treat toxic shock syndrome (TSS) in plaintiff's decedent, resulting in her death. At issue was the state of knowledge concerning TSS at the time of death, as well as the nature of care rendered to the decedent after she developed septic shock.
(c) I represented defendant Beaumont.
(d) The case was settled on the first day of trial.

20 Criminal History. [illegible] and also provide the degree of offense, sentence, or disposition and describe the particulars of [illegible].

NO CRIMINAL RECORD - NOT EVEN A TRAFFIC TICKET

21 Party to Civil or Administrative Proceedings. State whether you or any business of which you are or were an officer [illegible] ever been involved as a party in any civil or administrative proceeding. Answer "yes" if you [illegible] position that is reflected in a record available to the public. If so, please describe in detail the nature of your participation in the litigation and the final disposition of the case. Include all proceedings in which you were a party in interest. Do not list any proceedings in which you were a guardian *ad litem*, stakeholder, or material witness.

NEITHER I NOR A BUSINESS IN WHICH I AM OR WERE AN OFFICER HAVE EVER BEEN A PARTY OR OTHERWISE INVOLVED IN ANY CIVIL OR ADMINISTRATIVE PROCEEDING.

22 Potential Conflict of Interest. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts of interest during your initial service in the position to which you have been nominated.

I WILL RECUSE MYSELF FROM ANY MATTER IN WHICH MY HUSBAND'S LAW FIRM IS INVOLVED. IN AS MUCH AS I HAVE NOT REPRESENTED ANY CLIENTS FOR OVER TEN YEARS, I DO NOT BELIEVE OTHER POTENTIAL CONFLICTS ARE LIKELY WITH THE SOLE POSSIBILITY BEING CASES WHERE PARTIES ARE PUBLICLY TRADED COMPANIES WHOSE STOCK IS HELD BY ME DIRECTLY OR

INDIRECTLY (E.G. MUTUAL FUNDS). IN CASES INVOLVING PARTIES WHOSE SHARES ARE PUBLICLY TRADED, I WILL UNDERTAKE A REVIEW OF MY PORTFOLIO. TO THE EXTENT I OWN SHARES IN SUCH COMPANY, I WILL DISCLOSE THE SAME TO THE LEGAL COUNSEL INVOLVED IN SUCH MATTER AND ASCERTAIN WHETHER I SHOULD RECUSE MYSELF FROM THE MATTER. REALISTICALLY, HOWEVER, I DO NOT BELIEVE THAT MY PORTFOLIO HOLDS SECURITIES IN ANY SINGLE COMPANY WHICH ARE SO MATERIAL IN VALUE AS TO WARRANT RECUSAL.

23 **Outside Commitments During Court Service.** Do you have any plans, commitments or arrangements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

NO PLANS, COMMITMENTS OR AGREEMENTS EXIST OR ARE CONTEMPLATED.

24 **Sources of Income.** [illegible] received during [illegible] gifts, rents, [illegible] copies [illegible]

SEE ATTACHED FINANCIAL DISCLOSURE FORM (EXHIBIT D - TAB [illegible])

25 **Statement of Net Worth.** [illegible] and attach the financial net worth [illegible] schedules as called for.

SEE ATTACHED NET WORTH STATEMENT (EXHIBIT D - TAB 8)

26 **Selection Process.** Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts?

(a) If so, did it recommend your nomination?

THERE WAS A QUALIFICATIONS COMMITTEE ESTABLISHED BY THE GOVERNOR OF THE STATE OF MICHIGAN AND THE MICHIGAN REPUBLICAN CONGRESSIONAL REPRESENTATIVES WITH RESPECT TO NOMINEES FOR THE UNITED STATES SIXTH CIRCUIT COURT OF APPEALS. UPON INFORMATION AND BELIEF, I RECEIVED THE HIGHEST RATING FROM THE COMMITTEE ("EXCEPTIONALLY WELL QUALIFIED"). IT IS FURTHER MY UNDERSTANDING THAT I WAS RECOMMENDED FOR A NOMINATION BY THE GOVERNOR AND BY MEMBERS OF MICHIGAN'S REPUBLICAN CONGRESSIONAL DELEGATION.

(b) Describe your experience in the judicial selection process, including the circumstances leading to your nomination and the interviews in which you participated

THE PROCESS COMMENCED WITH A DISCUSSION WITH THE LEGAL COUNSEL FOR GOVERNOR ENGLER IN MID-JANUARY, 2001 CONCERNING POTENTIAL OPPORTUNITIES FOR ADVANCEMENT WITHIN THE MICHIGAN JUDICIAL SYSTEM AND/OR THE FEDERAL COURT SYSTEM. I WAS ENCOURAGED TO MAKE APPLICATION FOR CONSIDERATION FOR THE SIXTH CIRCUIT COURT OF APPEALS. I WAS CONTACTED ON JANUARY 31, 2001 AND ADVISED THE COMMITTEE WOULD INTERVIEW ME ON FEBRUARY 4, 2001. I COMPLETED AND SUBMITTED THE REQUIRED QUESTIONNAIRE AND THE INTERVIEW OCCURRED ON FEBRUARY 4, 2001. ON JUNE 11, 2001, I WAS CONTACTED BY THE OFFICE OF THE LEGAL COUNSEL TO THE PRESIDENT TO SCHEDULE AN INTERVIEW WITH JUDGE GONZALES AND HIS COLLEAGUES. THE INTERVIEW TOOK PLACE ON JUNE 14, 2001. ON JUNE 29, 2001, I WAS ADVISED THAT MY NAME WAS BEING REFERRED TO THE DEPARTMENT OF JUSTICE FOR FURTHER CONSIDERATION.

[illegible] asking or speaking about [illegible]

NO DISCUSSIONS OF THE TYPE SUGGESTED HAVE OCCURRED.

QUESTIONNAIRE FOR NOMINEES BEFORE THE COMMITTEE ON THE JUDICIARY, UNITED STATES SENATE

CONFIDENTIAL

NAME SUSAN BIEKE NEILSON (nee SUSAN MARY BIEKE)

HOME ADDRESS 542 NORTH ROSEDALE COURT
GROSSE POINTE WOODS, MICHIGAN 48236

TELEPHONE NUMBER (313) 884-0595
HOME E-MAIL: jtneil@home.com

1. Employment History

I HAVE NEVER BEEN DISCHARGED FROM EMPLOYMENT NOR HAVE I EVER RESIGNED DUE TO AN OKSTATUS THAT AN EMPLOYER INTENDED TO DISCHARGE ME.

2. Bankruptcy and Tax Information and your spouse

(a) Have you and your spouse ever failed to pay any federal, state and local) as of the date of your nomination? Have you ever filed married filing separately? Did you make any back tax payments at the time of the date of you have made any back tax payments with respect to the past three (3) years? If so, please provide full details.

ALL PRIOR YEAR'S INCOME TAX RETURNS WERE FILED TIMELY AND ALL TAXES HAVE BEEN PAID TIMELY (ASIDE FROM TAXES DETERMINED TO BE LATER DUE AS A RESULT OF MATHEMATICAL OR COMPUTATIONAL ERROR). ALL RETURNS FILED BY ME DURING MY MARRIAGE WERE JOINT TAX RETURNS.

(b) Has a tax lien or any collection proceeding(s) ever been instituted against you or your spouse by federal, state or local authorities? If so, please provide full details.

NONE, OTHER THAN FOR MINOR TAX ADJUSTMENTS ARISING FROM MATHEMATICAL OR COMPUTATIONAL ERRORS. ANY AMOUNT DUE WAS PROMPTLY PAID.

(c) Have you or your spouse ever been the subject of any audit, investigation, or inquiry for federal, state or local taxes? If so, please provide full details.

ON A PERSONAL LEVEL, NO AUDIT, INVESTIGATION OR INQUIRY HAS BEEN UNDERTAKEN. MY HUSBAND'S LAW FIRM (A PROFESSIONAL CORPORATION) HAS BEEN AUDITED ONCE IN ITS SIXTEEN YEAR HISTORY.

(d) Have you or your spouse ever declared bankruptcy? If so, please provide full details.

NO - OUR CREDIT IS IMPECCABLE

3 **Litigation, Investigations and Complaints**

(a) State whether, to your knowledge, you have ever been under federal, state, or local investigation for a possible violation of any criminal statute or administrative agency regulation? If so, please provide full details.

NONE TO MY KNOWLEDGE

Has any [illegible] ever been [illegible] criminally? If so, please provide full details.

NONE TO MY KNOWLEDGE

[illegible] agency, bar association, committee or other [illegible] grievance filed by each of ethics unprofessional conduct or a violation of any rule of practice? If so, please provide full details.

AS A JUDGE WHO HAS PRESIDED OVER CRIMINAL MATTERS, AN OCCASIONAL COMPLAINT IS DIRECTED TO THE JUDICIAL TENURE COMMISSION (USUALLY FROM PRISON). I HAVE NEVER HAD TO RESPOND TO ANY COMPLAINT OF ANY KIND FOR THE REASON THAT THE COMMISSION IMMEDIATELY DETERMINED THAT THE COMPLAINT HAD NO MERIT WHATSOEVER.

(d) Other than instances described in response to prior questions, have you ever been a party to whether plaintiff, defendant or in any other capacity to any litigation? If so, please provide full details.

I PRESUME THAT OCCASIONALLY, MY FORMER LAW FIRM WAS FORCED TO FILE COLLECTION ACTIONS AGAINST FORMER CLIENTS, BUT I HAD NO PERSONAL INVOLVEMENT IN SUCH ACTIONS. ASIDE FROM THAT, I HAVE NEVER BEEN A PARTY IN ANY LITIGATION.

4 **Disclosure** Please advise the Committee of any unfavorable information that may affect your nomination.

I AM NOT AWARE OF ANY UNFAVORABLE INFORMATION.

QUESTIONNAIRE FOR NOMINEES BEFORE THE COMMITTEE ON THE JUDICIARY, UNITED STATES SENATE

AFFIDAVIT

I SUSAN BIEKE NEILSON being duly sworn, hereby state that I have read and signed the foregoing Questionnaire for Nominees Before the Committee on the Judiciary and that the information provided therein is, to the best of my knowledge, current, accurate, and complete.

SUSAN BIEKE NEILSON

SUBSCRIBED AND SWORN TO before me this 10th day of DECEMBER, 2001.

Washtenaw County, Michigan
My commission expires

FIRST RESTATED SUPPLEMENT TO THE DECEMBER 10, 2001[1]
QUESTIONNAIRE OF NOMINEE SUSAN BIEKE NEILSON
UNITED STATES SENATE COMMITTEE ON THE JUDICIARY

Question #3

3 **Address**: List current office address and telephone number. If state of residence [illegible] from your place of employment, please list the state where you currently reside.

OFFICE: FRANK MURPHY HALL OF JUSTICE
1441 ST. ANTOINE
DETROIT, MICHIGAN 482[illegible]

TELEPHONE: (313) 224-5201 or (313) 224-5203

[illegible]

Health [illegible]

MY LAST PHYSICAL EXAMINATION WAS [illegible] NOVEMBER 2002. MY OVERALL HEALTH IS EXCELLENT.

Question [illegible]

If you [illegible] have been [illegible]

(b) a short summary and citations for all rulings of yours that were reversed or significantly [illegible] on appeal, together with a short summary of and citations for the opinions of the reviewing court.

Items 1 through 23 - See questionnaire dated December 10, 2001 previously submitted.

24. *Frankenmuth Mutual Insurance Company v Chrysler Corporation* (CA No. 225013) **I granted summary disposition concluding that no genuine issue of material fact existed as to the applicability of an indemnity provision to a construction contract. The Court of Appeals found, after providing all possible inferences in favor of the appellant, that a question of fact existed and remanded. An appeal has been filed with the Michigan Supreme Court. See Exhibit S-1.**

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[1] This supplement supersedes the supplement dated March 4, 2002 previously provided to the Committee.

25. *West v General Motors* (CA No. 224408) I summarily dismissed Plaintiff's complaint which alleged: (a) Claim under Whistleblower Protection Act; (b) Race Discrimination Claim; (c) Michigan Civil Rights Act Claim (d) Assault and Battery Claim; and (e) Worker's Disability Compensation Act. The Court of Appeals affirmed my dismissal of all claims with the exception of the Claim under the Whistleblower Protection Act finding that the causation requirement under the Act presented a question of fact for the jury. The Defendant has filed an appeal with the Michigan Supreme Court. See Exhibit S-2.

26. *John Doe v American Medical Pharmacies, Inc. and Shirley Black* (CA No. 230239) In this case involving slander and intentional infliction of emotional distress, I granted defendant's motion for judgment notwithstanding the verdict. I found that an essential element of the multiple theories of liability had not been established. Based upon a review of the record, the appellate court disagreed with my finding and reinstated the award of the jury. See Exhibit S-3

27. *Payne v John Struthers, D.O., P.C. et al* (CA No. 229452) This case involved a medical malpractice claim. I denied Defendant's motion for a new trial and assessed mediation sanctions against the Defendant. I granted Defendant's motion for remittitur as to one element of the damages awarded by the jury. I was affirmed in all respects other than my granting the motion of remittitur. See Exhibit S-4

28. *Brousseau v Dayton Hudson Corporation* (CA No. 225880) This case was a personal injury claim. Defendant appealed my denial of his motion for new trial, motion for judgment notwithstanding the verdict, motion for remittitur and my granting of plaintiff's motion for assessment of costs and attorney fees. Plaintiff appealed my reduction of damages for future economic damages to present value. I was affirmed in all respects except in my calculation of the amount of attorney fees to be awarded to Plaintiff. See Exhibit S-5

29. *Trent v Suburban Mobility Authority For Regional Transportation et al* (Published CA No. 229253) In this case of first impression, I granted summary disposition in a case involving an automobile accident where the defendant was a transportation agency. The basis for my ruling was that Plaintiff had not timely complied with a notice provision required by statute. As discussed in the opinion, the interplay among multiple statutes had not been previously addressed by the appellate courts and the Court of Appeals came to a different conclusion than I did. I anticipate the case will be appealed to the Michigan Supreme Court. See Exhibit S-6.

30. *Mc Gee v City of Detroit* (CA No. 225819) In this employment case, Plaintiff appealed my ruling which denied him statutory work loss benefits and concluded that he was not entitled to interest at a rate of twelve percent. The defendant appealed my denial of the award of mediation sanctions against Plaintiff. I was affirmed as to my interpretation of the statute as not providing additional work loss benefits and that plaintiff was not entitled to interest on the judgment at the rate of twelve percent. The appellate court found that an issue of fact existed as to whether Plaintiff's failure of a drug test was a justifiable reason for termination of employment and reversed for trial on that issue. The appellate court also found that my denial of mediation sanctions against the plaintiff was not correct. See Exhibit S-7.

PLEASE NOTE THAT ITEMS 24 AND 25 SET FORTH IN THE QUESTIONNAIRE DATED DECEMBER 10, 2001 PREVIOUSLY SUBMITTED HAVE BEEN RENUMBERED AS ITEMS 31 AND 32 IN THIS SUPPLEMENT. THERE CONCERN CASES WHERE I WAS ORIGINALLY REVERSED IN TWO PUBLISHED COURT OF APPEALS DECISIONS WHICH WERE THEMSELVES REVERSED BY THE MICHIGAN SUPREME COURT:

31. *Mina v General Star* (published at 218 Mich App 678) was peremptorily reversed by the Supreme Court in an order of 7 22 97.

32. *Robinson v City of Detroit* (published at 225 Mich App 14) was reversed by the Supreme Court at 462 Mich 439.

Question [illegible]

17 Office, Political Activities and Affiliations

[illegible]

ident [illegible]

[illegible]

THE [illegible] CAMPAIGNS I HAVE BEEN INVOLVED WITH WERE MY RE-ELECTION CAMPAIGNS FOR JUDICIAL OFFICE IN 1996 AND 2002, AND THE CAMPAIGN DESCRIBED IN (a) ABOVE FOR THE MICHIGAN COURT OF APPEALS IN 1998. MY RESPONSIBILITIES WERE LIMITED TO PERSONAL CAMPAIGN APPEARANCES, ENDORSEMENT INTERVIEWS, APPROVAL OF CAMPAIGN LITERATURE AND FILING OF CAMPAIGN FINANCE REPORTS AS REQUIRED BY LAW.

Question [illegible]

24 Sources of Income: List sources and amounts of all income received during the calendar year preceding the nomination, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding $500. If you prefer to do so, copies of the financial disclosure report required by the Ethics in Government Act of 1978, may be substituted here.

SEE ATTACHED FINANCIAL DISCLOSURE FORM (EXHIBIT S-8)

Question [illegible]

25 Statement of Net Worth: Complete and attach the [illegible] net worth statement in detail. Add schedules as necessary.

SEE ATTACHED NET WORTH STATEMENT (EXHIBIT S-9)

AFFIDAVIT

I, SUSAN BIEKE NELSON, being duly sworn, hereby state that I have read and signed the foregoing Restated Supplement No. 1 to Questionnaire for Nominees Before the Committee on the Judiciary and that the information provided therein is, to the best of my knowledge, current, accurate and complete.

SUSAN BIEKE NELSON

SUBSCRIBED AND SWORN TO BEFORE ME THIS 7TH DAY OF JANUARY, 2003.

Notary Public
Nelson, Nobles County, MN
My Commission Expires:

AO 10 (by Rev. 1/2000)

FINANCIAL DISCLOSURE REPORT
Nomination Report

Government Act of 1978, as amended (5 U.S.C. App. 4, Sec. 101-112)

1. Person Reporting (Last name, first, middle initial)	2. Court or Organization	3. Date of Report
NEILSON, SUSAN B.	U.S. COURT OF APPEALS-6TH CIR.	11/09/2001
4. Title (Article III judges indicate active or senior status; magistrate judges indicate full- or part-time)	**5. Report Type (check type)**	**6. Reporting Period**
U.S. COURT OF APPEALS JUDGE	X Nomination, Date 11/08/2001 Initial Annual Final	01/01/2001 to 10/31/2001
7. Chambers or Office Address	**8. On the basis of the information contained in this Report and any modifications pertaining thereto, it is in my opinion, in compliance with applicable laws and regulations.**	
1607 COLEMAN A. YOUNG MUN. CTR DETROIT, MICHIGAN 48226	Reviewing Officer _____ Date _____	

IMPORTANT NOTES: The instructions accompanying this form must be followed. Complete all parts, checking the NONE box for each section where you have no reportable information. Sign on the last page.

I. POSITIONS *(Reporting individual only; see pp. 9-13 of Instructions.)*

	POSITION	NAME OF ORGANIZATION / ENTITY
☐ NONE (No reportable positions.)		
1	TRUSTEE	TRUST #1
2	TRUSTEE	TRUST #2
3	GRANTOR OF TRUST	TRUST #3

II. AGREEMENTS *(Reporting individual only; see pp.14-16 of Instructions.)*

	DATE	PARTIES AND TERMS
☐ NONE (No reportable agreements.)		
1	10/31/01	PARTICIPANT - MICHIGAN JUDGES RETIREMENT SYSTEM (NO CONTROL)
2	10/31/01	PARTICIPANT - STATE OF MICHIGAN 401K PLAN (ASSETS REPORTED IN SECTION VII)
3	10/31/01	PARTICIPANT - WAYNE COUNTY EMPLOYEES RETIREMENT SYSTEM (NO CONTROL)

III. NON-INVESTMENT INCOME *(Reporting individual and spouse; see pp. 17-24 of Instructions.)*

	DATE	SOURCE AND TYPE	GROSS INCOME (yours, not spouse's)
☐ NONE (No reportable non-investment income.)			
1	1999	1999 JUDICIAL SALARY	114539
2	2000	2000 JUDICIAL SALARY	119744
3	10/31/01	2001 JUDICIAL SALARY THROUGH 10/31/2001	113150
4	2000	SPOUSE'S 2000 INCOME FROM LAW PRACTICE	

03/11/02 MON 13:51 FAX

FINANCIAL DISCLOSURE REPORT	NEILSON, SUSAN B.	Date of Report 11/09/2001

SECTION HEADING. (Indicate part of report.)

Information continued from Parts I through VI, inclusive.

PART 3. NON-INVESTMENT INCOME (cont'd.)

Line	Date	Source and Type	Gross Income
5	10/31/01	SPOUSE'S 2001 INCOME FROM LAW PRACTICE	

FINANCIAL DISCLOSURE REPORT | NEILSON, SUSAN B. | Date of Report: 11/09/2001

IV. REIMBURSEMENTS — transportation, lodging, food, entertainment.

(Includes those to spouse and dependent children. See pp. 25-28 of Instructions.)

	SOURCE	DESCRIPTION
☐	NONE (No such reportable reimbursements.)	
1		EXEMPT
2		
3		
4		
5		
6		
7		

V. GIFTS

(Includes those to spouse and dependent children. See pp. 29-32 of Instructions.)

	SOURCE	DESCRIPTION	VALUE
☐	NONE (No such reportable gifts.)		
1		EXEMPT	
2			
3			

VI. LIABILITIES

(Includes those of spouse and dependant children. See pp. 33-35 of Instructions.)

	CREDITOR	DESCRIPTION	VALUE CODE*
☒	NONE (No reportable liabilities.)		
1			
2			
3			
4			
5			
6			

* VAL. CODES: J=$15,000 or less K=$15,001-$50,000 L=$50,001 to $100,000 M=$100,001-$250,000 N=$250,001-$500,000
O=$500,001-$1,000,000 P1=$1,000,001-$5,000,000 P2=$5,000,001-$25,000,000 P3=$25,000,001-$50,000,000 P4=$50,000,001 or more

FINANCIAL DISCLOSURE REPORT | NEILSON, SUSAN B. | 11/09/2001

VII. Page 1 INVESTMENTS and TRUSTS– income, value, transactions *(Includes those of spouse and dependent children. See pp. 36-54 of Instructions.)*

A. Description of Assets (including trust assets) *Place "(X)" after each asset exempt from prior disclosure.*	B. Income during reporting period (1) Amount Code (A-H)	B. (2) Type (e.g., dividend, rent or interest)	C. Gross value at end of reporting period (1) Value Code (J-P)	C. (2) Value Method Code (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, partial sale, merger, redemption)	If not exempt from disclosure (2) Date: Month-Day	(3) Value Code (J-P)	(4) Gain Code (A-H)	(5) Identity of buyer/seller (if private transaction)
☐ NONE (No reportable income, assets, or transactions.)									
1 TRUST #1									
2 --OTTAWA FINANCIAL COMMON STK	A	Dividend			EXEMPT				
3 --MORGAN STANLEY MONEY MKT	A	Dividend	J	T	EXEMPT				
4 --PURADYN FILTERS TECH INC		None	J	T	EXEMPT				
5 --CISCO SYSTEMS		None	J	T	EXEMPT				
6 --SIRIUS SATELLITE		None	J	T	EXEMPT				
7 --WALT DISNEY	A	Dividend	J	T	EXEMPT				
8 --WORLDCOM		None	J	T	EXEMPT				
9 --SI DIAMOND TECHNOLOGY		None							
10 --MARRIOTT TIMESHARE INTEREST		None	K	W	EXEMPT				
11 --CITIGROUP	A	Dividend	J	T	EXEMPT				
12 --GENERAL ELECTRIC	A	Dividend	J	T	EXEMPT				
13 TRUST #2									
14 --OTTAWA FINANCIAL	A	Dividend			EXEMPT				
15 --MORGAN STANLEY MONEY MARKET	A	Dividend	J	T	EXEMPT				
16 --LOW 5 EQUITY TRUST	A	Dividend			EXEMPT				
17 --MASCOTECH STOCK	A	Dividend			EXEMPT				

1 Inc/Gain Codes: A=$1,000 or less B=$1,001-$2,500 C=$2,501-$5,000 D=$5,001-$15,000 E=$15,001-$50,000
(Col. B1, D4) F=$50,001-$100,000 G=$100,001-$1,000,000 H1=$1,000,001-$5,000,000 H2=$5,000,001 or more

2 Val Codes: J=$15,000 or less K=$15,001-$50,000 L=$50,001-$100,000 M=$100,001-$250,000 N=$250,001-$500,000
(Col. C1, D3) O=$500,001-$1,000,000 P1=$1,000,001-$5,000,000 P2=$5,000,001-$25,000,000 P3=$25,000,001-$50,000,000 P4=$50,000,001 or more

3 Val Mth Codes: Q=Appraisal R=Cost (real estate only) S=Assessment T=Cash/Market
(Col. C2) U=Book Value V=Other W=Estimated

FINANCIAL DISCLOSURE REPORT | NEILSON, SUSAN B. | 11/09/2001

VII. Page 2 INVESTMENTS and TRUSTS-- income, value, transactions *(Includes those of spouse and dependent children. See pp. 36-54 of Instructions.)*

A. Description of Assets (including trust assets) *Place "(X)" after each asset exempt from prior disclosure.*	B. Income during reporting period (1) Amount Code (A-H)	B. (2) Type (e.g., dividend, rent or interest)	C. Gross value at end of reporting period (1) Value Code (J-P)	C. (2) Value Method Code (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, partial sale, merger, redemption)	If not exempt from disclosure (2) Date: Month-Day	(3) Value Code (J-P)	(4) Gain Code (A-H)	(5) Identity of buyer/seller (if private transaction)
☐ NONE (No reportable income,assets, or transactions.)									
18 --CISCO SYSTEMS		None	J	T	EXEMPT				
19 --E DIGITAL CORPORATION		None	J	T	EXEMPT				
20 --KRAFT FOODS		None			EXEMPT				
21 --LIFECORP BIOMEDICAL		None	J	T	EXEMPT				
22 --PURADYN FILTERS TECH.		None	J	T	EXEMPT				
23 --SIRIUS SATELLITE		None	J	T	EXEMPT				
24 --TEXAS BIOTECHNOLOGY		None	J	T	EXEMPT				
25 --PFIZER, INC	A	Dividend	J	T	EXEMPT				
26 TRUST #3									
27 --MASCOTECH	A	Dividend			EXEMPT				
28 --MORGAN STANLEY DEAN WITTER	A	Dividend	J	T	EXEMPT				
29 --CISCO SYSTEMS		None	J	T	EXEMPT				
30 --E DIGITAL CORPORATION		None	J	T	EXEMPT				
31 --LIFECORP BIOMEDICAL		None	J	T	EXEMPT				
32 --PURADYN FILTER TECH.		None	J	T	EXEMPT				
33 --SIRIUS SATELLITE		None	J	T	EXEMPT				
34 --TEXAS BIOTECHNOLOGY		None	J	T	EXEMPT				

1 Inc/Gain Codes: A=$1,000 or less B=$1,001-$2,500 C=$2,501-$5,000 D=$5,001-$15,000 E=$15,001-$50,000
(Col. B1, D4) F=$50,001-$100,000 G=$100,001-$1,000,000 H1=$1,000,001-$5,000,000 H2=$5,000,001 or more

2 Val Codes: J=$15,000 or less K=$15,001-$50,000 L=$50,001-$100,000 M=$100,001-$250,000 N=$250,001-$500,000
(Col. C1, D3) O=$500,001-$1,000,000 P1=$1,000,001-$5,000,000 P2=$5,000,001-$25,000,000 P3=$25,000,001-$50,000,000 P4=$50,000,001 or more

3 Val Mth Codes: Q=Appraisal R=Cost (real estate only) S=Assessment T=Cash/Market
(Col. C2) U=Book Value V=Other W=Estimated

FINANCIAL DISCLOSURE REPORT | NEILSON, SUSAN B. | Date of Report 11/09/2001

VII. Page 3 INVESTMENTS and TRUSTS– income, value, transactions *(includes those of spouse and dependent children. See pp. 36-54 of Instructions.)*

A. Description of Assets (including trust assets) *Place "(X)" after each asset exempt from prior disclosure.*	B. Income during reporting period (1) Amount Code (A-H)	B. (2) Type (e.g., dividend, rent or interest)	C. Gross value at end of reporting period (1) Value Code (J-P)	C. (2) Value Method Code (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, partial sale, merger, redemption)	If not exempt from disclosure (2) Date: Month-Day	(3) Value Code (J-P)	(4) Gain Code (A-H)	(5) Identity of buyer/seller (if private transaction)
☐ NONE (No reportable income,assets, or transactions.)									
35 CREATIVE CAMPAIGN CONCEPTS	D	Distribution	J	W	EXEMPT				
36 REAL ESTATE LLC #1	B	Distribution	K	W	EXEMPT				
37 REAL ESTATE LLC #2	B	Distribution	J	W	EXEMPT				
38 SPOUSE LAW PRACTICE P.C.		None	M	W	EXEMPT				
39 GRANDFATHER TRUST	A	Distribution	J	T	EXEMPT				
40 BANK ONE, N.A.	A	Interest	J	T	EXEMPT				
41 HUNTINGTON BANKS - MICHIGAN	C	Interest	L	T	EXEMPT				
42 IRA #1									
43 --MORGAN STANLEY MONEY MARKET	A	Dividend	J	T	EXEMPT				
44 --AES CORP		None	J	T	EXEMPT				
45 --CITIGROUP	A	Dividend	J	T	EXEMPT				
46 --GUIDANT CORP		None	J	T	EXEMPT				
47 --IMMUNEX CORP		None	J	T	EXEMPT				
48 --INTEL CORP	A	Dividend	J	T	EXEMPT				
49 --JABIL CIRCUIT		None	J	T	EXEMPT				
50 --KRAFT FOODS	A	Dividend	J	T	EXEMPT				
51 --ORACLE CORP		None	J	T	EXEMPT				

1 Inc/Gain Codes: A=$1,000 or less B=$1,001-$2,500 C=$2,501-$5,000 D=$5,001-$15,000 E=$15,001-$50,000
(Col. B1, D4) F=$50,001-$100,000 G=$100,001-$1,000,000 H1=$1,000,001-$5,000,000 H2=$5,000,001 or more

2 Val Codes J=$15,000 or less K=$15,001-$50,000 L=$50,001-$100,000 M=$100,001-$250,000 N=$250,001-$500,000
(Col. C1, D3) O=$500,001-$1,000,000 P1=$1,000,001-$5,000,000 P2=$5,000,001-$25,000,000 P3=$25,000,001-$50,000,000 P4=$50,000,001 or more

3 Val Mth Codes Q=Appraisal R=Cost (real estate only) S=Assessment T=Cash/Market
(Col. C2) U=Book Value V=Other W=Estimated

FINANCIAL DISCLOSURE REPORT | Name of Reporting: NEILSON, SUSAN B. | Date of Report: 11/09/2001

VII. Page 4 INVESTMENTS and TRUSTS-- income, value, transactions *(Includes those of spouse and dependent children. See pp. 36-54 of Instructions.)*

A. Description of Assets (including trust assets) *Place "(X)" after each asset exempt from prior disclosure.*	B. Income during reporting period (1) Amount Code (A-H)	B. (2) Type (e.g., dividend, rent or interest)	C. Gross value at end of reporting period (1) Value Code (J-P)	C. (2) Value Method Code (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, partial sale, merger, redemption)	If not exempt from disclosure (2) Date: Month-Day	(3) Value Code (J-P)	(4) Gain Code (A-H)	(5) Identity of buyer/seller (if private transaction)
NONE (No reportable income,assets, or transactions.)									
52 --PRUDENTIAL VALUE FUND A	A	Dividend	K	T	EXEMPT				
53 --AIM AGGRESSIVE GROWTH FD A	A	Dividend	K	T	EXEMPT				
54 --PRUDENTIAL 20/20 FOCUSED A	A	Dividend	K	T	EXEMPT				
55 --STRATEGIC PRTNS SPCL M/M/B	A	Dividend	J	T	EXEMPT				
56 --UNIT VK FOCUS PORTFOLIO 22A	A	Dividend	J	T	EXEMPT				
57 IRA #2									
58 --MORGAN STANLEY MONEY MARKET	A	Dividend	J	T	EXEMPT				
59 --PURADYN FILTER TECH		None	J	T	EXEMPT				
60 --SIRIUS SATELLITE		None	J	T	EXEMPT				
61 IRA #3									
62 --MORGAN STANLEY MONEY MARKET	A	Dividend	J	T	EXEMPT				
63 --CISCO SYSTEMS		None	J	T	EXEMPT				
64 --JABIL CIRCUIT		None	J	T	EXEMPT				
65 --LIFECORP BIOMEDICAL		None	J	T	EXEMPT				
66 --TSL HOLDINGS		None	J	T	EXEMPT				
67 --PRUDENTIAL JENISON GROWTH	A	Dividend	J	T	EXEMPT				
68 STATE OF MICHIGAN 401K PLAN									

1 Inc/Gain Codes: A=$1,000 or less B=$1,001-$2,500 C=$2,501-$5,000 D=$5,001-$15,000 E=$15,001-$50,000
(Col. B1, D4) F=$50,001-$100,000 G=$100,001-$1,000,000 H1=$1,000,001-$5,000,000 H2=$5,000,001 or more

2 Val Codes: J=$15,000 or less K=$15,001-$50,000 L=$50,001-$100,000 M=$100,001-$250,000 N=$250,001-$500,000
(Col. C1, D3) O=$500,001-$1,000,000 P1=$1,000,001-$5,000,000 P2=$5,000,001-$25,000,000 P3=$25,000,001-$50,000,000 P4=$50,000,001 or more

3 Val Mth Codes: Q=Appraisal R=Cost (real estate only) S=Assessment T=Cash/Market
(Col. C2) U=Book Value V=Other W=Estimated

FINANCIAL DISCLOSURE REPORT | Name of Person Reporting: NEILSON, SUSAN B. | Date of Report: 12/09/2001

VII. Page 5 INVESTMENTS and TRUSTS-- income, value, transactions *(Includes those of spouse and dependent children. See pp. 36-54 of Instructions.)*

A. Description of Assets (including trust assets) *Place "(X)" after each asset exempt from prior disclosure.*	B. Income during reporting period (1) Amount Code (A-H)	B. (2) Type (e.g., dividend, rent or interest)	C. Gross value at end of reporting period (1) Value Code (J-P)	C. (2) Value Method Code (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, partial sale, merger, redemption)	If not exempt from disclosure (2) Date: Month-Day	(3) Value Code (J-P)	(4) Gain Code (A-H)	(5) Identity of buyer/seller (if private transaction)
☐ NONE (No reportable income, assets, or transactions)									
69 --DODGE & COX FUND	A	Dividend	L	T	EXEMPT				
70 --FIDELITY MAGELLEN	A	Dividend	K	T	EXEMPT				
71 --PUTNUM VOYAGER	A	Dividend	K	T	EXEMPT				
72 --DREYFUS EMERGING LEADERS	A	Dividend	K	T	EXEMPT				
73 --S & P MIDCAP	A	Dividend	J	T	EXEMPT				
74									
75									
76									
77									
78									
79									
80									
81									
82									
83									
84									
85									

1 Inc/Gain Codes: A=$1,000 or less; B=$1,001-$2,500; C=$2,501-$5,000; D=$5,001-$15,000; E=$15,001-$50,000
(Col B1, D4) F=$50,001-$100,000; G=$100,001-$1,000,000; H1=$1,000,001-$5,000,000; H2=$5,000,001 or more

2 Val Codes: J=$15,000 or less; K=$15,001-$50,000; L=$50,001-$100,000; M=$100,001-$250,000; N=$250,001-$500,000
(Col. C1, D3) O=$500,001-$1,000,000; P1=$1,000,001-$5,000,000; P2=$5,000,001-$25,000,000; P3=$25,000,001-$50,000,000; P4=$50,000,001 or more

3 Val Mth Codes: Q=Appraisal; R=Cost (real estate only); S=Assessment; T=Cash/Market
(Col. C2) U=Book Value; V=Other; W=Estimated

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	NEILSON, SUSAN B.	11/09/2001

VIII. ADDITIONAL INFORMATION OR EXPLANATIONS.

(Indicate part of report.)

NONE

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	NEILSON, SUSAN B.	11/09/2001

IX. CERTIFICATION

I certify that all the information given above (including information pertaining to my spouse and minor or dependent children, if any) is accurate, true, and complete to the best of my knowledge and belief, and that any information not reported was withheld because it met applicable statutory provisions permitting non-disclosure.

I further certify that earned income from outside employment and honoraria and the acceptance of gifts which have been reported are in compliance with the provisions of 5 U.S.C. app. 4, section 501 et. seq., 5 U.S.C. 7353 and Judicial Conference regulations.

Signature Susan B Neilson Date 11/9/01

Note: Any individual who knowingly and wilfully falsifies or fails to file this report may be subject to civil and criminal sanctions (5 U.S.C. App. 4, Section 104).

FILING INSTRUCTIONS

Mail original and three additional copies to:

Committee on Financial Disclosure
Administrative Office of the United States Courts
One Columbus Circle, N.E.
Suite 2-301
Washington, D.C. 20544

JEFFREY T. AND SUSAN B. NEILSON
STATEMENT OF NET WORTH @ 10/31/01

ASSETS	A/C #1	A/C #2	A/C #3	Total
Cash on hand and in banks	13000	0	70000	83000
U.S. Government Securities	0	0	0	0
Listed Securities (See Note 1)	21000	0	0	21000
Unlisted Securities (See Note 2)	0	171	0	171
Accounts and Notes Receivable	0	0	0	0
Real Estate Owned (See Note 3)	45000		550000	595000
Real Estate Mortgages Receivable	0	0	0	0
Autos and other personal property	75000	25000	75000	175000
Cash Value - life insurance	10800	Note 4	0	10800
Other Assets (itemize):				
Lipson Neilson LLC (real estate investment)	0	8000	0	8000
Bajemast Associates LLC (real estate investment)	0	12000	0	12000
Coin Collections	0	10000	0	10000
Combined Profit Sharing & 401K Account (vested)	0	350000	0	350000
401 K Account (vested)	168000	0	0	168000
Individual Retirement Account	140000	20000	0	160000
Pension Benefits - See Note 5	60000	0	0	60000
Children's Trust Account - See Note 6	0	0	0	0
TOTAL ASSETS	532800	425171	695000	1652971
LIABILITIES				
Notes payable to banks - secured	0	0	0	0
Notes payable to banks - unsecured	0	0	0	0
Notes payable to relatives	0	-20000	0	-20000
Accounts and bills due	0	0	0	0
Unpaid income tax	0	0	0	0
Other unpaid income and interest	0	0	0	0
Real estate mortgages payable				0
Principal residence	0	0	-128000	-128000
Chattel mortgages and other liens payable	0	0	0	0
Other debts	0	0	0	0
TOTAL LIABILITIES	0	-20000	-128000	-148000
NET WORTH	532800	405171	567000	1504971

CONTINGENT LIABILITIES				
As endorser, comaker or guarantor	none	Note 7	none	
On leases or contracts	none	none	none	
Legal Claims	none	none	none	
Provision for Federal Income Tax	none	none	none	all taxes withheld
Other Special Debt	none	none	none	
GENERAL INFORMATION				
Are any assets pledged?	no	no	no	
Are you defendant in any suits or legal actions?	no	no	no	
Have you ever taken bankruptcy?	no	no	no	

Senate Judiciary Committee Questionnaire / Submitted by Susan Bieke Neilson / November 9, 2001

NOTES TO FINANCIAL STATEMENT OF JEFFREY T. AND SUSAN B. NEILSON

Note 1 Listed securities owned by a revocable trust agreement established by Susan B. Neilson are:

Cisco	400 shs	Citigroup	100 shs
Puradyn Filter Tech.	1000 shs	GE	100 shs
Sirus Satellite	2000 shs		
Disney	100 shs	Loan A/C	-5400
WorldCom	156 shs		

Note 2 The amount set forth of $171.00 represents the cost basis of such shares which is less than fair market value. The transfer of such shares has been restricted under a buy-sell agreement with the other shareholders of the corporation.

Note 3 Real estate owned consists of the principal residence of Jeffrey and Susan Neilson (owned jointly) with an estimated fair market value of $550,000. In addition, Susan Neilson owns three weeks at the Marriott Desert Springs timeshare. Each week has been valued at $15,000 each.

Note 4 Jeffrey T. Neilson is the insured under a policy which has a cash surrender value. However, the cash surrender value is subject to the terms of a split dollar agreement with his employer. Consequently, no cash surrender value is being reported.

Note 5 As reported elsewhere in the questionaire, Susan Neilson is entitled to a pension benefit from the State of Michigan and the County of Wayne. The amount of the benefit is more fully described elsewhere. The amount set forth represents the amount paid by Susan Neilson in connection with her participation in this retirement program and interest thereon.

Note 6 Jeffrey Neilson and Susan Neilson have established educational trusts for the benefit of their two children. The trust assets of approximately $13,000 and $10,000 do not constitute the property of either Jeffrey or Susan Neilson.

Note 7 Jeffrey T. Neilson has, in connection with his fellow shareholders of his professional corporation, guaranteed certain corporate indebtedness to Standard Federal Bank. He is liable for a maximum of 20% of a long term note with an outstanding balance of $282,000.00 as well as the balance of a line of credit which presently has no outstanding balance. Current accounts receivable and work in process are more than sufficient to satisfy such indebtedness. He has also guaranteed, along with the other owners, the underlying mortgage obligations associated with the real estate limited liability companies. The fair market value of the real estate is more than sufficient to satisfy the mortgage obligation.

Chairman HATCH. Well, we are grateful to have you here. I will put into the record a letter that I have received from Senators Levin and Stabenow, or Senator Levin in this particular case, and keep the record open for Senator Stabenow if she cares to submit a letter or any other statement for the record.

As you know, we have had a very difficult time here because of a mix-up caused by both sides in many respects that did not allow two of the Clinton judges to take their seats. In the process, the Democrats basically said we are not going to allow any Republicans, even though this circuit is in real dire straits and does need judges.

I have been trying to work that out. I offered yesterday to the distinguished Senators from Michigan to try and get two additional judges, a circuit and a district court judge, in the judgeship bill that should come over from the House if they would allow an up-and-down vote for the four nominees. They could argue against any one of you. They could make whatever case they wanted to against Judge Saad in this particular case that they are opposed to. I don't think they are opposed to the other three circuit judges, except for this situation—I am trying to resolve it—and the two district court judges. For that, we would put one of the two who did not make it, Democrats, on a district court seat if we could get those two seats done; in other words, the House would pass a bill with those two seats, and one would take a district court and the other would take a circuit court of appeals. It would be up to the White House to make that determination which one would get which seat. But that would mean votes up and down for all eight of the judgeship nominees. It would help Michigan, help the circuit court of appeals in grand ways to be able to get this done.

I have been told by the Senators that they would not allow a vote up or down on Judge Saad, for whatever reasons, that I am sure are sincere reasons on their part. And I am not sure they would allow votes up and down on the others, but we are going to proceed anyway. If they do not agree to that, then I am not going to argue for two extra seats for Michigan, and whoever wins the election will have the privilege of putting these people through unless we can, between now and the election, find a way to put the four of you through and the two district court nominees through, because I presume that you should have an easy time going through with a well-qualified rating from the American Bar Association, the highest rating they can possibly give, with absolutely stunning recommendations from Democrats and Republicans in the State for really all four of you who are nominated for the circuit court of appeals, and because of the tremendous abilities that you have.

I think it is a shame that we are in this mess because I think Michigan suffers, I think the country suffers; certainly the Sixth Circuit Court of Appeals is suffering; but most of all, the litigants and the people who want justice in the courts are suffering because that court simply cannot do its job as well or as expeditiously as it should be done.

So your nomination here is very important. And as you can see, we have little piques on the Committee, and they are cheap little piques, it seems to me—p-i-q-u-e-s, I guess I spelled that right—over nothing, when we ought to be—when we see fine people like

yourself, we ought to be doing everything we can to make sure that you folks are given the privilege of serving. And that is regardless of party, and I have always tried to do that. And so I particularly resent the implication that while I am Chairman, we are not trying to do what I have always tried to do I helping the Democrats when they have been in charge accomplish what they would like to accomplish for their particular Presidents.

But let me ask you a few questions, Judge Neilson. I hope that explains it a little bit.

Judge NEILSON. Yes.

Chairman HATCH. I could get this done. I think the House is bringing up that bill tomorrow or the next day. I could have those two judgeships, I believe, in the House and then it would have to come over here because there are additions to our judgeship bill. It would have to come over here and be passed by the Senate. I would hope that if we did that, the Democrats not only would allow it to be passed by the Senate, because many Democrats are getting judges in that bill. We have been very fair in the bill. But not only that, we would be able to resolve a lot of problems with that bill. And if we could do that, then we would have votes up and down for all four Republican nominees or President Bush nominees to the circuit court. We would have votes up and down for the two district court nominees, and I do not think there are any objections to them either. And we would have votes up and down, and I would recommend positive votes up and down for the two Clinton nominees in the fourth year of the Bush administration.

Now, that is how far I have tried to lean over backwards to try and resolve this problem for our Senators from Michigan. And I do not think they will go for that because they do not want Judge Saad to be able to serve on the circuit court of appeals. I think they are tremendously mistaken in that, and I think it is not the right thing for them to do. But I cannot—you know, they are both good people, and they have their own thoughts on this matter, and I just want the record to be straight so that everybody understands I am doing my very best to try and resolve this problem.

But be that as it may, if we do not have those two judges added and there is any way we can get the four of you votes up and down, I am going to do it before the end of this year. And if not—and I hope with all my heart President Bush is re-elected—then we are certainly going to put you four up and pass you through in the next—

Judge NEILSON. Well, on behalf of myself and all the nominees, Mr. Chairman, we thank you for your efforts.

Chairman HATCH. Judge Neilson, as a Third Judicial Circuit Court Judge, you do have a firsthand knowledge on how our judicial system works. Everybody says that.

Now, how have these experiences shaped your views on the proper role of a Federal judge within our political system?

Judge NEILSON. A trial judge in Michigan sees a broad variety of cases. I think that being a trial judge assists you in looking at the law and in determining what law applies. You see that in such a broad variety of context on the trial bench.

Chairman HATCH. What would you say has been your most challenging case on your current court, and could you please tell us on

the Committee how you address that challenge and what lessons you learned from it?

Judge NEILSON. Mr. Chairman, it is hard to think of the most challenging case. It probably depends on what day you ask me. They all present somewhat of a challenge. I think that some simple cases become very complex in the middle of trial. I think that lengthy trials are challenging because you want to make sure that everyone's rights are preserved, and it is difficult when you have a lengthy trial. I cannot really make any generalizations. I could not say to you products liability cases are the hardest or medical malpractice, those are the most complex, because I have had some very interesting cases that some people would consider stem from very mundane facts.

Chairman HATCH. That is great. Your ability to constructively interact with your fellow judges on the Sixth Circuit will be, as far as I can see, an important element of your work. Could you speak for the moment about the role and significance of collegiality on the bench, and please indicate how you would intend to contribute to collegiality once you join the Federal bench?

Judge NEILSON. I believe that a judge has a duty to set an example of politeness, or listening to what colleagues have to say. This does not mean that in any way you should change your true values and true opinions for the sake of congeniality. But there is no excuse for a judge not to be polite and respectful to her colleagues.

Chairman HATCH. I note that you have done a great deal of work with the Soroptimist International of Grosse Pointe, which is the local branch of an international organization devoted to improving the lives of women and children. Could you tell the Committee about that experience and how that prepares you to be a judge?

Judge NEILSON. Well, Soroptimist International is a service organization which attempts to better the lives of women and children. Our local chapter focuses mostly on domestic violence shelters and assisting them in providing for the women and children who come there. There are many domestic violence shelters that do not allow children to come with the mothers, or there is no facilities for the children, and we attempt to fill that gap.

Chairman HATCH. I really appreciate that because every year I hold a charitable golf tournament to raise money basically for women in jeopardy programs or domestic violence programs or battered women programs, and this year we were able to contribute to some 37 different programs in Utah, without which, without that money they probably would not be able to function anywhere near, but some of them are trying to do what you have been trying to do. I appreciate your work in that area.

If there were no controlling precedent dispositively concluding an issue with which you were presented, to what sources would you turn for persuasive authority?

Judge NEILSON. Well, Senator, the first place a judge looks, assuming a statute is involved, is the plain language of the statute, and often even when there is no case authority under the statute the language of the statute is clear and the judge can rule based on the language of the statute. Legislative history can be helpful. I like to use the word "helpful" not "persuasive" because the judge has to again look at the plain language of the statute, and if it—

if the legislative history seems to say something different than the plain language, I believe that the plain language is controlling.

Chairman HATCH. And if you do not have a statute, what would you turn to?

Judge NEILSON. You mean if the decision is based simply on case law?

Chairman HATCH. If you were on the Sixth Circuit Court of Appeals, yes.

Judge NEILSON. There are certainly cases of first impression. Sometimes I look at cases from other jurisdictions. Again, I would call them helpful because every State is different, but there are certain general principles of law that apply in most cases, and I apply them.

Chairman HATCH. As a Circuit Judge you would be looking to the Supreme Court, I take it, for finding precedent.

Judge NEILSON. Oh, of course.

Chairman HATCH. That goes without saying.

Judge NEILSON. Correct.

Chairman HATCH. Can you please explain for the Committee your views on the difference between binding legal precedent and policy choices determined by elected officials and their staffs? In other words, put differently, what is the proper role for a judge to follow? Should the judge follow binding legal precedent, or to shape the law to achieve a desired result?

Judge NEILSON. The judge should never change the law to achieve a desired result. The judge's role is not to impose his or her personal beliefs on the law. Our duty is to follow the law as it was written by the legislature, and that is how I perceive that I would conduct myself if I were fortunate enough to be confirmed.

Chairman HATCH. Let me just say this. I do not want to put you through any more because I know darn well you can answer every question. I know that your background is extensive. I know that you have the well-qualified rating from the American Bar Association. I believe that this hearing has been too long delayed, mainly as I have tried to resolve these difficulties between the two Senators from Michigan and the Committee, and so far have not been very successful, although I have done my very best, and have offered a final offer.

All I can say is that I am going to support you very strongly, and I believe everybody on this Committee ought to support you very strongly. I do not think there is an excuse for this to be delayed any longer. By the way, how long have you been delayed?

Judge NEILSON. I believe that I was first nominated in November of 2000, 2001?

Chairman HATCH. 2001 you mean?

Judge NEILSON. Yes.

Chairman HATCH. It has been about 3 years.

Judge NEILSON. I have tried not to count the days, Mr. Chairman. I apologize.

Chairman HATCH. That is okay, but it has been a long time.

Judge NEILSON. It has.

Chairman HATCH. A lot longer than it should have been. That does happen on this Committee from time to time, but I think in this particular case it is not right, and we are going to have to try

and solve that. I will do my best to do that, and I have been trying, but I just want to compliment you for being willing to serve in this position, knowing that you would so faithfully, that you would execute the law faithfully, that you would be impartial, and that you would have the intelligence and the capacity to be able to do this job well. I know well your record, and I am going to very strongly support you.

With that, we will just let you go, and thank you and your family, your husband in particular, for being here.

Judge NEILSON. Thank you, Mr. Chairman.

Chairman HATCH. Thank you so much.

If I can have the other three please take their seats. Please raise your right hands. Do you swear that the testimony you are about to give will be the truth, the whole truth and nothing but the truth, so help you God?

Judge ALVAREZ. I do.

Judge STARRETT. I do.

Judge FINCH. I do.

Chairman HATCH. Thanks so much. We are happy to have all three of you here. You are three excellent people, three excellent nominees. We know how important, Judge Finch, your job is there, and you need that reappointment, and that is what you are being honored with here today.

Judge Starrett, your reputation is a sterling reputation. Everybody knows that and there is no excuse for holding you back in any way.

Judge Alvarez, you have had a lot of experience. You have tried a lot of cases. You have also been a judge, so you understand the law and how it should be applied and so forth.

Let me just say this. Let me ask all three of you these questions, and you can give—would any of—let us start with you, Judge Alvarez and go across the table. Would you care to make any statements? I forgot that you should be able to introduce—your family has been introduced, but if you would care to do that again, I would appreciate it, and friends.

STATEMENT OF MICAELA ALVAREZ, NOMINEE TO BE DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF TEXAS

Judge ALVAREZ. Thank you, Mr. Chairman. I appreciate the opportunity to be before this Committee. Senator Hutchison has been gracious enough to introduce my family.

I would like to recognize my children, who because of school commitments could not be here today. They are my son, Javier, my two daughters, Cecilia and Victoria. I would also like to, just for the record, mention my mother, Macaria Alvarez, who also could not be here today.

[The biographical information of Judge Alvarez follows:]

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name (include any former names used.)

   Micaela Alvarez

2. Address: List current place of residence and office address(es).

   Residence: McAllen, Texas
   Office: 612 W. Nolana, Suite 370, McAllen, Texas 78504

3. Date and place of birth.

   June 8, 1958, Donna, Texas

4. Marital Status (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).

   Divorced

5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

   University of Texas, Austin, Texas 1976-1980; Bachelor of Social Work - 1980
   University of Texas School of Law, Austin, Texas 1986-1989; Doctor of Jurisprudence - 1989

6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

1981-1983	Texas Department of Human Resources, Lockhart, TX - Social Worker
1983-1985	Employment Resources, San Marcos, TX - Employment Counselor
1985-1986	Travis State School, Gonzalez, TX - Case Manager
1989-1993	Atlas & Hall, L.L.P., McAllen, TX - Associate (lawyer)
1993-1995	Law Offices of Ronald G. Hole, McAllen, TX - Associate (lawyer)
1995-1996	Judge, 139th Judicial District Court, Edinburg, TX
1997-1997	Law Offices of Ronald G. Hole, McAllen, TX - Associate (lawyer)
1997-present	Hole & Alvarez, L.L.P., McAllen, TX - Partner
1997-present	State Office of Risk Management, Texas - Board Member
1998-2001	McAllen Medical Center: Board of Governors Member

1998-2003	McAllen Airport Advisory Board: Chairman 2001
1998-present	South Texas Community College, Legal Assisting Program Advisory Board Member
2002 - 2003	Presidential Commission on Educational Excellence for Hispanic Americans

7. Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

Not applicable

8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

October 1996	University of Texas - Pan American, named as a Notable Valley Hispanic
1996	Kenneth White Junior High, Mission, Texas - named as a Notable Hispanic
1997	Hidalgo County Bar Association (survey) - Highest Rated Judge

9. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

Hidalgo County Bar Association, 1989 - present
State Bar of Texas, 1989 - present
United States District Court, Southern District of Texas - Committee for Selection of Magistrate, 1994
United States District Court, Southern District of Texas - Committee for Selection of Federal Public Defender, 2003
United States District Court, Southern District of Texas Management/ Electronic Case Filing Committee, 2004

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.

I am not a member of any organization which is active in lobbying before any public bodies. I am however, a member of the following:

1997-present	State Office of Risk Management, Texas - Board Member
1998-present	South Texas Community College, Legal Assisting Program Advisory Board Member

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

Texas State Courts, 1989 - present
United States District Court, Southern District of Texas, 1990 - present

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.

I have not published any books, articles, reports or other materials, nor have I given any speeches on issues involving constitutional law or legal policy. However, during the time I was campaigning for office (district judge), I gave numerous speeches pertaining to my qualifications for that office. I have not retained any notes from those speeches. None of those speeches involved issues of constitutional law or legal policy. Additionally, I participated in drafting the following:

> *From Risk to Opportunity* - The Final Report of the President's Advisory Commission on Educational Excellence for Hispanic Americans, March 31, 2003

13. Health: What is the present state of your health? List the date of your last physical examination.

I am in good physical health. I underwent a physical examination on May 24, 2004 and my doctor's certification is enclosed herewith.

14. Judicial Office: State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

Presiding Judge, 139th Judicial District Court, Hidalgo County, Texas, July 1995 - December 1996; appointed; court of general jurisdiction

15. Citations: If you are or have been a judge, provide: (1) citations for the ten most significant opinions you have written; (2) a short summary of and citations for all

appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions.

(1) Significant opinions:

I am unable to provide citations for the ten most significant opinions I have written, as judgments in a trial court do not generally have an opinion written by the trial judge. The general practice in this area is that after a jury verdict, the prevailing party will submit the judgment for the judge's consideration. I have listed below ten cases in which I entered judgments during my tenure as a judge (three appellate opinions, as well as a brief synopsis, reconstructed to the best of my ability, of seven other cases tried to verdict during my tenure.)

1. *Alvarado v. Old Republic Ins. Co.* 951 S.W.2d 254 (Tex.App.–Corpus Christi 1997, writ denied)

Claimants injured in automobile accident while riding in insured's vehicle sued insured's workers' compensation carrier, alleging bad faith denial of their claim. I granted summary judgment to carrier, and claimants appealed. The Court of Appeals held that claimants were independent contractors and not employees of insured when accident occurred, and thus carrier did not deny claim in bad faith. The Court of Appeals affirmed.

2. *Bridgestone/Firestone, Inc. v. The Thirteenth Court of Appeals,* 929 S.W.2d 440 (Tex. 1996

Plaintiffs sued defendants for personal injuries. After granting one motion for continuance of motion to transfer venue hearing, I denied a second continuance and transferred venue. Plaintiffs sought writ of mandamus. The Corpus Christi Court of Appeals, 925 S.W.2d 119, directed me to vacate my order, and one defendant sought writ of mandamus. The Texas Supreme Court held that plaintiffs were not entitled to second continuance of venue hearing. The Texas Supreme Court conditionally granted the writ directing the court of appeals to withdraw its mandamus judgment.

3. *Republic Royalty v. Evins,* 931 S.W.2d 338 (Tex.App.–Corpus Christi 1996)

Three separate actions by royalty owners against producers of various mineral leases were filed in three different district courts. Defendants sought transfer of actions to second court in which one of the actions had been filed, and second court granted transfer and consolidated the three cases. I transferred the case which originated in the 139th District Court back to the 139th. Plaintiffs that brought action in second court that was consolidated with action transferred from the 139th filed mandamus proceeding alleging that I had abused my discretion in ordering back to the 139th court the suit originally filed

in the 139th and party's suit filed in other court that was consolidated. Interconnected with this dispute was a related issue concerning the effect of the attempted disqualification of myself, as the judge of the 139th District Court. The Court of Appeals held that: (1) first party's mere filing of motion to recuse did not provide rational basis for second court to order transfer of action; (2) court was not precluded from ruling on motion to transfer case back to court by pending re-filed motion to recuse judge from case; and (3) "with prejudice" notation did not prevent refiling of motion for recusal. The Court of Appeals also found that it was clear from the record that the judge of the second court abused his discretion in transferring the first lawsuit out of the 139th District Court and concluded that I was justified in transferring the consolidated lawsuit back to the 139th in order to correct that initial abuse by the second Judge. However, the Court of Appeals also held that I should have retained only the lawsuit originally filed in the 139th, and severed and returned the other lawsuits to the 370th District Court. Therefore, the Court of Appeals conditionally granted the writ in part, and denied in part.

4. *State v. Michael Magee*, Cause No. CR-2425-92-C

Attempted murder, the defendant was found guilty and sentenced to 15 years in prison.

5. *State v. Delfino Cuellar*

Murder, the defendant was found guilty and sentenced to 99 years in prison.

6. *State v. Timoteo Cladero*n, Cause No. CR-1291-94-C

Sexual assault, defendant found guilty

7. *Sonia Garcia v. Dillards*, Cause No. C-3538-91-C

Defamation and wrongful imprisonment action, judgment for plaintiff.

8. *Moreno v. Jackson*, C-1655-94-C

Personal injury, judgment for plaintiff

9. *Cisneros v. Walmart*, C-3468-92-C

Products liability, judgment for defendant

10. *Collyer v. Collins*, C-3559-94-C

Personal injury, judgment for defendant

(2) Reversals

Below is a short summary of, and citations for, all appellate opinions where my decisions were reversed. I am not aware of any other appellate decisions pertaining to cases which I tried as a judge.

1. *Nabejas v. Texas Dept. of Public Safety*, 972 S.W.2d 875 (Tex.App.–Corpus Christi 1998, no writ)

Spanish-speaking individuals who were allegedly verbally abused by officer of state department of public safety (DPS) during traffic stop sought permanent injunction against DPS and officer as remedy for violation of their rights under state constitution. I granted summary judgment in favor of defendants. Appeal was taken. The Court of Appeals held that: (1) district court did not have jurisdiction over action against DPS, and (2) individuals could seek permanent injunction against individual DPS officer as remedy for violation of their rights under state constitution. The Court of Appeals dismissed in part; reversed and remanded in part.

2. *Pentico v. Mad-Wayler, Inc.* 964 S.W.2d 708 (Tex.App.–Corpus Christi 1998, writ denied)

Borrowers filed usury action against lenders. I denied lenders' motion for summary judgment and granted borrowers' motion for summary judgment. The lenders appealed. The Court of Appeals held that: (1) lenders' mere brushing aside its miscalculation of late charges as "erroneous" and presenting arguments based on correct figure did not establish defense to borrowers' usury claim as matter of law; (2) late charges initially demanded by lenders had to be added to conventional interest rate agreed upon by parties in note when determining total compensation charged by lenders for purposes of determining usury; (3) application of spreading of interest doctrine to compute total amount of interest allowable over term of loan established that interest and late charges assessed by lenders as of date of lawsuit were not usurious; (4) past due interest became new and independent debt for which additional interest could be charged at maximum lawful rate; and (5) lack of any evidence on terms of any agreement for additional loan and on dates on which borrowers mailed payments precluded summary judgment on usury claims based on interest charged on sum that was not part of original note or charged during alleged "interest free period." The Court of Appeals affirmed in part, reversed in part, and remanded.

3. *Gutierrez v. Lone Star Nat'l Bank*, 960 S.W.2d 211 (Tex.App.–Corpus Christi 1997, writ denied)

Petition was filed for bill of review following dismissal of action for lack of prosecution. I denied the petition and petitioner appealed. The Court of Appeals held that dismissal was invalid on due process grounds where notice of dismissal hearing was not given to plaintiff or her attorneys, and constitutional infirmity was not cured even if plaintiff

and her lawyers were notified of the signing of the order of dismissal. The Court of Appeals reversed and remanded.

4. *Texas Employment Com'n v. Alvarez*, 915 S.W.2d 338 (Tex.App.–Corpus Christi 1997)

Personal injury action was brought against Texas Employment Commission. Commission sought to disqualify visiting judge. I imposed sanctions, and Commission sought writ of mandamus. The Court of Appeals held that: (1) objection to judge that did not specifically name judge was insufficient to trigger mandatory prohibition from hearing case; (2) objection to visiting judge was waived by failure to obtain ruling from judge on it; and (3) court's order for sanctions was invalid. The Court of Appeals conditionally granted the writ.

5. *The State of Texas v. Munoz*, 991 S.W.2d 818 (Tex. Crim. App. 1999)

Defendant was charged with one count of deadly conduct and three counts of attempted murder. After 17 months in jail, defendant filed motion to dismiss based on lack of speedy trial. I granted the motion and State appealed. The Court of Appeals affirmed my dismissal. The Court of Criminal Appeals held that: (1) good faith plea negotiations are a valid reason for trial delay and should not be weighed against the prosecution for federal constitutional speedy trial purposes, and (2) 17-month delay did not violate defendant's federal constitutional speedy trial rights under the circumstances. The Court of Criminal Appeals reversed and remanded the case to the trial court.

(3) Significant opinions on federal or state constitutional issues:

I am unaware of any cases which I handled as a judge which involved significant federal or state constitutional issues.

16. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

Board Member (appointed), State Office of Risk Management, 1997 - present
Candidate for District Judge, 139th Judicial District Court, Hidalgo County, TX, 1996
Presidential Commission on Educational Excellence for Hispanic Americans, 2002 - 2003

17. Legal Career:

a. Describe chronologically your law practice and experience after graduation from law school including:

1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;

I have never served as a clerk to a judge.

2. whether you practiced alone, and if so, the addresses and dates;

I have never been a solo practitioner.

3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;

July 1997 to present: Hole & Alvarez, L.L.P., 612 W. Nolana, Suite 370, McAllen, Texas 78504

Litigation attorney (partner). Handling all types of litigation, but primarily medical malpractice defense, insurance defense, products liability, employment defense, and wrongful discharge defense.

January 1997 to June 1997: Law Offices of Ronald G. Hole, 4800 N. 10th, Suite C, McAllen, Texas 78504

Litigation attorney (associate). Handling all types of litigation, but primarily insurance defense, employment defense, wrongful discharge defense, medical malpractice defense and products liability.

July 1995 to December 1996: Presiding Judge, 139th Judicial District Court, Hidalgo County, Texas (court of general jurisdiction).

July 1993 to June 1995: Law Offices of Ronald G. Hole, 4800 N. 10th, Suite C, McAllen, Texas 78504

Litigation attorney (associate). Handling all types of litigation, but primarily insurance defense, employment defense, wrongful discharge defense, medical malpractice defense and products liability.

August 1989 to June 1993: Atlas & Hall, L.L.P., 818 Pecan, McAllen, Texas 78504

Litigation attorney (associate). Handling all types of litigation, but primarily insurance defense, employment defense and wrongful discharge defense.

b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

I have been a litigation attorney throughout my legal career, with the exception of my brief tenure as a district judge.

2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

Most of my typical former clients are physicians as, for the last several years, I have primarily handled medical malpractice. I have also represented various business entities in employment related disputes and in products liability cases.

c. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.

Throughout my legal career, I have appeared in court frequently. Of course, the frequency of my court appearances has increased over time, due to my increased experience.

2. What percentage of these appearances was in:
   (a) federal courts;
   5-10%
   (b) state courts of record;
   89-90%
   (c) other courts.
   1%

3. What percentage of your litigation was:
   (a) civil;
   98%
   (b) criminal.
   2%

4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

It is difficult for me to estimate the number of cases I have tried to verdict over the course of my career. I would estimate the number to be between twenty and twenty-five. Of these, I would estimate that the majority were cases in which I was associate counsel.

5. What percentage of these trials was:
   (a) jury;
   96%

(b) non-jury.
4%

18. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

1. *Cantu v. Butron*, 960 S.W.2d 91, (Tex. App.–Corpus Christi, 1997)

(a) the date of representation:
1995 -1997;

(b) the name of the court and the name of the judge or judges before whom the case was litigated:
93 Judicial District Court, Hidalgo County, Texas; Judge Fernando Mancias;

(c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

Plaintiffs' counsel:
Jose E. Garcia
4311 N. McColl Road
McAllen, Texas 78504
(956) 630-0081

Co-counsel:
Ronald G. Hole
612 W. Nolana, Suite 370
McAllen, Texas 78504
(956) 631-2891

Co-Defendant's counsel:
Mr. R.E. Lopez
Lopez Peterson & Benavides PLLC
101 W. Hillside Rd Ste. 1
Colonnade Square 1
Laredo, TX, 78041
(956) 718-2134
and

Ms. Christiana Dijkman
Phillips & Akers
3400 Phoenix Tower
3200 Southwest Freeway
Houston, Texas 77027-7523
713) 552-9595

I represented former clients being sued by their former attorney on a wrongful garnishment claim arising from a judgment obtained by the clients against their attorney for legal malpractice. I was trial counsel for the defendants and actively participated in the discovery and pretrial hearings. In the garnishment action, the former attorney obtained a temporary injunction prohibiting collection of a supersedeas bond. On appeal, the temporary injunction was dissolved. After three weeks of trial of the garnishment action, the claim was settled in favor of my clients.

2. *Trico Technologies Corp. v. Montiel*, 949 S.W.2d 308 (Tex. 1997)

(a) the date of representation
1996-1997

(b) the name of the court and the name of the judge or judges before whom the case was litigated:
103rd Judicial District Court, Cameron County, Texas; Judge Menton Murray

(c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

Plaintiff's counsel:
Miguel A. Saldana
Carinhas & Sandana, L.L.P.
302 Kings Highway, Suite 109
Brownsville, Texas 78521
(956) 542-9161

The case was one of first impression for the trial court, the court of appeals, and the Texas Supreme Court. I represented an employer (Defendant) in a wrongful discharge case arising from the lay-off on an employee. After the employee was laid-off, the employer discovered that the employee had lied on the employment application. We argued that because of this "after-acquired evidence" of employee misconduct, the plaintiff was barred from recovery. The Texas Supreme Court held that the "after-acquired evidence" doctrine, while not a complete bar to recovery, could limit the employee's damages for retaliatory discharge. The case was remanded to the trial court and was subsequently settled.

3. *Anthony Alvarez, et al. v. Little Caesar Enterprises, Inc.*, Civil Action No. M-95-245

(a) the date of representation:
1995 -1997;

(b) the name of the court and the name of the judge or judges before whom the case was litigated:
Southern District of Texas, McAllen Division, Judge Ricardo Hinojosa; and

(c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

Co-counsel:
Eric Meyer
Stephen D. Susman
SUSMAN GODFREY, L.L.P.
5100 First Interstate Bank Plaza
1000 Louisiana
Houston, Texas 77002-5096
(713) 653-7853

Plaintiffs' counsel:
Michael A. Caddell
Cynthia Chapman
Caddell & Chapman
1331 Lamar, Suite 1070
Houston, Texas 77010
(713) 751-0400

The case arose from a dispute between a franchisee and Little Caesar's Corporation. The franchisee alleged that Little Caesar's Corporation had breached their contract, had breached duties of good faith and fair dealing, had tortiously interfered with a contract for the sale of the franchise and had conspired with a bank to prevent the sale of the franchise. I, along with co-counsel, represented Little Caesar's Corporation. I handled various discovery matters, participated in all pre-trial hearings and examined various witnesses at the trial. The case involved complicated issues including whether Michigan law governed the claims for breach of contract, tortious interference and conspiracy and whether the plaintiffs could assert a claim for breach of the duty of good faith and fair dealing along with their contract action.

4. *United States of America v. Peter Gayle*, Criminal No. M-97-219

(a) the date of representation:
1996 -1997;

(b) the name of the court and the name of the judge or judges before whom the case was litigated:
Southern District of Texas, McAllen Division, Judge Ricardo Hinojosa; and

(c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

Co-counsel:
Ronald G. Hole
612 W. Nolana, Suite 370
McAllen, Texas 78504
(956) 631-2891

Counsel for the United States
Charlie Dause
Assistant United States Attorney
1701 West Highway 83-Suite 305
McAllen, Texas
(956) 630-3173

I assisted my partner in the defense of a criminal case to which he was appointed by the federal court. The defendant was alleged to have transported a large quantity of marijuana in a concealed compartment of his employer's tractor trailer. I participated in the investigation and was second chair during the trial. The case was a difficult one because our client vigorously asserted his innocence and because neither my partner nor I had previously tried a criminal case, as our practice is civil in nature. The case was further complicated because the transaction in question was part of a larger, ongoing undercover investigation and it was necessary to wade through all the evidence accumulated in the entire investigation.

5. *Bryan Glenn Hole v. Texas A & M University,* Cause No. 03-00860-CV-272

a) the date of representation:
2003-2004

(b) the name of the court and the name of the judge or judges before whom the case was litigated:
272ND Judicial District, Brazos County, Texas; Judge Rick Davis

(c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

Co-counsel:
Ronald G. Hole
612 W. Nolana, Suite 370
McAllen, Texas 78504
(956) 631-2891

Co-Plaintiffs' counsel:
Mr. Tom Matlock
Attorney at Law
8718 Bent Tree
College Station, Texas 78745
(979) 575-5806

Mr. Brandon Baade
P.O. Box 448
Quitman, Texas 75783
(903) 763-3600

Defendant's counsel:
Mr. Russ Harris
Attorney General's Office
General Litigation Division
P.O. Box 12548
Capital Station
Austin, Texas 78711-2548
(512) 463-2120

Mr. Jerry M. Brown
The Texas A&M University System
Office of General Counsel
A&M System Building, Suite 2079
200 Technology Way
College Station, Texas 77845-3424
(979) 458-6120

I, along with my partner, represented members of a university organization (plaintiffs) in a claim that their constitutional rights had been violated in the student disciplinary process when the university sought to expel the students. The Plaintiffs alleged that in conducting its investigation and disciplinary hearings, the University had violated the students' constitutional rights. I participated in the discovery, pretrial and trial of the case. The case was tried to the court and a letter ruling in favor of the Plaintiffs was issued by the Court in early 2004. A final judgment has not been entered.

6. *Vega Roofing Co. v. McAllen Independent School District,* Case No. 13-98-342-CV

a) the date of representation:
1997-1999

(b) the name of the court and the name of the judge or judges before whom the case was litigated:
139th Judicial District, Hidalgo County, Texas; Judge Benjamin Euresti, Jr.

(c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

Co-counsel:
Ronald G. Hole
612 W. Nolana, Suite 370
McAllen, Texas 78504
(956) 631-2891

Defendant's counsel:
Jeffrey A. Brannen
Mcguire Craddock & Strother, PC
500 N AKARD
3550 LINCOLN PLAZA
DALLAS, TX, 75201
(214) 954-6800

I, along with my partner, represented Vega Roofing (Plaintiff) in a breach of contract action against McAllen Independent School District (Defendant) alleging that it had failed to make a final payment pertaining to a roofing contract. The Defendant filed a counter-claim alleging a breach of contract, breach of warranty and negligence. I handled discovery, pre-trial hearing and participated in the trial. The jury found in favor of Plaintiff on its breach of contract action and against Defendant on all claims. The judgment was appealed and the Court of Appeals affirmed on all grounds.

7. *Ramirez v. Carreras*, 10 S.W.3d 757 (Tex. App.–Corpus Christi 2000, no writ)

a) the date of representation:
1997-present

(b) the name of the court and the name of the judge or judges before whom the case was litigated:
332th Judicial District, Hidalgo County, Texas; Judge Mario Ramirez

(c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

Co-counsel:
Ronald G. Hole
612 W. Nolana, Suite 370
McAllen, Texas 78504
(956) 631-2891

Plaintiff's counsel:
Ester Cortez
5415 N. McCall
McAllen, Texas
(956) 631-5686

I, along with my partner, represented a physician who was sued by a worker's compensation claimant, alleging medical negligence, common-law negligence and assault and battery. The physician had been hired by the worker's compensation insurance carrier to perform an impairment rating. A summary judgment was granted by the trial court based on plaintiff's failure to comply with the requirements of Article 4590i of the Texas Medical Liability and Insurance Improvement Act. The negligence claims were severed and were appealed by the Plaintiff. The Court of Appeals reversed the trial court's judgment holding that (1) the relationship between the physician and the claimant was not a physician-patient relationship, and thus the claimant could not hold the physician liable for medical negligence; (2) the claimant presented some evidence that physician breached duty not to injure him and that breach was proximate cause of injuries, thus precluding no-evidence summary judgment; and (3) that the Texas Medical Liability and Insurance Improvement Act did not govern the claim for breach of duty not to injure. The case was remanded and tried to a jury verdict in favor of the physician. The plaintiff has appealed. I handled discovery, pre-trial hearings, co-chaired the trial and am handling the appeal.

8. *Gruma Corporation v. Zurich Compania de Seguros*, Civil Action No. M-02-246

a) the date of representation:
2002-present

(b) the name of the court and the name of the judge or judges before whom the case was litigated:
Southern District of Texas, McAllen Division, Judge Ricardo Hinojosa;

(c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

Co-counsel:
Scott R. Hoyt
Gibson, Dunn & Crutcher, LLP
2100 McKinney Avenue, Suite 1100
Dallas, Texas 75201
Telephone: (214) 698-3100
and
Steven D. Turner
Jones Turner, LLP
23422 Mill Creek Drive, Suite 125
Laguna Hills, California 92653
(949) 581-4451

Plaintiffs' counsel:
David Oliveira
Roerig, Oliveira & Fisher, L.L.P.
506 East Dove Boulevard
McAllen, Texas 78504
(956) 631-8049

I am currently counsel for Zurich Compania de Seguros, a Mexican insurance company, in a case arising from the "Starlink crisis" (the genetically modified corn containing Cry9C). The plaintiff, Gruma Corporation, alleged that Zurich breached its contract of insurance by failing to pay damages for the profits lost as a result of Gruma's exit from the yellow corn market for almost a one year period. The Plaintiff initially filed in state court alleging various causes of action including claims for breach of the duty of good faith and fair dealing and insurance code violations. The case was removed to federal court and all but the breach of contract claim were disposed of before trial. I participated in all the pre-trial hearings and in the trial. The case was just recently settled during trial.

9. *Brummett v. Arango,* Case No. 13-02-00326-CV

a) the date of representation:
2001-present

(b) the name of the court and the name of the judge or judges before whom the case was litigated:
370th Judicial District, Hidalgo County, Texas; Judge Noe Gonzalez

(c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

My partner and I represented a physician in a medical malpractice action in which the Plaintiff failed to comply with the requirements of Article 4590i of the Texas Medical Liability and Insurance Improvement Act. Although the trial court dismissed the case and

awarded attorneys' fees to the defendant/physician, we appealed the court's decision based on the inadequacy of the fees. The Court of Appeals has affirmed the trial court's decision and I have filed a petition for review with the Texas Supreme Court. While I was not actively involved in the hearings leading to the dismissal, I have handled the appeal of this case.

10. *Vasquez, et al Advanta Usa, Inc. d/b/a Garst Seed Co., and Pedro Guillen*, Civil Action No. M-02-162

a) the date of representation:
2002-2003

(b) the name of the court and the name of the judge or judges before whom the case was litigated:
Southern District of Texas, McAllen Division, Judge Ricardo Hinojosa;

(c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

Plaintiffs' counsel:
Melody Fowler-Green
Texas Rural Legal Aid, Inc.
300 W. Texas Blvd.
Weslaco, Texas 78596
(956) 968-6574

Attorney for Defendant Advanta
Raymond Cowley
Rodriguez, Colvin & Chaney, L.L.P.
4900 North 10th, Bldg. A-2
McAllen, Texas 78504
(956) 686-1287

I was counsel for Defendant Pedro Guillen in defense of a claim arising under the Agricultural Worker's Protection Act and certain Illinois state stautes. The plaintiffs were migrant farm-workers who had, through Mr. Guillen, contracted to work for Defendant Advanta. They alleged that Mr. Guillen had violated the Plaintiffs' employment and housing rights pursuant these various statutes. After the plaintiff prevailed through summary judgment on various grounds, the case was settled.

19. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question, please omit any information protected by the attorney-client privilege (unless the privilege has been waived.)

During 2002 - 2003, I was a member of the Presidential Commission on Education Excellence for Hispanic Americans. As a member of the Commission, I participated in the fact finding meetings of the Commission, in the meetings to gather expert testimony, and in the drafting of the Interim Report and the Final Report.

I was counsel for Fratelli Pettinaroli, S.P.A., an Italian corporation, in defense of a claim for indemnity arising from an underlying suit in which a claim was made that my client manufactured a defective shut-off valve. The Plaintiff, Jomar International, Ltd., (the defendant in the underlying action) had settled with the plaintiffs in the underlying suit and sought indemnification from my client. In the indemnity action, Jomar claimed that it was a seller entitled to indemnity from the manufacturer, my client. While I was substituted as counsel later in the litigation, we were able to expeditiously and favorably resolve the case by raising novel issues pertaining to who is a seller and who is a manufacturer.

I was also, and am currently, counsel for Texas Instruments in multiple separate cases involving allegations of a defective speed control deactivation switch. The case involves multiple plaintiffs, multiple defendants, joinder issues and complicated technical issues. As counsel for Texas Instruments, I have handled the majority of the court hearings for cases pending in Hidalgo County and a significant portion of the discovery. While some of such claims have been settled, others remain pending.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.

   In my current practice, we bill on either a monthly or quarterly basis. Therefore, the only anticipated compensation that will be due should I leave my practice will be for any work which has actually been performed at the time that I leave my firm. I anticipate that my percentage of those revenues will be forwarded to me when they are received at the firm. Additionally, I anticipate that any equity in my partnership will be paid out over time, by agreement with my partner which will be determined prior to departure from the firm.

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.

   Since the judicial position for which I am being considered in not in the area where I currently live, I do not anticipate conflicts will be a significant issue. Nonetheless, I believe requiring parties to submit a certificate of interested parties will allow me to make an initial determination of any potential conflicts and in the event a conflict exists, I will follow the guidelines of the Code of Judicial Conduct.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

   I do not have any plans, commitments, or agreements to pursue outside employment during my service with the court.

4. List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding $500 or more (If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.)

Please my Financial Disclosure Report, submitted herewith.

5. Please complete the attached financial net worth statement in detail (Add schedules as called for).

   See attached net worth statement.

6. Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

   Other than my own campaign, I have never held a position or played a role in a political campaign.

AO-10
Rev. 1/2002

FINANCIAL DISCLOSURE REPORT

Calendar Year 2003

Report Required by the Ethics in Government Act of 1978 (5 U.S.C. app. §§ 101-111)

1. Person Reporting (Last name, First name, Middle initial)	2. Court or Organization	3. Date of Report
Alvarez, Micaela	District Court-S.District-TX	6/17/2004
4. Title (Article III Judges indicate active or senior status; magistrate judges indicate full- or part-time) U.S. District Judge - Nominee	5. ReportType (check appropriate type) (•) Nomination, Date 6/16/2004 ( ) Initial ( ) Annual ( ) Final	6. Reporting Period 1/1/2003 to 6/17/2004
7. Chambers or Office Address 612 W. Nolana, Suite 370 McAllen, Texas 78504	8. On the basis of the information contained in this Report and any modifications pertaining thereto, it is, in my opinion, in compliance with applicable laws and regulations. Reviewing Officer_____ Date_____	

IMPORTANT NOTES. The instructions accompanying this form must be followed. Complete all parts, checking the NONE box for each part where you have no reportable information. Sign on last page.

I. POSITIONS. (Reporting individual only; see pp. 9-13 of filing instructions)

☐ NONE - (No reportable positions.)

	POSITION	NAME OF ORGANIZATION/ENTITY
1.	Partner	Hole & Alvarez, L.L.P.
2.	Board Member (current)	State Office of Risk Management - Texas
3.	Board Member (former)	McAllen Airport Advisory Board
4.	Member (former)	Presidential Commission on Educational Excellence for Hispanic Americans

II. AGREEMENTS. (Reporting individual only; see pp. 14-16 of filing instructions)

☐ NONE - (No reportable agreements.)

	DATE	PARTIES AND TERMS
1.	2004	Hole & Alvarez, L.L.P. income earned during partnership
2.	2003	Atlas & Hall, L.L.P. Retirement Plan with former law firm

III. NON-INVESTMENT INCOME (Reporting individual and spouse; see pp. 17-24 of filing instructions)

☐ NONE - (No reportable non-investment income.)

	DATE	SOURCE AND TYPE	GROSS INCOME (yours, not spouse's)
1.	2002	Hole & Alvarez, L.L.P.-partnership income for legal services performed	$118,548 adjusted
2.	'03-04	Hole & Alvarez, L.L.P.-partnership income for legal services performed	$307,455 adjusted

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Alvarez, Micaela	6/17/2004

IV. REIMBURSEMENTS -- transportation, lodging, food, entertainment.

(Includes those to spouse and dependent children. See pp. 25-27 of instructions.)

☐ **NONE** - (No such reportable reimbursements.)

	SOURCE	DESCRIPTION
1.	Exempt	

V. GIFTS. (Includes those to spouse and dependent children. See pp. 28-31 of instructions.)

☐ **NONE** - (No such reportable gifts)

	SOURCE	DESCRIPTION	VALUE
1.	Exempt		

VI. LIABILITIES. (Includes those of spouse and dependent children. See pp. 32-34 of instructions.)

☐ **NONE** - (No reportable liabilities.)

	CREDITOR	DESCRIPTION	VALUE CODE
1.	Ford Motor Company	Note on personal vehicle	K

FINANCIAL DISCLOSURE REPORT
Page 1 of 1

Name of Person Reporting	Date of Report
Alvarez, Micaela	6/17/2004

VII. INVESTMENTS and TRUSTS– income, value, transactions (includes those of the spouse and dependent children. See pp. 34-57 of filing instructions.)

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A -H)	B. (2) Type (e.g. div. rent. or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g. buy, sell, merger, redemption)	If not exempt from disclosure (2) Date: Month - Day	(3) Value Code 2 (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)
☐ **NONE** (No reportable income, assets, or transactions)									
1. Stable Asset Return Fund	A	Dividend	J	T	Exempt				
2. Balanced Fund	A	Dividend	J	T	Exempt				
3. Large-Cap Growth Equity Fund	A	Dividend	J	T	Exempt				
4. Small-Cap Equity Fund	A	Dividend	J	T	Exempt				
5. Centennial Money MKT TR	A	Dividend	L	T	Exempt				
6. Growth Fund of America, Inc.	A	Dividend	K	T	Exempt				
7. MFS Series Trust V research Fund-Class B	A	Dividend	J	T	Exempt				
8. MFS Series Trust I Strategic Growth Fund-Class B	A	Dividend	J	T	Exempt				
9. Rental property-Donna, TX	B	Rent	J	R	Exempt				

1. Income/Gain Codes (See Columns B1 and D4)	A = $1,000 or less	B = $1,001-$2,500	C = $2,501-$5,000	D = $5,001-$15,000	E = $15,001-$50,000
	F = $50,001-$100,000	G = $100,001-$1,000,000	H1 = $1,000,001-$5,000,000	H2 = More than $5,000,000	
2 Value Codes: (See Columns C1 and D3)	J = $15,000 or less	K = $15,001-$50,000	L = $50,001-$100,000	M = $100,001-$250,000	
	N = $250,000-$500,000	O = $500,001-$1,000,000	P1 = $1,000,001-$5,000,000	P2 = $5,000,001-$25,000,000	
	P3 = $25,000,001-$50,000,000		P4 = $More than $50,000,000		

FINANCIAL DISCLOSURE REPORT

Name of Person Reporting	Date of Report
Alvarez, Micaela	6/17/2004

VIII. ADDITIONAL INFORMATION OR EXPLANATIONS (Indicate part of Report.)

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Alvarez, Micaela	6/17/2004

IX. CERTIFICATION.

I certify that all information given above (including information pertaining to my spouse and minor or dependent children, if any) is accurate, true, and complete to the best of my knowledge and belief, and that any information not reported was withheld because it met applicable statutory provisions permitting non-disclosure.

I further certify that earned income from outside employment and honoraria and the acceptance of gifts which have been reported are in compliance with the provisions of 5 U.S.C. § 501 et. seq., 5 U.S.C. § 7353, and Judicial Conference regulations.

Signature Micaela Alvarez Date June 17, 2004

NOTE: ANY INDIVIDUAL WHO KNOWINGLY AND WILFULLY FALSIFIES OR FAILS TO FILE THIS REPORT MAY BE SUBJECT TO CIVIL AND CRIMINAL SANCTIONS (5 U.S.C. app. § 104)

FILING INSTRUCTIONS

Mail signed original and 3 additional copies to:

Committee on Financial Disclosure
Administrative Office of the United States Courts
Suite 2-301
One Columbus Circle, N.E.
Washington, D.C. 20544

FINANCIAL STATEMENT

NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS		LIABILITIES	
Cash on hand and in banks	$10,000.00	Notes payable to banks-secured	- 0 -
U.S. Government securities-add schedule	- 0 -	Notes payable to banks-unsecured	$3,296.00
Listed securities-add schedule	- 0 -	Notes payable to relatives	- 0 -
Unlisted securities--add schedule	- 0 -	Notes payable to others (Ford Motor Co.)	$43,286.00
Accounts and notes receivable:	- 0 -	Accounts and bills due	$2,560.00
Due from relatives and friends	$3,625.00	Unpaid income tax	- 0 -
Due from others	- 0 -	Other unpaid income and interest	- 0 -
Doubtful	$ 500.00	Real estate mortgages payable-schedule attached	$125,273.0
Real estate owned-schedule attached	$172,537.00	Chattel mortgages and other liens payable	- 0 -
Real estate mortgages receivable	- 0 -	Other debts-itemize:	- 0 -
Autos and other personal property	$118,286.00		
Cash value-life insurance	- 0 -		
Other assets itemize:			
Interest in law firm	$100,000.0		
Retirement account	$100,000.0		
		Total liabilities	$174,415.0
		Net Worth	$330,533.0
Total Assets	$504,948.00	Total liabilities and net worth	$504,948.0
CONTINGENT LIABILITIES		GENERAL INFORMATION	
As endorser, comaker or guarantor	- 0 -	Are any assets pledged? (Add schedule)	No
On leases or contracts	- 0 -	Are you defendant in any suits or legal actions?	No
Legal Claims	- 0 -	Have you ever taken bankruptcy?	No
Provision for Federal Income Tax	- 0 -		
Other special debt	- 0 -		

Schedule

Real estate owned:	Home - $158,037.00
Real estate mortgage payable:	Countrywide Home Loans - $ 125,273.00
Real estate owned:	Rental House - $14,500.00 (Mortgage free)
Notes Payable to others:	Ford Motor Company - $43,286.00 2004 Lincoln Aviator

III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

While I have not engaged in any formal pro bono programs, I have provided pro bono legal services to family, friends, and friends of family throughout my legal career. I have also donated my time to a pro se divorce clinic. Additionally, I served as co-counsel for a criminal defendant on a pro bono basis as my partner was appointed by the federal court to represent the defendant. I was also co-counsel (pro bono) for various university students facing expulsion from Texas A & M University. Finally, I have served, without pay, as a board member of the State Office of Risk Management, the McAllen Medical Center Board, the McAllen Airport Advisory Board and the South Texas Community College Legal Assisting Advisory Board.

2. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates -- through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What you have done to try to change these policies?

I do not now, nor have I ever, belonged to such organizations.

3. Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).

I was interviewed by a selection committee which recommended my name for consideration by Senator Kay Bailey Hutchinson and Senator John Cornyn. I was then interviewed by Senator Hutchinson and Senator Cornyn. I have also been interviewed by the White House Counsel's office, the FBI and the Department of Justice.

4. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that

could reasonably be interpreted as asking how you would rule on such case, issue, or question? If so, please explain fully.

No one involved in the process of selecting me as a judicial nominee discussed with me any specific case, legal issue or question in a manner that could reasonably be interpreted as asking me how I would rule on such case, issue, or question.

5. Please discuss your views on the following criticism involving "judicial activism."

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped-many of the prerogatives of other branches and levels of government.

Some of the characteristics of this "judicial activism" have been said to include:

a. A tendency by the judiciary toward problem-solution rather than grievance-resolution;

b. A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;

c. A tendency by the judiciary to impose broad, affirmative duties upon governments and society;

d. A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and

e. A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

The founders of this country, and the framers of the Constitution, provided for three branches of the federal government. The executive branch carries out and enforces the laws made by Congress. The legislative branch has the power to enact legislation. The main role of the federal judiciary is to decide conflicts arising under the Constitution, conflicts involving federal laws, conflicts between state governments and conflicts between citizens of different states.

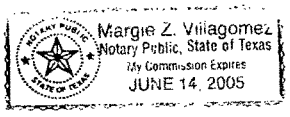
The purpose of the judicial branch is to interpret the laws and actions of the executive and legislative branches, using the Constitution and prior decisions of the

courts, as a foundation. The oath taken by a judge necessarily includes the limits put upon the judicial branch by the Constitution.

AFFIDAVIT

I, Micaela Alvarez, do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

June 17, 2004 (DATE) Micaela Alvarez (NAME)



Margie Z. Villagomez (NOTARY)

Chairman HATCH. Thank you, and we welcome all the rest of your family who have all been introduced. We appreciate having you with us and we are honored by your presence.

Judge STARRETT.

STATEMENT OF KEITH STARRETT, NOMINEE TO BE DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

Judge STARRETT. Thank you, Senator Hatch, and thank you so much for having this hearing today.

I would like to recognize my wife, Barbara, who is here.

Chairman HATCH. Barbara, if you would stand. Delighted to have you here.

Judge STARRETT. I also have my children who were not able to be here today. My son Josh and his wife Melissa, my daughter Leah Claire and her husband Grant Bennett, and my son Whit, are not able to be here today.

I also have two special friends, Judge Joe Pigott and his wife Lorraine are here today, if you would stand. Judge Pigott was my predecessor in office. He served our State and district very well as circuit judge for 17½ years before I took the bench upon his retirement.

Chairman HATCH. We welcome both of you here. It is nice of you to come all this way.

Judge STARRETT. I would also like to point out, Senator, that their son was approved by this Committee about 10 years ago as U.S. Attorney for the Southern District of Mississippi.

Thank you.

[The biographical information of Judge Starrett follows:]

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name (include any former names used.)

Melvin Keith Starrett, Keith Starrett

2. Address: List current place of residence and office address(es).

(Residence)	(Office)
	Post Office Box 1913
McComb, Mississippi 39648	299 Apache Drive, Suite C
	McComb, Mississippi 39649

3. Date and place of birth.

July 15, 1951; McComb, Mississippi

4. Marital Status (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).

Married to Barbara Leah O'Neal Starrett
Occupation - Staff Therapist
Employer - Southwest Mississippi Children's Advocacy Center
Address - 208 North Front Street, McComb, Mississippi 39648

5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

National Judicial College, General Jurisdiction, 1992, Advanced Evidence, 1996, Current Issues in Substance Abuse, 1998, Today's Justice, Historic Bases, 2001, The Fourth Amendment, Comprehensive Training for Trial Judges - (as an instructor), 2004

University of Mississippi School of Law - August 1972-December 1974; Degree Received - Juris Doctor

Mississippi State University - June 1971-August 1972; Degree Received - Bachelor of Science in Business Administration

Millsaps College - August 1969-May 1971 (No degree received)

6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

1972-1977 Worked part-time in my father's business, Farmers Milling and Seed Company, Magnolia, MS

1972-1974 Worked part-time in the law library at the University of Mississippi

1973-1974 Worked part-time as a clerk and abstractor for Omar Craig, Attorney, Oxford, Mississippi

1975-1976 Statham & Watkins Attorneys; employed as an associate attorney

1975-present M-J-K, Inc.; officer and director

1976-1977 Statham and Watkins Attorneys as a junior partner

1977-1979 Statham, Watkins, Starrett and Mitchell Attorneys; partner

1978-1992 First Bank and First Southwest Corporation as a director

1980-1984 Self-employed as solo practitioner - attorney

1981 March and April) State of Mississippi; part-time assistant district attorney for the Fourteenth Circuit Court District

1983-1988 Mississippi Mining and Marketing Company as an officer and director

1984-1986 Practiced law in association with Mr. Gary L. Honea and later formed a partnership Starrett and Honea, PA, said partnership was dissolved in 1986

1985-2003 East McComb Landfill, Inc. officer and director

1986-1992 Self-employed as a solo practitioner - attorney

1990 Liberty Furniture Manufacturing Company as a director

1992-present State of Mississippi as a Circuit Judge

2000-2002 Southwest Mississippi Forestry Association, president

2003-present Brookhaven Outreach Ministries as a director

7. Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

None

8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

Judicial Excellence Award given by the Mississippi Bar Association 2003

Fellow Mississippi Bar Foundation 2003

Justice Achievement Award given by the Mississippi Court Administrators Association 2002

Leadership Award given by the Louisiana Association of Drug Court Professionals 2002

9. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

Mississippi Bar

American Bar Association

Southwest Mississippi Bar Association - served as secretary for several terms and as a president in 1990-91

Appointed to the Mississippi State Judicial Nominating Committee by Governor William Winter 1978-82

Served as delegate for the Conference of Circuit Judges to the Study Commission on the Mississippi Judicial System 2001

Serve on Mississippi Commission to redraft the Mississippi Criminal Code 2002-present

Serve as a director for the Mississippi Association of Drug Court Professionals 2003-present

Serve on the Mississippi Drug Court Commission (appointed by Mississippi Supreme Court Chief Justice) 2002-present

Serve on Faith Based Initiatives and Corrections Transition Team Committee (appointed by Governor Haley Barbour) 2003- present

Member of Conference of Circuit Judges 1992-present

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.

Member of organizations active in lobbying:

Conference of Mississippi Judges

Mississippi Bar Association

Organizations to which I belong:

Southwest Mississippi Forestry Association, president, 2000-2002

Mississippi Forestry Association

McComb Fitness Center

First Baptist Church of McComb, Mississippi

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

Mississippi Supreme Court December 21, 1974 - present

United States District Court for the Northern District of Mississippi December 20, 1974 - present

United States District Court for the Southern District of Mississippi February 13, 1978 - present

There have been no lapses since admission.

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.

Publications:

The Felony Level Drug Courts in Mississippi: An Update. THE MISSISSIPPI LAWYER (April-May 2002)

Effective Solutions for the War on Drugs: Are Drug Courts the Answer? THE MISSISSIPPI LAWYER (January-February 2000)

Is it Time for Drug Courts in Mississippi? MISSISSIPPI POLICE JOURNAL (Winter 1999)

Speeches Involving Issues of Constitutional Law or Legal Policy:

September 15, 1992 spoke to McComb High School Mock Trial Team on Rules of Evidence

December 1, 1992 spoke to Southwest Mississippi Law Enforcement Association regarding issuing involving Circuit Court.

January 20, 1993 spoke to Kiwanis Club in Brookhaven, Mississippi regarding current issues in Circuit Court.

April 14, 1993 speech delivered to the McComb Rotary Club regarding the court system. (Copy attached)

June 22, 1993 spoke to McComb Lions Club regarding general Circuit Court issues.

June 24, 1993 spoke at the opening and dedication of new Pike County Jail in Magnolia, Mississippi.

October 7, 1993 spoke to the Rotary Club in Tylertown, Mississippi regarding the Circuit Court system

October 14, 1993 spoke to Daughters of American Revolution regarding the need for education of felony offenders.

October 27, 1993 same speech as above delivered to the Crystal Springs, Mississippi Chamber of Commerce.

January 12, 1994 speech delivered to the Kiwanis Club in Brookhaven, Mississippi - informational speech about the court system in our district. (Copy attached)

February 3, 1994 spoke to Lincoln County Bar Association on discovery abuse.

March 17, 1994 speech given to the Exchange Club of McComb, Mississippi - an informational speech about the court system in our district. (Copy attached)

March 19, 1994 speech to the Keenagers Group, an organization of older citizens - an informational speech about the court system in our district (Copy attached)

June 7, 1994 Speaking to community group in Copiah County, Mississippi regarding problems created by drugs and drug related crime

July 19, 1994 speech to McComb Lions Club regarding criminal problems and problems caused in society.

August 11, 1994 spoke to Senior Citizens Group at Co-Lin Community College regarding substance abuse problems in the community.

April 10, 1995 spoke to government class at North Pike High School in McComb, Mississippi regarding the judicial system.

April 13, 1995 spoke at Higgins Middle School in McComb, Mississippi on democracy and rights of citizens.

January 11, 1996 spoke to Exchange Club in Brookhaven, Mississippi regarding circuit court.

June 6, 1996 gave speech entitled "Education and the

Judicial System" delivered to the State Correctional Education Conference, Jackson, Mississippi

January 13, 1997 program presented to Southwest Mississippi Bar Association on Mississippi Tort Claim Act

November 6, 1997 spoke to Southwest Mississippi Bar Association regarding circuit court issues.

February 19, 1998 spoke to Exchange Club in Brookhaven, Mississippi on general circuit court issues.

April 3, 1998 spoke at St. James Missionary Baptist Church regarding community involvement and assisting persons involved in the criminal justice system. St. James is the largest African-American church in Lincoln County, Mississippi.

May 14, 1998 spoke for Law Day Program at Osyka Elementary School in Osyka, Mississippi. Topic of speech - Celebrate Your Freedom.

January 5, 1999 spoke to McComb Lions Club regarding sentencing alternatives used in circuit court.

January 22, 1999 spoke to Southwest Mississippi Bar Association - circuit court update.

February 4, 1999 spoke to McComb Lions Club regarding Drug Court.

February 25, 1999 spoke to Neighborhood Watch Group regarding increase in crime in our communities.

March 18, 1999 spoke to group of judges at Jolimar Recovery Center regarding our new Drug Court Program.

April 7, 1999 spoke to class at Copiah Lincoln Community College in Wesson, Mississippi on charge to the grand jury.

August 12, 1999 Presenter for the Mississippi Department of Human Services, speech dealing with community based family resources and support programs for children

August 17, 1999 spoke to National Association of Social Workers, Chapter in Bogue Chitto, Mississippi.

September 11, 1999 spoke to a study conference of Mississippi Defense Lawyers Association in Jackson, Mississippi regarding litigation techniques.

October 17, 1999 Speech delivered at Adams United Methodist Church on the breakdowns in society and the problems created in the criminal justice system.

December 11, 1999 spoke to Lincoln County Land Owners Association regarding trespass.

January 30, 2000 spoke at dedication of New Zion Baptist Church in Tylertown, Mississippi. Topic - the church's mission to its community.

February 16, 2000 spoke to Mississippi Association of Circuit Clerks at their annual meeting on drug court programs.

March 22, 2000 spoke to government class at Co-Lin Community College in Wesson, Mississippi regarding circuit court.

May 22, 2000 spoke at Sweet Home Missionary Baptist Church in McComb, Mississippi regarding drug courts.

June 22, 2000 presented a program on Mississippi Educational Television on drug courts.

July 25, 2000 spoke at Columbia Rotary Club in Columbia, Mississippi on drug courts.

August 3, 2000 spoke at Juvenile Justice Conference in Jackson, Mississippi on implementation of drug courts in youth court.

April 27, 2001 spoke to Mississippi Association of Legal Assistants in Hattiesburg, Mississippi on drug courts.

July 4, 2001 speech to Wade Baptist Church for a patriotic celebration. (Copy attached)

December 13, 2001 spoke to Law Clerk's Association in Jackson, Mississippi regarding drug courts.

March 20, 2002 spoke to McComb Rotary Club - drug court update.

June 6, 2002 spoke to Community Leadership Program in

McComb, Mississippi on the court system and how it works in the community.

September 11, 2002 spoke at Community September 11 Memorial Program at Parklane High School in McComb, Mississippi regarding sacrifices made by our forefathers.

March 5, 2003 spoke to government class at Southwest Community College in Summit, Mississippi on the court system.

April 3, 2003 spoke at Community Leadership Program on the court system.

April 24, 2003 spoke to Mississippi Association of Court Administrators at their annual conference on drug courts and also received the Judicial Achievement Award from said association.

May 7, 2003 spoke at conference sponsored by Mississippi Bureau of Narcotics Agency on different ways to address the substance abuse problem in our state.

May 12, 2003 spoke to the American Inns of Court in Jackson, Mississippi and presented a program on drug courts.

June 20, 2003 spoke to Jackson County Bar Association in Pascagoula, Mississippi on establishing a drug court in Jackson County.

August 20, 2003 presented at Professionalism Program for new law students at Mississippi College School of Law.

October 2003 Presenter the conference of Mississippi judges on the new Drug Court Law enacted in Mississippi

October 23, 2003 "What is a Drug Court and Why Do We Need Drug Courts" presented to the Mississippi Association of District Attorneys at their annual conference in Tunica, Mississippi.

November 20, 2003 Speech promoting drug courts delivered to a circuit court district in Philadelphia, Mississippi

January 30, 2004 spoke at Southwest Mississippi Regional

Continuing Legal Education of the Mississippi Bar regarding circuit court update.

February 26, 2004 spoke at Exchange Club of Brookhaven, Mississippi - drug court update.

March 30, 2004 spoke at McComb Lions Club in McComb, Mississippi - update on Drug Court.

13. Health: What is the present state of your health? List the date of your last physical examination.

Excellent; February 10, 2004

14. Judicial Office: State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

July 1, 1992-December 1994; Circuit Court Judge for the Fourteenth Circuit Court District of Mississippi; Appointed by Governor Kirk Fordice

January 1, 1995-present; Circuit Court Judge for the Fourteenth Circuit Court District of Mississippi; elected

The jurisdiction for July 1992 through December 1994 included the counties of Lincoln, Pike, Walthall and Copiah.

The jurisdiction from January 1995-present includes the counties of Lincoln, Pike and Walthall.

Circuit Court is a court of general jurisdiction.

15. Citations: If you are or have been a judge, provide: (1) citations for the ten most significant opinions you have written; (2) a short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions.

(1) Citations for the ten most significant opinions written:

1. **Billy K. White and Daphne E. White, A Minor, by And Through Her Natural Mother and Next-Friend, Judy White-Smith v Yellow Freight Systems, Inc. And James D. Parish**, Civil Action Number 5138-A, In the Circuit Court of Pike County, Mississippi. Opinion granting sanctions in August of 2002.

2. **Jane Wactor Scott, et al v Pulse Engineering, Inc., et al**, Civil Action Number 95-0056 in the Circuit Court of Lincoln County, Mississippi. Order issued in June of 2002.

3. **Sue V. Oliver v Sheila Marie Chisolm, et al** in the Circuit Court of Lincoln County, Mississippi, Civil Action Number 94-0022-A. Ruling on motion for summary judgment rendered in March of 1998.

4. **L.W. Individually, and as Next-Friend of Her Son, J.A. v McComb Separate School District and unknown John Does (1-5)**, Civil Action Number 97-004-A in the Circuit Court of Pike County, Mississippi. Order on 12(b)Motion granted in March of 2001. Ruling reversed. **L.W. v the McComb Separate Municipal School District**, 754 So.2d 1136 (Miss. 1999).

5. **Darlene Fortenberry, Natural Mother and Next-Friend and Jeffery Fortenberry, Natural Father and Next-Friends of Michael Charles Fortenberry, A Minor, Individually and on Behalf of Michael Charles Fortenberry v Walthall County Board of Education and Walthall County School District**, Civil Action Number 2001-78-A in the Circuit Court of Walthall County, Mississippi.

6. **Employers Mutual Casualty Insurance Company v Phil Price and Phillip Wayne Price**, Civil Action Number 99-060-A in the Circuit Court of Pike County, Mississippi ordered entered in May of 2001.

7. **State of Mississippi v Glen Conley**, Case Number 15559-A in the Circuit Court of Pike County, Mississippi order overruling general and specific demurrer rendered in June of 1998. Affirmed 790 So.2d 773 (Miss.2001).

8. **Billy Bordeleon, Administratrix of the Estate of Robert Alexander, Deceased v Joseph R. Slaughter and Lott Furniture Company, Inc.**, Cause Number 97-0026-A in the Circuit Court of Pike County, Mississippi. Ordered entered in February 2002.

9. **Air Comfort Systems, Inc. and Jimmy D. Lewis v Honeywell, Inc.**, civil action number 96-0176-A. Ruling on a motion for summary judgment rendered in June of 1998. Affirmed 760 So2d 43 (Miss. App. 2000).

(2) A short summary of and citations for all appellate opinions where my decisions were reversed or where my judgment was affirmed with significant criticism of my substantive or procedural rulings.

I have located 102 of my cases that have been appealed to the Mississippi Supreme Court. Eleven of the cases were reversed and they are as follows:

1. **Reynolds v State**, 818 So.2d 1287 (Miss. App. 2002). This case was one for simple assault on a law enforcement officer. The testimony was that the defendant hit the law enforcement officer with a "glancing blow". The officer did not testify to pain and he related no injury. The indictment did not allege attempted assault and the case was remanded for a new trial because the State did not present proof of actual injury.

2. **Churchill v Pearl River Basin Development**, 757 So.2d 940 (Miss. 1999). The **Churchill** case is a suit by a young man who was swimming at a water park and dove into shallow water, breaking his neck. A jury instruction and special interrogatory on assumption of the risk were given. The Court, in a split decision, found that the doctrine of assumption of the risk had been subsumed into comparative negligence. Following a defendants' verdict, the Court found that the instruction was in error and the case required reversal.

3. **Mississippi Employment Security Commission v Ratcliff**, 754 So.2d 595 (Miss. App. 2000). This case is an appeal of a ruling by the Circuit Court sitting as an intermediate appellant court that

reversed the ruling of the Mississippi Employment Security Commission denying unemployment benefits to Ratcliff. Ratcliff was terminated from her job at Target when it was discovered that she had omitted on her employment application her previous employment at Wal-Mart. The Circuit Court opinion found that this did not rise to the level of gross misconduct and granted the employee unemployment compensation. The Court of Appeals reversed the Circuit Court and reinstated the finding of the Employment Security Commission of no unemployment benefits. The Appellate Court pointed out that the Circuit Court was not at liberty to substitute its opinion for that of an administrative body so long as their was substantial evidence in the record supporting the decision of the administrative body.

5. **Slaughter v State**, 752 So.2d 1092 (Miss. App. 1999). In this case the defendant was indicted for murder and convicted of manslaughter. The basis for the reversal is that the state's attorney asked a question on cross-examination of the defendant regarding a prior occasion when he had drawn a pistol on someone in anger. Once the defendant denied that this had ever occurred the State's attorney called a rebuttal witness to impeach the defendant's testimony. The Court found that setting up an impeachment witness by eliciting an answer to a question on cross-examination was reversible error.

6. **Banks v State**, 726 So.2d 567 (Miss. 1998). This was a conspiracy to sell cocaine case. The defendant was convicted by a jury. There were originally nine people indicted on the conspiracy and Banks was the only one tried. There was evidence that the defendant, Banks, had engaged in conspiracies with two of the co-conspirators. They in fact testified about his involvement in the conspiracy to possess and sell cocaine. There was also some other evidence regarding Banks involvement in the conspiracy. However, the Supreme Court found that there was nothing to connect the two separate conspiracies or to connect the conspiracies with the other six co-indictees. The Court found that there was a material variance between the indictment and the

State's proof and that although sufficient proof of individual conspiracies existed between three of the nine indictees that the State's proof was insufficient to prove the charge laid in the indictment and therefore the evidence failed. The Supreme Court reversed the Court of Appeals, which had affirmed the case.

7. **Lambert v State**, 724 So.2d 392 (Miss. 1998). The defendant Lambert was convicted of one count of touching a child for lustful purposes. Rebuttal testimony was admitted regarding lewd acts of Lambert with other children under Rule 404(b). The Court reversed and found that it was error to allow 404(b) evidence when it involved acts of the defendant with children other than the victim in the case before the Court.

8. **Cotton v State**, 675 So.2d 308 (Miss. 1996). Cotton was convicted of aggravated assault. The victim refused to testify against the defendant and also claimed medical privilege to prevent the doctor from testifying about the gunshot wound through the victim's leg. A police detective was allowed to testify concerning the workings of the weapon used in the assault. The Court found that allowing the detective to testify and give opinions about the gun was error since he was not tendered as an expert witness. Also, the Court found that allowing the doctor to testify regarding the injuries to the victim without the medical privilege being waived constituted error and the case was reversed.

9. **Cowart v State**, 665 So.2d 887 (Miss. 1995). This opinion was not designated for publication. Cowart was indicted for sale of cocaine, conspiracy to sell cocaine and possession of cocaine with intent to distribute. He was found guilty of all three charges by the jury. Defendant had been originally indicted jointly with his brother and was with him when the crack cocaine sale was made. The cases were severed and the Court found that the State failed to present enough proof tying the brothers together and reversed and rendered in favor of Jewel Cowart, Jr.

10. **Robinson v State**, 669 So.2d 793 (Miss. App. 1995).

Louise Robinson was convicted of murder and aggravated assault. As part of its case the State offered and was allowed to present evidence under Rule 404(b). The evidence that was used included prior instances of violence between the defendant and one of the victims. The Appellate Court found that the evidence did not fall within one of the exceptions for character evidence stated in Rule 404(b) and that the evidence was inadmissible and constituted reversible error.

11. **L.W. v the McComb Separate Municipal School District,** 754 So.2d 1136 (Miss. 1999). A student was assaulted by another student after leaving school. The plaintiff alleged that the school district was negligent in its supervision of the students and that there was evidence of "bullying" at school which should have alerted the school district to provide protection for the student even after leaving the school property. Summary judgment was granted based on the newly enacted Mississippi Tort Claim Act and the case against the school district was dismissed. The Supreme Court in a very far reaching opinion, reversed the finding of immunity pursuant to the Tort Claim Act.

(3) Citations for significant opinions on federal or state constitutional issues:

1. **Hollywood Cemetery Association v Board of Mayor and Selectmen of the City of McComb City, Mississippi, etc.** Civil Action Number 96-0168-A and Civil Action Number 97-0064-A combined. The ruling on Bills of Exception rendered in May of 1998. Affirmed 760 So2d 715 (Miss. 2000).

16. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

(A) March & April 1981 - Part-time Assistant District Attorney for the Fourteenth Circuit Court District of Mississippi. (Appointed)

(B) 1987 unsuccessful candidate for Mississippi State

Senate.

2000 unsuccessful candidate for Mississippi Supreme Court.

17. Legal Career:

a. Describe chronologically your law practice and experience after graduation from law school including:

1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;

I did not serve as a clerk to a judge.

2. whether you practiced alone, and if so, the addresses and dates;

January 1980-1982 - I practiced as a sole practitioner at 101 North Cherry Street, Magnolia, Mississippi 39652 in a building called The 101 Building.

1982-1984 - I was a sole practitioner and my practice was located at 265 South Cherry Street in Magnolia, Mississippi.

1984-1986 I practiced in association with Gary Honea. The association was known as Starrett and Honea.

1986-1989 I practiced as a sole practitioner at 265 South Cherry Street, Magnolia, Mississippi 39652.

1989-1992 I practiced as a sole practitioner at 299 Apache Drive, Suite A, McComb, Mississippi 39648.

3. the dates, names and addresses of law firms or offices, companies or

governmental agencies with which you have been connected, and the nature of your connection with each;

1975-1977 Statham and Watkins; 110 North Cherry Street, Magnolia, Mississippi 39652. I practiced with Mr. B.D. Statham and Mr. William Watkins as an associate.

1977-1979 Statham, Watkins, Starrett and Mitchell; 110 North Cherry Street, Magnolia, Mississippi 39652. I practiced with Mr. William Watkins and Mr. Lem Mitchell as a partner.

1984-1986 I practiced in association with Mr. Gary L. Honea with the firm of Starrett and Honea as a partner. Our office was located at 265 South Cherry Street, Magnolia, Mississippi.

1981 (March & April) I worked for the State of Mississippi as a part-time assistant district attorney for newly elected district attorney in the Fourteenth Circuit Court District. Our arrangement was that I work for a couple of months to help him get his office up and running and then return to full time private practice. Our office was located at 210 East Bay Street, Magnolia, Mississippi.

1992-present State of Mississippi - I have served as circuit judge for the Fourteenth Circuit Court District. My office is located at 299 Apache Drive, Suite C, McComb, Mississippi 39648.

b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

During my entire law practice I worked as a small town practitioner representing plaintiffs, defendants, debtors, creditors and criminal defendants. My practice included real estate, personal injury, bankruptcy, criminal defense, domestic relations and commercial litigation.

2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

My typical former clients would be individuals. I did not specialize but most of my income was generated through litigation and real estate practice.

c. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.

I appeared in court frequently, averaging at least one litigated issue in a court of record each week during my entire practice.

2. What percentage of these appearances was in:
(a) federal courts; 10%
(b) state courts of record; 85%
(c) other courts. 5%

3. What percentage of your litigation was:
(a) civil; 90%
(b) criminal. 10%

4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

I tried at least four hundred cases as sole or chief counsel and a few as associate counsel.

5. What percentage of these trials was:
(a) jury; 15%

(b) non-jury.85%

18. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

(a) the date of representation;
(b) the name of the court and the name of the judge or judges before whom the case was litigated; and
(c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

(1) **Entex Inc. v McGuire**, reported at 414 So.2d 437 (Miss. 1982). This was a suit that was tried in the Circuit Court of Pike County, Mississippi. I represented two individuals whose home was destroyed by an explosion and fire that was caused by the employees of the City of McComb performing maintenance work on a water line and striking a gas line. During the trial in circuit court, I worked with co-counsel Breed O. Mounger, Jr., and obtained a verdict on behalf of the plaintiffs. I handled the appeal alone. I represented the McGuires from about January of 1980 through the conclusion of the case. My work included investigation, preparation, trial and appeal of the case. The case was tried before:

Honorable Joe N. Pigott
Circuit Judge
Post Office Box 1916
McComb, Mississippi 39649
phone number 601-684-8155.

My co-counsel was:

Honorable Breed O. Mounger, Jr.
Post Office Box 191
Tylertown, Mississippi 39667
Phone number 601-876-4011.

The principal counsel for the City of McComb was:

Honorable Robert W. Brumfield
119 North Broadway Street
Post Office Box 886
McComb, Mississippi 39649
Phone number 601-684-6421.

The principal counsel for Entex was:

Honorable Newt Harrison
Suite 1400, 248 East Capitol Street
Jackson, Mississippi 39205
Phone number 601-948-3101.

The case was affirmed in part and reversed in part by the Mississippi Supreme Court. On re-trial we obtained a verdict that was not appealed. At the time it was one of the largest verdicts ever rendered in Pike County, Mississippi.

(2) **Illinois Central Gulf Railroad Company v Sanders,** 368 So.2d 839 (Miss. 1979) and **Illinois Central Gulf Railroad Company v Sanders**, 440 So.2d 1009 (Miss. 1983).
The litigation was a suit for damages brought by my client, Mrs. Blanche Bacot Sanders, against Illinois Central Gulf Railroad Company for flooding that was caused by the improper maintenance of the railroad right-of-way. A significant flooding problem was caused, killing a large volume of trees. Representation was begun in 1975 and concluded in 1983 when the verdict in favor of my client was finally affirmed by the Mississippi Supreme Court. The case was tried before Honorable Bert Jones, Chancery Judge (now deceased) in the Chancery Court of Pike County, Mississippi. I handled the case for the plaintiff alone.

The principal counsel for the railroad was:

Honorable Robert W. Brumfield
119 North Broadway Street
Post Office Box 886
McComb, Mississippi 39649
Phone number 601-684-6421.

(3) **Masonite Corp. v Williamson and Tate,** 404 So.2d

565 (Miss. 1981). The case was tried in the Chancery Court of Pike County, Mississippi before Honorable Bert Jones, Chancery Judge (now deceased). I represented the individual plaintiffs Mrs. Marie Williamson and Mr. W.B. Tate. The case involved the theft of a large volume of timber from property owned by the plaintiffs and the conversion of the timber by a number of different sawmills. I represented the plaintiffs from 1979 through 1981 and handled the preparation, trial and appeal of the case. The case was affirmed on appeal and established current law as to measure of damages in timber theft cases.

One of the defendants was represented by:

Honorable John Gordon Roach, Jr.
225 Canal Street
Post Office Box 506
McComb, Mississippi 39649
Phone number 601-684-6630.

The other attorneys are deceased.

(4) **Rogers, et al v Ainsworth**, Case Number 29,967 in the Chancery Court of Pike County, Mississippi. The case was tried by:

Honorable R. B. Reeves
Chancery Judge (now retired)
208 Third Street
Post Office Box 1144
McComb, Mississippi 39649
Phone number 601-684-5336.

The litigation was by owners of an interest in an oil field against the operator and co-owner of the oil field for conversion. It involved the over billing, theft and fraud by the operator in the operations of the oil field and involved hundreds of thousands of dollars in fraud and over charges. I represented all of the plaintiffs.

The defendant was represented by:

Honorable John Jefferies
Post Office Box 6
Laurel, Mississippi 39441

Phone number 601-426-3626.

The case was very complex and involved an immense amount of accounting and discovery work. The case was settled in the middle of the trial for a substantial sum of money. The case was filed December 8, 1982 and finally dismissed October 4, 1985.

(5) **Williams and McBride v Magnolia Electric Power Association**, Case Number 4059 in the Circuit Court of Pike County, Mississippi. I represented the plaintiffs in an electrical injury case against Magnolia Electric Power Association. The case was filed in January of 1984 and was finally settled and dismissed in July of 1986. The case involved negligence in the installation and maintenance of electrical power lines and severe personal injuries resulting from the alleged negligence.

My co-counsel in this case was:

Honorable Ronald Whittington
229 Main Street
Post Office Drawer 1919
McComb, Mississippi 39649
Phone number 601-684-8888.

Counsel for the defendant was:

Honorable Jack Land
Bryan, Nelson, Randolph and Weathers
6524 U.S. Highway 98, West
Hattiesburg, Mississippi 39402
Phone number 601-261-4100.

The judge that handled this case was:

Honorable Joe N. Pigott
Circuit Judge
Post Office Box 1916
McComb, Mississippi 39649
Phone number 601-684-8155.

(6) **State of Mississippi v David Jackson**, docket number 12,523 in the Circuit Court of Pike County,

Mississippi. The presiding judge was:

Honorable Joe N. Pigott
Post Office Box 1916
McComb, Mississippi 39649
Phone number 601-684-8155.

I represented the defendant, Mr. David Jackson, as sole counsel. The counsel for the State of Mississippi was:

Honorable Dunnica Ott Lampton
188 East Capitol Street, Suite 500
Jackson, Mississippi 39201
Phone number 601-973-2832.

The case involved a conspiracy to commit capital murder or murder for hire. Mr. Jackson was the president of the local Chamber of Commerce and a businessman in McComb who allegedly hired two men to kill his estranged wife who was in the state of Tennessee. The case was tried to a conclusion and a defendant's verdict was reached.

(7) **Billy Joe Fortenberry v Wyeth Laboratories**, Case Number 4300 in the Circuit Court of Pike County, Mississippi. The case was a products liability and medical malpractice case brought against the physician administering and the manufacturer of a flu vaccine. The case was filed October 31, 1985 in the Circuit Court of Pike County, Mississippi. I was co-counsel with:

Honorable Ralph Chapman
501 First Street
Post Office Box 428
Clarksdale, Mississippi 39614
Phone number 662-627-4105.

The defendant was represented by:

Honorable Roy Smith
Suite 400, 4400 Old Canton Road
Post Office Box 1084
Jackson, Mississippi 39215-1084
Phone number 601-969-7607.

The case was filed October 31, 1985 and was

finally ruled on by the Mississippi Supreme Court in September of 1988. At the trial there was a verdict rendered in favor of the plaintiff in the amount of $200,000.00. The case was reversed and rendered by the Mississippi Supreme Court. I did not participate in the appeal. The presiding judge was:

Honorable Joe N. Pigott
Post Office Box 1916
McComb, Mississippi 39649
Phone number 601-684-8155.

The case is reported at 530 So.2d 688 (Miss.1988).

(8) **Charles Smith, et al v Chevron U.S.A., et al** Civil Action No. 96-0298-A; In the Circuit Court of Lincoln County, Mississippi and ten other separate filings involving numerous other Plaintiffs with the same defendants all filed in the Circuit Court of Lincoln County, Mississippi.

The above cases were mass tort cases wherein a group of personal injury claimants and property damage claimants sued Chevron U.S.A. for pollution, including radio active pollution for a large area in Lincoln County. There were approximately fourteen hundred plaintiffs that alleged both personal injuries and property damage that resulted from the contamination of approximately six thousand acres. The cases went on over a period of approximately six years and included one five week trial. All of the cases involved very complex fact situations and immense amounts of expert testimony. I handled this case as judge. The primary lawyers involved were:

Jeffery S. Thompson
Williams, Bailey Law Firm, LLP
8441 Gulf Freeway, Suite 600
Houston, Texas 77017
Phone 713-230-2200

Thomas E. Bilek
Hoffener, Bilek and Eidman, LLP
440 Louisiana, Suite 720
Houston, Texas 77002

Phone 713-227-7720

Stewart Smith
Attorney at Law
365 Canal Street, Suite 2850
New Orleans, Louisiana 70130
Phone 504-593-9600

Robert E. Meadows
1100 Louisiana Street, Suite 4000
Houston, Texas 77002-5213
Phone 713-276-7370

William Keffer
Attorney at Law
8401 North Central Expressway, Suite 630, LB #10
Dallas, Texas 75225
Phone 214-696-2050

Robert O. Allen
Attorney at Law
214 Justice Street
Brookhaven, Mississippi 39601
Phone 601-833-4361.

(9) **J.C. Givens v Transworld Drilling Company, et al**, Docket number 6:86CV1485 In the United States District Court for the Western District of Louisiana. Co-counsel for the plaintiff was:

Honorable James George
1505 Perkins Road
Building 2, Suite D
Baton Rouge, Louisiana 70810
Phone number 225-769-3064

The case was a personal injury case involving a defective alignment of a stairway coming down from the crane on a offshore drilling rig. The defendant, Transworld, was represented by:

Honorable Nicholas Gachassin
Gachassin & Hunter
Post Office Box 2850
Lafayette, Louisiana 70502
Phone number 337-235-4576.

The case involved a significant amount of

discovery, expert preparation, etc., but was settled for a very significant amount of money shortly before trial. The judge that handled the case was:

Honorable Mildred Methvin
800 Lafayette Street, Suite 3500
Lafayette, Louisiana 70501
Phone number 337-593-5140.

(10) **Katherine Fairburn v Chemhaulers, Inc.**, docket number 8458 in the U.S. District Court for the Eastern District of Louisiana,(New Orleans). Co-counsel for the plaintiff was:

Honorable Ralph Brewer
200 Government Street, Suite 210
Baton Rouge, Louisiana 70802
Phone number 225-387-0293.

Counsel for the defendants was:

Honorable Craig R. Nelson
610 Baronne Street
New Orleans, Louisiana 70113
Phone number 504-524-6221.

The case was a wrongful death case which occurred when an eighteen wheeler struck my client's vehicle as he was traveling down the interstate, causing his truck to flip and his death. The case was settled the night before the trial was to begin for a significant sum of money in a structure for the widow and four children.

The judge that handled the case was Honorable Patrick Carr, now deceased.

19. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question, please omit any information protected by the attorney-client privilege (unless the privilege has been waived.)

1. Representation of First Bank and First Southwest

Corporation in a potential Chapter 11 filing of First Southwest Corporation. During the very difficult financial times for banks during 1988-1991 the holding corporation of First Bank considered the filing of a bankruptcy. There were significant dealings regarding same. There was a workout arranged with the holding company lender and no Chapter 11 was filed.

2. In 1995 I presided at judge in the case of King v Illinois Central Railroad *in the Circuit Court of Lincoln County, Mississippi. The case was a wrongful death case but the special significance of the case was that nationally known author John Grisham was the plaintiff's attorney. The case was covered by national and international media. My staff and I developed a plan to deal with this extremely high profile case, including the ground rules for reporters and spectators. The case flowed very smoothly with no problems attributable to the notoriety of the case.*

3. *In 1999 and 2000 I presided over the case of State of Mississippi v Michael Rubenstein. Mr. Rubenstein was charged with three counts of murder, including the murder of a child, to collect a large insurance policy. The case involved numerous nationally known forensic experts and complex legal and evidentiary issues. The case was tried the first time for eleven days and resulted in a hung jury. The case was tried the second time in 2000 and Mr. Rubenstein was convicted and sentenced to death. The case has been reported on CBC news program Sixty Minutes, ABC's 20/20 News Program and last month was the topic of a forty minute segment of A&E's Cold Case Files.*

4. I assisted in the development and financing of a subdivision called Chatawa Bluffs and its owners subsequent development of a time share camping club located on the Bogue Chitto River. There were many details that were handled, including the closing of a multimillion dollar loan in Hartford, Connecticut.

5. In 1999 I started the first felony level drug court in Mississippi. The court has developed into the model court for Mississippi and other drug courts that have been started have followed our model. The drug court program has been developing in Mississippi over the last five years and I have led the charge to develop drug courts in our state. I participated in writing

the current law and am currently involved in obtaining statewide funding for the program. I have put on and participated in numerous educational programs and promotions for drug courts in Mississippi.

6. Throughout my career I have been interested in alternatives to incarceration for non-violent, non-drug dealing offenders. I have promoted the restitution center program operated by the Department of Corrections and various educational and drug treatment programs through the correctional system. I have also been instrumental in setting up special programs for women offenders and working to ensure that women have increased opportunities for alternatives in the correctional system.

7. I worked for and was a part of having a GED Program and a Drug and Alcohol Program established in the Pike County Jail. In 2002 I was given the Leadership Award by the Louisiana Association of Drug Court Professionals.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.

   Mississippi State Retirement System benefits payable at age 65. I also have participated in a Deferred Compensation Program through the Public Employees Retirement System of Mississippi, which will be payable to me at sometime following my severance of employment with the State of Mississippi.

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.

   When I see parties involved in litigation that could potentially cause a conflict of interest or be perceived as a conflict of interest, I disclose it to the attorneys. An example of this would be when one of my former law partners is involved in the litigation, I will disclose it to the attorney on the other side. Also, when one of my close personal friends is involved in litigation, I will disclose it to the opposing counsel and offer to recuse myself. If one side or the other verbally requests it, then I do recuse myself. I have had very few requests for recusal over twelve years and have only had three or four written motions filed. I try to very carefully follow the Code of Judicial Conduct and comply with the code in dealing with conflicts and potential conflicts.

   I know of no other litigation or financial arrangements that are likely to present potential conflicts of interest. I have served as a judge for twelve years.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during

your service with the court? If so, explain.

No

4. List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding $500 or more (If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.)

See financial disclosure report required by Ethics in Government Act of 1978.

5. Please complete the attached financial net worth statement in detail (Add schedules as called for).

See attached net worth statement.

6. Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

I have never held a position in any political campaign other than my own campaigns. However, I worked as a volunteer for many political campaigns prior to becoming circuit judge. The work that I did included making phone calls, encouraging people to vote and passing out literature. Occasionally I put up some yard signs. My role in campaigns other than my own was always minor and I did no more than many other volunteers.

FINANCIAL STATEMENT

NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS				LIABILITIES			
Cash on hand and in banks	10	000	00	Notes payable to banks-secured			0
U.S. Government securities-add schedule			0	Notes payable to banks-unsecured			0
Listed securities-add schedule	251	000	00	Notes payable to relatives			0
Unlisted securities--add schedule	378	425	00	Notes payable to others			0
Accounts and notes receivable:			0	Accounts and bills due			0
Due from relatives and friends			0	Unpaid income tax			0
Due from others			0	Other unpaid income and interest			0
Doubtful			0	Real estate mortgages payable-add schedule Federal Land Bank	350	000	00
Real estate owned-add schedule	3127	000	00	Chattel mortgages and other liens payable GMAC	17	000	00
Real estate mortgages receivable	566	000	00	Other debts-itemize:			
Autos and other personal property	1000	000	00	Misc. unsecured debt and credit card debt			0
Cash value-life insurance			0				
Other assets itemize:				Margin debt on Brokerage account (net)	60	000	00
Pension Plan & IRAs and 401K Plan	11000	000	00				
				Total liabilities	427	000	00

				Net Worth	5125	425	00
Total Assets	5552	425	00	Total liabilities and net worth	5552	425	00
CONTINGENT LIABILITIES				GENERAL INFORMATION			
As endorser, comaker or guarantor			0	Are any assets pledged? (Add schedule) Yes (schedule attached)			
On leases or contracts			0	Are you defendant in any suits or legal actions? No			
Legal Claims			0	Have you ever taken bankruptcy? No			
Provision for Federal Income Tax	20	000	00				
Other special debt			0				

III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

Prior to taking the bench I took pro-bono cases and averaged ten to twenty hours per year doing pro-bono work. I also have done an extensive amount of volunteer work through school, community and church organizations.

Since becoming judge I have worked with Department of Corrections and local officials with improving the programs for prisoners, both in the county jails and in the state institutions. I have been instrumental in having GED programs and drug treatment programs established in local jails. For the last six or seven years I have spent an extensive amount of time working to develop a drug court system for Mississippi and a drug court for this district. This work included starting and insuring the success of the first felony level drug court in Mississippi, which has developed into the model drug court for Mississippi. I continue to direct this program which has branched out into a second special purpose court, being a felony DUI program. We have developed several new programs, including a Naltrexone program, a women offenders program, special women's issue groups, family groups and other innovative processes and procedures through the drug court. In 2002 I was given the Leadership Award by the Louisiana Association for Drug Court Professionals.

I also currently serve on numerous boards and commissions on a volunteer basis. I mentor a fourth grade at risk child and have encouraged others to mentor children.

2. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates -- through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What you have done to try to change these policies?

No.

3. Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).

No.
N/A.

I was recommended by United States Senators Thad Cochran and Trent Lott. I then participated in an interview process with Deputy White House Counsel and Department of Justice staff. The White House Counsel indicated that I would considered further and requested that I complete forms and undergo an FBI background investigation.

4. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as asking how you would rule on such case, issue, or question? If so, please explain fully.

No.

5. Please discuss your views on the following criticism involving "judicial activism."

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped-many of the prerogatives of other branches and levels of government.

Some of the characteristics of this "judicial activism" have been said to include:

a. A tendency by the judiciary toward problem-solution rather than grievance-resolution;

b. A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;

c. A tendency by the judiciary to impose broad, affirmative duties upon governments and society;

d. A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and

e. A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

Our government is structured in three separate branches and this structure has worked well for over two hundred years. Each branch has its own separate responsibilities. The role of the judiciary is to resolve disputes and to interpret conflicts in the interpretations of laws made by the legislative branch. It is not the role of the judge to make laws. I believe, and try to practice, the traditional (and what I believe to be the constitutional) purpose for having the court system. We have a system of checks and balances established and if each of branch of government faithfully adheres to its purpose, then our constitutional system of laws will work.

As a trial judge I have an obligation to make sure that litigants are properly before the court and that they have standing to address a specific issue before the court. It is also important to make sure that a pending issue is ripe for a decision and that all of the other processes, including administrative agencies, have been given the opportunity to resolve disputes prior to litigation.

I also believe that our common law system depends on courts giving great deference to stare decisis. Trial judges are required to follow case law established by the appellate courts.

AO-10
Rev. 1/2002

FINANCIAL DISCLOSURE REPORT

FOR CALENDAR YEAR 2003-2004

Report Required by the Ethics in Government Act of 1978, (5 U.S.C. App., §§101-111)

1. Person Reporting *(Last name, first, middle initial)*	2. Court or Organization	3. Date of Report
Starrett, Keith	District Court, Southern District of Mississippi	July 7, 2004

4. Title *(Article III judges indicate active or senior status; magistrate judges indicate full- or part-time)*	5. Report Type (check appropriate type)	6. Reporting Period
United States District Judge	X Nomination, Date 7/6/04 Initial Annual Final	January 1, 2003 - July 6, 2004

7. Chambers or Office Address	8. On the basis of the information contained in this Report and any modifications pertaining thereto, it is, in my opinion, in compliance with applicable laws and regulations.
Post Office Box 1913 McComb, Mississippi 39649-1913	Reviewing Officer _____ Date _____

IMPORTANT NOTES The instructions accompanying this form must be followed. Complete all parts, checking the NONE box for each part where you have no reportable information. Sign on last page.

I. POSITIONS. *(Reporting individual only; see pp. 9-13 of Instructions.)*

	POSITION	NAME OF ORGANIZATION/ENTITY
☐	**NONE** (No reportable positions.)	
1	Officer and Director	M-J-K, INC
2	Officer and Director	East McComb Landfill, Inc.
3	Executor	Estate of Mary Nell R. Starrett (mother's estate)
4	Director	Brookhaven Outreach Ministries
5	Trustee	Keith Starrett Self-Employed Retirement Plan & Trust

II. AGREEMENTS. *(Reporting individual only; see pp. 14-16 of Instructions.)*

	DATE	PARTIES AND TERMS
☐	**NONE** (No reportable agreements.)	
1	2	Mississippi State Employees Pension Fund; Pension Upon Retirement Age 65
2		
3		

III. NON-INVESTMENT INCOME. *(Reporting individual and spouse; see pp. 17-24 of Instructions.)*

	DATE	SOURCE AND TYPE	GROSS INCOME (yours, not
☐	**NONE** (No reportable non-investment income.)		
1	2003 2004	State of Mississippi State of Mississippi	$ 94,600.00 52,200.00
2	2002 2003	Spouse is employed part time with the Southwest Mississippi Children's Advocacy Center in McComb, Mississippi	$
3	2004	Dade Behring Company - Speaking Fee for Program on Drug Courts at Annual Meeting in Dallas, Texas	$ 250.00
4	2003	M-J-K, Inc. Director's Fee	$ 10,000.00
5	2002	M-J-K, Inc. Director's Fee	$ 10,000.00

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting: Keith Starrett	Date of Report: July 7, 2004

IV. REIMBURSEMENTS -- transportation, lodging, food, entertainment.
(Includes those to spouse and dependent children. See pp. 25-27 of Instructions.)

	SOURCE	DESCRIPTION
☐	**NONE** (No such reportable reimbursements.)	
1	Exempt	
2		
3		
4		
5		
6		
7		

V. GIFTS. *(Includes those to spouse and dependent children See pp. 28-31 of Instructions.)*

	SOURCE	DESCRIPTION	VALUE
☐	**NONE** (No such reportable gifts.)		
1	Exempt		$
2			$
3			$
4			$

VI. LIABILITIES. *(Includes those of spouse and dependent children See pp. 32-33 of Instructions.)*

	CREDITOR	DESCRIPTION	VALUE CODE*
☐	**NONE** (No reportable liabilities.)		
1	Federal Land Bank of Texas	Mortgage on Farmland	N
2			
3			
4			
5			
6			

*Value Codes:	J- $15,000 or less	K-$15,001-$50,000	L-$50,001-$100,000	M-$100,001-$250,000
N-$250,001-$500,000				
O-$500,001-$1,000,000	P1-$1,000,001-$5,000,000			P2-$5,000,001-

1. Income/Gain Codes (See Col. B1, D4)	A-$1,000 or less	B-$1,001-$2,500	C-$2,501-$5,000	D-$5,001-$15,000	E-$15,001-$50,000
	F-$50,001-$100,000	G-$100,001-$1,000,000	H1-$1,000,001-$5,000,000	H2-More than $5,000,000	
2. Value Codes (See Cols. C1, D3)	J-$15,000 or less	K-$15,001-$50,000	L-$50,001-$100,000	M-$100,001-$250,000	
	N-$250,001-$500,000	O-$500,001-$1,000,000	P1-$1,000,001-$5,000,000	P2-$5,000,001-$25,000,000	
	P3-$25,000,001-$50,000,000	P4-More than $50,000,000			
3. Value Method Codes (See Col. C2)	Q-Appraisal	R-Cost (real estate only)	S-Assessment	T-Cash Market	
	U-Book value	V-Other	W-Estimated		

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Keith Starrett	July 7, 2004

VII. Page 2 INVESTMENTS and TRUSTS -- income, value, transactions *(Includes those of spouse and dependent children See pp 34-57 of Instructions)*

A. Description of Assets (including trust assets) *Place "(X)" after each asset exempt from prior disclosure.*	B. Income during reporting period (1) Amt. Code1 (A-H)	B. (2) Type (e.g., div., rent or int.)	C. Gross value at end of reporting period (1) Value Code2 (J-P)	C. (2) Value Method Code (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, merger, redemption)	If not exempt from disclosure (2) Date: Month-Day	(3) Value Code2 (J-P)	(4) Gain Code1 (A-H)	(5) Identity of buyer/seller (if private transaction)
☐ NONE (No reportable income, assets, or transactions)									

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Keith Starrett	July 7, 2004

VII. Page 1 INVESTMENTS and TRUSTS -- income, value, transactions *(Includes those of spouse and dependent children. See pp 34-57 of Instructions)*

A. Description of Assets (including trust assets) *Place "(X)" after each asset exempt from prior disclosure.*	B. Income during reporting period (1) Amt. Code1 (A-H)	B. (2) Type (e.g., div., rent or int.)	C. Gross value at end of reporting period (1) Value Code2 (J-P)	C. (2) Value Method Code3 (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, merger, redemption)	If not exempt from disclosure (2) Date: Month-Day	(3) Value Code2 (J-P)	(4) Gain Code1 (A-H)	(5) Identity of buyer/seller (if private transaction)
☐ NONE (No reportable income,									
1 Rental Property No 1 McComb, MS (1999)	F	rent	N	Q	Exempt				
2 Rental Prop. #2 McComb, MS	E	rent	M	W	Exempt				
3 Rent Prop. #3 McComb, MS(1999	E	rent	M	Q	Exempt				
4 Rental Property #4 Magnolia, MS	C	rent	K	W	Exempt				
5 Min Rts. Little Creek Pike Co., MS. Denbury Energy & Pruit Prod	E	royalties	K	W	Exempt				
6 Oakhurst Associates LP	C	rent	A	W	Exempt				
7 Left Blank Intentionally									

1 Income/Gain Codes: A=$1,000 or less B=$1,001-$2,500 C=$2,501-$5,000 D=$5,001-$15,000 E=$15,001-$50,000
(See Col. B1, D4) F=$50,001- $100,000 G=$100,001-$1,000,000 H1=$1,000,001-$5,000,000 H2=More than $5,000,000

2 Value Codes: J=$15,000 or less K=$15,001-$50,000 L=$50,001- $100,000 M=$100,001-$250,000
(See Col. C1, D3) N=$250,001-$500,000 O=$500,001-$1,000,000 P1=$1,000,001-$5,000,000 P2=$5,000,001-$25,000,000
P3=$25,000,001-$50,000,000 P4=More than $50,000,000

3 Value Method Codes: Q=Appraisal R=Cost (real estate only) S=Assessment T=Cash/Market
(See Col. C2) U=Book value V=Other W=Estimated

FINANCIAL DISCLOSURE REPORT

Name of Person Reporting	Date of Report
Keith Starrett	July 7, 2004

VII. Page 3 INVESTMENTS and TRUSTS -- income, value, transactions

(Includes those of spouse and dependent children See pp. 34-57 of Instructions.)

	A. Description of Assets (including trust assets). *Place "(X)" after each asset exempt from prior disclosure.*	B. Income during reporting period (1) Amt. Code1 (A-H)	B. (2) Type (e.g., div., rent or int.)	C. Gross value at end of reporting period (1) Value Code2 (J-P)	C. (2) Value Method Code (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, merger, redemption)	If not exempt from disclosure (2) Date: Month-Day	(3) Value Code2 (J-P)	(4) Gain Code1 (A-H)	(5) Identity of buyer/seller (if private transaction)
	NONE (No reportable income, assets, or transactions)									
8	Pike County National Bank	A	interest	J	T	Exempt				
9	Pike County National Bank	A	dividend	J	T	Exempt				
10	First SW Corp. Common Stock	D	dividend	N	T	Exempt				
11	Alltel Corp Common Stock	A	dividend	J	T	Exempt				
12	AmSouth Bank	A	interest	J	T	Exempt				
13	Federal Land Bank of South MS	A	interest	J	T	Exempt				
14	Royalty Interests Fernwood Field Pike County, Mississippi	A	royalties	J	W	Exempt				
15	Easley Tool and Machine, Inc	A	interest	J	T	Exempt				
16	Walthall County Co-Operative	A	distrib	J	T	Exempt				
17	Timber Walthall Co. MS 2 Tracts	D	timber	O	W	Exempt				
18	Timberland Pike Co., MS 6 Tracts	E	rent & timber	O	W	Exempt				
19	Timberland Felder's Campground Area, Pike County, Mississippi	C	timber sale	L	W	Exempt				
20	East McComb Landfill, Inc.	F	liquidat dividend	A	W	Exempt				
21	Walker #1 Oil Invest. Marion Co. MS	A	royalties	J	W	Exempt				
22	Oppenheimer Quest International Value Fund	A	dividend	J	T	Exempt				

1 Income/Gain Codes: A=$1,000 or less B=$1,001-$2,500 C=$2,501-$5,000 D=$5,001-$15,000 E=$15,001-$50,000
(See Col. B1, D4) F=$50,001- $100,000 G=$100,001-$1,000,000 H1=$1,000,001-$5,000,000 H2=More than $5,000,000

2 Value Codes: J=$15,000 or less K=$15,001-$50,000 L=$50,001- $100,000 M=$100,001-$250,000
(See Col. C1, D3) N=$250,001-$500,000 O=$500,001-$1,000,000 P1=$1,000,001-$5,000,000 P2=$5,000,001-$25,000,000
P3=$25,000,001-$50,000,000 P4=More than $50,000,000

3 Value Method Codes: Q=Appraisal R=Cost (real estate only) S=Assessment T=Cash/Market
(See Col. C2) U=Book value V=Other W=Estimated

FINANCIAL DISCLOSURE REPORT

Name of Person Reporting	Date of Report
Keith Starrett	July 7, 2004

VII. Page 4 INVESTMENTS and TRUSTS -- income, value, transactions *(Includes those of spouse and dependent children. See pp. 34-57 of Instructions.)*

A. Description of Assets (including trust assets) *Place "(X)" after each asset exempt from prior disclosure.*	B. Income during reporting period (1) Amt. Code1 (A-H)	B. (2) Type (e.g., div., rent or int.)	C. Gross value at end of reporting period (1) Value Code2 (J-P)	C. (2) Value Method Code (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, merger, redemption)	If not exempt from disclosure (2) Date: Month-Day	(3) Value Code2 (J-P)	(4) Gain Code1 (A-H)	(5) Identity of buyer/seller (if private transaction)
NONE (No reportable income, assets, or transactions)									
23 Franklin Equity Income Fund	A	dividend	J	T	Exempt				
24 Franklin Rising Dividends Fund	A	dividend	J	T	Exempt				
25 Trust #1 Keith Starrett Self-Emp. Retirement Plan & Trust	B	dividend interest	O	W	Exempt				
All investment decisions involving listed common stocks made by independent investment advisors									
26 ATK									
27 ABK									
28 APH									
29 AOT									
30 ARB									
31 AVCT									
32 BEC									
33 BLK									
34 CRL									
35 CME									

1. Income/Gain Codes: (See Col. B1, D4)	A=$1,000 or less	B=$1,001-$2,500	C=$2,501-$5,000	D=$5,001-$15,000	E=$15,001-$50,000
	F=$50,001- $100,000	G=$100,001-$1,000,000	H1=$1,000,001-$5,000,000	H2=More than $5,000,000	
2. Value Codes: (See Col. C1, D3)	J=$15,000 or less	K=$15,001-$50,000	L=$50,001- $100,000	M=$100,001-$250,000	
	N=$250,001-$500,000	O=$500,001-$1,000,000	P1=$1,000,001-$5,000,000	P2=$5,000,001-$25,000,000	
	P3=$25,000,001-$50,000,000		P4=More than $50,000,000		
3. Value Method Codes: (See Col. C2)	Q=Appraisal	R=Cost (real estate only)	S=Assessment	T=Cash/Market	
	U=Book value	V=Other	W=Estimated		

FINANCIAL DISCLOSURE REPORT

Name of Person Reporting	Date of Report
Keith Starrett	July 7, 2004

VII. Page 5 INVESTMENTS and TRUSTS -- income, value, transactions *(Includes those of spouse and dependent children See pp. 34-57 of Instructions.)*

A. Description of Assets (including trust assets) *Place "(X)" after each asset exempt from prior disclosure.*	B. Income during reporting period (1) Amt. Code1 (A-H)	B. Income during reporting period (2) Type (e.g., div., rent or int.)	C. Gross value at end of reporting period (1) Value Code2 (J-P)	C. Gross value at end of reporting period (2) Value Method Code (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, merger, redemption)	D. Transactions during reporting period — If not exempt from disclosure (2) Date: Month-Day	(3) Value Code2 (J-P)	(4) Gain Code1 (A-H)	(5) Identity of buyer/seller (if private transaction)
☐ **NONE** (No reportable income, assets, or transactions)									
36 CTXS									
37 EXBD									
38 CMLS									
39 DRL									
40 DNB									
41 EW									
42 FIC									
43 GYI									
44 GPN									
45 GTN									
46 GTK									
47 HEW									
48 Raymond James Bank									
49 IMDC									
50 IDC									
51 INTU									
52 IRM									

1 Income/Gain Codes (See Col. B1, D4)	A=$1,000 or less	B=$1,001-$2,500	C=$2,501-$5,000	D=$5,001-$15,000 E=$15,001-$50,000
	F=$50,001- $100,000	G=$100,001-$1,000,000	H1=$1,000,001-$5,000,000	H2=More than $5,000,000
2 Value Codes (See Col. C1, D3)	J=$15,000 or less	K=$15,001-$50,000	L=$50,001- $100,000	M=$100,001-$250,000
	N=$250,001-$500,000	O=$500,001-$1,000,000	P1=$1,000,001-$5,000,000	P2=$5,000,001-$25,000,000
	P3=$25,000,001-$50,000,000		P4=More than $50,000,000	
3 Value Method Codes (See Col. C2)	Q=Appraisal	R=Cost (real estate only)	S=Assessment	T=Cash/Market
	U=Book value	V=Other	W=Estimated	

FINANCIAL DISCLOSURE REPORT

Name of Person Reporting	Date of Report
Keith Starrett	July 7, 2004

VII. Page 6 INVESTMENTS and TRUSTS -- income, value, transactions *(Includes those of spouse and dependent children. See pp 34-57 of Instructions.)*

A. Description of Assets (including trust assets) *Place "(X)" after each asset exempt from prior disclosure.*	B. Income during reporting period (1) Amt. Code1 (A-H)	B. Income during reporting period (2) Type (e.g., div., rent or int.)	C. Gross value at end of reporting period (1) Value Code2 (J-P)	C. Gross value at end of reporting period (2) Value Method Code (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, merger, redemption)	If not exempt from disclosure (2) Date: Month-Day	(3) Value Code2 (J-P)	(4) Gain Code1 (A-H)	(5) Identity of buyer/seller (if private transaction)
NONE (No reportable income, assets, or transactions)									
53 KRON									
54 MATK									
55 MCRS									
56 NXTP									
57 PTV									
58 PNR									
59 PX									
60 PRGS									
61 PL									
62 SEIC									
63 SFA									
64 SMG									
65 SRC;									
66 SDS									
67 TCB									
68 TEK									
69 VAL									

1 Income/Gain Codes: (See Col. B1, D4)	A=$1,000 or less	B=$1,001-$2,500	C=$2,501-$5,000	D=$5,001-$15,000	E=$15,001-$50,000
	F=$50,001- $100,000	G=$100,001-$1,000,000	H1=$1,000,001-$5,000,000	H2=More than $5,000,000	
2 Value Codes: (See Col. C1, D3)	J=$15,000 or less	K=$15,001-$50,000	L=$50,001- $100,000	M=$100,001-$250,000	
	N=$250,001-$500,000	O=$500,001-$1,000,000	P1=$1,000,001-$5,000,000	P2=$5,000,001-$25,000,000	
	P3=$25,000,001-$50,000,000		P4=More than $50,000,000		
3 Value Method Codes: (See Col. C2)	Q=Appraisal	R=Cost (real estate only)	S=Assessment	T=Cash/Market	
	U=Book value	V=Other	W=Estimated		

FINANCIAL DISCLOSURE REPORT

Name of Person Reporting	Date of Report
Keith Starrett	July 7, 2004

VII. Page 7 INVESTMENTS and TRUSTS -- income, value, transactions *(Includes those of spouse and dependent children. See pp. 34-57 of Instructions.)*

A. Description of Assets (including trust assets) *Place "(X)" after each asset exempt from prior disclosure.*	B. Income during reporting period (1) Amt. Code1 (A-H)	B. Income during reporting period (2) Type (e.g., div., rent or int.)	C. Gross value at end of reporting period (1) Value Code2 (J-P)	C. Gross value at end of reporting period (2) Value Method Code (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, merger, redemption)	D. If not exempt from disclosure (2) Date: Month-Day	(3) Value Code2 (J-P)	(4) Gain Code1 (A-H)	(5) Identity of buyer/seller (if private transaction)
NONE (No reportable income, assets, or transactions)									
70 VARI									
71 WTW									
72 XTO									
73 ZBRA									
74 GSF									
75 RNR									
76 MO									
77 AXP									
78 BAC									
79 BAX									
80 CVS									
81 CMCSK									
82 DELL									
83 EMR									
84 XOM									
85 FNM									
86 FDX									
87 GDT									

1. Income/Gain Codes: (See Col. B1, D4)	A=$1,000 or less	B=$1,001-$2,500	C=$2,501-$5,000	D=$5,001-$15,000	E=$15,001-$50,000
	F=$50,001- $100,000	G=$100,001-$1,000,000	H1=$1,000,001-$5,000,000	H2=More than $5,000,000	
2. Value Codes: (See Col. C1, D3)	J=$15,000 or less	K=$15,001-$50,000	L=$50,001- $100,000	M=$100,001-$250,000	
	N=$250,001-$500,000	O=$500,001-$1,000,000	P1=$1,000,001-$5,000,000	P2=$5,000,001-$25,000,000	
	P3=$25,000,001-$50,000,000		P4=More than $50,000,000		
3. Value Method Codes:	Q=Appraisal	R=Cost (real estate only)	S=Assessment	T=Cash/Market	

FINANCIAL DISCLOSURE REPORT

Name of Person Reporting	Date of Report
Keith Starrett	July 7, 2004

VII. Page 8 INVESTMENTS and TRUSTS -- income, value, transactions *(Includes those of spouse and dependent children. See pp. 34-57 of Instructions.)*

A. Description of Assets (including trust assets) *Place "(X)" after each asset exempt from prior disclosure.*	B. Income during reporting period (1) Amt. Code1 (A-H)	B. Income during reporting period (2) Type (e.g., div., rent or int.)	C. Gross value at end of reporting period (1) Value Code2 (J-P)	C. Gross value at end of reporting period (2) Value Method Code (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, merger, redemption)	D. If not exempt from disclosure (2) Date: Month-Day	D. (3) Value Code2 (J-P)	D. (4) Gain Code1 (A-H)	D. (5) Identity of buyer/seller (if private transaction)
☐ **NONE** (No reportable income, assets, or transactions)									
88 HD									
89 ITW									
90 INTC									
91 KMB									
92 MCD									
93 MRK									
94 MSFT									
95 NWL									
96 NOK									
97 OMC									
98 PFE									
99 TSM									
100 TWX									
101 TYC									
102 UTX									
103 WB									
104 WMI									
105 WYE									

1 Income/Gain Codes: (See Col. B1, D4)	A=$1,000 or less	B=$1,001-$2,500	C=$2,501-$5,000	D=$5,001-$15,000	E=$15,001-$50,000
	F=$50,001- $100,000	G=$100,001-$1,000,000	H1=$1,000,001-$5,000,000	H2=More than $5,000,000	
2 Value Codes: (See Col. C1, D3)	J=$15,000 or less	K=$15,001-$50,000	L=$50,001- $100,000	M=$100,001-$250,000	
	N=$250,001-$500,000	O=$500,001-$1,000,000	P1=$1,000,001-$5,000,000	P2=$5,000,001-$25,000,000	
	P3=$25,000,001-$50,000,000		P4=More than $50,000,000		
3 Value Method Codes:	Q=Appraisal	R=Cost (real estate only)	S=Assessment	T=Cash/Market	

FINANCIAL DISCLOSURE REPORT

Name of Person Reporting	Date of Report
Keith Starrett	July 7, 2004

VII. Page 9 INVESTMENTS and TRUSTS -- income, value, transactions *(Includes those of spouse and dependent children. See pp. 34-57 of Instructions.)*

A. Description of Assets (including trust assets) *Place "(X)" after each asset exempt from prior disclosure.*	B. Income during reporting period (1) Amt. Code1 (A-H)	B. (2) Type (e.g., div., rent or int.)	C. Gross value at end of reporting period (1) Value Code2 (J-P)	C. (2) Value Method Code (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, merger, redemption)	D. If not exempt from disclosure (2) Date: Month-Day	(3) Value Code2 (J-P)	(4) Gain Code1 (A-H)	(5) Identity of buyer/seller (if private transaction)
NONE (No reportable income, assets, or transactions)									
106 ILA									
107 MMT									
108 MIRKQ									
109 Mineral Interest, Marion Co., MS Pd. By Scrivanos Engineering									

1 Income/Gain Codes: (See Col. B1, D4)	A=$1,000 or less F=$50,001-$100,000	B=$1,001-$2,500 G=$100,001-$1,000,000	C=$2,501-$5,000 H1=$1,000,001-$5,000,000	D=$5,001-$15,000 H2=More than $5,000,000	E=$15,001-$50,000
2 Value Codes: (See Col. C1, D3)	J=$15,000 or less N=$250,001-$500,000 P3=$25,000,001-$50,000,000	K=$15,001-$50,000 O=$500,001-$1,000,000	L=$50,001-$100,000 P1=$1,000,001-$5,000,000 P4=More than $50,000,000	M=$100,001-$250,000 P2=$5,000,001-$25,000,000	
3 Value Method Codes:	Q=Appraisal	R=Cost (real estate only)	S=Assessment	T=Cash/Market	

FINANCIAL DISCLOSURE REPORT

Name of Person Reporting	Date of Report
Keith Starrett	July 7, 2004

VII. Page 10 INVESTMENTS and TRUSTS -- income, value, transactions

(Includes those of spouse and dependent children. See pp. 34-57 of Instructions.)

A. Description of Assets (including trust assets) *Place "(X)" after each asset exempt from prior disclosure.*	B. Income during reporting period (1) Amt Code1 (A-H)	B. Income during reporting period (2) Type (e.g., div., rent or int.)	C. Gross value at end of reporting period (1) Value Code2 (J-P)	C. Gross value at end of reporting period (2) Value Method Code (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, merger, redemption)	D. Transactions during reporting period If not exempt from disclosure (2) Date: Month-Day	(3) Value Code2 (J-P)	(4) Gain Code1 (A-H)	(5) Identity of buyer/seller (if private transaction)
NONE (No reportable income, assets, or transactions)									
110 Annuity Purchased General Electric Credit Corp									
111 Timberland, Copiah Co., MS									
112 86 acres timberland Noxubee Co . MS									
113 Promissory Note Bohan									
114 1st SW Corp Common Stock									
115 692 Shares Pike Co Nat Bank Common Stock									
116 Guardian Life Insur Policies									
117 IRA #1 Charles Schwab & Co All investment decisions made by independent investment advisors	E	DIV INT	N	T					
118 ABT									
119 AA									
120 ALTR									
121 CLF									
122 AMGN									
123 HSP									
124 CRE									
125 CAKE									
126 SFL									

1 Income/Gain Codes: (See Col. B1, D4)	A=$1,000 or less	B=$1,001-$2,500	C=$2,501-$5,000	D=$5,001-$15,000 E=$15,001-$50,000
	F=$50,001- $100,000	G=$100,001-$1,000,000	H1=$1,000,001-$5,000,000	H2=More than $5,000,000
2 Value Codes: (See Col. C1, D3)	J=$15,000 or less	K=$15,001-$50,000	L=$50,001- $100,000	M=$100,001-$250,000
	N=$250,001-$500,000	O=$500,001-$1,000,000	P1=$1,000,001-$5,000,000	P2=$5,000,001-$25,000,000
	P3=$25,000,001-$50,000,000		P4=More than $50,000,000	
3 Value Method Codes:	Q=Appraisal	R=Cost (real estate only)	S=Assessment	T=Cash/Market

FINANCIAL DISCLOSURE REPORT

Name of Person Reporting	Date of Report
Keith Starrett	July 7, 2004

VII. Page 11 INVESTMENTS and TRUSTS -- income, value, transactions *(Includes those of spouse and dependent children. See pp. 34-57 of Instructions.)*

A. Description of Assets (including trust assets) *Place "(X)" after each asset exempt from prior disclosure.*	B. Income during reporting period (1) Amt. Code1 (A-H)	B. (2) Type (e.g., div., rent or int.)	C. Gross value at end of reporting period (1) Value Code2 (J-P)	C. (2) Value Method Code (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, merger, redemption)	D. If not exempt from disclosure (2) Date: Month-Day	(3) Value Code2 (J-P)	(4) Gain Code1 (A-H)	(5) Identity of buyer/seller (if private transaction)
NONE (No reportable income, assets, or transactions)									
127 CORV									
128 CREE									
129 DD									
130 DUK									
131 EBAY									
132 SNCI									
133 EMR									
134 EOP									
135 FCS									
136 FCX									
137 FDP									
138 FRO									
139 GPS									
140 GE									
141 GM									
142 HD									
143 IFLO									
144 IFN									

1 Income/Gain Codes: A=$1,000 or less B=$1,001-$2,500 C=$2,501-$5,000 D=$5,001-$15,000 E=$15,001-$50,000
(See Col. B1, D4) F=$50,001-$100,000 G=$100,001-$1,000,000 H1=$1,000,001-$5,000,000 H2=More than $5,000,000

2 Value Codes: J=$15,000 or less K=$15,001-$50,000 L=$50,001-$100,000 M=$100,001-$250,000
(See Col. C1, D3) N=$250,001-$500,000 O=$500,001-$1,000,000 P1=$1,000,001-$5,000,000 P2=$5,000,001-$25,000,000
P3=$25,000,001-$50,000,000 P4=More than $50,000,000

3 Value Method Codes: Q=Appraisal R=Cost (real estate only) S=Assessment T=Cash/Market

FINANCIAL DISCLOSURE REPORT

Name of Person Reporting	Date of Report
Keith Starrett	July 7, 2004

VII. Page 12 INVESTMENTS and TRUSTS -- income, value, transactions *(Includes those of spouse and dependent children See pp. 34-57 of Instructions.)*

A. Description of Assets (including trust assets) *Place "(X)" after each asset exempt from prior disclosure.*	B. Income during reporting period (1) Amt Code1 (A-H)	B. Income during reporting period (2) Type (e.g., div., rent or int.)	C. Gross value at end of reporting period (1) Value Code2 (J-P)	C. Gross value at end of reporting period (2) Value Method Code (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, merger, redemption)	D. If not exempt from disclosure (2) Date: Month-Day	D. (3) Value Code2 (J-P)	D. (4) Gain Code1 (A-H)	D. (5) Identity of buyer/seller (if private transaction)
☐ **NONE** (No reportable income, assets, or transactions)									
145 IRF									
146 JNJ									
147 KFX									
148 LNOP									
149 LPX									
150 KRB									
151 MHX									
152 TWR									
153 MNST									
154 NSM									
155 XMSR									
156 PFE									
157 QCOM									
158 RTN									
159 RNWK									
160 SIRI									
161 SLR									
162 SONO									

1 Income/Gain Codes: A=$1,000 or less B=$1,001-$2,500 C=$2,501-$5,000 D=$5,001-$15,000 E=$15,001-$50,000
(See Col. B1; D4) F=$50,001-$100,000 G=$100,001-$1,000,000 H1=$1,000,001-$5,000,000 H2=More than $5,000,000

2 Value Codes: J=$15,000 or less K=$15,001-$50,000 L=$50,001-$100,000 M=$100,001-$250,000
(See Col. C1, D3) N=$250,001-$500,000 O=$500,001-$1,000,000 P1=$1,000,001-$5,000,000 P2=$5,000,001-$25,000,000
P3=$25,000,001-$50,000,000 P4=More than $50,000,000

3 Value Method Codes: Q=Appraisal R=Cost (real estate only) S=Assessment T=Cash/Market

FINANCIAL DISCLOSURE REPORT

Name of Person Reporting	Date of Report
Keith Starrett	July 7, 2004

VII. Page 13 INVESTMENTS and TRUSTS -- income, value, transactions *(Includes those of spouse and dependent children See pp. 34-57 of Instructions.)*

A. Description of Assets (including trust assets) *Place "(X)" after each asset exempt from prior disclosure.*	B. Income during reporting period (1) Amt Code1 (A-H)	B. (2) Type (e.g., div., rent or int.)	C. Gross value at end of reporting period (1) Value Code2 (J-P)	C. (2) Value Method Code (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, merger, redemption)	If not exempt from disclosure (2) Date: Month-Day	(3) Value Code2 (J-P)	(4) Gain Code1 (A-H)	(5) Identity of buyer/seller (if private transaction)
☐ **NONE** (No reportable income, assets, or transactions)									
163 SMRK									
164 LUV									
165 SUNW									
166 SYNA									
167 TE									
168 TXN									
169 WMT									
170 XLNX									
171 Charles Schwab IRA #2	B	DIV	L	T	EXEMPT				
172 BBY									
173 CLF									
174 LPX									
175 SONO									
176 Mother's estate 1/3 of total assets held in Brokerage Account #2	J	DIV & INT	M	T	EXEMPT				

1 Income/Gain Codes: A=$1,000 or less B=$1,001-$2,500 C=$2,501-$5,000 D=$5,001-$15,000 E=$15,001-$50,000
(See Col. B1, D4) F=$50,001-$100,000 G=$100,001-$1,000,000 H1=$1,000,001-$5,000,000 H2=More than $5,000,000

2 Value Codes: J=$15,000 or less K=$15,001-$50,000 L=$50,001- $100,000 M=$100,001-$250,000
(See Col. C1, D3) N=$250,001-$500,000 O=$500,001-$1,000,000 P1=$1,000,001-$5,000,000 P2=$5,000,001-$25,000,000
P3=$25,000,001-$50,000,000 P4=More than $50,000,000

3 Value Method Codes: Q=Appraisal R=Cost (real estate only) S=Assessment T=Cash/Market

FINANCIAL DISCLOSURE REPORT

Name of Person Reporting	Date of Report
Keith Starrett	July 7, 2004

VII. Page 14 INVESTMENTS and TRUSTS -- income, value, transactions *(Includes those of spouse and dependent children. See pp 34-57 of Instructions.)*

A. Description of Assets (including trust assets) *Place "(X)" after each asset exempt from prior disclosure.*	B. Income during reporting period (1) Amt Code1 (A-H)	B. (2) Type (e.g., div., rent or int.)	C. Gross value at end of reporting period (1) Value Code2 (J-P)	C. (2) Value Method Code (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, merger, redemption)	If not exempt from disclosure (2) Date: Month-Day	(3) Value Code2 (J-P)	(4) Gain Code1 (A-H)	(5) Identity of buyer/seller (if private transaction)
☐ **NONE** (No reportable income, assets, or transactions)									
177 JHFT					EXEMPT				
178 LSI					EXEMPT				
179 Charles Schwab Brokerage Acct # 3 Personal, All investment decisions made by independent investment advisors	E	DIV & INT	N	T	EXEMPT				
180 AA	A	DIV	D	T	EXEMPT				
181 ALEX	A	DIV	E	T	EXEMPT				
182 ALD	A	DIV	K	T	EXEMPT				
183 ASO	A	DIV	J	T	EXEMPT				
184 ILA	A	DIV	J	T	EXEMPT				
185 ADM	A	DIV	J	T	EXEMPT				
186 CAT	A	DIV	K	T	EXEMPT				
187 CNP	A	DIV	J	T	EXEMPT				

1 Income/Gain Codes: (See Col. B1, D4) A=$1,000 or less; B=$1,001-$2,500; C=$2,501-$5,000; D=$5,001-$15,000; E=$15,001-$50,000; F=$50,001- $100,000; G=$100,001-$1,000,000; H1=$1,000,001-$5,000,000; H2=More than $5,000,000

2 Value Codes: (See Col. C1, D3) J=$15,000 or less; K=$15,001-$50,000; L=$50,001- $100,000; M=$100,001-$250,000; N=$250,001-$500,000; O=$500,001-$1,000,000; P1=$1,000,001-$5,000,000; P2=$5,000,001-$25,000,000; P3=$25,000,001-$50,000,000; P4=More than $50,000,000

3 Value Method Codes: Q=Appraisal; R=Cost (real estate only); S=Assessment; T=Cash/Market

FINANCIAL DISCLOSURE REPORT

Name of Person Reporting	Date of Report
Keith Starrett	July 7, 2004

VII. Page 15 INVESTMENTS and TRUSTS -- income, value, transactions *(Includes those of spouse and dependent children See pp 34-57 of Instructions.)*

A. Description of Assets (including trust assets) *Place "(X)" after each asset exempt from prior disclosure.*	B. Income during reporting period (1) Amt. Code1 (A-H)	B. Income during reporting period (2) Type (e.g., div., rent or int.)	C. Gross value at end of reporting period (1) Value Code2 (J-P)	C. Gross value at end of reporting period (2) Value Method Code (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, merger, redemption)	D. Transactions during reporting period If not exempt from disclosure (2) Date: Month-Day	(3) Value Code2 (J-P)	(4) Gain Code1 (A-H)	(5) Identity of buyer/seller (if private transaction)
NONE (No reportable income, assets, or transactions)									
188 C	A	DIV	J	T	EXEMPT				
189 CLF	A	DIV	J	T	EXEMPT				
190 DD	A	DIV	J	T	EXEMPT				
191 EBAY	A	DIV	J	T	EXEMPT				
192 EIX	A	DIV	J	T	EXEMPT				
193 EMR	A	DIV	J	T	EXEMPT				
194 ETR	A	DIV	K	T	EXEMPT				
195 FDRY	A	DIV	J	T	EXEMPT				
196 FCX	A	DIV	K	T	EXEMPT				
197 FDP	A	DIV	J	T	EXEMPT				
198 FRO	A	DIV	J	T	EXEMPT				
199 GE	A	DIV	K	T	EXEMPT				
200 GP	A	DIV	J	T	EXEMPT				
201 GTM	C	DIV	K	T	EXEMPT				
202 JNJ	A	DIV	J	T	EXEMPT				
203 KMB	A	DIV	J	T	EXEMPT				
204 LOJN	A	DIV	J	T	EXEMPT				
205 MDT	A	DIV	J	T	EXEMPT				

1 Income/Gain Codes: A=$1,000 or less B=$1,001-$2,500 C=$2,501-$5,000 D=$5,001-$15,000 E=$15,001-$50,000
(See Col. B1, D4) F=$50,001- $100,000 G=$100,001-$1,000,000 H1=$1,000,001-$5,000,000 H2=More than $5,000,000

2 Value Codes: J=$15,000 or less K=$15,001-$50,000 L=$50,001- $100,000 M=$100,001-$250,000
(See Col. C1, D3) N=$250,001-$500,000 O=$500,001-$1,000,000 P1=$1,000,001-$5,000,000 P2=$5,000,001-$25,000,000
P3=$25,000,001-$50,000,000 P4=More than $50,000,000

3 Value Method Codes: Q=Appraisal R=Cost (real estate only) S=Assessment T=Cash/Market

FINANCIAL DISCLOSURE REPORT

Name of Person Reporting	Date of Report
Keith Starrett	July 7, 2004

VII. Page 16 INVESTMENTS and TRUSTS -- income, value, transactions *(Includes those of spouse and dependent children. See pp. 34-57 of Instructions.)*

A. Description of Assets (including trust assets) *Place "(X)" after each asset exempt from prior disclosure.*	B. Income during reporting period (1) Amt. Code1 (A-H)	B. (2) Type (e.g., div., rent or int.)	C. Gross value at end of reporting period (1) Value Code2 (J-P)	C. (2) Value Method Code (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, merger, redemption)	If not exempt from disclosure (2) Date: Month-Day	(3) Value Code2 (J-P)	(4) Gain Code1 (A-H)	(5) Identity of buyer/seller (if private transaction)
☐ **NONE** (No reportable income, assets, or transactions)									
206 MRK	A	DIV	J	T	EXEMPT				
207 MIRKQ	A	DIV	J	T	EXEMPT				
208 GNW	A	DIV	J	T	EXEMPT				
209 NSM	A	DIV	K	T	EXEMPT				
210 MLS	A	DIV	J	T	EXEMPT				
211 PD	A	DIV	J	T	EXEMPT				
212 PXD	A	DIV	K	T	EXEMPT				
213 QCOM	A	DIV	K	T	EXEMPT				
214 RYN	A	DIV	J	T	EXEMPT				
215 RRI	A	DIV	J	T	EXEMPT				
216 REM	A	DIV	J	T	EXEMPT				
217 SVM	A	DIV	J	T	EXEMPT				
218 TSM	A	DIV	J	T	EXEMPT				
219 SFL	A	DIV	J	T	EXEMPT				
220 SO	B	DIV	K	T	EXEMPT				
221 WAG	A	DIV	J	T	EXEMPT				
222 WY	A	DIV	J	T	EXEMPT				
223 M-J-K, Inc. A Corporation Totally Owned & Controlled by K. Starrett									

1. Income/Gain Codes: A=$1,000 or less B=$1,001-$2,500 C=$2,501-$5,000 D=$5,001-$15,000 E=$15,001-$50,000 (See Col. B1, D4) F=$50,001-$100,000 G=$100,001-$1,000,000 H1=$1,000,001-$5,000,000 H2=More than $5,000,000

2. Value Codes: J=$15,000 or less K=$15,001-$50,000 L=$50,001-$100,000 M=$100,001-$250,000 (See Col. C1, D3) N=$250,001-$500,000 O=$500,001-$1,000,000 P1=$1,000,001-$5,000,000 P2=$5,000,001-$25,000,000 P3=$25,000,001-$50,000,000 P4=More than $50,000,000

3. Value Method Codes: Q=Appraisal R=Cost (real estate only) S=Assessment T=Cash/Market

FINANCIAL DISCLOSURE REPORT

Name of Person Reporting	Date of Report
Keith Starrett	July 7, 2004

VII. Page 17 INVESTMENTS and TRUSTS -- income, value, transactions *(Includes those of spouse and dependent children See pp. 34-57 of Instructions.)*

A. Description of Assets (including trust assets) *Place "(X)" after each asset exempt from prior disclosure.*	B. Income during reporting period (1) Amt. Code1 (A-H)	B. (2) Type (e.g., div., rent or int.)	C. Gross value at end of reporting period (1) Value Code2 (J-P)	C. (2) Value Method Code (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, merger, redemption)	If not exempt from disclosure (2) Date: Month-Day	(3) Value Code2 (J-P)	(4) Gain Code1 (A-H)	(5) Identity of buyer/seller (if private transaction)
☐ **NONE** (No reportable income, assets, or transactions)									
Brokerage Account of M-J-K, Inc. w/ Charles Schwab	C	DIV	L	T	EXEMPT				
224 AT	A	DIV	J	T	EXEMPT				
225 ILA	A	DIV	J	T	EXEMPT				
226 D	A	DIV	J	T	EXEMPT				
227 EP	A	DIV	J	T	EXEMPT				
228 MOSH	A	DIV	J	T	EXEMPT				
229 MMT	A	DIV	J	T	EXEMPT				
230 MIRKQ	A	DIV	J	T	EXEMPT				
231 MOT	A	DIV	J	T	EXEMPT				
232 PXD	A	DIV	K	T	EXEMPT				
233 REM	A	DIV	J	T	EXEMPT				
234 Cash	A	INT	J	T	EXEMPT				
235 Timberland Percy Quin Area Pike County, Mississippi	A	RENT	N	Q	EXEMPT				
236 Mineral Rights, Amite Co., MS Field operated by Denbury Entergy	NONE	Royalty	J	W	EXEMPT				
237 Unleased mineral int.Franklin Co. MS, Sect. 30, 24 &19, TS5N, R5E	NONE	N/A	J	W	EXEMPT				
238 Unleased mineral acres S 31&36, TS 1N, R10 E, Walthall Co, MS	NONE	N/A	J	W	EXEMPT				
239 Unleased mineral acres S22&27, TS 4N, R 6E, Amite Co. MS	NONE	N/A	J	W	EXEMPT				
240 Unleased mineral acres S12, TS 6N, R 7E Lincoln Co., MS	NONE	N/A	J	W	EXEMPT				

1 Income/Gain Codes: A=$1,000 or less B=$1,001-$2,500 C=$2,501-$5,000 D=$5,001-$15,000 E=$15,001-$50,000
(See Col. B1, D4) F=$50,001- $100,000 G=$100,001-$1,000,000 H1=$1,000,001-$5,000,000 H2=More than $5,000,000

2 Value Codes: J=$15,000 or less K=$15,001-$50,000 L=$50,001- $100,000 M=$100,001-$250,000
(See Col. C1, D3) N=$250,001-$500,000 O=$500,001-$1,000,000 P1=$1,000,001-$5,000,000 P2=$5,000,001-$25,000,000
P3=$25,000,001-$50,000,000 P4=More than $50,000,000

3 Value Method Codes: Q=Appraisal R=Cost (real estate only) S=Assessment T=Cash/Market

FINANCIAL DISCLOSURE REPORT

Name of Person Reporting	Date of Report
Keith Starrett	July 7, 2004

VII. Page 18 INVESTMENTS and TRUSTS -- income, value, transactions *(Includes those of spouse and dependent children See pp 34-57 of Instructions)*

A. Description of Assets (including trust assets) *Place "(X)" after each asset exempt from prior disclosure*	B. Income during reporting period (1) Amt. Code1 (A-H)	B. (2) Type (e.g., div., rent or int.)	C. Gross value at end of reporting period (1) Value Code2 (J-P)	C. (2) Value Method Code (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, merger, redemption)	If not exempt from disclosure (2) Date: Month-Day	(3) Value Code2 (J-P)	(4) Gain Code1 (A-H)	(5) Identity of buyer/seller (if private transaction)
☐ **NONE** (No reportable income, assets, or transactions)									
241 Unleased mineral acres S 27, TS 9N, R 9E, Copiah Co. MS	NONE	N A	J	W	EXEMPT				
242 Unleased mineral acres S 2, TS 1N, R 7E, Pike Co., MS	NONE	N A	J	W	EXEMPT				
243 Unleased min acres S 12, TS 1N, R 7E, S 8, TS 1N, R 9 E, S 35, TS 1N, R 9E, S 33, TS 2N, R 8E. Pike Co. MS	NONE	N A	J	W	EXEMPT				
244 Unleased min acres S 21, TS 1N, R8, S 3, TS 1N, R 9, Pike Co . MS	NONE	N A	J	W	EXEMPT				
245 Timberland Lincoln Co , MS	NONE	N A	L	W	EXEMPT				
246 401 K Plan Deferred Comp State of Mississippi	C	DIV INT	M	T	EXEMPT				
247 T.Rowe Price International Stock Fund									
248 Boston Co Premier Value Eq Daily									
249 Fayez Sarofim Fund									
250 ING VP Growth & Income Port-R									
251 GE Value Equity Fund									
252 Barclay Int Govt/Credit Bnd Index Fund									
253 Fidelity Small Cap Stock Fund									
254 Time Share Condominium New Orleans, LA	A	RENT	J	W	EXEMPT				
255 Note and Mortgage Receivable (Magee)	E	INT	N	W	EXEMPT				

1. Income/Gain Codes: A=$1,000 or less B=$1,001-$2,500 C=$2,501-$5,000 D=$5,001-$15,000 E=$15,001-$50,000 (See Col. B1, D4) F=$50,001-$100,000 G=$100,001-$1,000,000 H1=$1,000,001-$5,000,000 H2=More than $5,000,000

2. Value Codes: J=$15,000 or less K=$15,001-$50,000 L=$50,001- $100,000 M=$100,001-$250,000 (See Col. C1, D3) N=$250,001-$500,000 O=$500,001-$1,000,000 P1=$1,000,001-$5,000,000 P2=$5,000,001-$25,000,000 P3=$25,000,001-$50,000,000 P4=More than $50,000,000

3. Value Method Codes: Q=Appraisal R=Cost (real estate only) S=Assessment T=Cash/Market

FINANCIAL DISCLOSURE REPORT

Name of Person Reporting	Date of Report
Keith Starrett	July 7, 2004

VII. Page 19 INVESTMENTS and TRUSTS -- income, value, transactions *(Includes those of spouse and dependent children See pp. 34-57 of Instructions.)*

A. Description of Assets (including trust assets) *Place "(X)" after each asset exempt from prior disclosure.*	B. Income during reporting period (1) Amt. Code1 (A-H)	B. (2) Type (e.g., div., rent or int.)	C. Gross value at end of reporting period (1) Value Code2 (J-P)	C. (2) Value Method Code (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, merger, redemption)	If not exempt from disclosure (2) Date: Month-Day	(3) Value Code2 (J-P)	(4) Gain Code1 (A-H)	(5) Identity of buyer/seller (if private transaction)
NONE (No reportable income, assets, or transactions)									
256 Note and Mortgage Receivable (Allred)	D	INT	M	W	EXEMPT				
257 Note and Mortgage Receivable (Ming)	C	INT	K	W	EXEMPT				
258 Rental Property #5 (Residential McComb, MS)	D	RENT	L	W	EXEMPT				
259 Note and Mortgage Receivable (MHD, INC)	C	INT	J	W	EXEMPT				
260 Note and Mortgage Receivable (Parsons)	B	INT	J	W	EXEMPT				

1	Income/Gain Codes: (See Col. B1, D4)	A=$1,000 or less F=$50,001-$100,000	B=$1,001-$2,500 G=$100,001-$1,000,000	C=$2,501-$5,000 H1=$1,000,001-$5,000,000	D=$5,001-$15,000 E=$15,001-$50,000 H2=More than $5,000,000
2	Value Codes: (See Col. C1, D3)	J=$15,000 or less N=$250,001-$500,000 P3=$25,000,001-$50,000,000	K=$15,001-$50,000 O=$500,001-$1,000,000	L=$50,001- $100,000 P1=$1,000,001-$5,000,000 P4=More than $50,000,000	M=$100,001-$250,000 P2=$5,000,001-$25,000,000
3	Value Method Codes:	Q=Appraisal	R=Cost (real estate only)	S=Assessment	T=Cash/Market

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
		July 7, 2004

VIII. ADDITIONAL INFORMATION OR EXPLANATIONS (Indicate part of Report.)

All listed common stocks owned in Pension Trust or IRAs are bought and sold by an investment advisor. I have no control over these transactions.

My mother's estate is owned one-third by me and two-thirds by my two sisters. This estate is ready to close and should be closed and the assets distributed within sixty days.

IX. CERTIFICATION.

I certify that all information given above (including information pertaining to my spouse and minor or dependent children, if any) is accurate, true, and complete to the best of my knowledge and belief, and that any information not reported was withheld because it met applicable statutory provisions permitting non-disclosure.

I further certify that earned income from outside employment and honoraria and the acceptance of gifts which have been reported are in compliance with the provisions of 5 U.S.C. app., § 501 et. seq., 5 U.S.C. § 7353 and Judicial Conference regulations.

Signature Keith Starrett Date 7-7-04

NOTE: ANY INDIVIDUAL WHO KNOWINGLY AND WILFULLY FALSIFIES OR FAILS TO FILE THIS REPORT MAY BE SUBJECT TO CIVIL AND CRIMINAL SANCTIONS (5 U.S.C. App., § 104.)

FILING INSTRUCTIONS:

Mail signed original and 3 additional copies to:

Committee on Financial Disclosure
Administrative Office of the
United States Courts
Suite 2-301
One Columbus Circle, N.E.
Washington, D.C. 20544

Chairman HATCH. Thank you.
Judge Finch.

STATEMENT OF RAYMOND L. FINCH, NOMINEE TO BE JUDGE FOR THE DISTRICT COURT OF THE VIRGIN ISLANDS

Judge FINCH. Thank you, Senator, for the opportunity to be here today.

I will take this opportunity to introduce my wife, Anne Marie.

Chairman HATCH. So happy to have you with us.

Judge FINCH. And my daughter, Jennifer, who is here, and a very good friend of mine, former Senator Claude Malloy.

Chairman HATCH. We are honored to have you all here.

Judge FINCH. Thank you very much.

[The biographical information of Judge Finch follows:]

ANSWERS TO
QUESTIONNAIRE FOR JUDICIAL NOMINEES

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. **Full name (include any former names used.)**

Raymond Lawrence Finch

2. **Address: List current place of residence and office address(es).**

Residence: St. Croix Virgin Islands 00820

Office: Almeric L. Christian Federal Building
3013 Estate Golden Rock
St. Croix, Virgin Islands 00820

3. **Date and place of birth.**

October 4, 1940
Christiansted, St. Croix, Virgin Islands

4. **Marital Status (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).**

Anne Marie Molina - housewife

5. **Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.**

Howard University: September 1958 - June 1962, B.A. degree, June 1962; Howard University School of Law: August 1962 -June 1965, LL.B., June, 1965.

6. **Employment Record: List (by year) all business or professional corporations, companies, firms or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.**

1965 - 1968 - Law clerk, Territorial Court of the V.I.
1968 - 1969 - U.S. Army
1969 - 1976 - Associate, Hodge & Sheen
1976 - 1994 - Judge, Territorial Court of the Virgin.

1994 - 1998 - U.S. District Judge, Virgin Islands
1998 - Present - Chief District Judge, Virgin Islands

7. **Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge.**

Yes. U.S. Army, September 25, 1966 -October 15, 1969
Armor; detailed; JAGC; Captain; 580096953; Inactive Reserve.
Discharged honorably October 15, 1969.

8. **Honors and Award: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.**

Marquis WHO'S WHO IN AMERICA (1978 to present)
PERSONALITIES OF THE SOUTH (1978-79)
ARMY COMMENDATION MEDAL December 1968
NATIONAL DEFENSE SERVICE MEDAL
VIETNAM SERVICE MEDAL
VIETNAM CAMPAIGN MEDAL W/60 DEVICE
BRONZE STAR MEDAL TWO OVERSEAS BARS
American Law Institute (1993 to present)

9. **Bar Associations: List all bar associations, legal or judicial-related committee or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such, groups.**

Virgin Islands Bar - 1970 to present
Bar membership - United States Court of Appeals for the Third Circuit
- District Court of the Virgin Islands
Professional Association - American Bar Association
- American Judges Association
- American Judicature Society -National Bar Association

10. **Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.**

Lobbying: None.
Other: St. Croix Radio Club.
American Radio Relay League

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

United States District Court of the Virgin Islands: December 1970; Third Circuit Court of Appeals: January 1976.

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.

None.

13. Health: What is the present state of your health? List the date of your last physical examination.

Excellent. September 2003.

14. Judicial Office: State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

Judge, Appellate Division, United States District Court of the Virgin Islands. The Appellate Division of the District Court of the Virgin Islands was created by 48 U.S.C. §1613a to "have such appellate jurisdiction over the courts of the Virgin Islands established by local law to the extent now or hereafter provided by local law. ..."

Judge by Special Designation, United States District Court of the Virgin Islands. Judges of the Territorial Court were designated to sit as judges of the U.S. District Court of the Virgin Islands by the Chief Judge of the United States Court of Appeals for the Third

Circuit. This was required due to the vacancy which occurred when Judge Warren H. Young died. I sat by special designation during the following periods: April, July and October 1976; December 10,13, 15, 22 and 29, 1976; February, May, August and November 1977; October, November and December 1980; and August 26 through September 30, 1982, October 7, 1985 through October 11, 1985.

Judge, Territorial Court of the Virgin Islands, Division of St. Croix, Kingshill, St. Croix, Virgin Islands.

I was appointed to the Municipal Court of the Virgin Islands in February, 1976 for a term of four years and served as a judge therein for a period of one year. Since the name of the court was changed to the Territorial Court of the Virgin Islands, my judicial appointment was by the then Governor, Cyril E. King, now deceased. I had subsequent appointments since then, to-wit, in 1980 I was appointed by Governor Juan Luis for six-year term; in 1986 I was reappointed by Governor Luis for another six-year term; in 1992 I was reappointed by Governor Alexander A. Farrelly for a six-year term.

The Municipal Court had jurisdiction over juvenile matters, traffic, small claims wherein the claim involved did not exceed $500.00, criminal cases wherein the maximum sentence that might be imposed did not exceed imprisonment for one year, and civil cases wherein the amount in controversy did not exceed $10,000.00. On January 1, 1977, the Municipal Court of the Virgin Islands became the Territorial Court of the Virgin Islands. All judges of the Municipal Court became judges of the Territorial Court pursuant to legislation. I served as a judge of the Territorial Court from 1977 to 1994.

The Territorial Court has jurisdiction over juvenile matters, traffic, small claims wherein the claim involved does not exceed $5,000.00, divorce, annulment and separation procedures, support cases, adoptions, guardianship matters, probate matters, criminal cases wherein the maximum period of confinement does not exceed fifteen years, and civil cases wherein the amount in controversy does not exceed $ 200,000.00.

Effective January 1, 1994, the Territorial Court was given unlimited civil jurisdiction in civil cases and full jurisdiction in criminal cases.

From February 1980 to 1994, I was the administrative representative on St. Croix for the Presiding Judge. As such, my duties included the administration of all court matters on St. Croix inclusive of but not limited to, overseeing of all personnel and the contracting for service jobs and equipment required by the court. In the interest of judicial expediency and fiscal responsibility, I completely revamped the court schedules.

1994 to present - U.S. District Court of the Virgin Islands
1998 to present - Chief District Judge, Virgin Islands

The District Court of the Virgin Islands was established by Congress pursuant to its legislative authority under Article 4 of the Constitution and is jurisdictionally equivalent to a District Court of the United States.

15. Citations: **If you are or have been a judge, provide: (1) citations for the ten most significant opinions you have written; (2) a short summary of citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially, please provide copies of the opinions.**

(1) Urgent v. Technical Assistance Bureau, Inc., 255 F. Supp.2d 532 (D.V.I. 2003).

Marcano v. Hess Oil Virgin Islands Corp., 237 F. Supp.2d 592 (D.V.I., App. Div. 2003).

Plaskett v. Bechtel Intern'l, Inc., 243 F. Supp.2d 334 (D.V.I. 2003).

Sunshine Shopping Center, Inc. v. Kmart Corp., 85 F. Supp.2d 537 (D.V.I. 2000).

Guardian Ins. Co. v. Bain Hogg Intern'l Ltd., 52 F. Supp.2d 536 (D.V.I. 1999).

Richards v. United States, 1 F. Supp.2d 498 (D.V.I. 1998).

Abdullah v. American Airlines, Inc., 969 F. Supp. 337 (D.V.I. 1997).

Rivera v. United States, 910 F. Supp. 239 (D.V.I. 1996).

Olmeda v. Schneider, 889 F. Supp. 228 (D.V.I. 1995).

In re Grand Jury, Misc. No. 95-0009, slip op. (D.V.I., June 19, 1995).

15. (2) United States v. Sobratti, 2003 WL 21716323 (3d Cir., July 21, 2003). Reversed.

The Third Circuit, after reviewing the evidence, found that police officers had a reasonable suspicion of criminal conduct and cause to believe that they were dealing with an armed dangerous person, justifying a limited warrantless search for weapons within the vehicle. The District Court's decision to suppress evidence was reversed.

Martinez-Sanes v. Turnbull, 318 F.3d 483 (3d Cir. 2003). Affirmed in part and reversed in part.

The Court was affirmed in finding that all five appellees, former employees of the Virgin Islands Government, were fired for political reasons, that three of the appellees were fired in violation of their First and Fourteenth Amendment rights and that one of the appellees was fired in violation of his First Amendment rights only. However, the fifth appellee was a policy-maker whose First Amendment rights were subordinate to Governor Turnbull's right to require that the policy-makers and confidential advisors in his administration share his political views. Thus, the District Court clearly erred in issuing an injunctive order upholding the fifth appellee's claims and ordering her reinstatement.

United States v. Latimer, 2002 WL 31831567 (3d Cir., Dec. 18, 2002). Affirmed in part and remanded for

resentencing.

The Court plainly erred in including loss outside the offense of conviction in calculating the amount of loss for purposes of sentencing and imposing restitution.

Island Insteel Systems, Inc. v. Waters, 296 F.3d 200 (3d Cir. 2002). Reversed and remanded.

In a case of first impression, the Court improperly held that the filing of an action in another forum that was dismissed for lack of personal jurisdiction could not equitably toll the statute of limitations. The case was remanded for the Court to determine, using a multi-faceted test, whether the doctrine of equitable tolling should be applied.

Amerada Hess Corp. v. Zurich Ins. Co., 2002 WL 356162 (3d Cir., Mar. 6, 2002). Reversed.

The Court erroneously concluded that Hess Oil Virgin Islands Corporation and its parent company, Amerada Hess Corporation (collectively "HOVIC") could not recover from Zurich Insurance Company because HOVIC's claim was unambiguously excluded from coverage under the policy. The Third Circuit reasoned that because HOVIC and Zurich were both able to offer conflicting, yet compelling interpretations, the policy was ambiguous, and should have been construed against the insurer, Zurich, under Virgin Islands law. The Court also erred in limiting Zurich's exposure to the amount HOVIC paid pursuant to th first tier of its settlement agreement, rather than requiring Zurich to cover the entire amount negotiated by the insured and plaintiffs as part of a reasonable settlement.

Club Comanche, Inc. v. Government of the Virgin Islands, 278 F.3d 250 (3d Cir. 2002).
Vacated and remanded with instructions to dismiss without prejudice.

The Third Circuit held *sua sponte* that the District Court lacked subject matter jurisdiction to support federal question jurisdiction in a quiet title action brought pursuant to the Virgin Islands quiet title statute.

United States v. Ntreh, 279 F.3d 255 (3d Cir. 2002). Reversed.

The Court incorrectly surmised that a federal felony offense cannot be tried by information in the Virgin Islands.

United States v. Hodge, 246 F.3d 301 (3d Cir. 2001). Reversed.

The Court erred in finding that an affidavit supporting a search warrant failed to establish sufficient nexus to defendant's home despite the affiant, a drug task force officer, stating that defendant discarded narcotics while fleeing from police, that defendant was known by a confidential informant to be a drug dealer, and that drug dealers tend to keep drugs at their homes. The Court also should have found the good faith exception to the exclusionary rule to be applicable since, given that the issuance of the warrant was a close call, the affiant reasonably relied on the magistrate's judgment.

Government of the Virgin Islands v. Martinez, 239 F.3d 293 (3d Cir. 2001). Reversed and remanded.

The Court erred in imposing a sentence including a period of incarceration and a period of probation without expressly suspending a portion of the execution of the prison term. The Third Circuit remanded to give the Court an opportunity to correct the sentence.

Elcock v. Kmart Corporation, 233 F.3d 734 (3d Cir. 2000). Affirmed in part, reversed in part, and remanded.

A new trial was granted because the Court did not conduct a *Daubert* hearing - in this pre-*Kumho Tire* era - before receiving the testimony of an expert in vocational rehabilitation and because the Court should have excluded the opinion of an expert economist whose economic model relied on assumptions concerning percent disability and life-expectancy without foundation in the record.

Callwood v. Enos, 230 F.3d 627 (3d Cir. 2000). Vacated and remanded with instructions.

The Third Circuit held that the District Court was divested of jurisdiction to consider petitions for writs of habeas corpus under territorial habeas corpus

law by the Legislature of the Virgin Islands on October 1, 1991, but that the District Court does have jurisdiction under 28 U.S.C. § 2241. However, prisoner was required to exhaust his remedies in the Territorial Court before proceeding in the District Court under federal law.

Cestonara v. United States, 211 F.3d 749 (3d Cir. 2000). Reversed and remanded.

The Court improperly concluded that the National Park Service's decisions concerning cautionary measures concerning a parking lot in which the decedent was killed fell under the discretionary function exception to the Federal Tort Claim Act's waiver of sovereign immunity.

James v. Zurich-American Ins. Co. of Illinois, 203 F.3d 250 (3d Cir. 2000). Affirmed in part and reversed in part.

The Court wrongly declared that an insurance policy between Zurich Insurance Company and Hess Oil also provided coverage for Meridian, a Hess subcontractor. Although the policy was ambiguous as found by the Court, the undisputed conduct of the parties showed that the parties to the policy interpreted the policy as not covering Meridian.

United States v. Applewhaite, 195 F.3d 679 (3d Cir. 1999). Reversed in part, and remanded.

The Court should have found the carjacking statute, 18 U.S.C. § 2119(2), to be inapplicable because defendants did not use force or intimidation with the intent of stealing the victim's car - rather the object of the force was to seriously injure or kill the victim.

United States v. Vasquez de Reyes, 149 F.3d 192 (3d Cir. 1998). Vacated.

The Court should not have admitted otherwise suppressable statements concerning a fraudulent marriage under the inevitable discovery doctrine. Statements are too ephemeral and circumstances under which such statements inevitably would occur are too speculative.

United States v. Isaac, 141 F.3d 477 (3d Cir. 1998). Reversed and remanded.

The Court did not apply contract principles in interpreting and enforcing a plea agreement which gave the government sole discretion in deciding whether to move for a sentence reduction based on substantial assistance.

Tamarind Resort Associates v. Government of the Virgin Islands, 138 F.3d 107 (3d Cir. 1998). Affirmed in part and remanded.

The Court exceeded its jurisdiction by deciding a writ of review appealing a local administrative determination, as provided by 12 V.I.C. § 913(d) and 5 V.I.C. § 1421, statutes that the legislature had implicitly repealed. The Third Circuit remanded for the Court to examine the constitutional claims under its original jurisdiction, rather than in an appellate capacity.

Gotha v. United States, 115 F.3d 176 (3d Cir. 1997). Reversed and remanded.

The Court improperly concluded that the United States Navy's failure to provide safeguards on a footpath leading to a structure under its control implicated the discretionary function exception to the Federal Tort Claims Act.

Williams v. Rene, 72 F.3d 1096 (3d Cir. 1995). Reversed and remanded.

The Court erred in granting partial judgment as a matter of law against employer on *respondeat superior* issue when accident occurred while employee was driving a company car.

15. **(3)** None.

16. **Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.**

None.

17. Legal Career:

a. **Describe chronologically your law practice and experience after graduation from law school including:**

1. **whether you served as a clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were clerk;**

After my graduation from law school in 1965 and until August 1966, I was a law clerk in the Municipal Court of the Virgin Islands. I clerked for former judges Alexander A. Farrelly, Antoine L. Joseph and Cyril Michael. All three judges are now deceased. During my tenure as a law clerk I did extensive legal research and analysis and drafted many advisory opinions for the judges mentioned.

2. **whether you practiced alone, and if so, the addresses and the dates;**

I have never practiced alone.

3. **the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;**

In September 1966 I left St. Croix to report to active duty in the U.S. Army. My ranking upon entry was that of First Lieutenant. I was assigned to the Second Armored Cavalry Regiment, headquartered in Hamburg, Germany. After a tour of duty in Germany, I was assigned to duties in the Republic of Vietnam.

While in the Army my duties were varied and extensive.

In Vietnam, I was assigned to the office of the Staff Judge Advocate, H/Q IIFFV. In that capacity I served essentially with the Office of the Staff Judge Advocate, performing the following functions: adjudicated claims of United States personnel and Vietnamese Nationals; appeared before Elimination Boards as an advocate; appeared as advocate in Article 15 Hearings; appeared as an advocate in

Article 32 Investigations.

In October 1969 I returned to St. Croix and was employed as a law clerk by the firm of Hodge & Sheen located at #46-47 Company Street, Christiansted, St. Croix, Virgin Islands. I was employed in the stated capacity until December 1970. During this employment I did much legal research and analysis, drafted pleadings, and prepared legal memoranda and trial briefs. I also did investigative reporting on cases and otherwise generally assisted the lawyers in their trial preparations.

In December of 1971 I became a partner in the firm of Hodge, Sheen & Finch located at #46-47 Company Street, Christiansted, St. Croix, Virgin Islands. I remained a partner of the aforementioned law firm until February 1976.

In February 1976 I was appointed to the Municipal Court bench in St. Croix, Virgin Islands. This court is now the Territorial Court of the Virgin Islands.

I became a U.S. District Court Judge in September 1994.

b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

After my graduation from law school and until August 1966, I was a law clerk in the Municipal Court of the Virgin Islands. I clerked for former judges Alexander A. Farrelly and Antoine L. Joseph and the late Cyril Michael. During my tenure as a law clerk I did extensive legal research and analysis and drafted many advisory opinions for the judges mentioned.

In September 1966 I left St. Croix to report to active duty in the U.S. Army. My ranking upon entry was that of First Lieutenant. I attained the rank of Captain before being honorably discharged.

While in the Army my duties were varied and extensive.

In October 1969 I returned to St. Croix and was employed as a law clerk by the firm of Hodge & Sheen located at #46-47 Company Street, Christiansted, St.

Croix, Virgin Islands. I was employed in the stated capacity until December 1970. During this employ-employment I did much legal research and analysis, drafted pleadings, and prepared legal memoranda and trial briefs. I also did investigative reporting on cases and otherwise generally assisted the lawyers in their trial preparations.

In December of 1971 I became a partner in the firm of Hodge, Sheen & Finch located at #46-47 Company Street, Christiansted, St. Croix, Virgin Islands. I remained a partner of the aforementioned law firm until February 1976.

In February 1976 I was appointed to the Municipal Court bench in the Virgin Islands. From February 1976 to the present, I have heard an excess of 20,000 cases.

2. **Describe your typical former clients, and mention the areas, if any, in which you have specialized.**

My typical former civil clients were generally middle income Virgin Islanders who needed legal advice with reference to business contracts, especially contracts related to the sale or purchase of real estate. My biggest corporate client was First Federal Savings & Loan Association of Puerto Rico.

c. 1. **Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.**

I appeared in court regularly.

2. **What percentage of these appearances was in:**
(a) federal court;
(b) state courts of record;
(c) other courts.

(a) Approximately fifty percent (50%) of my court appearances were in the United States District Court of the Virgin Islands.

(b) Approximately fifty percent (50%) of my court appearances were in the Municipal Court of the Virgin Islands.

©) I did not appear before any other courts.

3. What percentage of your litigation was:
(a) civil;
(b) criminal.

(a) Approximately eighty-five percent (85%) of my litigation was civil.

(b) Approximately fifteen percent (15%) of my litigation was criminal.

4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

During the years I was in practice, approximately 200 of my cases were tried to verdict or judgment. In all these cases I was chief counsel.

5. What percentage of these trials was:
(a) jury;
(b) non-jury.

(a) Ten percent (10%) of these trial were jury trials in the District Court of the Virgin Islands.

(b) In the District Court, the remaining ninety percent (90%) were non-jury.

18. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

(a) the date of representation;
(b) the name of the court and the name of the judge or judges before whom the case was litigated; and

(c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the

other parties.

Robert Gustafson v. Fort Louise Augusta Condominiums, Inc. and The Government of the Virgin Islands - Civil No. 75-318.
In this civil action for damages, the plaintiff a minor, recovered $125,000 for injury to the left lacrimal duct as a result of an automobile accident. Sensitive bone restoration was performed by a specialist in New York. This case is of significance because it was tried thirty days after the Federal Rules of Evidence became effective in the Virgin Islands and I was able to use the Rule 703 so as to allow an expert resident in the Virgin Islands to testify using the medical records of the doctor in New York. Date of representation: November 18, 1975. The trial judge was Warren H. Young (deceased). Opposing counsel was David V. O'Brien (deceased).

I represented the plaintiff and did all of the pre-trial and trial work. The trial occurred in November of 1975 in the United States District Court of the Virgin Islands before the Honorable Warren H. Young. Counsel for the other party was Robert Ruskin, now deceased.

Government of the Virgin Islands v. Jesus Santiago, Crim. No. 43-1971.
In this criminal prosecution for burglary, I represented the defendant. The case was tried before a twelve person jury in the United States District Court of the Virgin Islands, Judge Warren H. Young (deceased) presiding. The jury returned a verdict of not guilty. This case is of significance because of the overwhelming odds of an acquittal. Every member of the firm except myself declined representation of the accused. The Government was represented by Attorney Julio Brady, Innovative Business Center, 4006 Estate Diamond, St. Croix, Virgin Islands, telephone number (340) 777-7700. Date of representation: October 7, 1971.

In Re the Discharge of Private Clyde Miller. This was a charged trial which occurred in the Republic of Vietnam. The trial was before a board of officers presided over by an officer of the rank of colonel whose name I do not recall. Private Miller was about to be discharged because he was caught in a homosexual act. This case is of significance to me because I was

able to convince the board with credible evidence, that Miller's sexuality was a result of a psychological defect. Considering the grave charge involved, and considering the tense, combat atmosphere of the time and place involved, Miller's discharge was a significant achievement. I do not recall the name of opposing counsel.

First Federal Savings & Loan Association of Puerto Rico v. Giddel Martinez. Civil No. 379-1972.
This was a foreclosure action in which I represented the plaintiff in the United States District Court of the Virgin Islands, Judge Warren H. Young (deceased) presiding. This case was significant because the defendant challenged the annual percentage mortgage rate as usurious. Warner Alexander defended the case and was settled. Date of representation: February 11, 1974.

United States Army v. Michael Smith.
This was a court martial for AWOL, (3 charges) and failure to obey a lawful order. The matter was tried before a board of officers presided over by an officer of colonel rank, whose name I do not recall. I defended Private Smith who was convicted. However, I raised a defense in that case that is now, law. The only identification the military had against Private Smith was his name, rank and serial number which he was forced to give upon return to camp after an absence of 3 months. His unit had been eliminated in an attack and no one could identify him. I argued that the Miranda warnings should have been given to Smith even prior to questions as to his identity. I do not recall the name of opposing counsel.

Government of the Virgin Islands v. Roy Seales.
In this criminal prosecution for unlawful entry and larceny tried in the Municipal Court of the Virgin Islands before the Honorable Antoine L. Joseph, the defendant was convicted. The significance of the case is that it presented in the Municipal Court for the first time, the question as to the admissibility of statements of co-defendants against each other. The prosecutor was William Brown who is now practicing law in the United States, and whose address is unknown. This file was destroyed during Hurricane Hugo in 1989.

Lourdes Cintron v. Clemence Cintron, Sr. Civ. No.

478-1971.
This was an action for divorce filed in the United States District Court of the Virgin Islands, Judge Almeric L. Christian (deceased) presiding. I represented the plaintiff in this case. It was significant because of the extensive personal properties which became involved in the litigation and the question of child custody. The matter was terminated by a decree of divorce, the terms of which I negotiated in a series of settlement conferences. The defendant was represented by Mr. Francisco Corneiro, former Attorney General of the Virgin Islands, now deceased. Co-counsel: Derek M. Hodge, 12D Bjerge Gade, St. Thomas, Virgin Islands 00801. Date of representation: February 27, 1973.

Anna Deering v. The Cola Bottling Co. of the Virgin Islands. Civil No. 218-1971.
This was a personal injury action filed in the United States District Court of the Virgin Islands, Judge Warren H. Young (deceased) presiding. I represented Anna Deering, the plaintiff. It was a trial before a jury which, in my opinion, was significant in view of the jury award of $5,000 to the plaintiff, notwithstanding very minimal damages. In this case, the plaintiff, the operator of a restaurant, happened to be in the vicinity of a Coca Cola bottle which exploded and cause a small one-inch cut on the forehead. Opposing counsel: Robert Ellison, now deceased.

Monserrate Velez v. Isabel, Velez Gonzalez. Civ No. 236-1968.
This was an action for divorce filed in the United States District Court of the Virgin Islands, Judge Warren H. Young (deceased) presiding. This action is important because of the vast amount of real property involved and the fact that my client, the plaintiff, did not
suffer the loss of his assets. Attorney for the. defendant was John D. Merwin, now living in New Hampshire, and on St. Croix. Mr. Merwin's address is P.O. Box 297, Franconia, New Hampshire 03580. Telephone No. (603) 823-5217. Date of representation: February 27, 1975.

Christian Hendricks v. Gulf Mortgage Corporation. Civ. No. 74-979.
This is an action in foreclosure against the Gulf

Mortgage Corporation filed in the United States District Court of the Virgin Islands, Judge Warren H. Young (deceased) presiding. This foreclosure is important because of the extensive title search involved and substantial questions of priorities of mortgages that arose. The defendant was represented by Warner Alexander, who presently resides at 502 S. Florida Ave., Apt. 115, Tarpon Springs, Florida 34689.

The records in all the above-mentioned cases in which I appeared as counsel were destroyed by Hurricane Hugo, and thus any additional information is difficult to obtain.

19. **Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question, please omit any information protected by the attorney-client privilege (unless the privilege has been waived.)**

My career on the bench is my most significant legal activity and has been so for the past eighteen years.

Member, Judicial Ethics Committee of the American Judges Association, 1979 to present.

The Committee has given attention to the formation of new commissions investigating judges and has studied cases involving allegations of past judicial misconduct. As a member of the stated committee I have read much material on the various judicial ethics committees, judicial accountability commissions and judicial nominating commissions. It is my opinion that the matter of ethics in judging is of crucial importance to the judiciary. Judges must continue to exhibit impartiality in word and deed so as to foster confidence in the judicial system. A judge must be perceived to be unfailingly fair.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.

   Retirement benefits equal to 66-2/3% of the current salary of judges of the Territorial Court as retirement benefits.

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.

   I do not anticipate any potential conflict of interest. However, if any conflict of interest arise, I shall apply the Code of Judicial Conduct insofar as it relates t recusal of judges.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compenf3ation, during your service with the court? If so, explain.

   None.

4. List sources and amounts of all income received during the calendar year preceding your nomination and j:or the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding $500 or more (If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.)

   See Financial Disclosure Report.

5. Please complete the attached financial net worth statement in detail (Add schedules as called for.)

See attachment.

6. **Have you ever had a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.**

No

SCHEDULE A

Bank of Nova Scotia Sunny Isle Branch St. Croix, Virgin Islands	$2,400.00
First Bank of Puerto Rico Golden Rock Branch St. Croix, Virgin Islands	768,474.23
Prudential Bache Christiansted, St. Croix Virgin Islands	38,170.66

FINANCIAL STATEMENT

NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS		LIABILITIES	
Cash on hand and in banks See Sch.A		Notes payable to banks-secured	0
U.S. Government securities-add schedule	0	Notes payable to banks-unsecured	0
Listed securities-add schedule	0	Notes payable to relatives	0
Unlisted securities--add schedule	0	Notes payable to others	0
Accounts and notes receivable:	0	Accounts and bills due	0
Due from relatives and friends	0	Unpaid income tax	0
Due from others	0	Other unpaid income and interest	0
Doubtful	0	Real estate mortgages payable-add schedule	0
Real estate owned-add schedule **See below**	0	Chattel mortgages and other liens payable	0
Real estate mortgages receivable		Other debts-itemize:	0
Autos and other personal property	65,000.00		
Cash value-life insurance	0		
Other assets itemize:			
		Total liabilities	0
		Net Worth $	1,276,044.00
Total Assets $	1,276,044.00	Total liabilities and net worth	1,276,044.00
CONTINGENT LIABILITIES		GENERAL INFORMATION	
As endorser, comaker or guarantor	0	Are any assets pledged? (Add schedule) **No**	
On leases or contracts	0	Are you defendant in any suits or legal actions? **No**	
Legal Claims	0	Have you ever taken bankruptcy? **No**	
Provision for Federal Income Tax	0		
Other special debt	0		

Property #1 - St. Croix, Virgin Islands $350,000.00
Property #2 - St. Croix, Virgin Islands 45,000.00
Property #3 - St. Croix, Virgin Islands 7,000.00

III. GENERAL (PUBLIC)

1. **An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.**

Member, Donald Walker's Scholarship Foundation - three days per month. This foundation funds and operates the Boys' Club of St. Croix and awards scholarships to needy graduates of the public schools.

Served on Board of Directors, Boys Club of St. Croix, Virgin Islands.

Served on Board of Directors, Boys Scout Council of the Virgin Islands - one day each month. This organization approved operating guidelines for the Boy Scouts Troop in the Virgin Islands.

Served on church council, Lord God of Sabbaoth Lutheran Church. This organization operates the Lutheran Church on St. Croix.

Served as a member of the Virgin Islands Law Enforcement Planning Commission. This organization approved guideline funding of law enforcement agencies of the Virgin Islands.

2. **The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates --through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership.**

No.

3. **Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process,**

from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).

I was interviewed by the chairman of the Republican Party of the Virgin Islands, Mr. Holland Redfield. He obtained approval from the local committee and thereafter my name was submitted to the White House as a candidate.

4. Has anyone involved in the process of selecting you as a judicial nominee discussed with *you* any specific case, legal issue or question in a manner that could reasonably be interpreted as asking how *you* would rule on such case, issue, or question? If so, please explain fully.

No.

5. Please discuss your views on the following criticism involving "judicial activism."

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government.

Some of the characteristics of this "judicial activism" have been said to include:

a. A tendency by the judiciary toward problem-solution rather than grievance-resolution;

b. A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;

c. A tendency by the judiciary to impose broad, affirmative duties upon governments and society;

d. A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and

e. **A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.**

In rendering decisions, I have always felt constrained by the rule of law, precedent, and the United States Constitution. I have not used the authority of the court to impose administrative oversight on the other branches of government. The legislative branch of the government makes the law and the judicial branch interprets it.

In arriving at conclusions of law, and in making judgments and otherwise rendering decisions, courts must follow the appropriate jurisdictional requirements. Courts should always require that litigants have standing to bring suit and further, that cases before the court are ripe for decision.

Feb-17-2004 16:33 From-DISTRICT COURT STX 13407732113 T-860 P.002/005 F-138

AO-10
Rev. 1/2002

FINANCIAL DISCLOSURE REPORT

FOR CALENDAR YEAR 2002 NOMINATION REPORT

Report Required by the Ethics in Government Act of 1978, (5 U.S.C. App. §§101-111)

1. Person Reporting (Last name, first, middle initial)	2. Court or Organization	3. Date of Report
FINCH, Raymond L.	District Court - Virgin Islands	2/3/04

4. Title (Article III judges indicate active or senior status; magistrate judges indicate full- or part-time)	5. Report Type (check appropriate type)	6. Reporting Period
District Judge Nominee	X Nomination, Date 2/2/04 __ Initial X Annual __ Final	1/1/02 to 1/15/04

7. Chambers or Office Address	8. On the basis of the information contained in this Report and any modifications pertaining thereto, it is, in my opinion, in compliance with applicable laws and regulations.
	Reviewing Officer _____ Date _____

IMPORTANT NOTES: The instructions accompanying this form must be followed. Complete all parts, checking the NONE box for each part where you have no reportable information. Sign on last page.

I. POSITIONS. *(Reporting individual only; see pp. 9-13 of Instructions.)*

	POSITION	NAME OF ORGANIZATION/ENTITY
X	NONE (No reportable positions.)	
1		
2		
3		

II. AGREEMENTS. *(Reporting individual only; see pp. 14-16 of Instructions.)*

	DATE	PARTIES AND TERMS
X	NONE (No reportable agreements.)	
1		
2		
3		

III. NON-INVESTMENT INCOME. *(Reporting individual and spouse; see pp. 17-24 of Instructions.)*

	DATE	SOURCE AND TYPE	GROSS INCOME (yours, not spouse's)
	NONE (No reportable non-investment income.)		
1			
2	2002	Annuity from V.I. Government for year 2002	$ 106,730.70
3	2003	Annuity from V.I. Government for year 2003	$ 106,730.70
4	2004	Annuity from V.I. Government to date	$ 10,384.62
5			$
			$

FINANCIAL DISCLOSURE REPORT

Name of Person Reporting: RAYMOND L. FINCH

2/3/04

IV. REIMBURSEMENTS -- transportation, lodging, food, entertainment.
(Includes those to spouse and dependent children. See pp. 25-27 of Instructions.)

	SOURCE	DESCRIPTION
☐	NONE (No such reportable reimbursements.)	
1		
2	Exempt	
3		
4		
5		
6		
7		

V. GIFTS. *(Includes those to spouse and dependent children. See pp. 28-31 of Instructions.)*

	SOURCE	DESCRIPTION	VALUE
☐	NONE (No such reportable gifts.)		
1			
2	Exempt		$
3			$
4			$
			$

VI. LIABILITIES. *(Includes those of spouse and dependent children See pp. 32-33 of Instructions.)*

	CREDITOR	DESCRIPTION	VALUE CODE*
X	NONE (No reportable liabilities.)		
1			
2			
3			
4			
5			

*Value Codes: J=$15,000 or less; K=$15,001-$50,000; L=$50,001-$100,000; M=$100,001-$250,000; N=$250,001-$500,000; O=$500,001-$1,000,000; P1=$1,000,001-$5,000,000; P2=$5,000,001-$25,000,000; P3=$25,000,001-$50,000,000; P4=$50,000,001 or more.

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	RAYMOND L. FINCH	2/3/04

VII. Page 1 INVESTMENTS and TRUSTS -- income, value, transactions *(Includes those of spouse and dependent children. See pp. 34-37 of Instructions.)*

A: Description of Assets (including trust assets) *Place "(X)" after each asset exempt from prior disclosure.*	B: Income during reporting period (1) Amt. Code1 (A-H)	B: Income during reporting period (2) Type (e.g., div., rent or int.)	C: Gross value at end of reporting period (1) Value Code2 (J-P)	C: Gross value at end of reporting period (2) Value Method Code3 (Q-W)	D: Transactions during reporting period (1) Type (e.g., buy, sell, merger, redemption)	D: Transactions during reporting period If not exempt from disclosure (2) Date: Month-Day	(3) Value: Code2 (J-P)	(4) Gain: Code1 (A-H)	(5) Identity of buyer/seller (if private transaction)
☐ NONE (No reportable income, assets,									
1 V.I. Community Bank	G	O							
2 Wachovia Securities Command Money Fund Class A	B	K							
3									
4									
5									
6									
7									
8									
9									
10									
11									
12									
13									
14									
15									
16									
17									

1	Income/Gain Codes: (See Col. B1, D4)	A=$1,000 or less F=$50,001 - $100,000	B=$1,001-$2,500 G=$100,001-$1,000,000	C=$2,501-$5,000 H1=$1,000,001-$5,000,000	D=$5,001-$15,000 H2=More than $5,000,000	E=$15,001-$50,000
2	Value Codes: (See Col. C1, D3)	J=$15,000 or less N=$250,001-$500,000 P3=$25,000,001-$50,000,000	K=$15,001-$50,000 O=$500,001-$1,000,000	L=$50,001 - $100,000 P1=$1,000,001-$5,000,000 P4=More than $50,000,000	M=$100,001-$250,000 P2=$5,000,001-$25,000,000	
3	Value Method Codes: (See Col. C2)	Q=Appraisal U=Book value	R=Cost (real estate only) V=Other	S=Assessment W=Estimated	T=Cash/Market	

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting: RAYMOND L. FINCH	Date of Report: 2/3/04

VIII. ADDITIONAL INFORMATION OR EXPLANATIONS (Indicate part of Report.)

Item I of Investments and Trusts - Section VII- reflects a deposit of a check from the Government of the Virgin Islands for annuities due from 1994 to 1997.

IX. CERTIFICATION.

I certify that all information given above (including information pertaining to my spouse and minor or dependent children, if any) is accurate, true, and complete to the best of my knowledge and belief, and that any information not reported was withheld because it met applicable statutory provisions permitting non-disclosure.

I further certify that earned income from outside employment and honoraria and the acceptance of gifts which have been reported are in compliance with the provisions of 5 U.S.C. app., § 501 et. seq., 5 U.S.C. § 7353 and Judicial Conference regulations.

Signature _____ Date February 3, 2004

NOTE: ANY INDIVIDUAL WHO KNOWINGLY AND WILFULLY FALSIFIES OR FAILS TO FILE THIS REPORT MAY BE SUBJECT TO CIVIL AND CRIMINAL SANCTIONS (5 U.S.C. App., § 104.)

FILING INSTRUCTIONS:

Mail signed original and 3 additional copies to:

Committee on Financial Disclosure
Administrative Office of the
United States Courts
Suite 2-301
One Columbus Circle, N.E.
Washington, D.C. 20544

Chairman HATCH. Thank you so much.

Let me just say that I know your reputations, and I have carefully reviewed your records. I think all three of you are very well qualified to serve on your respective benches.

Let me just ask a few cases though as we go through this. Let us say that you have a case where you believe one way but the law is the other, or at least there is a strong argument that the law is the other way. How are you going to handle that, Judge Alvarez?

Judge ALVAREZ. Thank you, Mr. Chairman. I believe that as a judge I am bound to uphold the law like any other citizen, and my personal beliefs are not what I should base my decisions on. My decisions would be based on the law.

Chairman HATCH. What if they are really strongly held beliefs?

Judge ALVAREZ. I believe that my decisions should nonetheless still be based on the law. As a judge my oath is to uphold the law, not to impose my personal views.

Chairman HATCH. Judge Starrett?

Judge STARRETT. I would like to agree with my colleague, Senator, and thank you for the question. I would always follow the law. I hope that I have tried to do that. I have tried to do that through my career and would continue doing it.

Chairman HATCH. Judge Finch?

Judge FINCH. Thank you, Senator. I have, throughout my career, followed the law, and I will continue to do so. I think as a trial judge that it is my primary task in decision making simply to follow the law.

Chairman HATCH. Thank you.

Judge Starrett, you have given numerous speeches and written at least two articles on drug courts. You have also been instrumental in establishing GED and drug treatment programs in the local jails, and you have spent the last six or 7 years working to establish a drug court system in Mississippi. Would you please express to the Committee how effective these efforts have been in combatting the drug problems in your State?

Judge STARRETT. The drug courts are—I do not want to say in their infancy because I have had one for over 6 years, and I would like to thank the Senate and the House for supporting drug courts on a national level. But by the end of next year there should be 18 active drug courts working in Mississippi.

Chairman HATCH. You were the first to start this?

Judge STARRETT. Yes, sir, in Mississippi. And they are—a law that I worked to draft, we have one of the most progressive, if not the most progressive, drug court statute in the Nation. We also have one of the best, if not the best, funded drug court programs in the Nation. This has all come about in the last 2 years in difficult budget times.

Chairman HATCH. In these respective positions that you have, you have tremendous caseloads. How do you plan on managing those caseloads once you get there? As I understand in your case, Judge Starrett, this caseload will be—this is an emergency position.

Let us start with you, Judge Alvarez. How do you plan on handling a caseload? I understand you have a tremendous caseload in

the position that you would be assuming that you are nominated for down in Texas.

Judge ALVAREZ. Thank you for expressing that concern. That is also my understanding, that there is a very heavy caseload in the Laredo Division. I would do what I have always done in my life, and that is I am a very hard worker, so I would certainly do that. I believe that the role of a judge is not limited to 8 to 5, so I would commit myself to the time that is required to move the docket, of course, with the assistance of the magistrates and the other court staff.

Chairman HATCH. Thank you.

Judge Starrett?

Judge STARRETT. Thank you, Senator. Having a large caseload is not something new to me. When I took over as circuit judge from Judge Pigott, there was the highest caseload of any judge in the State at that time. When I take over, if I am so fortunate as to be confirmed, the district in Hattiesburg, where the seat will be, has the highest caseload of any U.S. District Court. The way to work it is just to work. You do the things that you have to do to manage the docket and to reduce the caseload.

Chairman HATCH. Judge Finch.

Judge FINCH. Senator, thank you for expressing your concern in this area. I have, since being on the Federal bench, used the expertise of the magistrate judges in our court to assist in moving our cases, and that has been very effective and I will continue to do so. In addition to that, of course, I will continue to work as hard as I can and as hard as my health will allow.

Chairman HATCH. Thank you so much.

One thing I like to ask, especially District Court nominees, how important do you think temperament is? I tried cases in the Western District of Pennsylvania before going to Utah, and then tried cases before the fabled—well, in both cases, the fabled Judge Wallace Gorley there in the Western District of Pennsylvania, who was kind of a law unto himself, but a very fine judge in many respects; and Willis Ritter, who has a very interesting reputation in the District Court there in Utah. How important is temperament? We will start with you, Judge Alvarez.

Judge ALVAREZ. I think the temperament is very important for any judge, especially I think a trial judge is seen by the public as the administrator of justice, and so for that reason a judge should always remember to treat those who come before that judge with dignity and respect.

Chairman HATCH. Judge Starrett.

Judge STARRETT. Thank you, Senator. The temperament of a judge is crucial to the perception of the fairness by the litigants and the attorneys. A judge should have a temperament that is courteous and respectful, but it also should be firm. It should be one that would run a courtroom in a way that gives respect to litigants, jurors, attorneys and all participants.

Chairman HATCH. And gets the job done.

Judge STARRETT. And gets the job done, yes, sir.

Chairman HATCH. Judge Finch.

Judge FINCH. It is my opinion that temperament is of utmost importance in conducting court proceedings. It is especially so in situ-

ations where one has to face non-lawyer litigants, and of course also with lawyers. Courtesy is of utmost importance, and I have exercised courtesy and respect to all lawyers who come into my court, and I will continue to do so.

Chairman HATCH. That is great. How are you going to treat young lawyers who may not have the practical experience, may not even be as well versed in the rules of evidence, may not be able to ask the questions, you know, listen to responses from witnesses as well as they should. Let us start with you, Judge Finch.

Judge FINCH. The short answer is great patience.

Chairman HATCH. Okay.

Judge FINCH. Great patience, and of course, courtesy. I have in some situations expressed from the bench my particular interest in an issue, and although the young lawyer may have completely missed the issue, having expressed my interest in it, I have given that lawyer time to submit additional memoranda on the subject and request a hearing if he so desires.

Chairman HATCH. Judge Starrett.

Judge STARRETT. Thank you, Senator. I have not forgotten when I was a young lawyer and needed some help from judges, but I would do the same thing that Judge Finch has said.

Chairman HATCH. Judge Alvarez.

Judge ALVAREZ. Thank you, Mr. Chairman. I believe that a judge can offer some guidance to a young lawyer, but of course should be careful not to become the advocate for either side, but as my colleagues have said, I believe great patience would be the strength that the judge could offer to the young lawyer.

Chairman HATCH. That is great. I have seen judges who try to try the cases for lawyers or who interject their own feelings or their own personal views all the time, and that should not happen. But there are times when a young lawyer is having a difficult time asking the question a way that is unobjectionable, where a judge might say, "You might want to ask it this way, counselor," just to help them.

I have seen great judges lose their tempers because sometimes the courtroom can be a very, very volatile place, but for the most part you pretty well should not, and I just believe that all three of you will make excellent judges, trial court judges from what I know about your backgrounds.

I am very honored to have you all here today. I know that you can answer any other question that I even could think of, and I have a lot that I might have asked you if you were other than the great people that you are. I am going to do my best to get you through between now and the end of this Congress, and hopefully will be able to do that. I would hope that in your cases that there will not be objections by the other side, and I am hopeful that we might be able to find some way that both sides will quit being so ridiculous at the end of presidential years, or at the end of any particular year, but especially presidential years. Both sides have been wrong from time to time, and the irritations continue to carry over, and I am trying to bridge that if I can. As you can see, it is very difficult, but in any event, I will do my very best to get you through.

I want to thank each of you for being here, your family members, your friends, and I will keep the record open for one week till September 15th for any further questions or statements that might be put into the record, and then we will probably put you on the markup for next week, next week or the week thereafter.

Thank you all. With that, we will end this hearing and recess until further notice.

[Whereupon, at 11:24 a.m., the Committee was adjourned.]

[Questions and answers and submissions for the record follow.]

QUESTIONS AND ANSWERS

Micaela Alvarez
6100 North 28th Street
McAllen, Texas 78504
Telephone: (956) 630-4648
Cell Phone: (956) 457-6332
Telecopy: (956) 631-2415
E-Mail: micaela@holealvarez.com

September 16, 2004

The Honorable Orrin G. Hatch, Chairman
Committee on the Judiciary
224 Dirksen Senate Office Bldg.
Washington, D.C. 20510

Dear Chairman Hatch:

Enclosed herewith please find my responses to the questions posed by Senator Leahy following the confirmation hearing held on September 8, 2004. Should the committee require any further information, please feel free to contact me.

Very truly yours,

Micaela Alvarez

MA:bcc
Enclosure

xc: The Honorable Patrick J. Leahy

Responses of Micaela Alvarez to Questions from Senator Patrick Leahy:

1. You received a partial rating of a "Not-Qualified" from the American Bar Association. Based on the research of my staff, I understand that your law firm has a reputation for being experienced but also for sometimes using aggressive and abrasive practices which raise questions of trustworthiness and ethics. While I do not impute the actions of other lawyers to you, what is the standard that you follow for determining whether your behavior is ethical and collegial? What is the standard you follow for evaluating the attorneys with whom you work? Have you ever had a situation in which you had concerns about another lawyer's honesty, trustworthiness or fitness to practice law? If so, how did you respond to such situations and did you report the professional misconduct, in accordance with Rule 8.03 of the Texas Disciplinary Rules of Professional Conduct?

   Response:
   In Texas, a lawyer is bound by the Texas Disciplinary Rules of Professional Conduct and by the Texas Lawyer's Creed. During my time as a lawyer and my brief time as a judge, I have always striven to uphold both the Disciplinary Rules and the Lawyer's Creed. Additionally, I believe I have an ethical obligation to report conduct that I reasonably believe violates the Disciplinary Rules. In my practice, I have had one occasion where I believed a lawyer had violated the Disciplinary Rules and that he should be reported to the Grievance Committee of the State Bar. While I was not the reporting attorney, I ensured that the referral to the Grievance Committee was made.

2. You were appointed and served as a judge on the 139th Judicial District Court in Texas from July 1995 to December 1996. At least five of your decisions during this time were subsequently reversed on appeal, a few for improperly granting summary judgment. In considering these reversals, what lessons would you take with you to the federal bench, if confirmed?

   Response:
   As trial judge in Texas, I made every effort to determine what law applied to the facts presented. I found that if a judge is unfamiliar with the particular area of the law, the judge should attempt to educate himself by conducting his own research, by requesting briefing from the parties, or, in federal court, by requesting briefing from the law clerks. Once the judge determines what law applies, the judge should then endeavor to apply that law to the facts presented. Of course, an appellate court may subsequently determine that the trial court was in error. Should I be confirmed, I would use the resources available, including my own knowledge and research, to determine what law applies to the facts presented in the case and would then apply that law to those facts.

3. You state on your Senate Questionnaire that your current law practice primarily focuses on medical malpractice defense, insurance defense, products liability

defense, employment defense, and wrongful discharge defense. As a judge, in most of the significant cases that you cited involving personal injury and employment issues, you ruled in favor of the corporate defendant. Given your significant experience as a counsel defending large corporate interests and your past experience as a judge, what assurances can you give that, if confirmed to the federal court, you will be fair to individual plaintiffs and consumers who bring claims against corporate interests? What steps would you take to ensure that, despite the fact that your career as attorney was defending companies in employment and personal injury cases, you would not act with bias, perhaps unintentionally, in favor of civil defendants and against plaintiffs?

Response:
While I have generally represented defendants, many of those were individuals rather than corporations. Additionally, I have represented individual plaintiffs suing corporations and also represented a group of plaintiffs suing a large university. I firmly believe that a judge should make every effort to treat all litigants in a fair and impartial manner. A judge's decisions should be based upon the law and facts presented, and not on the status of the party. If confirmed, I would base my decisions on the applicable law, rather than on a party's status as plaintiff or defendant.

4. You indicate in your Senate Questionnaire that almost all of your court appearances have involved civil matters in state courts and that you have little experience in criminal matters or appearing in federal court. Moreover, you note that in the majority of cases that you tried to verdict over the course of your career, you were associate counsel and not the lead counsel. As you know, a significant portion of the federal judicial docket, particularly in courts located in border towns, deals with criminal and immigration matters. How has your legal career prepared you to adjudicate complex federal criminal and civil cases and manage a busy docket involving such matters? If you are confirmed, how will you get up to speed and respond to the challenge of handling the federal substantive and procedural matters that will be before you?

Response:
While I have had significant experience in state court, I am also experienced in federal court. Over the course of my career, I have handled both criminal and civil cases in federal court. Additionally, there are many similarities, both substantive and procedural, between practice in state court and in federal court. I believe my extensive experience in state court and my experience in federal court, combined with my commitment to work hard will assist me in handling the challenges of a federal docket, should I be confirmed.

DISTRICT COURT OF THE VIRGIN ISLANDS
OF THE UNITED STATES

CHAMBERS OF
RAYMOND L. FINCH
CHIEF JUDGE

3013 ESTATE GOLDEN ROCK
CHRISTIANSTED, ST. CROIX
VIRGIN ISLANDS 00820-4355
(340) 773-5021 • FAX: (340) 773-2113
E-MAIL: JUDGEFINCH@VID.USCOURTS.GOV

September 16, 2004

Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Hatch,

Attached are my responses to the Honorable Patrick J. Leahy follow-up questions. If there are any additional questions or requirements, please feel free to notify me.

Sincerely,

Raymond L. Finch
Chief Judge

cc: Honorable Patrick J. Leahy.

Judge Raymond Finch's Responses to Senator Leahy's Follow-up Questions

1. **As you are no doubt aware, many people's only interaction with the Federal government is in our nation's courtrooms. Accordingly, it is very important that federal officials treat all people with patience and dignity, When Strom Thurmond was Chair of this Committee, he would ask judicial nominees if they would promise to be courteous if confirmed as a judge. He said that the more power a person has, the more courteous a person should be. Please describe your thoughts on the importance of treating all persons who appear before you with courtesy, and detail how you ensure that lawyers, staff, court officials and others subject to your direction are patient, dignified, and courteous to other litigants, jurors, witnesses, and lawyers?**

Every person involved in the judicial process should leave the Court with the sense that justice had been done. Fundamental to the impression of having been treated fairly and equally is the opportunity to be heard. In tailoring my practices, I keep in mind the importance to all parties of having a voice in the proceedings.

I give the parties reasonable leeway with respect to the briefing of issues, within the limits of the federal procedural rules. For example, no page limits are placed on legal memorandum and a local rule allows parties to agree between themselves upon extensions of time for briefing without involving the Court. In scheduling hearings, the court clerk allocates sufficient time for me to engage in dialogue with the litigants and for them to fully present their positions. When issues arise that have not been sufficiently researched, I encourage the parties to file supplemental briefs before I rule. By adhering to these practices, I ensure that whether or not the parties agree with my decisions, they are satisfied that they have been heard and have been able to make an adequate record for appeal.

I treat witnesses and jurors respectfully in the courtroom and expect the same of my staff and the litigants. In emphasizing that the Court provides fair and equal service to all, I lead my staff, the lawclerks, and court officials by example, rather than by micromanagement. Each Court employee performs his or her work efficiently and professionally without my intervention. Because the Court employees pride themselves in their work, and recognize that their objective is to serve the public, they consistently provide excellent services in an accommodating manner.

My chamber door is open to everyone: court staff, members of the bar, and virtually anyone who requests an audience with me, that would not implicate ex parte communications. I also interact with the local bar by attending events and by accepting speaking engagements. By making myself accessible, I am able to see the reflection of the Court in the eyes of the community, and make adjustments as needed.

2. **You have been a member of the Judicial Ethics Committee of the American Judges Association for twenty-five years, and you write in your Senate Questionnaire that you have "read much material on the various judicial ethics committees, judicial accountability commissions and judicial nominating commissions." What standards have you adopted to ensure that your decisions and actions on the bench are ethical and fair?**

I abide by the Code of Conduct for United States Judges, 28 U.S.C. § 455, and all applicable ethical rules.

Under what situations do you think a federal judge should recuse him/herself to avoid the perception of impropriety?

My practice is to recuse myself *sua sponte* when I believe that my impartiality may be reasonably questioned. When the connection is sufficiently distant that I have no reason to believe that anyone would question my impartiality, I still inform the litigants of any issues to give them an opportunity to move for my recusal.

Do you think that there need to be any changes to the current code of conduct for judges to protect the impartiality and respect for our judicial system, and, if so, what improvements would you suggest?

I have not encountered any problems with the current code of conduct that would leave me to believe that any changes are necessary.

3. **You have served as a judge on the U.S. District Court for the Virgin Islands for ten years. What lessons the you have learned during your first term on the bench that you will bring with you to your next term, if confirmed?**

During my first ten year term, I have had to manage a heavy caseload. My practice is to give criminal cases top priority. Trials are scheduled within the guidelines of the Speedy Trial Act. I hear pre-trial motions in a timely manner so that the cases will be ready for trial.

Because I empathize with civil litigants who have had to wait for long periods in the past for rulings or trial, I do not allow my criminal calendar to hinder resolution of the civil cases. To expedite the civil cases, I ensure that the Magistrate Judge is proactive in entering discovery scheduling orders, handling non-dispositive motions without delay, and ordering that the parties participate in mediation. I personally review every dispositive motion that is filed with any eye toward resolving non-complex motions in a prompt fashion. Finally, in fairness to the litigants, I focus my efforts on the longest pending cases and motions. Should I be confirmed for a second term, I would continue these practices to ensure that the docket is handled in a timely fashion.

The Circuit Court
for the Third Judicial Circuit of Michigan
1701 Coleman A. Young Municipal Center
Detroit, Michigan 48226

SUSAN BIEKE NEILSON
Circuit Court Judge

AREA CODE (313)
TELEPHONE 224-5436

October 5, 2005

The Honorable Arlen Specter
Chairman, Committee of the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Re: U.S. Court of Appeals for the Sixth Circuit

Dear Mr. Chairman:

Attached are my responses to the written questions of Senators Feingold and Durbin. If you have any questions, please do not hesitate to contact me at your convenience.

Very truly yours,

Susan Bieke Neilson

Susan Bieke Neilson

SBN:jtn

cc: Honorable Patrick J. Leahy

Answers To Questions Asked by Senators Durbin and Feingold

1. When you made the contribution, were you aware of the Code of Conduct for United States Judges and in particular, the prohibition on political contributions contained in Canon 7A?

   Answer: I was generally aware that the Code of Judicial Conduct prohibited federal judges from engaging in political activity which would include the making of political contributions. It was my understanding that the making of political contributions by nominees was not prohibited. To be clear, the Canons of Judicial Conduct adopted by the State of Michigan do not prohibit the making of political contributions by judges.

2. If the answer to question 1 is Yes, how did you come to decide to make the contribution?

   Answer: The Canons of Judicial Conduct adopted by the State of Michigan do not prohibit a Judge from making a political contribution. As such, I made a personal decision to support President Bush.

3. Did you consider at the time you made the contribution that it might be viewed as inappropriate because you were a judicial nominee?

   Answer: I believe that Canons or Codes which govern a judge's conduct are concerned with the appearance of impropriety. Because it was my belief that the Code's restrictions did not extend to judicial nominees, I did not believe that such contribution was inappropriate.

4. Prior to making the contribution, did you consult with anyone in the White House, the Department of Justice, the President's campaign organization, or anyone else concerning the propriety of making a political contribution? If so, what advice were you given?

   Answer: I do not recall any discussion with any personnel of the organizations cited on the subject of contributions. I do recall discussions in 2003 that I should avoid any appearance or attendance at any political event for any candidate (which would be allowed under Michigan's Canons).

5. Do you believe that even though the Code of Conduct specifically governs the conduct of judges and only provides guidance to nominees, that nominees should avoid making political contributions?

Answer: Judicial nominees should look to the Code of Conduct for guidance. While I treated the federal Code of Conduct as guidance, I also looked to the Michigan Canons of Judicial Conduct to which I am subject. Because the Michigan rules did not prohibit such contribution, I did not believe that my contribution created an appearance of impropriety.

6. If the answer to question 5 is No, do you think it unreasonable for others to believe that judicial nominees should refrain from making political contributions based on the guidance that the Code of Conduct provides?

Answer: I do not believe it unreasonable for others to believe that judicial nominees should refrain from making significant political contributions that would suggest a significant involvement in the political process by the nominee.

7. In your view, what ethical concerns are raised by judicial nominees making contributions to candidates or political parties?

Answer: Upon appointment, federal judges must be seen as independent and non partisan. The Code of Conduct for United States Judges prohibits federal judges from making political contributions for this reason among others. The same rationale could be applied to nominees. I have adhered to the Canons of Judicial Conduct of the State of Michigan during my tenure as a judge in the State of Michigan. I recognize your concerns in this area, and assure you that, if confirmed, I would adhere to the Code of Conduct for United States Judges and all applicable statutes.

SUBMISSIONS FOR THE RECORD

Statement
United States Senate Committee on the Judiciary
Judicial Nominations
September 8, 2004

The Honorable John Cornyn
United States Senator , Texas

U.S. Senator John Cornyn
Judicial Nominations

Micaela Alvarez to be United States District Judge for the Southern District of Texas

Wednesday, September 8, 2004, 10 a.m.
Dirksen Senate Office Building Room 226

It is my pleasure to introduce to the committee Judge Micaela Alvarez, who has been nominated to serve as a U.S. District Judge for the Southern District of Texas. I want to thank the Chairman of the committee, Senator Hatch, for scheduling today's hearing.

Judge Alvarez has been nominated to fill the vacancy that will be created when Judge David Hittner takes senior status later this year. Judge Hittner serves in the Houston Division of the Southern District of Texas, and he has served his country admirably.

It would have been my preference, and that of the senior Senator, Senator Hutchison, that the President be given the opportunity to nominate an individual to serve in the Houston Division to succeed Judge Hittner. The Houston Division is one of the most important and active divisions in our entire federal judiciary, responsible for shepherding some of the nation's most complex commercial disputes and criminal prosecutions. Moreover, continuity of judicial service is important in any federal judicial division, because familiarity with the local community is an important asset to any federal district judge.

I am thus deeply disappointed that, according to the latest information available to my office, the vacancy that will be created in Houston by Judge Hittner's elevation to senior status is expected to be moved to Laredo, as the result of a decision by the Southern District to swap two judicial posts in Houston and Laredo.

Laredo deserves and needs continuity on its federal bench, especially due to its close proximity to the border and the substantial court docket that such geography brings. Accordingly, I introduced legislation, S. 1719, co-sponsored by Senator Hutchison, to redress precisely the problem presented by the Southern District's decision – and thus to ensure access to quality justice by ensuring continuity of judicial service throughout the state of Texas. But be that as it may, this is the situation that is before us, and I am pleased today to support the nomination of Judge Alvarez to fill this vacancy.

Judge Alvarez is a long-time resident of South Texas, and a graduate of the University of Texas, where she received both her undergraduate and law degrees. She is bilingual – a skill that will surely be of great benefit to those who would appear before her as a federal district judge in Laredo. Judge Alvarez is currently engaged in the private practice of law at Hole & Alvarez, L.L.P. She has also served on the President's Advisory Commission on Educational Excellence for Hispanic Americans, and she continues to serve as a board member for the State Office of Risk Management.

In 1995, then-Governor George W. Bush appointed Alvarez to serve on the 139th Judicial District Court in Hidalgo County. To Governor Bush, this was no ordinary appointment. As he wrote in his 1999 book, A Charge To Keep:

One of my favorite parts of the job is administering the oath of office to my new appointees. They invite family and friends. Their parents and children are bursting with pride. I always feel honored to look through this window into someone's life. I think of the day I traveled to Edinburg, in south Texas, to administer the oath of office to Micaela Alvarez . . . , the first Hispanic woman ever to serve as district judge in Hidalgo County. I listened as one of her lifelong friends spoke of Micaela's integrity, her love for her family, her fairness, and her conservative philosophy. I watched as her parents, husband, children, sisters, cousins, and nieces and nephews crowded around to have their pictures taken with her. They all wanted to participate in this glorious moment in the life of their family.

Micaela's parents were migrant farm workers who traveled from job to job on farms throughout Texas and the southern United States. For them, Micaela was not just a success story. She was living proof of what they had lived for and promised their children: that in Texas and in America, if you work hard, get an education, make good choices in life, you can be whatever you want to be. And I can assure you, when her mother held that Bible for Micaela to take the oath of office to serve the state of Texas as a district judge, there wasn't a dry eye in the packed house.

So the appearance of Judge Alvarez before this committee today is yet another inspiring example of the American dream becoming a reality. She deserves this committee's support. She was the "Highest Rated Judge" according to a survey taken by the Hidalgo County Bar Association, and the American Bar Association's Standing Committee on the Federal Judiciary has certified her as "qualified" for the federal bench.

I am pleased that the President has nominated Judge Alvarez to serve on the Southern District of Texas, and I look forward to today's hearing.

Statement
United States Senate Committee on the Judiciary
Judicial Nominations
September 8, 2004

The Honorable Orrin Hatch
United States Senator , Utah

Statement of Senator Orrin G. Hatch, Chairman
Before the United States Senate Committee on the Judiciary
Hearing on the Nominations of:

Susan B. Neilson
to be United States Circuit Judge for the Sixth Circuit;

Micaela Alvarez
to be United States District Judge for the Southern District of Texas;

Keith Starrett
to be United States District Judge for the Southern District of Mississippi; and

Raymond L. Finch
to be Judge for the District Court of the Virgin Islands

I welcome members of the Committee and express my appreciation for the cooperation exhibited yesterday as we confirmed three additional judges. I know there may be some resistance to continuing the work of the Committee, but we must do our duty to advice and consent on judicial nominations. I would repeat what I have stated on earlier occasions – our Constitutional duty is not on a mythical time clock.

The judicial nominations process does not shut down during presidential election years. For example, when Senator Thurmond chaired this Committee, during a presidential election year, the Senate confirmed six Circuit Judges after August 1st – one in August and five in October. In addition, twelve district judges were confirmed in September and October of that year.

I will continue to bring the President's nominees to the Committee for action and to the Senate for consideration.

On today's agenda are four nominees to various positions within the federal judiciary. I welcome each of them, their families and guests. We are also privileged to have with us home state Senators and members of the House of Representatives and we welcome each of you as well.

The nominees we will hear from today are Susan B. Neilson, nominated to be United States Circuit Judge for the Sixth Circuit; Micaela Alvarez, to be United States District Judge for the Southern District of Texas; Keith Starrett, to be United States District Judge for the Southern District of Mississippi; and Raymond L. Finch, to be Judge for the District Court of the Virgin Islands for a term of ten years.

Judge Neilson is an outstanding candidate, who received a unanimous Well Qualified rating from the American Bar Association. She graduated with high distinction from the University of Michigan Honors College in 1977 and was elected to Phi Beta Kappa. Judge Neilson received her J.D. degree

(cum laude) from Wayne State University School of Law in 1980 and was a member of its law review. Following her graduation, Judge Neilson began her legal career in 1980 as an associate at the Detroit law firm of Dickinson Wright PLLC, one of the oldest and most prestigious law firms in Michigan. She became a partner in the firm in 1986 and continued to practice there until 1991. While in private practice, Judge Neilson appeared in court on a regular basis and handled hundreds of cases at both the trial and appellate levels.

She was appointed to her current judgeship on the Third Judicial Circuit, the trial court bench in Michigan's state court system, in 1991 by Governor John M. Engler, and was reelected in 1992, 1996 and 2002. She presently is assigned to the criminal division of the Court. During her tenure on the Court has served in the civil and family divisions and on several Court administrative committees.

Micaela Alvarez, nominated to be United States District Judge for the Southern District of Texas, is an experienced attorney and trial judge. She began her legal career in 1989 as an Associate Litigation Attorney at the law firm of Atlas & Hall, L.L.P. in McAllen, Texas where she handled all types of litigation, but primarily insurance defense, employment defense, and wrongful discharge defense. Four years later, Judge Alvarez joined the Law Offices of Ronald G. Hole where she maintained her initial practice and expanded it to include medical malpractice defense and products liability. In 1995, Judge Alvarez served as the Presiding Judge to the 139th Judicial District Court, Hidalgo County, Texas. After a little more than a year on that court of general jurisdiction, Judge Alvarez rejoined the Law Offices of Ronald G. Hole, and was promptly made a partner. She has remained at the firm since 1997.

A majority of the ABA Committee has recognized this seasoned nominee with a qualified rating, and I look forward to hearing from her today. Judge Alvarez brings a wealth of experience to the federal bench and he will make an excellent addition to the Southern District of Texas.

Keith Starrett is our nominee for the U.S. District Court for the Southern District of Mississippi. Judge Starrett is an experienced and accomplished jurist, having served as a circuit court judge for the state of Mississippi since 1992. Since 1995, he has retained his seat on the bench via election. The American Bar Association unanimously gave him its highest rating of "Well Qualified." The Mississippi Bar Association awarded him with the Judicial Excellence Award in 2003. Undoubtedly, he will be a wonderful addition to the federal bench. We welcome him this morning.

Raymond Finch has been renominated to a second term as United States District Judge for the Virgin Islands. This Committee has seen few nominees with as much experience as Judge Finch. As an attorney, he tried approximately 200 cases to verdict or judgment. In addition to his litigation experience, he has been a judge for nearly thirty years, having first been appointed to the Territorial Court of the Virgin Islands in 1976. He was confirmed as a U.S. District Judge for the Virgin Islands in 1994, and was promoted to Chief Judge of that District in 1998. The ABA has recognized the extensive experience of this fine nominee by awarding him a Majority Qualified/Minority Well-Qualified rating.

It is my privilege to welcome these distinguished nominees to the Committee, and I look forward to their testimony.

Opening Statement of Senator Patrick Leahy
Ranking Democratic Member, Judiciary Committee
Judicial Nominations Hearing
September 8, 2004

The Republican majority's utter disregard for the rules, traditions and precedents of the United States Senate and the Judiciary Committee-- and of their own actions -- is something to behold. This hearing marks yet another milestone in Republicans' break from their adherence to the Thurmond Rule and their own prior practices.
This hearing joins a long list of double standards imposed by Senate Republicans: From the way that home-state Senators are treated, to the way hearings are scheduled, to the way the Committee questionnaire was altered, to the way our Committee's historic protection of the minority by Committee Rule IV has been violated; Senate Republicans have destroyed virtually every custom and courtesy that used to help create and enforce cooperation and civility in the confirmation process.

In addition to holding yet another hearing for a Sixth Circuit nominee without the approval of her home-state Senators, the majority is openly ignoring another longstanding practice by holding a nominations hearing after Labor Day in a presidential election year. It was a Republican-imposed reality when Democratic Presidents occupied the White House, that certainly after the political parties' presidential nominating conventions, they would not proceed with judicial nominations hearings or votes, except by consensus.

There was a consensus arrangement earlier this year to proceed with consideration of 25 appointments to lifetime nominations. Democrats fulfilled that understanding. This hearing and these nominees are not part of a consensus arrangement.

It has been long acknowledged that absent the consent of the minority, the Senate awaits the results of the election and the inauguration of a new president before acting on additional lifetime appointments to the judiciary. Certainly with vacancies at an historic low level, that practice, insisted upon by Republicans with Democratic Presidents, would be followed. This hearing is clear indication that Senate Republicans have no such intention of maintaining a consistent practice. Instead, in another blatant double standard, they have demonstrated their efforts to breach that practice, as well.

In 1996, when a Democratic President was seeking re-election, the Republican-controlled Committee held only one hearing to consider one district court nominee after the August recess, and then never allowed that nominee to have a Committee vote. Indeed, that nominee, Judge Ann Aiken of Oregon, was obstructed so severely by the Republican majority that she was not confirmed to her position until nearly a year and a half later.

In 2000, the Republican-controlled Committee followed the Thurmond Rule to the letter. After the August recess work on judicial nominations came to a halt. Although there were over 30 nominees pending after July 25, 2000, no more judicial nominees were scheduled for hearings or considered by the Committee.

But now the "by any means necessary" approach that has characterized this Republican leadership persists. Their approach to our rules and precedents continues to follow their own partisan version of the golden rule that "he, with the gold, rules." Today, after July 4th, after the presidential nominating conventions and after Labor Day, the Republican majority has scheduled a hearing for four judicial nominees, including one to a circuit court opposed by both home-state Senators, in a presidential election year. In contrast to the stalling that dominated Republican treatment of President Clinton's nominees, now Senate Republicans want to proceed to fill judicial vacancies that have not even occurred and will not occur until after the election.

With a Democratic President's judicial nominees, a single objection by a Republican home-state Senator was enough to derail any action. As we have seen so many times over the last three and a half years, the Republican Senate perspective is far different when Democratic home-state Senators object to a nomination. Nearly a year ago, the Chairman crossed a line that he had never before crossed when he held a hearing for Henry Saad, a Michigan nominee to the Sixth Circuit who was opposed by both his home-state Senators. I think it may have been the first time that any Chairman and any Senate Judiciary Committee proceeded with a hearing on a judicial nominee over the objection of both home-state Senators. It was certainly the only time in the last 50 years, and I know it to be the only time during my nearly 30 years in the Senate. Having broken that longstanding practice with Henry Saad, it has now been repeated again and again.

The Michigan Senators have come to the Committee time and again to articulate their very real grievances with the White House and their honest desire to work toward a bipartisan solution to filling vacancies in the Sixth Circuit. We should respect their views, as the views of home-state Senators have been respected for decades. I have urged the White House to work with them. I have proposed reasonable solutions to the impasse that the White House rejected. The Michigan Senators have proposed reasonable solutions, including a bipartisan commission, which the White House continues to reject. This is not the time to press ahead with yet another Sixth Circuit nominee without a resolution to this impasse.

I have also heard concerns about the President's decision to nominate Keith Starrett to the vacancy created when this President bypassed the Senate to appoint Charles Pickering to the Fifth Circuit without the consent of the Senate. I ask that a letter sent to the Committee just recently by the Magnolia Bar Association, a primarily African-American bar association in Mississippi, be included in the record.

The Magnolia Bar's President, Crystal Wise Martin, expresses the group's strong opposition to proceeding with Judge Starrett's nomination, not only because it is so late in the session, but also because, as she writes: "[I]it fails to remedy the egregious problem concerning the lack of diversity on Mississippi's federal bench." She points out that Mississippi has the highest percentage of African Americans of any State, but only had one African-American federal judge. She explains that the Magnolia Bar and the National Bar Association have both made direct requests to the President that he appoint an African American to this seat. During the consideration of Charles Pickering's nomination, his son, Congressman Chip Pickering reportedly expressed his willingness to advocate for an African American nominee if his father received support from the Magnolia Bar. Apparently, this Administration did not honor that intention of proceeding with a qualified African-American nominee for this judgeship.

Also on the agenda is a nominee for a vacancy that will not arise until after the November election. While it can be argued that for purposes of efficiency nominees can and should be confirmed shortly in advance of the time the vacancy they are filling actually arises, it is astounding that the partisans who assiduously followed the Thurmond Rule and shut down consideration of judicial nominees in the last six months of a presidential term have now reversed themselves to insist that vacancies, which will not arise until after the presidential election, be filled in advance.

This President has seen more than 200 of his nominees confirmed, there remain just 27 vacancies in the federal district and circuit courts combined and there are more active judges sitting on the bench than at any time in this nation's history. By contrast, Republicans presided over rising vacancies that reached over 100 during President Clinton's term and refused to proceed on more than 17 judges in the entire 1996 session.

Under our Constitution, the Senate has an important role in the selection of our judiciary. The brilliant design of our Founders established that the first two branches of government would work together to equip the third branch to serve as an independent arbiter of justice. As columnist George Will recently wrote: "A proper constitution distributes power among legislative, executive and judicial institutions so that the will of the majority can be measured, expressed in policy and, for the protection of minorities, somewhat limited." The structure of our Constitution and our own Senate rules of self-governance are designed to protect minority rights and to encourage consensus. Despite the razor-thin margin of recent elections, Senate Republicans are not acting in a measured way, but in complete disregard for the traditions of bipartisanship that are the hallmark of the Senate. Senate Republicans have acted to ignore precedents, reinterpret longstanding rules to their advantage and simply break them when they choose. This practice of might makes right is wrong.

# # # # #

CARL LEVIN
MICHIGAN

United States Senate

WASHINGTON, DC 20510-2202

September 8, 2004

Honorable Orrin Hatch
Chairman, Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

As I mentioned to you yesterday, I will be unable to join you this morning because of an important meeting with the President regarding intelligence reform. Had I been able to attend, I would have expressed my opposition to your decision to proceed with the nomination of Judge Susan Bieke Neilson to the Sixth Circuit. I do so, in part, for the reasons I have opposed moving forward on the other nominations for Michigan vacancies without addressing serious concerns regarding the fundamentally unfair treatment of Michigan judicial nominees during the previous administration. I would ask that you incorporate by reference in today's hearing record my statements of July 16, 2004 and July 30, 2003 that detail the reasons for my objections.

Both of those statements describe my efforts, as well as those of Senator Leahy and others, to urge the Committee to hold hearings on two of President Clinton's nominees for Michigan vacancies on the Sixth Circuit during the Clinton administration. Those efforts were unsuccessful and the Committee's failure to consider those nominees was not only grossly unfair to the two nominees themselves but, if accepted, would amount to approval of a significant distortion of the judicial nominating process.

On more than one occasion, the White House Counsel has stated that some nominees during the previous administration were wrongly treated. In fact, last year Judge Gonzales said that he and the President believed that the treatment of some nominees during the Clinton administration was "inexcusable". We have said repeatedly that it is also wrong for the President to seek the confirmation of his nominees to the Michigan seats on the Sixth Circuit before that acknowledged wrong is corrected.

As a demonstration of our hope of reaching a bipartisan compromise to fill the Michigan Sixth Circuit vacancies, Senator Stabenow and I established an informal advisory group to meet with the Michigan nominees to the Sixth Circuit and give us their confidential assessment. We extended an invitation to each of the nominees and our advisory group met with Judges Saad, McKeague, and Griffin on September 7, 2003.

Unfortunately, Judge Neilson was unable to meet with our advisory group at that time. In

a September 3, 2003 letter to us, Judge Neilson stated that her medical situation imposed certain restrictions on her activities and that, as a result of these restrictions, she would be unable to attend a meeting. However, at that time, Judge Neilson said that she wished to provide us "the utmost cooperation" within the limits established by her physicians and stated her willingness to meet at the appropriate time.

On Wednesday of last week we were informed by Judiciary Committee staff that Judge Susan Bieke Neilson, a Michigan nominee for the Sixth Circuit Court of Appeals, would be included on the agenda for today's Judiciary Committee nominations hearing. This was the first time we were made aware that Judge Neilson's health would permit her to undertake activities related to her nomination.

When Senator Stabenow and I were informed that Judge Neilson was on the Committee's hearing agenda, we asked that you postpone the hearing on her nomination until our advisory group had the chance to meet with her, which we offered to arrange as soon as possible. We felt that this would be consistent with our shared hope for a bipartisan compromise and Judge Neilson's stated willingness to meet when her medical situation permitted. We were disappointed that, despite our request, you chose to move forward with this hearing before that essential step was taken.

Given the number of Michigan vacancies on the Sixth Circuit, it has been Senator Stabenow's and my belief that a bipartisan compromise to resolve the current impasse and fill those vacancies is achievable.

Sincerely,

Carl Levin

Carl Levin

cc: Senator Patrick Leahy

Senator Trent Lott
Statement of Introduction for Judge Keith Starrett
Judiciary Committee Hearing
Wednesday, September 8, 2004

Mr. Chairman, I am pleased to be here today to introduce Judge Keith Starrett to this committee. I was delighted when the President nominated Judge Starrett to be a United States District Court Judge for the Southern District of Mississippi because he is one of the most experienced and respected trial court judges in the Mississippi state court system. I want to take a moment to greet and introduce his lovely wife Barbara who has come with him to Washington for this important occasion.

Judge Starrett is a bright light in the Mississippi legal

community. He holds an undergraduate degree from Mississippi State University and a J.D. degree from the University of Mississippi School of Law. Additionally, as a sitting trial court judge he has completed a number of courses at the National Judicial College which have added to the knowledge base which he will bring to the federal bench.

Judge Starrett engaged in the general practice of law for 17 years in Pike County and also served as an Assistant District Attorney, gaining broad experience in the law that such practice areas provide. He was appointed to a vacant state Circuit Court Judgeship in 1992, and he was elected to continue in this position in 1994, 1998, and 2002. During his 12 years on the bench,

Judge Starrett has earned a strong reputation as a fair and outstanding trial judge presiding over both civil and criminal cases.

One of Judge Starrett's most important accomplishments in his judicial career is the leadership he provided in establishing the first felony level drug court in Mississippi in his state judicial district. This court was used as a model for the creation of other drug courts in the state. Judge Starrett's expertise and involvement in this area has been a key driving force as Mississippi works to implement a drug court system for the entire state, and he has written and spoken extensively on this topic. These special courts are better able to address the issues of justice and rehabilitation for those charged with

crimes involving drugs, and I commend Judge Starrett for the groundbreaking work he has done in this area.

Judge Starrett has also found time to serve his community and profession in many other ways. He helped to found Mission Pike County, a racial and denominational reconciliation organization and Southwest Mississippi Child Protection, a child advocacy group in Lincoln and Pike Counties. He is a leader in his church and the legal community in Mississippi, and he has been recognized with awards such as the 2003 Judicial Excellence Award given by the Mississippi Bar Association.

Mr. Chairman, it is no surprise that the American Bar Association's Standing Committee on the Federal

Judiciary has unanimously found Judge Keith Starrett to be Well-Qualified to serve as a U.S. District Court Judge. The seat which Judge Starrett has been nominated to fill has been designated a judicial emergency, and more specifically this seat has the highest weighted/adjusted filings per judge of all the 14 judicial emergencies in the country. In order to prevent justice from being delayed any further for the parties whose cases are stalled in the Southern District of Mississippi, I look forward to the committee's swift approval of this fine nominee, and to quick confirmation by the full Senate.

Magnolia Bar Association, Inc.

Post Office Box 648
Jackson, Mississippi 39205-0648
Office: (601) 353-2540
Fax: (601) 352-0208
magnoliabar@bellsouth.net

September 6, 2004

Senator Orrin Hatch
Chair, Senate Judiciary Committee
224 Senate Dirksen Office Building
Washington DC 20510
FAX: 202-224-9102

Senator Patrick Leahy
Ranking Member, Senate Judiciary Committee
152 Senate Dirksen Office Building
Washington DC 20510
FAX: 202-228-0861

Dear Senators Hatch and Leahy:

Founded in 1955 by less than ten black lawyers with several purposes including advancing the science of jurisprudence and promoting reform in the law, the Magnolia Bar Association can now boast that it has more than four hundred African-American and white members who practice across Mississippi and many states throughout America. Our members are engaged in every form of practice just as other members of the Mississippi Bar. We are prosecutors, criminal defense attorneys, plaintiff attorneys, defense attorneys, and we are administrative lawyers. Our ranks also include attorneys who specialize in domestic relations and commercial litigation. Simply put, we do it all. We practice in state, federal and tribal courts. The Magnolia Bar is represented on every court in Mississippi except the Fifth Circuit Court of Appeals. We are proud of what we do, and we are committed to our profession. I, Crystal Wise Martin, am indeed honored to serve as its president.

We are strongly opposed to the Senate's consideration of the nomination of Keith Starrett to the Southern District of Mississippi so late in this Administration's term. We understand there is a longstanding and well-respected practice of the Senate Judiciary Committee to withhold consideration of controversial federal judicial nominations by the fall of an election year. We see no reason to deviate from this tradition in the case of the Starrett nomination.

The Starrett nomination is particularly untimely. President Bush only nominated Keith Starrett on July 7 of this year, to fill the seat vacated by Charles Pickering upon his recess appointment to the Fifth Circuit. Consideration of the nomination at this point in an election year is simply inappropriate. In Mississippi, absentee voting in the Presidential election begins on September 20. Holding a hearing on the nomination just twelve days before Mississippians can cast their Presidential votes is simply too late. Moreover, it is doubtful that Mr. Starrett could even proceed through the Judiciary Committee before the voting begins.

We know of no federal judicial nomination in recent history in which the nomination was made so late in a Presidential term and yet still received a hearing before the Judiciary Committee in the fall of an election year. In the last presidential election year of 2000, there were no hearings whatsoever held in the fall. For example, when President Clinton nominated Ricardo Morado to the district court in Texas on May 11, 2000, Senators objected to the nomination as occurring too late in an election year; Mr. Morado never received a hearing.

Additionally, we strongly object to the Starrett nomination because it fails to remedy the egregious problem concerning the lack of diversity on Mississippi's federal bench. Mississippi has the highest percentage of African Americans of any state in the country. Yet, Mississippi has had only one African American federal judge – ever. Judge Henry Wingate, who holds this distinction, was appointed nearly twenty years ago.

Earlier this year, the Magnolia Bar Association made a direct plea to President Bush to rectify this lack of diversity. In a letter dated February 2, we urged President Bush to appoint an African American to the Southern District of Mississippi. We wrote that the "appointment of an African American . . . is long overdue." We set forth the history of the lack of appointments, and concluded there was a "compelling case" for the appointment. We noted the existence of hundreds of African American lawyers in the State and the representation we have been able to achieve on our State and local bench. We offered to consult with the President about the numerous candidates who exist for a federal court position. The National Bar Association, the nationwide organization of African American lawyers, made a similar request this year, directed specifically to the vacancy in the Southern District of Mississippi.

Moreover, many members of the African American community in Mississippi were led to believe that an African American would receive the nomination to fill Judge Charles Pickering's district court seat. Judge Pickering's supporters, including but not limited to his son, Representative Chip Pickering, were express about their intentions to bring about the nomination of an African American should Judge Pickering be elevated. These representations are well documented in the press. The Washington Post reported that "Chip Pickering confirmed that he has also been telling prominent African Americans in the state that if his father is promoted to the appeals court, his replacement on the district court will likely be an [African American nominee]." ("Judge's Fate Could Turn on 1994 Case," Washington Post, May 27, 1993). The Clarion-Ledger from Jackson, Mississippi referred to Congressman Pickering's representations in an article entitled, "Pickering Vows to Push Diversity." (Clarion-Ledger, May 28, 2003).

President Bush has refused to heed our requests. Despite having four opportunities, he has not nominated one African American to the federal bench in Mississippi. During his term, President Bush has nominated three persons to the federal district court in Mississippi and one person from Mississippi to the Fifth Circuit Court of Appeals. None are African American. We deplore this Administration's record on diversity in judicial appointments in Mississippi.

The failure to diversify Mississippi's federal bench is just one example of the lack of diversity in this Administration's judicial appointments generally. In four years, President Bush has appointed only 11 African Americans to district court seats anywhere in the country. These 11 appointments constitute only less than seven percent of the total of 162 district court appointments. This stands in stark contrast to the record of President Bush's predecessor. In his first term, President Clinton appointed 33 African Americans out of 170 district court appointments, or almost twenty percent. In his second term, President Clinton appointed 20 African Americans out of 137 district court appointments, or fourteen percent. The Magnolia Bar Association strongly believes we should be advancing in African American representation on the federal bench, not retreating.

For all of these reasons, we urge you to refrain from considering the Starrett nomination at this late date. Thank you.

Respectfully yours,

Crystal Wise Martin
President
Magnolia Bar Association

The Circuit Court
for the Third Judicial Circuit of Michigan
Frank Murphy Hall Of Justice
1441 Antoine
Detroit, Michigan 48226

SUSAN BIEKE NEILSON
Circuit Court Judge

AREA CODE (313)
TELEPHONE 224-5201

July 30, 2004

The Honorable Carl Levin
United States Senate
Washington, DC 20510

The Honorable Debbie A. Stabenow
United States Senate
Washington, DC 20510

Re: Nomination to 6th Circuit Court of Appeals

Dear Senators Levin and Stabenow:

Last year, you requested that I meet with a judicial advisory committee you established in connection with nominations from Michigan to the 6th Circuit Court of Appeals. Regrettably, my health situation at that time precluded such a meeting.

I am pleased to inform you that my health has sufficiently improved to allow me to meet with this committee should you so desire.

Very truly yours,

Susan Bieke Neilson

SBN:jtn

Senator Debbie Stabenow
Statement for Record
Senate Judiciary Hearing on Judge Susan Neilson
September 8, 2004

Mr. Chairman, I would like to thank you, Ranking Member Leahy, and the members of your committee for allowing me the opportunity to testify today. I want to thank Senator Levin for his leadership in trying to get fairness in the nomination process to the Sixth Circuit Court of Appeals.

Before I begin my testimony, I want to welcome Judge Susan Neilson. I am pleased to hear that she is feeling better and wish her a continued speedy recovery. This is actually the first time Judge Neilson and I have met. Unfortunately, due to her health problems, Judge Neilson was unable to meet with our informal advisory group last summer, or meet in person with me and Senator Levin last fall.

Both the advisory group and the in person meetings gave us an opportunity to meet the 6th Circuit nominees and learn more about their backgrounds and judicial outlook. Judge Neilson is the only 6th Circuit nominee who has been given a hearing without participating in this process.

Last week, we sent Chairman Hatch a letter asking that this hearing be postponed as a courtesy to the home-state senators so that we could schedule these meetings with Judge Neilson. Unfortunately, this request was not granted and neither Senator Levin nor I have had an opportunity to meet with this nominee.

Mr. Chairman, this is the third time that I have testified before this committee urging for a compromise solution.

Before the August recess, we were forced to have three cloture votes on the other 6th Circuit nominees, Judges Saad, McKeague and Griffin. I was extremely disappointed by this partisan maneuver, and I still believe that the best way to end this impasse is to forge a compromise.

As you know, Senator Levin and I have proposed to settle this conflict by appointing a bipartisan commission to make recommendations to the White House on judicial nominations, similar to the commission that is up and working just across Lake Michigan in Wisconsin.

In fact, just one month before these partisan cloture votes, the Senate confirmed Judge Diane Sykes for a vacancy on the 7th Circuit Court of Appeals. Judge Sykes, a Bush Administration nominee, was recommended by the bipartisan Wisconsin commission, and had the support of both of her Democratic home-state Senators. This process works.

The Wisconsin commission includes representatives from the Wisconsin Bar Association, the Deans of the state's law schools, as well as members appointed by both Republicans and Democrats, and they only recommend qualified candidates that have the support of the majority of the commission.

The President then looks to the recommendations of the commission when making his nominations. The Wisconsin commission's recommendations have always been followed by the President, regardless of political party. This type of commission preserves the Constitutional prerogatives of both the President and the Senate.

Wisconsin is not the only state where this type of bipartisan commission works. In a similar form, it has worked in several other states including Washington State, California and Vermont.

Unfortunately, the White House continues to reject this proposal, despite having agreed to similar commissions in other states with other Democratic Senators.

Senator Levin and I are interested in finding a bipartisan solution to this problem. We have stated on numerous occasions that we are willing to accept the commission's recommended nominees even if they are not Helene White or Kathleen Lewis, or any other person we would choose if it were up to us.

Mr. Chairman, I hope we can still accomplish this, and that you will work with us to develop a fair compromise to this longstanding problem. I look forward to working with you and Ranking Member Leahy on a fair compromise.

NOMINATIONS OF CHRISTOPHER BOYKO, NOMINEE TO BE DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF OHIO; AND BERYL ALAINE HOWELL, NOMINEE TO BE A MEMBER OF THE UNITED STATES SENTENCING COMMISSION

WEDNESDAY, SEPTEMBER 22, 2004

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The Committee met, pursuant to notice, at 3:45 p.m., in room SD–226, Dirksen Senate Office Building, Hon. Mike DeWine presiding.

Present: Senators DeWine and Leahy.

Senator DEWINE. The hearing will come to order. First let me apologize. There is a briefing going on in regard to Iraq and I apologize for being late. That briefing started at three; it is still going on.

We have today a Senate Judiciary Committee hearing on judicial nominations. Christopher Boyko will be the first. Before we start, let me call up the Honorable Steven LaTourette, who is here, and we will hear Congressman LaTourette's testimony. Congressman, thank you very much for joining us.

PRESENTATION OF CHRISTOPHER BOYKO, NOMINEE TO BE DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF OHIO, BY HON. STEVEN LATOURETTE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OHIO

Representative LATOURETTE. Senator DeWine and Senator Leahy, thank you very much for letting me come over and spend a few minutes before you inquire of my long-time friend, Judge Boyko. And first of all, I want to indicate that, Senator DeWine, in putting his name forward, you have made an incredibly wise choice, and I am grateful to the President of the United States for sending his nomination for your consideration and hopefully consent.

I have had the pleasure of knowing Chris Boyko since 1976. We were first year law students together at Cleveland-Marshall College of Law, and I know Senator DeWine knows a little bit about Cleveland-Marshall, but it is the kind of law school where when you do not have a lot of money, you work a day job, you go at night. It is the only way we were able to become lawyers.

And Chris Boyko, you will find he looks today the same way he looked in 1976. He was clean-cut, he worked hard, he was a health nut before that was in vogue, and we did not have all those fancy gyms you can go to. He eats well. He used to make fun of me for eating Twinkies and drinking coke for lunch, and you know that when you go into that first year of law school, the professor comes back from Paper Chase, the professor always says take a look to your left, take a look at your right, and at the end of the semester, one out of the three of you is not going to be here.

Well, as I said, Chris looks exactly as he does now. I had just graduated from the University of Michigan. I had long hair, a beard, I wore a lot of flannel, and Chris told me years later, he was sure after looking at me he was in, and he was going to be the one that would be around at the end, and I have had the pleasure of being associated with him ever since.

Chris has served honorably as the elected Law Director in the City of Parma, a large and thriving suburb of the City of Cleveland. He then became the Parma Municipal Judge and distinguished himself as well. He was appointed to the Common Pleas Bench by then Governor Voinovich, now Senator Voinovich, and he has been twice elected, and not to be partisan at all, but Cuyahoga County, Senator DeWine knows well, I think the Democratic registration beats the Republican registration by four to one, and you only get elected and reelected as a Republican jurist if you do what people want you to do, you do it fairly, you do it honestly, you do it with integrity, and Chris Boyko has been twice elected.

So while he may be surprised that I am a member of the United States Congress after meeting me for the first time in 1976, I am not surprised at all that he sits before you today with a nomination by the President of the United States to become a judge of the Northern District of Ohio, and again I appreciate you giving me the opportunity to say a few words about my friend and hopefully our next Federal judge in Cleveland.

Senator DEWINE. Congressman, thank you very much, very eloquent. We appreciate your being here very much.

Senator LEAHY. We are not going to ask the Congressman searching, tough questions about those college days?

[Laughter.]

Senator DEWINE. I will leave that up to you, Senator.

Senator LEAHY. I am assuming we will not on the hopes that nobody would ever do that to us.

[Laughter.]

Senator LEAHY. Thank you, Congressman.

Representative LATOURETTE. Thank you both.

Senator DEWINE. I am going to now defer to my colleague Senator Leahy for the introduction of Beryl Howell to be a member of the United States Sentencing Commission.

PRESENTATION OF BERYL ALAINE HOWELL, NOMINEE TO BE A MEMBER OF THE UNITED STATES SENTENCING COMMISSION, BY HON. PATRICK LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Senator LEAHY. Why I thank you for the courtesy, Mr. Chairman, and I am delighted, of course, that she is here. We have tried to

make the U.S. Sentencing Commission bipartisan, thus nonpartisan, with balanced and experienced commissioners that stick to the merits, command the respect of both Congress and the Judiciary. Beryl Howell is certainly in that category.

I like the fact that when she first came here that she had been a prosecutor, in fact, a very tough Federal prosecutor. She earned a number of commendations for her actions. She was the Deputy Chief of the Narcotics Section, Assistant U.S. Attorney in the Eastern District of New York, though she consented to join the staff of the Senate Judiciary Committee in 1993. She served with great distinction, earned the respect of both Republicans and Democrats alike.

As my general counsel, she devoted herself to resolving issues on the merits. Probably the biggest challenge was the one we faced following September 11, when she led the negotiating team with the administration. She has gone on to become highly successful as the Managing Director and General Counsel of the Washington, D.C. office of Stroz Friedberg, one of the leading cybersecurity and forensic firms in the country.

She is here with her husband Michael Rosenfeld, a well-known cinema journalist, if I can use that term. I, like you, have had times on Air Force One. He helped produce the definitive documentary on Air Force One. I felt like I was right back on it in watching it. But Jared, Alina, and Calla are all here, and Mrs. Rosenfeld is here. Other friends who Beryl will mention when she comes up are also here, but I have to tell you how extremely impressed I am that you are here.

Could I mention one other thing, too, Mr. Chairman? And I am glad Beryl is here, because she knows how hard we worked on this technological milestone for the Senate. Today the Senate Judiciary Committee will officially begin broadcasting live on the Senate television system with closed captioning, using advanced technology of voice recognition software.

We have been eagerly awaiting this. We have worked for it, planned for it for years. We have worked with the Office of the Secretary of the Senate—Madam Secretary, I appreciate you coming over here; you honor us all by being here—with the Committee on Rules. We developed a pilot project that would allow us to study the captioning of committee hearings, offering real time captioning as a demonstration for the use of Senators and their staff. We are very, very proud of this and have worked very closely with Senator Hatch, and I am glad we are able to do this.

I should also mention Clara Kircher, my Deputy Chief of Staff, who has devoted well over a year of her own life to this project, and she is sitting here today as well. She has truly brought us through the peaks and valleys of the closed captioning. We have tried different systems. Some held promise, but not reality. This one does, and Clara, everybody, everybody owes you thanks. I think too of Rachel Arfa who worked for this Committee with great distinction, first as an intern, then as the Nominations Clerk, and then went on to law school. The amazing thing is she cannot hear, but she also worked with us on this and encouraged me throughout the time, even times when we tended to give up and wonder if we could possibly do it.

Because of the events following September 11, we find many, many barriers around Washington that were not there when I was a law student, a time when you could just walk in this building and just about any other building easily. They show the realities of today. But this is one way to break down barriers. The people, whether they can hear or are hard of hearing, or for whatever reason, can follow it, and I think, Mr. Chairman, we open the Senate up more by doing it. I will put my full statement in the record, but I just did want to mention that.

If I could also mention, as one who has been here for nearly 30 years, the great public service of Sheila Joy. I will put a full statement in here. But she is retiring from the Department of Justice after 26 years working on nominations, 37 years in public service. She has assisted people through their confirmation, every judicial nomination, the Ford, Carter, Reagan, former Bush, Clinton and the current administration. She knows everybody better than all the rest of us and we will miss her.

It will seem strange to look down and not see her at the back of the room. The only difference is all the rest of us have aged and Ms. Joy has not. So thank you, Mr. Chairman. I will put the rest in the record.

[The prepared statement of Senator Leahy appears as a submission for the record.]

PRESENTATION OF CHRISTOPHER BOYKO, NOMINEE TO BE DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF OHIO, BY HON. MIKE DEWINE, A U.S. SENATOR FROM THE STATE OF OHIO

Senator DEWINE. Before I ask our two nominees to come up, let me just make a few introductory comments about Judge Boyko. The judge currently serves on the Cuyahoga County Court of Common Pleas which in Ohio is our highest trial court, where all the major civil and crimina matters are tried. During his time on the bench, Judge Boyko has really seen virtually every type of case that you can imagine. He is an excellent judge and his reputation reflects that. Consensus among lawyers in the Cleveland area is that Judge Boyko is intelligent, fast, fair and has a terrific temperament, so much so that lawyers really want their cases to be assigned to Judge Boyko.

And I would say the only objection I have heard, that I have received, at least, so far to Judge Boyko's nomination is that the Court of Common Pleas will be losing one of its best judges. Let me also note that the ABA has also given him a rating of "unanimous well qualified."

Before serving on the Court of Common Pleas, Judge Boyko served as a judge on the Parma Municipal Court in 1993. From 1981 until 1993, Judge Boyko was assistant prosecutor and then prosecutor for the City of Parma, prosecuting a variety of criminal matters for the city.

During much of that time, Judge Boyko was the Director of Law for Parma, overseeing the civil litigation which the city was involved, and also during that time period Judge Boyko was engaged in private practice with his father and brother.

There are only a few attorneys in Ohio who are willing to tackle this kind of a diverse practice engaging in private practice, acting as a prosecutor and representing a local Government all at the same time. I think this is a real testament to Judge Boyko's work ethic, not to mention the vast legal experience he gained from this type of practice early in his career.

Let me finally just mention the broad bipartisan support that the judge has in Ohio. I have a number of letters that we have received from prominent people in Ohio, including a number of prominent Democrats, which I will submit for the record without objection.

But let me just read a couple excerpts. Jimmy Dimora, the Chairman of the Cuyahoga County Democratic Party, has written:

"I am recommending that Judge Chris Boyko be confirmed for appointment as Federal District Judge. He is fair and open-minded with a commitment and dedication to the law. His high ethical standards and judicial temperament will be useful on the Federal bench with experience and a background to match. If any Republican deserved Democratic support, Judge Boyko does."

George Forbes, President of the Cleveland Chapter of the NAACP, wrote to Senator Daschle:

"Judge Boyko has not only served with distinction on the Court of Common Pleas, but is a parson of fairness, integrity, keen knowledge of the law, and possesses the judicial temperament to execute the duties of a Federal judge in a fair and impartial manner. I can say without reservation that Judge Boyko would make an excellent judge."

Russell Tye, President of the Norman S. Minor Bar Association, the largest African-American Bar Association in the state of Ohio, has written:

"Judge Boyko has always been honest, fair and a man of great integrity. Judge Boyko is a very learned judge who has certainly mastered the art of always following the law and carefully applying it with judicial discretion and fairness."

Tony George, who describes himself as "a Kerry delegate, lifelong Democrat, teamster member, and Ohio businessman," has written:

"I have known Judge Boyko for over 15 years and he has built a reputation for integrity, fairness and professional competence. Although he is a Republican nominee of President Bush, he finds as much favor among Democrats as he does Republicans. His nonpartisan approach to judging and politics has earned him an extensive bipartisan support."

[The prepared statement of Senator DeWine appears as a submission for the record.]

Senator DEWINE. I would ask that our two nominees come forward and please continue to stand. Please state your name.

Judge BOYKO. I, Christopher Boyko.

Senator DEWINE. Do you swear that the testimony you are about to give before the Committee will be the truth, the whole truth and nothing but the truth, so help you God?

Judge BOYKO. I do.

Ms. HOWELL. I do.

Senator DEWINE. Please be seated. Judge Boyko, we will start with you. If you have any opening statement, we will be more than happy to hear it at this time.

STATEMENT OF CHRISTOPHER BOYKO, NOMINEE TO BE DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF OHIO

Judge BOYKO. Thank you, Mr. Chairman. Although I will decline a formal opening statement, I do want to thank you, first of all, Mr. Chairman, for having this hearing, for all your support, the same thing with Senator Voinovich for all his support, of course, for President Bush, for nominating me to this coveted position.

Although my wife of 23 years, Robbie, could not be here because of her own job obligations, I do want to acknowledge that she is with me here in spirit, as well as my children Philip and Ashley, our teenagers, studying hard for their exams, I hope, to get good grades and keep my insurance rates low for a good student discount.

Senator Leahy, good afternoon, sir. It is a pleasure to have you here also. I do want to thank Congressman LaTourette for those very generous and kind words that he mentioned. Steve has been a great life-long friend and I cherish his support. Also I do want to acknowledge a very good and dear friend of mine that is with me here today, Tary Szmagala from Cleveland. He has known me since I have been in diapers and knows everything about me. He is has been a great mentor of mine and a close personal friend.

Senator DEWINE. We may call him as a witness later.

[Laughter.]

Senator LEAHY. Closed session.

[Laughter.]

Judge BOYKO. But I do want to acknowledge Mr. Szmagala and thank you, Mr. Chairman, for allowing me those thanks.

[The biographical information of Judge Boyko follows:]

QUESTIONNAIRE FOR NOMINEES REFERRED TO THE UNITED STATES SENATE COMMITTEE ON THE JUDICIARY

CHRISTOPHER ALLAN BOYKO

1. **Full name (include any former names used.)**

   Christopher Allan Boyko

2. **Address: List current place of residence and office address(es).**

   Residence: Parma, Ohio

   Court: The Justice Center
   1200 Ontario Street, Rm. 18-B
   Cleveland, Ohio 44113

3. **Date and place of birth.**

   October 10, 1954
   Cleveland, Ohio

4. Marital Status **(include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).**

   Married
   Spouse: Roberta Ann Boyko (nee Gentile)
   Sherwin-Williams Co
   101 Prospect Avenue
   Cleveland, Ohio 44114

5. **Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.**

Mount Union College, 1972-1976 (B.A. Political Science 1976)
Scholastic Achievement Award - G.P.A. 3.55
Cleveland-Marshall College of Law, 1976-1979 (J.D. 1979) - G.P.A. 3.0

I am a Masters of Judicial Studies candidate at the University of Nevada, Reno, through the National Judicial College. I have completed all my course work (four years) and will receive my degree upon completion of my thesis. This has expanded my judicial knowledge and gives me the opportunity to excel at my chosen career. I have served several times as Group Discussion leader at the request of the National Judicial College and have been asked to teach at the National Judicial College.

6. **Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.**

January 29, 1996-Present
Judge, Court of Common Pleas, State of Ohio/Cuyahoga County

September 7, 1993-December, 1993
Judge, Parma Municipal Court, State of Ohio/City of Parma

1987-September 6, 1993
Director of Law, City of Parma, Ohio,

1987-September 6, 1993
Prosecutor, City of Parma, Ohio

1981-1987
Assistant Prosecutor, City of Parma, Ohio,

Boyko & Boyko, Attorneys at Law, 1979-1993, 1995

Employer: Self and with father (retired Judge Andrew Boyko)

Executive Vice President/General Counsel, Copy America, Inc.
(now Ikon Copy Services), 1994-1995

Vice President/General Counsel, Transnational Information Control, Inc.
(later Multilogic, Inc.), 1989-1992 (now defunct)

Boyko & Boyko, Attorneys at Law, Summer Intern (see information above)

Attorney General's Office-Eminent Domain Section
Summer Intern 1978, 1977 (Attorney General William Brown)
Worked out of Transportation Department for both years

Summer Intern, Law Department, City of Parma, Ohio, from June to September 1978

Summer Intern (Legal), City of Parma, Ohio, Law Department from June 1976 to September 1976

7. **Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.**

No.

8. **Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.**

Elected to Who's Who in American Law, 1992-2004
Profiled in Cleveland Magazine, March, 1990
Martindale Hubbell AV Rated Attorney (highest rating), 1994-1997

9. **Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates to any offices which you have held in such groups.**

Member of American Bar Assn. (1979 - present)
Member of Federal Bar Assn. (Common Pleas Court Rep.) (1979 - present)
Member of Florida Bar Assn. (1985 - present)
Member of Cleveland Bar Assn. (Past Member of Board of Trustees 2000-2002)

Liaison to Criminal Law and Government Attorneys Sections (2002-Present)
Steering Committee, National Institute of Trial Advocacy (2003-Present)
Lecturer in Law - Cleveland Bar Association (2002-Present)
Member of Cuyahoga County Bar Assn. (1979 - present)
Member of Parma Bar Assn. and former Trustee and Past President (1990) (1979-present)
Co-Administrator - Judicial Corrections Board (2001 - present)
Chair - Veteran's Service Committee, Common Pleas Court (2001 - present)
Master of the Bench William K. Thomas Inns of Court (2001 - present)
Member of Criminal Rules and Jury Committees, Common Pleas Court (1999 - present)
Member of Bench/Bar Committee (2002 - present)
Ohio Judicial College - lecturer
National Judicial College - lecturer
Member of Justinian Forum (2002 - present)
Member of Parma Community Drug Task Force, 1988 - 1993
Judicial-related committees:
American Bar Association State Trial Court Division (2003-Present)
Member of the Veterans Service Committee Chairman (2001-Present)
Criminal Rules Committee (1996-Present)
Jury Committee (1996-Present)

10. <u>Other Memberships</u>: **List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.**

Amvets, 1993 - Present
Sons of American Legion, 1985 - Present
St. Anthony of Padua Church (1993 - present)
Cleveland Marshall (Cleveland State) Law Alumni Assn. (1979 - present)
Mt. Union College Alumni Association (1979 - present)
Parmadale Children's Services, Advisory Council and Ambassador's Club, 1990 - Present
Brotherhood of Elks Parma Lodge No. 1938, 1988 - Present
Citizens League of Greater Cleveland, 1995 - Present
American Nationalities Movement, 1990 - Present

11. <u>Court Admission</u>: **List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.**

Admitted to Federal Bar, U.S. District Court, Northern Ohio Eastern Division 1979
Admitted to Ohio Bar 1979
Admitted to Florida Bar 1985

Admitted to United States Tax Court 1986
Admitted to Supreme Court of the United States 1988
Admitted to U.S. Court of Appeals, Sixth Circuit 1990

12. **Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.**

I have given many speeches to children in schools, boy scouts, etc., on the law and the concept of honor and its importance in our world.

"View from the Bench": "It's the Little Things that Matter" - Law and Fact Magazine
Cuyahoga County Bar Association
January/February 2000 Vol. 75 Issue I

"View from the Bench" - Law and Fact Magazine
Cuyahoga County Bar Association
March/April 2000 Vol. 75 Issue 2

Have also edited many articles in Law and Fact while co-editor of "View from the Bench" for Law and Fact in 1999.

I have given numerous speeches on Professionalism to the FBI, Bar Association Seminars and Catholic Lawyers Guild.

Finally, I authored the Court's Media and Public Access Plan for High Profile Cases In Cuyahoga County

13. **Health: What is the present state of your health? List the date of your last physical examination.**

My health is excellent. Last physical examination was June 14, 2004.

14. **Judicial Office: State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.**

Co-Acting Administrative Judge - Common Pleas Court, General Division (2002 - present)

Judge-Common Pleas Court, Cuyahoga County, General Division (January 1996-Present)
Appointed January 29, 1996
Elected Judge - Common Pleas Court, Cuyahoga County, General Division November, 1996
Elected Common Pleas Court, Cuyahoga County, General Division - November, 1998
Appointed Judge-Parma Municipal Court (September 1993-December 1993),

15. Citations: **If you are or have been a judge, provide: (1) citations for the ten most significant opinions you have written; (2) a short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions.**

1. **Citations for the ten most significant opinions you have written:**

(a) *Rushdan v. Baringer, M.D. et al,*
(Cuyahoga County, Ohio Case No. 326887, July 25, 2000)
Eighth District Court of Appeals Case No. 78478
Affirmed on appeal

(b) *Minotas v. Harvey, Jr.*
(Cuyahoga County, Ohio Case No. 295740, April 3, 1998)
Eighth District Court of Appeals Case No. 74460
Appeal dismissed July 13, 1998 for failure to file record.

(c) *Rubin v. Gallery Auto Sales*
(Cuyahoga County, Ohio Case No. 303854, June 23, 1997)
Eighth District Court of Appeals Case No. 72902
Appealed, but settled and dismissed

(d) *Iwenofu, et al v. St. Luke School, et al*
(Cuyahoga County, Ohio Case No. 301707, September 15, 1997)
Eighth District Court of Appeals Case No. 73355
Affirmed on Appeal; 132 Ohio App.3d 119 (February 4, 1999)

(e) *Kotoch, et al v. City of Highland Heights*
(Cuyahoga County, Ohio Case No. 309227, April 6, 1998)
Eighth District Court of Appeals Case No. 74426
Court declined jurisdiction and dismissed (January 24, 2000)

(f) *Ward v. City of Cleveland*
(Cuyahoga County, Ohio Common Pleas Case No. 415139, June 13, 2001)
Eighth District Court of Appeals Case No. 79946, February 2, 2002
Unreported 2002 WL 192092
Affirmed on Appeal

(g) *Carlton v. St. John AME Church, et al*
(Cuyahoga County, Ohio Case No. 426902, November 20, 2002)

(h) *Stowe, Admin v. Cuyahoga County Board of Mental Retardation, et al*
(Cuyahoga County, Ohio Case No. 479273, January 27, 2004)

(i) *Simon v. Waste Management, et al*
(Cuyahoga County, Ohio Case No. 402634, April 26, 2002)

(j) *Resnick v. Wilsman*
(Cuyahoga County, Ohio Case No. 389187, December 20, 2000)

(See attached copies of above opinions.)

(2) **A short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings;**

(a) *Cappara v. Schibley et al.,* (1999) 85 Oh. St.3d 403

Plaintiff motorist brought a negligence claim against Defendant motorist and a negligent entrustment claim against Defendant's employer, and sought punitive damages for malice or conscious disregard for rights and safety of others. The trial court entered judgment on the jury's compensatory and punitive damages awards to Plaintiff. The Court of Appeals reversed and remanded and the Ohio Supreme Court allowed a discretionary appeal The Ohio Supreme Court held that the admission of Defendant's post-accident convictions for driving under the influence was erroneous and the error was not harmless.

(b) State of Ohio v. Bailey, Marvin (Ohio App. 8 Dist) Cuyahoga Cty. No. 73849, unreported, 1999 WL 126946.

Defendant was convicted of breaking and entering, theft of property, possessing criminal tools and failure to comply. Prior to trial Defendant filed a pro se motion asking the trial court to remove his appointed counsel from his case. Defendant stated in his motion that "if this Court forces Defendant to proceed with this attorney to trial then at this moment Defendant waives right to attorney and request to proceed Pro Se." The trial court denied

Defendant's motion without a hearing. The Court of Appeals held that Defendant had a constitutional right to self-representation. The case was reversed and remanded.

(c) Robbin Riley v. Wendy's International, Inc. et al., (Ohio App. 8 Dist) Cuyahoga Cty. No. 73996, unreported, 1999 WL 258187.

Plaintiff tripped and fell in a pothole when entering a Defendant's restaurant. Plaintiff alleged negligence on the part of defendant for failure to keep and maintain the premises in a safe condition. The trial court granted summary judgment for Defendant on the grounds that the pothole was "open and obvious"negating any duty on the part of Defendant to warn invitees of the danger. The Appellate Court reversed stating that there were genuine issues of fact as Defendant had actual nôtice of the hazard and the hazard was not readily discernible to Plaintiff.

(d) Margaret A. Arales v. Furs By Weiss, Inc. (Ohio App 8 Dist.) Cuyahoga Cty. No. 81603, unreported, 2003 WL 2149131.

Buyer of a fur coat brought an action against retail store, salesperson , and store president for fraud and violation of the Consumer Sales Practices Act (CSPA). Plaintiff purchased a new fur coat from Defendants. Some time after purchasing the coat Plaintiff discovered a previous owner's monogram inside the coat. The trial court granted summary judgment in favor of defendants and the Court of Appeals remanded for determination of Plaintiff's claims. The trial court bifurcated the issues of liability and damages and the jury found for Defendants. The Court of Appeals reversed finding that it was unclear what issues had been agreed upon for trial and that the jury had not been instructed on Plaintiff's fraud claim.

(e) Jean D. Matteo, et al., v. Cuyahoga County Bd. Of Revision, et al., (Ohio App. 8 Dist) Cuyahoga Cty. No. 74780, unreported, 1999 WL 809812.

Defendant appealed the trial courts decision that Plaintiff's complaint on the assessment of real property be reinstated and heard after being dismissed by Defendant. Defendant had dismissed Plaintiff's complaint for lack of jurisdiction finding that one of Plaintiff's signatures was unauthorized. The BOR held that the filing of a complaint with the BOR by a non-attorney agent constituted the unauthorized practice of law pursuant to a subsequent Ohio case. On appeal to the Court of Common Pleas the trial court reversed the BOR finding that Ohio Case law on the subject did not have retrospective effect. The Court of Appeals found that subsequent Ohio case law did apply retrospectively to complaints filed with the BOR.

(f) *Fitzgibbons, Arnold & Co. Agency, Inc. v. Michael T. Schmutte,* (Ohio app. 8 Dist.) Cuyahoga Cty. No. 75126, unreported, 1999 WL 1024132.

Plaintiff filed an action for damages arising from breach of employment contract and Defendant taking a book of insurance business with him when he left Plaintiff's employ. After a bench trial the trial court found in favor of Defendant and Plaintiff appealed. The Court of Appeals reversed and remanded to the trial court for findings of fact and conclusions of law. The Defendant argued and the trial court agreed that a buyout clause was too vague to enforce. The Court of Appeals reversed finding that its terms could have been inferred from the context of the agreement and the intent of the parties.

(g) *William S. Lightbody v. Charles R. Rust, et al.,* (Ohio App. 8 Dist.) Cuyahoga Cty. No. 80927, unreported, 2003 WL 21710601.

Patent attorney, who performed work for law firm on certain cases under an alleged contingency fee oral contract, filed suit against the firm seeking to recover full amount of fees owed to him. The principal attorney at the firm counterclaimed, alleging theft of trade secrets based on patent attorney's departure from the firm with more than half of its clients. The trial court granted principal attorney's motion for directed verdict on the basis of accord and satisfaction. Patent attorney appealed. The Court of Appeals held that evidence that patent attorney orally disputed terms of the contract with principal attorney and told the principal attorney that he did not consider the check tendered to him as payment in full raised issues of fact for the jury as to whether mutual assent existed to allow application of full accord and satisfaction.

(h) *Pittsburgh Crankshaft Service, Inc. v. Thomas R. Lanzo,* (Ohio App. 8 Dist.) Cuyahoga Cty No. 76144, unreported, 2000 WL 377498.

Defendant appealed the trial courts judgment finding him personally liable for accounts owed to Plaintiff. A corporation filed an answer on behalf of defendant stating that it owed monies to Plaintiff but disputed the amounts. Plaintiff filed for summary judgment but the docket failed to indicate any ruling on the motion. The court then ordered the parties to submit briefs in lieu of trial or the court would hold an evidentiary hearing on disputed facts. The docket failed to reflect any agreement of the parties to an alternate method of resolving the case outside of trial. The Court ruled in favor of Plaintiff on briefs alone. The Court of Appeals held that any agreement by the parties to resolve the matter in some alternative medium must be indicated clearly in the record. In addition the Court held that there was insufficient evidence presented that would support the trial court's decision in favor of Plaintiff.

(i) *State of Ohio v. Floyd J. Hull,* (Ohio App. 8 Dist.) Cuyahoga Cty. No. 76460, unreported, 2000 WL 868461.

Defendant appealed the trial court's determination that he is a sexual predator pursuant to statute. Defendant was convicted in 1986 of three counts or rape, kidnapping and felonious assault. After serving ten years Defendant was released on parole which he subsequently violated and was returned to prison. In 1999, after his release, the State moved to have Defendant declared a sexual predator. After a hearing the court granted the State's motion. The Court of Appeals held that one offense does not establish by clear and convincing evidence that Defendant is more likely than not predisposed to commit another sexually oriented offense. The Court of Appeals reversed and vacated the trial court sexual predator determination.

(j) *The Color Bar Printing Co. v. Vel Litt,* (Ohio App. 8 Dist) Cuyahoga Cty. No. 76715, unreported, 2000 WL 193251.

Plaintiff filed suit alleging breach of contract in a contract for the layout, design, printing and distribution of a magazine. Defendants moved for dismissal denying any contractual relationship and alleging failure to join proper party. The Court of Appeals reversed finding that Plaintiff had pled a colorable claim against Defendant and that the dismissal was improper as Plaintiffs complaint must be presumed true.

(k) *Stephen Penberthy et al. v. Daniel E. Caprett,* (Ohio App. 8 Dist.) Cuyahoga Cty. No. 77416, unreported, 2001 WL 66233.

Plaintiff filed a motion for pre-judgment interest arising from Plaintiffs allegation that Defendant insurer failed to make a good faith offer of settlement. The trial court agreed and granted prejudgment interest. Defendant insurer appealed. The Court of Appeals held that while pre-judgment interest was appropriate the amount must be limited to interest on the amount awarded to each particular Plaintiff and not on the pre-judgment interest accrued on the sum total of the awards to all Plaintiffs. Reversed in part.

(l) *Chiropractic Clinic of Solon, et al. v. Enterprise Group Planning, Inc., et al.,* (Ohio App. 8 Dist) Cuyahoga Cty No. 77632, unreported, 2001 WL 60031.

Plaintiff suit for unpaid chiropractic fees against the insurer of patient Dale Kutsko. After some time in municipal court the unpaid fees were paid by Defendant. Plaintiff then brought suit in common pleas court against defendant insurers for tortuous interference with contract. The statute of limitations for tortious interference is 4 years. The trial court granted Defendants motion to dismiss for filing outside the 4 year statute of limitations period. The Court of Appeals reversed finding that the it was impossible to determine from the face of the complaint the date the alleged interference occurred and therefore dismissal was erroneous at such an early stage of the proceedings.

(m) State of Ohio v. Abelt, (2001) 144 Oh. App.3d 168.

Defendant pled guilty to rape in 1991. In 1999 the state sought to return Defendant, who was scheduled to appear before the parole board, for the purpose of determining whether he should be classified as a sexual predator pursuant to statute. The court denied Defendants motion to have a court appointed psychiatric examination for purposes of determining the likelihood of his being a repeat offender and found him to be a sexual predator. The Court of Appeals reversed in part finding that Defendant had received treatment and attended programs in prison for sexual offenders. Coupled with the fact that Defendants crimes occurred ten years prior to the hearing the Court of Appeals found that it was a reasonable probability that expert psychiatric/psychological assistance would aid in defendant's defense of the sexual predator finding.

(n) State of Ohio v. James Sample, (Ohio App. 8 Dist.) Cuyahoga Cty. No. 78753, unreported, 2001 WL 1035182.

This was an appeal of defendants sentence in which the Defendant argued that the imposition of a four year prison term was inappropriate for a third degree felony. Ohio Statutes require the Court to impose the minimum time if the offender has not served a previous prison term unless the court finds that such a term will demean the seriousness of the offense or will not adequately protect the public from future crimes. The Court of Appeals held that the trial court failed to establish that the shortest prison term would demean the seriousness of the offense or would not adequately protect the public. The sentence was vacated and the matter remanded for re-sentencing.

(o) Swagelok Co. v. Michael Young, (Ohio App. 8 Dist.) Cuyahoga Cty. No. 78976, unreported, 2002 WL 145058.

Plaintiff brought suit against Defendant for injunctive relief seeking to enforce a non-compete clause in the Defendants employment agreement. The trial court denied the motion finding there was no consideration. The Court of Appeals reversed finding that continued at-will employment constitutes sufficient consideration to uphold a non-compete clause.

(p) *Eileen Belleli v. Goldberg Co., Inc.,* (Ohio App. 8 Dist.) Cuyahoga Cty No. 79061, unreported, 2001 WL 931641.

Plaintiff brought suit against Defendant business owner when she tripped and fell while descending a stairway on Defendants premises. The trial court granted summary judgment in favor of Defendant as Plaintiff prior to her fall she knew that one of the steps was cracked. The Court of Appeal reversed finding that open and obvious defense was questionable in Ohio in light of case law and that it was appropriate to apportion out negligence under a comparative negligence standard.

(q) *Michael A. Lanier et al. v. Jazniya Curioca, M.D. et al.,* (Ohio App. 8 Dist.) Cuyahoga Cty. No. 80711, unreported, 2002 WL 31429798.

Patient brought a medical malpractice action against doctor. The trial court granted doctor's motion for directed verdict and patient appealed. The Court of Appeals held that an issue as to whether patient's penile infection was linked to the first circumcision performed by the doctor was for a jury.

(r) *State of Ohio v. James Hajdin,* (Ohio App. 8 Dist.) Cuyahoga Cty. No. 81058, unreported, 2003 WL 21290929.

Defendant was convicted of in the Court of Common Pleas of breaking and entering, theft and possession of criminal tools. The Court of Appeals held that presence of computer printout containing defendant's criminal history and police reports concerning present offenses in the jury room during deliberations amounted to prejudicial error.

(s) *State of Ohio v. Darwin Hutchins,* (Ohio App. 8 Dist.) Cuyahoga Cty. No. 81578 &81579, unreported, 2003 WL 1901334.

Following jury trials, defendant was convicted in Court of Common Pleas of sexual battery, possession of crack cocaine, preparation and trafficking in crack cocaine. Court of Appeals held that trial court failed to state its reasons for ordering consecutive sentences.

(t) *Robert A. Molchan, Jr. v. Robert L. Williams,* (Ohio App. 8 Dist.) Cuyahoga Cty. No. 81653, unreported, 2003 WL 2149137.

Employee brought action against insurance company that issued general automobile insurance policy to employer, seeking uninsured motorist and underinsured motorist coverage. The Court of Common Pleas entered discovery sanction that prevented insurance company from entering into evidence employer's rejection form that would have limited amount of UM and UIM coverage available to employee. On appeal the

Court of Appeals held that while sanctions were warranted the particular sanction awarded was unreasonable and unconscionable.

(u) Carl E. Miller v. Household Realty Corp., et al. (Ohio App. 8 Dist.) Cuyahoga Cty. No. 81968, unreported, 2003 WL 21469782.

Prospective borrower brought action against lender seeking rescission of home financing loan agreement, termination of mortgage and return of money and property. Lender moved to compel arbitration and to stay litigation pending arbitration. Trial court granted motion without conducting a hearing. Court of Appeals held that prior to compelling arbitration trial court was required to make the initial determination of whether an arbitration rider that the parties allegedly executed as part of the loan agreement was in existence.

(v) Charlene Beard v. Meridia Huron Hospital et al., (Ohio App. 8 Dist.) Cuyahoga Cty. No. 82541, unreported, 2003 WL 22510598.

Patient's estate brought medical malpractice action against surgeon who performed hernia repair on patient. Following a jury trial the trial court entered judgment for surgeon. The Court of Appeals held surgeon's reference to medical and surgical literature purportedly stating that patients with benign familial neutropenia could be operated on safely with white blood cell counts greater than 1,000 was inadmissible hearsay and improper admission of hearsay evidence was prejudicial.

(3) citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions.

(a) *Kotoch, et al v. City of Highland Heights*
(Cuyahoga County, Ohio Case No. 309227, April 6, 1998)

(b) *Carlton v. St. John AME Church, et al*
(Cuyahoga County, Ohio Case No. 426902, November 20, 2002)

16. **Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.**

Assistant Prosecutor - City of Parma
1981 - 1987 (appointed)

Director of Law - City of Parma
1987 - 1993 (elected)

Prosecutor - City of Parma
1987 - 1993 (elected) By law, the Director of Law is the Chief Prosecutor for the City.

1993 - Unsuccessful candidacy for Parma Municipal Court Judge

17. **Legal Career:**

a) **Describe chronologically your law practice and experience after graduation from law school, including:**

1. **Whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;**

2. **Whether you practiced alone, and if so, the addresses and dates;**

3. **The dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;**

b) 1. **What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?**

2. **Describe your typical former clients, and mention the areas, if any, in which you have specialized.**

c) 1. **Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.**

2. **What percentage of these appearances was in:**
(a) federal courts;
(b) state courts of record;
(c) other courts.

3. **What percentage of your litigation was:**
(a) civil;
(b) criminal.

4. **State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.**

5. **What percentage of these trials was:**
   (a) jury;
   (b) non-jury.

Legal Career:

(a) June 1979-September 6, 1993, 1996, January 1-28, 1996
Boyko & Boyko, Attorneys
6741 Ridge Road
Parma, Ohio 44129

Sole proprietor practicing with Andrew Boyko, my father. I practiced privately with my father until May, 1987, when he was sworn in as Parma Municipal Court judge. I practiced privately by myself until 1989 when my brother, Timothy, joined me in the practice as my associate. We began a partnership on January 1, 1992, which continued until September 6, 1993, when I was appointed judge of the Parma Municipal Court.

April 1981- June 1987
Assistant Prosecutor, City of Parma, Ohio
5450 West 54th Street
Parma, Ohio 44129
I continued with my private practice. In 1984, I became the legal advisor to the Parma Police Department's SWAT Team. I was on call 24 hours to assist at crisis scenes and critique training sessions. I continued in that position until September 6, 1993.

Prosecutor, City of Parma, Ohio
1987 - September 6, 1993
6611 Ridge Road
Parma, Ohio 44129

When I became Law Director, by law I became City Prosecutor. I was the head of the Criminal Division of my office and oversaw all criminal matters.

June 1987-September 6, 1993
Director of Law, City of Parma, Ohio
6611 Ridge Road
Parma, Ohio 44129

As Director of Law, I served as statutory legal counsel for the Parma School District (Tri-City area-Parma, Parma Heights, Seven Hills).

In 1991, I became chief legal counsel for the Southwest Enforcement Bureau (SEB)-a sixteen city Drug Task Force. I coordinated prosecutors from various cities to assist narcotics detectives around the clock.

In 1992, I was a member of the Parma City Schools Tri-City Task Force. Assisted in drafting the Gang Task Force Policy.

September 6, 1993-December 1993
Judge, Parma Municipal Court (appointed)

January 1994-1995
Copy America, Inc. (now IKON Copy Services)
3333 Chester Avenue
Cleveland, Ohio 44114
Executive Vice President/General Counsel (corporate and business law)

Judge, Court of Common Pleas, Cuyahoga County
Appointed January 1996
Elected November 1996
Elected November 1998-Present

(b)(1) With Boyko & Boyko, my practice was general, with an emphasis on small business, guardianships, and estates. Domestic relations was phased out many years ago.

With the City of Parma, from 1981-1987, I prosecuted misdemeanors on behalf of the city and charged felonies. I represented Parma in Preliminary Hearings for felonies, conducted Prosecutor's Mediation Hearings (a form of Alternate Dispute Resolution) and represented the city in the Eighth District Court of Appeals and Supreme Court of Ohio.

I was consulted extensively by the Detective Bureau of the Parma Police Department on all types of investigations. They consulted me on important or sensitive issues and investigations.

As Law Director, I have handled an extremely broad range of cases-from slip and falls to police excessive force and wrongful deaths.

Since Parma is a self-insured municipality, we generally handled most of our cases in-house.

My clients by law were the Mayor, Auditor, Treasurer, President of Council, Police Chief, Fire Chief, Safety Director, Service Director, all other department heads, members of Council, and other employees of the city.

I also represented all boards, commissions and agencies of the city and the Parma City School District.

Municipal law has naturally become my speciality.

I headed a fully independent department of four assistant law directors, one special assistant law director, and three assistant prosecutors.

My duties as Law Director included preparation of all legislation, preparation of all legal documents, bringing cases on behalf of the city, defending all lawsuits, issuing legal opinions, prosecuting criminal matters, representing the Parma City School District and giving daily advice and direction to all city officials on the operation of the City of Parma.

(b)(2) Typical private clients would be small business owners, persons whose spouse had passed away, persons seeking wills and guardian-ships, personal injury clients.

The Probate Court turned to me to take over troubled probate and guardianship matters where either the executor, administrator or guardian have failed in their duties under the law.

My private practice was limited at that time due to the responsibility placed upon me as Law Director.

(c)(1) As Assistant Prosecutor (1981-1987), I was in Court three to five times per week on pretrial hearings, motions to suppress, non-jury trials, jury trials, and preliminary hearings.

As Prosecutor (1987-1993), I supervised the attorneys who did all the above as my assistants.

As Law Director, I appeared in Court occasionally at pretrials, status conferences and trials. I was given certain authority by ordinance to settle claims, therefore, I was always personally involved in settlement negotiations..

With Boyko & Boyko (1979-1993, January 1-28, 1996), I appeared occasionally in Court on motions, pretrials and status conferences.

With Copy America (1994-1995) I never appeared in Court. I counseled the corporate officers and employees in-house.

(c)(2) (a) federal courts;
(b) state courts of record;
(c) other courts.

(a) federal courts - 10%;
(b) state courts - 90% of record (Common Pleas and Municipal)
(c) other courts - 0%

(c)(3) (a) civil;
(b) criminal.

(a) As Director of Law - 90% civil
Private Practice - 10% civil
(b) As Assistant Prosecutor and Prosecutor - 90% criminal
Private Practice - 10% criminal

(c)(4) 30 to 40
Sole counsel - approximately 30
Chief counsel - approximately 5
Associate counsel - 3 to 5

(c)(5) (a) jury;
(b) non-jury.

(a) Jury - 35 to 45%
(b) Non-Jury - 55 to 65%

18. **Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:**

(a) the date of representation;

(b) the name of the court and the name of the judge or judges before whom the case was litigated; and

(c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties:

1. *City of Parma v. Manning*
Dates case began and ended:
Filed: Date unknown
November 6, 1986 – date of announcement of Court of Appeals' decision
Final disposition: Court of Appeals affirmed Defendant's (Manning) conviction
Court and Judge:
Parma Municipal Court Judge George Spanagel
8th District Court of Appeals, Cuyahoga County, Case No. 51109:
Joseph J. Nahra (presiding judge); Pryatel, J.; and Ann McManamon, J.

Attorneys:
For Plaintiff-Appellee:
Christopher A. Boyko
Assistant Prosecutor, City of Parma
Parma Municipal Building (now demolished)
5750 West 54th Street
Parma, OH 44129
(440) 885-8132

For Defendant-Appellant:
Gloria Rowland Homolak
6515 Olde York Road
Parma Heights, OH 44130
(440) 885-5599

The defendant was charged with trespassing for failure to obtain a permit for distributing literature at a Proud of Parma event held at Cuyahoga County Community College, Western Campus.

The college's rules and regulations required a person to obtain a permit for distribution in order to coordinate this activity with other scheduled activities at the college.

The city argued obtaining a permit was a valid time, place and manner restriction under the First Amendment to the U.S. Constitution. Defendant argued no permit was necessary.

I tried the case to a jury and obtained a guilty verdict. Defendant appealed and the verdict was upheld by the Court of Appeals. Certiorari was denied by the Ohio Supreme Court March 25, 1987 (Case No. 87-123).

Defendant subsequently filed a separate habeas corpus action in Federal District Court (C-87 1184) which was granted in January of 1992.

This case is significant because it addresses fundamental constitutional issues of freedom of speech and the extent to which a governmental entity can restrict the time, place and manner of that expression.

This case also resulted in a rewriting of the college's policies on distribution of literature.

2. *Rispo Realty & Development Co. v. City of Parma*
Date case began and ended:
Filed. June 30, 1987
December 5, 1990 – date of announcement of Ohio Supreme Court decision
Final disposition: Judgment reversed in part and affirmed in part – Ward veto provisions of Parma ordinance invalidated; reversed Court of Appeals' determination upholding automatic referendum provisions of ordinance; ordinance declared invalid in its entirety.

Court and Judge:

Court of Common Pleas, Cuyahoga County (No. 131920):
Judge Carolyn B. Friedland
8th District Court of Appeals Case No. 56722
Ohio Supreme Court; 55 Ohio St.3d 101 (1990) Case No. 89-1514
Moyer, C.J., wrote opinion

Attorneys:

Weston, Hurd, Fallon, Paisley & Howley, Ronald A. Rispo and
Robert G. Shumay
2500 Terminal Tower
50 Public Square
Cleveland, OH 44113
(216) 241-6602

Christopher A. Boyko, Law Director
Robin B. DeBell
City of Parma
6611 Ridge Road
Parma, OH 44129
(440) 885-8132

The City of Parma passed ordinances requiring that any change in zoning cannot be passed into effect by City Council without first submitting the question to both the electors in the ward and electors throughout the city.

Rispo, a developer seeking a zoning change, filed suit asking for a declaratory judgment that Parma's ordinances were in direct conflict with Ohio's referendum provisions.

The trial court granted summary judgment in favor of Rispo on the ward provision and let stand Parma's requirement of all electors approving the change.

The Ohio Supreme Court unanimously ruled that Ohio Revised Code Sections 731.28 and 731.29 were general laws that both of Parma's requirements were in direct conflict with state law. Since Parma is a non-chartered city, it must adhere to the scheme set forth under the above Revised Code sections.

This case is considered a significant zoning decision since it firmly sets the parameters under which a non-chartered municipality may legislate in the area of zoning.

I participated in all phases of this litigation, preparation of all trial court pleadings, motions, pretrials, Court of Appeals and Ohio Supreme Court pleadings.

3. *Picha v. City of Parma*

Dates case began and ended:

Filed February 19, 1989

Ended April 26, 1994

Final disposition: Jury verdict in favor of City of Parma affirmed. Trial court dismissed claims against Martin Vittardi and Michael Ries. Judgment as matter of law in favor of Mayor Ries reversed. Settled and dismissed.

Court and Judge:

Trial Court: District Judge Matia, Northern District of Ohio (Case No. 89-02453)

6th Circuit Court of Appeals (Case Number 92-4262)

Judges: Milburn and Guy, Circuit Judges, Brown, Senior Circuit Judge

Attorneys:

City of Parma:

Christopher Boyko, Law Director
Rodger A. Pellagalli, Chief Assistant & co-lead
William Mason, Law Director
Robert Coury, Chief Assistant
6611 Ridge Road
Parma, OH 44129
(440) 885-8132

Plaintiff:

Andrew Margolius
55 Public Square, Suite 1600
Illuminating Building
Cleveland, OH 44113
(216) 621-6214

John Picha was a civil service employee laid off from employment as Parma's Chief Inspector by the Service Director for lack of work.

The lack of work was the result of Parma City Council passing legislation introduced by the Administration "privatizing" the city's right-of-way inspection services.

Picha supervised part-time inspectors whose jobs were abolished by the privatization.

Picha filed suite under Title VII alleging he was terminated for political reasons, *i.e.*, he was discharged for being a staunch supporter of the current Mayor's opponent-former Mayor John Petruska.

The District Court granted Parma's Motion for Summary Judgment.

Picha appealed to the Sixth Circuit, which reversed the District Court, setting the case for trial.
The case proceeded to jury trial. The jury was hung on the Mayor's liability and the jury was discharged by the Court. Parma moved for judgment on the law and it was granted. The Court held that regardless of the Mayor's motivation, City Council would have privatized anyway. The jury had absolved the City of Parma and the Court had dismissed out the Service Director at the close of plaintiff's case.

Plaintiff again appealed to the Sixth Circuit.Jury verdict for Parma affirmed. Reversed judgment of trial court finding for Mayor. Case settled and dismissed..

This case is significant because the constitutional issues addressed plaintiff's claim of political discrimination under Title VII and the municipal officials claims of qualified immunity from suit.

I participated in all phases of this litigation, from the drafting of pleadings, motions, overseeing discovery, attending pretrials and trial.

I tried this case with my Chief Assistant, including examination, cross-examination, preparation of jury instructions, and final argument.

I also argued the appeal before the Sixth Circuit.

4. *DeCore v. City of Parma, et al*
State case
Dates case began and ended:
Filed April 14, 1989
Dismissed 1992
Final disposition: Trial Court granted summary judgment for Defendant City of Parma. Trial in January 1992 and court directed verdict for Defendant. Settlement entered into by Plaintiff and Defendant.
Court and Judge:
Trial: Common Pleas Court (No. 167920); Judge Linda Rocker
Appeal: 8th District Court of Appeals of Cuyahoga County (No. 59018)
John V. Corrigan, August Pryatel, William L. Martin

Attorneys:

Christopher A. Boyko, Law Director (Defendant attorney) Lead
Robin B. DeBell, Chief Assistant Law Director
City of Parma Law Department
6611 Ridge Road
Parma, OH 44129
(440) 885-8132

Robert M. Winston (Plaintiff attorney)
Standard Building
Cleveland, OH 44113
(216) 771-3314

Plaintiff, Vito DeCore, brought a 42 U.S.C. Section 1983 action alleging that he had been terminated from his job solely for his political beliefs and affiliations. The legal issues in the case were virtually identical to those in *Picha* set forth above.

As lead counsel for the defense, it was my position that for several reasons no political discharge occurred in violation of the First Amendment. This defense was first premised upon my determination that plaintiff's claim would fail as the speech and affiliations of plaintiff, which were alleged to be the motivating factors of plaintiff's termination, were not entitled to constitutional protection pursuant to *Connick v. Myers*, 461 U.S. 138 (1983).

Secondly, even should such conduct be accorded constitutional protection, no violation had occurred, pursuant to *Mt. Healthy City Bd. of Education v. Doyle*, 429 U.S. 274 (1977), as the employer, City of Parma, could establish that plaintiff would have been terminated regardless of his protected conduct.

Lastly, the individually named defendants were entitled to avail themselves of the doctrine of qualified immunity as set forth in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Davis v. Scherer*, 468 U.S. 183 (1984); and, *Anderson v. Creighton*, 483 U.S. 635 (1987).

Regarding the issue of qualified immunity, the trial court denied defendant's Motion for Summary Judgment; whereupon an interlocutory appeal was immediately taken to the United States Court of Appeals for the Sixth Circuit. Following oral argument, the Sixth Circuit affirmed the lower court's determination that material questions of fact existed regarding defendant's qualified immunity.

This case settled after I left as Law Director. I participated in all phases except for the actual oral argument.

5. *Cleveland Branch, NAACP, et al v. City of Parma*

Dates case began and ended:

Filed August 6, 1990

Final disposition: Consent decree. Trial Court granted Defendant City of Parma's Motion for Summary Judgment. Court also denied Plaintiff's Motion for Reconsideration.

6th Circuit Court of Appeals, reversed.

Court and Judge:

U.S. District Court, N.D. Ohio, Eastern Division: Judge Battisti (1:90 CV 1404)

Attorneys:

Plaintiff:

David L. Rose
Joshua N. Rose
Rose & Rose, P.C.
1320 19th St., NW, Suite 601
Washington, D.C. 20036
(202) 331-8555

Defendant (City of Parma)

Robert Soltis (Legal) (now deceased)
Special Counsel
6611 Ridge Road
Parma, OH 44129
(440) 885-8132

Christopher A. Boyko, Law Director
William D. Mason, Law Director
Timothy Dobeck, Law Director
City of Parma Law Department
6611 Ridge Road
Parma, OH 44129
(440) 885-8132

The NAACP sued the City of Parma over the City's residency requirement and marketing of jobs. Special counsel was hired to defend the City. This case initiated in 1990 and finally resolved by Consent Decree in 2002. As in *United States v. Parma*, my role was basically supervisory, coordinating the City's defense with special counsel.

6. *U.S. v. City of Parma*

Dates case began and ended:

Filed April 27, 1973

Order issued – October 14, 1981. July 23, 199 – Case dismissed with prejudice by Kathleen O'Malley; Memorandum and Order filed.

Final disposition: City of Parma found to have violated the Fair Housing Act (June 5, 1980) 494 F.Supp. 1049 (1980). Court issued Remedial Order that required City of Parma to develop fair housing committee and procedures, and appoint Special Master to oversee City actions (December 4, 1980). 504 F. Supp. 913 (1980). Court of Appeals affirmed judgment of District Court in part (City violated Fair Housing Act; injunction valid; fair housing committee), and reversed in part (appointment of Special Master). (No. 81-3031)

Court and Judge:

Northern District of Ohio, Eastern Division; Judge Frank Battisti; succeeded by Kathleen O'Malley

6th Circuit Court of Appeals: Circuit Judges Lively, Keith and Merritt

Attorneys:

City of Parma: Robert R. Soltis (Special Counsel – lead), Andrew Boyko, Christopher Boyko, William D. Mason

6611 Ridge Road
Parma, OH 44129
(440) 885-8132

Fredric E. Kramer (Special Counsel – co-lead),
123 Prospect Avenue
Cleveland, OH 44115
(216) 621-9870

U.S. Civil Rights Division, U.S. Dept. of Justice, Washington, D.C.:

Robert J. Reinstein, Brian F. Heffernan, Michael L. Barrett, Theodore M. Shaw, James R. Williams, Drew S. Days

When I became Parma Law Director in 1987, Special counsel (now deceased), had already been hired years ago to spearhead the City's defense. I acted in a supervisory capacity. This litigation was in the remedial phase of the action brought by the Department of Justice alleging violation of the Fair Housing Act by reason of the city's alleged interference with the provision of low-income housing. The remedial phase of this litigation has been the smoothest-run of any of the so-called "institutional reform" genre in the nation, Parma's efforts in compliance with the remedial order having been complimented by the Department of Justice.

I supervised all work in the case when I became Law Director, focusing on carrying out the remedial orders of the District Court. I made sure we built some low-income housing and expeditiously moved in qualified residents. This involved coordinating with the Justice Department at all stages.

This case was significant because it established the city as the actual housing agency (Parma Public Housing Agency). Parma is one of the few cities in the country with this title and authority.

7. *Duskey v. Duskey*

Dates case began and ended:

Filed June 16, 1978
Ended April 14, 1983

Final disposition:

Common Pleas Court (Cuyahoga County; No. D-93413) – Custody of child taken from mother (plaintiff-appellant) and awarded to father (defendant-appellee)

8th District Court of Appeals of Ohio (No. 45339) – Reversed and judgment entered for appellant.

Court and Judge:

Common Pleas Court: Judge John L. Maxwell
Court of Appeals: Nahra, Jackson, Dahling

Attorneys:

Plaintiff-Appellant: Andrew Boyko, Christopher Boyko (lead appeal)
6741 Ridge Road
Parma, OH 44129
(440) 886-3800

Defendant-Appellee: John P. Hildebrand
21430 Lorain Road
Fairview Park, OH 44126
(440) 333-3100

The parties were divorced in 1978 and the wife was awarded custody of the parties daughter. The husband filed a Motion for Change of Custody in 1981, alleging unstableness of the wife.

The trial referee and judge granted the motion.

Up to this point, I was not involved in the case. However, when the wife decided to appeal, I took over for my father.

I wrote the appellate brief and argued the case before the Court of Appeals.

I obtained a reversal of the modification of custody because I showed that the husband failed to prove the existence of significant endangerment to the child's emotional development.

This case established law in the specific area of modification of custody and has been cited at numerous domestic relations seminars.

8. *Albert v. City of Parma*
Dates case began and ended:
Filed July 16, 1990
Ended November 18, 1992
Final disposition: Settled. Court dismissed with prejudice.
Court and Judge:
Common Pleas Court of Cuyahoga County (No. 193382); Judge Patricia Gaughan
Attorneys:
Plaintiff:
Terry H. Gilbert
1370 Ontario Street
1700 Standard Building
Cleveland, OH 44113
(216) 241-1430

Defendant:
Christopher Boyko, Law Director, City of Parma (lead)
Timothy Dobeck, Assistant Law Director
6611 Ridge Road
Parma, OH 44129
(440) 885-8132

Kathleen Albert was a probationary employee with the City of Parma Police Department, serving in the capacity of basic patrol officer. She was terminated in December 1987.

Albert initially filed a complaint with the Equal Employment Opportunity Commission, alleging sexual harassment in the work place. The City of Parma, through the Law Department, was able to successfully defend the city at the administrative level. Thereafter, Albert filed suit in the United States District Court, Northern District of Ohio, and subsequently refiled the action in Cuyahoga County Common Pleas Court. Her complaint alleged in addition to the sexual harassment claims, violations of her civil rights pursuant to 42 USC 1983.

The lawsuit proceeded through an extensive discovery schedule including the retention by each party of an expert in the field of police officer training. The matter settled on the eve of trial.

Despite the misfortune of the filing of the lawsuit and upon my recommendations, the city did examine and made revisions to its police office hiring policy and training policies in subsequent police cadet classes.

This case was significant because of the sexual harassment allegations raised against police officers and the city under Title VII.

I participated in all phases of proceedings, including Court attendances, except for the actual taking of depositions.

9. *Darlene J. Thomas, Administratrix, et al. v. City of Parma*

Dates case began and ended:

Filed March 11, 1991 (Case No. CV-207086)

June 24, 1993 – date of announcement of decision (Court of Appeals No. 63014)

Final disposition: Common Pleas Court granted summary judgment in favor of defendants, City of Parma. Court of Appeals affirmed.

Court and Judge:

Common Pleas Court: Richard J. McMonagle

Court of Appeals, 8th District of Ohio: Harper, Blackmon and Nugent

Attorneys:

Plaintiff-Appellant:

Robert J. Vecchio
Anthony J. Vegh
Robert J. Vecchio Co. LPA
720 Leader Building
Cleveland, OH 44114
(216) 566-1424

Defendant-Appellee:

Christopher Boyko, Law Director
Timothy G. Dobeck, Assistant
Rodger A. Pelagalli (Chief Assistant - lead)
Anthony J. Zampedro, Assistant
City of Parma
6611 Ridge Road
Parma, OH 44129
(440) 885-8132

This wrongful death action in which the plaintiff alleges that her decedent, who was allegedly intoxicated at the time of her incarceration, was not recognized or handled as a potential suicide risk at the Parma Jail and, therefore, the decedent hung himself. The action was filed against the City of Parma as well as its police chief.

This is a significant case because jail suicides are an increasing problem facing states, counties, municipalities, and other governmental entities throughout the country. Nevertheless, this action was dismissed as to all defendants on a Motion for Summary Judgment based on the merits of the claim itself as well as various immunities available to both the city and the police chief. The jail employees had followed all appropriate procedures.

I participated in drafting the Motion for Summary Judgment.

10. *Solitaria v. Stallard, et al*

Dates case began and ended:

Filed February 5, 1982
Ended January 3, 1986

Final disposition: Judgment for Plaintiff Solitaria. Appeals exhausted (affirmed judgment)

Court and Judge:

Court of Common Pleas, Cuyahoga County (No. 38886); Judge Donald C. Nugent
Court of Appeals; Cuyahoga County (Nos. 52018; 52565)
Ohio Supreme Court (Nos. 89-227, 89-116)

Attorneys:

Plaintiff:

Norman J. Stark
960 Leader Building
Cleveland, OH 44114
(216) 696-2390

Defendant:

Andrew Boyko, Law Director
City of Parma Law Department
6611 Ridge Road
Parma, OH 44129
(440) 885-8132

This is a wrongful death action filed against the City of Parma by the estate of a pedestrian allegedly killed by an automobile as a result of purported defects in roadway signage and markings.

The action was handled by the city's insurance carrier resulting in a judgment against the city in the amount of $1,050,000 plus pre-judgment and post-judgment interest. The verdict was affirmed at all levels of appeal and, with pre-judgment and post-judgment interest, ultimately totally $2,000,000. The city had insurance coverage for only $500,000 plus post-judgment interest.

Following the initial verdict, the city's Law Department became actively involved in the case. Through intensive research and reconstruction of the insurer's file, I was able to convince the insurer to absorb the full amount of the judgment plus all sums of pre-judgment and post-judgment interest and further agreed to indemnify the city for any additional damages which might arise from other aspects of the case.

This case was significant because we forced an insurance company to act in "good faith" in honoring the terms of its policy.

I was involved in this case beginning in 1985, initially as a prosecutor investigating the case to decide whether to charge the juvenile who killed Solitaria. I did charge the juvenile with Reckless Operation.

Then, as City Law Director, I monitored the insurance defense, then became actively involved in all aspects surrounding our attempt to convince the insurance company to honor its coverage.

19. <u>Legal Activities</u>: **Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question, please omit any information protected by the attorney-client privilege (unless the privilege has been waived).**

1. While Parma Law Director I worked closely with North Coast Homes, a non-profit agency, who successfully built group homes in Parma. North Coast houses a "family-unit" of eight non-related individuals who are mildly retarded. The group homes provide a comfortable environment for disabled adults to learn to be productive citizens. My legal opinion gave an expanded interpretation of "family-unit" to include non-related individuals, consistent with progressive development of the law in this area.

2. In conjunction with the city's efforts under the remedial order in *United States v. Parma*, 661 F. 2d 562 (1981), I worked hard to insure that Chevybrook Estates (low income housing project) would be completed and the tenants moved in before Christmas of 1988. It was a rewarding experience to shelter the disadvantaged under the authority of the Parma Housing Agency. I received an extensive number of telephone calls from the disadvantaged thanking me for my efforts.

3.. *City of Parma v. McKelvey*
Ct. Of App. Case No. 53702 (8th Dist. Cuy. County 1986)
Cert. denied by Ohio Supreme Court Dec. 14, 1988 (No. 88-1293)

Noreen Gulas was a coach of a girl's softball team. The defendant's daughter played on the opposing side. The game played at the end of the 1986 season would decide the championship.

Throughout the game defendant harassed Mrs. Gulas and afterward struck her in the face with a folding chair, breaking her nose.

I tried the case before a jury, obtaining a guilty verdict, which was upheld in the Eighth District Court of Appeal. The Supreme Court of Ohio denied review, allowing the verdict to stand.

The significance of this case lies in the message sent to the community--The City of Parma will not tolerate acts of violence at children's athletic events. Hopefully, this well-publicized case (two Plain Dealer articles), discouraged others from attempting similar actions.

4. *In Re: Timothy Rinas v. Ohio Civil Rights Commission*,
Charge Number B4102391 (24926) 111891 (1992)

The above complaint filed against the City of Parma alleging violations of Ohio Law concerning discrimination of individuals with handicaps or disabilities. The complaint was filed in January 1992, which was prior to the effective date of the comprehensive American with Disabilities Act (ADA).

The complainant had applied for employment with the Parma City School District in the capacity of a maintenance worker. While he successfully completed the written exam, he was unable to pass a hand-strength test known as the dynamometer due to the fact that he suffered from a form of muscular dystrophy.

Despite the ADA not yet being in effect, the Parma Law Department worked out an agreement with the Ohio Civil Rights Commission whereby the provisions of the hand-strength test were waived as to this individual.

In addition, the job application and the hiring practices in Parma were revised and updated to take into consideration the "reasonable accommodation" provisions of the ADA.

This case was significant due to the handicap and/or disability of the complainant. My approach was to accommodate Mr. Rinas to allow him to obtain employment.

I directed and participated in the proceedings before the Commission and the settlement, and participated in revising Parma's application and hiring policies.

5. I was Legal Counsel for the Parma Charter Commission. I directed the Commission in its deliberations in forming a "Constitution" for the City of Parma.

6. As Co-Administrator for the Judicial Corrections Board and Chair of the Veteran's Service Committee, I am pursuing ways to respectively handle our adult criminal population short of prison and provide the best means of serving our worthy veterans in Cuyahoga County.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

CHRISTOPHER ALLAN BOYKO

1. **List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.**

   The only deferred income I have from a former employer is a 401(K) plan rolled over from my short time at Copy America, Inc. (now IKON Copy Services) from 1994-1995.

   Putnam Investments
   Amount: $2,100.00 (approximate)
   OPERS: I have almost twenty-five years in the Ohio Public Employees Retirement System, which would give me a retirement benefit of about 66% of the average of my three highest gross income years for life.

   I have no other anticipated receipts from any sources from any previous business relationships, professional services, from memberships, former employers, clients, or customers. No arrangements for any financial/business interest

2. **Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.**

   The key to resolving potential conflicts of interest is full disclosure to all parties and then deciding on a course of action, which avoids actual or the appearance of impropriety.

   Conflict with persons: If someone appears before me, whom I have a close relationship with (either as counsel or party), I will either immediately recuse myself if I believe the appearance of impropriety may not be alleviated or I will disclose the relationship to opposing counsel, direct them to discuss this with their clients and tell them I would be willing to recuse myself if they had any concerns and if not, assure them I will be fair and impartial as I am in every case. I will have the attorney and client acknowledge their agreement in writing and move on.

Conflict with financial: This will probably not occur due to my very limited investments which are mainly PERS retirement, State of Ohio Deferred Income, Putnam Investments 401(K), and Charles Schwab IRA. I do not own any individual stocks nor do I have any financial interest in any company other than what the above companies invest in on behalf of thousands of similar clients. If there were a financial conflict of interest, the procedure would be basically the same as with persons.

In all areas I will follow the guidelines of the Code of Federal Conduct (28 USC 455).

3. **Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.**

No plans to pursue an outside employment.

4. **List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding $500 or more (if you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here).**

See attached Financial Disclosure Report.

5. **Please complete the attached financial net worth statement in detail (Add schedules as called for.).**

See attached Financial Net Worth Statement.

6. **Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.**

Other than my own, No.

AO-10
Rev. 1/2002

FINANCIAL DISCLOSURE REPORT

Calendar Year 2003

Report Required by the Ethics in Government Act of 1978 (5 U.S.C. app. §§ 101-111)

1. Person Reporting (Last name, First name, Middle initial)	2. Court or Organization	3. Date of Report
Boyko, Christopher A	District Court - Northern Ohio	7/22/2004
4. Title (Article III Judges indicate active or senior status; magistrate judges indicate full- or part-time) U.S. District Judge - Nominee	5. ReportType (check appropriate type) (•) Nomination, Date 7-22-04 ( ) Initial ( ) Annual ( ) Final	6. Reporting Period 1/1/2003 to 7/1/2004
7. Chambers or Office Address 1200 Ontario Street Cleveland, Ohio 44113	8. On the basis of the information contained in this Report and any modifications pertaining thereto, it is, in my opinion, in compliance with applicable laws and regulations. Reviewing Officer_____ Date_____	

IMPORTANT NOTES: The instructions accompanying this form must be followed. Complete all parts, checking the NONE box for each part where you have no reportable information. Sign on last page.

I. POSITIONS. (Reporting individual only, see pp. 9-13 of filing instructions)

☑ NONE - (No reportable positions.)

	POSITION	NAME OF ORGANIZATION/ENTITY
1		

II. AGREEMENTS. (Reporting individual only, see pp. 14-16 of filing instructions)

☐ NONE - (No reportable agreements.)

	DATE	PARTIES AND TERMS
1	1983	Ohio Public Employees Retirement System; pension upon retirement at earliest date of eligibility of November 1, 2009.

III. NON-INVESTMENT INCOME. (Reporting individual and spouse, see pp. 17-24 of filing instructions)

☐ NONE - (No reportable non-investment income.)

	DATE	SOURCE AND TYPE	GROSS INCOME (yours, not spouse's)
1.	2004	Sherwin Williams	
2.	2003	Sherwin Williams	
3.	2002	Sherwin Williams	

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Boyko, Christopher A	7/22/2004

III. NON-INVESTMENT INCOME. (Reporting individual and spouse; see pp. 17-24 of filing instructions)

☐ **NONE** - (No reportable non-investment income.)

	DATE	SOURCE AND TYPE	GROSS INCOME (yours, not spouse's)
4.	2004	Cuyahoga County - Wages	$4,866
5.	2004	State of Ohio, Judiciary/Supreme Court - Wages	$40,020
6.	2003	Cuyahoga County - Wages	$14,598
7.	2003	State of Ohio, Judiciary/Supreme Court - Wages	$93,600
8.	2002	Cuyahoga County - Wages	$14,598
9.	2002	State of Ohio, Judiciary/Supreme Court - Wages	$92,200

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting Boyko, Christopher A	Date of Report 7/22/2004

IV. REIMBURSEMENTS -- transportation, lodging, food, entertainment.

(Includes those to spouse and dependent children. See pp. 25-27 of instructions.)

☐ **NONE** - (No such reportable reimbursements.)

	SOURCE	DESCRIPTION
1.	EXEMPT	

V. GIFTS. (Includes those to spouse and dependent children. See pp. 28-31 of instructions.)

☐ **NONE** - (No such reportable gifts.)

	SOURCE	DESCRIPTION	VALUE
1	EXEMPT		

VI. LIABILITIES. (Includes those of spouse and dependent children. See pp. 32-34 of instructions.)

☑ **NONE** - (No reportable liabilities.)

	CREDITOR	DESCRIPTION	VALUE CODE
1.			

FINANCIAL DISCLOSURE REPORT
Page 1 of 2

Name of Person Reporting	Date of Report
Boyko, Christopher A	7/22/2004

VII. INVESTMENTS and TRUSTS – income, value, transactions (includes those of the spouse and dependent children See pp 34-57 of filing instructions.)

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A-H)	B. (2) Type (e.g. div., rent, or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g. buy, sell, merger, redemption)	D. If not exempt from disclosure (2) Date: Month - Day	D. (3) Value Code 2 (J-P)	D. (4) Gain Code 1 (A-H)	D. (5) Identity of buyer/seller (if private transaction)
NONE (No reportable income, assets, or transactions)									
Rental Property #1, Cape Coral, FL	A	Rent			EXEMPT				
College Advantage Savings Plan, Guranted Savings Fund	A	Interest	J	T	EXEMPT				
College Advantage Savings Plan, Guaranteed Savings Fund	A	Interest	J	T	EXEMPT				
Sherwin Williams Federal Credit Union	A	Interest	J	T	EXEMPT				
5/3 Bank	A	Interest	J	T	EXEMPT				
Parkview Federal Savings & Loan	A	Interest	J	T	EXEMPT				
IRA #1 Charles Schwab	A	Interest	K	T	EXEMPT				
- Schwab Money Market Fund									
- Vanguard GNMA Fund									
IRA #2 Charles Schwab	A	Interest	K	T	EXEMPT				
- Schwab Money Market Fund									
- Vanguard GNMA Fund									
Sherwin Williams Employee Stock Purchase and Savings Plan	B	Div & Int	K	T	EXEMPT				
- Sherwin Williams Common Stock									
- Fidelity Instl Sh - Int Govt Fund									
Sherwin Williams Salaried Employees Revised Pension Inv Plan	A	Div & Int	J	T	EXEMPT				
- Fidelity Magellan Fund									
- PIMCO Low Dur Admin Fund									

Income/Gain Codes (See Columns B1 and D4)	A = $1,000 or less	D = $1,001-$2,500	C = $2,501-$5,000	D = $5,001-$15,000	E = $15,001-$50,000	
	F = $50,001-$100,000	G = $100,001-$1,000,000	H1 = $1,000,001-$5,000,000	H2 = More than $5,000,000		
Value Codes (See Columns C1 and D3)	J = $15,000 or less	K = $15,001-$50,000	L = $50,001-$100,000	M = $100,001-$250,000		
	N = $250,000-$500,000	O = $500,001-$1,000,000	P1 = $1,000,001-$5,000,000	P2 = $5,000,001-$25,000,000		
	P3 = $25,000,001-$50,000,000		P4 = More than $50,000,000			
Value Method Codes (See Column C2)	Q = Appraisal	R = Cost (Real Estate Only)	S = Assessment	T = Cash/Market		
	U = Book Value	V = Other	W = Estimated			

FINANCIAL DISCLOSURE REPORT
Page 2 of 2

Name of Person Reporting	Date of Report
Boyko, Christopher A	7/22/2004

VII. INVESTMENTS and TRUSTS -- income, value, transactions (includes those of the spouse and dependent children. See pp. 34-37 of filing instructions.)

	A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A-H)	B. (2) Type (e.g. div., rent, or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g. buy, sell, merger, redemption)	D. If not exempt from disclosure (2) Date: Month - Day	D. (3) Value Code 2 (J-P)	D. (4) Gain Code 1 (A-H)	D. (5) Identity of buyer/seller (if private transaction)
19.	- Fidelity Ret Govt MM Fund									
20.	Ohio Public Employees Deferred Compensation Plan	C	Div & Int	K	T	EXEMPT				
21.	- Fidelity Contra Fund									
22	- Fidelity Growth Company Fund									
23.	- Janus Fund									
24.	- Vanguard Institutional Index Fund									
25	Ohio Public Employees Retirement System Pension Plan	D	Div & Int	N	T	EXEMPT				

Income/Gain Codes:	A = $1,000 or less	B = $1,001-$2,500	C = $2,501-$5,000	D = $5,001-$15,000	E = $15,001-$50,000	
(See Columns B1 and D4)	F = $50,001-$100,000	G = $100,001-$1,000,000	H1 = $1,000,001-$5,000,000	H2 = More than $5,000,000		
Value Codes:	J = $15,000 or less	K = $15,001-$50,000	L = $50,001-$100,000	M = $100,001-$250,000		
(See Columns C1 and D3)	N = $250,000-$500,000	O = $500,001-$1,000,000	P1 = $1,000,001-$5,000,000	P2 = $5,000,001-$25,000,000		
	P3 = $25,000,001-$50,000,000		P4 = $More than $50,000,000			
Value Method Codes	Q = Appraisal	R = Cost (Real Estate Only)	S = Assessment	T = Cash/Market		
(See Column C2)	U = Book Value	V = Other	W = Estimated			

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Boyko, Christopher A	7/22/2004

VIII. ADDITIONAL INFORMATION OR EXPLANATIONS (Indicate part of Report.)

NONE

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Boyko, Christopher A	7/22/2004

IX. CERTIFICATION.

I certify that all information given above (including information pertaining to my spouse and minor or dependent children, if any) is accurate, true, and complete to the best of my knowledge and belief, and that any information not reported was withheld because it met applicable statutory provisions permitting non-disclosure.

I further certify that earned income from outside employment and honoraria and the acceptance of gifts which have been reported are in compliance with the provisions of 5 U.S.C. § 501 et. seq., 5 U.S.C. § 7353, and Judicial Conference regulations.

Signature Christopher A Boyko Date JULY 27, 2004

NOTE: ANY INDIVIDUAL WHO KNOWINGLY AND WILFULLY FALSIFIES OR FAILS TO FILE THIS REPORT MAY BE SUBJECT TO CIVIL AND CRIMINAL SANCTIONS (5 U.S.C. app. § 104)

FILING INSTRUCTIONS

Mail signed original and 3 additional copies to:

Committee on Financial Disclosure
Administrative Office of the United States Courts
Suite 2-301
One Columbus Circle, N.E.
Washington, D.C. 20544

FINANCIAL STATEMENT

NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS		LIABILITIES	
Cash on hand and in banks	18,000.00	Notes payable to banks-secured	see below
U.S. Government securities-add schedule		Notes payable to banks-unsecured	
Listed securities-add schedule		Notes payable to relatives	
Unlisted securities--add schedule		Notes payable to others	
Accounts and notes receivable:		Accounts and bills due credit cards	1,500.00
Due from relatives and friends		Unpaid income tax	
Due from others(campaign loan)	11,000.00	Other unpaid income and interest	
Doubtful	75,000.00	Real estate mortgages payable-add schedule (personal residence) *	155,000.00
Real estate owned-add schedule	340,000.00	Chattel mortgages and other liens payable	42,000.00
Real estate mortgages receivable		Other debts-itemize:	
Autos and other personal property	50,000.00		
Cash value-life insurance			
Other assets itemize:			
OPERS	275,000.00		
IRA'S	38,000.00		
DEFERRED COMP	20,000.00	Total liabilities	198,500.00
401K	2,200.00		
PENSION/STOCK PLAN	28,000.00	Net Worth	658,700.00
Total Assets	857,200.00	Total liabilities and net worth	857,200.00
CONTINGENT LIABILITIES		GENERAL INFORMATION	
As endorser, comaker or guarantor		Are any assets pledged? (Add schedule) NO	
On leases or contracts		Are you defendant in any suits or legal actions? NO	
Legal Claims		Have you ever taken bankruptcy? NO	
Provision for Federal Income Tax			
Other special debt			

* Mortgage holder is Cleveland Selfreliance Credit Union

III GENERAL (PUBLIC)

CHRISTOPHER ALLAN BOYKO

1. **An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.**

   I have been unable to provide legal services for the past five years because of my judicial position. I have in the past done the following:

   I provided legal assistance to veterans (hospitalized and non-hospitalized) by drafting legal documents, and giving legal advice, etc. I participated in Parma Bar Association's Law Day at Parmatown Mal and gave free legal advice over several years to community members.

   For many years I participated as a guardian *ad litem* in Juvenile Court, representing legal interests of minors when parents were charged with abuse, neglect or dependency. I also discounted fees.

   Several years ago I helped pass out Christmas baskets to needy veterans at South Park Giant Eagle. The United States Veteran's Relief Organization was the sponsor, and I continued to work with Veterans as Chairman of the Court's Veteran's Service Committee..

2. **The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates – through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What have you done to try to change these policies?**

   No.

3. **Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please describe from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).**

Senators DeWine and Voinovich have a Screening Committee to make recommendations to them for their final decision on whom to recommend to the President. I was one of several finalists recommended to the Senators.

The Republican Party of Cuyahoga County also put together a screening committee on their own, and again, I was one of several finalists recommended to the Senators.

The application form for the Senators was long and detailed, similar in many aspects to this one.

The Senator's Selection Committee was a diverse group of professionals from law firms, government and academia, who focused their questions on qualifications. The Selection Committee in many ways mirrored the concerns of Senators DeWine and Voinovich concerning professional qualifications, respect in the legal community and whether the applicant exhibits proper judicial temperament.

I interviewed with White House Counsel approximately one week after the Senators sent their letter of recommendation to the President. Two members of White House Counsel and one attorney from the Department of Justice spoke to me for an hour about qualifications, judicial philosophy and areas of potential conflict. They were professional, personable and respectful.

On July 22, 2004, the President submitted my name to the Senate.

4. **Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as asking how you would rule on such case, issue, or question? If so, please explain fully.**

No one on the Senator's Selection Committee or White House discussed a specific case, legal issue or question in a manner that could reasonably be interpreted as asking how I would rule on such case, issue or question.

5. **Please discuss your views on the following criticism involving "judicial activism".**

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has

become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government.

Some of the characteristics of this "judicial activism" have been said to include:

(a) A tendency by the judiciary toward problem-solution rather than grievance-resolution;

(b) A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;

(c) A tendency by the judiciary to impose broad, affirmative duties upon governments and society;

(d) A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and

(e) A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

A judge should hold a strong belief in the separation of powers among the executive, legislative and judicial branches. The structure of the executive to administer and the legislative to investigate, review, contemplate, propose and enact laws gives meaning to the "people's voices" in government. .

Courts are activated via "grievances" filed before them. Not every problem contained in litigation has a solution – nor should it. Courts resolve disputes consistent with jurisdictional, statutorial and evidentiary boundaries. Formal judicial proceedings are not alternative dispute resolution forms such as arbitration and mediation. Judicial "rules" have a purpose – structural guidelines to fairly, and impartially, resolve legal disputes, not simply "problems". Structure exists for predictability and fairness so that everyone who seeks relief or defends against a complaint knows the rules of the game. If a court rules in a way which limits the consequences to the parties before the court (or at least a predictably affected audience), then the legislative and executive have an opportunity to focus on a more defined issue or problem and decide what, if anything, they should do as representatives.

Every court should be mindful of its role in government.

Senator DEWINE. Judge, thank you very much. Ms. Howell.

STATEMENT OF BERYL ALAINE HOWELL, NOMINEE TO BE A MEMBER OF THE UNITED STATES SENTENCING COMMISSION

Ms. HOWELL. Good afternoon, Chairman DeWine and Senator Leahy. It is a pleasure to be here, although it is a new experience for me to be sitting on this side of the table rather than behind you members up on the podium, and a little bit of a frightening experience, one that is a little bit surprising to me.

And I just want to reiterate what Judge Boyko said, which is I am very grateful to the President for considering me and giving me this nomination and also very grateful to Senator Leahy, in particular, and Chairman Hatch and the other members for their assistance and support during this process.

I really look forward to the opportunity to work with the distinguished members of the Sentencing Commission and the excellent staff there, with whom I had many dealings when I was on the Judiciary Committee staff, and I know that they are just great. And I do not have a written statement, but I will be happy to answer any questions you may have.

[The biographical information of Ms. Howell follows:]

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name (include any former names used.)
Beryl Alaine Howell

2. Address: List current place of residence and office address(es).
Residence: Washington, D.C.
Office: 1150 Connecticut Ave., NW, Suite 200, Washington, D.C. 20036

3. Date and place of birth.
December 3, 1956 at Ft. Benning, Georgia

4. Marital Status (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).
I am married to Michael Rosenfeld, who is employed by National Geographic Television, 1145 17th Street, N.W., Washington, D.C. 20036-4688

5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.
1974-1978 Bryn Mawr College, B.A. in 1978
1980-1983 Columbia University School of Law, J.D. in 1983

6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

7/78-7/80 Legal Assistant, Shanley & Fisher, Newark, N.J.
6/81-8/81 Summer Associate, Shanley& Fisher, Newark, N.J.
6/82-8/82 Summer Assistant, U.S. Attorney's Office, S.D.N.Y.
2/83- 4/83 Student Assistant, U.S. Attorney's Office, S.D.N.Y.
5/83-6/83 Summer Associate, Schulte Roth & Zabel, New York, N.Y.
8/83-9/84 Law Clerk, Hon. Dickinson R. Debevoise, D.N.J., Newark, N.J.
1/85-8/87 Associate Counsel, Schulte Roth & Zabel, New York, N.Y.
9/87-6/93 Assistant U.S. Attorney & Deputy Chief of Narcotics Section, U.S. Attorney's Office, E.D.N.Y., Brooklyn, NY
7/93-2/03 Sr. Counsel and General Counsel, U.S. Senate Committee on the Judiciary, Washington, D.C. 20510
2/03-present Managing Director & General Counsel of D.C. Office of Stroz Friedberg, LLC, Washington, D.C. 20036

7 Military Service: Have you had any military service? **No.** If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received. **N/A**

8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

1976-78	**President and Member, Honor Board, Bryn Mawr College**
1981-82	**Harlan Fiske Stone Scholar, Columbia University School of Law**
1982-83	**International Fellows Program, Columbia University School of Law**
July 1990	**DEA Certificate for Outstanding Contributions in the field of Drug Law Enforcement**
1990	**U.S. Attorney's Special Achievement Award for Sustained Superior Performance**
April, 1991	**Attorney General's Director's Award for Superior Performance**
1991	**U.S. Attorney's Special Achievement Award for Sustained Superior Performance**
Oct 1992	**Award from FBI for public corruption case; Award from NYC Department of Investigation for public corruption case**
Dec 1992	**Award from DEA, Asian Heroin Task Force for prosecution of Flying Dragons Leader**
Feb 1993	**DEA Certificate for Outstanding Contributions in the field of Drug Law Enforcement**
Mar 2001	**Induction into the Freedom of Information Act Hall of Fame**
Sept 2004	**First Amendment Award, Society of Professional Journalists**

9. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.
American Bar Association

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.
I have been an active member and on the executive committee of the Parent-Teacher Association of my children's public elementary school, the Francis Scott Key Elementary School, Washington, D.C. I am also a member of the American Bar Association, and I am registered as a lobbyist for the Recording Industry Association of America and Universal Music to consult on anti-piracy legislation and efforts.

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.
Admitted to New York Bar since 6/18/1984;
Admitted to U.S. Supreme Court Bar since 1/6/1997;
Admitted to DC Bar since 4/4/1997.

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.
PUBLICATIONS (attached):

- **B.A. Howell, "Ambiguities in US law for investigators," Digital Investigation, Volume 1, Issue 2, pp.106-111 (2004).**
- **B.A. Howell and E.M. Friedberg, "21st Century Forensics: Searching for the 'Smoking Gun' in Computer Hard Drives," The Prosecutor, pp.18-27, November/December 2003.**
- **B.A. Howell, "Information Overload," Legal Times, June 2, 2003, vol. XXV, No. 22.**
- **B.A. Howell and S.J. Moritz, "Mail Fraud, Wire Fraud and Securities Fraud as Predicate Acts in Civil RICO Actions," Civil RICO, Practicing Law Institute, Course Handbook Series, Number 139, 1985.**
- **B.A. Howell and S.J. Moritz, "Mail Fraud, Wire Fraud and Securities Fraud as Predicate Acts in Civil RICO Actions," Civil RICO, Practicing Law Institute, Course Handbook Series, Number 141, 1986.**

SPEECHES: I have attached a list of speeches I have given, including the dates, topics and groups before whom I spoke. I always speak extemporaneously and do not have transcripts of my remarks.

13. Health: What is the present state of your health? List the date of your last physical examination.
My health is excellent and my last physical examination was in December, 2003.

14. Judicial Office: State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court. **None.**

15. Citations: If you are or have been a judge, provide: (1) citations for the ten most significant opinions you have written; (2) a short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3)

citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions. **Not Applicable.**

16. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.
None.

17. Legal Career:

a. Describe chronologically your law practice and experience after graduation from law school including:

1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;

Yes, I served as a law clerk for one year to Judge Dickinson R. Debevoise of the U.S. District Court, District of New Jersey from August, 1983 to September, 1984.

2. whether you practiced alone, and if so, the addresses and dates;

NONE.

3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;

Yes, I have worked for the law firms and governmental agencies listed below in various capacities, as indicated.

7/78-7/80 Legal Assistant, Shanley & Fisher, 550 Broad Street, Newark, NJ
6/81-8/81 Summer Associate, Shanley & Fisher, 550 Broad Street, Newark, NJ
6/82-8/82 Summer Assistant, U.S. Attorney's Office, S.D.N.Y., One St. Andrew's Plaza, NY, NY
2/83- 4/83 Student Assistant, U.S. Attorney's Office, S.D.N.Y., One St. Andrew's Plaza, NY, NY
5/83-6/83 Summer Associate, Schulte Roth & Zabel, 900 Third Ave., NY, NY
8/83-9/84 Law Clerk, Hon. Dickinson R. Debevoise, D.N.J., U.S. Courthouse & Post Office, Newark, NJ
1/85-8/87 Associate Counsel, Schulte Roth & Zabel, 900 Third Ave., NY, NY
9/87-6/93 Assistant U.S. Attorney & Deputy Chief of Narcotics Section, U.S. Attorney's Office, E.D.N.Y., 225 Cadman Plaza East, Brooklyn, NY

7/93-2/03 Sr. Counsel and General Counsel, U.S. Senate Committee on the Judiciary, Washington, D.C. 20510.
2/03-present Managing Director & General Counsel of D.C. Office of Stroz Friedberg, LLC, 1150 Connecticut Ave., NW, Washington, D.C. 20036.

b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?
Most of my legal career has been in public service, working as a law clerk to a Federal Judge, as a Federal prosecutor and as staff on the Senate Judiciary Committee, which altogether cover a period of about seventeen years. For a period early in my career, from 1984 to 1987, I worked as an associate counsel at the law firm of Schulte, Roth & Zabel, and I currently work as the Managing Director and General Counsel of the Washington, D.C. Office of Stroz Friedberg, LLC, a digital forensics consulting and technical services firm.

2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.
While working in the government, as a law clerk to a Federal District Court Judge, I provided legal analysis and recommendations primarily on pending civil matters before the judge for whom I was clerking; as an Assistant U.S. Attorney, I represented the Federal government in criminal prosecutions; as counsel on the Senate Judiciary Committee staff, I provided legal analysis on proposed and pending legislation and issues to Senator Patrick Leahy. When I was in private practice, as an associate counsel at Schulte Roth & Zabel, I worked on civil matters for the firm's clients, which were generally corporations. In my current firm, Stroz Friedberg, LLC, I provide professional consulting services in civil and criminal investigatory and litigation matters to both publicly and privately held corporations, U.S. Attorney's Offices, law firms and trade associations.

c. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.
When I was an Assistant U.S. Attorney, I appeared frequently in Federal District Court and the Court of Appeals for the Second Circuit. When I was in private practice at Schulte Roth

& Zabel, I appeared in Federal District Court in the Southern District of New York occasionally to argue discovery motions.

2. What percentage of these appearances was in:
   (a) federal courts;
   (b) state courts of record;
   (c) other courts.

When I was an Assistant U.S. Attorney and in private practice at Schulte Roth & Zabel, 100 percent of my appearances were in Federal Courts.

3. What percentage of your litigation was:
   (a) civil; **About 5 percent.**
   (b) criminal. **About 95 percent.**

4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

As an Assistant U.S. Attorney, I was the lead prosecutor on over one hundred criminal cases, many of which involved multiple defendants and all of which were resolved by verdict or guilty plea.

5. What percentage of these trials was:
   (a) jury;
   (b) non-jury.

I tried approximately ten criminal cases to a verdict before a jury.

18. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

(a) the date of representation;
(b) the name of the court and the name of the judge or judges before whom the case was litigated; and
(c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

NOTE: Many of these cases were litigated over a decade ago in New York, and I have therefore provided the names of the defense counsel involved to the best of my recollection and current contact information to the extent I was able to locate it.

1. **Brennan v. United States, 867 F.2d 111 (2d Cir. 1989).**
a) 1987- 1989
b) Judge Leonard Weinstein, Eastern District of New York; Court of Appeals for the Second Circuit
c) Co-Counsel: Hon. John Gleeson, U.S.D.J., E.D.N.Y., 225 Cadman Plaza East, Brooklyn, New York 11201,(718) 260-2450
d) Defense Counsel:
Arnold E. Wallach, New York, N. Y. – no listing found

Summary: I successfully handled the response to a petition, filed pursuant to 28 U.S.C. 2255, by a corrupt former Justice of the New York Supreme Court to set aside his convictions for racketeering, Travel Act violations and extortion. The defendant had been convicted of agreeing to "fix" cases in exchange for bribes. Following the Supreme Court decision in McNally v. U.S., 107 S.Ct. 2875 (1987), which rejected an "intangible rights" theory for wire and mail fraud convictions, Brennan's wire fraud convictions were vacated. He then sought vacatur of his remaining convictions. The Second Circuit denied his motion to set aside his remaining convictions.

2. **United States v. Benjamin Clemente, et al., 22 F.3d 477 (2d Cir. 1994).**
a) 1989-1993
b) Judge I. Leo Glasser, Eastern District of New York
c) Co-Counsel: AUSA David James, U.S. Attorney's Office, E.D.N.Y., 147 Pierrepont Street, Brooklyn, NY 11201, (718)254-7000
d) Defense Counsels included:
- **Daniel M. Felber, counsel for defendant Albunio, 99 Wall Street 21st Fl, New York, N.Y. 10005, (212) 422-4600**

- Robert Koppelman, counsel for defendant Mirenda, 585 West End Ave., New York, New York 10024
- Samuel Gregory, counsel for defendant Demolfetto, 360 Court St Ste 3, Brooklyn, N.Y. 11231, (718) 488-1900
- Robert J. Collini, counsel for defendant Cassera, Judge, New York Supreme Court, 120 Skimmerhorn Street, Brooklyn, NY 11201, (718) 643-8615
- Allen Lashley, counsel for defendant Sharkey, 16 Court St., Rm 906, Brooklyn, N.Y. 11241, (718) 875-1128
- Charles Ross, counsel for defendant Messana, 767 Third Ave., 26th Floor, New York, N.Y. 10017, (212) 425-9464.
- Martin Adelman, counsel for defendant Zurica, 225 Broadway, Suite 1804, New York, NY 10007, (212) 732-4343
- Louis Diamond, counsel for defendant Schramm, 400 St Marks Place, Staten Island, NY 10301, (718) 448-4800

Summary: This case involved a three-year investigation into widespread corruption within the New York City Department of Buildings (DoB) by building inspectors and their supervisors across the boroughs of Manhattan, Staten Island, Brooklyn and Queens. The case resulted in the convictions of over 25 building inspectors for extorting payoffs from architects, engineers, builders and others for "expediting" certificates of occupancy (COs) and insuring that paperwork was not lost or unreasonably delayed. The intense investigation involved reluctant cooperators and consensual recordings and culminated in a trial on Hobbs Act and other charges that lasted five weeks. Before the trial one of the defendants sought to kill a cooperating witness by hiring a "hit-man," who cooperated with authorities and the illegal plan was stopped before a witness was harmed. This case uncovered a pervasive and systematic pattern of corruption at DoB, and resulted in the arrests of over one-fifth of the inspection force of the construction division of the DoB. Importantly, this investigation provided the impetus for local officials to reform DoB procedures and management policies to minimize corruption on this massive scale in the future at DoB.

3. U.S. v. Johnny Eng, 14 F.3d 165 (2d Cir. 1994).
a) 1988-1992
b) Judge Reena Raggi, former U.S.D.J., Eastern District of New York, current Judge on U.S. Court of Appeals, Second Circuit, Thurgood Marshall U.S. Courthouse, 40 Foley Square, NY, NY 10007, (212) 857-8500
c) Co-Counsel: Karen Seymour, U.S. Attorney's Office, S.D.N.Y., One St Andrews Plaza, Room 619, NY, NY 10007, (212) 637-2200; Catherine

Palmer, Latham & Watkins, 885 Third Avenue, Suite 1000, New York, NY 10022, (212) 906-1335
d) Defense Counsel: Gerald L. Shargel, 570 Lexington Avenue, 16th floor, New York, NY 10022, (212) 446-2323

Summary: The defendant was the head of the Flying Dragons, a violent gang operating in the Chinatown area of Manhattan. One of his "street names" was "Machine-gun Johnny." He was charged with engaging in a continuing criminal enterprise and running a heroin trafficking operation that used various ingenious methods to smuggle heroin into the United States from 1987 to 1988. Shortly after other members of the Flying Dragons were arrested, the defendant fled the country and was subsequently apprehended in Hong Kong, where he was held in custody from August, 1989 until November 1991. Shortly after I traveled to Hong Kong to work with authorities there, he was successfully extradited to the United States to stand trial. Over the course of this investigation, a cooperating defendant was shot at point-blank range in an assassination attempt, but survived. Eng was convicted after a four week trial in December 1992.

4 U.S. v. Michael Yu, et. al, 697 F. Supp. 635 (E.D.N.Y. 1988).
a) 1988-1992
b) Judge Leonard Wexler, Eastern District of New York
c) Defense Counsels included:

- Jay Goldberg, counsel for Defendant Yu, Suite 2020, 250 Park Avenue, New York, N.Y. 10177, (212) 453-3917
- Gerald B. Lefcourt, counsel for Defendant Lee, 148 E 78th St, New York, N.Y., no phone number listed.
- Judd Burstein, counsel for Defendant Chen, Suite 1501, 1790 Broadway, New York, N.Y. 10019, (212) 974-2400
- Richard Ware Levitt, counsel for Defendant Tom, 148 E 78th, New York, N.Y. 10021, (212) 737-0400
- Bernard H. Udell, counsel for Defendant Chin, Brooklyn, N.Y. No listing found
- Charles D. Lavine, Esq., Attorney for Defendant Ting, 30 Vesey St. 6th Fl., New York, N.Y. 10007, (212)608-6650

Summary: The defendant, Michael Yu, was the underboss of the Flying Dragons, a violent gang operating in the Chinatown area of Manhattan. He and his girlfriend and co-defendant, Wah Tom Lee, helped Johnny Eng, the head of the Flying Dragons, recruit Chinese women, who were regular customers at gambling parlors operated by the gang and owed gambling debts, to accept boxes of heroin shipped from Hong Kong to help repay

their debts. This is one method used by Johnny Eng and others in the gang to smuggle heroin into the United States. As part of the investigation, we used controlled deliveries of these boxes, to crack this method of heroin importation and take down the leadership of the Flying Dragons. The investigation resulted in the convictions of 8 individuals, including one woman who was nine months pregnant during the trial and gave birth shortly before jury deliberations began, and disrupted the heroin trafficking operation of this Chinatown gang.

5. U.S. v. Carlos Restrepo, et al., 936 F.2d 661 (2d Cir. 1991).
a) 1987-1991
b) Judge Charles P. Sifton, Eastern District of New York.
c) Defense Counsels included:

- William Mogulescu, 220 Fifth Ave., New York, N. Y. 10001
- Emanuel Moore, 168 Canal Street, New York, N.Y. 10013
- Frank Mandell, 319 Fifth Ave., 3rd Floor, New York, N.Y. 10016
- James Cohen, 140 W 62nd St, New York, NY 11241, (212) 929-7500
- Vincent F. Siccardi, Suite 1040, 80-02 Kew Gardens Rd, Kew Gardens, NY 11415, (718) 544-0306
- Russell J. Carbone, 125-10 Queens Blvd., Suite 2710, Kew Gardens, N.Y. 11415
- Mario Malerba, 80-02 Kew Gardens Rd, Kew Gardens, NY 11415, (718) 544-0306
- Jerald Levine, 73-19 Broadway, Jackson Heights, NY 11372, (718) 507-6464
- Miguel A. Gonzalez, Suite 705, 280 Madison Ave, New York, NY 10016, (212) 684-3889
- Carlos Perrez Olivo, 369 E. 149th Street, Bronx, N.Y. 10455
- Jake LaSala, 125-10 Queens Blvd., Kew Gardens, N.Y. 11415

Summary: This case invited the successful investigation and prosecution of various aspects of the largest money laundering cell and narcotics distribution cell of the Cali, Columbia cartel ever located up to that time, in the New York area. This achievement was highlighted in a November 13, 1989 issue of Newsweek, when six of the defendants prosecuted in this case were included in an article on the cartels (copy attached). An important aspect of the investigation began with an undercover investigation I supervised of a person who installed secret compartments in vehicles that were used by narcotics traffickers. The information resulting from this investigation led to an intensive investigation of a warehouse located in Queens, New York. Several investigative techniques, including pen register devises, the use of a video pole camera, physical surveillances and garbage searches, developed strong circumstantial evidence that the warehouse was used as a central location by the Cali

cartel drug organization to distribute multi-kilogram quantities of cocaine and to collect their cash narcotics proceeds. As a result, law enforcement officers were able to identify many vehicles, including trucks, vans and cars, used by members of the organization to transport cocaine and cash narcotics proceeds in hidden, electronically-operated compartments.

During December 1988 and the beginning of January 1989, agents and police officers assigned to the New York Drug Enforcement Task Force conducted intensive surveillance of various defendants as they moved large loads of cocaine and drug proceeds around Queens, New York. During the night of January 4, 1989, I obtained telephonic search warrants for four locations in Queens, New York. These search warrants resulted in the single largest cash seizure of drug proceeds ever made at that time in the United States -- $19 million. They also resulted in the arrests of ten high ranking associates of the Cali cartel, including Moises Gomez, who was the head of that cell, and the seizure of four semi-automatic pistols, a silencer and ammunition, money counting machines, and records showing the accumulation of $ 44 million in narcotics proceeds between November 1, 1988 and January 4, 1989.

Analysis of the records seized on January 4, 1989, produced significant amounts of information on additional "stash pads" used by members of the drug organization. These additional stash locations were placed under surveillance and subsequently searched, resulting in the recovery of evidence which became critical in understanding the scope of the organization's operations. Ultimately, all ten defendants were convicted. Six pleaded guilty to money laundering charges and four were convicted of money laundering and narcotics charges after a four week trial at which I led the prosecution team.

6 U.S. v. Campino, et al., 890 F.2d 588 (2nd Cir. 1989), cert denied, 110 S.Ct. 1787(1991).
a) 1989-1991
b) Judge Sifton, Eastern District of New York.
c) Defense Counsel:

- Jerald Levine, 73-19 Broadway, Jackson Heights, N.Y., 718-507-6464
- Barry E. Schulman, 189 Montague Street, Brooklyn, NY 11201, 718-855-8855
- Michael A. O'Connor, 189 Montague Street, Brooklyn, NY 11201, 718-855-8855

Summary: The defendants in this case were convicted in a "dry conspiracy" of narcotics trafficking based solely on the seizure of $93,000 in cash narcotics proceeds, firearms and coded transactions that were

proved to be narcotics records. No cocaine was ever found connected to the defendants, but this case helped establish that senior management in cocaine wholesale operations could not inoculate themselves from narcotics charges by storing the narcotics in a separate place than the money and records of the illegal wholesale operation.

7. U.S. v. Carlos Montoya and Jose Calderon, 760 F. Supp. 27 (E.D.N.Y. 1991); U.S. v. Michael Ahuja, 936 F.2d 85 (2d Cir. 1991).
a) 1988-1991
b) Judge I. Leo Glasser, Eastern District of New York.
c) Defense Counsel:

- Jorge DeJ. Guttlein, counsel for defendant Montoya, N.Y. Suite 707, 291 Broadway, New York, N.Y. 10007, (212) 608-7575
- Joel Cohen, counsel for defendant Calderon, N.Y. 30 W 42nd St Ste 1301, New York, N.Y. 10036, (212) 944-1499
- Roger L. Stavis, counsel for defendant Ahuja, N.Y 820 Second Avenue, 4th Floor, New York, N.Y. 10017, 212-557-6767

Summary: While in the midst of prosecuting the Cali cartel cell headed by Moises Gomez, I discovered that an undercover New York City Police Officer had been approached by an individual named Michael Ahuja, who offered to pay $30,000 as a bribe to aid in the escape of four of the defendants in that case incarcerated at the Metropolitan Correctional Center in New York City. The federal agents on the case and I perceived this illegal activity to be a direct threat by a Colombian drug cartel to the integrity of our criminal justice system, and decided that an aggressive investigative posture was necessary. I drafted and obtained wiretap applications for three telephones in an effort to determine the individuals directing Ahuja's activities. I then supervised the FBI and DEA in its investigation of the targets identified through the wiretaps.

In March 1989, the Ahuja wiretap investigation resulted in the identification of additional members of the conspiracy to break the defendants out of jail, all of whom were believed to be high ranking associates of the Cali cartel. These additional targets paid a $50,000 cash bribe to an undercover NYC police officer, made arrangements for the defendants to fly out of the country to Columbia, provided four complete suits of clothing so that the defendants would be appropriately attired when they made their escape, and negotiated a bribe price for the jail-break of two additional members of the narcotics organization, who had been arrested with the seizure of $5.7 million in Houston, Texas. I then successfully prosecuted these individuals, two of whom pleaded guilty and one of whom was convicted after a two-week trial.

This case was important to demonstrate to Colombian drug cartel members that the American criminal justice system was not easily susceptible to corruption, and that they could not bribe their way out of U.S. jails and prisons to avoid liability for criminal activity here.

8. U.S. v. Moskowitz, et al., 883 F.2d 1142 (2d Cir. 1989).
a) 1987-1988
b) Judge Raymond Dearie, Eastern District of New York
c) Bonnie Klapper, U.S. Attorney's Office, E.D.N.Y., 147 Pierrepont Street, Brooklyn, NY 11201, (718)254-7000
d) Defense Counsels included:

- Lawrence H. Schoenbach, counsel for Moskowitz, 111 Broadway, 12th Fl., New York, New York,

Summary: I conducted the initial investigation, handled the pre-trial motions and then supervised a new Assistant U.S. Attorney at the trial of this case. The four defendants in this case were charged with cocaine possession and recklessly violating federal regulations on transporting hazardous material in air commerce, stemming from their efforts to free-base cocaine on an Eastern Airlines flight from New York to Florida. One of the defendants was caught in the airplane bathroom burning a butane torch, glass pipe, and other drug paraphernalia. This forced the plane to be turned back to New York, whereupon the other defendants were found to have similar free-basing equipment in their possession. The defendants were all convicted at trial.

9. U.S. v. Contractor, et al., 926 F.2d 128 (2d Cir. 1991).
a) 1989-1991
b) Judge Joseph M. McLaughlin, Eastern District of New York
c) Defense Counsel included:

- Christine Yaris, counsel for defendant D'Souza, N.Y.
- Robert Stolz, counsel for defendant D'Souza, Judge, State of New York, NYC Criminal Ct., 100 Centre St New York, NY 10013, (718) 590-2931 B
- Susan Kellman, counsel for defendant D'Souza, 25 8th Avenue, Brooklyn, NY, (212) 732-7200
- Jeffrey Traub, counsel for defendant Shafiq, 100 Church St., New York, NY 10007, (212) 732-0208

Summary: I supervised an undercover investigation of heroin trafficking by a practicing physician at a medical clinic in Brooklyn, New York. This physician, Dr. Mohammed Iqbal Contractor, agreed to sell almost a kilogram of cocaine to a confidential informant and undercover DEA agent.

When Dr. Contractor was unable to supply the cocaine, he instead sold over a half kilogram of heroin. At the same time, he advised the undercover agent about additional shipments of heroin that he was in the process of importing. Over the course of the next few months, arrangements were made for the shipment of five kilograms of heroin in meetings that took place in Pakistan and New York. The investigation resulted in the arrest not only of the physician, but also of his heroin suppliers from Pakistan, Robert Sebastian D'Souza (who was a former DEA informant) and Khawaja Mohammed Shafiq. All three defendants pleaded guilty. This case was important not only because it shut down the illegal narcotics trafficking operation of a practicing physician but also because it took a crooked DEA informant off the streets and stopped him from damaging other law enforcement investigations.

10 U.S. v. Huerta, 878 F. 2d 89 (2d Cir. 1989).
a) 1987-1989
b) Judge Edward R. Korman, Eastern District of New York
c) Defense Counsel:

- **Helen Coady, The Legal Aid Society, Federal Defender Services Unit, 52 Duane Street, New York, NY 10007, (212) 417-8700**

Summary: I believe that this was the first test in the Second Circuit of the constitutionality of a provision in the Sentencing Reform Act, 18 U.S.C. section 3553(e), which allows the government – and only the government – to make a motion for the defendant to be eligible for a sentence below the statutory minimum for providing substantial assistance to the government. The defendant in this case, Robert Huerta, arranged for the sale and delivery of one kilogram of cocaine to a DEA informant. Although he agreed to cooperate, his efforts were fruitless, incomplete and produced no results. Consequently, the defendant was sentenced to a mandatory minimum of five years' imprisonment.

On appeal, he claimed that the statute requiring a government motion for eligibility to be sentenced below the statutory mandatory minimum was unconstitutional as violation of the separation of powers, and on other grounds. I successfully defended the constitutionality of this portion of the statute and the government's prerogative to evaluate the substantiality of cooperation.

19 Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question, please omit any information protected by the attorney-client privilege (unless the privilege has been waived.)

During the time that I was privileged to work on the Senate Judiciary Committee staff for Senator Patrick Leahy, I was involved in a number of significant legislative matters, including those relating to criminal justice, intellectual property, anti-terrorism, law enforcement access to information, Freedom of Information Act and many others.

SUPPLEMENT TO QUESTION 12: LIST OF SPEECHES BY BERYL A. HOWELL

AS MANAGING DIRECTOR AT STROZ FRIEDBERG, LLC:

City of Philadelphia Law Department, Continuing Legal Education Meeting, panel presentation on "*Balancing Privacy Interests with the Patriot Act,*" Philadelphia, Pennsylvania, August 12, 2004.

American Bar Association, Section of Science & Technology Law, 2004 ABA Annual Meeting, panel presentation on "*Cyber Security Liability – A Growing Legislative Trend*," Atlanta, Georgia, August 8, 2004.

U.S. Attorney's Office for the Eastern District of Pennsylvania, Annual Retreat, "*Computer Forensics in Support of Litigation and Investigations*," Golden Inn and Conference Center in Avalon, New Jersey, June 4, 2004.

Yale Law School, Information Society Project, Digital Cops in a Virtual Environment: CyberCrime and Digital Law Enforcement Conference, panel presentation on "*New Crimes: Virtual Crimes of the Information Age*," March 27, 2004.

Baker & Hostetler, Seminar on "*Top Ten Pointers for Successful Lobbying on the Hill*," Society of Professional Journalists, March 12, 2004.

The George Washington University Law School, Symposium on "*The Future of Internet Surveillance Law,*" panel discussion moderated by Ellen S. Podgor, Georgia State University College of Law, on "Surveillance Law: Reshaping the Framework," October 23, 2003.

Hamilton College Program in Washington, D.C., Seminar on "*The USA PATRIOT Act Controversies*," September 17, 2003.

Knight Center for Specialized Journalism, Conference on Government Secrecy: Local, State, National, "*The PATRIOT Act, Law Enforcement and Civil Liberties,*" September 11, 2003.

Computer Science and Telecommunications Board, National Research Council of the National Academies, "*Computer Forensics: Use in Litigation and Investigations*," CSTB Brown Bag Seminar, August 7, 2003.

The American Constitution Society for Law and Policy, First National Convention, "*Surveillance and Detention After September 11*," panel discussion moderated by Robert Weiner, former Senior Counsel in the White House Counsel's Office, August 2, 2003.

D.C. Women's Criminal Defense Luncheon, "*Computer Forensics In Support of Litigation and Investigations: What, When, Where and How*," May 28, 2003.

American Bar Association Standing Committee on Law and National Security, "*The War on Terror – Setting the Legal Agenda*," panel discussion moderated by Stewart Baker, former General Counsel, National Security Agency (covered by C-SPAN), April 22, 2003.

The Federalist Society For Law and Public Policy Studies, Georgetown University Law Center, *Playing Games with Privacy: Homeland Security Measures and Your Rights*, panel discussion moderated by Mark Bonner, Professor and Senior Policy Advisor to the Under Secretary (Border and Transportation Security) at the Department of Homeland Security, April 16, 2003,.

AS STAFF OF THE SENATE JUDICIARY COMMITTEE:

American Library Association Midwinter Conference, Philadelphia, Pennsylvania, *Legislative Briefing: Library Surveillance and the USA PATRIOT Act*, January 25, 2003.

Knight Center for Specialized Journalism, *Civil Liberties in an Age of Terror*, "*The USA PATRIOT Act: Consequences Intended, and Not,*" December 5, 2002.

Communications Daily and Washington Internet Daily, Audio Conference, *Risks and Rewards In the New Senate: Prospects for Telecom, Views from the Judiciary Committee,* December 3, 2002.

Cardozo Law School, Course: Regulation of the Electronic Media, Guest Lecture on "*The Digital Rights Management Debate: From the DMCA to the FCC*," November 26, 2002.

Model Congress, "*How the Judiciary Committee Works,*" November 22, 2002.

Columbia University Graduate School of Journalism, *The New Gatekeepers: A Conference on Free Expression in the Arts,* panel discussion on "*Reconciling the Commons and the Marketplace,*" November 21, 2002.

Georgetown University's Communication, Culture & Technology Program, Course: Code & Law: Policy Implications of Internet Architecture, Guest Lecture on "*The Evolution of the Debate Over Digital Rights Management: From Encryption and the DMCA To Pending Bills,*" October 23, 2002.

American Society of Access Professionals, panel discussion on *"Critical Infrastructure Dilemma,"* September 11, 2002.

D.C. Women's Criminal Defense Luncheon, on *"White Collar Practice and the USA PATRIOT ACT,"* January 30, 2002.

Federal Judicial Center Program For Federal Judges, on *"Terrorism and the Law: The USA PATRIOT ACT,"* January 17, 2002.

Cato Institute, Technology and Society Conference, on "*Future of Intellectual Property,*" November 14, 2001.

ABA Standing Committee on Law and National Security, on *"The Information Sharing Provisions in the USA PATRIOT ACT,"* November 14, 2001.

Public Leadership Education Network (PLEN), on *"Women, Law and Public Policy."* November 2, 2001.

DC Bar, Civil Rights Committee of the Criminal Law and Individual Rights Section, on "*Fighting Terrorism Through Legislation: Where Privacy Rights and Law Enforcement Collide,*" November 1, 2001.

Georgetown Law School, on "*Technology: Peer-to-Peer and End-to-End: Copyright and Napster,*" April 4, 2001.

Governmental Affairs Institute at Georgetown, Presidential Management Interns, on "*A Day in the Life of Judiciary Committee Staffer,*" February 26, 2001.

National Youth Leadership Forum on Law, on *"Incorporating Public Service Into Your Legal Career,"* November 1, 8, and 15, 2000.

The Government Affairs Institute at Georgetown University, "*What Happens in Conference*?" September 24, 2000.

U.S. Chamber of Commerce, Roundtable on ICANN and Related Issues, on "*Cybersquatting: The Effect of New TLDs on IP Rights,*" June 20, 2000.

George Washington University Law School, on "*An Insider's View Of Legislative History,*" February 1, 2000.

Electronic Commerce Conference sponsored by Cross-Industry Working Team and Electronic Payments Forum, in cooperation with the Financial Services Technology Consortium and Commerce Net, on "*Cooperation and Competition: What's Next?* " October 27, 1999.

National Sentencing Policy Institute, on "*Role of the Congress, the Commission, and the Courts in Sentencing: A Legislative Perspective,*" March 8, 1999.

American Jewish Committee, on "*Encryption: Law Enforcement Meets Competitive Reality,*" December 3, 1998.

American Society of Access Professionals (ASAP), on *"Government Information Policy Issues Before Congress: Nazi War Crimes Disclosure Act, Implementation of EFOIA Amendments, and Declassification,"* November 17, 1998.

Fraternal Order of Police Annual Conference, on "*Action Items for the Senate Judiciary Committee,*" February 10, 1998.

U.S. Conference of Mayors, Task Force on Youth Violence, on "*Why S. 10 is Not the Solution to Youth Violenc,.*" December 1, 1997.

Fulbright Foreign Student Washington Seminar, on *"The Federal Role in Combating Crime,"* April 4, 1997.

American Society of Access Professionals' (ASAP) Annual Symposium, on "*Implementation of the E-FOIA Amendments,*" December 13, 1996.

Society of Professional Journalists National Convention, on "*Passage of Electronic Freedom of Information Act Amendments,*" September 20, 1996.

American Library Association's Government Documents Round Table and D.C. Library Association's Government Documents Interest Group, on "*Progress on the E-FOIA Amendments,*" April 10, 1995.

New York City Bar Association, Committee on Science and Law, on "*Hi-Tech Issues Before Congress,*" February 22, 1995.

American Society of Access Professionals (ASAP), on *"Electronic Freedom of Information Act Amendments,"* October 20, 1994.

Democratic Legislative Directors, on *"Progress Report on Digital Telephony and Clipper Chip,"* July 12, 1994.

Department of Justice, Seminar for FOIA Personnel, on *"Congressional Concerns with FOIA,"* December 14, 1993.

SUPPLEMENT TO QUESTION 18 (5):
Copy of November 13, 1989 article in Newsweek attached.

1 of 2 DOCUMENTS

Newsweek

November 13, 1989, UNITED STATES EDITION

SECTION: NATIONAL AFFAIRS; The Drug Crises; Pg. 36

LENGTH: 3055 words

HEADLINE: Cocaine's 'Dirty 300'

BYLINE: TOM MORGANTHAU with RICHARD SANDZA and MARK MILLER in Washington, DAVID L. GONZALEZ and ERIK CALONIUS in Miami, PETER MCKILLOP and PATRICK ROGERS in New York, MICHAEL A. LERNER and SHAWN DOHERTY in Los Angeles and bureau reports

HIGHLIGHT:
How the Colombian drug cartels operate their sophisticated, $5 billion drug business in America

BODY:

Like many big drug cases, this one began with the seizure of a large amount of cocaine and the arrest of a group of suspects nobody ever heard of — faceless men, men who were dumb enough or unlucky enough to be hanging around when the law cam crashing in. The raid took place on July 29, 1987, at a produce market on Chicago's West Side. Nearly 5,000 pounds of pure cocaine were seized, and the big fish, as usual, got away. But today, more than two years later, federal authorities in Miami say they have the man who masterminded the Chicago shipment. His name is Luis (Lucho) Santacruz Echeverri, and he was arrested outside his home in suburban Dade County last July. Santacruz is married and a father, and has lived in Florida since 1983; he claims to be a law-abiding businessman. The Feds claim Santacruz is the U.S. overboss for one of Colombia's biggest cocaine cartels — and, they say, his presence in Miami is one sign that the cartels are revolutionizing cocaine trafficking in the United States.

According to the FBI and the U.S. Drug Enforcement Administration, the Colombian cartels are now directly distributing cocaine nationwide. Ten years ago the cartels were largely content to sell their product to American middlemen. Now, according to federal law-enforcement experts, cartel kingpins have established smuggling, marketing and money-laundering networks that extend from coast to coast. "Instead of hundreds of individual entrepreneurs dealing in smaller [loads], you saw a transformation into a very well-organized business with multiton shipments," says Tim McNally, assistant special agent in charge of the FBI's Miami field office. "The Colombians knew that if they . . . controlled the warehousing [in the United States] and sold to the first-line customer, they would enhance their profits dramatically — which they have."

McNally and other ranking lawmen say the Colombians' methods are highly sophisticated and the scale of the industry mind-boggling. The cartels' combined gross wholesale revenues may be as high as $5 billion a year. At least 22,000 Colombians are involved in the cocaine trade both here and in Latin America. Federal lawmen have identified about 300 Colombian trafficking groups now operating in this country, each headed by a Colombian sent to the United States from South American by the cartel heads. These men and women — brokers, expediters and smugglers, some identified by name and others still unknown — are NEWSWEEK'S "Dirty 300."

Clear picture: Many of these managers and trafficking groups are now being investigated by federal agencies, and a clearer picture of the cartels' U.S.-based organizations is emerging. In dozens of interviews with NEWSWEEK correspondents, federal prosecutors and FBI and DEA experts stress three broad findings about the Colombian traffickers. First, like any well-run corporation, the cartel networks are businesslike, pragmatic and flexible. Second, the Colombians are extremely skillful at evading police surveillance — and when they do get caught, they have an army of high-priced American lawyers at their disposal (page 41). As a result, though many investigators are confident the cartels can be broken, no one predicts that victory will come easily or soon. Finally, federal sources say, the impact of the Colombian government's current crackdown against the drug lords is already fading, and that the cartels' ability to move large amounts

of cocaine to and within this country has probably been only temporarily affect.

The popular image of big-time coke trafficking is largely wrong. The Colombian networks do not much resemble La Cosa Nostra, and there are no flamboyant capos like Al Capone. The cartels are not particularly hierarchical. The 300 Colombian groups in the United States range in size from five to 50 members, FBI sources say, and they generally operate as self-contained cells; information is tightly compartmentalized, and only a handful of managers know all the operatives. The FBI and DEA believe that cartel chieftains in Colombian control their U.S. operations by demanding strict accountability from their U.S. managers. In the case that led to Lucho Santacruz's arrest, for example, on investigator says the Cali cartel "knew where the dope was to a gnat's ass."

The Santacruz case is alleged to be a prime example of the cartels' operational style — their agility, secretiveness and transcontinental sweep. Lucho Santacruz is the half brother of Jose Santacruz Londono, said by the FBI to be co-chief of the Cali cartel. (The Cali and Medellin cartels are believed to supply most of the cocaine on the U.S. market.) DEA officials say the cartel arranged with a Miami import-export firm to conceal just under 5,000 pounds of cocaine in a shipment of plantains, and that Lucho Santacruz or his associates supervised the load at every step. It was spotted in Miami by an alert U.S. Customs inspector, then tailed by federal agents from Miami to New York and to Chicago. The DEA believes Santacruz and two key associates were in Chicago when the load arrived: at wholesale prices of between $10,000 and $15,000 per kilo, the load was worth at least $23 million.

Multiply this case example a hundred-fold and the scope of the Colombian conspiracy begins to come clear. Cartel operators are masters at smuggling cocaine into this country: using planes, ships, trucks, cars and human "mules," they are successfully penetrating the entire U.S. coastline and the Mexican border as well. From primary distribution centers in four U.S. cities — Miami, Los Angeles, New York and Houston — they have been able to move shipments of cocaine to virtually any point in the nation. Colombian cells have been identified in 16 states, and two recent massive seizures have left U.S. lawmen both amazed and appalled. One, a record for a cocaine bust in the United States, was the discovery of a 20-ton mother lode in a Sylmar, Calif., warehouse. The other was a lucky hit on a farmhouse in Harlingen, Texas: nine tons of stockpiled cocaine were found. "It boggles my mind," says Lawrence Lawler, special agent in charge of the FBI Los Angeles field office. "This is the first time in my 27 years in this business that I've looked out and said, 'I wonder if society's gonna make it?'"

No turf: Frontline agents are more concerned by the war in the trenches — the exhausting task of chasing tips and leads and rumors through the twilight world of drug trafficking. The Colombians, they say, could teach a thing or two to other criminal groups. They are expert at disguise and are highly disciplined. Many top-level managers live in south Florida but do business all over the country; the Colombian organizations are not based on geographical turf. Second-tier operators — traffic managers, distributors and money-launderers — are scattered from New Haven, Conn., to Portland, Ore. A third tier, which Special Agent Tom Cash of the Miami DEA office calls "the ant army," consists of thousands of working-class Colombian immigrants who serve as loaders, lookouts, couriers and guards. The Los Angeles Herald Examiner reported that at least 6,000 Colombians living in the Los Angeles area are engaged in the cocaine trade, and federal sources say about 5,000 Colombians in the Miami area are doing the same thing. Consider the suspects in this "Dirty Half-Dozen".

* In 1982 cops arrested "Pablo Nieves" on drugs and weapons charges. Two years later he was living under the name Luis Martinez; in 1985 he used the names Carlos Rendon and Orlando Torres. He was Luis Martinez again in a 1987 drug bust in Houston. In September 1988 authorities nabbed him with 56 kilograms of cocaine and $1.3 million. He pleaded guilty under the name Carlos Moncado-Rua.

* Florida officials say Leonel Martinez used his Miami real-estate office to coordinate shipments of cocaine from the Bahamas — 400 kilos at a time. They claim he stored coke in the false ceiling of his office; he took in $1 million in cash at a time in boxes and bags. Earlier this year — before his arrest — Dade County honored Martinez for his "fantastic accomplishments" as an entrepreneur.

* Humberto Sanchez and his family seemed to live an ordinary, middle-class life. His daughter Gloria was a debutant and attended Bonida High School outside San Diego. But customs agents arrested Sanchez after he accompanied a truck shipment of cocaine from the Mexican border to Los Angeles. Agents took Sanchez's keys — and, in garages and storage lots across San Diego, found Mercedeses, BMWs, a Jaguar and a trailer.

* In 13 months, Marguerite de Coninck and her daughters Cecilia and Beatriz laundered $36 million — most of it in $20 bills. Authorities who finally busted the Conincks in San Diego were reluctant to book 82-year-old Marguerite. But

a sharp-eyed woman agent notice that Marguerite's bosom had grown — and found thousands of dollars stuffed in the old woman's bra.

Melida and Pablo Garzon are probably typical of second-tier cartel managers operating under deep cover. Melida and the couple's three children — Jose, 25, Carolina, 20, and Pablo Jr., 19 — lived in a modest house in Longwood, Fla., a suburb of Orlando. Pablo Garzon, a Colombian rancher, often visted his family at their U.S. home. But prosecutors say Melida Garzon spent hours on the phone arranging cocaine shipments and money transfers for the Medellin cartel, and that the drug work was "a family affair." Neighbors were stunned when, last summer, all five Garzons and Mrs. Garzon's two sisters were arrested during a banquet celebrating Carolina's graduation from Rollins College. Pablo and Melida pleaded guilty to drug charges, Carolina and her aunts pleaded guilty to currency violations, and the charges against the two sons were dropped. "Unless you knew," says a cop who helped stake out the Garzons, "you wouldn't have suspected a thing."

From Colombia and Peru to Los Angeles and New York, cartel operations follow the same general pattern. Cells and subgroups tend to specialize in smuggling, distribution or money laundering, and the connections among them are fluid. As a rule, cocaine stashes and money drops, both called *caletas* in Spanish, are kept separate, and buyers never see the main warehouses and countinghouses. Those who do are usually trained in detecting and eluding police. To avoid wiretaps, most business is conducted on pay phones or cellular phones. Truck and car shipments are often accompanied by guards who protect the load and conduct countersurveillance for police tails. The elaborate security measures create huge problems for federal agents. In a recent case in St. Petersburg, Fla., the stakeout team needed a hidden microphone, a hidden video camera, aerial surveillance and more than 100 officers and agents to do the job — but they did find 3,303 kilos of cocaine in a shipment of South American lumber.

Rubber bands: The clandestine complexity of a cartel distribution center is illustrated by the Zoom warehouse case According to DEA investigators, Zoom Furniture was a Cali cartel operation in Queens, N.Y. It was raided by the DEA on Jan. 4, 1989, with spectacular results: agents seized $19 million *in cash* — the U.S. record for cash busts. As the DEA tells it, Zoom was home base for a network of stash houses and countinghouses in suburban Long Island, and was serviced by a fleet of cars and trucks equipped with hidden compartments for cocaine. The coke came from as far away as Brownsville, Texas; couriers were given fake driver's license that allegedly came from a New York state Motor Vehicles Department office in Queens. The main countinghouse, in Great Neck, N.Y., contained two bill-counting machines, a huge collection of rubber bands and tape, and accounting records indicating revenues of $44 million in less than two months.

The huge stash-house busts in California and Texas are evidence of another development that lawmen agree is significant: the gradual shift westward, from Miami to Texas and Los Angeles, in the flow of smuggled cocaine. The trend may be the result of increasing Coast Guard and Customs Service pressure on smuggling across the Caribbean. South Florida is still awash with drugs and drug money, and the DEA and FBI believe most of the top U.S. managers for the Cali and Medellin cartels still live in the Miami area. But the DEA estimates that 40 percent of all cocaine entering the United States now comes across the Mexican border. It arrives in trucks, cars, vans, campers, airplanes and on mules — both human and real ones

The Sylmar bust — 20 tons of cocaine and $10 million in cash — is seen by law-enforcement officials as proof positive of the Mexican connection. The Colombian cartels, they say, have allied with Mexican smugglers operating along the Texas, Arizona and California borders the Mexicans, who have long used their knowledge of the backcountry along the border to smuggle in marijuana and heroin, are now carrying cocaine as well. DEA agents call it "the Mexican trampoline." "The drugs are being given by the Colombian cartels to the Mexican organizations, who move it north," says Susan Bryant-Deason, an assistant U S attorney in Los Angeles "[The Mexicans] are then passing it back to Colombian distribution networks "

Joint venture: The inventor of the Mexican trampoline, say DEA and FBI officials, is a Honduran billionaire named Juan Ramon Matta Ballesteros Matta has allegedly been involved in drug trafficking since the late 1960s. Federal sources say he organized a major West Coast cocaine-distribution ring, and that he has been a major player in both the Cali and Medellin cartels In 1988 Matta was arrested by Honduran police and turned over to U S authorities; last month he was found guilty of drug trafficking and racketeering in a Los Angeles federal court. The prosecution charged that his joint venture with the Colombian cartels and Mexican smugglers had distributed $72 million worth of cocaine in Los Angeles, and that his narcotics empire was worth up to $2 billion. Matta's lawyer, who says he will appeal the case, says Matta is an innocent businessman convicted because of prejudicial publicity engineered by the government

So far, at least, the Colombian cartels do not seem to be involved in street-level cocaine sales in the United States. Although the potential revenues on the retail level are enormous, FBI sources say there are good reasons why the cartels have not done so. One is that cartel operators, who rely almost entirely on Colombian nationals to do their dirty work, do not have the street knowledge or dealer network to do so. Also, American dealers — the cartels' best customers — already control the retail market. Finally, lawmen say, street-level sales are troublesome, labor-intensive — and put operatives dangerously close to cops. The cartels may in fact be wise in leaving that end of the trade to others. But there is no doubt that the cartels have close connections to major American dealers. Brian (Waterhead Bo) Bennett, for example, a suspected cocaine dealer awaiting trial in Los Angeles, has been linked to Los Angeles street gangs and to crack house in Detroit. The investigation began with a top from Danish police that Bennett was touring Europe with a suspected Colombian dealer and his wife. According to law-enforcement sources and court records, Bennett and his supplier arranged cocaine shipments from Colombia to Los Angeles with telephone calls made from Denmark and Italy.

The ongoing wave of assassinations and bombings in Colombia has enhanced the cartels' reputation for ruthless violence. Theft, betrayal or any form of cooperation with the authorities is likely to lead to murder; death threats against Colombian judges, prosecutors and witnesses have become commonplace. "These guys have declared ware, and they're shooting . . . they're nuts," says Joseph Russoniello, the U.S. attorney in San Francisco. "It's possible that the terror we see in Colombia will occur [here]." Although the Cali and Medellin cartels were widely believed to be on the brink of turf warfare in New York just last year, DEA sources say the feud seems to be resolved. But there is no question that the cartels regard murder and kidnapping as forms of organizational discipline.

Hit men. Over the past five years, Tom Healy, a New York police detective in Queens, has become an expert in Colombian murders. He says there were 55 drug-related Colombian hits in Queens during 1988, and at least that many so far this year. Healy also says a little-known group called Los Palestinos — "the Palestinians" — is responsible for many of them. When New York police first heard the name in 1984, they assumed there might be a link to Palestinian terrorists. They learned instead that Palestino was a tough slum in Medellin — and a notorious breeding ground for professional assassins. Los Palestinos are the muscle for the Cali cartel, Healy says; he believes they have killed about 50 people since coming to New York. But because victims' families rarely complain to police, few Colombian killings are solved. No member of Los Palestinos has ever been convicted of murder in Queens

The Colombian cartels may constitute the biggest criminal conspiracy of this century — and perhaps inevitably, law-enforcement experts compare today's cocaine syndicates to the Mafia's involvement with heroin. But according to prosecutors like U.S. Attorney Andrew Maloney of Brooklyn, N.Y., the cartels' U.S. networks are 10 times larger than mob heroin rings ever were. "The drug money so dwarfs the money made by Cosa Nostra that the exact figures are inconsequential," says Ronald Goldstock of the New York State Organized Crime Task Force. So it came as no surprise last week when the FBI in Miami announced the indictment of an alleged mafioso in a cocaine-smuggling case that also involved a little-known Colombian cartel. It was the first hard evidence, the FBI said, of a direct link between the Sicilian Mafia and the Colombians — a conjunction, so to speak, of a terrible past and a future that may be even worse.

GRAPHIC: Picture 1, Juan Ramon Matta, Convicted kingpin trafficker and racketeer; Picture 2, Moises Gomez, Accused of distributing cocaine for Cali cartel; Picture 3, Carlos Restrepo, Convicted of laundering money for Cali, Picture 4, Luis Santacruz, Alleged overboss charged with smuggling; Picture 5, The crackdown is already fading: Miami bust, SUSAN GREENWOOD — GAMMA — LIAISON; Picture 6, Alvaro Quintero, Fugitive indicted in major Cali coke seizure; Picture 7, Melida Garzon, Pleaded guilty on drug-trafficking charges; Picture 8, Pablo Garzon, Sr., Admitted to cocaine possession in Florida; Picture 9, Carolina Garzon, Busted at her graduation-day banquet; Picture 10, Julio Cruz, FBI fugitive indicted on distribution charges; Picture 11, Ana Ruiz, One of Cali's money launderers; Picture 12, Leonel Martinez, Awaiting trial on charges of importing coke; Picture 13, Fabio Ochoa, Jr., Member of a drug-smuggling clan; Picture 14, Cesar Ramirez, Pleaded guilty to laundering money for Cali; Picture 15, Felix Gallardo, Alleged head of Mexican smuggling cartel; Picture 17, Jose Rivera, A confessed money launderer for Cali; Picture 18, Omar Ospina, Entered guilty plea for money laundering for Cali, Picture 16, 'Fantastic accomplishments': Leonel Martinez's mansion, Picture 19, Maintaining a low profile -- and high profits: Confiscated cars and currency, CHRISTOPHER BROWN — SIPA; Picture 20, Maintaining a low profile — and high profits: Confiscated cars and currency,

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.
The position for which I have nominated is a part-time position and I plan to continue my salaried employment at Stroz Friedberg, LLC. In addition, I have a Thrift Savings Plan account from my prior Federal Government employment and a 401K account with my current firm.

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.
I will follow and comply with both the letter and the spirit of all applicable ethical rules, statutes and codes.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.
Yes. The position for which I have been nominated is a part-time position and I, therefore, plan to continue my position as Managing Director and General Counsel of the Washington, D.C. office of Stroz Friedberg, LLC.

4. List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding $500 or more (If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.)
See attached financial disclosure report required by the Ethics in Government Act of 1978.

5. Please complete the attached financial net worth statement in detail (Add schedules as called for). **The financial net worth statement is attached.**

6. Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities **No.**

FINANCIAL STATEMENT

NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household. **MY BEST ESTIMATES ARE PROVIDED HERE.**

ASSETS				LIABILITIES			
Cash on hand and in banks		50	000	Notes payable to banks-secured		See Mort gage	
U.S. Government securities-add schedule	NA			Notes payable to banks-unsecured		NA	
Listed securities-add schedule A		24	000	Notes payable to relatives		20	000
Unlisted securities--add schedule	NA			Notes payable to others		NA	
Accounts and notes receivable:	NA			Accounts and bills due (includes credit cards, tuition, mortgage, utilites)		12	000
Due from relatives and friends	NA			Unpaid income tax		NA	
Due from others	NA			Other unpaid income and interest		NA	
Doubtful	NA			Real estate mortgages payable-add schedule (See B)		638	000
Real estate owned-add schedule B	1	127	000	Chattel mortgages and other liens payable		NA	
Real estate mortgages receivable	NA			Other debts-itemize:			
Autos and other personal property		60	000	Bank of NY credit card		10	000
Cash value-life insurance		30	000	Citibank Preferred Credit card		7	000
Other assets itemize:				Car loan - Honda		25	000
IRAs (personal and spouse)		14	000				
Principal 401K (spouse) Learning Qwest 529 Ed Savings Accounts (3 accounts for 3 children)		202 15	000 000				
Government TSP (personal)		238	000	Total liabilities		712	000
Paychex 401K (personal)		19	000	Net Worth	1	067	000
Total Assets	1	779	000	Total liabilities and net worth	1	779	000
CONTINGENT LIABILITIES				GENERAL INFORMATION			

As endorser, comaker or guarantor	NA			Are any assets pledged? (Add schedule)		no	
On leases or contracts	NA			Are you defendant in any suits or legal actions?		no	
Legal Claims	NA			Have you ever taken bankruptcy?		no	
Provision for Federal Income Tax	NA						
Other special debt	NA						

SCHEDULE A- LISTED SECURITIES

The following listed securities are held through Charles Schwab Institutional in the name of the nominee and her spouse or in custodial accounts of their three children:

Cisco	$2,510.
Intel	$3,290.
Microsoft	$1,994.
Time Warner	$ 666.
Amex	$4,521.
Citigroup	$3,834.
Coca Cola	$1,314.
Echostar	$ 831.
Exxon Mobil	$2,778.
Qualcomm	$2,490.
Total:	$24,228.

SCHEDULE B

1. REAL ESTATE OWNED

Primary Residence, Washington DC
2004 assessment: $1,003,000.

Vacation Home, Leicester, VT
2004 assessment: $124,000.

Total assessed value of real estate owned: $1,127,620.

2. REAL ESTATE MORTGAGES PAYABLE

National City mortgage on primary residence: $611,000.

National City line of credit on primary residence: $27,000.

No mortgage on Vermont property.

Total: $638,000

AO-10
Rev. 1/2004

FINANCIAL DISCLOSURE REPORT

Calendar Year

Report Required by the Ethics in Government Act of 1978 (5 U.S.C. app. §§ 101-111)

1 Person Reporting (Last name, First name, Middle initial)	2 Court or Organization	3 Date of Report
Howell, Beryl A	U.S Sentencing Commission	9/20/04
4 Title (Article III Judges indicate active or senior status; magistrate judges indicate full- or part-time)	5. ReportType (check appropriate type)	6. Reporting Period
Commissioner - Nominee	(•) Nomination, Date 9/20/04 ( ) Initial ( ) Annual ( ) Final	1/1/2003 to 8/30/2004
7 Chambers or Office Address	8 On the basis of the information contained in this Report and any modifications pertaining thereto, it is, in my opinion, in compliance with applicable laws and regulations	
Stroz Friedberg LLC 1150 Connecticut Ave , NW Wash DC 20036	Reviewing Officer_____ Date_____	

IMPORTANT NOTES: The instructions accompanying this form must be followed. Complete all parts, checking the NONE box for each part where you have no reportable information. Sign on last page.

I. POSITIONS. (Reporting individual only; see pp. 9-13 of filing instructions)

☐ NONE - (No reportable positions.)

	POSITION	NAME OF ORGANIZATION/ENTITY
1	Managing Director, General Counsel of DC office	Stroz Friedberg, LLC

II. AGREEMENTS. (Reporting individual only; see pp. 14-16 of filing instructions)

☐ NONE - (No reportable agreements.)

	DATE	PARTIES AND TERMS
1	2004	Stroz Friedberg, LLC, continuing employment and position

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Howell, Beryl A	9/20/04

III. NON-INVESTMENT INCOME. (Reporting individual and spouse; see pp. 17-24 of filing instructions)

A. Filer's Non-Investment Incom

☐ NONE - (No reportable non-investment income.)

	DATE	SOURCE AND TYPE	GROSS INCOME (yours, not spouse's)
1.	2003	Stroz Friedberg, LLC salary	$250,000
2.	2002	U.S. Senate Judiciary Committee	Exempt

B. Spouse's Non-Investment Income (If you were married during any portion of the reporting year, please complete this section (dollar amount not required except for honoraria)

☐ NONE - (No reportable non-investment income.)

	DATE	SOURCE AND TYPE
1.	2003	National Geographic TV
2	2002	National Geographic TV

IV. REIMBURSEMENTS -- transportation, lodging, food, entertainment

(Includes those to spouse and dependent children See pp 25-27 of instructions.)

☐ NONE - (No such reportable reimbursements.)

	SOURCE	DESCRIPTION
1.		EXEMPT

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Howell, Beryl A	9/20/04

V. GIFTS. (Includes those to spouse and dependent children. See pp 28-31 of instructions.)

☐ NONE - (No such reportable gifts.)

	SOURCE	DESCRIPTION	VALUE
1.		EXEMPT	

VI. LIABILITIES. (Includes those of spouse and dependent children. See pp. 32-34 of instructions.)

☐ NONE - (No reportable liabilities.)

	CREDITOR	DESCRIPTION	VALUE CODE
1	Bank of New York	credit card	J
2	Citibank Preferred	credit card	J
3.	Suntrust Bank Card Service	credit card	J
4	Bank One Visa	credit card	J

FINANCIAL DISCLOSURE REPORT
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Name of Person Reporting	Date of Report
Howell, Beryl A	9/20/04

VII. INVESTMENTS and TRUSTS -- income, value, transactions (includes those of the spouse and dependent children. See pp. 34-57 of filing instructions)

	A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A-H)	B. (2) Type (e.g. div. rent or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g. buy, sell, merger, redemption)	If not exempt from disclosure (2) Date Month - Day	(3) Value Code 2 (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)
☐	NONE (No reportable income, assets, or transactions)									
1	Paychex 401K (personal)	A	Dividend	K	T					
2	Principal Financial Group 401K (spouse)	E	Dividend	M	T					
3	Citibank IRA	A	Interest	J	T					
4	Bank of NY IRA	A	Interest	J	T					
5	Learning Quest 529 Education Savings Program (3)	B	Dividend	K	T					
6	Time Warner	A	Dividend	J	T					
7	Custodial Accounts for 3 children (total) Amex	A	Dividend	J	T					
8	Custodial Accounts for 3 children (total) Citigroup	A	Dividend	J	T					
9	Custodial Accounts for 3 children (total) Coca Cola Company	A	Dividend	J	T					
10	Custodial Accounts for 3 children (total) Exxon Mobil	A	Dividend	J	T					
11	Custodial Accounts for 3 children (total) Echostar Comm	A	Dividend	J	T					
12	Custodial Accounts for 3 children (total) Intel Corp	A	Dividend	J	T					
13	Custodial Accounts for 3 children (total) Microsoft	A	Dividend	J	T					
14	Cusotodial Accounts for 3 children (total) Qualcommm Inc	A	Dividend	J	T					
15	Cisco Systems	A	Dividend	J	T					
16	Intel Corp	A	Dividend	J	T					
17	Microsoft Corp	A	Dividend	J	T					

1 Income/Gain Codes (See Columns B1 and D4)	A = $1,000 or less	B = $1,001-$2,500	C = $2,501-$5,000	D = $5,001-$15,000	E = $15,001-$50,000			
	F = $50,001-$100,000	G = $100,001-$1,000,000	H1 = $1,000,001-$5,000,000	H2 = More than $5,000,000				
2 Value Codes (See Columns C1 and D3)	J = $15,000 or less	K = $15,001-$50,000	L = $50,001-$100,000	M = $100,001-$250,000				
	N = $250,000-$500,000	O = $500,001-$1,000,000	P1 = $1,000,001-$5,000,000	P2 = $5,000,001-$25,000,000				
	P3 = $25,000,001-$50,000,000		P4 = $More than $50,000,000					
3 Value Method Codes (See Column C2)	Q = Appraisal	R = Cost (Real Estate Only)	S = Assessment	T = Cash/Market				
	U = Book Value	V = Other	W = Estimated					

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Howell, Beryl A	9/20/04

VIII. ADDITIONAL INFORMATION OR EXPLANATIONS (Indicate part of Report.)

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Howell, Beryl A	9/20/04

IX. CERTIFICATION.

I certify that all information given above (including information pertaining to my spouse and minor or dependent children, if any) is accurate, true, and complete to the best of my knowledge and belief, and that any information not reported was withheld because it met applicable statutory provisions permitting non-disclosure.

I further certify that earned income from outside employment and honoraria and the acceptance of gifts which have been reported are in compliance with the provisions of 5 U.S.C. § 501 et. seq., 5 U.S.C. § 7353, and Judicial Conference regulations.

Signature Beryl A. Howell Date 9/20/04

NOTE: ANY INDIVIDUAL WHO KNOWINGLY AND WILFULLY FALSIFIES OR FAILS TO FILE THIS REPORT MAY BE SUBJECT TO CIVIL AND CRIMINAL SANCTIONS (5 U.S.C. app. § 104)

FILING INSTRUCTIONS

Mail signed original and 3 additional copies to:

Committee on Financial Disclosure
Administrative Office of the United States Courts
Suite 2-301
One Columbus Circle, N.E.
Washington, D.C. 20544

III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.
Most of my legal career has been spent in public service for the good of the people. I believe that my almost seventeen years of public service is consistent with this canon. When I was in private practice at Schulte Roth & Zabel, I worked *pro bono* on an immigration matter representing a Haitian immigrant seeking asylum. After leaving government service, over the past year and one-half, I have provided continuing legal education seminars in speaking engagements to law firms, and at conferences of bar associations and of federal and local government agencies.

2. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates -- through either formal membership requirements or the practical implementation of membership policies? **No.**
If so, list, with dates of membership. What you have done to try to change these policies? **N/A**

3. Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts?
There is no selection commission for candidates to the U.S. Sentencing Commission.
If so, did it recommend your nomination? **N/A**
Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you participated). **N/A**

4. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as asking how you would rule on such case, issue, or question? **No.** If so, please explain fully. **N/A**

5. Please discuss your views on the following criticism involving "judicial activism."

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that

alleges that the judicial branch has usurped-many of the prerogatives of other branches and levels of government.

Some of the characteristics of this "judicial activism" have been said to include:

a. A tendency by the judiciary toward problem-solution rather than grievance-resolution;

b. A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;

c. A tendency by the judiciary to impose broad, affirmative duties upon governments and society;

d. A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and

e. A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

The United States Constitution established a three branch federal government with checks and balances built into the system to ensure that the defined roles and powers of the judicial, legislative and executive branches are restrained and limited.

The role of the judiciary is particularly circumscribed to deciding only the cases before it. Indeed, the judiciary lacks the power to reach out and resolve controversies not before it. The power of the judiciary is limited not only by the case and controversy requirement but also by other jurisprudential doctrines that help focus decisions on those interpretations necessary to resolve the case, with opinions outside that realm being deemed "dictum" with no legal effect. When the courts are called upon to interpret legislation or executive branch regulations they must adhere to these principles and interpret the plain language of the provisions at issue. The characteristics of "Judicial activism" described in the question pose the risk of impinging upon the prerogatives of the political branches and should be avoided.

Senator DEWINE. Thank you very much. I do not want to make you nervous, but the family is enjoying watching you on the big screen there.

[Laughter.]

Ms. HOWELL. Yes, well, if I could just take a moment to acknowledge my family who is here. My husband, Michael Rosenfeld, and my three children who got to get out of school a little early today, Alina, Jared and Calla, and my mother-in-law, Judy Rosenfeld, is here. My parents unfortunately are out of the country. And my children's babysitter, Amanda DeBock, is here, and a good friend from my prosecutor days, Kirby Heller, is also here.

Senator DEWINE. Good. We welcome them all.

Ms. HOWELL. As well as all of my friends on the Committee staff.

Senator DEWINE. We welcome you back. Thank you very much.

Senator Leahy.

Senator LEAHY. Thank you.

Senator DEWINE. You start and I will follow you.

Senator LEAHY. As I say, Ms. Howell is up for the Sentencing Commission, the fairness and sentencing. I almost wonder whether we should ask her children how is she at meting out any sentences? You do not have to answer that.

[Laughter.]

Senator LEAHY. Bad question. I really do not have any questions of Ms. Howell. I know her so well. I just think how fortunate the country would be to have her there. I have been very pleased, and if I can only just put one bit of a suggestion, I have been extremely pleased with the way the Sentencing Commission has worked in the last few years. As you look at their results of the various things, you cannot really tell whether this was pushed by the Republican side or the Democratic side. The fact that they have reached some consensus, I think, has been helpful to judges. We obviously have the recent Supreme Court case which raises whole questions, but that is something the Congress is going to try to work out.

In the meantime, I think the Commission must continue to work as it has done, and I know the efforts you have made to reach consensus, so I know that will continue. But I just, I would only emphasize to you as I have to other members of the Commission how important that consensus is. And I realize it is not always possible, but to the extent that it has been, I think it makes the life of judges much, much easier.

And Judge Boyko, as I understand, there is not a vacancy at the moment. You have been nominated for a seat that is still filled; is that right?

Judge BOYKO. Yes, Senator, that is correct.

Senator LEAHY. But if you are confirmed, you do not want the President to immediately nominate somebody for your seat in anticipation of your leaving?

Judge BOYKO. Yes, sir.

Senator LEAHY. Most of your work was in State courts. I think you said 90 percent or so. How do you expect to get up or what do you plan to do to get up to speed for Federal court, keeping in mind that they have increasingly large criminal dockets that are sometimes very complex issues, as well as, of course, civil cases?

I do not know exactly what type of procedures they use in Ohio, how closely they track either the Federal Criminal Procedures or the Federal Civil Procedures, but I assume that there are some differences. Does this concern you and what do you plan to do about it?

Judge BOYKO. Thank you for that question, Senator. We carry a very heavy caseload in Cuyahoga County State Court, and, as Mr. Chairman alluded to, we hear all different types of cases. So we have to keep cases moving while giving them due deference.

Ohio does track the Federal Rules of Civil and Criminal Procedure. There is very little difference really between the two. So I am used to handling a heavy caseload. I do get complicated cases in State Court at the Common Pleas level, and I am very familiar with the rules of evidence, and they do track very closely between State and Federal, Senator.

Senator LEAHY. I know it makes life easier in those States where they do. I know a lot of States try to. Senator DeWine mentioned the letters of support for you from the President of Norman Minor Association, the NAACP's Cleveland Chapter, I went back in the history in the City of Parma. During the 1990s, you were their Director of Law. The NAACP filed suit against Parma alleging discriminatory practices in the hiring practices.

They had also filed suit against three cities in Ohio. The other two cities, and correct me if I am wrong in my facts on this, but I understood they fairly quickly settled. Parma chose to fight the suit for over a decade opening it to a lot of criticism. What was your position there? Obviously, the NAACP is supporting you now, but what was your position during this time when Parma would not settle, the others did? Were you urging a settlement? What did you do?

Judge BOYKO. Thank you again for that question, Senator, and it is a good one because as Director of Law, I was lawyer for the city. I was not involved in any of the policy decisions that the Mayor and Council made with regard to how to handle that case. I was in a supervisory capacity. I did my best to work with the opposition in resolving the matter, but there were some internal disagreements on how that should be handled from a policy level.

Again, it was my obligation to represent the city to the best that I could, at the same time trying to push for a resolution of that case. It was very difficult at that time.

Senator LEAHY. And am I right that it took nearly ten years to resolve?

Judge BOYKO. Yes, it did, Senator. I had left and it was still going on.

Senator LEAHY. With what you know about the final resolution, are you happy with that?

Judge BOYKO. I am, Senator, because it was a consent decree and both sides got together and finally resolved it and came to an agreement to finally bring it to an end.

Senator LEAHY. I just find it interesting. We do not have these situations in Vermont because of our, not from any great purity on our part, but because of racial makeup in our State, and I know it can sometimes be difficult, but I was stuck on the fact that it

had taken longer there than the others, and I appreciate your answer. I think it is very candid.

Judge BOYKO. Thank you, Senator.

Senator LEAHY. Mr. Chairman, I have no other questions. I am sure you are going to submit Ms. Howell to withering cross-examination.

Senator DEWINE. I have about two hours' worth.

Ms. HOWELL. Thank you for that invitation.

Senator LEAHY. Yeah, but knowing that, having seen her cross-examining and knowing the reputation she had, the brilliant reputation she had as a prosecutor, I think she will be safe.

Senator DEWINE. I think she can survive.

Senator LEAHY. Actually, you know, you got a lot of prosecutors here. Senator DeWine—

Senator DEWINE. That is right.

Senator LEAHY.—myself.

Senator DEWINE. Judge.

Senator LEAHY. Boyko and Ms. Howell. So old home week. But if you do not mind, I am going on to other things. I did want to be here, of course, for Ms. Howell and her family, who I will freely admit so everybody knows where my prejudices are, are close friends of my wife's and mine, and greatly admired by us, but also I just want again to compliment everybody who worked so hard to get the closed captioning going. If this works here, I suspect the day will soon come where this will be the norm in all committees.

Senator DEWINE. It is a great thing to see. It is good. Thanks, Pat. Thank you, Senator. Ms. Howell, I wonder if you could kind of give us your just general philosophy how you will approach this new position, a very general question, but I think I would just kind of like to hear a little bit about how you look at this job?

Ms. HOWELL. Well, I have had experience with the sentencing guidelines since 1987 when I first became a prosecutor, and that is when the sentencing guidelines first became effective, and spent I think the first couple years of my life as a young prosecutor learning how to use the guidelines and working with the judges in the Eastern District of New York and other practitioners there on how to effectively implement them.

And I think, through that process, I have gained an enormous respect for the guidelines although they are not perfect and critics, you know, have points that they can make about them that may be accurate, but generally I think that the guidelines have, you know, certainly reached some of the statutory goals that Congress laid out for them, and I look forward to working as an integral part of the Commission to help, you know, ensure that the guidelines continue to reflect congressional intent and the statutory goals to reduce unwarranted sentencing disparities and promote transparency, accountability in the sentencing process.

Senator DEWINE. If you look back in the history of the guidelines and the history of the Sentencing Commission, is there anything that you have learned from that history that would help guide you in the decisions in the future? We always look back at either mistakes or successes or trends. What have we learned, collectively about the history of the Sentencing Commission that would help us in the future?

Ms. HOWELL. Well, I know that there were times when even during my tenure on the Senate Judiciary Committee staff when there were—it is not a full slate of Commissioners on the Sentencing Commission—and people, I think within the Senate and within the Congress, perhaps both houses, questioned sort of the role of the Sentencing Commission.

I think one of the, you know, important jobs of the Sentencing Commission I think is to also maintain good communications with certainly members of the House and Senate Judiciary Committees that have jurisdiction over criminal justice issues and sentencing guidelines, in particular, to, you know, make sure that there are open lines of communication there, and that when the Sentencing Commission makes proposed rule changes that the reasoning behind those proposals are, you know, fully understood by members of Congress, and that there can be a dialogue, and I think that one of the things that I may be able to bring to the job is an ability to assist in that dialogue.

Senator DEWINE. What about the other side of that coin which is the judges? There is the natural, I do not want to overgeneralize here, but, you know, natural inclination of many judges not to like the whole idea of the Sentencing Commission anyway. So how do you get input from judges or do you? Is that part of the role of the Sentencing Commission or not?

Ms. HOWELL. I think that the—I mean and that is one of the things that I am going to learn, Senator. I mean I am certainly, you know, I am much more familiar from my past experience with the communications between the Hill and the Sentencing Commission. I mean I do know that the Sentencing Commission has regular meetings with the Criminal Law Committee of the Judicial Conference, and that they have probably much more regular, you know, contact with the judges and certainly, you know, but I am not—I will be honest with you. I am not fully apprised yet of all of the communications with the judiciary.

Senator DEWINE. Okay. Judge Boyko, every judge has a different style. Describe your style for us. How do you deal with lawyers, for example?

Judge BOYKO. Mr. Chairman, I would like to think of myself as user friendly. The cases and the clients are tough enough; the court does not have to add to that. I want to make sure that everybody believes that their case was fully heard before me before they leave that courtroom and that is important because of their clients, not just the attorneys.

The client's first question, did the judge listen to you; did he hear our side of the argument, he or she; was he fair; what did he think? Those are the questions that the clients ask of the attorneys. So it is my job, my duty, to make sure that the attorney is able to answer that question by saying yes, we were given full and fair consideration even if he did not rule in our favor. It is the perception of what went on that drives me to think that way and act accordingly.

Senator DEWINE. A complaint you hear sometimes from lawyers is the judge did not allow me to try my case. How do you react to that?

Judge BOYKO. I have heard the complaint before. In my courtroom, the lawyers are allowed to try their cases, and you have to strike the balance and the key to that is setting parameters before the trial starts, sitting down with counsel, going over what you expect of them, ask their opinion on things, how long certain phases of the trial they think will last, and allow them to be heard during trial, because again the only way a client can be heard, a litigant can be heard, is through their attorney, and if you do not give the attorney the opportunity to be heard during trial, the client is not heard during trial.

Senator DEWINE. You have been on the bench for a number of years now. What has that experience taught you? I will not ask you the questions of what mistakes you have made, but what have you learned from that experience that will help you be a better Federal judge, understanding that Common Pleas is a trial court bench in Ohio and is frankly very similar to the Federal bench with difference in jurisdiction obviously?

Judge BOYKO. Yes. Thank you for that question, Senator, and what I have learned is that even though we have a great amount of cases that we have heard, and I have heard probably in the neighborhood of 8,600 cases since I have been there eight years, that each case is important to that person who comes in front of you, and you cannot forget that, that it may be, quote, "run of the mill," or you have seen this type of case a thousand times, but it is important to that person.

So I stick with that and remind myself daily that every case is important and I should not shirk my responsibility just because I have seen this before. I take that same attitude, enthusiasm, energy, and hopefully we all learn from our mistakes, and we do make them, and I think the best thing anyone can do, including a judge, is admit that you have made a mistake, learn from it and move on. Do not be bigger than the job. No one is every bigger than the job.

Senator DEWINE. Why do you want to be on the Federal bench?

Judge BOYKO. Mr. Chairman, I love being a trial judge. I love the dynamics of trial. I love the interaction with the attorneys, the litigants, and I have dedicated most of my professional life to public service. To serve on this nation's premier trial bench would be not only the epitome of my career, but allow me to fulfil my dream of public service for a lifetime.

Senator DEWINE. Docket management is always a challenge on the Federal court. What have you learned in your current position? How do you do it? How do you move cases? How are you going to move cases expeditiously and keep things rolling, make sure people have their day in court on time?

Judge BOYKO. Thank you, Mr. Chairman. Again, as I mentioned before, we do have a heavy caseload so I am used to moving cases. In Cuyahoga County alone last year, we had upwards of 17,000 criminal indictments and 35,000 civil cases filed each year. So we are used to moving a great number of cases.

You meet with the attorneys. First off you set deadlines. You give them realistic deadlines, enough time to prepare their cases, but with the expectation that those time frames will only be moved if necessary, and sometimes it is. Sometimes there are emer-

gencies; sometimes there is illnesses, and you have to accommodate them and be reasonable with that.

Set a trial date; stick with it. I found very helpful if the attorneys are having discovery problems, for instance, instead of having them paper the case to death, call me, call my staff attorney, we will get you in, sit you down for 15 minutes, resolve it and move on. That not only saves time for the case itself but saves the litigants extra money.

Senator DEWINE. Talk to me a minute about your view of judicial temperament. What kind of judicial temperament would you say you have? And what is the proper judicial temperament?

Judge BOYKO. Proper judicial temperament is treat everybody the way you want to be treated. When I was practicing law, I only asked two things of a judge: to give me a fair hearing and treat me with respect. I have kept that in mind ever since I have walked onto the bench, and I believe I have conducted myself accordingly. Again, the perception of our system is huge. You want the public to believe that the judges are fair, open-minded, non-emotional, and that they give the attorneys the time of the day and henceforth the litigants the time of the day. And I would carry that temperament with me if I am fortunate enough to be on the federal bench.

Senator DEWINE. Judge, what do you think has been your most challenging case while serving as a judge, and can you tell us about that?

Judge BOYKO. Certainly, Mr. Chairman, and thank you. My most challenging case was probably about five or six years ago when I had the capital murder trial of a defendant who had shot a Cleveland police officer to death on the streets of Cleveland.

It was a very challenging case, not because of the complexity of the issue itself, which was the aggravated murder, but because of the extreme emotionalism and heavy media coverage of that trial. Had officer after officer come in and break down on the stand. The jury would break down in tears listening to the testimony. I had the jurors after the case crying when the verdict was being read. Some of them had to actually seek psychological counseling as a result of this case. There was turmoil within the jury deliberations themselves such that it was an 11 to one decision that was turned around by that one person, and many of the jurors could not forgive themselves for that. That was the most challenging case I have ever had.

Senator DEWINE. And how did you deal with that then?

Judge BOYKO. You have to be the eye of the storm in the sense that when everybody else is breaking down or things are running amok, you have got to be stable, pull everybody together. If breaks are necessary, give them breaks. Take time so that everybody can collect themselves. Remind them that we are here in trial, but you have got to be compassionate when you do that because this is a very tumultuous experience for everybody that was involved including myself. I will never forget the case.

But you have got to be stable enough. Remember it is your courtroom, you are in control, but give the people time to collect themselves and move on.

Senator DEWINE. Judge, you serve on a trial court bench that at least by Ohio standards is a big bench. How many judges, Common Pleas judges, are there in Cuyahoga County?

Judge BOYKO. We have in the General Trial Division 34 that sit in my division. Of course, there are other divisions. There is a Probate, Juvenile and Domestic, and so there are many other Common Pleas judges, but in the General Trial Division, we have 34 judges.

Senator DEWINE. And how do you all interact? You all have, obviously, your own docket, but—

Judge BOYKO. We have regular judges' meetings. We also have committee meetings. I sit on the Criminal Rules Committee, the Jury Committee. I head the Veterans Service Committee. So we are constantly meeting on different issues, and I think that it is important to have collegiality. It is important for judges to talk to find out what the issues are in their own courtrooms, how attorneys are acting, how the cases are being tried.

We help one another with suggestions after going through different experiences so that, again, the collegiality is extremely important when you sit on a bench as large as the one I serve on.

Senator DEWINE. Judge, under what circumstances do you believe it appropriate for a Federal court to declare a statute enacted by Congress unconstitutional?

Judge BOYKO. Well, Mr. Chairman, thank you for that difficult question, and it is a difficult one, because I think, first of all, probably it would be a rare circumstance if that happened, but you have to do a step-by-step analysis. There is a strong presumption of constitutionality for any legislative act. And you have to look at every facet.

When I say that, you have to start from beginning, get the facts, get all the facts that you possibly can, distill the operative facts from what you have, then start looking above, above at Supreme Court decisions, the Sixth Circuit Court of Appeals. Let us see what they have done, what their decisions have been in that issue, on that issue and area of law.

It is not for me to impose my will on a case. It is for me to look at Supreme Court decisions, Sixth Circuit decisions, and impose what I believe their will is, and if I am convinced, if I am convinced after giving all due deference, because I am a strong believer in the separation of powers, that it is right to rule it unconstitutional, I would do that. But again, it would only be in very rare circumstance, Mr. Chairman.

Senator DEWINE. Well, let me follow up with that, and I think you have certainly, at least partially if not completely, already answered this, but in general Supreme Court precedents are, of course, binding on all lower courts and the circuit court precedents are binding on the district courts within that particular circuit.

I have to ask you as we all ask all nominees whether you are committed to following the precedents of higher courts faithfully and giving them full force and effect even if you personally disagree with such precedents?

Judge BOYKO. Unequivocally, yes, Senator. There is no question that is my duty under oath to follow those decisions and to inject my personal views or opinions would be highly improper.

Senator DEWINE. You stated—I appreciate your answer—there may be times, however, when you will be faced with cases of first impression. If there were no controlling precedent concluding an issue with which you were presented in your circuit, to what sources would you turn for persuasive authority? What principles will guide you or what method will you employ in deciding cases on first impression?

Judge BOYKO. Thank you for that question, Mr. Chairman, because I had to face it actually in State court. So we have to start with again gathering the facts, looking at Supreme Court cases. If there are none there, moving on to the Court of Appeals level. If there are none there, look at the trial level, but you have to start from the beginning. Statutory construction means you look at the plain language.

Then you look at the statutory and case law that surrounds that. I had an issue of attorney-client privilege surviving a death that I had to address in Ohio for the first time, and there were no cases on all fours that I could point to to guide my decision. So I had to carefully analyze what was available in other districts, other counties in Ohio, and there were none.

So I literally had to go out of State to find persuasive authority to render my decision. So it is a painstaking step-by-step logical analysis using statutory rules of construction that you employ to reach that decision.

I would do the same on the Federal bench. You have to again give all due deference to whatever persuasive authority is out there, but it just be logical, cogent, and reasonable.

Senator DEWINE. Well, I want to thank both of you very much for your testimony here today. As Ms. Howell knows, the record will remain open, and members of the Committee may be submitting written questions. We would encourage both of you, of course, to respond to those questions if you receive them as soon as possible. The record will remain open. We appreciate your testimony.

Before we conclude the hearing today, though, I want to take a minute to recognize someone who is here in the audience as she has been here for literally hundreds of Senate Judiciary Committee nominations hearings over the years. Sheila Joy is retiring from the Department of Justice on October 1. This is her last, we believe at least, her last Judiciary Committee hearing. Sheila, will you stand up, please, so we can recognize you, please?

[Applause.]

Senator DEWINE. Sheila has been with the department since 1968, has served under 14 attorney generals. She has been facilitating judicial nominations for 26 years in both Democratic and Republican administrations. She has played a role in confirming over 1,400 judges to our Federal court including eight of the nine current Supreme Court justices.

She has patiently worked with all the nomination staff on this Committee and the entire Senate including the various members of my Judiciary Committee staff, and let me just say that she will certainly be missed.

Sheila, on behalf of Chairman Hatch, Senator Leahy, and all the current and certainly former members of the Senate Judiciary Committee, I would like to thank you for your hard work and your

dedication and your service and for contributing to one of the most important roles that this Committee plays or that this Senate plays, and we just thank you very much for your great work. And we certainly wish you the best in your retirement. Thank you very much.

Ms. JOY. Thank you for your very kind words.

Senator DEWINE. Thank you very much. The hearing will be adjourned.

[Whereupon, at 4:30 p.m., the Committee was adjourned.]

[Questions and answers and submissions for the record follow.]

QUESTIONS AND ANSWERS

JUDGE CHRISTOPHER A. BOYKO

September 29, 2004

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Hatch:

Attached are my responses to Senator Leahy's written follow up questions to my Hearing on September 22, 2004.

Thank you for your consideration.

Respectfully,

Christopher A Boyko

Christopher A. Boyko, Judge

cc: Senator Patrick J. Leahy

Written Responses of Judge Christopher A. Boyko to the Written Questions of Senator Patrick J. Leahy

1. **In 2001, the Cleveland *Plain Dealer* reported about a case involving a child molester who negotiated a plea agreement with the prosecutor, and where you were the presiding judge. You apparently sentenced the man to prison for eighteen years. According to the news article, during the sentencing hearing, you told the defendant, "There's a special place in hell for you. Predators of children are the lowest form of life on the planet." While many may share your feelings, judges are also expected to remain fair and impartial and treat others with dignity.**

    a. **Do you recall making this statement? Please provide a copy of the transcript from the sentencing hearing for this defendant, David K. King (approximate date: March 15, 2001). If there is a written opinion in this case, please provide a copy.**

Response: Although I do not specifically recall this statement, I acknowledge it, since the sentencing transcript so states. A copy of the sentencing hearing is attached. There was no written opinion in this case.

    b. **The Ohio Code of Judicial Conduct, Canon 3, section B(4) states: "A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity." Section B(5) of the same Canon states: "A judge shall perform judicial duties without bias or prejudice." The Code of Conduct for federal judges contains similar provisions. How do you reconcile your statement in this case with the Ohio Code of Judicial Conduct?**

Response: In this case, as in all others, I gave defense counsel and the defendant, Mr. King, a full and fair opportunity to be heard before passing sentence. As the transcript demonstrates, I ensured that the defendant's rights were protected and that he understood the consequences of his plea agreement. The Plain Dealer article and the sentencing transcript provide the background for what I clearly remember as an emotionally charged courtroom full of seven boys and their families who suffered immeasurably. The young boys, including the defendant's own son, were repeatedly raped, physically violated and emotionally and psychologically ravaged over a period of years. I saw the tears, the boys shaking, a parent having an asthma attack, the boys' fear of being in the same room with the defendant, the recounting of a near suicide of one of the victims. I can understand how these two sentences might be perceived. I can assure you that it is not my normal practice to use such language. However, I believe that a review of the entire transcript demonstrates that I comported myself in a manner consistent with the Code of Judicial Conduct.

c. What will you do, to ensure that you – as well as the lawyers, staff, court officials and others subject to your direction and control -- are patient, dignified, and courteous to other litigants, jurors, witnesses, and lawyers?

Response: There are several factors that control my conduct and those whom I supervise. First, as I continue to give speeches on "Professionalism" I am more aware of my own conduct and pass my thoughts on to those around me. Second, I have tried to build a reputation for being courteous and dignified to litigants, jurors, witnesses and lawyers. If confirmed to the federal district court, I would continue to set a tone of dignity and respect towards everyone who appears in the courtroom.

2. On numerous occasions the Court of Appeals of Ohio reversed your decisions for abuses of discretion or blatant mistakes in applying the law. Since you did not provide copies of your underlying opinions in this case, my understanding of your rulings are based on the appellate court decisions. For example, in Beard v. Meridia Huron Hospital, the appellate court found your decision to admit certain evidence a clear abuse of discretion because the evidence materially prejudiced the defendant. The court concluded that "the trial court's action was inconsistent with substantial justice." In Molchan v. Williams, you granted the plaintiff's motion to impose a discovery sanction on the defendant insurer. The appellate court held that you abused your discretion in imposing the sanction, finding the sanction to be "unreasonable, arbitrary, and unconscionable." In light of these Court of Appeals decisions, as well as others, how can you assure me that you will not "abuse your discretion" as a federal District Court Judge? Please provide me with copies of your underlying opinions in these two cases.

Response: I attempt to carefully apply the law to the individual facts of each case and would continue to do so if I were confirmed to the federal district court. I believe that a review of my entire record would demonstrate that I am a fair and impartial judge. In addition, I have spent four straight years at the National Judicial College focused on constantly improving myself with courses such as Advanced Evidence, Managing Trials Effectively, and Conducting the Trial. I can assure the Committee that I would continue to apply the law in a fair and impartial manner if confirmed.

In addition, to clarify, although *Beard v. Meridia Huron Hospital* was on my docket, I did not try the case. Because I was in trial on a criminal case, *Beard* was referred to retired Judge Robert Feighan for trial. I have attached a copy of part of the Court's docket in this case to confirm that I did not try the case.

3. Please provide copies of the articles that you wrote for the Cuyahoga Bar Association publication "Law and Fact."

Response: The articles are attached.

THE STATE OF OHIO,)
) SS: CHRISTOPHER A. BOYKO, J.
COUNTY OF CUYAHOGA.)

IN THE COURT OF COMMON PLEAS
CRIMINAL DIVISION

THE STATE OF OHIO,	)	
	)	
Plaintiff,	)	
	)	
-v-	)	Case No. CR-395587
	)	C/A: N/A
	)	
DAVID KING,	)	
	)	
Defendant.	)	

- - - -

DEFENDANT'S TRANSCRIPT OF PROCEEDINGS

- - - -

APPEARANCES:

WILLIAM D. MASON, ESQ., Prosecuting Attorney, by: KESTRA SMITH, ESQ., Assistant County Prosecutor,

on behalf of the Plaintiff;

DONALD BUTLER, ESQ.,

on behalf of the Defendant.

Bruce J. Bishilany, RDR/CRR
Official Court Reporter
Cuyahoga County, Ohio

THE STATE OF OHIO,)
) SS: CHRISTOPHER A. BOYKO, J.
COUNTY OF CUYAHOGA.)

IN THE COURT OF COMMON PLEAS
CRIMINAL DIVISION

THE STATE OF OHIO,	)	
	)	
Plaintiff,	)	
	)	
-v-	)	Case No. CR-395587
	)	C/A: N/A
	)	
DAVID KING,	)	
	)	
Defendant.	)	

- - - -

DEFENDANT'S TRANSCRIPT OF PROCEEDINGS

- - - -

BE IT REMEMBERED, that at the January A.D., 2001 term of said Court, to-wit, commencing on Thursday, March 15, 2001, this cause came on to be heard before the Honorable Christopher A. Boyko, in Courtroom No. 19C, Courts Tower, Justice Center, Cleveland, Ohio, upon the indictment filed heretofore.

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THURSDAY MORNING SESSION, MARCH 15, 2001

THE COURT: We are proceeding on case number 395587, the State of Ohio versus David King. Mr. King is present in court with counsel, Mr. Donald Butler. On behalf of the State of Ohio Ms. Kestra Smith. This matter has been set for trial today. Ms. Smith, go ahead.

MS. SMITH: Judge, may it please the Court, Judge, this is a case, it is a 29 count indictment. All of the victims being boys under age 13 at the time of the act.

Judge, I have met with Mr. Butler this morning and he advises me at this juncture on the day of trial his client's wish to change his plea from not guilty. The state is therefore offering him to plead to count 24, which is one count of rape, deleting the sexual violence specification, as well as deleting the language that talks about force, and the child under the age of 13.

The state expects also that he will plead to count 20, which is also one count of rape, amending that count in the indictment to delete the sexual violent predator

specification as well as deleting the language of force and the child being under the age of 13 at the time of the act.

The state is also offering that Mr. King plead to count 15, felonious assault, as well as counts two, 12, 17, 19 and 20, all counts of gross sexual imposition, deleting in those counts the language sexual violent predator specification as well.

Judge, as part and parcel of this plea agreement it is agreed that Mr. King will spend 18 years in prison. No shock probation, no early release as well as part of the plea agreement.

It is part of his plea that he agrees to being found a sexual predator, which means that he will have to register for the rest of his life when he gets out every 90 days.

Now, Judge, this plea has been approved by Tom Sammon, who is the supervising attorney in my office as well.

I have all the victims except for one, the defendant's own son isn't here but the other victims are present in the courtroom as well as the parents of the victims. I have

discussed this case with them and they are in agreement with this plea.

The State of Ohio has made no threats nor any promises to induce this plea.

THE COURT: Thank you, Ms. Smith.

MS. SMITH: The parents do want to be heard, some of them, at some point.

THE COURT: Okay.

Mr. Butler.

MR. BUTLER: Judge, that's a correct statement of the plea agreement that I have discussed with my client after discussing same with the State of Ohio and at this time my client is prepared to withdraw his formerly entered plea of not guilty and enter pleas of guilty to counts 24, 20, 15, 2, 12, 17, 19 and 29 as amended by the State of Ohio with the understanding that after his plea of guilt to these counts of the indictment is accepted by the Court, the Court will go over his Constitutional rights with him.

Judge, I'm satisfied that after you have went over his Constitutional rights with him that the plea of guilty that he will give

to these counts of the indictment will be knowingly, intelligently and voluntarily made with the further understanding that all other counts will be nolled against him.

THE COURT: Okay. Mr. Butler, is there an agreement to the sexual predator classification?

MR. BUTLER: That's correct, Your Honor.

THE COURT: Mr. King, did you understand everything that has taken place in your case so far?

THE DEFENDANT: Yes.

THE COURT: As you stand before me right now are you under the influence of alcohol or drugs?

THE DEFENDANT: No.

THE COURT: Is your mind clear?

THE DEFENDANT: Yes.

THE COURT: Are you on the same page with Mr. Butler?

THE DEFENDANT: Yes.

THE COURT: Let's go over the plea agreement. You will plead to counts two,

12, 15, 17, 19, 20, 24 and 29. Let's go over those in detail.

Count two is GSI, the specification is removed. 12 is gross sexual imposition. Again, the specification is removed. Count 15 is felonious assault, the sexual motivation specification is removed. Count 17, gross sexual imposition, the specification is removed. Count 19, gross sexual imposition, the specification is removed. Count 20 is rape, the specification is removed. Count 24 is rape, the specification is removed. Count 29 is gross sexual imposition, the specification is removed.

Now for each of those gross sexual imposition charges, those are felonies of the third degree, potential sentence on those are one to five years, $10,000 in fines, not subject to a community control; do you understand that, Mr. King?

THE DEFENDANT: Yes.

THE COURT: Count 15 is felonious assault, that's a felony of the second degree, potential sentence is two to eight years, that's a $15,000 fine. Again,

presumption is prison on that; do you understand that?

THE DEFENDANT: Yes.

THE COURT: Count 20 and count 24, each of those are rape charges. Those are felonies of the first degree, for each of those counts potential sentence is three to ten years, up to $20,000 in fines, presumption is prison; do you understand that?

THE DEFENDANT: Yes.

THE COURT: Since there will be no chance of community control in this situation, I must advise you that when you are sent to prison please keep in mind that the parole authority has the power to place conditions upon you when you are released. Those conditions will last five years; do you understand that?

THE DEFENDANT: Yes.

THE COURT: And if you violate any of their conditions you will find yourself back in prison. You can serve up to nine months for each incident and for repeated violations up to one-half of the maximum term; do you understand that?

THE DEFENDANT: Yes.
THE COURT: Another thing, Mr. King, if you do commit a new felony or felonies, in addition to the time you can serve for those, you can again be brought back into prison for these charges and you can serve up to an additional one year in prison; do you understand that?
THE DEFENDANT: Yes.
THE COURT: You also understand you have agreed to be classified as a sexual predator. You have to register when you are released once every 90 days for life with the county sheriff in the county in which you reside. If you do change addresses you must notify the sheriff's office at least seven days in advance so they know where you are going to live so they keep track of you at all times; do you understand that the failure to do this could constitute a separate crime; do you understand that?
THE DEFENDANT: Yes.
THE COURT: Do you have any questions at all about this?
THE DEFENDANT: No.

THE COURT: Now that you understand the remaining charges, all the potential penalties, are you willing to enter pleas of guilt to the charges I have just discussed with you?

THE DEFENDANT: Yes.

THE COURT: All right. Mr. King, are you an American citizen?

THE DEFENDANT: Yes.

THE COURT: How old are you right now?

THE DEFENDANT: 31.

THE COURT: How far did you go in school?

THE DEFENDANT: Got my GED.

THE COURT: Do you understand that by entering pleas of guilty you are waiving or giving up certainly Constitutional rights?

THE DEFENDANT: Yes.

THE COURT: Let me know that you understand those rights by saying yes to the questions I ask you.

Do you understand you have the right to trial by jury or by a judge?

THE DEFENDANT: Yes.
THE COURT: You have the right to call witnesses to appear and testify in your behalf?
THE DEFENDANT: Yes.
THE COURT: You have the right to confront and cross examine witnesses?
THE DEFENDANT: Yes.
THE COURT: You have the right to have the State of Ohio prove your guilt beyond a reasonable doubt?
THE DEFENDANT: Yes.
THE COURT: You have the right not to testify at trial and no one may use your silence against you?
THE DEFENDANT: Yes.
THE COURT: Other than what has been agreed to for the sentence, has anyone else made any threats or promises in order to convince you to change your pleas?
THE DEFENDANT: No.
THE COURT: Are you currently on probation or parole in any other case?
THE DEFENDANT: No.
THE COURT: And you

understand that legally the Court could proceed and will proceed to sentencing you after accepting your pleas?

THE DEFENDANT: Yes.

THE COURT: Okay. Mr. King, as to count two, GSI, as amended, felony of the third degree, how do you plead?

THE DEFENDANT: Guilty.

THE COURT: Count 12, gross sexual imposition, a felony of the third degree, how do you plead?

THE DEFENDANT: Guilty.

THE COURT: Count 15, felonious assault, a felony of the second degree, how do you plead?

THE DEFENDANT: Guilty.

THE COURT: Count 17, gross sexual imposition, a felony of the third degree, how do you plead?

THE DEFENDANT: Guilty.

THE COURT: Count 19, gross sexual imposition, a felony of the third degree, how do you plead?

THE DEFENDANT: Guilty.

THE COURT: Count 20, rape, a

felony of the first degree, how do you plead?

THE DEFENDANT: Guilty.

THE COURT: Count 24, rape, a felony of the first degree, how do you plead?

THE DEFENDANT: Guilty.

THE COURT: And count 29, gross sexual imposition, a felony of the third degree, how do you plead?

THE DEFENDANT: Guilty.

THE COURT: The Court finds the defendant has knowingly, intelligently, voluntarily entered his plea with a full understanding of his Constitutional rights and therefore will enter findings of guilt on those specific charges. The rest of the charges will be dismissed.

Mr. King, do you have any questions at all about what we just did?

THE DEFENDANT: No.

THE COURT: You understand everything so far?

THE DEFENDANT: Yes.

THE COURT: Mr. Butler, is there any reason why we should pass sentence at this time?

MR. BUTLER: No, Your Honor.
THE COURT: Before we hear from you and Mr. King, Ms. Smith, on behalf of the State of Ohio.
MS. SMITH: Thank you, Judge. It is my understanding that Dessirae Thomas and Mona Basala will speak.
THE COURT: Step forward, please. I want them over to this side. Okay. Who is speaking first?
MS. D. THOMAS: Your Honor, I want to.
THE COURT: Can you please give me your name, ma'am?
MS. D. THOMAS: My name is Dessirae Thomas. My two sons were involved in this and I want you to know that this man destroyed the trust that my sons had in the male gender to the point they will not even stay in the room by themselves with their grandfathers. They have to be at my side or my husband's side when they are not in school. They don't trust anybody any more and I don't think that is fair for them. That's all I wanted to say.

THE COURT: Thank you, ma'am.

Your name, ma'am.

MS. F. THOMAS: Felona Thomas.

I just wanted to say, you know, as much as wrong has been done here, I can't say I hate anybody, I pity them. These kids, it's sad my 13 year old is suicidal. I have five boys involved in this but because of my nerves I couldn't deal with things with my kids, that I put my faith in somebody that pretended to be a friend.

I advised everybody around me to know who your friends are because these kids, they are living through nightmares. They cry together, they stay together. Last night they wanted to be together before the trial at my house. They needed that. Today they wanted to eat lunch together because they wanted one last day before they had to face him.

They have stated to me that to have lost faith. It seems like the person that -- one of the people that they cared about the most is the one who hurt them the most.

18 years is a short time compared to what these kids are going to have to live with

because they are going to have to live with this until the day they die. So I hope, Dave, you learned a lesson from all this, you change your life. You do what's right. Don't hurt anyone again. These kids loved you, every one of them did. You were their hero. You were somebody that could be there for them. Don't let anyone else down, please.

THE COURT: Thank you, ma'am.

Your name, ma'am.

MS. BASALA: My name is Mona Basala and I just wanted to say that I really don't think that 18 years is enough. I think he deserves more, but he put our kids through enough right now and we don't need to put them on the stand to see his face again.

And, David, I don't understand you, they trusted you, we trusted you. We had cookouts together, our families, they were friends, and the whole time you were molesting our children. How can you do that?

I just want to know, I just want to know why you did that. Were they mean to you? Did you like them not looking up to you? Is that what it was?

I don't understand, David. I don't understand. I just don't understand.

I'm done, Your Honor.

THE COURT: Thank you.

Ms. Smith, anything else on behalf of the state?

MS. SMITH: Nothing else on behalf of the state. Thank you, Judge.

THE COURT: Mr. Butler, on behalf of Mr. King.

MR. BUTLER: Judge, just briefly, I think this entire experience is obviously traumatic for all and I think my client is hard pressed about what has occurred here and what his conduct was in the situation. He realized that he had a relationship with not only these children but the families, and he is regretful and he is remorseful as to what happened here. He has expressed that to me. I think he wants to just put this behind him so that he can at some point get on with his life.

These children have been taken away from him. He will probably never see his children again. So he has lost a lot here and he is going to pay a tremendous price for it

and he understands that and he has accepted that responsibility by entering a plea and saving these kids from testifying in this courtroom.

I just think, Judge, he wants to move on and put this behind him.

THE COURT: Thank you, Mr. Butler.

Mr. King, anything you want to say before I pass sentence?

THE DEFENDANT: Just I apologize to the Court and families and I hope that somewhere a long the line some good comes out of this. That's all.

THE COURT: All right.

Before the Court passes sentence we need to address classification as a sexual predator. As we discussed before, Mr. King, you have agreed to be classified as a sexual predator once every 90 days with the county sheriff's office for life. Again, you can't change your address without notifying them without subjecting yourself to a second separate criminal charge. Again, you understand that, don't you?

THE DEFENDANT: Yes.

THE COURT: All right. Mr. Butler, may I please have Mr. King's signature on this form so that he understands what we are talking about?

Thank you, Mr. Butler.

Okay. I'm satisfied that Mr. King understands his duty to register as a sexual predator upon hearing held pursuant to 2950.09 (B). The defendant is hereby adjudicated to be a sexual predator and is ordered -- an address registration and verification is ordered every 90 days for life and for any remaining applicable period as set forth below after any determination of the defendant's status as a sexual predator.

The Court notified the defendant of all registration duties pursuant to 2950.03 and hereby submits to them.

Okay. Time to pass sentence. We have heard from the State of Ohio and the victims' mothers, friends and family, we have heard from Mr. Butler on behalf of Mr. King and from Mr. King.

There has been suggested to the Court

an agreed upon sentence of 18 years. I must take into consideration all the factors the law requires me to and first and foremost I must also consider the victims, many of which I know are seated in the back of this courtroom. They had to go through all of this.

The Court is going to accept the agreed upon sentence of 18 years mainly because the children were spared the ordeal of going through this trial, Mr. King, and that is the only reason I'm doing that or else I would not be accepting this agreed upon term of 18 years.

This crime is nothing short of disgusting, to be a predator of children is to be the lowest form of life on this earth. At least you finally admitted to it after going through all of this and putting the families and children through all of this.

18 years is nothing compared to what they will go through for the rest of their life, the psychological damage and emotional damage which will also affect them. Their families will have to live with this. They will have some comfort knowing that you will be away for 18 years but it doesn't change the

fact that these horrible crimes were committed. They were victims here, all of whom were children when this was done.

By pleading you averted a life sentence if the state would have proved their case, and again we saved the children from testifying and having to relive this in public view as a witness to these horrendous crimes.

By law community control isn't an option and obviously we have an agreed sentence of 18 years which will be as follows: In counts two, 12, 17, 19 and 29, those are all gross sexual imposition, five years at the Lorain Correctional Institute. Counts 15, which is a felonious assault, three years Lorain Correctional Institute. Counts 20 and 24, which are the rapes, ten years each, Lorain Correctional. Counts two, five, 17, 19 and 29 shall run concurrent to each other. Count 15 shall run consecutive to those former counts. Counts 20 and 24 shall run concurrent to each other and consecutive to the other counts. I'm sorry, delete count five, that will be count 12 instead of five. I'm sorry.

The maximum term as given on the gross

sexual imposition on each of the counts is, the Court finds the defendant committed the worst form of the offense. He possesses the greatest likelihood of committing future crimes, and for the consecutive terms the Court finds that this is necessary to protect the public and punish the offender. It's not disproportionate to his conduct, which the danger he possesses and harm is so great and unusual that the sentence does not reflect the seriousness of the conduct.

As far as the rapes, those are maximum sentences, same thing. The offender committed the worst form of the offense, rapes on boys under the age of 13. Worst of all, worst of all, Mr. King, everyone trusted you, these children trusted you, looked up to you. You took advantage of young boys. There is a special place in hell for you. But after that, five years of post release control. Costs are waived.

The families and boys have suffered enough. Time to put this to an end. I hope that all the families can find it in their strength to come together and get over this. It's going to take a long time. The boys will

need help, everyone will need help. Stick together and do the best that you can.

Thank you very much for your help, Ms. Smith, Mr. Butler. Thank you.

Mr. King, time to start doing your prison time right now.

MR. BUTLER: Thank you, Your Honor.

(Thereupon, Court was adjourned.)

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C E R T I F I C A T E

I, Bruce J. Bishilany, Chief Court Reporter for the Court of Common Pleas, Cuyahoga County, Ohio, do hereby certify that Elsie Slayton took down in stenotype all of the proceedings had in said Court of Common Pleas in the above-entitled cause; that due to her unavailability I have transcribed her said stenotype notes, to the best of my ability, into typewritten form, as appears in the foregoing Transcript of Proceedings; that said transcript is a complete record of the proceedings had in the trial of said cause and, to the best of my knowledge, constitutes a true and correct Transcript of Proceedings had therein.

Bruce J. Bishilany

Bruce J. Bishilany, RDR/CRR
Official Court Reporter
Cuyahoga County, Ohio

CUYAHOGA COUNTY COURT OF COMMON PLEAS

DATE: 9/29/2004
TIME: 11:17 AM
CASE: CV-01-433340

APPEARANCE DOCKET

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CMSR5143

OT	GEN	P 1	1/23/2003	P1 CHARLENE BEARD AMENDED PRAYER FOR RELIEF..... THOMAS D ROBENALT 0055960	
OT	GEN	D 4	1/24/2003	D4 OSCAR NICHOLSON DEPOSITION OF ANDREW PIETZMAN MD. KRIS H TREU 0013106	
OT	GEN	D 4	1/24/2003	D4 OSCAR NICHOLSON NOTICE OF FILING DEPOSITION OF ANDREW PEITZMAN MD. KRIS H TREU 0013106	
CS	GEN1	P 1	1/28/2003	COURT REPORTER: JENNIFER TOKAR...START DATE: 1/27/03...END DATE: NONE LISTED...NO.JURORS: 8 (1 ALT) ON TRIAL...VOL.2871 PG.0479	
JE	JE	P	1/28/2003	JURY EMPANELLED AND SWORN WITH ALTERNATE..ON TRIAL..VOL.2871 PG.0479 NOTICE ISSUED	4.00
JE	JE	P	1/28/2003	ON TRIAL...VOL.2871 PG.0480 NOTICE ISSUED	4.00
BR	GEN	P 1	1/29/2003	P1 CHARLENE BEARD PLTF'S BRIEF IN OPPOSITION TO DEFTS. PROPOSED JURY INSTRUCTIONS. WILLIAM J NOVAK 0014029	
JE	JE	P	1/29/2003	JUROR #5 RELEASED. REPLACED BY ALT. HEARD BY JDG FEIGHAN. VOL 2872 PG 656. NOTICE ISSUED.	4.00
SF	247V		1/30/2003	VISITING JUDGE ROBERT E FEIGHAN ASSIGNED TO CASE (MANUALLY).	
JE	JE	P	1/31/2003	ON TRIAL. PLTF RESTS. HEARD BY JDG FEIGHAN. VOL 2873 PG 975. NOTICE ISSUED.	4.00
CS	GEN1	P 1	2/03/2003	CT REPORTER: JENNIFER TOKAR..START DATE: 1/27/03..END DATE: 1/31/03..NO. JURORS: 8..START DATE: 1/27/03..END DATE: 1/31/03..FINAL. VOL 2874 PG 599.	
CS	GEN1	P 1	2/03/2003	CT REPORTER: NOT LISTED..START DATE: NOT LISTED.END DATE: NOT LISTED..NO. JURORS: 8+1..START DATE: 1/27/03..END DATE: NOT LISTED..VOL 2874 PG 599.	
CS	GEN1	P 1	2/03/2003	CT REPORTER: NOT LISTED..START DATE: NOT LISTED..END DATE: NOT LISTED..NO. JURORS: 8+1..START DATE: 1/27/03..END DATE: NOT LISTED..VOL 2874 PG 598.	
JE	JE	P	2/03/2003	ARGUMENT & CHARGE. HEARD BY JDG FEIGHAN. VOL 2874 PG 599. NOTICE ISSUED.	4.00
JE	JE	P	2/03/2003	BECAUSE OF THE HEAVY TRL SCHED ON DOCKET OF ORIGINAL JDG C. BOYKO THIS CASE IS HEREBY ASSIGNED TO VISITING JDG R. FEIGHAN FOR TRL. VOL 2874 PG 598. NOTICE ISSUED.	4.00
JE	JE	P	2/03/2003	ON TRIAL. BOTH SIDES REST. HEARD BY JDG FEIGHAN. VOL 2874 PG 598. NOTICE ISSUED.	4.00
JE	JE	D	2/03/2003	ARGUMENT DELIBERATION. VERDICT FOR DEFT + COST. HEARD BY JDG FEIGHAN. FINAL. VOL 2874 PG 599. NOTICE ISSUED. COURT COST ASSESSED TO THE PLAINTIFF(S).	4.00
CA	1	P 1	2/28/2003	---------- NOTICE OF APPEAL ---------- CA NO. 82541 NOTICE OF APPEAL FILED BY THE PLTF. APPELLANT W/A 9A PRAECIPE AND DOCKETING STATEMENT ON THE REGULAR CALENDAR. COPIES MAILED.	
JE	JE		3/12/2003	PLAINTIFF'S MOTION FOR AN ORDER AUTHORIZING COUNSEL	4.00

STATE OF OHIO	)	IN THE COURT OF COMMON PLEAS
	) SS:	
CUYAHOGA COUNTY	)	CASE NO. 442745
		CV01442745
ROBERT A. MOLCHAN, JR.	)	
	)	
Plaintiff,	)	13987675
vs.	)	
	)	**OPINION AND JOURNAL ENTRY**
ROBERT L. WILLIAMS, JR., et al.,	)	
	)	
Defendants.	)	

Christopher A. Boyko, J.

The present case involves a declaratory judgment action brought by Plaintiff Robert Molchan ("Plaintiff") seeking a determination of the extent of uninsured motorists coverage ("UM coverage") existing under the automobile liability and general commercial liability policies issued to his employer, Defendant Spoth, Inc. dba Lakeland Temporary Agency ("Lakeland") by Defendant Westfield Insurance Company ("Westfield"). Plaintiff brings the action pursuant to *Scott-Pontzer v. Liberty Mut. Fire Ins. Co.* (1999), 85 Ohio St.3d 660. For the following reasons, the Court finds that UM coverage limits exist up to $2,000,000 under Lakeland's automobile liability policy and that no UM coverage exits under Lakeland's general commercial liability policy. Thus, the only remaining issues in the case are the liability of the tortfeasors herein and the extent of Plaintiff's damages for which he can claim UM coverage.

I. FACTUAL AND PROCEDURAL HISTORY

The parties do not substantially dispute the facts underlying the accident giving rise to the present lawsuit. At the time of the accident, Plaintiff was an employee of Defendant Spoth, Inc. dba Lakeland Temporary Agency ("Lakeland").[1] On June 28, 1999, a Ford F-150 truck owned by Defendant Ricky Wilson and driven by Defendant Robert L. Williams, Jr. struck Plaintiff while Plaintiff was waiting outside of Lakeland's 1285 W. 9th Street offices for transportation to where he would be working that day. As a result of the accident, Plaintiff suffered severe and debilitating injuries.

Apparently, neither Wilson nor Williams were insured.[2] Furthermore, neither of these defendants has responded to Plaintiff's complaint. Because neither defendant is insured, Plaintiff brought a declaratory judgment action against Lakeland's insurer, Westfield Insurance Company, seeking uninsured motorist coverage pursuant to two policies issued to Lakeland, an automobile liability policy and a general commercial liability policy.

The commercial automobile liability policy with Westfield at issue, policy number CWP 8 381 144, initially contained liability and UM/UIM coverage limits of

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[1] On January 9, 2002, the Court granted Lakeland's Motion for Summary Judgment filed November 2, 2000 on Count Three of Plaintiff's Amended Complaint. As such, Lakeland is no longer a party to this action.

[2] In his complaint, Plaintiff did not allege that Wilson and Williams were uninsured, nor is there any independent evidence in the record to establish this. However, at no time has Westfield challenged the uninsured status of either individual and has in fact proceeded throughout this litigation as if they were in fact uninsured and even tendered what it asserted were the limits of its uninsured motorists coverage, $500,000.00

$500,000.00, effective August 1, 1998 through August 1, 1999. On April 30, 1999, Lakeland increased its liability limits from $500,000.00 to $2,000,000.00. The parties dispute whether Westfield offered and/or Lakeland rejected corresponding UM/UIM limits of $2,000,000.00.

The commercial general liability policy (CGL policy), policy number CWP 8 381 144, provided exclusions for liability coverage for accidents involving aircraft, automobiles, or watercraft, with a limited exception for damages arising from "parking an 'auto' on, or on the ways next to, premises you own or rent, provided the 'auto' is not owned by or rented or loaned to you or the insured."

II LAW AND ANALYSIS

A. Coverage under Lakeland's Commercial Automobile Liability Policy

Former R.C. § 3937.18[3] required all automobile liability policies issued in Ohio to offer coverage for injuries caused by accidents involving both uninsured and underinsured motor vehicles, in amounts equal to the liability limits of the policy. The offer needed to be in writing. An insured could either select lower UM/UIM limits or reject the coverage altogether. Selection of lower limits or outright rejection also had to be in writing, signed by the insured and had to occur prior to the effective date of the policy.[4] See *Gyori v. Johnston Coca-Cola Bottling Group, Inc.* (1996), 76 Ohio St.3d

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[3] The statute as it existed on the effective date of the policies at issue, see *Ross v. Farmers Ins. Group of Cos.* (1998), differs substantially from the current version.

[4] In 1997, HB 261 amended R.C. § 3937.18(C) to allow for the presumption of a written offer of UM/UIM coverages where the insured provided a written, signed rejection of such coverages.

565. The failure to offer and/or secure a written rejection of either UM/UIM coverage would result in coverage arising by operation of law.

With respect to the present case, the parties devoted the majority of their arguments as to whether and what extent there had been a valid rejection of increased UM/UIM limits under the standard imposed by the Supreme Court in *Linko v. Indemnity Insurance Co. of North America* (2000), 90 Ohio St.3d 445. Specifically, the parties dispute the applicability of *Linko* to cases involving the post HB 261 version of R.C. § 3937.18, which took effect on September 3, 1997.[5] While the Court is inclined to conclude that the requirements of *Linko* do not apply to post HB 261 cases, it need not necessarily address the issue because it is not dispositive of the case. Regardless of the applicability of *Linko*, what is dispositive is that this Court will not permit Westfield to introduce a purported signed rejection form from Lakeland in support of its Motion for Summary Judgment that was not produced to Plaintiff during discovery.

Irrespective of the internal disorganization which led to discovering the rejection form long after discovery was closed, the Court will not allow Westfield to conduct trial by surprise. The legal strategies of each side are driven by the facts and evidence produced during discovery. The policy behind the discovery rules of openness is thwarted by interjecting the rejection form into this case at the trial stage. Cutoff dates and sanctions exist as procedural safeguards to insure fairness and integrity in the time line of a case.

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[5] This precise issue is currently pending before the Supreme Court in *Kemper v. Mich. Millers Mut. Ins. Co.* (2002), 94 Ohio St.3d 1435.

Under Civ. R. 37(B), a court may impose sanctions against a party failing to provide discovery after a court issues an order requiring it to do so. The Rule is not limited to orders made pursuant to a motion to compel discovery under Civ. R. 37(A), but allows for sanctions for failure to abide by any order of the court to provide discovery. Possible sanctions include "an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting [it] from introducing designated matters in evidence. Civ. R. 37(B)(2)(b) (emphasis added). The rules of discovery give trial courts great latitude in crafting sanctions to fit discovery abuses. *Nakoff v. Fairview Gen. Hosp.* (1996), 75 Ohio St.3d 254.

A review of the docket reveals that in an entry journalized December 20, 2001, this Court specifically ordered Westfield to provide responses to Plaintiff's discovery requests by January 3, 2002. Westfield failed to provide a copy of the rejection form, incorporated into the affidavit of Alan Sills attached to its Motion for Summary Judgment, until May 7, the day the Motion was filed with this Court. Furthermore, Westfield failed to identify Mr. Sills as a witness in the case. This court will not permit Westfield to submit this testimony and documentary evidence to support its Motion for Summary Judgment when such was not revealed to Plaintiff through discovery.

Westfield's response to Plaintiff's Motion in Limine/Motion to Strike leaves something to be desired in terms of credulity. Basically, Westfield claims that it never provided the rejection form to Plaintiff because Plaintiff never asked for it. However, Plaintiff's Request for Production of Documents No.1 states: "Please provide a verified copy of the policy of insurance and attachments, endorsements, and amendments that was

in effect in June 1999, between Westfield Insurance Company and . . . Lakeland . . . ." Furthermore, Plaintiff's Interrogatory No.3 states: "please list any and all exhibits, documents, photographs and/or other material which you intend to introduce or admit into evidence in the within matter."[6] Neither discovery request elicited the rejection form that Westfield attempted to attach to its Motion for Summary Judgment. However, Plaintiff's discovery requests, in particular, Request for Production of Documents No.1, are sufficiently broad enough to obligate Westfield to produce Lakeland's purported rejection of UM/UIM coverage in an amount equal to its liability limits. Because it failed to produce this form in discovery, Westfield is precluded from introducing it at what was essentially the trial stage in the case. As Westfield failed to properly produce evidence of a valid written, signed selection of lower UM/UIM limits, the Court concludes as a matter of law that UM coverage exists under Lakeland's commercial automobile liability portion of its policy with Westfield in an amount equal to the liability limits under the policy, $2,000,000.00.

B. Coverage under Lakeland's CGL Policy

The Court concludes as a matter of law that Lakeland's CGL policy does not constitute an automobile liability policy thereby requiring the corresponding offer of

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[6] Although Westfield objected to this Interrogatory on the basis of attorney work-product privilege, it nevertheless stated in its answer that it would supplement pursuant to the local rules. Local Rule 21 requires parties to submit lists of non-expert trial witnesses seven days in advance of the final pretrial. Westfield failed to identify Alan Sills as a non-expert witness in its final pretrial statement. While the Court eventually ordered the case submitted on briefs alone in lieu of trial, Westfield would still have been required to disclose any non-expert witnesses from whom it intended to procure affidavits in support of its defense of the case if such witnesses were not disclosed during discovery.

UM/UIM coverage, and as such, no such coverage arises by operation of law due to the failure to offer such coverage. In *Selander v. Erie Ins. Group* (1999), 85 Ohio St.3d 541, the Ohio Supreme Court held that the provisions of R.C. § 3937.18 applied to a policy of general liability insurance that provided coverage for claims of liability arising out of the use of hired or non-owned vehicles. The Court rationalized that where an insurance policy provides any measure of motor vehicle liability coverage, even in limited form, it must offer UM/UIM coverage, and that failure to do so creates such coverage under R.C. § 3937.18.

Two years later, in *Davidson v. Motorists Mutual Ins. Co.* (2001), 91 Ohio St.3d 91, the Court held that a homeowner's insurance policy that provides limited liability coverage for vehicles that are not subject to motor vehicle registration and are not intended to be used on a public highway is not a automobile liability policy and is thus not subject to the requirements of former R.C. § 3937.18. The court concluded that an automobile liability policy as that term is defined in R.C. § 4509.01(L) is limited to policies certified as proof of financial responsibility and which applies to vehicles by which persons or property may be transported upon a public highways ("we have found that 'the financial responsibility laws and the UIM statute are related in purpose and that the General Assembly intended them both to apply only to policies that insure against liability arising from the ownership or operation of "vehicles" that can be used for transportation on the highway,'" quoting *Delli Bovi v. Pacific Indemn. Co.* (1999), 85 Ohio St.3d 343, 345. The Court distinguished the *Selander* decision in that the policy in *Selander* expressly provided insurance against liability arising out of the use of

automobiles that were used and operated on public roads.

In this case, Lakeland's CGL policy contains an "Aircraft, Auto, or Watercraft" liability exclusion, with the following relevant exception as to "parking an 'auto' on, or on the ways next to, premises you own or rent, provided the 'auto' is not owned by or rented or loaned to you or the insured." While the Court finds that the phrase "on the ways next to premises you own or rent" is ambiguous as to whether the "ways next to" could include public highways, the court nevertheless concludes that the parking exception does not provide motor vehicle liability coverage, even in limited form, as that created by the policy in *Selander*, in that the exception applies only to parking a vehicle, not to the general operation of a vehicle along a public highway. A closer case could be made under a strict application of the reasoning of *Davidson* since there is no indication that the automobiles contemplated by this "valet parking" exception would not be intended to be used on public roads, even if just for the limited purpose of parking them, thereby subjecting them to motor vehicle registration.

However, the Court need not decide this issue, due to the language added to R.C. § 3937.18 by HB 261, effective September 3, 1997. Specifically, HB 261 added § 3937.18(L), which provides as follows:

> (L) As used in this section, "automobile liability or motor vehicle liability policy of insurance" means either of the following:
> (1) Any policy of insurance that serves as proof of financial responsibility, as proof of financial responsibility is defined by division K of section 4509.01 of the Revised Code, for owners or operators of the motor vehicles specifically identified in the policy of insurance;

(2) Any umbrella policy of insurance.[7]

R.C. § 4509.01(K) defines "proof of financial responsibility" as:

> [P]roof of ability to respond in damages for liability, on account of accidents occurring subsequent to the effective date of such proof, arising out of the ownership, maintenance, or use of a motor vehicle in the amount of twelve thousand five hundred dollars because of bodily injury to or death of one person in any one accident, in the amount of twenty-five thousand dollars because of bodily injury to or death of two or more persons in any one accident, and in the amount of seven thousand five hundred dollars because of injury to property of others in any one accident.

Under subsection (L), then, Lakeland's CGL policy would not qualify as an "automobile liability or motor vehicle liability policy" in that the automobiles referenced in the "valet parking" exception are not specifically identified in the CGL policy. As such, the CGL policy is not an automobile liability or motor vehicle liability policy under former R.C. § 3937.18(L)(1). Furthermore, the CGL policy is primary insurance, and not umbrella coverage.[8] See CGL policy, Section IV(4)(a). Thus, it cannot qualify as an automobile liability or motor vehicle liability policy of insurance under former R.C. § 3937.18(L)(2). Accordingly, as the CGL policy is not an automobile liability policy, the UM/UIM requirements of former R.C. § 3937.18 do not apply, and Plaintiff cannot recover under this policy.

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[7] Subsequent amendments to R.C. § 3937.18 have completely eliminated this subsection. However, this subsection as quoted was in effect on the effective date of the policy and therefore applies.

[8] While the GCL policy provides excess coverage in limited circumstances, such does not transform the policy into an umbrella policy. An umbrella policy would never provide any form of primary coverage, and as such, the GCL policy can in no way be considered an umbrella policy under R.C. § 3937.18(L)(2).

III CONCLUSION

For the foregoing reasons, the Court finds (1) UM/UIM coverage exists under Lakeland's automobile liability policy up to $2,000,000 and (2) no UM/UIM coverage exists under Lakeland's CGL policy. The case shall proceed on the issue of damages in the event Plaintiff's motion for default judgment is granted as against Defendants Wilson and Williams.

IT IS SO ORDERED.

Chris Boyko
CHRISTOPHER A. BOYKO, JUDGE

Date: July 16, 2002

CERTIFICATE OF SERVICE

A copy of the foregoing Ruling has been sent by regular U.S. Mail this ____ day of July, 2002 to the following:

RECEIVED FOR FILING

JUL 17 2002

Vincent A. Stafford, Esq.
Jennifer L. Malensek, Esq.
STAFFORD & STAFFORD CO. L.P.A.
323 Lakeside Avenue, West
380 Lakeside Place
Cleveland, Ohio 44113
Attorneys for Plaintiff

Christopher M. Ernst, Esq.
Lisa M. Sidoti, Esq.
WESTON HURD FALLON PAISLEY & HOWLEY L.L.P.
2500 Terminal Tower
50 Public Square
Cleveland, Ohio 44113-2241
Attorneys for Defendant Westfield Insurance Company

View from the Bench . . . Cuyahoga County

By The Honorable Christopher A. Boyko

I often quip to the attorneys at civil pretrials that I don't envy them practicing before thirty-four different judges in this county (more if they practice in other divisions). Each judge carries a different set of expectations based upon their professional and personal backgrounds. Their life histories generate specific mind sets, beliefs and attitudes toward the people and cases they are assigned.

Clients who present their case at the pretrial meeting with the attorney understandably want to know how their case shapes up and their chances of success. I know more than a few attorneys who respond telling them, "I'll know more after I see who we pull". Some clients are shocked to know that decisions aren't based entirely on the existing case law, as if the judge merely regurgitates some Ohio Supreme Court ruling. Interpretations by people wearing robes leads us back to their life histories. But there is more.

Attorney's fresh out of law school (especially young in age) who haven't been exposed to the realities of practicing law are more anxious to give clients their anticipated measure of success based upon the law only. In a perfect world with perfect judges, that would be good advice. But it's not reality. Whom you pull as your judge on a particular case will force you to choose one strategy over another. And those attorneys who fail to learn everything they can and about the judge are bordering on malpractice (not legal - practical).

The Cuyahoga County Bar Association did a major service to practicing lawyers by compiling a sort of profile of the trial judges in Cuyahoga County. The judges individual expectations on civil discovery, pretrials, motion practice and other important subjects is invaluable information. But your inquiry does not end there. Read on:

YOUR OPPONENT

Who is your opposing counsel? Someone you know and have handled cases with over the years? Someone you never heard of? Veteran? Rookie? Solo? Law firm? Which one?

Knowing something about your opposing counsel is mandatory. You owe your client an idea of what to expect from the other side. Nice guy who will be flexible and agreeable throughout the case (less time and money)? Or a real pistol, bent on making you and your client's life a living hell (more money, time and gray hairs)? Some attorneys you can trust with your money and family. Others would do whatever it takes for "Mr. Green" all day and sleep like babies at night. Know your opposition and adjust!

THE BAILIFF

By appearing a couple of times in a judge's room, you will know how much authority a particular bailiff possesses. As gatekeeper, your access to the judge and how the judge treats you may be affected by your relationship with his or her bailiff. Treat the bailiff badly and guarantee a slashing comment to the judge. I know bailiffs can be as bad or worse than the judges at times but you just have to bite your lip and stay polite, calm, and professional. Think of your client and fend off the urge to slap the gatekeeper. Know the bailiff and adjust!

THE STAFF ATTORNEY

It amazes me how attorneys sometimes treat the staff attorneys. For some unknown reason (let's call it stupidity), they, believe they can demand, push, denigrate, criticize or try to manipulate the staff attorney. The resulting effect on the judge's perception of the attorney can range from irritating to "Give me something on the law so I can rule against him or her." What, you don't think judges speak to their staff attorneys about who counsel is on the case? I want to know from my staff attorney how he's treated. He will automatically tell me now who's nice, who's a pain in his side and who's trying to manipulate him, is criticizing one, or both of us. It's easy to be nice to a judge when you appear in chambers or in open

(Continued from page 10)

court. You should adopt the same attitude with the bailiff and staff attorney. I work very closely with my staff attorney, reading and discussing cases together. I have respect for his opinion and even though the final decision is mine, his opinion carries weight. Find out the relationship the staff attorney has with his or her judge, and something about the staff attorney. In some courtrooms this may be a waste of time. In others, where the staff attorneys recommendations are rubber-stamped, it could decide your case prior to trial. Know the staff attorney and adjust!

THE TRIAL JUDGE

Getting back to profiling your judge on a case, you need to know what to expect at trial. Are sidebars allowed generally when requested? Is he or she on top of the evidence rules? How much leeway is allowed on examinations, especially redirect and recross? Is the judge flexible in the timing and method of presenting witnesses? Are you given latitude during voir-dire? Are liquid refreshments permitted at the trial table? Will the judge allow note-taking and/or questions by jurors? Will the judge berate you in front of the jury for not adhering to his or her rules?

The questions are almost endless but you should know generally what to expect from a judge when the prospective jurors fill the courtroom. Ask around. Who do you know has tried a civil or criminal case in the judge's room? Get as much information as you can. If no one has a handle on the judge, then you must go through the experience and take notes for future reference. Any trial lawyer who seeks to succeed in all our courtrooms should have a short and pertinent profile on each judge. You should know something about me and how I handle cases before you walk through my door. You should know what to expect if you try a case in my room. You can never have too much knowledge about your opponent, the judge and his or her bailiff and staff attorney.

This doesn't mean the law and your hard work aren't important. They count for a great deal.

My point is this: By knowing your opponent, the judge, the bailiff and the staff attorney you can form an intelligent over-all strategy to the case and spend your client's money wisely. Your handle on the lawsuit will be stronger, your advice better, and your client satisfied that you've considered the people who have a say in how his or her case is decided.

I've focused on the civil side but much of what I've said applies to criminal. Know your prosecutor and your judge's anticipated sentencing for your type of case, and whether he or she will give you an indication of what the sentence may be if your client pleads. Of course, you make no promises to your client but at least there should be no major surprises. As we all know, which judge you pull can give you a spread of community control to consecutive time in prison.

They may not teach all of this in law school but until they replace people with computers in our justice system you would be wise to keep in mind something I've said before - This is a people business.

And that, ladies and gentlemen, is the reality of practicing law.

The Honorable Chirstopher A. Boyko is a Judge in the Cuyahoga County Court of Common Pleas and Co-Editor of View from the Bench *for Law and Fact.*

View From The Bench:

It's The Little Things That Matter

By The Honorable Christopher Boyko

Sitting on the common pleas bench for almost four years continues to be a great learning experience. The attorneys that come before a judge run the gamut – from, "How did he get his license?" to, "It's a privilege to have her practicing before me."

Trials are the same. I tell my juries to expect "the good, the bad, the ugly, happiness, sorrow, and everything in between." From the dynamics of a trial comes a decision by the jury that, in any given case, will affect someone's freedom, money, property, livelihood, health, reputation or life.

Therefore, how an attorney handles himself or herself during trial consciously or subconsciously impacts on the dynamics of a jury's decision-making process. Are details important? You bet. Says who? I'll tell you who – the jurors that I speak with at length after every jury trial I have concluded.

I have put together some points that I hope will enlighten the beginning trial attorney and fine tune the veteran. Some thoughts are my own, but most are straight from the mouths of jurors. Don't make the mistake of thinking some of the items I mention below will overcome a lack of credible evidence. Look for these to make a difference when the cases are close. As you know, many are, and as the saying goes, "There is no substitute for preparation (hard work)."

Here we go:

1. Failing to use jurors' names or pronouncing them incorrectly

One of the most prized possessions a person has is his or her name. Countless times I have seen attorneys point to a prospective juror and say, "How about you?" or take a tough name, butcher it, and not bother to ask the juror the correct pronunciation. If you don't care enough to use their names or find out how to pronounce them, why should they take an interest in you? If they have a diminished interest in you, your client is the one who ultimately suffers.

Don't make the opposite mistake of using their first names. They are not your drinking buddies and some jurors see it as a slick way to get close to them, and, by association, close to your client. In either case, you will be viewed as less than professional. Look at this from a different perspective. If you are like me, I have an immediate disinterest in mail I receive with my name misspelled.

2. Give the jury some background information on you and your client

During *voir dire* we ask jurors very personal questions and even though we tell them we don't wish to pry into their personal lives, that is exactly what we do. If the judge allows you, try and level the playing field by briefly opening up a part of your life to the jurors. If they know something about you and your client they feel "less exposed."

Your goal is to make the jurors comfortable with you and your client. Sure, you will elicit personal information from your client on the stand (if he or she takes it), but that comes later. The jury needs to relax a little during *voir dire*. They enter a courtroom nervous and intimidated. I do my best to make them loosen up, but it doesn't hurt to have counsel personalize themselves. All of us come into court with a life history – why should the jurors not know some of yours?

3. Repeating yourself *ad nauseum* and inefficiency

Not only will you try the patience of the judge in asking the same question ten different ways to the prospective jurors and witnesses, but you harm your credibility. Constant repetition conveys a condescending message to the jury – "you jurors are not sharp enough to understand something the first or second time, so I'm going to spoonfeed you eight times to make sure it sinks in." Hogwash. One of the biggest complaints about attorneys at my jury debriefings is the lack of efficiency and time management. Ask your question, make your point, and move on. Remember, you have eight or twelve minds processing all the information. If it was a good point, most of them will remember, and include it in deliberations. Also, why have the judge tell you the question has been answered and to move on? Don't ever set yourself up to be reprimanded from the bench. The message to the jury is clear: You are not

... *continued on page 22* ...

... *continued from page 21* ...
doing a proper job so the judge has to straighten you out.

During my post *voir dire* instructions I tell the jury that this isn't television and not everything will be packaged so neatly to fit into an hour segment. Scheduling witnesses, especially experts, can be a nightmare. Everyone has things to do and lining people up in smooth chronological order is almost fiction. However, there are lessons to learn from Law and Order, The Practice, and the former L.A. Law. The attorneys must get their point across in a limited time so their direct, cross, opening and closing statements must be concise, understandable, and generate impact. There is much to the phrase "less is more" when the "less" is quality.

Keep in mind that the jurors have plenty of downtime already – they wait to be brought up, wait to be brought out, and wait while we have sidebars. They rightfully expect that once we are in trial their time will not be wasted any further.

4. Editorializing during examination of a witness and remarks to opposing counsel

Keep your unsolicited comments to yourself. If you are frustrated by a witness' lack of cooperation, understanding, or contradiction in testimony, do not make remarks under your breath. The jury will notice your lack of control and wonder if you have the temperament to properly finish the trial. Remember, you are not testifying, nor are you entitled to editorialize on whatever the witness says. If he or she is avoiding the question, the judge is available to help the witness along.

I have had to pull attorneys to sidebar and stop the comments between them (again, slightly under their breath) which demonstrated a lack of professionalism and civility in the courtroom. No matter how tough the case, client, or witness is, you must maintain self-control. If there is a problem the judge cannot readily identify, ask for a sidebar in a "professional manner." Think of yourself as the eye of a storm. Your head will stay clear and your case will remain focused.

5. Trying to take over the courtroom

There are attorneys who want to run the show when they try a case. Sorry, Mr. Wanna-be-judge, but that is my job. Not only is it disrespectful to the court and jury to yell, whine, moan, personally attack counsel, and demand to have things your way, but the jury will punish you and your client for outrageous behavior and lack of professionalism. Besides, you may find yourself in jail or paying a fine.

I believe attorneys are generally comfortable trying a case in my room and I give them a reasonable amount of leeway. What I expect in return is that they don't cross the line and try to take advantage of my goodwill. I view my courtroom the same way a police officer thinks about his gun – no matter what the circumstances, I never give it up.

6. Failing to utilize demonstrative evidence in all phases of the trial

You have heard how important this is before, but in one out of every three trials I find myself asking the witness to step down to the blackboard and sketch a room, an intersection, street, house, living room, or a hundred other things to clarify testimony. Demonstrative evidence should be a part of opening statements, direct and cross, and closing arguments. Many times the jury looks at me with puzzled faces, forcing me to ask for visual clarification of testimony. Giving them something to look at keeps their attention, focuses the testimony, and increases retention. Civil attorneys use it more than the prosecutors and criminal defense lawyers and it remains an effective device for getting your point across.

7. Repeating to the jury, "What I say is not evidence"

This is one of my favorites. Translation of this heading: "Don't listen to me because what I have to say is not important." I literally cringe every time I hear an attorney make that statement. I already said it in my post *voir dire* overview of the case, and I will say it again in my closing instructions. Why de-emphasize your importance? What you say, and how you say it, is important! Do you really want the jury to ignore your explanation of why your client should prevail? Either don't repeat what I have said (first choice), or, if you feel compelled to comment, use it as a springboard: "Ladies and gentlemen, even though the judge has told you what I say is not evidence, that doesn't mean my remarks are not important. They certainly are to my client, Mr. Jones. He's counting on me to help you understand how the evidence clearly demonstrates his entitlement to a verdict."

FINAL THOUGHTS

There are certainly other do's and don'ts at trial we can discuss, but these will hopefully give you a framework where other things fall in place.

Again, I have focused on "secondary" matters which cannot substitute for credible witnesses and exhibits, but which, nonetheless can influence a jury's verdict.

Keep in mind this is a people business and you influence juries by effective communication and presenting yourself and your client as trustworthy.

Good luck and see you at trial!

STROZ FRIEDBERG, LLC

October 1, 2004

The Honorable Orrin G. Hatch
Chairman
Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

Enclosed please find my responses to the written questions submitted by Senator Jeff Sessions and Senator Saxby Chambliss in connection with my nomination to the United States Sentencing Commission.

Thank you for your consideration.

Sincerely,

Beryl A. Howell

Beryl A. Howell

cc: Senator Patrick Leahy

1 CONNECTICUT AVENUE, NW, SUITE 200, WASHINGTON, DC 20036 202 464 5800 FAX 202 [illegible] 5700
email@strozllc.com www.strozllc.com

OCTOBER 1, 2004 RESPONSES OF BERYL ALAINE HOWELL TO SENATOR SESSIONS' FOLLOW-UP QUESTIONS, SUBMITTED SEPTEMBER 29, 2004

1. Please summarize your understanding of the purpose(s) behind the creation of the Federal Sentencing Commission.

Answer: If I am confirmed to be a Commissioner, I would faithfully follow the determinations of Congress regarding sentencing, including the purposes for the creation of the Federal Sentencing Commission, as set forth in section 991(b) of title 28, United States Code. These include assuring the purposes of sentencing to reflect the seriousness of the offense, promote respect for the law, provide just punishment, afford adequate deterrence to criminal conduct, protect the public, and provide the defendant with needed training, medical care or other correctional treatment in the most effective manner; establishing sentencing policies and practices for the Federal criminal justice system that provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices; and measuring the degree to which the sentencing, penal and correctional practices are effective in meeting the purposes of sentencing described above.

2. Explain what role you believe that the Federal Sentencing Commission serves in today's judicial system.

Answer: I believe that the Federal Sentencing Commission serves the role Congress set for it as an agency located within the Judicial Branch of the Federal government. It is charged with promulgating and distributing to all courts of the United States and to the United States Probation System guidelines for use in determining the sentences to be imposed in criminal cases, and policy statements regarding application of the guidelines or other aspects of sentencing and sentence implementation, pursuant to the statutes passed by Congress and signed by the President. Among the other responsibilities specified by Congress, the Commission was created to fulfill the mandate of Congress to limit sentencing disparities and assure greater uniformity in federal sentences, and I believe it is serving that role, with continued guidance from the Legislative Branch.

3. What do you understand to be the responsibilities demanded of members of the Federal Sentencing Commission?

Answer: The responsibilities demanded of members of the Federal Sentencing Commission include helping to establish sentencing policies and practices for the Federal courts, including guidelines for the punishment of offenders convicted of federal crimes as prescribed by Congress; assisting Congress and the Executive Branch in the development of effective and efficient sentencing policy; and collecting, analyzing, and distributing information on federal crime and sentencing statistics. Commissioners

are responsible for participating in the numerous public hearings the Commission holds each year as well as helping to prepare the publications distributed by the Commission.

4. Do you believe that your experience as a staff-member on the Senate Judiciary Committee will have any effect on your ability to fulfill your responsibilities as a member of the Federal Sentencing Commission?

   A. If yes, how will that experience affect your job performance?

   B. If no, why will that experience not affect your job performance?

Answer: Yes. My experience as a staff member on the Senate Judiciary Committee will have a positive effect on my ability to fulfill the responsibilities as a member of the Federal Sentencing Commission as well as my experience as an Assistant U.S. Attorney. I have tremendous respect for the prerogatives and decisions of the Legislative Branch under our Constitution.

5. Please summarize the content of the following speech that you made on the Federal Sentencing Commission: "Role of the Congress, the Commission, and the Courts in Sentencing: A Legislative Perspective," March 8, 1999.

Answer: On March 8, 1999, I spoke at the National Sentencing Policy Institute as part of a panel discussion with a counsel from Senator Hatch's staff, and others. To the best of my recollection, each speaker on the panel was given a few minutes to make introductory remarks and then responded to questions from the moderator(s) and the audience. To the best of my recollection, the discussion involved pending legislation that could have an impact on sentencing. I provided the only copy I have of an audio tape of the panel discussion to the Committee.

6. Please summarize the content of the following speeches that you gave on the USA PATRIOT Act of 2001 and other post-9.11 matters, addressing specifically which provisions you spoke in approval of and those you disapproved:

   A. "Balancing Privacy Interests with the Patriot Act," August 12, 2004.

Answer: I spoke as part of a panel discussion with representatives from the ACLU and the U.S. Attorney's Office for the Eastern District of Pennsylvania at a continuing legal education meeting sponsored by the City of Philadelphia Law Department. I have provided to the Committee an unpublished essay, which was submitted in connection with this CLE and discussed approvingly in general the following provisions in that law: the telephone and internet surveillance provisions, the FISA changes, the national security letter provisions, and the delayed notice for search warrant provision, but each of these points was not covered during my oral remarks due to time constraints. I recall that in my extemporaneous remarks I addressed some of the "myths" about the USA PATRIOT Act, which were listed in the essay I have provided to the Committee.

B. "The USA PATRIOT Act Controversies," September 17, 2003.

Answer: I spoke to a group of Hamilton College students as part of a seminar program and primarily responded to their questions about some of the controversies reported in the press about which the students were concerned surrounding the USA PATRIOT Act. To the best of my recollection, the questions focused on the delayed notice for search warrants provision and the pen register law changes, and I spoke generally approvingly of those provisions in the law.

C. "The PATRIOT Act, Law Enforcement and Civil Liberties," September 11, 2003.

Answer: I spoke to a group of journalists at a conference sponsored by the Knight Center for Specialized Journalism, and primarily responded to their questions about some of the controversies reported in the press about which the journalists were concerned surrounding the USA PATRIOT Act. To the best of my recollection, the questions focused on the process involved in passage of the USA PATRIOT Act, the delayed notice for search warrants provision and the pen register law changes, and I spoke generally approvingly of those provisions in the law.

D. "Surveillance and Detention After September 11," August 2, 2003.

Answer: I spoke at the First National Convention of The American Constitution Society for Law and Policy, as part of a panel discussion addressing how certain hypothetical situations outlined by the moderator could be resolved under the USA PATRIOT Act. To the best of my recollection, the questions focused on the delayed notice for search warrants provision and the criticisms by librarians of section 215 of the USA PATRIOT Act. I spoke generally approvingly of those provisions in the law.

E. "The War on Terror – Setting the Legal Agenda," April 22, 2003.

Answer: I spoke as part of a panel discussion sponsored by the American Bar Association Standing Committee on Law and National Security, and responded to questions posed by the moderator. To the best of my recollection, the questions focused on the criticisms by librarians of section 215, the sunset provision, and FISA wiretap provisions of the USA PATRIOT Act. I spoke generally approvingly of those provisions in the law.

F. "Playing Games with Privacy: Homeland Security Measures and Your Rights," April 16, 2003.

Answer: I spoke as part of a panel discussion sponsored by The Federalist Society For Law and Public Policy Studies at Georgetown University Law Center. I focused my remarks on the electronic surveillance provisions in the USA PATRIOT Act, and spoke generally approvingly of those provisions in the law.

G. "Legislative Briefing: Library Surveillance and the USA PATRIOT Act, January 25, 2003.

Answer: I spoke as part of a panel discussion sponsored by the American Library Association and addressed concerns that had been raised by the librarians in the press about section 215 in the USA PATRIOT Act and, specifically, whether that provision had authorized and, in fact, prompted increased surveillance at libraries. To the best of my recollection, as part of my remarks, I reviewed answers provided publicly by FBI officials to oversight questions posed by Members of the House and Senate Judiciary Committees on this issue, and spoke generally approvingly of that provision in the law.

H. "Civil Liberties in an Age of Terror, 'The USA PATRIOT Act: Consequences Intended, and Not,'" December 5, 2002.

Answer: I spoke to a group of journalists at a conference sponsored by the Knight Center for Specialized Journalism, and primarily responded to their questions about some of the controversies surrounding the USA PATRIOT Act. To the best of my recollection, the questions focused on the process involved in passage of the USA PATRIOT Act, the delayed notice for search warrants provision and the pen register law changes, and I spoke generally approvingly of those provisions in the law.

I. "White Collar Practice and the USA PATRIOT Act," January 30, 2002.

Answer: I spoke as part of a panel discussion to a group of attorneys and primarily responded to their questions about some of the controversies surrounding the USA PATRIOT Act. To the best of my recollection, the questions focused on the money laundering provisions and the pen register law provisions, and I spoke generally approvingly of those provisions in the law.

J. "Terrorism and the law: The USA PATRIOT Act," January 17, 2002.

Answer: I spoke, along with one other panelist, as part of a Federal Judicial Center's education program for Federal judges about the USA PATRIOT Act. To the best of my recollection, I spoke about the process involved in passage of the USA PATRIOT Act, the delayed notice for search warrants provision and the pen register law changes, and I spoke generally approvingly of those provisions in the law. I provided the only copy I have of a videotape of the panel discussion to the Committee.

K. "The Information Sharing Provisions in the USA PATRIOT ACT," November 14, 2001.

Answer: I spoke at a program sponsored by the American Bar Association's Standing Committee on Law and National Security about the USA PATRIOT Act. To the best of my recollection, my remarks addressed the process involved in passage of the USA PATRIOT Act, the delayed notice for search warrants provision and the pen register law changes, and I spoke generally approvingly of those provisions in the law.

L. "Fighting Terrorism Through Legislation: Where Privacy Rights and Law Enforcement Collide," November 1, 2001.

Answer: I spoke, along with a representative from the U.S. Department of Justice and others, as part of a panel discussion that was sponsored by the District of Columbia Bar Association. To the best of my recollection, my remarks and the questions posed addressed the process involved in passage of the USA PATRIOT Act, the delayed notice for search warrants provision and the pen register law changes, and I spoke generally approvingly of those provisions in the law.

OCTOBER 1, 2004 RESPONSES OF BERYL ALAINE HOWELL TO SENATOR CHAMBLISS' FOLLOW-UP QUESTIONS, SUBMITTED SEPTEMBER 29, 2004

1. Regarding the following provisions of the Feeney Amendment to the PROTECT Act, Publ. L. No. 108-21 (1993), please state your opinion on the merits or shortcomings of each provision, and please include any relevant, personal experiences you can provide as a former Federal prosecutor:

a. With respect to child-victim and sex-crimes cases, the prohibition on non-specified grounds for departure and the elimination of departures for aberrant behavior, family/community ties, and diminished capacity;
b. The reversal of the Supreme Court's decision in *Koon v. United States* by establishing *de novo* review of departure decisions in all cases;
c. Required reporting of departures by the courts to the Sentencing Commission;
d. The ban on granting downward departures based on new grounds when a case is remanded to the trial court for resentencing after a successful government appeal; and
e. The requirement of a government motion to allow an additional one-point downward departure for acceptance of responsibility in early guilty pleas.

Answer: The Feeney Amendment was passed by the Congress in order to reduce the number of departures, especially downward departures, which were perceived to create sentencing disparities and undermine the purpose of the Sentencing Guidelines. Thus, the Feeney Amendment, *inter alia*, eliminates certain grounds previously available for departures from a guideline range (e.g., (a) and (d), above), provides a new procedure before a defendant is eligible for a one-point downward departure for acceptance of responsibility (e.g., (e) above), and provides a mechanism for enhanced oversight by the Congress and review by appellate courts of the exercise by Federal judges of their departure authority (e.g., (b) and (c), above). When I was a Federal prosecutor, I prosecuted over one hundred cases and worked on a daily basis within the rubric of the Sentencing Guidelines in charging decisions, plea negotiations, and sentencing recommendations. If I were confirmed to be a Sentencing Commissioner I would faithfully help implement the provisions of the Feeney Amendment, as with all obligations of federal law, including those items listed above and I am confident that my experience prosecuting federal crimes would be an asset to the work of the Commission in fulfilling its statutory responsibilities.

2. What are your thoughts on the propriety and utility of statutory minimum sentences, particularly in regard to those imposed under Title 21 of the United States Code? Do you think that the limitations on the applicability of statutory minimum

sentences imposed in Section 5C1.2 of the United States Sentencing Guidelines are adequate and, if not, how so?

Answer: The Congress has the power to define criminal prohibitions and set the penalties for such activity, including the minimum and maximum sentences that may be imposed upon conviction. Title 21 of the United States Code contains mandatory minimum sentences for crimes involving specified amounts of illegal narcotics. Statutory mandatory minimum sentences have been used successfully by prosecutors, including myself when I served in the U.S. Attorney's Office for the Eastern District of New York, to provide incentives to defendants to cooperate against other participants in narcotics conspiracies and to plead guilty, without the necessity of a trial, as part of an agreement with the government to be charged with an alternative applicable offense that did not carry a mandatory minimum penalty. The question of whether mandatory minimum sentences are adequate to deter and punish crime is a question committed to Congress, which has established the mandatory minimum sentences by statute.

Section 5C1.2 of the U.S.S.G. mirrors the statutory direction from Congress set forth in 18 U.S.C. § 3553(f). Based on my experience, I believe there is some inadequacy in the Guidelines because currently defendants may abuse the opportunity to seek a reduction in sentence--provided by both the statute and the Guidelines--by truthfully providing the government with information and evidence only on the day of sentencing, when the government's ability to pursue leads and conduct follow-up investigation to test the veracity of the information may be hampered by belated communication of the information and inability to obtain further cooperation from the defendant after sentence is imposed. If this is a matter about which the Congress would like the Sentencing Commission to research, I would be honored, should I be confirmed, to help bring such matters to the attention of the Chairman and other Members of the Commission. Overall, based on my prosecutorial experience, I do not believe mandatory minimums to be inadequate but rather found them to be useful in the effort to deter and punish crime.

SUBMISSIONS FOR THE RECORD

HEARING STATMENT
INTRODUCTION OF JUDGE CHRISTOPHER BOYKO
NOMINATED TO BE FEDERAL DISTRICT JUDGE
FOR THE NORTHERN DISTRICT OF OHIO
U.S. SENATOR MIKE DEWINE
SEPTEMBER 22, 2004

I'm happy to introduce Judge Christopher Boyko, who President Bush has nominated for an upcoming vacancy in the Northern District of Ohio, in Cleveland.

Judge Boyko currently serves on the Cuyahoga County Court of Common Pleas. This is Ohio's highest trial court, where all the major civil and criminal matters are tried. During his time on the bench, Judge Boyko has seen virtually every type of case you can imagine. He is an excellent judge, and his reputation reflects that. The consensus among lawyers in Cleveland is that Judge Boyko is intelligent, fast, fair, and has a terrific temperment.

So much so that lawyers want their cases to be assigned to Judge Boyko. The only objection I've heard to Judge Boyko's nomination is that the Court of Common Pleas will be losing one of its best judges! I'd like to note that the ABA and I are in agreement on Judge Boyko -- they've given him a rating of "Unanimous Well Qualified."

Before serving on the Court of Common Pleas, Judge Boyko also served as a judge on the Parma Municipal Court in 1993. From 1981 until 1993, Judge Boyko was Assistant Prosecutor and then Prosecutor for the City of Parma, prosecuting a variety of criminal matters for the City. During much of that time, Judge Boyko was the Director of Law for Parma, overseeing the civil litigation in which the City was involved. And, also during that time period, Judge Boyko was engaged in private practice with his father and brother at the firm of Boyko and Boyko. There are only a few attorneys in Ohio who are willing

to tackle this kind of a diverse practice -- engaging in a private practice, acting as a prosecutor, and representing a local government, all at the same time.
I think this is a real testament to Judge Boyko's work ethic, not to mention the vast legal experience he gained from this type of practice earlier in his career.

Finally, I just want to mention the broad bi-partisan support Judge Boyko has in Cuyohoga County. I have a number of letters here from prominent Ohio Democrats, which I'll submit for the record without objection. Let me just read to you from a few of those letters:

Jimmy Dimora, the Chairman of the Cuyahoga County Democratic Party, wrote to Senator Leahy:

> "I am recommending that Judge Chris Boyko be confirmed for appointment as Federal District Judge.... He is fair and open-minded with a commitment and dedication to the law. His high ethical standards

> and judicial temperament will be useful on the federal bench -- with experience and a background to match.... If any Republican deserves Democratic support, Judge Boyko does."

George Forbes, President of the Cleveland Chapter of the NAACP, wrote to Senator Daschle:

> "Judge Boyko has not only served with distinction on the Court of Common Pleas, but is a person of fairness, integrity, keen knowledge of the law and possesses the judicial temperament to execute the duties of a federal judge in a fair and impartial manner.... I can say without reservation that Judge Boyko would make an excellent judge."

Russell Tye, President of the Norman S. Minor Bar Association, the largest African-American Bar Association in the State of Ohio, wrote to Senator Leahy:

> "Judge Boyko has always been honest, fair and a man of great integrity.... Judge Boyko is a very learned judge who has certainly mastered the art of always following the law and carefully applying it with judicial discretion and fairness."

Tony George, who describes himself as "a Kerry delegate, lifelong Democrat, Teamster member, and Ohio businessman" wrote to Senator Feingold:

> "I have known Judge Boyko for over 15 years and he has built a reputation for integrity, fairness, and professional competence. Although he is a Republican nominee of President Bush, he finds as much favor among Democrats as he does Republicans. His non-partisan approach to judging and politics has earned him extensive bi-partisan support."

I have other letters of support here from people like Dennis White, the Chair of the Ohio

Democratic Party; Dean DePiero, the Democrat Mayor of the City of Parma; Loree Soggs, the Executive Secretary of the Cleveland Building and Construction Trades Council; and many others.

I recognize that the Committee is considering this nominee in an election year. But, I'd encourage the Members of this Committee to seriously consider Judge Boyko on the merits. I believe he is an excellent nominee, and I hope any political considerations can be set-aside, especially given Judge Boyko's strong support from Ohio Democrats.

Statement of Senator Orrin G. Hatch, Chairman

Before the Committee on the Judiciary
United States Senate

On the Nominations of
Christopher A. Boyko, United States District Court for the Northern District of Ohio, and
Beryl Alaine Howell, United States Sentencing Commission

September 22, 2004

Today the Committee has the honor of considering the nominations of two outstanding individuals: Christopher Boyko, our nominee for the Northern District of Ohio, and Beryl Howell, a former staffer of this Committee, nominated to the United States Sentencing Commission. I commend the President for selecting such fine nominees for these posts, and I look forward to their testimony.

Judge Boyko has distinguished himself as one of Ohio's best judges through his tenure on the Court of Common Pleas in Cuyahoga County and Parma Municipal Court.

Prior to his appointment to the bench, Judge Boyko built a successful private law practice, which he coupled with his duties as assistant prosecutor, prosecutor, and director of law for the city of Parma. He also served as the legal advisor to the local police department's S.W.A.T. team, as a statutory legal counsel for the Parma School District, and as chief legal counsel for the Southwest Enforcement Bureau.

Judge Boyko's broad bipartisan support is another indication that he is clearly qualified to sit on the federal bench. I'd like to highlight just a few of the many letters sent to this Committee regarding the character and experience of this fine nominee.

The Chairman of the Cuyahoga County Democratic Party, Jimmy Dimora, said of Judge Boyko, "Although [he] has always run as a Republican, I want all the Democratic members of the United States Senate Committee on the Judiciary to know that he has always been fair to Democrats here locally. ... He is fair and open-minded with a commitment and dedication to the law. His high ethical standards and judicial temperament will be useful on the federal bench—with experience and a background to match."

Tony George, a self-identified "Kerry delegate, lifelong Democrat, Teamster member, and Ohio businessman," has known Judge Boyko for more than 15 years. He "strongly" urges this Committee to move quickly to confirm Judge Boyko. He says of Judge Boyko, "He has built a reputation for integrity, fairness and professional competence. ... [He] is more interested in justice than toeing the party line."

Avery Friedman, Chief Counsel of the Fair Housing Council of Northeast Ohio, says it is "with much enthusiasm" that he supports this nominee. Mr. Friedman notes that Judge Boyko, "has had a lifetime professional commitment to civil rights. As a recipient of the Freedom Award, the NAACP's highest local honor, and as a recipient of the 2004 Legendary Champion of Civil Rights Award given by the Southern Christian Leadership Conference, I write you with not only thirty years of experience in federal civil rights prosecution, but also with the specific knowledge of this unique candidate." He closes his letter by urging that Judge Boyko, "be given a swift confirmation."

Let me just also say that the ABA Committee has recognized this seasoned nominee with a unanimously "Well Qualified" rating. In addition, he has received Martindale-Hubbell's highest rating of "AV". He has the distinction of having been elected to Who's Who in American Law (1994-2004), and the Judicial Candidates Rating Coalition, unanimously gave him an "Excellent" rating for 2004.

I think my colleagues will all agree that with his impeccable credentials, reputation and experience, Judge Boyko will make an excellent addition to the Northern District of Ohio.

I am also pleased to introduce one of our own, Beryl Howell. Ms. Howell currently serves as the Managing Director and General Counsel for the D.C. office of the consulting firm Stoz and Friedberg, where her practice focuses on legislative and strategic solutions for computer-based risks. Prior to joining her current firm, she worked for Senator Leahy as General Counsel of this Committee. During her tenure here, she worked on many significant pieces of legislation including the USA PATRIOT Act, the Freedom of Information Act, the Homeland Security Act, amendments to the Computer Fraud and Abuse Law, and the Digital Millennium Copyright Act.

From 1987 to 1993, Ms. Howell distinguished herself as one of the finest attorneys in the U.S. Attorney's Office for the Eastern District of New York. She began as an Assistant United States Attorney and was later promoted to Deputy Chief of the Narcotics Section. She prosecuted some interesting cases, including many RICO violations, drug smuggling and human trafficking operations, money laundering rings, and a conspiracy to break members of a Columbian drug cartel out of jail.

From 1985 to 1987, Ms. Howell was an associate at the law firm of Schulte Roth & Zabel in New York City, where she was involved in insurance and securities fraud litigation. Immediately after law school, she served as a law clerk to the Honorable Dickinson R. Debevoise, U.S. District Judge for the District of New Jersey. She received her B.A. from Bryn Mawr College with honors, and her J.D. from Columbia University School of Law, where she was a Harlan Fiske Stone Scholar. Ms. Howell's knowledge and experience will make her a valuable addition to the U.S. Sentencing Commission.

LIABILITY FOR CYBER-SECURITY: IS IT TIME TO GET OFF THE SOAPBOX?

FOR PANEL ON CYBER SECURITY LIABILITY – A GROWING LEGISLATIVE TREND
ABA ANNUAL MEETING, ATLANTA, GEORGIA
August 8, 2004
By Beryl A. Howell[1]

Our enormous dependence on computer systems and networks means that damage from malicious insiders or outsiders, or failures in the systems themselves, can result in significant losses. Even if the system software and hardware work as intended or designed, sloppy design and lax system administration creates vulnerabilities that are easily exploitable by malicious actors. Allocating who will bear the cost of those losses, and when the cost burden will be shifted from the victim to others, is a time-honored way in our legal system to force change and focus attention and resources on fixing perceived problems.

Policy makers and legislators are regularly bombarded with statistics on the scope of the cyber security problem, with billions of dollars of losses mounting each year. From the vantage point of investigating cyber security incidents, my firm regularly sees the economic harm to businesses caused by cyber security breaches, as well as how frustrating and distracting such incidents can be for the senior management at Fortune 500 companies.

In one recent case solved by my firm earlier this year, a publicly traded company was the victim of a two-year e-mail harassment campaign in which their clients were sent e-mails with obscene attachments and derogatory information about the company. As those clients started taking their business elsewhere, the FBI was brought in but was unable to identify who was sending the e-mails, or even whether the e-mails were being sent by a person acting alone or a group of people.

Tracking the perpetrator was no easy matter since he used several methods simultaneously to hide his identity: he spoofed the e-mail address to make the e-mails appear to come from senior executives within the company; he hi-jacked AOL and Yahoo e-mail accounts with stolen passwords from authorized users to use to send the spoofed e-mails; and he used open computer labs at universities and unprotected wireless access points to access the Internet to transmit the e-mails. The e-mail harassment escalated to a multi-million dollar extortion demand made to the CEO of the company, or else the perpetrator threatened to unleash a denial of service attack on the firm's clients to make it appear to come from the company. Using a variety of technical and investigative techniques, we were able to track the culprit, and he pleaded guilty in Federal court earlier this summer to violations of the Computer Fraud and Abuse statute. While the victim did not seek redress from the university through which the perpetrator launched his attack, it seems only a matter of time before such a suit is brought on the theory that lax security, i.e. negligence, by the "innocent" entity in the middle made the attack possible. It seems

[1] The author is the Managing Director and General Counsel of the Washington, D.C. office of Stroz Friedberg, LLC, a technical services and professional consulting firm specializing in digital forensics and cyber security investigations. She previously served as the General Counsel on the U.S. Senate Judiciary Committee for Senator Patrick J. Leahy (D-VT).

unlikely that corporate victims would ever bring such suits against homeowners on the same theory, even though many recent, major distributed denial of service attacks against corporate targets are being launched by co-opting thousands of such unsecured home machines and using them as "zombies" that attack the corporate target at a specified time.

In the course of this investigation, we saw multiple forms of physical and cyber security vulnerabilities that allowed this criminal to steal confidential data, not just from hacking into the company's computer network by using obsolete but still viable authentication passwords, but also by "Dumpster Diving" – or physically going through the company's unsecured trash bins. He used multiple wireless routers that consumers are setting up in their homes without changing the default settings to secure access and log users, and insecure computer labs at local universities. The defendant was deftly able to exploit multiple vulnerabilities for criminal purposes, and the question we consider today, is how the law should be used to promote more secure networks so cyber criminals do not have such an easy playing field.

At the Federal level, the policy has been to provide incentives for, rather than mandates on, the private sector to improve cyber security. Criminal and civil liability has been reserved for malicious actors, who may be pursued by either injured parties or government agents. One cyber security expert has called the federal approach the "soapbox strategy," which involves "warning of the urgency of the problem, urging hardware and software manufacturers to make more secure products, and cajoling owners and operators of critical business networks and utilities to devote more attention and resources to their own cyber security."[2] Rather than imposing any affirmative obligation on manufacturers, owners or operators of computer systems to take responsibility for cyber security, they have been shielded from liability that might serve as an incentive to take action. As one commentator noted, "Rather than increasing accountability of manufacturers or consumers, the government has ... shielded manufacturers from liability for harm arising from software failure."[3]

Discussed below are three fairly recent examples reflecting this federal policy.

Y2K Act. Five years ago, when people across the country were worried about Y2K computer failures, the response of the Congress was to pass a liability limiting law that created special procedural hurdles for plaintiffs who claimed either actual or potential computer failures that caused harm before January 1, 2003; preempted state consumer protection laws; capped punitive damages; and limited liability for any potential Y2K failures, no matter how much harm or injury was foreseeable or caused.[4] Opponents, who were concerned that this law promoted a "don't worry, be happy" mentality instead of providing incentives for software manufacturers to take remedial action and fix the

[2] Michael A. Vatis, Testimony before the U.S. House of Representatives Committee on Government Reform, Subcomm. On Technology, Information Policy, Intergovernmental Relations and the Census, at hearing on "Cybersecurity: The Challenges Facing our Nation in Critical Infrastructure Protection," April 8, 2003, at p. 5-6.

[3] Kevin R. Pinkney, "Putting Blame Where Blame is Due: Software Manufacturer and Customer Liability for Security-Related Software Failure," 13 Albany Law Journal of Science & Technology 43 (2002).

[4] Y2K Act, P.L. 106-37 (July 20, 1999), codified at 15 U.S.C. § 6601, *et seq.*

problems, lost this debate in the Congress.

In fact, the new law had the effect of allowing a software manufacturer to avoid certification of a plaintiff class of software consumers, after the manufacturer cancelled technical support for a software product with a known Y2K defect, rather than repair it.[5] Other plaintiffs who claimed harm from software with Y2K defects also had their suits dismissed for failure to satisfy the new pleading requirements under the Act, or stayed with mandatory referral to alternative dispute proceeding.[6]

CFAA. Y2K may have been a special circumstance, coming once only every 1000 years, but other laws enacted after the Y2K Act similarly re-direct liability for cyber-security failure away from computer software and hardware design vulnerabilities. The Computer Fraud and Abuse Act, ("CFAA"), 18 U.S.C. § 1030, is the primary Federal criminal statute prohibiting multiple forms of computer crime, including computer frauds, viruses, worms, theft of computer data, and hacking. This statute has ridden the wave of concern about cyber security over the past twenty years, with periodic amendments, which have dramatically expanded its reach. Tracking these changes, and in particular, the scope of the civil liability provided in this law, is illustrative of the trends generally at the Federal level.

When this statute was initially added to the Federal criminal code, the CFAA was focused on outside hackers or malicious insiders who obtained unauthorized access to classified information or other information on government computers. The only private data and computers deemed sufficiently important to protect under this new federal law were financial records or credit histories held by financial institutions. There was no civil liability, no specific federal prohibition on damaging computers or stealing data from computers, or any general federal protection for private sector computers.

In the early days of the CFAA, the view of the Congress was generally summed up as follows: "the most effective means of preventing and deterring computer crime is 'more comprehensive and effective self-protection by private business' and that the primary responsibility for controlling the incidence of computer crime falls upon private industry and individual users, rather than on Federal, State, or local governments."[7] The CFAA has been regularly amended to expand the scope of its coverage to virtually every computer connected to the Internet, to provide civil causes of action for violations, and to create new offenses for online extortions, damage or alteration of data by unauthorized users, the theft of data, and the transmittal of damaging worms, viruses or other programs.

One byproduct of the new offenses, in combination with the civil liability, was the use by software consumers of this statute to sue software and hardware manufacturers for

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[5] *Mineral Area Osteopathic Hospital, Inc v. Keane, Inc.*, 192 F.R.D. 589 (N.D. Iowa 2000).

[6] *Lewis Tree Service, Inc. v. Lucent Technologies, Inc.*, 2000 U.S. Dist. LEXIS 12922 (S.D.N.Y.); *Preferred MSO of America-Austin v. Quadramed Corporation*, 85 F. Supp. 2d 974 (C.D. CA 1999).

[7] "*Computer Fraud and Abuse Act of 1986*," Report of Senate Committee on the Judiciary, 99th Cong., 2d Sess., Report 99-432, at p. 3 (Sept. 3, 1986), *citing Report on Computer Crime*; Task Force on Computer Crime, Section of Criminal Justice, American Bar Association, at p. 84, June 1984.

defective or negligently designed products. As one court explained, in allowing a civil suit under the CFAA to proceed against the manufacturer of faulty computer parts, "Congress, grappling with technology that literally changes every day, drafted a statute capable of encompassing a wide range of computer activity designed to damage computer systems – from computer hacking to time bombs to defective microcode."[8]

Following the 9-11 terrorist attacks, the Congress amended the CFAA to increase penalties and protections for government computers. Specifically, in the USA PATRIOT Act,[9] the requirement of a minimum of $5,000 in damage for felony liability was eliminated for attacks against computers used for national security or criminal justice. In addition, the damage from a single attack could be aggregated across many computers to meet the $5,000 damage threshold in other contexts.

In a little-noticed but significant provision of the USA PATRIOT Act, however, the scope of civil liability under the CFAA was limited for software or hardware glitches. Specifically, the statute was amended so that no civil action may be brought under the CFAA for the "negligent design or manufacture of computer hardware, computer software, or firmware." This provision limits the ability of consumers, including businesses, from suing over alleged defects in software or hardware that may have been the source of security vulnerabilities that resulted in loss to the end user.

One commentator acknowledged that, "Admittedly, Congress seems to have intended the CFAA to curb computer fraud and abuse resulting from unauthorized computer use. Removing manufacturer liability is faithful to the original purpose." Nevertheless, "the unfortunate result was to foreclose an opportunity for software manufacturers to be held liable for defective programming."[10]

What Congress giveth, the Congress may taketh away. Some prominent cyber-security experts are calling for software manufacturers to be held accountable and liable for security failures. Richard Clarke, the former chairman of the President's Critical Infrastructure Protection Board has called upon the government and software consumers to hold vendors accountable for the security of software products.[11]

CII Act. Other recently enacted federal laws continue this incentive and liability limiting approach. For example, the Critical Infrastructure Information Act, passed as part of the Homeland Security Act in 2002,[12] granted special protections to

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[8] *Shaw v. Toshiba America Information Systems, Inc.*, 91 F. Supp. 2d 926, 937 (E.D. Tx 1999); *North Texas Preventive Imaging, L.L.C. v. Eisenberg*, 1996 U.S. Dist. LEXIS 19990 (C.D. Cal. Aug. 19, 1996) (finding that plaintiff had stated claim under § 1030(a)(5)(A) where disk manufacturer had provided plaintiff with defective disks that were programmed to render software inoperable on a specific date); *In re AOL Version 5.0 Software Litigation*, 168 F. Supp. 2d 1359 (S.D. Fl. 2001)(plaintiffs consumers stated claim under CFAA for injury from defendant's defectively designed and/or unreasonably dangerous software installation process).

[9] USA PATRIOT Act, P.L. 107-56 (Oct 26, 2001).

[10] Pinkney, *supra* n. 3, at p. 65.

[11] Dennis Fisher, "Clarke: Hold Developers Accountable for Software Insecurity," eWeek, May 14, 2004, http://www.eweek.com/article2/0,1759,1592963,00.asp.

[12] The Homeland Security Act, P.L. 107-296 (November 25, 2002)("HSA"), title II, subtitle B.

information voluntarily submitted, either orally or in writing, by businesses to any federal government agency that is marked as "critical infrastructure information" ("CII"). This law was intended to make moot the excuses that businesses used to explain their reluctance to share with the government information about cyber-security vulnerabilities and security risks to systems supporting energy, banking, telecommunications, transportation, and other vital services, most of which are owned and controlled by the private sector.

The CII Act gives this private sector CII information more protection than classified national security information. CII information is exempt from FOIA disclosure, exempt from rules barring submission of *ex parte* materials to decision-makers in regulatory proceedings, exempt from Federal Advisory Committee Act rules, and exempt from disclosure to Congress. Criminal penalties apply to any government worker who discloses CII-marked information. Moreover, CII-marked information may not be used directly in any civil action, even against persons other than the submitter, without the submitter's consent. What this means is that when information that has or may have been submitted as CII-marked information, is used in a regulatory or enforcement action or in a civil suit, a party may litigate whether the source of information is the CII-marked information or independently obtained, before it may be used against the party.[13] This could potentially complicate litigation, depending on how much companies take advantage of the ability to submit CII-marked information to the government.

Right now, the CII-marked submissions have been "underwhelming" with only six submissions made between January and May of this year.[14] If this experiment with voluntary submissions to the government of cyber-security vulnerabilities is not successful, despite the myriad of protections extended to the submissions, the government may strike the permissive "may" used in the law and mandate disclosure.

CALIFORNIA LAW. Against the backdrop of Federal law limiting liability for software security-related vulnerabilities, California has taken the lead to shift the burden of security risks to those owning and operating computer systems and networks. This new California law became effective one year ago. It was enacted a few months after a hacker obtained the personal information of over 200,000 state employees from a government system housing payroll information, and in the context of increasing consumer complaints about identity theft.

Under Bill 1386, companies that hold any computerized personal information of California residents – whether or not the company itself is located in California – must take steps either to encrypt this personal information or adopt, as part of an information security policy, certain notice and disclosure procedures for any computer security breaches– whether or not the breach occurs in California. Noncompliant companies are subject to civil suits, including class actions, for damages and injunctive remedies in

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[13] HSA, section 214(a)(1)(C).

[14] William Jackson," Response slow to DHS protected info sharing," May 24, 2004, GCN Staff. >http://www.gcn.com/vol1_no1/security-policy/26030-1.html.

California courts. One commentator observed that, "in forcing companies to come clean, the California law takes the opposite approach of the Bush Administration's emerging cyber security policies, which encourage secret disclosure to government officials, rather than public warnings."[15]

The mandatory disclosure requirements are triggered by a broadly defined "breach of the security of the system." Such a breach covers any situation where there is a reasonable belief that there has been an "unauthorized acquisition of computerized ... personal information maintained by the person or business." Disclosure of the security breach must be "in the most expedient time possible and without unreasonable delay, consistent with the legitimate needs of law enforcement ... or any measures necessary to determine the scope of the breach and restore the reasonable integrity of the data system." Reporting of breaches to law enforcement agencies would allow companies to delay the required disclosure to affected customers.

TRENDS. The liability limitations imposed at the federal level may only be a Pyrrhic victory for software and hardware manufacturers since States are taking the opportunity to provide consumer and business protection in a patchwork of regulatory enforcement actions and new laws, such as the California mandatory disclosure law. New York Attorney General Eliot Spitzer applied the State's unfair practices law in a recent enforcement action against Victoria's Secret for data leakages at its Web site. This type of suit is also available to the Federal Trade Commission in enforcement actions against companies that claim to observe security as part of their privacy policies but then allow data leakages through sloppy practices, as violations of Section 5 "Unfair and Deceptive Practices." The FTC has brought and settled unfair trading practice actions against Microsoft and Eli Lilly and Company for misleading consumers and not having sufficient security measures in place to fulfill promises to customers about the security and privacy of their data.[16]

At the Federal level, the consumer pressure for improved privacy protection may also be forcing a new trend. The Senate Judiciary Committee held a hearing late last year on a Federal version of the California mandatory disclosure law, called S. 1350, the Notification of Risk to Personal Data Act, S. 1350.[17] This bill would require Federal agencies, and persons engaged in interstate commerce, in possession of electronic data containing personal information, to disclose any unauthorized acquisition of such unencrypted information by notifying the persons whose personal information was affected. Failure to provide the required disclosures and notification may be penalized with fines. Unlike the California law, enforcement is left to the FTC and State Attorney Generals, rather than private causes of action. This bill would preempt similar state laws,

[15] Kevin Poulsen, Security Focus, Jan. 6, 2003.

[16] FTC Press Release, Eli Lilly Settles FTC Charges Concerning Security Breach, Jan. 18, 2002, http://www.ftc.gov/opa/2002/01/elililly.htm; Microsoft settlement of FTC complaint that the company falsely represented that it employs reasonable and appropriate measures to maintain and protect the privacy and confidentiality of consumers' personal information collected through its Passport and Passport Wallet services, including credit card numbers and billing information stored in Passport Wallet, http://www.ftc.gov/opa/2002/08/microsoft.htm.

[17] "Database Security: Finding Out When Your Information Has Been Compromised," Hearing Before the Senate Judiciary Subcommittee on Terrorism, Technology and Homeland Security on November 4, 2003.

except for California's SB 1386.

Other pending bills, the Software Principles Yielding Better Levels of Consumer Knowledge, or SPY BLOCK, Act (S. 2145), and the Securely Protect Yourself Against Cyber Trespass Act, or "SPY ACT" (H.R. 2929) would require disclosure to computer users of certain computer software features that may pose a threat to user privacy.

Computer security experts do not think that the "soapbox strategy" is working and argue that more is needed to change the legal, policy and economic environment to improve cyber security without imposing burdensome regulations that would put at risk technological advances. Approaches that have been suggested include:

- tax incentives to increase network security expenditures;
- requiring distribution of computer software and hardware with the most secure default settings activated;
- legislation that creates liability on manufacturers or network operators for negligent actions or omissions that harm others; and
- requiring disclosures by public companies of potential cyber risks or actual security breaches in their annual Form 10-K disclosure.[18]

It is only a matter of time before federal policy makers get off the "soapbox" and start legislating more aggressive measures. It is then that cyber security investigators will have to be vigilant to ensure that important self-help and self-defense tools and methods, which are helpful in detecting, tracking, identifying, monitoring and apprehending malicious insiders or outside hackers, are not unduly hampered by legal restrictions or mandated security measures that can make these tasks more difficult. Over-broad legislative or policy fixes implemented to protect privacy or security may risk throwing out the proverbial baby with the dirty bath water at a time when companies victimized by computer crime often turn to private firms for help, when law enforcement agencies are otherwise engaged in fighting terrorism.

[18] M. A. Vatis, *supra* n. 2

SURVEILLANCE POWERS IN THE USA PATRIOT ACT: HOW SCARY ARE THEY?

City of Philadelphia Law Department, Continuing Legal Education Program

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By Beryl A. Howell[1]

"Conventional wisdom" holds the USA PATRIOT Act[2] is a prime example of government over-reaching in times of national security crises. This law is not perfect, but few are, and after a decade of service on the Senate Judiciary Committee, I have seen the passage, both before and after the USA PATRIOT Act, of more seriously flawed laws, which nonetheless have not generated the same ferocity of grass-roots opposition. In fact, Philadelphia is one of over 250 other cities and communities to pass a resolution calling upon its congressional representatives to repeal the law.[3] This resolution, and others passed around the country, cite the following four examples of expanded surveillance powers that raise concern:

(1) Limiting judicial supervision of telephone and internet surveillance;

(2) Granting law enforcement and intelligence agencies broad access to sensitive medical, mental health, financial, and educational records with little, if any, judicial oversight;

(3) Expanding the government's ability to conduct secret searches of individual's homes and businesses, including monitoring books bought from bookstores or borrowed from libraries; and

(4) Limiting the disclosure of public documents and records under the Freedom of Information Act (FOIA).[4]

This litany of horrors is downright scary, but just how scared we should be requires a careful parsing of how the USA PATRIOT Act actually changed the law and the underlying reasons for the changes. This essay is not intended to be an exhaustive review of the USA PATRIOT Act, but a brief discussion of the provisions that may have prompted each of the four examples cited in the City's resolution.

At the outset, however, I want to address three myths surrounding this law:

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[1] The author is the Managing Director and General Counsel of the Washington D.C. Office of Stroz Friedberg, LLC, a professional consulting and technical services firm specializing in the forensic preservation, acquisition and examination of digital evidence. During 2001, she served as the General Counsel of the Senate Committee on the Judiciary for Senator Patrick Leahy (D-VT), who was then the Committee's Chairman.

[2] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 Pub. L. No. 107-56, 115 Stat. 272 (2001).

[3] Resolution against the USA PATRIOT Act and Other Executive Orders for the City of Philadelphia, Pennsylvania, passed by Philadelphia City Council, by a vote of 13-3, on May 29, 2003.

[4] *Id.*, at seventh "Whereas" clause.

MYTH ONE: Congress was just a rubber-stamp giving the Ashcroft Justice Department and the Bush Administration every new power for which they asked. To demonstrate its legislative prowess, the Administration has encouraged this myth. Yet, the Administration did *not* get everything it asked for; at the same time it got a lot it never asked for or wanted. In fact, the Department of Justice contributed only about *one-third* of the provisions that became the USA PATRIOT Act, and that one-third was significantly modified from what the Attorney General presented in draft form to the Congress.[5] While the parts of this law that have proven the most controversial come from the one-third originally proposed by the Administration, Congress supplied most of the substantive provisions, including a sunset on many of the surveillance provisions, the anti-money laundering title, provisions increasing resources for security on the Northern Border, increasing the number of translators at the FBI and practical steps for improving coordination among law enforcement personnel at different levels of government.

MYTH TWO: The Congress short-circuited the normal legislative processes to pass the Administration's proposals without any public hearings. The process for passage of the USA PATRIOT Act was not perfect but to say there were no public hearings is incorrect. While the bill was not "marked up" or formally reported by the Senate Judiciary Committee, a version of the bill was debated, amended and "marked-up" in the House Judiciary Committee. Bills are often only marked up in a committee of one House, rather than both Houses, of Congress. The House Judiciary Committee held a hearing on the bill; the Senate Judiciary Committee and its subcommittees held three hearings on the bill before its passage; and the Senate Banking and Intelligence Committees each held hearings on parts of the bill. In total, at least six hearings were held on parts of the bill that became law. Indeed, despite the criticisms about the legislative process, this bill received more public hearings and attention from multiple committees in the Senate than many bills *ever* get before passage and certainly more than the Administration wanted.

The Administration wanted the bill passed immediately, without any hearings. Even before the Justice Department had provided a draft bill, the Attorney General publicly demanded that Congress pass the yet-unseen legislation by September 21, 2001. The Attorney General and the Vice President repeatedly set artificial deadlines on Sunday talk shows and the press, with the intended or actual result of making it appear that Congress was moving too slowly. The Administration appeared to look for opportunities to lodge partisan criticism against the Democrats for delaying legislative action and being insufficiently tough on

[5] The USA PATRIOT Act contains 161 substantive sections compared to the 53 sections in the Administration's draft Anti-terrorism Act, which amounts to only about one-third the number of sections in the final law.

terrorism. The New York Times even criticized the Attorney General's "scurrilous remarks" after one outburst when he indicated Senators Leahy and then-Majority Leader Daschle were being obstructionists.[6]

The complaints about the abbreviated legislative process for consideration of the USA PATRIOT Act are somewhat ironic since there were some brave Members from both parties who stood up to the Administration, at their own political peril, and made clear the legislation would be reviewed and public hearings would be held before the bill would be passed. Senator Leahy was one of them and paid for it by being called in the conservative press "Osama's Enabler in Congress."[7]

MYTH Three: The USA PATRIOT Act is to blame for a panoply of controversial civil liberties actions taken by the Administration. This law has been the fly paper catching much of the blame for many of the controversial actions raising serious constitutional and civil liberties concerns that were taken by the Administration and the Justice Department after 9-11. Many of these unilateral, executive branch actions were taken in the few short months after the new law was enacted at the end of October 2001, and became indelibly linked in the public perception to passage of the new law. It may come as a surprise that the following actions have NOTHING to do with -- and were not in any way authorized or addressed in -- the USA PATRIOT Act:

- Authorizing the use of military tribunals for combatants captured on the battlefield and for American citizens arrested in the United States;
- Not allowing certain U.S. citizens arrested on American soil to have access to lawyers;
- Detaining hundreds of immigrants for indeterminate periods and refusing to disclose the numbers to anyone, including congressional oversight committees;
- Arresting some unknown number of people, including citizens, and holding them for indeterminate amounts of time as "material witnesses;" while refusing to disclose the numbers, locations or names of these persons to anyone, including congressional oversight committees; and
- Issuing new administrative rules authorizing eavesdropping on attorney-client privileged communications of detained persons;
- Modifying long-standing Attorney General guidelines restricting FBI surveillance activities at churches, mosques and other public meetings and allowing much broader surveillance of

[6] Editorial, *Toward a Balanced Terrorism Bill*, N. Y. Times, Oct. 4, 2001, at A26.
[7] Edward Walsh, Wash. Post, "Civil Liberties Defender Picks His Fights," December 6, 2001, at A37 (citing "the headline 'Osama's Enabler in Congress,' [in] the conservative magazine Human Events this week").

> public meetings, wherever they may be held, including in denominational and nondenominational settings, such as parades.

This law may have become controversial even before it was on paper, when the Administration focused attention immediately following the 9-11 terrorist attacks on perceived shortcomings in the law. Every Administration, when tragedies strike, is adept at blaming the state of the law and running to Congress for legislative changes. This is much easier than undertaking the time-consuming and sometimes embarrassing task of identifying any management, personnel, resource or other factors that may have contributed to the incident. At the same time, pushing for legislation in the aftermath of a tragic incident heightens skepticism about whether the legal changes are necessary or responsible, since this is the most difficult time for the Congress to say "no" to any law enforcement and national security measure. In addition, prematurely legislating before an opportunity for a full accounting of what actually went wrong makes it difficult to defend the legislation as a targeted approach to fix an identified problem.

The antidote to this skepticism about the USA PATRIOT Act was inclusion of a sunset provision requiring the most controversial surveillance provisions to lapse at the end of 2005. The sunset was intended to provide an incentive to the Justice Department to cooperate with the Congress in evaluating whether the surveillance powers were needed and effective in fighting terrorism and to be careful about avoiding abuses. The FBI understands the point of the sunset. FBI field guidance issued after passage of the USA PATRIOT Act on use of administrative subpoenas, called National Security Letters ("NSL"), in foreign intelligence gathering investigations, advises agents that:

> "[NSLs] must be used judiciously. The USA PATRIOT Act greatly broadened the FBI's authority to gather this information. However, the provisions of the Act relating to NSLs are subject to a 'sunset' provision that calls for the expiration of those provisions in four years. In deciding whether or not to re-authorize the broadened authority, Congress will certainly examine the manner in which the FBI exercised it."

Set against that background on the myths surrounding the USA PATRIOT Act, the four examples of potentially over-reaching government powers contained in the law are discussed below.

(1) Limiting judicial supervision of telephone and internet surveillance.

The legal rules governing federal government surveillance are generally found in two places, depending on the type of investigation. Chapters 119 and 121of the Federal criminal code deal with electronic surveillance to gather evidence in criminal investigations; and the Foreign Intelligence Surveillance Act deals

with gathering evidence in foreign intelligence, espionage and international terrorism investigations. The USA PATRIOT ACT made changes in the rules governing electronic surveillance in both types of investigations.

The changes to the statutory authority governing electronic surveillance in criminal investigations largely reflected codifications of pre-existing case-law or practice, clarified the authority that law enforcement was already exercising without clear guidance and, in some ways, actually increased privacy protections. That being said, the changes made were not perfect and could have been improved from a privacy protection and Fourth Amendment standpoint – but the legislative process is not a solitary one. Legislating is a messy process where the perfect is often sacrificed, or compromised, for the better.

The electronic surveillance changes that have garnered the most controversy were those made to the pen register statute, and the new computer trespass exception to the wiretap law. I will talk briefly about each of those provisions.

Pen Register Devices. Pen registers are devices that track the numbers (not the content) of all outgoing calls on a telephone or, when applied to Internet communications, collect addressing information on emails or header information on data packets showing where on the Internet a user is going. The USA PATRIOT Act made two significant changes to the pen register law: (1) nationwide effect was given to pen register and trap and trace orders obtained by Government attorneys, obviating the need to obtain identical orders in multiple Federal jurisdictions; and (2) the language was updated to clarify that pen registers may be used for computer transmissions to obtain electronic addresses.

Despite the controversy, neither of these amendments changed what prosecutors or investigators could do already. Prosecutors have been able for years to get a pen register in one district for targets in an entirely different district. Furthermore, updating the language of the pen register statute, which used archaic language like having a pen register or trap and trace "device" being "attached" to a telephone "line," so that it clearly applied to Internet communications was also nothing new. Investigators have been using the pen register statute to do surveillance on the Internet for years.

This does not mean the changes to the pen register were perfect. New terms – "routing," "addressing" and "signaling"—were added to the statute to describe the Internet application but were not defined. The Justice Department refused to provide definitions for these new terms, prompting concern that pen registers might be used to intercept the content of communications online, even though content may be captured only upon a showing of probable cause, not the mere relevancy standard of the pen register statute. Absent definitions of the new terms, Congress added an explicit prohibition on the interception of "content."

In addition, the law imposed a new restriction on law enforcement's unauthorized disclosure of information obtained from the use of pen register and trap and trace devices. Specifically, any willful disclosure of such information that is not made in the proper performance of the official functions of the officer is punishable.[8] Finally, the USA PATRIOT Act added a new reporting requirement on the government's use of devices that monitor the addressing information in Internet communications.[9]

In terms of judicial review, the pen register statute *both before* and *after* the USA PATRIOT does not provide for any meaningful judicial review on whether the pen register and trap and trace devices are being used appropriately. Existing law requires an attorney for the government to certify that the information likely to be obtained by the installation of a pen register or trap and trace device will be relevant to an ongoing criminal investigation. The court is required to issue an order upon presentation of the prosecutor's certification. The court is not authorized to look behind the certification to evaluate the judgment of the prosecutor. Senator Leahy has urged that government attorneys be required to include facts about the investigations in applications for pen/trap orders and allow courts to grant such orders only where the facts support the relevancy of the information likely to be obtained by the orders. This is not a change in the applicable standard, which would remain the very low relevancy standard. Instead, this change would simply allow the court to evaluate the facts presented by a prosecutor, and, if it finds that the facts support the government's assertion that the information to be collected will be relevant, issue the order. The Justice Department has resisted this change, and it was not made in the USA PATRIOT Act.

Computer Trespasser. The USA PATRIOT Act provided a new exception to the wiretap law to allow government wiretaps where the owner or operator of a computer may give consent to law enforcement to do wiretap surveillance on unauthorized persons on the system. This was intended to allow law enforcement to help victims, whose computers are being used by a hacker as a means for the hacker to reach a third computer, such as in denial of service attacks. Since the victim is not a party to the "communication," he or she could not, without this change, simply consent to law enforcement monitoring of the computer. This legal anomaly had the perverse consequence that providers were sometimes forced to sit idly by as hackers entered and, in some situations, damaged their systems and networks while law enforcement was

[8] USA PATRIOT Act, at § 223 (amending 18 U.S.C. § 2707(g)). One commentator has noted, "During the congressional negotiations, pro-privacy legislators managed to insert language that limits the disclosure of information obtained through [the use of pen register and trap and trace devices] to disclosures made 'in the proper performance of the official functions of the officer or governmental entity making the disclosure.'" Orin S. Kerr, *Internet Surveillance Law After the USA Patriot Act: The Big Brother That Isn't*, 97 Nw. U. L. Rev. 607, 640 (2003) (quoting 18 U.S.C. § 2707(g)).

[9] 18 U.S.C. § 3123(a) (3) (A) (West Supp. 2003).

distracted by the detailed process of seeking a wiretap order to assist them.

The computer trespass provision limits use of the new consent authority so that an Internet user who violates a workplace computer use policy or online service contract— and is thereby an "unauthorized" user – may not be wiretapped without a court order. In the USA PATRIOT Act, the Congress limited the authority for consensual wiretapping of the communications of unauthorized users to exclude users with an existing subscriber or other contractual relationship with the owner/operator. This limitation was not in the Administration's proposal. Furthermore, even absent a contractual relationship, the Justice Department has indicated that consensual monitoring "would not be allowed in the case of a person using a system with permission. Thus, a library terminal user permitted to use the library's system would by definition not be 'without authorization,' and could not be monitored under the authority of the new provision. Similarly, employees or students who are using computer systems with the permission of their employer or university would likewise have 'authorization' within the meaning of the statute."[10]

In short, the computer trespasser provision updated the wiretap statute to provide authority for owners and operators of computer systems victimized by sophisticated computer hackers to call upon law enforcement for expeditious assistance in tracking the perpetrator.

FISA Changes. The authority of the government to conduct electronic surveillance under the Foreign Intelligence Surveillance Act (FISA) was expanded in the USA PATRIOT Act by, *inter alia*, increasing the duration of FISA wiretaps, allowing roving wiretap authority, and, most significantly, changing the standard for use of FISA authorities to allow use where a "significant purpose" (rather than the primary purpose) is to obtain foreign intelligence information. At the same time, the law retained the requirement of judicial review of FISA applications and court orders to use pen registers, trap and trace devices, wiretaps, and to compel production of documents, as well as the requirement that FISA surveillance be directed only at foreign powers and agents of foreign powers to collect foreign intelligence information. The Administration sought more expansive changes in FISA authority than the Congress granted in the USA PATRIOT Act and unsuccessfully resisted the sunset provision that applies to virtually all of the FISA surveillance changes.

(2) Granting law enforcement and intelligence agencies broad access to sensitive medical, mental health, financial, and educational records with little, if any, judicial oversight.

The USA PATRIOT Act has been strongly criticized for expanding government authority to access

[10] Letter, dated November 29, 2001, from Daniel J. Bryant, Assistant Attorney General, to Senator Leahy.

sensitive personal records with limited or no judicial oversight. Three points are significant to provide the context for a fair evaluation of this criticism.

First, the Administration asked Congress during negotiations over the USA PATRIOT Act to eliminate any judicial review and court order requirement to obtain tax and education records, and business records under FISA. The Congress said "no" to all three of these requests. Consequently, the USA PATRIOT Act does not contain the Administration's proposal to allow the Secretary of the Treasury to make discretionary disclosures of tax return information to state and federal law enforcement and U.S. intelligence agencies. In addition, this law requires the Attorney General to obtain a court order to obtain records from an educational institution, upon an application certifying that "there are specific and articulable facts giving reason to believe that the education records are likely to obtain information" relevant to an authorized investigation or prosecution of a terrorism offense or an act of domestic or international terrorism.[11] Finally, the law retains the requirement under FISA for the government to obtain an order from the FISA court to compel production of records in connection with a foreign intelligence investigation.[12]

Second, while the USA PATRIOT Act retained the court order requirement to obtain records under the FISA, other criteria for obtaining records were relaxed. The FISA originally limited the types of records that could be obtained in FISA investigations, even those involving serious national security risks with foreign spies and international terrorists, to four categories of businesses: common carriers, public accommodation facilities, physical storage facilities and car rental facilities.[13] By contrast, in grand jury investigations involving run-of-the-mill criminal activity, prosecutors and federal agents may compel production with a grand jury subpoena of any non-privileged testimony, document or tangible item, without limitation to any category. The USA PATRIOT Act expanded the FBI's authority to obtain third-party records with a FISA court order by eliminating the limitation to only four categories of businesses. Now, the government may follow the investigation where it may lead, just as in grand jury investigations, but (unlike grand jury investigations) subject to strict FISA court supervision.

It is important that our law enforcement agencies are able to follow critical leads where they need to go, even if that means into our libraries. We certainly do not want our libraries to become a known safe haven for terrorists while the FBI is barred from the door.

At the same time, it is critical to protect the confidentiality of what we read in books or view online

[11] USA PATRIOT Act, section 507.
[12] *Id.*, at section 215.
[13] 50 U.S.C. § 1862(a) (2000).

in our libraries. The USA PATRIOT Act bars use of FISA authority to investigate Americans engaging in activities protected by the First Amendment, and imposes reporting requirements on use of FISA orders to obtain records.

Some critics blame this provision (section 215) for increased surveillance of libraries. The Justice Department has confirmed that the FBI has "*sought information from libraries. For example, various offices followed up on leads concerning e-mail and Internet use information about specific hijackers from computers in public libraries.*"[14] But the FBI has told Senator Leahy that, "*Information has been sought from libraries on a voluntary basis and under traditional law enforcement authorities not related to [FISA] or the changes brought about by the USA PATRIOT Act.*"[15] The FBI has acknowledged that a FISA order "*could conceivably be served on a public library*" but said that "*if the FBI were authorized to obtain the information the more appropriate tool for requesting electronic communication transactional records would be a National Security Letter (NSL),*" which is used to obtain from ISPs "*subscriber name, screen name or other on-line names, records identifying addresses of electronic mail sent to and from the account, records relating to merchandise orders/shipping information, and so on but not including message content and/or subject fields.*"[16]

Finally, as noted above, the FBI uses National Security Letters, or NSLs, to obtain business records in national security-related investigations. NSLs are a form of administrative subpoena, which means they may be authorized by senior FBI personnel without approval from a court or a prosecutor. These subpoenas were created long before the USA PATRIOT Act in three other statutes: the Electronic Communications Privacy Act (ECPA); the right to Financial Privacy Act (RFPA); and the Fair Credit Reporting Act (FCRA). NSLs may be used to obtain only seven types of information for use in foreign intelligence collection and foreign counterintelligence investigations: 1) subscriber information; 2) toll billing records; 3) electronic subscriber information; 4) electronic communication transactional records; 5) financial records; 6) identity of financial institutions; and 7) consumer identifying information. NSLs specifically warn that no officer, employee, or agent of an entity in receipt of an NSL may disclose that the FBI has sought or obtained access to the requested information or records. This so-called "gag order" was part of NSL law long before the

[14] Letter, dated December 23, 2002, from Daniel J. Bryant, Assistant Attorney General, to Sen. Leahy, forwarding Department of Justice responses to written questions at Senate Judiciary Comm. Hrg., *"Oversight Hearing on the Department of Justice,"* July 25, 2002 (answer to question number 14(c).

[15] *Id.*

[16] Letter, dated July 29, 2002, from Daniel J. Bryant, Assistant Attorney General, to Sen. Leahy, forwarding Department of Justice responses to written questions submitted by House Judiciary Committee on June 3, 2002 (answer to question number 12).

USA PATRIOT Act.

The USA PATRIOT Act amended the three statutes that govern NSLs and made it easier for the FBI to use NSLs to get these limited categories of records in investigations to protect against international terrorism or clandestine intelligence activities. To use NSLs, the same standard of "relevance" applies that is used for subpoenas for records in criminal cases, but the limitations on the categories of information remains. Outside of those limited categories of information, the FBI may obtain records in foreign intelligence and international terrorism investigations, only with a court order. The changes made to the NSL laws are also subject to the sunset provision.

(3) Expanding the government's ability to conduct secret searches of individual's homes and businesses.

Based upon an Administration proposal, the USA PATRIOT Act included an amendment allowing a court to delay notice of the execution of a search warrant to search for seize property or material constituting evidence of a criminal offense. Just like conventional search warrants, Federal agents must show that there is probable cause to believe evidence of criminal activity will be found on the premises to be searched in order to obtain a sneak and peek warrant.[17] Unlike conventional search warrants, sneak and peek warrants authorize surreptitious entry to the premises to be searched to gather information, rather than to seize any tangible items, and with delayed notice to the owner of the premises.

These so-called "sneak and peek" warrants were not a novel idea dreamed up by the Bush Administration and the Ashcroft Justice Department. On the contrary, for over a decade before passage of the USA PATRIOT Act, courts had sanctioned the use of sneak and peek warrants, and their use was, if not frequent, fairly routine.[18] Nevertheless, this provision continues to generate significant controversy as a constitutionally suspect departure from the normal notice requirement.[19] The House of Representatives has even overwhelmingly passed an amendment that would bar all funding for use of this provision.[20]

In denying motions to suppress evidence derived from information obtained from sneak and peek

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[17] *Ludwig*, 902 F. Supp. 121, 126-27 (W.D. Tex. 1995) ("the same standard for probable cause applies to all search warrants, whether the property is seized or not").

[18] *See, e.g.*, *United States v. Freitas*, 800 F.2d 1451, 1454 (9th Cir. 1986)["Freitas I"] ("the agents advised the magistrate who issued the warrant of its special nature; and . . . that 'similar warrants' have been issued in other districts, including the Eastern District of California."); *but see United States v. Freitas*, 856 F.2d 1425, 1430 (9th Cir. 1988)["Freitas II"] (court held that district court's decision was not clearly erroneous in finding that prior sneak and peek warrants for storage lockers in Oakland were not similar to such warrant executed at private residence); *see also United States v. Pangburn*, 983 F.2d 449, 452 (2d Cir. 1993)("agents were aware through past experiences of 'sneak and peek' warrants").

[19] *See, e.g.*, Nat Hentoff, No *'Sneak and Peek,'* Wash. Times, Aug. 4, 2003, at A17.

[20] 149 Cong. Rec. H7289-93 (daily ed. July 22, 2003) (Amendment offered by Rep. Otter).

warrants, courts have relied heavily on the government's assertion of exigent circumstances requiring a delay in the notice of execution of the search and the agents' good faith reliance on the warrant.[21] In the absence of statutory guidance on what excuses justify delayed notice and the standard of review that should be applied in reviewing those excuses, courts have relied on stretching the elastic exceptions to the exclusionary rule. From a civil liberties perspective, rather than allow the continued expansion of exclusionary rule exceptions, it is preferable to provide courts with clear guidelines for use of the sneak and peek procedure—and that is what the USA PATRIOT Act provided.

Certainly, some may advocate the outright ban of sneak and peek warrants on the grounds that allowing law enforcement to sneak into premises, without notice, to find evidence of criminal activity that would, in turn, support a conventional search warrant is simply offensive to the inherent principle of notice encompassed by the warrant requirement of the Fourth Amendment. The Supreme Court, however, has made plain that, "covert entries are constitutional in some circumstances, at least if they are made pursuant to warrant. [There is] no basis for a constitutional rule proscribing all covert entries."[22] Sneak and peek warrants are used in circumstances where, despite probable cause for the search, executing the warrant without delayed notice would jeopardize the investigation in specific enumerated ways.

For example, in *United States v. Ludwig*,[23] the government was granted a sneak and peek warrant to search in a self-storage unit in an effort to recover 356 pounds of cocaine that had been stolen from a United States Customs Drug Storage facility.[24] Understandably, if the agents did not find all or any cocaine in the unit, they did not want to tip off the suspect that he had been targeted, which might result in destruction or removal of the cocaine, flight of the suspect and danger to the informant. The district court determined that the officers acted in good faith, and upheld the warrant.

It is easy to envision other scenarios where use of a sneak and peek warrant would be a valuable option for law enforcement. For example, while tracking a suspected kidnapper, law enforcement may want to use sneak and peek warrants to search locations where the suspect may be holding the victim without

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[21] *Freitas II*, 856 F.2d at 1433 (suppression ruling reversed since, despite constitutional defect in sneak and peek warrant due to delayed notice being more than seven days, the surreptitious search did not affect the completion of the crime and was therefore not "prejudicial"). *See also Ludwig*, 902 F. Supp. at 127 ("the good faith exception to the exclusionary rule applies in the instant case and the Court need not reach the issue of probable cause"); *United States v. Johns*, 948 F.2d. 599, 605 (9th Cir. 1991), *cert. denied*, 505 U.S. 1226 (1992) (no suppression was required because "the prosecutor's and magistrate's approval of the illegal provisions of the [sneak and peek] warrant were sufficient to establish objectively reasonable behavior on the part of the officers conducting the search").

[22] *Dalia v. United States*, 441 U.S. 238, 247 (1979).

[23] 902 F. Supp. 121 (W.D. Tex. 1995).

[24] *Id.* at 123-24.

tipping off the suspect that law enforcement has targeted the suspect for surveillance and jeopardizing the life or safety of the victim.

Although the Administration's original proposal ignored key limitations created by the courts for sneak and peek search warrants, the Congress substantially modified the original proposal with restrictions that bar any seizure of tangible items, unless in addition to showing probable cause for the search, the government makes a showing of reasonable necessity for the seizure.[25] In addition, the law expressly prohibits the seizure of "any wire or electronic communication (as defined in section 2510), or, except as expressly provided in chapter 121, any stored wire or electronic information."[26] Senator Leahy also urged that specific time limitations be codified in the law for how long notice of the search may be delayed, consistent with court cases generally allowing delayed notice for only seven days. In the end, this time period of delay was left to the court's discretion depending upon the circumstances.

(4) Limiting the disclosure of public documents and records under the FOIA.

The USA PATRIOT Act contains no new exemptions to the FOIA and no new restrictions on release of records relating to criminal or national security information to the public.[27] Information related to criminal and national security investigations have been subject to FOIA exemptions for many years before passage of the USA PATRIOT Act.[28] In fact, two significant actions that have adversely affected the availability of records under the FOIA have nothing to do with the USA PATRIOT Act. First, the Attorney General, on October 12, 2001, provided guidance to federal agencies on implementation of the FOIA and counseled that no disclosure of a government record should be made whenever an exemption arguably applies. This reversed the policy of Attorney General Janet Reno that discretionary disclosures under the FOIA should be made whenever possible, so long as there is no foreseeable harm from the disclosure. The Justice Department described this change as follows:

> "[T]he Ashcroft FOIA Memorandum establishes a new "sound legal basis" standard governing the Department of Justice's decisions on whether to defend agency actions under the FOIA when they are challenged in court. This differs from the "foreseeable harm" standard that was employed under the predecessor memorandum. Under the new standard, agencies

[25] USA PATRIOT Act, section 213 (amending 18 U.S.C. § 3103a).
[26] *Id.*
[27] Only a single section of the USA PATRIOT Act, section 358, exempts from the FOIA certain reports of the Secretary of the Treasury under the Bank Secrecy Act.
[28] 5 U.S.C. § 552(b).

> should reach the judgment that their use of a FOIA exemption is on sound footing, both factually and legally, whenever they withhold requested information."[29]

Second, the Department of Homeland Security Act, which became law after the USA PATRIOT Act, contained the "Critical Infrastructure Information Act of 2002," or CII Act.[30] The CII Act granted special protections to information marked as "critical infrastructure information" (CII) to encourage the sharing of private sector information with the government to more effectively protect vital national facilities. This new law makes any information marked "CII" and submitted to the government by the private sector exempt from disclosure under the FOIA and any State "sunshine" law. "CII"-marked information may not even be disclosed in a government report. Any federal government employee who does disclose this information is subject to job loss and criminal penalties.[31] The restrictions in the CII Act, in combination with the Attorney General's FOIA implementation policies, are more likely culprits for any reduction in public access to government records under the FOIA than the USA PATRIOT Act.

CONCLUSION. I commend the organizers of the CLE program for including a panel discussion on the USA PATRIOT Act. The speed with which this law was enacted, and the importance and complexity of the issues tackled by the USA PATRIOT Act, make it important that the public be informed about the substance and effect of the legislation. Debates about how much surveillance power the government needs to protect our national security and public safety are critical in our democracy and should be welcomed by our government officials, but should be well-informed rather than grounded in myths.

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[29] http://www.usdoj.gov/oip/foiapost/2001foiapost19.htm.
[30] The Homeland Security Act, P.L. 107-296 (November 25, 2002) ("HSA"), section 214(a) (2) (A).
HSA, section 214(f).

REAL WORLD PROBLEMS OF VIRTUAL CRIME

By Beryl A. Howell[1]

Theoretical debates about how best to address cybercrime have their place but, in the real world, companies and individuals are facing new harmful criminal activity that poses unique technical and investigatory challenges. There is nothing virtual about the real damage on-line crime can inflict off-line to victims. At the same time, technology is inviting uses that may result in significant, though sometimes inadvertent, criminal and civil liability. The law is not always crystal clear about whether specific conduct is a crime and about which tools investigators may use to collect evidence identifying the scope of the criminal activity and the perpetrator. In this essay, three stories based on real-life cases are described that highlight gaps in the law.

At the risk of spoiling the suspense, let me make the moral of these stories plain at the outset: specific laws directed to specific problems are important, both as guidance to law enforcement on how investigations may be conducted, with appropriate safeguards for civil liberties and privacy, and to alert people where legal lines are drawn as a caution against crossing them.

Does this require endless effort to update the laws to keep pace with technology? Yes, but the Congress returns every year with the job of making new laws. Will the pace of legal changes always be behind technological developments? Yes, but in my view the correct pace is a "go slow" one. By the time a proposal has gone through the legislative process, the problem it seeks to address will have ripened into better definition. The better defined a problem is, the better policy-makers are able to craft a narrow and circumscribed law to address the problem, while minimizing the risk of over-breadth that could chill innovation and technological development.

The first story arises from a computer investigation that has been conducted within the Senate Judiciary Committee over the past five months. This story could appropriately be named: **THE CASE OF THE SNOOPING STAFFERS AND PEEKING POLITICOS.** The facts of this case are quite simple. In November 2003, conservative papers and a website– the *Wall Street Journal* editorial page, the *Washington Times* and the Coalition for a Fair Judiciary – published excerpts from 19 internal staff memoranda to Democratic Members on the Senate Judiciary Committee. As with so many computer security breaches, these leaked memoranda were just the tip of

[1] The author is the Managing Director and General Counsel of the Washington, D.C. office of Stroz Friedberg, LLC, a technical services and professional consulting firm specializing in digital forensics and cybersecurity investigations. She also served as the General Counsel on the U.S. Senate Judiciary Committee for Senator Patrick J. Leahy (D-VT). A version of this paper was presented orally at the Yale Law School Conference on Cybercrime and Digital Law Enforcement, "Digital Cops in Virtual Environment," on March 27, 2004.

the iceberg.

The Senate Sergeant of Arms conducted a limited "administrative, fact-finding inquiry" at the bipartisan request of the Chairman of the Judiciary Committee and Senior Democratic Members into the circumstances surrounding the theft of the Democratic staff memoranda.[2] The report of the inquiry revealed that a staffer for Senator Hatch and a staffer for Majority Leader Frist had for almost 18 months on a daily basis methodically accessed files of targeted Democratic staffers working on judicial nominations and taken almost 4700 documents.[3] Evidence was uncovered that the Hatch and Frist staffers took steps to cover their tracks and conceal their theft of the Democratic staff memoranda, including by keeping the stolen documents in a zipped (i.e., compressed), password-protected folder on the Hatch staffer's computer.[4] The Committee file server was shared by both Democrats and Republicans, with each staffer having his or her own account. Staff working for the same Senator had permission to share certain files among themselves, but no other Members' staffs were permitted to see these files.[5] At least that is how the permissions had worked, were understood to work, and were supposed to work. When a new systems administrator was hired in 2001, he did not set the permissions correctly for over half of the staff on the Committee, so the files in those accounts were accessible to any user with access to the server.[6]

One might think the discovery that Republican staffers were spying on the internal and confidential memoranda among Democratic staff and Members would have the effect of throwing gas on an already simmering partisan fire. Interestingly, that is not what happened. Instead, virtually every Committee Member from both sides of the aisle agreed this spying was an appalling breach of confidentiality and custom on the Committee.

There has been public debate, however, about whether a crime has been committed, which is somewhat ironic since this incident happened on the Committee responsible for crafting the original Computer Fraud and Abuse Act ("CFAA") and every amendment to that law for the past decade.[7] Was the unauthorized access by the Republican staffers simply immoral or was it a crime?

Former White House Counsel C. Boyden Gray, former Majority Leader Trent Lott, and others, have asserted that there was no "hacking" since the security settings on the Committee file server were negligently set, providing easy access. Yet, a plain reading of the prohibitions in the CFAA make clear that unauthorized access and exceeding authorized access of "protected computers"[8] are barred. "Hacking" is not a defined term nor even used in that law, which also contains no requirement that data be secured and

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[2] Report to the U.S. Senate Committee on the Judiciary by Sergeant of Arms Bill Pickle, March 4, 2004, at p. 7 (hereafter "Pickle Report"). The inquiry was necessarily limited since the Sergeant of Arms has no subpoena powers.

[3] Pickle Report, at p. 9.

[4] Id., at p. 8.

[5] Id., at p. 18.

[6] Id., at p. 11.

[7] 18 U.S.C. § 1030.

[8] See 18 U.S.C. § 1030 (e) (2).

inaccessible.[9] This statute imposes misdemeanor criminal liability for merely obtaining computer information without authorization or by exceeding authorized access.[10] In other words, a Committee staffer may be authorized to access certain files archived on the server for certain purposes by the Member for whom that staffer is employed, but this authorized access is limited and does not cover the dissemination of private, confidential information from the archived files of other Senators' offices. The latter activity would exceed any such limited authorized access and would likely constitute a violation of the statute.

In addition to potentially facing a misdemeanor violation, the Republican staffers may have civil liability problems as well. The CFAA authorizes civil actions for compensatory damages or injunctive relief by any person who suffers any "damage," which is defined to mean any impairment to the integrity or availability of data,[11] or any "loss," which is defined to mean any reasonable cost of responding to an offense, conducting a damage assessment and restoring data, any revenue lost, cost incurred, or other consequential damages incurred because of interruption of service.[12] In other words, the staffers who obtained unauthorized access to the Democratic staff memoranda may be subject to civil suit for damages, including by the Senate, which has incurred expenses in the investigation into what happened, including the costs of personnel time in the office of the Sergeant of Arms and for a forensic examination of the systems involved.

Notably, the CFAA requires proof of more elements for civil liability than for criminal liability. The same conduct that may constitute a misdemeanor criminal charge may not support civil liability, which requires the plaintiff to show damage to the availability of data or financial loss.

The scope of what is covered by the undefined term "access without authorization" and "exceeds authorized access" may be quite broad, leaving enormous discretion to prosecutors. In a politically charged matter, such broad discretion may be both an unwelcome and uncomfortable circumstance. One commentator recently noted, "If it is widely believed that some conduct may technically fall within the language of the CFAA but should in fact not be criminal, the law should be amended. Reliance on the 'reasonable exercise' of prosecutorial discretion is not an adequate response. The text of the statute should reflect such limits."[13]

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[9] The Computer Fraud and Abuse statute, in pertinent part, bars (1)intentionally accessing a computer; (2) to obtain information from "any department of agency of the United States," which is defined, in 18 U.S.C. § 1030(e)(7), to include "the legislative or judicial branches of the Government;" (3) without authorization or by exceeding authorized access, which is defined, in 18 U.S.C. § 1030(e)(6), to mean accessing a computer with authorization but to use such access to obtain or alter information in the computer that the accesser is not entitled to obtain or alter.

[10] 18 U.S.C. §1030 (c) (2) (A). This illegal activity may also be a felony offense with up to 5 years' imprisonment if committed for commercial advantage, private financial gain, in furtherance of any criminal or tortuous act, or if the value of the information exceeded $5,000.

[11] 18 U.S.C. §1030 (e) (8).

[12] 18 U.S.C. §1030(g) and 1030(e) (11).

[13] Assistant Professor Joseph Metcalfe, University of Oregon School of Law, Cybercrime Posting, March

The Pickle Report stopped short of making any recommendations for referral of individuals for criminal violations, but did outline the relevant elements of potentially applicable criminal offenses.[14] The matter has now been referred to the Justice Department by a bipartisan group of Members. The ending to this story must await the prosecutors' decision as to whether a crime was committed.

In some situations, there may be no question that the computer activity at issue is a crime, but the technology creates issues about whether the crime was committed by the computer user or the computer program. This story is called the **CASE OF THE PARENTAL NIGHTMARE.**

It starts one morning just a few months ago, when a suburban Mom had her morning coffee interrupted by a knock at the door. It was FBI agents announcing they were there to question, and possibly arrest, the child pornography distributor living and using a computer in the house. They determined the computer being used to distribute child porn – a felony to possess and to distribute – was in the teenage son's room. Like over 60 million other people,[15] he had installed KaZaA on his computer. The teenager had then gone searching for erotic material, which he downloaded in his shared KaZaa folder. Included in this material were child porn images, which many other Kazaa users then located and uploaded from his home computer.

In fact, unbeknownst to the teenager, his machine had been turned into a supernode on the system. He was unaware of the option buried in the software to prevent this from happening and did not change the default settings, which permitted it. So his machine was being used by many clients and other supernodes to point to files available for sharing, including child porn. The teenager technically did not have all of the child porn files on his computer – enough for a felony -- but he had an index pointing to other locations with child porn. This also made his machine a much bigger target for law enforcement looking for online child porn distributors.

P2P file sharing programs make distribution a passive act, but no less subject to criminal liability. People do not fully realize that the simple act of selecting files or folders to share on KaZaa makes them a distributor of all those files, and that the act of distribution, even if initiated by other users, carries with it hefty criminal and civil liability under criminal copyright laws, child porn laws, and laws restricting the distribution of obscene materials to minors.[16]

This was just the beginning of the parents' problems. They then wanted to find out exactly what the evidence was on their son's computer. Was he actively sending child porn as e-mail attachments to others? Was he actively posting child porn images to any sites? Or, instead, was he merely a passive distributor by virtue of having downloaded the illegal images into a KaZaa shared folder, with the program doing the active work? The

22, 2004, hermes.circ.gwu.edu/archives/cybercrime.html.

[14] Pickle Report, at p. 13, 59-62.

[15] Source: Kazaa website, http://www.kazza.com

[16] 18 U.S.C. §1470.

answers to these questions could be helpful in the defense of their son to persuade a prosecutor not to charge him, but finding those answers required the services of a computer forensic examiner.

The child porn possession crime is so strict, however, forensic examiners and even attorneys have to be careful not to have these images in their possession. The law treats child porn essentially like heroin – the mere possession, even on behalf of a client to assist in an investigation or defense – is no exception to the crime.[17] Special protocols have to be followed for forensic examiners to handle matters involving child porn. These protocols may, in appropriate circumstances, be negotiated with the investigating law enforcement agency. Our forensic examination of the teenager's computer confirmed that he did not actively distribute the child porn images, which were nevertheless accessed and uploaded by other KaZaA users.

While we still do not know the end of the story of the **Peeking Politicos**, the story of the **Parental Nightmare** was a happy one, since the prosecutor declined to prosecute the juvenile.

Changes are already developing in P2P networks to get around the liability risks of possessing and distributing illegal material. One such system involves encrypting the files that a user wants to share, pushing the encrypted files onto an another client machine, and then making the decryption key available at "Free sites," along with pointers to where the material may be found.[18] The keys are distributed, not the material, and the person in possession of the encrypted material has deniability about what the subject matter of the encrypted file is. Some in law enforcement are already anticipating a need for new laws to make it illegal to possess a deliberately stored decryption key that the user knows relates to an illegal file.[19]

P2P networks actually make the work of investigators fairly easy, since they can track who is sharing illegal files and how much distribution is occurring.[20] In the digital world, users of peer-to-peer networks may find that the technology has taken them for a ride across legal lines imposed by strict liability laws for possession and distribution of certain materials, including child porn and infringing copyrighted works.[21]

Not every computer crime case is as easy to investigate as many of those on peer-

[17] 18 U.S.C. §2252(a) (5) (B), bars possession of any child porn, with punishment up to 5 years' imprisonment. The law provides an affirmative defense if the defendant (1) has fewer than 3 child porn images, AND (2) took prompt steps, without retaining or allowing any person other than a law enforcement agency to access the image, to destroy each image or report the matter, and allow access, to law enforcement.

[18] Geoff Fellows, "Peer-to-Peer Networking Issues-- An Overview," *Digital Investigation, The International Journal of Digital Forensics & Incident Response*, vol. 1, at pp. 3-6 (February, 2004).

[19] Id., at p. 6.

[20] Id., at p. 4 ("the structure of peer-to-peer networks presents opportunities to law enforcement for proactive investigation ... This results ... in prosecutions not for the mere possession of obscene images but rather for distribution, a much more serious offense.")

[21] While criminal copyright liability requires a "willful" intent, civil infringement liability is strict.

to-peer networks, as demonstrated by the next story of **THE CASE OF THE WIFI SPOOFER.** For over two years a company was the target of embarrassing e-mails containing derogatory and sexually explicit attachments. These e-mails were not sent to the company, but worse, sent to the company's clients with spoofed (i.e., faked) e-mail addresses to make the e-mails appear to have come from senior executives within the company. Clients, who received these disturbing spoofed e-mails, got upset, particularly when the company appeared to be incapable of stopping them. The company lost thousands of dollars as clients took their business elsewhere.

The e-mail header information on the e-mails showed the originating IP addresses which the FBI attempted to trace. However, the traces led not back to the perpetrator, but to random home users' wireless access points to which the perpetrator had gained access. This access was gained by a practice known as "war driving. The perpetrator would drive his car around residential neighborhoods with a laptop equipped with a WIFI card and antenna, searching for unprotected wireless access points to which he could connect. A typical home wireless access point will transmit its signal from several hundred feet, well beyond the home's walls. By the time the FBI was able to obtain the subscriber information and location of the WIFI point used by the perpetrator, the perpetrator was, of course, long gone. Wireless access point equipment is sold with the default setting of no security features enabled, and many users do not bother, or do not know how, to change the default settings on the equipment. Accordingly, even when access points that the perpetrator co-opted were examined, there were no logs of his particular computer having connected to them. This provided a perfect anonymizing method for the perpetrator.

In addition to war-driving, this perpetrator also sent spoofed e-mails from computer labs at various universities in the D.C. area, using false or stolen student accounts, also making him difficult to trace. He used the hijacked student account to access a proxy server to conceal the originating IP address of the computer he was using within the University computer lab, and use that proxy server to access e-mail accounts from which he sent spoofed e-mails.

Almost two years into this expensive harassment, the company turned to us for assistance. At that point, the company did not know whether the WIFI Spoofer was one person or a group, a malicious insider or outsider, what the person/persons wanted or what was motivating the harassment. Most of all, the company wanted the damaging e-mail campaign to stop.

Extensive computer forensic analysis of the company's computers and systems helped to rule out a malicious insider as the perpetrator of the e-mail campaign. This analysis revealed, however, a number of unauthorized logins to the company's server over a four month period in 2003 with originating IP addresses used at a local university. Steps were taken to lock down the security of the company's network.

Sometimes technology has to take a back seat to good old gumshoe work. Through a combination of interviews with people in the industry, including competitors

of the targeted company, plus use of a clinical psychologist with expertise in developing detailed profiles based upon text and e-mails, a primary suspect was identified within several weeks.

We also found that senior executives at a sister company of the targeted company had been sent e-mails from a person complaining about the targeted company. Textual and psychological analysis by the clinical psychologist demonstrated that the author of the spoofed e-mails was the same author sending the complaining e-mails (under a fake name) to the sister company. He further determined that a single author, not a group, was involved. But who was this person and how were we going to determine whether it was the primary suspect?

We sent the complainer an e-mail to see if he would re-engage in communications with representatives of the sister company. In order to find out the IP address of the computer where the email was opened, a technical tool, called a web-bug, was used to capture the IP address of the computer where the e-mail was opened. In addition, this tool provides related information about when the perpetrator opened the e-mail, how long the e-mail was kept open, and how long it took the perpetrator to respond after opening the e-mail. This information is relevant to building a profile of the perpetrator and anticipating how to interact with him in an effective manner to identify him.

Web-bugs such as the one used in this case capture information generated by the computer system itself, not content that is generated by the computer user. The CFAA was intended to protect the privacy and security of computer content and therefore does not cover computer system information, such as IP addresses. Yet, absent a definition of "information" in the statute, the blurry lines in the scope of the CFAA's coverage of such computer generated system information must be navigated by aggressive investigators choosing the technical tools necessary to investigate cybercrime.

After a carefully calibrated series of exchanges, the WIFI Spoofer sent a multi-million dollar extortion demand threatening to unleash a denial of service attack that would be made to appear to come from the targeted company and that would use as a "payload" confidential information on the company and its clients that he had obtained through "dumpster diving" of the company's trash bins. The perpetrator revealed many additional details that were consistent with the information on the primary suspect we had already identified. At the same time, the primary suspect was put under surveillance, which resulted in placing him in the same place – at a university computer lab – as certain originating emails.

The FBI then arrested him. When the defendant's house in Maryland was searched they found numerous firearms, explosives and chemicals, as well as a recipe for the production of a deadly toxin. He has been detained pending trial. As noted before, often in cybersecurity investigations, the threats that the victims are aware of usually are just the tip of the iceberg.

The story of the WIFI Spoofer had a happy ending, at least from the perspective of the targeted company. After two years of being victimized, it took the concerted

investigative effort of the FBI, U.S. Attorney's office and a private cybersecurity firm to track this perpetrator, through use of technical tools, physical surveillance, a clinical psychologist and good interviewing techniques.

This story also points out how the Computer Fraud and Abuse statute may stymie legitimate self-help efforts to identify perpetrators of harmful online crimes; and brings full circle the question of the scope of this statute. From the perspective of the Peeking Politicos in the case of the Senate Judiciary Committee server spying case, and of the investigators in the case of the WIFI Spoofer, the reach of the CFAA was a puzzle. This should be a cautionary note in future policy debates, including, for example, over "spyware." Care must be taken to ensure that legitimate and other self-help activities are not impaired by regulatory measures written so broadly they suffer from the same scope questions raised by the CFAA.

Rapid technological developments in communications technologies are providing new opportunities for violators to cover their tracks, new techniques for investigators to pursue them, and new traps of liability for the reckless computer user. Tensions are inevitable as these developments test the reach of current laws and the circumstances in which putative defendants may find themselves liable and victims may engage in self-help without themselves crossing ill-defined legal lines. It would be ironic, indeed, if the concern over harmful online activity results in over-regulation of the use of certain technologies with the effect of hamstringing victims and investigators from using those or similar tools to stop or prevent the harmful conduct.

Statement of Senator Patrick Leahy
Ranking Democratic Member, Judiciary Committee
Hearing of the Senate Judiciary Committee
September 22, 2004

Pilot Project on Closed Captioning

This afternoon's nomination hearing marks a technological milestone for the Senate. Today the Senate Judiciary Committee officially begins broadcasting live on the Senate television system with closed captioning that uses the advanced technology of voice-recognition software. We have been eagerly awaiting this day when hearing impaired Americans will be able to follow the proceedings of this Committee as they occur through closed captioning.

Working with the Office of the Secretary of the Senate and with the Committee on Rules, the Judiciary Committee has developed a pilot project that will allow us to study the captioning of committee hearings, offering real-time captioning as a demonstration for the use of Senators and their staff. We are very proud of the Judiciary Committee's groundbreaking role in testing this new technology. I want to thank Senator Hatch for agreeing to work with me on this project.

Through this pilot project, we are helping the Senate determine the feasibility of providing real-time captioning for all Senate committee hearings. We hope to bring closer the day when Americans with impaired hearing will have access to the legislative process, which often occurs in the committees and not only on the floor of the Senate.

Today's launch is particularly noteworthy coming at a time when we see barriers being erected all around Washington. We are glad for this opportunity to actually bring down a barrier between the American people and their government.

Sentencing Commission Nomination

This week, at long last, the President has finally sent the Senate a nominee for the remaining vacancy on the United States Sentencing Commission. I thank Senator Hatch for expediting the hearing on this nomination.

The nonpartisan nature of the Sentencing Commission is preserved by making sure it is balanced and includes experienced Commissioners who stick to the merits and command the respect of both Congress and the Judiciary. Our nominee today is just such a person. Beryl Howell was a tough federal prosecutor who earned a number of commendations for

her actions. She was the deputy chief of the narcotics section and Assistant U.S. Attorney in the Eastern District of New York until she consented to join the staff of the Senate Judiciary Committee in 1993. She served here with great distinction and earned the respect of Republicans and Democrats alike. As my General Counsel, she devoted herself to resolving issues on the merits and was a tremendous asset to the Committee as we considered legislative challenges. No challenge we faced was greater than the one we met in the weeks following September 11, 2001. She led our Senate staff's negotiations with the Administration. Had the White House not reneged on some of the commitments they made in the course of our negotiations, the PATRIOT Act would have been a better, more balanced bill.

She has gone on to become highly successful as the managing director and general counsel of the Washington, D.C. office of Stroz Friedberg, LLC, one of the leading cybersecurity and forensic firms in the country.

Appointments to the Sentencing Commission have enjoyed a tradition of bipartisanship. President Clinton worked long and hard at reaching a compromise with Senate Republican leaders on a slate of nominees to this important Commission. Seats went unfilled for too long while a Democratic White House negotiated with Majority Leader Lott and Chairman Hatch. Finally, in late 1999, we were able to get agreement from the Republican caucus and nominations went forward. Instead of honoring this tradition and doing what President Clinton had done, President Bush did not consult with Senate Democrats initially. It has taken some time but now, finally, the President has accepted a recommendation from the Democratic leader for this vacancy created by the resignation of Judge Diana Murphy. I thank Senator Daschle, Senator Kennedy and all Democratic Senators for their support for this nomination. With this nomination, the Committee and the Senate should be in a position to proceed promptly to confirm all the outstanding nominations to the Sentencing Commission as a package.

The Commission has important work to do. Especially in light of the Blakely decision and the Supreme Court's expedited consideration of follow-up cases that will affect the federal sentencing guidelines, we need to have the expertise and authority of the Commission in place and working in the weeks and months ahead.

Retirement of Sheila Joy

Finally, I would like to take a moment to acknowledge a woman has been involved in the judicial nominations process since I joined the Senate. Sheila Joy is a career civil servant at the Department of Justice who is retiring this month after 26 years working on nominations and 37 years in public service. Whether the man in the White House was a Democrat or a Republican, Sheila Joy served the public by assisting and advising judicial nominees on their papers for their Senate Judiciary Committee hearings for more than a quarter of a century. Her non-partisan advice about FBI and ethics issues, as well as history and precedent, has been relied upon by the Senate Judiciary Committee's investigators and counsel over these many years.

We appreciate that very much. It is literally true that Sheila has written in the official history books of the United States, recording the names and outcomes -- confirmed or blocked -- of every judicial nomination of Nixon, Carter, Reagan, Bush, Clinton and the current administration. She knows every lifetime appointed judge serving in the federal courts today and she knew them when they were humble nominees. She has served our country well and I commend her. I think it will be impossible for anyone to fill her shoes, with her breadth of experience and wisdom, but I wish her a wonderful and relaxing retirement.

Republican Double Standards for Judicial Nominations

Today marks another unfortunate milestone, however, in the way that Republicans have employed double standards for judicial nominees depending on the political affiliation of the President. From the way that home-state Senators are treated to the way hearings are scheduled, to the way the Committee questionnaire was altered, to the way our Committee's historic protection of the minority by Committee Rule IV has been violated, the Republican Senate leadership has destroyed virtually every custom and courtesy that used to help create and enforce cooperation and civility in the confirmation process. Their actions have contributed to the extended debate on controversial judicial nominees. They have also demonstrated time and again that the rules they used to insist upon when Democratic Presidents occupied the White House do not apply to Republicans.

Today, less than six weeks before the presidential election, the Committee is holding a hearing on a lifetime appointment to a seat that does not become vacant for more than eight weeks after the November election. It is another extension of their power for Republicans to insist the Senate consider nominees for positions that will not even arise until after the presidential election. When a Democratic President was seeking reelection in 1996, the Senate Republican leadership did not consider or confirm a single judicial nominee after the August recess despite scores of existing and longstanding vacancies. That session Senate Republicans only allowed 17 judicial nominations to be confirmed and they did not include a single nominee to the Courts of Appeals. How the rules have changed with the political affiliation of the occupant of the White House.

There remain just 27 vacancies in the federal district and circuit courts combined, and there are more active judges sitting on the bench than at any time in this nation's history. The Senate has already confirmed 201 of this President's judicial nominees and reduced vacancies to the lowest level in decades.

In 1996, when a Democratic President was seeking re-election, the Republican leadership allowed only one hearing to consider one district court nominee after the August recess, and then never allowed that nominee to have a Committee vote. Indeed, that nominee, Judge Ann Aiken of Oregon, was obstructed so severely by the Republican majority that she was not confirmed to her position until nearly a year and a half later. In September 1996, Republicans said: "[T]he fact of the matter is that both sides realize this process somewhat collapses really at the end of August, and it certainly has during presidential years because both sides are hoping that their candidates will win the presidency."

In 2000, the Republican Senate leadership insisted on following the Thurmond Rule. After the August recess work on judicial nominations came to a halt. Although there were over 30 nominees pending, after July 25, 2000, no more judicial nominees were scheduled for hearings or considered by the Committee. A leading Republican observed: "I have never seen an end of a session in a presidential year that is highly charged where there weren't people who couldn't get through at that point, where you just don't stop the process." In September 2000, when the vacancy rate was around seven percent, Republicans proclaimed that the judiciary was not suffering and that nominees would not move so late in the presidential election year. Today, the vacancy rate stands at around three percent, less than half of what it was in September 2000, after Republicans had shut down hearings for judicial nominees.

In both 1996 and 2000, Senate Republicans did not allow a single individual nominated after July 21st to be confirmed to the federal courts – even for seats that were long vacant. When Kent Markus of Ohio was nominated in February 2000 to the Sixth Circuit, he was told by Republicans that it was just too late. Today's hearing is for an individual nominated on July 22, 2004 to fill a district court seat that will not be vacant until December 31, 2004. Today's hearing is unprecedented but not surprising given the reversal of so many positions the Republican majority had followed during years in which the President was from another political party.

The Senate has already confirmed four of President Bush's district court nominees and two of his circuit court nominees from Ohio, including some who were problematic. Deborah Cook, now on the Sixth Circuit, is a staunch Republican and Federalist Society member who was one of the Ohio Supreme Court's most prolific and activist dissenters in favor of corporate interests. She was promoted by the Senators from Ohio and was confirmed last year. Another Sixth Circuit confirmation, Jeffrey Sutton, is an active Federalist Society member and one of the most controversial of President Bush's nominees confirmed. Prior to his confirmation to a lifetime appointment on the nation's second highest court, Judge Sutton sought out opportunities to attack federal civil rights laws and limit Congress' ability to protect individual rights. He received enough "negative" votes to have sustained a filibuster, but he was not blocked on the floor.

The Senate also confirmed four Ohio district court nominees, many of whom were active members of the Republican Party in Ohio and whose records were somewhat troubling. Michael Watson was just confirmed by the Senate earlier this month.

We moved forward with those nominations even though two of President Clinton's nominees to Ohio, Kent Markus and Steve Bell, were blocked during Republican control of the Senate. Neither received a hearing or a vote. Professor Markus was nominated to the Sixth Circuit in February 2000, but was told it was just too late. Steven Bell was nominated in August 1999 to the district court in Ohio and waited for more than a year without receiving a hearing.

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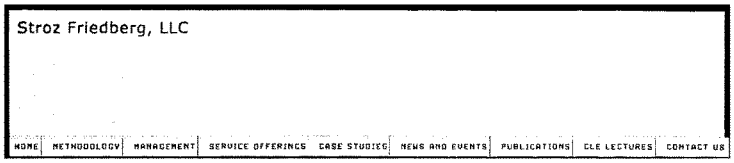

IN THE NEWS
EVENTS
PRESS RELEASES

FORMER GENERAL COUNSEL OF THE SENATE JUDICIARY COMMITTEE JOINS STROZ FRIEDBERG, LLC

Beryl Howell Joins Leading Cyber Security/Computer Forensics Firm as it Expands to Washington, D.C.

NEW YORK, March 3, 2003 - Stroz Friedberg, LLC, a leading cyber-crime, computer forensics and computer security firm that integrates technology, law, behavioral science, and trusted relationships in its unique consulting and technical services practice, is pleased to announce that Beryl A. Howell, former general counsel of the Senate Judiciary Committee, has recently joined the firm's newly-opened Washington, D.C. office. Beryl will serve as Executive Vice President of the firm, and Managing Director and General Counsel of the D.C. office. Headquartered in New York City, Stroz Friedberg's expansion to Washington, D.C. will allow the firm to provide additional services to its D.C.-based clients.

Ms. Howell will focus on legislative and strategic solutions for computer-based threats, including copyright piracy, computer hacking and technology-enabled theft and fraud. In addition, she will also handle the firm's traditional service offerings: computer forensics in support of litigation, cyber-crime response, and data preservation and analysis.

"Beryl is a seasoned professional with a strong background in technology policy and intellectual property matters," said Ed Stroz, President of Stroz Friedberg. "She joins the company at a time when Stroz Friedberg is experiencing tremendous growth, and we'll certainly benefit from the unique combination of her investigatory skills as an accomplished former prosecutor and her effectiveness in Washington's policy and legislative arena."

Ms. Howell worked for Sen. Patrick Leahy (D-VT), during his tenure as

Chairman and Ranking Member of the Senate Judiciary Committee, and, before that, on the Antitrust and Technology and Law Subcommittees. Ms. Howell is an expert on the legislative process and the policies and laws governing cyber-crime, encryption, intellectual property, and Internet privacy. Ms. Howell was also the lead Senate democratic staff negotiator with the White House during deliberations over the anti-terrorism law, the USA PATRIOT Act, after September 11, 2001. Prior to working on Capitol Hill, she was an Assistant U.S. Attorney, and the Deputy Chief of the Narcotics Unit, in the U.S. Attorney's Office for the Eastern District of New York.

About Stroz Friedberg

Headquartered in New York, Stroz Friedberg is a leading cyber security and computer forensics consulting firm that integrates technology, law behavioral science, and trusted relationships in its varied service offerings. Stroz Friedberg provides technical assistance, strategic advice and liaison with law enforcement in responding to and preventing cyber-crime. The firm also specializes in computer forensics in support of civil litigation, criminal prosecution and criminal defense. Stroz Friedberg also manages large-scale data preservation and electronic discovery projects in the contexts of civil litigation and regulatory compliance. Additional information about Stroz Friedberg can be found at www.strozllc.com.

Statement of Senator George V. Voinovich
on the Nomination of Christopher A. Boyko
September 22, 2004

Mr. Chairman, today I am very pleased to introduce a native of Cleveland, Ohio and a very qualified candidate for the United States District Court for the Northern District of Ohio -- Judge Christopher A. Boyko. Judge Boyko currently serves as a judge on the Common Pleas Bench, General Trial Division, a position to which I appointed him when I was Governor of Ohio.

Judge Boyko graduated from Cleveland-Marshall College of Law in 1979and went on to practice law at the firm of Boyko & Boyko until September 1993, when he was appointed Parma Municipal Court Judge. Subsequently, from 1981 to 1987, Judge Boyko served as an Assistant Prosecutor for the City of Parma where he prosecuted misdemeanors and charged felonies, conducted Prosecutor's Mediation Hearings and represented the City on appeal. He was also the on-site legal advisor to Parma's SWAT Team and guided the police department on issues of law during numerous types of investigations.

Judge Boyko had the distinction of twice being elected Parma's Law Director, where he prepared all legislation and legal documents, prosecuted civil and criminal cases on behalf of the City, defended all lawsuits, represented the Parma City School District and gave daily advice and direction to city officials. In addition, he represented all elected officials, department heads, City Council, boards, commissioners, city agencies and the Parma City School District.

Judge Boyko was appointed to the Parma Municipal Court during the latter part of 1993, where he served briefly before moving back to the private sector. During 1994 and 1995, Judge Boyko served as Executive Vice President and General Counsel to Copy America, Inc., representing the company in all legal affairs and providing managerial oversight of all employees. And on January 22, 1996, I appointed Judge Boyko to the Common Pleas Bench, where he serves today.

Chairman Hatch, Ranking Member Leahy, and Members of the Committee, I sincerely hope that this Committee acts favorably on Judge Boyko's nomination and sends this qualified nominee to the Senate floor. Thank you, Mr. Chairman.

NOMINATIONS OF THOMAS B. GRIFFITH, OF UTAH, NOMINEE TO BE CIRCUIT JUDGE FOR THE DISTRICT OF COLUMBIA; PAUL A. CROTTY, OF NEW YORK, NOMINEE TO BE DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF NEW YORK; AND J. MICHAEL SEABRIGHT, NOMINEE TO BE DISTRICT JUDGE FOR THE DISTRICT OF HAWAII

TUESDAY, NOVEMBER 16, 2004

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 9:02 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Orrin G. Hatch, Chairman of the Committee, presiding.

Present: Senators Hatch, Specter, Chambliss, Feingold and Schumer.

Chairman HATCH. We are ready to begin. We are anxious to proceed on these three nominees here this morning. It is late in the session, and so we are trying to do the best we can.

We are particularly honored to have two of our great Senators here this morning—Senator Inouye, who has been here almost from the beginning of this institution. He has been here so long, but we all respect Senator Inouye and know what a great man he is.

We congratulate you on this last year.

We also have my dear colleague, Senator Bennett, who has more than distinguished himself here in the United States Senate. We are grateful to have both of you here.

We have Senator Schumer, who is here as well to testify for his nominee as well.

Senator Inouye, we will begin with you, and then I am going to turn, with your permission, Bob, to Senator Schumer, and then I will—

Senator SCHUMER. That is all right. Bob can go.

Chairman HATCH. I want you to be able to get your remarks over with.

Senator Inouye, we will take you first.

PRESENTATION OF J. MICHAEL SEABRIGHT, OF HAWAII, NOMINEE TO BE DISTRICT JUDGE FOR THE DISTRICT OF HAWAII, BY HON. DANIEL INOUYE, A U.S. SENATOR FROM THE STATE OF HAWAII

Senator INOUYE. Mr. Chairman, I thank you very much, and I believe I speak for all when I say thank you for accommodating us. We realize that these are the last days of the session.

This morning, I have the great honor of presenting to the Committee Mr. J. Michael Seabright, of Honolulu, Hawaii, who was recently nominated by the President of the United States to serve as Federal district judge for the District of Hawaii.

Before proceeding, Mr. Chairman, I would like to present his First Lady, Margaret, and his children, Kate and Nick, and his mother, his sister and brother-in-law. They are all sitting in the back.

Chairman HATCH. If you would all stand, we surely welcome all of you here this morning. We are grateful to have you here and you must be very proud.

Senator INOUYE. Mr. Seabright is a graduate of Tulane University, where he received his degree magna cum laude. before going on to attend the National Law Center at G.W. University, where he received his juris doctor, graduated with high honors, and was a member of the Order of the Coif. At G.W., he further distinguished himself by serving as the Editor of the George Washington Journal of International Law and Economics.

Mr. Chairman, I have had the pleasure of knowing Mr. Seabright since he arrived in Hawaii 20 years ago, having watched him as he successfully became a member of the Hawaii State Bar and became involved in our community. Now, Mr. Seabright stands out as a leader in the legal side of law enforcement, where he developed the District of Hawaii plan for implementing Operation Triggerlock-Hawaii, a Federal-local effort aimed at the prosecution of violent, armed career criminals in the Federal courts.

His broad experience in prosecution, from violent crimes to government corruption, have provided him a balanced perspective of the criminal justice system that will continue to serve him well as he prepares for this most recent development in his career of public service.

Mr. Seabright's work for Hawaii goes beyond his professional commitments as an Assistant U.S. Attorney. He has served on the Hawaii Supreme Court's disciplinary board since 1995 and holds the chairmanship of its rules committee, which is charged with the drafting of proposed rules for the Hawaii Rules of Professional Conduct. He was also a member of the Hawaii State Bar Examiners and has been an adjunct professor at the University of Hawaii William Richardson School of Law.

Mr. Chairman, this extraordinary record of achievement has now culminated with his nomination to the Federal bench and amply supports the favorable reports he received from the Hawaii State Bar, the American Bar Association and the Federal Bureau of Investigation.

Mr. Chairman, I am confident that his record will prove equally impressive to this Committee. Naturally, I hope for a successful hearing this morning and I hope it will be expeditiously taken up

and passed by the full Senate during these waning days of this Congress.

Thank you very much, Mr. Chairman.

Chairman HATCH. Thank you, Senator Inouye. That means a lot to us and it is certainly high praise for Mr. Seabright.

We think you are very fortunate to have the Senator from Hawaii come here and speak for you. We have heard about you and we have every reason to want to support you.

Senator INOUYE. Mr. Chairman, may I be excused now?

Chairman HATCH. Without question.

Senator INOUYE. Thank you.

Chairman HATCH. We know our place here. We are happy to have you here, Senator Inouye.

The Democrats do have a caucus at 9:30, so that is why the convoluted approach here this morning. We are going to go until about 9:25 and then we will recess until eleven or shortly thereafter to allow our colleagues to come to finish the hearing.

We are trying to be very accommodating here. So that is one reason why I am going to Senator Schumer at this point so that he can certainly make that caucus meeting.

PRESENTATION OF PAUL A. CROTTY, OF NEW YORK, NOMINEE TO BE DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF NEW YORK, BY HON. CHARLES E. SCHUMER, A U.S. SENATOR FROM THE STATE OF NEW YORK

Senator SCHUMER. I want to thank you, Mr. Chairman, and thank you for holding this hearing and bringing these nominees to the fore.

Chairman HATCH. Senator, let me just say congratulations on your close encounter up there in New York.

Senator SCHUMER. Thank you. It was a nail-biter, Mr. Chairman. [Laughter.]

Chairman HATCH. Well, frankly, we knew you were going to win and we are very proud of you for doing so.

Senator SCHUMER. Thank you very much.

I am so proud to nominate Paul Crotty to join the Southern District as a judge. I get to know, as we all do, people who are nominated. With Paul, it is one of those rare instances where I knew him long before he was nominated, and he is just an outstanding person.

Before I talk a little about Paul, I would just once again like to say that we have done a very good job filling New York's Federal bench. We have worked closely with the White House and Judge Gonzales and Governor Pataki. It is an example, when we all come together, that we can make this work judiciarily, if you will.

I have always had three criteria for nominating judges—excellence. It is a very important job. People should be legally excellent, not someone's brother-in-law or some political hack.

Moderation. I don't like judges too far right; I also don't like judges too far left. Judges at the extremes tend to make law. They feel so passionately that they feel they know better than the long-established traditions of the law. They don't make good judges. They might make good other things.

And, finally, diversity. I try, at least in New York, to fill the bench with more women and people of color. We have done a very good job in New York, and I would just wish and hope and pray that in the upcoming session we can have the same kind of comity nationally that we have had with New York.

And I have to say, Mr. Chairman, without your help, we wouldn't have been as successful in New York, and your guiding hand, as well, for that. I also want to thank, as I mentioned, Governor Pataki, my colleague, Senator Clinton, and the White House for that.

As for our nominee, Paul Crotty, Mr. Chairman, is as good a nominee as this Committee ever sees, whether he is from New York or anywhere else. His legal credentials are outstanding. He has had a long and distinguished career in both the public and private sectors.

I like to nominate judges with practical experience because one of the things that bothers me is when judges are just legally-oriented, they sort of from on high impose all kinds of rules that just don't work. Paul has had a wealth of public experience, but he has been a great lawyer as well.

He graduated from Cornell Law School in 1967. He clerked for 2 years for Judge MacMahon, of the Southern District, the court to which he is now nominated. He served two of our mayors very, very well—Mayor Koch, where he was Commissioner of Finance, and Commissioner of Housing and Preservation. He then went to the private sector, where he was a partner in one of the most prestigious firms not only in New York, but in America—Donovan, Leisure, Newton and Irvine—and then served Mayor Giuliani as his Corporate Counsel, head of the city's Law Department. And that could be, Mr. Chairman, the most difficult legal job in municipal government anywhere in America.

He is now Group Vice President for New York and Connecticut for Verizon, and maybe I will ask him to make sure Verizon keeps its headquarters in New York before finally letting go of this nomination. In any case, he has done a great job there as well.

He is also very civic-minded. While he was at Verizon, he donated his time to the Lower Manhattan Development Corporation. That was the group, after 9/11, in charge of revitalizing lower Manhattan.

Let me just submit for the record letters sent by both Mayor Koch and Mayor Giuliani—both are friends of mine whom I work closely with, one a Democrat, one a Republican—showing the bipartisan support that Paul has.

Chairman HATCH. Without objection.

Senator SCHUMER. Mayor Giuliani said—I am just going to read an excerpt—"Paul Crotty is one of the finest men I know. He possesses all the qualities of an excellent judge—wisdom, compassion, toughness, curiosity, common sense, unwavering integrity and an abiding love of the law. Many possess knowledge of the law and knowledge of government. Paul Crotty is the rare individual who possesses mastery of both. He has set and achieved the highest standard at every stage of his career. Our Nation will be fortunate to have him join the Federal bench."

And from Mayor Koch's letter: "Paul is a man of high intelligence, total integrity and great courage. He has a delightful sense of humor and is a husband and father to a marvelous family." Since he wrote this letter to me, he says, "You know Paul so well, what I am stating is not unknown to you." We can leave that out.

Mayor Koch says, "I believe he would be a superb appointment." Well, I couldn't agree more. I was proud to recommend him to the President. I am proud the President agreed that Paul is a great choice for the bench. He will introduce his large family. The Crotty family is a legendary family in New York from one end of the State to the other, from Buffalo to New York.

He is a great choice and I hope the Senate moves expeditiously to confirm him because he will make a great judge.

Thank you, Mr. Chairman.

Chairman HATCH. Thank you, Senator. I appreciate that.

Let me just note for the record that Senator Clinton has notified me that she wants to be here, but might not be able to be here until eleven. But either way, she is going to have a very good statement put in the record. So we will keep the record open for her statement, whichever way it may delivered.

Senator Bennett, if I could turn to Senator Feingold, also, because they need to leave. I am taking liberties with my dear colleague, but he understands. Then we will go to Senator Akaka, and then you will wrap up.

Senator Feingold, we also congratulate you.

Senator FEINGOLD. Thank you, Mr. Chairman.

Chairman HATCH. It was a big win up there.

Senator FEINGOLD. It is good to be back.

Chairman HATCH. I personally expected you to win and I am proud to have you back on the Committee.

STATEMENT OF HON. RUSSELL D. FEINGOLD, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Senator FEINGOLD. It is good to be back on the Committee, Mr. Chairman. I just want to make a brief statement.

I would like to welcome the nominees and their families and those who are here to introduce them. Mr. Chairman, I know that the nomination of Mr. Griffith means a lot to you personally, and that is why you have scheduled this hearing during this lame duck session.

But I am a little concerned about the time chosen and allotted for this hearing. It has the potential of leaving members without a meaningful opportunity to question the nominee, given the day and the various scheduling conflicts today. I, like others on the Democratic side, will have to leave shortly, and I know you are sensitive to that.

Chairman HATCH. Well, we will back at eleven.

Senator FEINGOLD. I understand that you have announced this at this point. We, of course, didn't know that when we were making our plans for the day, so it is not clear that some of us could get back to continue. But I recognize that accommodation.

On its face, this is a controversial nomination. Since Mr. Griffith's nomination in May, there has been significant public discussion of the nominee's failures to follow the rules of two different

bars. The ABA took an unusually long time to examine the nominee's record, and finally in October gave him its lowest possible "qualified" rating. An examination of the Utah Bar documents on which he waived confidentiality pose a real question about whether he was engaged in the unauthorized practice of law.

Other than the Supreme Court, the D.C. Circuit is considered the most important court in this country. Senators need to be able to fully examine Mr. Griffith before being asked to vote on his nomination. Because the brief window of time that will be left this morning after the introductions is not a substitute for a meaningful chance to question the nominee about his communications with the Utah Bar, Mr. Chairman, I would like to ask that all the material sent to the Committee by the Utah Bar that has to do with Mr. Griffith's application and admission to the Utah Bar be admitted into the record.

Chairman HATCH. Part of that is confidential, but we will admit whatever we can.

Senator FEINGOLD. Well, Mr. Chairman, let me say that I understand—

Chairman HATCH. It can be admitted into the record. It is just that some of it is confidential.

Senator FEINGOLD. I understand you are probably referring to his bar application. At least with regard to that document, let me say that we do have an interest particularly in questions 46 and 52. So I would ask simply that those pages of the application be admitted, along with a cover page and his signature.

Chairman HATCH. Without objection.

Senator FEINGOLD. Thank you, Mr. Chairman. I appreciate it.

Chairman HATCH. Well, I appreciate that, and I hope the Senator will accommodate me on this one because of a wide variety of reasons and I think high qualifications.

Senator Akaka, we will turn to you.

PRESENTATION OF J. MICHAEL SEABRIGHT, OF HAWAII, NOMINEE TO BE DISTRICT JUDGE FOR THE DISTRICT OF HAWAII, BY HON. DANIEL AKAKA, A U.S. SENATOR FROM THE STATE OF HAWAII

Senator AKAKA. Thank you, Mr. Chairman. I thank you for moving this hearing so expeditiously. I also want to add my welcome to Mr. Seabright and his lovely family, to Margaret and Kate and Nick. It is so good to see you here in Washington, D.C.

Mr. Chairman, it is with great pleasure that I join Senator Inouye Mr. Michael Seabright for this morning's hearing. The Hawaii State Bar Association has found Mr. Seabright to be highly, highly qualified for the position of U.S. District Court Judge in Hawaii. This is of significant importance to me, as I value the opinion of Hawaii's legal community in evaluating those nominated to serve as judges.

Mr. Seabright has practiced law in the State of Hawaii for the past 20 years in a number of capacities, including both private practice and public service. Mr. Seabright has been employed by the U.S. Attorney's Office for the District of Hawaii for the past 15 years, and he has headed the White-Collar and Organized Crime Section since 2002.

I am very pleased that this position, after being vacant for so many years, will now be filled with an individual as qualified as Mr. Michael Seabright. For the past few years, I have heard from jurists and a number of attorneys in Hawaii about the need to fill this judicial vacancy. Together with Senator Inouye, I have tried to address the strains on the court's current judges as they work to manage an increasingly overcrowded docket.

In fact, Mr. Chairman, White House Counsel Alberto Gonzales, in a letter dated July 21, 2004, recognized the judicial emergency in Hawaii. It is our hope that the Senate will once and for all address this situation by enacting legislation to make Hawaii's fourth judgeship permanent during this session. I look forward to that, Mr. Chairman. I thank my colleagues for their favorable consideration of Mr. Seabright and look forward to expedited action on his nomination.

Thank you so much, Mr. Chairman.

Chairman HATCH. Thank you, Senator Akaka. That is a good statement and we appreciate your taking time to come and support Mr. Seabright for this position. We appreciate it and we are glad we are able to accommodate you here today. Thank you so much. It is high praise for this great nominee and we will do our best to get him through between now and the end of this session of Congress.

I will, of course, reserve my remarks until after my dear colleague and friend, Senator Bennett, makes his. All of these gentlemen are so busy. Then I will make my remarks and then we will go from there.

Senator Bennett.

PRESENTATION OF THOMAS B. GRIFFITH, OF UTAH, NOMINEE TO BE CIRCUIT JUDGE FOR THE DISTRICT OF COLUMBIA, BY HON. ROBERT BENNETT, A U.S. SENATOR FROM THE STATE OF UTAH

Senator BENNETT. Thank you very much, Mr. Chairman, for the opportunity of—

Chairman HATCH. Senator Akaka, we will excuse you. We know you have a caucus meeting and we understand.

Senator BENNETT.—for the opportunity of talking about Tom Griffith. As I listened to my colleagues go through he appropriate list of accomplishments of the other nominees, I have decided not to do that with respect to Tom Griffith, for the simple reason that the Committee already has all of the information about his performance educationally, his practice of law, his experience in the standard resume fashion. Rather than repeat that which is already in the record, I would like to talk about Tom Griffith, the individual, and what I think he brings to this particular assignment.

First, let me introduce to the Committee the people he has with him from his family. He is accompanied, of course, by his wife and her father, and by his two daughters and their husbands.

Maybe you would like to greet them and have them perhaps stand.

Chairman HATCH. We are so happy to have all of you here. Thanks for coming and we appreciate you supporting Tom Griffith.

Senator BENNETT. Now, Mr. Chairman, Tom Griffith really needs no introduction to the Senate because he served as Legal Counsel to the Senate in what is perhaps the Senate's most difficult experience, at least the most difficult experience in the time that I have been here. Tom Griffith was Counsel to the Senate when we went through the historic impeachment experience of holding an impeachment trial on President Clinton—only the second time in our Republic's history where the Senate has had this kind of challenge. I was involved in that, as were members of this Committee.

The primary burden of dealing with that challenge fell upon the two leaders, Senator Lott as the Majority Leader and Senator Daschle as the Minority Leader. I watched with interest and then admiration as Tom Griffith negotiated through that particular mine field, giving very sound, calm, carefully researched and reasoned advice to both sides. He was not a partisan counsel. From my observation, Senator Daschle was as reliant upon Tom Griffith's legal expertise as was Senator Lott.

If I can take us back to the memory of that experience, virtually everyone around us in Washington predicted a melt-down. The comment was made that this case was toxic. It had soiled the presidency, it had soiled the House of Representatives, and it was going to soil the United States Senate.

After it was over, the two leaders embraced in the well of the Senate. I can't remember which one it was that began it, but one said to the other, "we did it," and the other responded, "yes, we did." And the Senate came out of that experience with its reputation enhanced rather than soiled, and to no small degree that fact that we had that result is due to Tom Griffith.

There are very few nominees for the Federal bench who have had the experience of going through that kind of fire, who have had their judicial temperament tested in that kind of an atmosphere. Tom Griffith therefore comes before this Committee unique in terms of his experience with the Committee and with the Senate as a whole, and indeed in the national spotlight.

I would urge every member of the Committee, regardless of party, as they sift through the various controversial statements that have been made, in my view improperly, about Tom Griffith, to set those aside and think back over their personal experience with him in that time of great challenge and great trial in the Senate's history. I am sure if they do, the members of the Committee will recognize that the President has nominated an extraordinary man with an extraordinary background to this very important position. Upon reflecting on those personal qualities that he has, the members of the Committee will endorse and support him for this assignment.

I am happy to have had the opportunity and the honor of introducing him and his family to the Committee here this morning.

Chairman HATCH. Well, thank you, Senator Bennett. Those remarks are very, very well received by me, as you know, and I think should be received well by everybody. So thank you for being here and we appreciate your strong support of Mr. Griffith.

Perhaps I can make my remarks at this point and then I will turn to Senator Specter, if he has any he would care to make.

PRESENTATION OF THOMAS B. GRIFFITH, OF UTAH, NOMINEE TO BE CIRCUIT JUDGE FOR THE DISTRICT OF COLUMBIA, BY HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

Chairman HATCH. I am pleased to introduce and welcome to the Committee a member of the Senate family, Thomas B. Griffith. Many of us know Tom from his distinguished service, as Senator Bennett has said, as Senate Legal Counsel. That is no small position. It is one of the most important legal positions in the country.

As the chief legal officer of the Senate, Tom represented the Senate, its committees, members, officers and employees in litigation relating to their constitutional powers and privileges. He advised committees about their investigatory powers and procedures, represented the institutional interests of the Senate in the impeachment trial of President Clinton, in the Line Item Veto Act litigation, and in numerous Committee investigations, and handled them all with aplomb, decency, fairness, balance and integrity. My friends on the other side have acknowledged that.

Despite the difficult and often divisive issues that Tom encountered in his role as Senate Legal Counsel, he consistently exercised sound judgment, objectivity and fairness—qualities that all of us up here know are essential for any Federal judge. Tom's possession of these qualities earned him the respect and admiration of members on both sides of the aisle. Along these lines, I would like to take a couple of moments to share just a few excerpts from the many letters we received in support of his nomination.

Richard Wiley, of the firm Wiley, Rein and Fielding, one of the great firms in this town, and former law partner of Tom Griffith's, wrote that, quote, "Tom is an outstanding lawyer with keen judgment, congenial temperament and impeccable personal integrity," unquote.

Seth Waxman, former Solicitor General of the United States, a leading Democrat in this town and one of the attorneys I most respect in this town, said, quote, "I have known Tom since he was Senate Legal Counsel and I was Solicitor General, and I have the highest regard for his integrity. For my own part, I would stake most everything on his word alone. Litigants would be in good hands with a person of Tom Griffith's character as their judge," unquote.

Glen Ivey, former counsel to Senate Democratic Leader Tom Daschle, wrote to this Committee stating, quote, "I believe Mr. Griffith is an exceptional nominee and would make an excellent judge. Although Mr. Griffith and I have different part affiliations and do not agree on all political matters, I learned during the Senate's Whitewater and campaign finance reform investigations that Mr. Griffith took seriously his oath of office. Even when we were handling sensitive and politically-charged issues, he acted in a nonpartisan and objective manner. I believe Mr. Griffith has the intellect and the temperament to make an outstanding jurist," unquote.

Fred Fielding was White House Counsel for President Reagan. Fred helped found the reputable firm Wiley, Rein and Fielding. Mr. Fielding has described Tom as, quote, "a very special individual and a man possessed of the highest integrity. He is a fine profes-

sional who demands of himself the very best of his intellect and energies," unquote.

According to David Kendall, one of the leading attorneys in the country, certainly in this area, personal counsel to President and Senator Clinton, quote, "For years, Tom has been a leader in the bar and has shown dedication to its principles. The Federal bench needs judges like Tom, an excellent lawyer who is supported across the political spectrum. We support Tom and believe he has the intellect and judgment to be an excellent judge," unquote.

Harvard Law Professor William Stuntz has known Tom for over 20 years. He wrote, quote, "Few people I know deserve to be called wise; very few deserve to be called both wise and good. Tom is a wise and good man. I believe he will be one of the Nation's finest judges," unquote.

Tom's nomination is also wholeheartedly supported by a man who is uniquely qualified to say who would be a good fit for the U.S. Court of Appeals for the D.C. Circuit. Abner Mikva, former White House Counsel for President Clinton and a former judge of that very court, wrote, quote, "I have known Tom Griffith in the public sector and in the private sector, and I have never heard a whisper against his integrity or responsibility," unquote.

Finally, there are so many others I could read, but let me just say Senator Dodd, of Connecticut, our esteemed colleague, noted that "Tom handled his difficult responsibilities as Senate Legal Counsel with great confidence and skill...impressing all who knew him with his knowledge of the law and never succumbing to the temptation to bend the law to partisan ends," unquote.

Now, I could go on and on reading the comments received by the Judiciary Committee in praise of Tom Griffith. In all my years in the Senate, and they now comprise 28 years, I have rarely seen such a broad outpouring of support for a nominee from so many distinguished individuals on both sides of the aisle.

Tom has been a dedicated public servant and has demonstrated the sound judgment and temperament necessary to be an outstanding Federal circuit court of appeals judge. It is no wonder that the President chose to nominate Tom Griffith for the D.C. Circuit Court of Appeals.

Prior to coming to work for the Senate, Tom also earned an impressive record of achievement. He distinguished himself academically, graduating summa cum laude from Brigham Young University and valedictorian of his college. Tom earned his law degree from the University of Virginia, a great law school, where he was a member of the law review.

He also has extensive experience in the private sector, working at the North Carolina law firm of Robinson, Bradshaw and Hinson, and subsequently as a partner in the litigation and government affairs practice areas in the Washington firm of Wiley, Rein and Fielding.

Tom has also given back to the community throughout his legal career. While in private practice, he undertook the significant pro bono representation of a death row inmate, which led to the commutation of the inmate's sentence by the Governor of Virginia. He has also frequently volunteered his time to pro bono and public service groups.

Today, Tom serves as Assistant to the President and General Counsel of the largest private university in America, his alma mater, and mine, Brigham Young University. I understand that some have raised questions about whether he was required to take the Utah bar exam to serve in his current position as BYU General Counsel. This criticism can be put to rest by a letter I received from five former Utah Bar presidents.

They stated that, quote, "a general counsel working in the State of Utah need not be a member of the Utah Bar provided that when giving legal advice to his or her employer that he or she does so in conjunction with an associated attorney who is an active member of the Utah Bar and that said general counsel makes no Utah court appearances and signs no Utah pleadings, motions or briefs," unquote. In addition, the ABA has thoroughly examined Mr. Griffith's record and made the determination that he is qualified to serve on this bench.

A prominent Salt Lake City attorney, James Jardine, has described what Mr. Griffith would bring to the court, quote, "He is a skilled, thoughtful, experienced lawyer...He is extraordinarily thoughtful. His intelligence is tempered by his judgment. He engenders trust and confidence among colleagues. His integrity, balance and patience are genuine virtues. He will in every way enhance the court," unquote. Mr. Jardine concluded, quote, "I think in a time of divisiveness, his appointment can be a point of agreement," unquote. Mr. Jardine served in the Justice Department under then-Attorney General Griffin Bell.

I could not agree than with Jim Jardine. This important court needs this good man to serve, and I hope that the Senate will treat a member of the Senate family with all due respect and move quickly to confirm the President's nominee, Tom Griffith, to this long vacant seat.

I personally know Tom. He is a personal friend. I watched him when he served in the Senate. I saw a man of inestimable abilities who did the job here and did it fairly, and I know my colleagues on the other side know that. So I don't think you could get a person for this particular position.

We will chat more about Tom later, but let me talk about Paul Crotty. He is our distinguished district nominee for the Southern District of New York. He has impeccable credentials which include an LL.B. from Cornell Law School with the highest honors and a 2-year clerkship with Hon. Lloyd MacMahon in the Southern District of New York.

He has practiced law with the renowned firm of Donovan, Leisure, Newton and Irvine, in which he became a partner—a great law firm. He has had an illustrious career in the public sector, as well, serving as New York City Commissioner of various offices in two mayoral administrations. He is currently the Group President for New York and Connecticut of Verizon Communications.

We welcome you this morning.

John Seabright is our nominee for the District of Hawaii. A distinguished graduate of George Washington University Law School, Mr. Seabright has had an equally distinguished legal career and brings 20 years of experience to the Federal bench.

After a short tenure in private practice, he entered the public sector first as an Assistant U.S. Attorney for the District of Columbia, then as an Assistant U.S. Attorney for Hawaii. Since 2001, he has served as the Supervisory Assistant U.S. Attorney in Hawaii. So the Committee welcomes him this morning.

We are grateful to have both of you here as district court nominees, and, Mr. Griffith, you as a circuit court of appeals nominee. We welcome your families and your friends, as well. We are grateful to have all of them here. You have all had tremendous testimony by various Senators from your respective States and we are very happy to have you all here.

With that, I will turn to our distinguished friend, Senator Specter.

STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator SPECTER. Well, thank you very much, Mr. Chairman, and I commend you for scheduling a hearing on judges on the one day which we are back in session. No sooner are we here than we have a judicial hearing.

I join my colleagues in welcoming the distinguished nominees who are before us today. Mr. Griffith comes highly recommended by his two home State Senators, who know him very well, and backed up by a very impressive record on the Virginia Law Review, a mark of distinction, summa cum laude at Brigham Young University, valedictorian in the College of Humanities—that is first in his class—and has been noted with some specificity, served as counsel for the very complex hearings on the impeachment proceeding.

Mr. Crotty comes well recommended, a special call by former Senator Alfonse D'Amato, no longer in the Senate, but still heard with some gusto and emphasis in these chambers. J. Michael Seabright was recommended by Senator Inouye, which carries enormous weight with this Committee and in the Senate.

So I am pleased to see these distinguished nominees here, Mr. Chairman, and look forward to participating in the confirmation process.

Chairman HATCH. Thank you so much, Senator.

What we are going to do now is recess until about five after eleven and allow our colleagues time to come back. In fact, we will recess until eleven. I can start my questions at eleven. Maybe we will delay it just a little bit, but I hope all of the three judgeship nominees will be here promptly at eleven.

We apologize for this intervening time, but we want to accommodate our colleagues on the other side. These caucus meetings are very important at this time and it is the only way I know that we can conclude this matter. So we will do our very, very best to conclude this after we begin again at eleven. So I would appreciate it if all of you would come back at that time.

With that, we will recess until 11:00 a.m.

[The Committee stood in recess from 9:39 a.m. to 11:20 a.m.]

Chairman HATCH. We will call the Committee to order, and let me just say this. We are not sure whether any Democrats are going to come to the hearing, and my personal belief is that they like all

three of you and that we have a real chance of maybe putting some judges through before the end of this session. Now, it is miraculous if we do, but I think that with the help of my fellow Committee members, we may be able to do that.

But I still want to ask some questions of the three of you, so I am going to ask all three of you to come up to the table. Usually, we would start with the circuit court of appeals nominee first, but I am going to have all three of you in the interest of time.

Would you please raise your right hands?

Do you swear that the testimony you are about to give will be the truth, the whole truth and nothing but the truth, so help you God?

Mr. GRIFFITH. Yes.

Mr. CROTTY. Yes.

Mr. SEABRIGHT. Yes.

Chairman HATCH. Thank you. Please be seated.

Without objection, I will put a statement of Senator Leahy into the record immediately following my statement, if you will. Senator Leahy sends his regrets that he cannot be here.

I think what we will do is start with you, Mr. Griffith, and have you make any statement you care to make. I would like you during your statement to introduce your wife and family members who are here, and friends, if you care to go that far.

Then we will do the same with you, Mr. Crotty, and then with you, Mr. Seabright.

STATEMENT OF THOMAS B. GRIFFITH, NOMINEE TO BE CIRCUIT JUDGE FOR THE DISTRICT OF COLUMBIA

Mr. GRIFFITH. Thank you very much, Senator. It is an honor to be here. It is an honor to be nominated by President Bush for this position, and I want to publicly thank the President and express my gratitude to him for his confidence in me. I am also mindful of the Senate schedule and how busy you all are, and appreciate a great deal giving the three of us an opportunity to appear before the Senate.

I would like to introduce my family, if that is okay. Behind me is my wife of 28 years, Susan Stell Griffith.

Chairman HATCH. We are so happy to have you here, Susan.

Mr. GRIFFITH. And her father, my father-in-law, the best father-in-law in the world, William Stell.

Chairman HATCH. That is a good sign, when the father-in-law—

Mr. GRIFFITH. That is right.

Chairman HATCH. We are happy to have you here.

Mr. GRIFFITH. My wife and I have six children, two of whom still live in the Washington, D.C., area, our two married daughters, and I would like to introduce them and their husbands, if that is all right.

Chairman HATCH. That would be great.

Mr. GRIFFITH. Eric Watts and Chelsea Griffith Watts.

Chairman HATCH. So happy to have you here.

Mr. GRIFFITH. My daughter Chelsea is not feeling too well today because she is expecting and suffering from morning sickness.

Chairman HATCH. Some of us know how to deliver babies.

Mr. GRIFFITH. Fortunately, we are not at that point just yet.

Then I would also like to introduce my son-in-law Ryan Clegg and his wife, my daughter, Megan Griffith Clegg.

Chairman HATCH. So happy to have you both here.

Mr. GRIFFITH. Our children are home in Utah and I have a son—

Chairman HATCH. I know you had a number of friends in the audience both this morning and now.

Mr. GRIFFITH. I am grateful for their presence.

If I might just say one further expression of gratitude, I am very grateful to be back here in the Senate. This is an institution that I love and for which I have profound admiration and respect.

I counted among the greatest honors of my life that I was able to serve as Senate Legal Counsel. Some nice things were said about that this morning. I want to acknowledge that earlier today, my predecessor as Senate Legal Counsel, Michael Davidson, one of the finest lawyers I have ever worked with or known, was here, and I want to say publicly that much of the credit that you and others gave me for my performance as Senate Legal Counsel was because I was trained by Mike Davidson.

But I am honored to be here before the Committee, and I am willing and anxious to answer any questions that you may have.

[The biographical information of Mr. Griffith follows.]

SENATE JUDICIARY COMMITTEE QUESTIONNAIRE
THOMAS B. GRIFFITH

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name (include any former names used).

Answer: Thomas Beall Griffith

2. Address: List current place of residence and office address(es).

Answer:

Place of residence: Provo, UT

Office address: Brigham Young University, A-357 ASB, Provo, UT 84602

3. Date and place of birth.

Answer: July 5, 1954; Yokohama, Japan

4. Marital Status (include maiden name of wife, or husband's name): List spouse's occupation, employer's name and business address(es).

Answer: Married; Susan Stell; homemaker

5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

Answer:

College attended: Brigham Young University
Dates of attendance: August 1972 to April 1973; October 1975 to April 1978; January to April 1979
Degree received: Bachelor of Arts, summa cum laude
Date degree granted: April 1978

Law school attended: University of Virginia School of Law
Dates of attendance: August to December 1978; August 1982 to May 1985
Degree received: Juris Doctor
Date Degree granted: May 1985

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6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

Answer:

2000 to present	Brigham Young University. Assistant to the President and General Counsel
2004 to present	Friends of the CEELI Institute. International Advisory Board member.
1996 to present	Federalist Society for Law and Public Policy. Vice-Chairman, Federalism and Separation of Powers Practice Group.
1995 to present	American Bar Association, Central European and Eurasian Law Initiative (CEELI). Advisory Board member.
2002, 2003	United States Secretary of Education's Commission on Opportunity in Athletics. Commission member.
1999 - 2000	Advisory Commission on Electronic Commerce. General Counsel.
1996 -1999	American Bar Association, Section of Administrative Law and Regulatory Practice. *Ex officio* Council member.
1999, 2000	Wiley, Rein and Fielding. Partner.
1995 - 99	United States Senate. Senate Legal Counsel.
1989 - 95	Wiley, Rein and Fielding. Associate; partner.
1985 - 89	Robinson, Bradshaw and Hinson. Associate.
1984	Jones, Day. Summer associate.
1983	University of Virginia School of Law. Research assistant to Professor Harvey Perlman.
1982	United States Department of the Interior. Summer research assistant.

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1979 – 82	Church Educational System of the Church of Jesus Christ of Latter-day Saints. Director of programs in Baltimore, Maryland area.
1979	Pennsylvania Life Insurance Company. Summer sales associate.
1978	Washington, DC Temple of the Church of Jesus Christ of Latter-day Saints. Custodian.

7. Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

Answer: No.

8. Honors and Awards: List any scholarships, fellowships, honorary degrees and honorary society memberships that you believe would be of interest to the Committee.

Answer:

Edwin S. Hinckley Scholar, Brigham Young University
Valedictorian, College of Humanities, Brigham Young University
Summa cum laude, Brigham Young University
High honors with distinction, Honors Program, Brigham Young University
Member, Virginia Law Review, University of Virginia School of Law

9. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

Answer:

Bar associations: North Carolina State Bar Association; Bar Association of the District of Columbia; American Bar Association

Legal-related committees or conferences: Federalist Society; National Association of College and University Attorneys

Titles and dates of offices held in such groups:

a. American Bar Association. From 1996 to 1999, I served as an ex officio Council Member of the Section of Administrative Law and Regulatory Practice. From 1995 to the present, I have been a member of the Advisory Board of the Central European and Eurasian Law Initiative (CEELI).

b. Federalist Society. From 1996 to 2002, I served as a Vice-Chairman of the Federalism and Separation of Powers Practice Group. I currently serve as a Senior Advisor to that group.

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.

Answer:

Organizations to which I belong that are active in lobbying before public bodies:

a. American Bar Association
b. The Church of Jesus Christ of Latter-day Saints
c. Republican Party

All other organizations to which I belong:

a. Federalist Society
b. Rotary International
c. National Association of College and University Attorneys

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission and lapses if such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

Answer:

Supreme Court of the United States, April, 24, 1995.

Court of Appeals of the District of Columbia and the trial courts subject thereto, March 20, 1991. Membership in the District of Columbia bar lapsed for non-payment of dues on November 30, 1998 due to a clerical oversight, but was reinstated on November 13, 2001.

United States Court of Appeals for the Fourth Circuit, February 17, 1988.

North Carolina Supreme Court and all other state trial and appellate courts subject thereto, September 13, 1985 through July 17, 1992. My membership lapsed when I moved my practice from North Carolina to the District of Columbia.

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THOMAS B. GRIFFITH

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.

Answer:

Published material I have written or edited (attached):

a. "Lawyers and the Rule of Law," *Utah Bar Journal*, October 2003, at 12.

b. "Politics and the Atonement," in *The Rock of Our Redeemer: Talks from the 2002 BYU Women's Conference* 200 (Brigham Young University, 2002).

c. "Lawyers and the Atonement," *Clark Memorandum* (J. Reuben Clark Law School), Spring 2001, at 8. Also published as "Lawyers and the Atonement," in *Life in the Law* 233 (Galen L. Fletcher et al. eds., 2002).

d. "The Reality of Impeachment," *The American Lawyer*, August 1999, at 109.

e. Note, "Beyond Process: A Substantive Rationale for the Bill of Attainder Clause," *70 Va. L. Rev. 475* (1984).

f. "How Do We Practice Our Religion While We Practice?" *Clark Memorandum* (J. Reuben Clark Law School), Fall 2004, at 13.

Speeches I have given on issues involving constitutional law or legal policy (attached):

a. "Congressional Responses to Executive Orders." Statement to Subcommittee on Commercial and Administrative Law of the Committee on the Judiciary of the United States House of Representatives, October 28, 1999.

b. "Resurrecting the Non-delegation Doctrine." Statement as panelist at the Federalist Society Lawyers Convention, November 1998.

c. "Remedies for Presidential Misconduct." Statement as moderator of panel at the Federalist Society Lawyers Convention, November 1998.

d. "Line Item Veto Act." Statement as panelist in discussion sponsored by the Section of Administrative Law and Regulatory Practice of the American Bar Association at its annual meeting, August 1998.

e. "Disciplining Congress: The Taxing and Spending Powers." Statement as moderator of panel at the Federalist Society Lawyers Convention, November 1996.

f. "The Impeachment Trial of President Clinton." Outline of remarks given at various times and places.

g. "Investigating the President: The Role of the Government Lawyer." Given to the Utah Bar Association, September 1999.

h. "The Role of a General Counsel." Given to the Provo, Utah chapter of the American Inns of Court, August 2001.

i. "The Rule of Law." Given at a Utah Law Day event sponsored by the Attorney General of Utah, May 2003.

j. I have given variations on and combinations of two speeches titled, "Lawyers and the Atonement" and "Practicing Religion While Practicing Law."

k. "Ethical Perspectives for Perilous Times." Panel sponsored by the Dallas, Texas chapter of the J. Reuben Clark Law Society, October 2001.

l. I have participated in panel discussions discussing my work on the Secretary's Commission on Opportunity in Athletics (Title IX Commission) sponsored by the National Association of College and University Attorneys (June 2003) and the National Collegiate Athletic Association (April 2003).

13. Health: What is the present state of your health? List the date of your last physical examination.

Answer: I am in excellent health. My last physical examination took place on March 24, 2004.

14. Judicial Office: State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each court.

Answer: None.

SENATE JUDICIARY COMMITTEE QUESTIONNAIRE
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15. Citations: If you are or have been a judge, provide: (1) citations for the ten most significant opinions you have written; (2) a short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions.

Answer: I am not nor have I been a judge.

16. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

Answer: I have never been a candidate for elective public office. I have held two appointed public offices:

Commissioner, Secretary of Education's Commission on Opportunity in Athletics (Title IX Commission), 2002 - 03.

Senate Legal Counsel of the United States, 1995 – 99.

17. Legal Career:

a. Describe chronologically your law practice and experience after graduation from law school including:

1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;

2. whether you practiced alone, and if so, the addresses and dates;

3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each.

Answer:

1. I have not served as a clerk to a judge.

2. I have never practiced alone.

SENATE JUDICIARY COMMITTEE QUESTIONNAIRE
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3.

August 2000 to the present. I serve as Assistant to the President and General Counsel of Brigham Young University, A-357 ASB, Provo, UT 84602.

April 1999 to August 2000. I was a partner at Wiley, Rein and Fielding, 1776 K Street N.W., Washington, DC 20006.

March 1995 to March 1999. I served as Senate Legal Counsel of the United States, 642 Hart Senate Office Building, Washington, DC 20510.

December 1989 to March 1995. I was first an associate (1989-93) and then a partner (1994-95) at Wiley, Rein and Fielding, 1776 K Street N.W., Washington, DC 20006.

May 1985 to December 1989. I was an associate at Robinson, Bradshaw and Hinson, 101 North Tryon St., Suite 1900, Charlotte, NC 28246.

17.b.1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

Answer:

1985	General practice at a full-service corporate law firm: transactional, securities, corporate governance, and litigation work.
1986 - 89	Corporate, commercial, securities, and employment litigation.
1989 – 95	Environmental insurance coverage litigation and regulatory investigations.
1995 – 99	Legal matters related to the United States Senate. Primary focus was on Senate investigations, the work of Senate committees, the defense of Acts of Congress, and the impeachment trial of President Clinton.
1999 – 2000	Work of congressional commissions, intellectual property litigation, and environmental insurance coverage litigation.
2000 - present	Higher education law.

SENATE JUDICIARY COMMITTEE QUESTIONNAIRE
THOMAS B. GRIFFITH

17.b.2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

Answer:

Description of typical former clients: While in private practice, my clients were typically businesses involved in disputes over their corporate governance, transactions with other entities, employment matters, or in need of legal assistance to respond to regulatory investigations. Examples include a national accounting firm that was the target of an investigation by the federal Office of Thrift Supervision, insurance companies that underwrote liability policies to manufacturing entities held responsible by government agencies for the cleanup of environmental contamination, and employers whose employment practices were challenged under state tort law and federal civil rights laws. While serving the Senate, my clients were typically Senate committees conducting investigations, the Senate itself in litigation over its powers, or, in the case of the impeachment trial of President Clinton, creating processes that were fair and complete.

Areas of specialization: Insurance coverage disputes, employment law, and congressional investigations.

17.c.1. Did you appear in court frequently, occasionally, or not all? If the frequency of your appearances in court varied, describe each such variance, giving dates.

Answer: From 1985 until I became Senate Legal Counsel in 1995, I appeared in court occasionally. As an associate at Robinson, Bradshaw, and Hinson from 1985 to 1989, I appeared in four trials in state court and one trial in federal court. I also made appearances in state and federal court on motions. As an associate and then a partner at Wiley, Rein and Fielding from 1989 to 1995, I appeared in one trial in Superior Court of the District of Columbia and in a state habeas corpus proceeding in Virginia. During that time, I also made appearances in state and federal courts on various motions. Since that time, as I have become the head of legal offices, first as Senate Legal Counsel and now as general counsel at Brigham Young University, the number of my court appearances has diminished significantly. As Senate Legal Counsel, I argued the Senate's position on the constitutionality of the Line-Item Veto Act in federal district court in *Byrd v. Raines*, 956 F. Supp. 25 (D.D.C. 1997), and in *City of New York v. Clinton*, 985 F. Supp. 168 (D.D.C. 1998). As general counsel at Brigham Young University, I have made no court appearances.

17.c.2. What percentage of these appearances was in: (a) federal courts; (b) state courts of record; (c) other courts.

Answer: (a) Approximately 40% of my court appearances were in federal courts. (b) Approximately 60% of my appearances were in state courts. (c) I have made a single appearance before "other courts."

SENATE JUDICIARY COMMITTEE QUESTIONNAIRE
THOMAS B. GRIFFITH

17.c.3. What percentage of your litigation was: (a) civil; (b) criminal.

Answer: The criminal litigation in which I have been involved was representing a death row inmate in Virginia in his state and federal habeas corpus proceedings. All other litigation in which I have been involved was civil.

17.c.4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were the sole counsel, chief counsel, or associate counsel.

Answer: I have tried to judgment three cases in which I was the sole counsel and three cases in which I was associate counsel.

17.c.5. What percentage of these trials was: (a) jury; (b) non-jury.

Answer: Each of these cases was non-jury.

18. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case: (a) the date of representation; (b) the name of the court and the name of the judge or judges before whom the case was litigated; and (c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

Answer:

1. *The Impeachment Trial of President Clinton.* In 1998 and 1999, I represented the institutional interests of the United States Senate in the impeachment trial of President Clinton. The President had been impeached by the House of Representatives on charges that he had obstructed justice in a lawsuit in which he was a defendant and that he had committed perjury before a grand jury that was investigating allegations that he had obstructed justice in that lawsuit. My role was to advise the Senate leadership, its members, officers, and employees how to conduct an impeachment trial consistent with the Constitution, Senate rules and precedent, and judicial decisions. I was involved in the planning of the trial and was present throughout the Senate proceedings. I also advised the Senate leadership, its members, officers, and employees throughout the trial. I represented the interests of the Senate in negotiations over the conduct of the trial with the President of the United States, the House of Representatives, the Chief Justice of the United States, and the independent counsel. The Senate did not remove the President from office.

SENATE JUDICIARY COMMITTEE QUESTIONNAIRE
THOMAS B. GRIFFITH

My co-counsel during the trial was Deputy Senate Legal Counsel Morgan J. Frankel, 642 Hart Senate Office Building, Washington, DC 20510, 202-224-4435. The principal counsel for the House of Representatives was Representative Henry J. Hyde, 2110 Rayburn House Office Building, Washington, DC 20515, 202-225-4561. The principal counsel for the President of the United States was Gregory B. Craig, Williams and Connolly, 725 Twelfth St., N.W., Washington, DC, 20005, 202-434-5506. The principal counsel for the Chief Justice of the United States was James C. Duff, Baker, Donelson, Bearman and Caldwell, Lincoln Square, 555 Eleventh St., N.W., Sixth Floor, Washington, DC 20004, 202-508-3483.

2. *Clinton v. City of New York*, 524 U.S. 417 (1998). As Senate Legal Counsel, I represented the institutional interests of the United States Senate in a challenge to the constitutionality of the Line-Item Veto Act brought by the City of New York, among others. By statute, the challenge was to be considered initially by the federal district court in the District of Columbia, followed by appellate review by the Supreme Court of the United States. By resolution sponsored by the Republican and Democratic Leaders of the Senate, the Senate, by unanimous consent, directed the Senate Legal Counsel to appear in the case as *amicus curiae* in support of the Executive's view that the Act was constitutional. The Senate appeared in the case, filed briefs, and was given time to argue before the federal district court. I argued for the Senate. The district court ruled that the Act was unconstitutional. The Executive appealed the case to the Supreme Court. The Senate filed briefs with the Supreme Court, but, after consultation with the Solicitor General of the United States, it was determined that the Senate would not seek time to argue. I participated in the preparations of the Solicitor General for oral argument. The Court struck down the Act by a vote of 7-2 on the ground that it violated the Presentment Clause of the Constitution.

My co-counsel was Deputy Senate Legal Counsel Morgan J. Frankel, 642 Hart Senate Office Building, Washington, DC 20510, 202-224-4435. The principal counsel for the United States was Seth P. Waxman, then-Solicitor General of the United States, Wilmer, Cutler and Pickering, 2445 M St., N.W., Washington, DC 20037, 202-663-6800. The principal counsel for the City of New York was Charles J. Cooper, Cooper and Kirk, 1500 K St., N.W., Suite 200, Washington, DC 20005, 202-220-9600. The principal counsel for the Snake River Potato Growers was Louis R. Cohen, Wilmer, Cutler and Pickering, 2445 M St., N.W., Washington, DC 20037, 202-663-6700.

3. *Raines v. Byrd*, 512 U.S. 811 (1997). As Senate Legal Counsel, I represented the institutional interests of the United States Senate in a challenge to the constitutionality of the Line-Item Veto Act brought by Senator Robert Byrd and others. By statute, the challenge was to be considered initially by the federal district court in the District of Columbia, followed by appellate review by the Supreme Court of the United States. By resolution sponsored by the Republican and Democratic Leaders of the Senate, the Senate, by unanimous consent, directed the Senate Legal Counsel to appear in the case as *amicus curiae* in support of the Executive's view that the Act was constitutional. The Senate appeared in the case, filed briefs, and was given time to argue before the federal

district court. I argued for the Senate. The district court ruled that the Act was unconstitutional. The Executive appealed the case to the Supreme Court of the United States. The Senate filed briefs in the Supreme Court, but, after consultation with the Solicitor General of the United States, it was determined that the Senate would not seek time to argue. I participated in the preparations of the Solicitor General for oral argument. The Supreme Court dismissed plaintiffs' case on the ground that members of Congress lacked standing to challenge the constitutionality of the Act, an argument in which the Senate did not participate.

My co-counsel was Deputy Senate Legal Counsel Morgan J. Frankel, 642 Hart Senate Office Building, Washington, DC 20510, 202-224-4435. The principal counsel for the United States was Walter Dellinger, then-Acting Solicitor General of the United States, O'Melveny and Myers, 555 13th St., N.W., Suite 500 West, Washington, DC 20004, 202-383-5319. The principal counsel for plaintiffs before the district court was Charles J. Cooper, Cooper and Kirk, 1500 K St., N.W., Suite 200, Washington, DC 20005, 202-220-9600. The principal counsel for the appellees before the Supreme Court was Alan B. Morrison, Public Citizen Litigation Group, 1600 20th St., N.W., Washington, DC 20009, 202-588-1000.

4. *Houston General Insurance Co. v. American General Lloyds,* No. 141-101105-86 (Tex. Dist. Ct., Tarrant County, 1993). I was the principal associate representing American General Lloyds in a dispute between insurance carriers regarding who would bear the costs of cleaning up the Brio waste site near Houston, Texas. In the face of a ruling from the trial court judge, the Honorable Catherine Adamski Gant, setting a trial date far in advance of what the parties expected, I was the principal attorney involved in gathering the factual material in preparation for dispositive motions and trial. As such, in addition to taking depositions and preparing and arguing motions, I coordinated the activities of many other attorneys. I also participated as counsel in the mock trial staged to prepare for trial. The litigation was settled prior to trial.

My co-counsel was Walter J. Andrews, then-partner at Wiley, Rein, and Fielding, Shaw Pittman, 1650 Tysons Boulevard, McLean, VA 22102, 703-770-7900. The principal counsel for the Houston General Insurance Co. was Martin B. McNamara, Gibson, Dunn and Crutcher, 2100 McKinney Ave., Suite 1100, Dallas, Texas 75201, 214-698-3127.

5. *Office of Thrift Supervision v. Ernst and Young* (1992). I was the principal associate representing Ernst and Young in an investigation by the Office of Thrift Supervision related to the firm's involvement in audit work done for failed thrifts. Prior to making Ernst and Young the target of an investigation, the OTS had frozen the assets of the Kaye Scholer law firm following an investigation of its legal work for failed thrifts. As the principal associate, I supervised and coordinated a team of approximately 20 lawyers who were helping prepare a response to the OTS investigation. The investigation ended with a settlement that involved a $400 million payment from Ernst and Young to the government.

SENATE JUDICIARY COMMITTEE QUESTIONNAIRE
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My co-counsel was Fred F. Fielding, Wiley, Rein, and Fielding, 1776 K St., N.W., Washington, DC 20006, 202-719-7320. The principal counsel for the Office of Thrift Supervision was Harris Weinstein, then-chief counsel of the Office of Thrift Supervision, Covington and Burling, 1201 Pennsylvania Ave., N.W., Washington, DC 20004, 202-662-5302.

6. *Credit International Bank v. Lucey* (D.C. Super. Ct., 1990) I was the principal associate in the trial of an employment contract dispute between Credit International Bank, which my firm represented, and Charles Emmet Lucey. Mr. Lucey had been dismissed as the chief executive officer of the bank, but claimed that he was entitled to certain remuneration under the terms of an alleged employment contract. The bank disputed the existence of the contract. The alleged contract contained an arbitration clause. The trial was to determine whether there was an enforceable agreement to submit the dispute to arbitration. As principal associate, I was primarily responsible for the preparation of the legal and factual arguments to be made at trial and the motions and briefs filed with the court. Judge Nan Huhn ruled in our favor on all points.

My co-counsel was Fred F. Fielding, Wiley, Rein, and Fielding, 1776 K St., N.W., Washington, DC 20006, 202-719-7320. The principal counsel for Mr. Lucey was David Webster, Caplin and Drysdale, One Thomas Circle, N.W., Washington, DC 20005, 202-862-5000.

7. *Joseph Patrick Payne, Sr. v. Charles Thompson, Warden, Mecklenburg Correctional Center, et al.* (Va. Cir. Ct. Powhatan County, 1991). From 1991 through 1996, my law firm took on a pro bono representation as part of the American Bar Association's death penalty project. The firm represented Joseph Payne who, while an inmate serving a life sentence in Virginia's correctional system, had been convicted of murdering a fellow inmate. My firm represented Payne in his state and federal habeas proceedings. I became involved in the matter in preparation for the state habeas evidentiary hearing. Along with one other associate at the firm and a lawyer who was expert in criminal matters, I helped try the case at the evidentiary hearing before Judge Thomas V. Warren, Circuit Court Judge, Powhatan County, Virginia, in October 1991, and then participated in the briefing of the case through its subsequent reviews up to and including an unsuccessful petition seeking a writ of certiorari from the United States Supreme Court. My involvement in the case ceased when I became Senate Legal Counsel in March 1995. Prior to my leaving the case, I was the principal attorney charged with conceiving and executing a "pardon strategy". That strategy proved successful when Governor George Allen commuted Payne's death sentence in 1995 on the evening of his scheduled execution.

My co-counsel in the case was Paul Khoury, Wiley, Rein, and Fielding, 1776 K St., N.W., Washington, DC 20006, 202-719-7346. The principal counsel for the Commonwealth of Virginia was Thomas B. Bagwell, Office of the Attorney General, 900 East Main St., Richmond, VA 23219, 804-786-2071.

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8. *Stott v. Haworth*, 916 F.2d 134 (4th Cir. 1990). From 1987 to 1989, I participated in my firm's defense of the Governor of North Carolina and a number of his cabinet secretaries in a class action lawsuit brought in the Eastern District of North Carolina by state employees alleging that the newly-elected governor had taken adverse personnel actions against them based on improper partisan political concerns. My primary involvement was in the discovery and brief writing that resulted in the partial granting of our motions for summary judgment by Judge W. Earl Britt. I also participated in the briefing of the appeal to the Fourth Circuit, which, in an opinion written by Donald Russell, Circuit Judge, ruled in favor of the defendants on all points.

My co-counsel in the case was John R. Wester, Robinson, Bradshaw, and Hinson, 101 North Tryon Street, Suite 1900, Charlotte, NC 28246, 704-377-2536. The principal counsel for plaintiffs was Melinda Lawrence, Patterson, Harkavy and Lawrence, 200 West Morgan St., Raleigh, NC 27611, 919-755-1812.

9. *Loral Fairchild Corporation v. Sony Corporation.*, 181 F.3d 1313 (Fed. Cir. 1999), *cert. denied,* 528 U.S. 1075 (2000). I was the principal author of the legal arguments in the petition for the writ of certiorari. My firm had represented petitioner Loral Fairchild in an infringement suit against Sony and others over the use of charge coupled devices, a technology vital to camcorders. Sitting by designation in the Eastern District of New York, Circuit Judge Randall Rader overturned a jury verdict in favor of Loral Fairchild and granted Sony's motion for judgment as a matter of law. Judge Rader held that prosecution history estoppel precluded Loral Fairchild from asserting its infringement claims under the doctrine of equivalents. In doing so, he relied upon Loral Fairchild's citation of an article in a confidential abandoned application. On appeal, the Federal Circuit affirmed in an opinion written by Judge Glenn L. Archer, Jr. Our petition for certiorari argued that the Federal Circuit's reliance upon prosecution history estoppel to limit the use of the doctrine of equivalents ran afoul of the Supreme Court's ruling in *Warner-Jenkinson Co. v. Hilton Davis Chemical Co.*, 520 U.S. 17 (1997), that the use of estoppel must be consistent with the public notice function of the law. The Court denied our petition.

My co-counsel was James H. Wallace, Jr., Wiley, Rein, and Fielding, 1776 K St., N.W., Washington, DC 20006, 202-719-7000. The principal counsel for Sony Corporation was Charles E. Lipsey, Finnegan, Henderson, Farabow, Garrett and Dunner, Two Freedom Square, 11955 Freedom Dr., Reston, VA 20190, 571-203-2700.

10. *Alabama Plating Co. v. United States Fidelity and Guaranty Co.*, 690 So. 2d 331 (Ala. 1996). From 1993 through March 1995, I was the principal attorney in the representation of a liability insurer in a suit brought by a manufacturer seeking insurance coverage for the costs of complying with governmental orders requiring the cleanup of contamination it had caused over a number of years. My involvement in the case ceased when I became Senate Legal Counsel in 1995. Prior to that time, however, I directed and took most of the discovery that formed the basis for the defendant's motion for summary judgment that was granted by Judge Oliver P. Head of the Circuit Court of Shelby

County, Alabama (No. CV-92-623). On appeal, after I was no longer involved in the matter, the Alabama Supreme Court affirmed Judge Head's ruling that the pollution exclusion cause in the contract was clear and unambiguous, but, on rehearing reversed and withdrew its prior decision and held, *inter alia*, that the pollution exclusion clause in the insurance contract was ambiguous and did not bar coverage for gradual pollution.

My co-counsel was Walter J. Andrews, then-partner at Wiley, Rein, and Fielding, Shaw Pittman, 1650 Tysons Boulevard, McLean, VA 22102, 703-770-7900. The principal counsel for plaintiff was John W. Fried, Fried, Epstein, and Rettig, Herald Square, 1350 Broadway, Suite 1400, New York, NY 10018, 212-268-7111.

11. *United States Fidelity and Guaranty Co. v. Mississippi Chemical Corp.*, No. J89-0305(W)(S.D. Miss. 1994). I was the principal attorney in the representation of an insurance carrier seeking declaratory relief against a major industrial company in Mississippi over the terms of a liability insurance contract which the defendant claimed provided coverage for the costs of complying with governmental orders to cleanup its contamination of the environment. I was primarily responsible for conducting the discovery phase of the litigation in preparation for argument over dispositive motions and trial. The litigation settled before trial.

My co-counsel was Walter J. Andrews, then-partner at Wiley, Rein, and Fielding, Shaw Pittman, 1650 Tysons Boulevard, McLean, VA 22102, 703-770-7900. The principal counsel for Mississippi Chemical Corporation was Larry D. Moffett, Daniel, Coker, Horton, and Bell, 265 North Lamar Blvd., Suite R, Oxford, MS 38655, 662-232-8979.

19. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question, please omit any information protected by the attorney-client privilege (unless the privilege has been waived.)

Answer:

1. *Senate Whitewater II Investigation (1995-96).* As Senate Legal Counsel, I represented the institutional interests of the Senate in the investigation conducted by the Special Committee to Investigate Whitewater Development Corporation and Related Matters. My activities involved advising the Chairman and Ranking Member of the Special Committee, its members, and the Republican and Democratic leadership of the Senate on a range of issues, including the powers of Senate committees to investigate, immunity orders, speech or debate clause protection for Senate members and employees, the application of the Fifth Amendment privilege in Senate investigations, special government employees, congressional documentary subpoena practice, questioning at hearings, leaks, and the civil enforcement of Senate subpoenas. During the course of the investigation, the Senate debated and passed a resolution directing the Senate Legal Counsel to enforce a documentary subpoena against an Associate White House Counsel.

SENATE JUDICIARY COMMITTEE QUESTIONNAIRE
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On the eve of the Senate filing an enforcement action, the White House produced the documents sought.

2. *Senate Campaign Finance Investigation (1997-98).* As Senate Legal Counsel, I represented the institutional interests of the Senate in the investigation conducted by the Committee on Governmental Affairs into the financing of the 1996 presidential campaigns of the Democratic and Republican parties. My activities involved advising the Chairman and Ranking Member of the Committee, its members, and the Republican and Democratic leadership of the Senate on a range of issues, including the powers of Senate committees to investigate, immunity orders, the law and practice of executive privilege, the application of the Fifth Amendment privilege in Senate investigations, congressional documentary subpoena practice, questioning at hearings, and the civil enforcement of Senate subpoenas.

3. *Louisiana Contested Election Investigation (1997).* As Senate Legal Counsel, I represented the institutional interests of the Senate in the investigation conducted by the Committee on Rules and Administration into the 1996 Louisiana senatorial election. My activities involved advising the Chairman and Ranking Member of the Committee, its members, and the Republican and Democratic leadership of the Senate on a range of issues, including the powers of Senate committees to investigate, the history and precedential value of contested election investigations, the interpretation and application of the Committee's rules with respect to the calling of witnesses at hearings, congressional documentary subpoena practice, and the conduct of hearings.

4. *Advisory Commission on Electronic Commerce (1999-2000).* I was asked by Governor James Gilmore of Virginia to serve as general counsel to the Advisory Commission on Electronic Commerce. Governor Gilmore served as Chairman of that commission, which was created by Congress to make recommendations regarding whether states should be allowed to levy and collect sales tax on the purchase of goods over the Internet. My activities involved advising the Chairman and the Commission members on the law governing congressional commissions, the application of the statutory language creating the Commission to its work, including the authority of the Commission to report its work to Congress and make policy proposals on the basis of a majority vote alone.

5. *Secretary of Education's Commission on Opportunity in Athletics (2002-03).* I served as a member of the Secretary's Commission, which was given a charge to study the success of Title IX in collegiate athletics and to make recommendations how to improve efforts to expand opportunities in collegiate athletics for men and women. The Commission held a series of town hall style meetings around the nation over a six-month period, heard testimony from scores of witnesses, and read thousands of pages of written material. The Commission produced a report to the Secretary that contained a number of modest recommendations for ways to improve the enforcement of Title IX.

SENATE JUDICIARY COMMITTEE QUESTIONNAIRE
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6. *American Bar Association's Central European and Eurasian Law Initiative (CEELI) (1996 – present).* I serve on the Advisory Board of CEELI. In addition to attending the twice yearly meetings of the Board and traveling to Central Europe and Eurasia on occasion to meet with CEELI's in-country staff, my primary contribution has been as a liaison to the Senate Republican leadership staff, to keep them informed of CEELI's rule of law programs, and to encourage their continued support.

7. *Celebrex.* As general counsel at Brigham Young University, I oversee a team of lawyers comprised of inside and outside counsel representing the interests of the University and one of its most distinguished professors in a dispute with a major pharmaceutical company over the respective rights to the profits that have been generated by the sale of Celebrex. The University claims that the primary research that formed the basis for the development of Celebrex was done by the University and its professor, and that neither has been adequately compensated for that work.

SENATE JUDICIARY COMMITTEE QUESTIONNAIRE
THOMAS B. GRIFFITH

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.

Answer: I participate in a 401K retirement plan from my former law firm, Wiley, Rein and Fielding; the Thrift Savings plan from the United States Senate; and in a retirement plan with my current employer, Brigham Young University.

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the category of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.

Answer: The canons of judicial ethics have precise guidelines and a body of best practices that have been developed over the years regarding the resolution of conflicts to which I would certainly adhere. At a minimum, I would imagine that I would not participate in matters involving former clients, or matters in which any of my former law firms were involved, for an appropriate period of time. In addition, I anticipate that my involvement as a member of the Secretary of Education's Commission on Opportunity in Athletics would limit my involvement for an appropriate period in matters that brought into issue the development of the enforcement mechanisms used by the Department of Education to determine whether compliance with Title IX has been achieved.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

Answer: No. At some point, I might be interested in teaching a class as an adjunct professor at a law school, but certainly have no "plans, commitments, or agreements" to do so.

SENATE JUDICIARY COMMITTEE QUESTIONNAIRE
THOMAS B. GRIFFITH

4. List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding $500 or more (If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.)

Answer: See attached Financial Disclosure Report.

5. Please complete the detailed financial net worth statement in detail (Add schedules as called for).

Answer: See attached net worth statement.

6. Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

Answer: In the fall of 1980, I served as a volunteer for the Reagan-Bush campaign. In that capacity, I made telephone calls to potential voters encouraging them to vote for President Reagan and Vice-President Bush. In 1992 and again in 2000, I served as a volunteer for Lawyers for Bush. In that capacity, I contacted individuals from lists of lawyers encouraging them to vote for President Bush and make financial contributions to his campaign. In 2000, I also made a financial contribution to the Bush for President campaign and served as a counsel to the Rules Committee at the Republican National Convention. During the spring of 2000, I hosted a fundraising breakfast for Senator Hatch's campaign for the Republican nomination for the presidency.

AO-10 (WP)
Rev. 1/2004

FINANCIAL DISCLOSURE REPORT
FOR CALENDAR YEAR 2003

Report Required by the Ethics in Government Act of 1978, (5 U.S.C. App. §§101-111)

1. Person Reporting *(Last name, first, middle initial)*	2. Court or Organization	3. Date of Report
Griffith, Thomas B.	U. S. Court of Appeals District of Columbia Circuit	February 15, 2005

4. Title *(Article III judges indicate active or senior status; magistrate judges indicate full- or part-time)*	5. Report Type (check appropriate type)	6. Reporting Period
Circuit Judge Nominee	_X__ Nomination, Date __2-14-05__ ___ Initial ___ Annual ___ Final	January 1, 2004 - February 1, 2005

7. Chambers or Office Address	8. On the basis of the information contained in this Report and any modifications pertaining thereto, it is, in my opinion, in compliance with applicable laws and regulations.
Brigham Young University A-357 ASB Provo, Utah 84602	Reviewing Officer _____ Date_____

IMPORTANT NOTES: The instructions accompanying this form must be followed. Complete all parts, checking the NONE box for each part where you have no reportable information. Sign on last page.

I. POSITIONS. *(Reporting individual only; see pp. 9-13 of Instructions.)*

	POSITION	NAME OF ORGANIZATION/ENTITY
☐	**NONE** (No reportable positions.)	
1	Assistant to the President and General Counsel	Brigham Young University
2	Member, Advisory Board	American Bar Association Central European and Eurasian Law Initiative
3	Vice-chairman and Senior Advisor	Federalist and Separation of Powers Practice Group, The Federalist Society for Law and Public Policy

II. AGREEMENTS. *(Reporting individual only; see pp. 14-16 of Instructions.)*

	DATE	PARTIES AND TERMS
☐	**NONE** (No reportable agreements.)	
1	1992	Wiley, Rein & Fielding (former law firm) 401 K Retirement Plan
2	2000	Deseret Mutual Benefit Association (DMBA) Investment Fund (retirement plan)

III. NON-INVESTMENT INCOME. *(Reporting individual and spouse, see pp. 17-24 of Instructions.)*

A. Filer's Non-Investment Income

	DATE	SOURCE AND TYPE	GROSS
☐	**NONE** (No reportable non-investment income.)		
1	2005	Brigham Young University	$ 12,602.92
2	2004	Brigham Young University	$ 149,745.04
3	2003	Brigham Young University	$ 147,516.60

B. Spouse's Non-Investment Income - If you were married during any portion of the reporting year, please complete this section. (dollar amount not required except for honoraria)

x	**NONE** (No reportable non-investment income.)		
1			
2			

FINANCIAL DISCLOSURE REPORT

Name of Person Reporting	Date of Report
Thomas B. Griffith	February 15, 2005

IV. REIMBURSEMENTS -- transportation, lodging, food, entertainment.
(Includes those to spouse and dependent children. See pp. 25-27 of Instructions.)

	SOURCE	DESCRIPTION
☐	**NONE** (No such reportable reimbursements.)	
1		
2		
3		
4		
5		
6		
7		

V. GIFTS. *(Includes those to spouse and dependent children. See pp. 28-31 of Instructions.)*

	SOURCE	DESCRIPTION	VALUE
☐	**NONE** (No such reportable gifts.)		
1			$
2			$
3			$
4			$

VI. LIABILITIES. *(Includes those of spouse and dependent children See pp. 32-33 of Instructions.)*

	CREDITOR	DESCRIPTION	VALUE CODE*
☐	**NONE** (No reportable liabilities.)		
1	Wachovia	Credit Card	K
2	C & D Construction	Unsecured construction loan	K
3			
4			
5			

FINANCIAL DISCLOSURE REPORT

Name of Person Reporting	Date of Report
Thomas B. Griffith	February 15, 2005

VII. Page 1 INVESTMENTS and TRUSTS -- income, value, transactions *(Includes those of spouse and dependent children See pp. 34-57 of Instructions.)*

	NONE (No reportable income,										
1	Nuveen Mutual Fund Large Cap Value A #1	B	div	J	T	Exempt					
2	Nuveen Mutual Fund Large Cap Value A #2	B	div	J	T	"					
3	Nuveen Mutual Fund Large Cap Value A #3	B	div	J	T	"					
4	Wells Fargo Bank Account	A	int	J	T	"					
5	New York Life Whole Life Policy	A	int	K	T	"					
6	Wiley, Rein & Fielding 401(K)	F	div	L	T	"					
7	DMBA Investment Fund	F	div	L	T	"					
8											
9											
10											
11											
12											
13											
14											
15											
16											
17											

FINANCIAL DISCLOSURE REPORT

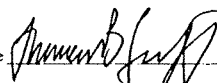
Name of Person Reporting	Date of Report
Thomas B. Griffith	February 15,2005

VIII. ADDITIONAL INFORMATION OR EXPLANATIONS (Indicate part of Report.)

IX. CERTIFICATION.

I certify that all information given above (including information pertaining to my spouse and minor or dependent children, if any) is accurate, true, and complete to the best of my knowledge and belief, and that any information not reported was withheld because it met applicable statutory provisions permitting non-disclosure.

I further certify that earned income from outside employment and honoraria and the acceptance of gifts which have been reported are in compliance with the provisions of 5 U.S.C. app., § 501 et. seq., 5 U.S.C. § 7353 and Judicial Conference regulations.

Signature  Date February 15, 2005

NOTE: ANY INDIVIDUAL WHO KNOWINGLY AND WILFULLY FALSIFIES OR FAILS TO FILE THIS REPORT MAY BE SUBJECT TO CIVIL AND CRIMINAL SANCTIONS (5 U.S.C. App., § 104.)

FILING INSTRUCTIONS

SENATE JUDICIARY COMMITTEE QUESTIONNAIRE
THOMAS B. GRIFFITH

AFFIDAVIT

I, Thomas Beall Griffith, do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

2-15-05
(Date)

(Name)

STATE OF UTAH)
) ss:
COUNTY OF UTAH)

On this 15 day of February, 2005, Thomas Beall Griffith personally appeared before me and signed the foregoing affidavit.

(Notary Public)

JEANINE BROXTON
NOTARY PUBLIC • STATE of UTAH
BYU, A-357 ASB
PROVO, UTAH 84602
COMM. EXP. 3-18-2006

FINANCIAL STATEMENT

NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS		LIABILITIES	
Cash on hand and in banks	13,000	Notes payable to banks-secured	
U.S. Government securities-add schedule		Notes payable to banks-unsecured	
Listed securities-add schedule		Notes payable to relatives	
Unlisted securities--add schedule		Notes payable to others	
Accounts and notes receivable:		Accounts and bills due	37,200
Due from relatives and friends	20,000	Unpaid income tax	
Due from others		Other unpaid income and interest	
Doubtful		Real estate mortgages payable-add schedule	254,072
Real estate owned-add schedule	274,903	Chattel mortgages and other liens payable	
Real estate mortgages receivable		Other debts-itemize:	
Autos and other personal property	195,000	Unsecured debt to builder	20,000
Cash value-life insurance	678	of home improvements (approximation; awaiting final bill)	
Other assets itemize:			
Mutual funds for children still at home	25,500		
Retirement funds from employment	160,346	Total liabilities	311,272
		Net Worth	378,155
Total Assets	689,427	Total liabilities and net worth	689,427
CONTINGENT LIABILITIES		GENERAL INFORMATION	
As endorser, comaker or guarantor		Are any assets pledged? (Add schedule)	No
On leases or contracts		Are you defendant in any suits or legal actions?	No
Legal Claims		Have you ever taken bankruptcy?	No
Provision for Federal Income Tax			
Other special debt			

REAL ESTATE SCHEDULE

PROPERTY OWNED

Personal residence	$274,903

REAL ESTATE MORTGAGES PAYABLE

Personal residence	$254,072

SENATE JUDICIARY COMMITTEE QUESTIONNAIRE
THOMAS B. GRIFFITH

III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

Answer: Between 1991 and 1995, I was involved in Wiley, Rein, and Fielding's pro bono representation of a death row inmate's effort to overturn his death sentence. I was one of two attorneys at the firm who participated in the preparation for and trial of the state habeas evidentiary hearing. I also participated in the writing of briefs in the subsequent efforts to overturn his conviction. Although I do not have access to records that would identify the precise amount of time I spent on this matter over the years, I would estimate that it involved several hundred hours. While an associate at my law firm in Charlotte, North Carolina from 1985 through 1989, I participated in a pro bono project in which I represented disadvantaged students in the public school system during the due process hearings that accompanied disciplinary actions that might lead to suspension. I would estimate that I spent fifty hours in those representations. As a member of my church, I have been involved on an ongoing basis in projects for the hungry at neighborhood emergency food pantries and "soup kitchens." As a bishop (lay leader) of my congregation, I was primarily responsible for the physical and material needs of the poor within our congregation. A recent project for which I am responsible and supervise involves sending university students from the twelve congregations over which I have responsibility to tutor disadvantaged Latino immigrant children in a local elementary school, to visit the elderly in nursing care facilities, and to visit youth confined to detention centers. I have no way to estimate the time involved in these church projects. They are continuing and ongoing and simply part of the fabric of life.

2. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates – through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What have you done to try to change these policies?

Answer: No.

SENATE JUDICIARY COMMITTEE QUESTIONNAIRE
THOMAS B. GRIFFITH

3. Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).

Answer: I am not aware of any such selection commission in my jurisdiction. Shortly after I left my position as Senate Legal Counsel in 1999, I participated in discussions with aides to various Senators about my interest in becoming a federal appeals court judge. Those discussions have continued over time. In the summer of 1999, Senator Hatch, who I had come to know during my tenure as Senate Legal Counsel, discussed with me my interest in being a federal appeals court judge. In the fall of 2003, I was called by an attorney in the Office of Counsel to the President who asked whether I would like to be considered as a possible nominee to the United States Court of Appeals for the District of Columbia Circuit. I said that I would and was asked to come to an interview in the Counsel's office. Following that interview, I spoke to Senator Hatch about my interest in being nominated. During the first week of March 2004, I learned that to take this process to the next step, I must supply the Department of Justice with requested information so that a thorough review of my background and qualifications could take place.

4. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as asking how you would rule on such case, issue, or question? If so, please explain fully.

Answer: No.

5. Please discuss your views on the following criticism involving "judicial activism."

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government.

Some of the characteristics of this "judicial activism" have been said to include:

a. A tendency by the judiciary toward problem-solution rather than grievance-resolution;

b. A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;

SENATE JUDICIARY COMMITTEE QUESTIONNAIRE
THOMAS B. GRIFFITH

c. A tendency by the judiciary to impose broad affirmative duties upon governments and society;

d. A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and

e. A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

Answer: The genius and success of the American constitutional system are due in large measure to the separation of powers. For that system to work and create the ordered liberty necessary to sustain the nation and allow the protection and expansion of opportunity, the actors within that system must honor the limits set upon their authority. For the Federal judiciary, that means, first and foremost, that a judge must work to understand the will of the people expressed in the Constitution, statute, and law and apply that to resolve the dispute at hand. A judge is bound in like manner by judicial precedent and especially those determinations made by the Supreme Court that apply to the dispute before him. It is inappropriate for a judge to act as if he were a member of the Legislative or Executive branches. Policy decisions must be made only by those responsive to the electorate. Failure of the Federal judiciary to heed these limits will, over time, undermine the foundations of our constitutional system.

Chairman HATCH. Well, thank you so much, Mr. Griffith.
Mr. Crotty.

STATEMENT OF PAUL A. CROTTY, NOMINEE TO BE DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF NEW YORK

Mr. CROTTY. Senator, good morning. Thank you very much. Like Mr. Griffith, I would like to join in his thanks to you for convening this hearing and the many courtesies your staff has extended to us building up to the hearing today.

I, too, am honored by the nomination of the President of the United States and very thankful to the President for the honor he has conferred upon me in nominating me. I know that my nomination takes place because of the strong support I have received from Senator Schumer over the last 2 years. I am very appreciative of that, along with the support of Governor Pataki, who joins with the Senator, as he indicated in his opening remarks about how things work together to produce acceptable candidates for nomination to the district courts in New York State.

If I could, Mr. Chairman, I would like to introduce my family who is with me today. First of all, my wife Jane of 37 years.

Chairman HATCH. Jane, we are happy to have you here.

Mr. CROTTY. And my son John. John is the Executive Vice President of the Housing Development Corporation of New York City, the leading multi-family bond issuer in the United States, and his wife Kate.

Chairman HATCH. John and Kate, we are happy to have you here.

Mr. CROTTY. My daughter Elizabeth, who is in her fourth year with Mr. Morgenthau. She is a member of Trial Bureau 70. She just moved over to the Special Investigations Unit.

Chairman HATCH. Very happy to have you here.

Mr. CROTTY. And my son David, who is with Verizon and works in the area of strategic development and works on mergers and acquisition.

I am also joined by two of my brothers—my brother Bob, who is a partner at Kelley, Drye and Warren in New York City, and my brother Jerry, who was Secretary to Governor Cuomo, who is now working in New Jersey.

Chairman HATCH. Happy to have you here.

Mr. CROTTY. And two colleagues from Verizon—Roger Mott, who is in our legislative office here in Washington, and Tom Dunne. Tom Dunne and I worked together very closely on repairing the telephone networks after the terrorist attack on 9/11, and Tom is one of the great unheralded heroes of Verizon's efforts in restoring telephone communications.

So thank you very much, Senator.

Chairman HATCH. Well, we are honored to have all of you here.

Mr. CROTTY. Thank you.

Chairman HATCH. Thank you, Mr. Crotty.

[The biographical information of Mr. Crotty follows.]

Paul A. Crotty
Group President
New York/Connecticut

verizon

1095 Avenue Of The Americas
New York, NY 10036

Phone 212 395-1078
Fax 212 597-2560
paul.a.crotty@verizon.com

February 15, 2005

Hon. Arlen Specter
Chairman
U.S. Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Senator Specter:

I have reviewed my response, dated August 31, 2004, to the U.S. Senate Judiciary Committee's Nomination Questionnaire. I certify that it is still accurate and complete and there is no need for any change, except in the following particulars for the response to question number 6, listing various board memberships: in December 2004, I resigned my Board memberships on St. Vincent's Hospital – Manhattan and the City University of New York Irish Studies Program, and I chose not to run for re-election to the Board of The New York State Business Development Corporation.

I have filed a current Financial Disclosure Form with the Administrative Office of the U.S. Courts.

Respectfully yours,

Paul A. Crotty

cc: Hon. Patrick J. Leahy
Ranking Member
U.S. Senate Committee on the Judiciary

AO-10
Rev. 1/2004

FINANCIAL DISCLOSURE REPORT

Calendar Year 2004

Report Required by the Ethics in Government Act of 1978 (5 U.S.C. app. §§ 101-111)

1. Person Reporting (Last name, First name, Middle initial)	2. Court or Organization	3. Date of Report
Crotty, Paul A	U.S. District Court (S.D.N.Y.)	2/15/2005
4. Title (Article III Judges indicate active or senior status; magistrate judges indicate full- or part-time) U.S. District Judge-Nominee	5. ReportType (check appropriate type) (•) Nomination, Date 2/14/2005 ( ) Initial ( ) Annual ( ) Final	6. Reporting Period 1/1/2004 to 1/31/2005
7. Chambers or Office Address 1095 Avenue of the Americas Room 4143 New York, New York 10036	8. On the basis of the information contained in this Report and any modifications pertaining thereto, it is, in my opinion, in compliance with applicable laws and regulations. Reviewing Officer_____ Date_____	

IMPORTANT NOTES: The instructions accompanying this form must be followed. Complete all parts, checking the NONE box for each part where you have no reportable information. Sign on last page.

I. POSITIONS. (Reporting individual only; see pp. 9-13 of filing instructions)

[ ] NONE - (No reportable positions.)

	POSITION	NAME OF ORGANIZATION/ENTITY
1.	Executive	Verizon Communications
2.	Director	N.Y. State Business Development Corporation
3.	Trustee	Trust #1
4.	Trustee	Trust #2

II. AGREEMENTS. (Reporting individual only; see pp. 14-16 of filing instructions)

[ ] NONE (No reportable agreements.)

	DATE	PARTIES AND TERMS
1.	2005	Verizon Retirement Plan (I.D.P. - Pension Savings)

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Crotty, Paul A	2/15/2005

II. NON-INVESTMENT INCOME. (Reporting individual and spouse; see pp. 17-24 of filing instructions)

A. Filer's Non-Investment Income

☐ NONE - (No reportable non-investment income.)

	DATE	SOURCE AND TYPE	GROSS INCOME (yours, not spouse's)
1.	2003	Verizon	604,669
2.	2004	Verizon	648,292
3.	2005	Verizon	297,554
4.	2003	N.Y. State Business Development Corporation	1,200
5.	2004	N.Y. State Business Development Corporation	800

B. Spouse's Non-Investment Income - (If you were married during any portion of the reporting year, please complete this section. (dollar amount not required except for honoraria)

☐ NONE - (No reportable non-investment income.)

	DATE	SOURCE AND TYPE
1.	2005	(Spouse) George Arzt Communications
2.	2004	(Spouse) George Arzt Communications

III. REIMBURSEMENTS – transportation, lodging, food, entertainment.

(Includes those to spouse and dependent children. See pp. 25-27 of instructions.)

☐ NONE - (No such reportable reimbursements.)

SOURCE	DESCRIPTION
Exempt	

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Crotty, Paul A	2/15/2005

. GIFTS. (Includes those to spouse and dependent children. See pp. 28-31 of instructions.)

] NONE - (No such reportable gifts.)

SOURCE	DESCRIPTION	VALUE
Exempt		

: LIABILITIES. (Includes those of spouse and dependent children. See pp. 32-34 of instructions.)

] NONE - (No reportable liabilities.)

CREDITOR	DESCRIPTION	VALUE CODE
American Express	Credit Card	J
First USA-Bank	Credit Card	J
Chase - Master Card	Credit Card	J
Chase - Visa	Credit Card	J

INANCIAL DISCLOSURE REPORT
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Name of Person Reporting	Date of Report
Crotty, Paul A	2/15/2005

I. INVESTMENTS and TRUSTS -- income, value, transactions (includes those of the spouse and dependent children. See pp. 34-57 of filing instructions.)

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A -H)	B. (2) Type (e.g. div. rent. or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g. buy, sell, merger, redemption)	If not exempt from disclosure (2) Date: Month - Day	(3) Value Code 2 (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)
NONE (No reportable income, assets, or transactions)									
Abbott Laboratories	A	Dividend	J	T	Exempt				
American Express	B	Dividend	L	T	Exempt				
American International Group	A	Dividend	K	T	Exempt				
Amgen	A	Dividend	K	T	Exempt				
Coca Cola	C	Dividend	L	T	Exempt				
Disney	A	Dividend	L	T	Exempt				
Exxon Mobil	B	Dividend	L	T	Exempt				
General Electric	C	Dividend	L	T	Exempt				
Hospira	A	Dividend	J	T	Exempt				
IBM	A	Dividend	J	T	Exempt				
JP Morgan Chase	C	Dividend	K	T	Exempt				
Marsh & McLennan	C	Dividend	K	T	Exempt				
Microsoft	A	Dividend	K	T	Exempt				
Newmont Mining	A	Dividend	K	T	Exempt				
Pfizer	C	Dividend	L	T	Exempt				
United Health Group	A	Dividend	L	T	Exempt				
Alliance Bernstein Capital	A	Interest	L	T	Exempt				
Fidelity NY Muni	A	Interest	J	T	Exempt				

Income/Gain Codes: A = $1,000 or less; B = $1,001-$2,500; C = $2,501-$5,000; D = $5,001-$15,000; E = $15,001-$50,000
(See Columns B1 and D4) F = $50,001-$100,000; G = $100,001-$1,000,000; H1 = $1,000,001-$5,000,000; H2 = More than $5,000,000
Value Codes: J = $15,000 or less; K = $15,001-$50,000; L = $50,001-$100,000; M = $100,001-$250,000
(See Columns C1 and D3) N = $250,000-$500,000; O = $500,001-$1,000,000; P1 = $1,000,001-$5,000,000; P2 = $5,000,001-$25,000,000
P3 = $25,000,001-$50,000,000; P4 = $More than $50,000,000

NANCIAL DISCLOSURE REPORT
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Name of Person Reporting	Date of Report
Crotty, Paul A	2/15/2005

I. INVESTMENTS and TRUSTS – income, value, transactions (includes those of the spouse and dependent children. See pp. 34-57 of filing instructions.)

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A-H)	B. (2) Type (e.g. div. rent. or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g. buy, sell, merger, redemption)	If not exempt from disclosure (2) Date: Month - Day	(3) Value Code 2 (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)
Norbelle LLC		None	L	T	Exempt				
Rollover IRA #1	C	Dividend	O	T	Exempt				
- Fidelity Low Priced Stock					Exempt				
- Baron Growth					Exempt				
- William Blair Int'l Growth					Exempt				
- Columbia Acorn Class 2					Exempt				
- Dodge & Cox Stock					Exempt				
- Harbor International					Exempt				
- Julius Baer Int'l Equity					Exempt				
- Longleaf Int'l					Exempt				
- Royce Premier					Exempt				
- Tweedy Brown Global					Exempt				
Rollover IRA #2	C	Interest	M	T	Exempt				
- Newberger Berman Intermediate					Exempt				
Verizon Income Deferral Plan	D	Dividend	P1	T	Exempt				
- Verizon Co.					Exempt				
- Fidelity Active U.S. Equity					Exempt				
- Clipper Fund					Exempt				

Income/Gain Codes (See Columns B1 and D4)	A = $1,000 or less	B = $1,001-$2,500	C = $2,501-$5,000	D = $5,001-$15,000	E = $15,001-$50,000	
	F = $50,001-$100,000	G = $100,001-$1,000,000	H1 = $1,000,001-$5,000,000	H2 = More than $5,000,000		
Value Codes (See Columns C1 and D3)	J = $15,000 or less	K = $15,001-$50,000	L = $50,001-$100,000	M = $100,001-$250,000		
	N = $250,000-$500,000	O = $500,001-$1,000,000	P1 = $1,000,001-$5,000,000	P2 = $5,000,001-$25,000,000		
	P3 = $25,000,001-$50,000,000		P4 = More than $50,000,000			

NANCIAL DISCLOSURE REPORT
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Name of Person Reporting	Date of Report
Crotty, Paul A	2/15/2005

I. INVESTMENTS and TRUSTS – income, value, transactions (includes those of the spouse and dependent children. See pp. 34-57 of filing instructions.)

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A-H)	B. (2) Type (e.g. div. rent. or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g. buy, sell, merger, redemption)	D. If not exempt from disclosure (2) Date: Month - Day	(3) Value Code 2 (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)
- Fidelity Passive U.S. Equity Index					Exempt				
-Active U.S. Small Cap					Exempt				
- FidReit Coll Pool					Exempt				
- Cash Account Moodys					Exempt				
- Pimco Real Rtn Bond					Exempt				
Verizon Executive Deferral Plan	D	Dividend	N	T	Exempt				
- Cash Account Moodys					Exempt				
- Pimco Real Return					Exempt				
- Clipper Fund					Exempt				
- Verizon Co. Stock					Exempt				
- FidReit Coll Pool					Exempt				
- Active U.S. Small Cap					Exempt				
Verizon Savings & Pension Plan	B	Dividend	M	T	Exempt				
- Active U.S. Small Cap Mgmt					Exempt				
- Passive U.S. Eq Ind					Exempt				
- Verizon Stock Port					Exempt				
- VZ Co Stock Fund Mgmt					Exempt				
- Fidelity Diverse Int'l					Exempt				

Income Gain Codes: (See Columns B1 and D4)	A = $1,000 or less	B = $1,001-$2,500	C = $2,501-$5,000	D = $5,001-$15,000	E = $15,001-$50,000
	F = $50,001-$100,000	G = $100,001-$1,000,000	H1 = $1,000,001-$5,000,000	H2 = More than $5,000,000	
Value Codes: (See Columns C1 and D3)	I = $15,000 or less	K = $15,001-$50,000	L = $50,001-$100,000	M = $100,001-$250,000	
	N = $250,000-$500,000	O = $500,001-$1,000,000	P1 = $1,000,001-$5,000,000	P2 = $5,000,001-$25,000,000	
	P3 = $25,000,001-$50,000,000		P4 = More than $50,000,000		

NANCIAL DISCLOSURE REPORT
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Name of Person Reporting	Date of Report
Crotty, Paul A	2/15/2005

I. INVESTMENTS and TRUSTS – income, value, transactions (includes those of the spouse and dependent children. See pp. 34-57 of filing instructions.)

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A-H)	B. (2) Type (e.g. div. rent. or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g. buy, sell, merger, redemption)	If not exempt from disclosure (2) Date: Month - Day	(3) Value Code 2 (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)
Trust No. 1	E	Dividend	O	T	Exempt				
- Abbot Labs					Exempt				
- Agilent Tech					Exempt				
- Alltell Corp					Exempt				
- Am Express					Exempt				
- Amer Int'l Group					Exempt				
- ATT					Exempt				
- Automatic Date Process					Exempt				
- Bank of Americas					Exempt				
- Cardinal Health					Exempt				
- Cisco					Exempt				
- Comcast Corp.					Exempt				
- Computer Assoc.					Exempt				
- Direct TV					Exempt				
- Freddie Mac					Exempt				
- Gen'l Dynamics					Exempt				
- General Electric					Exempt				
- Haliburton					Exempt				

Income/Gain Codes (See Columns B1 and D4)	A = $1,000 or less	B = $1,001-$2,500	C = $2,501-$5,000	D = $5,001-$15,000 E = $15,001-$50,000
	F = $50,001-$100,000	G = $100,001-$1,000,000	H1 = $1,000,001-$5,000,000	H2 = More than $5,000,000
Value Codes (See Columns C1 and D3)	J = $15,000 or less	K = $15,001-$50,000	L = $50,001-$100,000	M = $100,001-$250,000
	N = $250,000-$500,000	O = $500,001-$1,000,000	P1 = $1,000,001-$5,000,000	P2 = $5,000,001-$25,000,000
	P3 = $25,000,001-$50,000,000		P4 = $More than $50,000,000	

NANCIAL DISCLOSURE REPORT
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Name of Person Reporting	Date of Report
Crotty, Paul A	2/15/2005

I. INVESTMENTS and TRUSTS -- income, value, transactions (includes those of the spouse and dependent children. See pp. 34-57 of filing instructions.)

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A-H)	B. (2) Type (e.g. div. rent. or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g. buy, sell, merger, redemption)	If not exempt from disclosure (2) Date: Month - Day	(3) Value Code 2 (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)
- Hewlett Packard					Exempt				
- Hospira					Exempt				
- Intel Corp.					Exempt				
- JP Morgan Chase					Exempt				
- Merck					Exempt				
- Microsoft					Exempt				
- Montsanto					Exempt				
- Oracle Corp.					Exempt				
- Pfizer					Exempt				
- Piper Jaffray					Exempt				
- Procter & Gamble					Exempt				
- Smucker					Exempt				
- Solectron					Exempt				
- Sprint					Exempt				
- Sysco					Exempt				
- Target Corp.					Exempt				
- Tex. Inst.					Exempt				
- Time Warner					Exempt				

Income/Gain Codes: (See Columns B1 and D4)	A = $1,000 or less	B = $1,001-$2,500	C = $2,501-$5,000	D = $5,001-$15,000	E = $15,001-$50,000
	F = $50,001-$100,000	G = $100,001-$1,000,000	H1 = $1,000,001-$5,000,000	H2 = More than $5,000,000	
Value Codes: (See Columns C1 and D3)	J = $15,000 or less	K = $15,001-$50,000	L = $50,001-$100,000	M = $100,001-$250,000	
	N = $250,000-$500,000	O = $500,001-$1,000,000	P1 = $1,000,001-$5,000,000	P2 = $5,000,001-$25,000,000	

NANCIAL DISCLOSURE REPORT
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Name of Person Reporting	Date of Report
Crotty, Paul A	2/15/2005

I. INVESTMENTS and TRUSTS -- income, value, transactions (includes those of the spouse and dependent children. See pp. 34-57 of filing instructions.)

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A-H)	B. (2) Type (e.g. div. rent. or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g. buy, sell, merger, redemption)	If not exempt from disclosure (2) Date: Month - Day	(3) Value Code 2 (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)
- Tribune Co.					Exempt				
- United Technologies					Exempt				
- U.S. Bancorp					Exempt				
- Viacom					Exempt				
- Walgreen					Exempt				
- Walt Disney					Exempt				
- Wells Fargo					Exempt				
- BP PLC Spon ADR					Exempt				
- Nortel Network					Exempt				
- Schlumberger					Exempt				
- Tyco Int'l Ltd					Exempt				
Trust No. 2	D	Dividend	N	T	Exempt				
- Colgate Palmolive					Exempt				
- Conagra Food					Exempt				
- International Paper					Exempt				
- Key Corp.					Exempt				
- National Fuel Gas					Exempt				
- SBC					Exempt				

Income/Gain Codes (See Columns B1 and D4):	A = $1,000 or less	B = $1,001-$2,500	C = $2,501-$5,000	D = $5,001-$15,000	E = $15,001-$50,000	
	F = $50,001-$100,000	G = $100,001-$1,000,000	H1 = $1,000,001-$5,000,000	H2 = More than $5,000,000		
Value Codes (See Columns C1 and D3)	J = $15,000 or less	K = $15,001-$50,000	L = $50,001-$100,000	M = $100,001-$250,000		
	N = $250,000-$500,000	O = $500,001-$1,000,000	P1 = $1,000,001-$5,000,000	P2 = $5,000,001-$25,000,000		

NANCIAL DISCLOSURE REPORT
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Name of Person Reporting	Date of Report
Crotty, Paul A	2/15/2005

I. INVESTMENTS and TRUSTS – income, value, transactions (includes those of the spouse and dependent children. See pp. 34-57 of filing instructions.)

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A-H)	B. (2) Type (e.g. div. rent. or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g. buy, sell, merger, redemption)	If not exempt from disclosure (2) Date: Month - Day	(3) Value Code 2 (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)
- ABN Amro					Exempt				
- Eaton Vance Tax Adv					Exempt				
- Eaton Vance Global					Exempt				
- Nicholas Applegate					Exempt				
- Nuveen Total Rtn					Exempt				
- Baxter Intl					Exempt				
- St. Paul Cos.					Exempt				
- GMAC Smart Notes due 8/15/06					Exempt				
- GMAC Smart Notes due 2/15/07					Exempt				
- Ford Credit NTS due 2/20/08					Exempt				

Income/Gain Codes (See Columns B1 and D4)	A = $1,000 or less	B = $1,001-$2,500	C = $2,501-$5,000	D = $5,001-$15,000	E = $15,001-$50,000
	F = $50,001-$100,000	G = $100,001-$1,000,000	H1 = $1,000,001-$5,000,000	H2 = More than $5,000,000	
Value Codes (See Columns C1 and D3)	J = $15,000 or less	K = $15,001-$50,000	L = $50,001-$100,000	M = $100,001-$250,000	
	N = $250,000-$500,000	O = $500,001-$1,000,000	P1 = $1,000,001-$5,000,000	P2 = $5,000,001-$25,000,000	
	P3 = $25,000,001-$50,000,000				

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Crotty, Paul A	2/15/2005

C. CERTIFICATION.

I certify that all information given above (including information pertaining to my spouse and minor or dependent children, if ıy) is accurate, true, and complete to the best of my knowledge and belief, and that any information not reported was withheld :ause it met applicable statutory provisions permitting non-disclosure.

I further certify that earned income from outside employment and honoraria and the acceptance of gifts which have been ported are in compliance with the provisions of 5 U.S.C. § 501 et. seq., 5 U.S.C. § 7353, and Judicial Conference regulations.

gnature Paul A. Crotty Date February 15, 2005

)TE: ANY INDIVIDUAL WHO KNOWINGLY AND WILFULLY FALSIFIES OR FAILS TO FILE THIS REPORT MAY 3 SUBJECT TO CIVIL AND CRIMINAL SANCTIONS (5 U.S.C. app. § 104)

FILING INSTRUCTIONS

Mail signed original and 3 additional copies to:

Committee on Financial Disclosure
Administrative Office of the United States Courts
Suite 2-301
One Columbus Circle, N.E.
Washington, D.C. 20544

Chairman HATCH. Mr. Seabright, we will hear from you now.

STATEMENT OF J. MICHAEL SEABRIGHT, NOMINEE TO BE DISTRICT JUDGE FOR THE DISTRICT OF HAWAII

Mr. SEABRIGHT. Thank you very much, Senator Hatch. I appreciate the opportunity to come here today and appear before you.

I, too, want to begin by thanking the President for the honor of nominating me for this position for District Court Judge for the District of Hawaii. I also want to thank and recognize the two Senators, my home State Senators, Senators Inouye and Akaka, for their support for my nomination, and their help in getting me through this process and understanding the process and really walking me through the process.

I also would like to reintroduce, behind me, my wife Margaret Ahn.

Chairman HATCH. Margaret, happy to have you with us.

Mr. SEABRIGHT. My daughter, who is a sophomore in high school and getting a few days off high school coming to Washington, Kate.

Chairman HATCH. That is great. Good to have you here.

Mr. SEABRIGHT. And my son Nick, who likewise—he is in the sixth grade and gets a few days off school, but gets a real nice lesson in civics.

Chairman HATCH. A wonderful family.

Mr. SEABRIGHT. And then my mother Joan is here.

Chairman HATCH. Happy to have you here, Mom.

Mr. SEABRIGHT. My sister Leslie.

Chairman HATCH. Leslie.

Mr. SEABRIGHT. And my brother-in-law Adam.

Chairman HATCH. It is great to have you all here.

Mr. SEABRIGHT. Thank you.

[The biographical information of Mr. Seabright follows.]

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name (include any former names used.)

John Michael Seabright.

2. Address: List current place of residence and office address(es).

Residence: Honolulu, HI.
Office: 300 Ala Moana Blvd., Rm 6-100, Honolulu, HI 96850.

3. Date and place of birth.

January 30, 1959 in Wheeling, West Virginia.

4. Marital Status (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).

My spouse's name is Margaret Sun Dho Ahn. She is employed by the State of Hawaii, Office of the Attorney General, as a Deputy Attorney General. Her place of employment is 425 Queen Street, Honolulu, HI 96813.

5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

I attended college at Tulane University in New Orleans, La., graduating magna cum laude in May, 1981, and received a bachelors of arts degree. I entered Tulane in August, 1977. For one semester, from February 1979 through May 1979, I attended a program offered through the University of Colorado at Boulder that involved travel throughout various countries. For my junior year of college, from August 1979 through May 1980, I attended the University of Kent at Canterbury, England.

I attended law school at George Washington University, The National Law Center. I began law school in August 1981, and graduated with high honors in May, 1984 with a J.D. degree.

6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were

connected as an officer, director, partner, proprietor, or employee since graduation from college.

a. Summer 1982: I was an employee as a summer law clerk at the law firm of Kinder, Kinder & Hanlon in St. Clairsville, Ohio.

b. Summer 1983: I was an employee as a summer law clerk at the Honolulu law firm of Carlsmith Ball.

c. 1984-1985: I was an employee as an associate attorney at the Honolulu law firm of Carlsmith Ball.

d. 1985-1987: I was an employee as an associate attorney at the Honolulu law firm of Greely Walker & Kowen.

e. 1987: I was an employee as a contract hire at the Washington, D.C. law firm of Anderson, Kill & Olick. I worked at this job while waiting for a hiring freeze to lift at the U.S. Attorney's Office for the District of Columbia.

f. 1987-1990: I was an employee at the U.S. Attorney's Office for the District of Columbia as an Assistant U.S. Attorney.

g. 1990-present: I have been an employee at the U.S. Attorney's Office for the District of Hawaii as an Assistant U.S. Attorney.

h. 1993-1999: I served as a member of the Hawaii State Board of Bar Examiners.

i. 1999, 2000, 2002: I was an adjunct professor at the University of Hawaii William S. Richardson School of Law.

j. 1995-present: I have served as a member of the Hawaii Supreme Court Disciplinary Board.

7. Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

None.

8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

I graduated law school Order of the Coif.

9. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

Hawaii has a unified bar, and I am a member of the Hawaii State Bar Association.

From 1993 to 1999, I served as a member of the Hawaii State Board of Bar Examiners. This entity, appointed by the Hawaii Supreme Court, is responsible for the admission of new members to the Hawaii State Bar, including determinations of fitness to practice law and administering the bi-annual bar exam.

From 1995 to the present, I have served as a member of the Hawaii Supreme Court Disciplinary Board. The Disciplinary Board oversees the ethics of the members of the Hawaii State Bar, including hearing cases, recommending discipline to the Hawaii Supreme Court, and providing ethics opinions to the members of the Hawaii State Bar. I am presently Chair of the Disciplinary Board's Rules Committee and the Ethics 2000 Committee. The Ethics 2000 Committee is reviewing the recent amendments to the ABA Model Rules of Professional Responsibility, and suggesting changes to the Hawaii Rules of Professional Responsibility to the Hawaii Supreme Court.

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.

a. I am a member of the National Association of Assistant U.S. Attorneys. It is my understanding that this Association does lobby before the United States Congress on behalf of Assistant U.S. Attorneys.

b. I am a member of the Nuuanu YMCA gym located in Honolulu, Hawaii. I do not believe that this organization is active in lobbying before any public bodies.

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

State of Hawaii: I was admitted to practice in the State of Hawaii in 1984. I was on inactive status between June 1987 and January 1991, and have been active at all other times since admission to the bar.

United States District Court for the District of Hawaii: I have been admitted to practice in the United States District Court for the District of Hawaii since 1984.

United States Court of Appeals for the Ninth Circuit: I am presently admitted to practice in the U.S. Court of Appeals for the Ninth Circuit.

District of Columbia: I am presently on inactive status to practice law in the District of Columbia. I was admitted to the District of Columbia bar in 1985.

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.

a. During law school, I co-authored a note titled "The Reciprocal Alien Provision of the Mineral Leasing Act of 1920: An Examination of the Reciprocity Standard and Permissible Alien Stock Holdings," George Washington Journal of International Law & Economics, Vol. 17, No. 2, 1983. A copy is enclosed. While at Tulane University as an undergraduate, I wrote (or co-wrote) two or three articles for the school newspaper on school-related matters.

b. On August 7, 2001, I was an instructor at the Department of Justice National Advocacy Center in Columbia, South Carolina. I led a breakout group discussion of the prosecution of local and state officials. During the course of the breakout, the enclosed "Working problem - United States v. Mirikitani" was used as a teaching tool.

c. On February 26, 2002, I was a guest speaker, at the Honolulu Rotary Club discussing some of my prosecutions as an Assistant U.S. Attorney. I have no materials relating to this presentation.

d. On August 25, 2004, I was a guest speaker at the Chamber of Commerce in Honolulu, Hawaii, discussing Corporate Fraud and the liability of a corporation for the acts of its agents. During the discussion, I used the enclosed Powerpoint presentation.

13. Health: What is the present state of your health? List the date of your last physical examination.

My general health is excellent. My most recent physical exam was on August 10, 2004.

14. Judicial Office: State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

None.

15. Citations: If you are or have been a judge, provide: (1) citations for the ten most significant opinions you have written; (2) a short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions.

N/A.

16. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

None.

17. Legal Career:

a. Describe chronologically your law practice and experience after graduation from law school including:

1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;

I never served as a law clerk to a judge.

2. whether you practiced alone, and if so, the addresses and dates;

I never practiced alone.

3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;

After graduation from law school in May, 1984, I worked as an associate attorney at the law firm of Carlsmith Ball, Pacific Tower, 1001 Bishop Street, Ste. 2200, Honolulu, Hawaii 96813. As an associate at Carlsmith Ball, I was assigned for a short time to work in the business transactions section of the firm, but then transferred to the litigation section. I worked in two primary areas - antitrust defense and product liability defense.

I left Carlsmith Ball in November, 1985, after a group of Carlsmith Ball attorneys left to form their own law firm. I then worked at the newly created law firm of Greely Walker & Kowen until January, 1987. While at Greely Walker & Kowen, I continued to work on antitrust and product liability cases, but I also worked on litigation involving business disputes. This firm is no longer in existence, but was previously located at 1001 Bishop Street, Pauahi Tower, 13th Floor, Honolulu, Hawaii 96813.

In January, 1987, my wife and I moved to Washington, D.C., where my wife was offered a job for an approximate three-year period. I received a job offer to work at the U.S. Attorney's Office for the District of Columbia, but a hiring freeze was in place at the time. I then obtained employment as a contract attorney for the Washington, D.C. firm (branch of a New York office) of Anderson, Kill & Olick, presently located at 2100 M Street, N.W., Washington, D.C. 20037. I worked at this firm between February 1987 and October 1987, primarily in the area of reinsurance litigation, and during this time I second-chaired a product liability trial.

After the hiring freeze was lifted, I joined the U.S. Attorney's Office for the District of Columbia in October, 1987, 555 4th Street N.W., Washington, D.C. 20001. In that office, I worked for approximately six months doing appellate work. For the remainder of the time, I was assigned to various trial divisions, in both D.C. Superior Court and federal court. My experience in this office concentrated on violent crimes and narcotic offenses. I left the U.S. Attorney's Office for the District of Columbia in October, 1990.

My wife and I then returned to Hawaii in October, 1990, when I joined the U.S. Attorney's Office for the District of Hawaii, 300 Ala Moana Blvd., Room 6-100, Honolulu, HI 96850. In my first few years in this office, I concentrated on narcotic and firearm prosecutions. By 1993, I also began to work on white collar cases, with an emphasis on public corruption. During the last several years, I have worked exclusively in the white collar unit of the office. I was appointed as supervisor of the office's White Collar and Organized Crime Section in January, 2002.

b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

From graduation of law school until joining the U.S. Attorney's Office for the District of Columbia, I practiced civil law exclusively. The general character of my civil practice did not materially change. The practice centered on product liability defense, antitrust defense, and general business litigation.

I have practiced exclusively in the area of criminal law since October, 1987. During the course of my career as a prosecutor, I have handled a wide variety of cases, including narcotic and violent crime offenses, firearm offenses, and most recently white collar offenses.

2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

While engaged in civil practice, I was involved in defending an antitrust lawsuit involving the tourism industry in Hawaii. Several bus operators were sued, alleging anti-competitive behavior in the tourist bus market in Hawaii. I

also defended various automobile manufacturers in liability cases, including Ford Motor Company and Toyota.

As an Assistant U.S. Attorney, I have specialized most recently in white collar prosecutions, including public corruption cases, tax evasion, bank fraud, mail/wire fraud, civil rights offenses, social security fraud, money laundering, government contracting fraud, government program fraud, and postal offenses.

c. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.

During my period of civil practice, my appearances in court were occasional. I appeared in court for discovery matters, and was second-chair in two trials. One trial was in federal court in Honolulu and lasted several months, and the other shorter trial was in the District of Columbia Superior Court.

During my tenure as an Assistant U.S. Attorney in the District of Columbia and Hawaii from 1987 to the present, I have appeared in court frequently representing the United States in criminal matters. I have made frequent appearances for arraignments, bail hearings, motions to suppress evidence or statements, trials, change of plea proceedings, sentencing hearings, and appeals.

2. What percentage of these appearances was in:
   (a) federal courts;
   (b) state courts of record;
   (c) other courts.

While in civil practice, I would estimate that in excess of 75% of my court appearances were in state court, and the remainder in federal court.

While an Assistant U.S. Attorney in the District of Columbia, I would estimate 75% of my court appearances and trials were in Superior Court, and 25% were in federal court. Since joining the U.S. Attorney's Office for the District of Hawaii, all of my court appearances have been in federal court.

3. What percentage of your litigation was:

(a) civil;
(b) criminal.

As most of my litigation experience has taken place during my tenure as an Assistant U.S. Attorney, I would estimate that 95% of my litigation has been criminal.

4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

While in private practice, I was involved in two trials that reached verdict as an associate counsel.

I have not kept track of the number of trials that I have tried to verdict or judgment, and thus can only provide a fair estimate. While an Assistant U.S. Attorney in the District of Columbia, I would estimate that I tried 40 cases to a verdict. I was second chair for my first jury trial, and tried all other cases by myself.

While an Assistant U.S. Attorney in the District of Hawaii, I tried, as sole counsel, 15 or more cases to verdict.

5. What percentage of these trials was:
(a) jury;
(b) non-jury.

Both of the trials that I participated as associate counsel while in private practice were jury trials.

While an Assistant U.S. Attorney in the District of Columbia, I would estimate that 75% of my trials were jury trials and 25% were non-jury trials. All of my trials in the District of Hawaii have been jury trials.

18. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

(a) the date of representation;

(b) the name of the court and the name of the judge or judges before whom the case was litigated; and
(c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

a. Honolulu Liquor Commission RICO Prosecution

This case is captioned United States v. David Lee, Harvey Hiranaka, Arthur Andres, Samuel Ho, Eduardo Mina, Collin Oshiro, William Richardson, and Kenneth Wright, Cr. No. 02-00209 DAE (USDC Hawaii). On May 22, 2002, each defendant was charged in an indictment with RICO, RICO conspiracy, and several counts of extortion under color of official right.

The Honolulu Liquor Commission (HLC) is a city agency tasked with enforcing the laws and rules regulating the sale and service of liquor on the island of Oahu. In September 2000, an employee of the HLC, Charles Wiggins, approached the FBI and reported massive corruption within the nighttime enforcement section of the HLC. Wiggins agreed to cooperate in a joint FBI/Honolulu Police Department investigation. Wiggins then wore a recording device while at work over a six-month period. The conversations between the charged defendants and various bar owners in Honolulu revealed that the defendants were regularly accepting bribes from the bar owners in return for overlooking violations at the bars.

I was involved in this case from the beginning of the investigation in the fall of 2000. Six defendants, Lee, Andres, Ho, Oshiro, Richardson, and Wright, entered pleas of guilty. Two defendants, Hiranaka and Mina, went to trial before Chief Judge David A. Ezra on April 22, 2004. The jury returned a verdict of guilty on all counts on May 18, 2004. Three defendants have been sentenced, and the other five defendants are pending sentencing.

I was the sole attorney for the United States during the trial of this matter. Prior to the trial, Assistant U.S. Attorney Craig Nakamura assisted me on the case. Mr. Nakamura was appointed to the State of Hawaii judiciary prior to the April trial. Mr. Nakamura's address is 426 Queen Street, Room 201, Honolulu, HI 96813, phone number (808) 539-4206.

The following attorneys represent the defendants:

Defendant's name	Attorney's name	Attorney's Address	Attorney's phone #
David Lee	Rustam Barbee	1188 Bishop Street Suite 2606 Honolulu, HI 96813	(808) 524-4406
Harvey Hiranaka	Pamela Byrne	300 Ala Moana Blvd. Room 7-104 Honolulu, HI 96850	(808) 541-1878
Arthur Andres	Reginald Minn	Davies Pacific Center 841 Bishop Street Suite 2116 Honolulu, HI 96813	(808) 526-9343
Samuel Ho	David Gierlach	500 Ala Moana Blvd. Suite 330 5 Waterfront Plaza Honolulu, HI 96813	(808) 523-1332
Eduardo Mina	Clifford Hunt	500 Ala Moana Blvd. Suite 480 4 Waterfront Plaza Honolulu, HI 96813	(808) 545-4050
Collin Oshiro	Jerry Wilson	Central Pacific Plaza 220 S. King Street Suite 1450 Honolulu, HI 96813	(808) 536-9307
William Richardson	Donald Wilkerson	345 Queen Street Suite 915 Honolulu, HI 96813	(808) 533-4447
Kenneth Wright	Mark Worsham	Coates & Frey 900 Fort Street Mall Suite 1400 Honolulu, HI 96813	(808) 524-4854

b. Andrew Mirikitani and Sharron Bynum

This case is captioned United States v. Andrew Mirikitani and Sharron Bynum, Cr. No. 00-00442 HG (USDC Hawaii). Bynum's appeal is final and is reported as United States v. Bynum, 327 F.3d 986 (9th Cir. 2003). Mirikitani's appeal was decided on August 31, 2004, and can be found at 2004 WL 1936293.

On February 14, 2001, Mirikitani, and Bynum as an aider and abettor, were charged with obtaining by fraud property of the City and County of Honolulu, bribery while intending to be influenced in connection with a transaction involving the City and County of Honolulu, and extortion under color of official right. Mirikitani was also charged with wire fraud and witness tampering.

Until his sentencing in 2001, Andy Mirikitani was one of nine members of the Honolulu City Council. In June, 1999, Mirikitani told two of his employees that he would provide them with a bonus paid with city funds under the condition that the employees provide one-half of the bonus money to Mirikitani or his campaign committee. Both employees received the bonus, and both paid the agreed-upon amount to Mirikitani in return for receiving the bonus. Bynum, Mirikitani's girl-friend, was involved in determining the amount of money the employees owed to Mirikitani. After the FBI investigation began in this matter, Mirikitani asked one of the employees to lie to law enforcement regarding the kickback arrangement.

I was the sole attorney involved in this investigation and prosecution. Both defendants went to trial before Judge Helen Gillmor on June 5, 2001. The jury returned a verdict of guilty on all but one count against Bynum on July 3, 2001. Both defendants were sentenced.

Mirikitani was represented by John Edmunds, Edmunds and Verga, 841 Bishop Street, Ste. 2104, Honolulu, HI 96813, phone number (808) 524-2000 ext. 2. Bynum was represented by William Domingo, 300 Ala Moana Blvd., Room 7-104, Honolulu, HI 96850, phone number (808) 541-3448.

c. Daniel Kihano

This case is captioned United States v. Daniel Kihano, Cr. No. 96-00816 ACK (USDC Hawaii). The conviction was not appealed.

On August 28, 1996, Kihano was charged with wire fraud, mail fraud, money laundering, conspiracy to obstruct justice, obstruction of justice, witness tampering, filing a false income tax return, and criminal forfeiture.

Kihano served as a member of the State of Hawaii House of Representatives between 1970 and 1992, becoming the Speaker of the House of Representatives in 1987. As an elected official, Kihano established the Danny Kihano campaign committee to support his candidacy for office. State of Hawaii law requires that campaign funds can only be used for purposes directly related to the candidate's campaign or issues related to the campaign.

Instead of using the campaign funds for lawful purposes, Kihano had a long standing practice of embezzling Danny Kihano Campaign Committee funds, and using the funds for his own personal use. At one point, after converting a large sum of campaign funds, Kihano went to several Honolulu banks in an effort to launder the money taken from the campaign. After a grand jury was convened in this matter, Kihano asked a former campaign official to draft a note to reflect a loan from the Danny Kihano Campaign Committee to Kihano, when in fact there was no loan from the campaign to Kihano. This and related conduct led to the obstruction and witness tampering charges.

I was the sole attorney involved in this investigation and prosecution. Kihano went to trial before Judge Alan C. Kay on September 24, 1997. The jury returned a verdict of guilty on a majority of the counts on October 21, 1997.

Kihano was represented by Benjamin Cassiday, 5699 Kalanianaole Highway, Honolulu, HI 96821, phone number (808) 220-3200.

d. Milton Holt

This case is captioned United States v. Milton Holt, Cr. No. 98-00626 ACK (USDC Hawaii). The conviction was not appealed.

On October 1, 1998, and later in superseding charging documents, Holt was charged with mail fraud.

Holt was a member of the Hawaii State Senate between 1980 and 1996. As an elected official, Holt established the Friends of Milton Holt Campaign Committee to support his candidacy for office. State of Hawaii law requires that campaign funds can only be used for purposes directly related to the candidate's campaign or issues related to the campaign.

Holt, over a four-year period, converted the funds of the campaign fund for his own personal use. He did this, in large part, by writing campaign checks to third parties for what appeared to be a campaign-related expense (such as printing flyers), when in fact he received cash from the third party.

I was the sole attorney involved in this investigation and prosecution. Holt entered a plea of guilty to mail fraud on August 24, 1999, and he was sentenced on December 6, 1999.

Holt was represented by Reginald Minn, Davies Pacific Center, 841 Bishop Street, Ste. 2116, Honolulu, Hawaii 96813, phone number (808) 526-9343.

e. Allan Cui

This case is captioned United States v. Allan Cui, Cr. No. 95-00706 HG (USDC Hawaii). The conviction was affirmed in an unpublished opinion which can be located at 1997 WL 30336.

On July 12, 1995, Cui was charged with intentionally possessing with intent to distribute in excess of ten grams of methamphetamine.

Cui was a prison guard at the Halawa Correctional Facility, a State of Hawaii prison. An inmate at Halawa told law enforcement that Cui was smuggling drugs into the prison for the inmates. The inmate, cooperating with law enforcement, provided Cui with a pager number to the inmate's "source" of supply of drugs outside the prison, a person who in fact was an undercover officer with the Hawaii Department of Public Safety. Cui called the undercover officer, and agreed in return for $200 to accept methamphetamine from the "source," smuggle the drugs into the prison, and give the drugs to the inmate. Cui then met with the undercover officer in a parking lot, and provided the undercover officer with the drugs. He was then arrested.

I was the sole attorney involved in this investigation and prosecution. Cui went to trial before Judge Helen Gillmor on October 4, 1995. The jury returned a verdict of guilty on October 6, 1995. In addition to this case, I prosecuted several other prison guards during this time period for smuggling drugs into Halawa for sale to inmates.

Cui was represented by Wayne Tashima, now employed at the Department of Prosecuting Attorney, 1060 Richards Street, Floor 10, Honolulu, HI 96813, phone number (808) 523-4694.

f. Kenneth Rappolt

This case is captioned United States v. Kenneth Rappolt, Cr. No. 94-01574 ACK (USDC Hawaii). The conviction was not appealed.

On June 27, 1994, Rappolt was charged with mail fraud.

Rappolt was the Director of the City and County of Honolulu Department of Wastewater Management (DWWM). Between April 1994 and June 1994, Rappolt engaged in a scheme to defraud the citizens of Honolulu, Hawaii. In essence, Rappolt, as Director of DWWM, sought to obtain from a consulting company campaign contributions totaling $15,000 in exchange for the promise of an award of a no-bid engineering consulting contract to the consulting company in the sum of approximately $400,000.

I was the sole attorney involved in this investigation and prosecution. Rappolt pled guilty to the charge on June 29, 1994, and was sentenced in October, 1994.

Rappolt was represented by Peter Wolff (the present Federal Public Defender for the District of Hawaii), 300 Ala Moana Blvd., Room 7-104, Honolulu, HI 96850, phone number (808) 541-2526.

g. Marvin Miura, Rosario Prizzia, and Wayne Hayashi.

This case is captioned United States v. Marvin Miura, Rosario Prizzia, and Wayne Hayashi, Cr. No. 93-00846 ACK (USDC Hawaii). The convictions of all three defendants were not appealed.

In late 1992, and then in May or June, 1993, the defendants were charged with mail fraud, bribery, tax violations, and structuring financial transactions.

Miura was the head of the State of Hawaii Office of Environmental Quality Control, a cabinet-level position in the State of Hawaii. Miura, Hayashi and Prizzia engaged in a scheme in which Miura accepted financial benefits from Hayashi and Prizzia, including a $35,000 bribe, and gave them favorable treatment in awarding no-bid State contracts during the period 1988 through 1990.

I worked on this investigation and prosecution in conjunction with a former U.S. Attorney, Daniel Bent, and

after Mr. Bent left the office, with Ray Hulser from the U.S. Department of Justice, Public Integrity Section. Mr. Bent's address is Pauahi Tower, 1001 Bishop Street, Ste. 1155, Honolulu, HI 96813, phone number (808) 548-0080. Mr. Hulser's address is 1400 New York Avenue N.W., Washington, D.C. 20530, phone number (202) 616-0387.

All three defendants entered pleas of guilty in June, 1993, and were sentenced in October and November, 1993.

Miura was represented by Michael Weight, 300 Ala Moana Blvd., Room 7-104, Honolulu, HI 96850, phone number (808) 541-1879. Prizzia was represented by Howard Luke, 707 Richards Street, Ste. 610, Honolulu, HI 96816, phone number (808) 545-5000. Hayashi was represented by Hayden Alulu, 707 Alakea Street, Ste. 208, Honolulu, HI 96816, phone number (808) 533-3388.

h. Ronald Carlson

This case is captioned United States v. Ronald Carlson, Cr. No. 98-00091 SOM (USDC Hawaii), and is reported as United States v. Carlson, 235 F.3d 466 (9th Cir. 2000).

On August 20, 1998, Carson was charged with willfully attempting to evade and defeat United States income tax and willfully attempting to evade and defeat the payment of income taxes.

Carlson, a Honolulu dentist, had not paid income taxes or filed tax returns since 1983. The IRS audited Carlson, and assessed taxes against him. When the IRS began to levy to collect on the taxes owed, Carlson opened bank accounts using false identifying information, including social security numbers, in order to hide his assets.

I was the sole attorney involved in this investigation and prosecution. Carlson went to trial before Judge Susan Oki Mollway on July 7, 1999. The jury returned a verdict of guilty on all counts on July 13, 1999.

Carlson was represented by Stephen Pingree, Haseko Center, 820 Mililani Street, Ste. 701, Honolulu, HI 96813, phone number (808) 599-5911.

i. George Parker

This case is captioned United States v. George Parker, Cr. No. 96-00424 DAE (USDC Hawaii). The conviction was affirmed in an unpublished opinion which can be located at 1999 WL 273387.

On April 17, 1996, Parker was charged with conspiracy to engage in witness tampering, witness tampering, money laundering, and forfeiture.

Parker was a criminal defense attorney in Honolulu, Hawaii. In his capacity as a criminal defense attorney, Parker met with Bill Batkin, a large scale drug dealer. Batkin informed Parker that Frank Moon, one of Batkin's drug customers, had been arrested and that Batkin was concerned that Moon may cooperate with law enforcement against Batkin. Batkin retained Parker to represent Moon, with the understanding that Parker was in fact to represent the interests of Batkin by insuring that Moon did not cooperate against Batkin. Parker then met with Moon on many occasions in an effort to keep Moon from cooperating.

This case was originally handled by Assistant U.S. Attorney Marshall Silverberg. Mr. Silverberg's address is 300 Ala Moana Blvd., Room 6-100, Honolulu, HI 96813, phone number (808) 541-2850. I took over the case a few months prior to the commencement of the trial on January 2, 1997, before Judge David A. Ezra. The jury returned a verdict of guilty on all substantive counts January 29, 1997. The forfeiture count was later dismissed.

Parker was pro se throughout the trial. He is presently incarcerated.

j. Wade Rodrigues

This case is captioned United States v. Wade Rodrigues, Cr. No. 94-02233 HG (USDC Hawaii). The conviction was affirmed in an unpublished opinion which can be located at 1996 WL 672320.

On November 17, 1994, Rodrigues was charged with being a felon in possession of a firearm and ammunition, attempted distribution of methamphetamine, carrying and using a firearm in relation to a drug offense, possession of cocaine, and being an unlawful user of a controlled substance while possessing a firearm.

Rodrigues was a violent felon with a long criminal history. In September, 1994, Rodrigues was arrested outside of a 7-11 store by officers of the Honolulu Police Department. Prior to the arrest, defendant attempted to sell methamphetamine to a minor in the parking lot. At the time of his arrest, he was found to have a firearm with ammunition and cocaine on his person.

I was the sole attorney involved in this investigation and prosecution. Rodrigues went to trial before Judge Helen Gillmor on March 16, 1995. The jury returned a verdict of guilty on all but one count on March 23, 1999.

Rodrigues was represented by William Harrison, Harrison & Matsuoka, Davies Pacific Center, 841 Bishop Street, Ste. 800, Honolulu, HI 96813, phone number (808) 523-7041.

19. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question, please omit any information protected by the attorney-client privilege (unless the privilege has been waived.)

From 1993 to 1999, I served as a member of the Hawaii Supreme Court Board of Bar Examiners. During my tenure on this Board, I sat on two panels that heard evidence and then ruled on the fitness of an applicant to sit for the bar exam.

From 1995 to the present, I have served as a member of the Hawaii Supreme Court Disciplinary Board, the entity charged with overseeing legal ethics of those admitted to practice law in the State of Hawaii. The Board meets monthly to review findings made by a hearing committee to determine if a lawyer has violated the Hawaii Rules of Professional Conduct, and if so, what discipline to recommend to the Hawaii Supreme Court. I have also chaired the Board's "Ethics 2000" committee, which is reviewing the Hawaii Rules of Professional Conduct for potential amendments in light of the newly adopted ABA Model Rules of Professional Conduct.

For three years, I taught an appellate advocacy course at the University of Hawaii William S. Richardson School of Law in Honolulu, Hawaii. This course, taught by myself and another attorney, ran from January through April, and

required the students to conduct legal research, draft an appellate brief, and argue the case to a court of appeals.

I have also served, for several years, as the Professional Responsibility Officer for the U.S. Attorney's Office for the District of Hawaii. In this role, I provide advice to Assistant U.S. Attorneys in the office concerning ethical issues. I also served, several years ago, as the coordinator for "Operation Triggerlock- Hawaii." This operation involved coordination between federal and local law enforcement and prosecutors in an effort to ensure that the most serious firearm offenders were prosecuted in federal court.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.

   Individual Retirement Accounts, Federal Thrift Savings Plan, and pension from the United States.

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.

   I do not anticipate any conflicts arising based on my financial arrangements. My daughter owns a small amount of stock in a local bank. Should ownership in any stock or mutual fund create a conflict, I would follow the established rules regarding these matters.

   As an Assistant U.S. Attorney, I would follow established procedures when a government attorney leaves the executive branch for the judiciary, and expect that I would be recused from certain matters for a period of time. I will follow the guidelines of the Code of Judicial Conduct.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

   No, although if permitted I may have an interest in teaching, as I have done in the past, at the William S. Richardson School of Law as an adjunct professor.

4. List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding $500 or more (If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.)

See attached financial disclosure form.

5. Please complete the attached financial net worth statement in detail (Add schedules as called for).

See attached net worth statement.

6. Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

No.

AO-10 Rev. 1/2004	**FINANCIAL DISCLOSURE REPORT** Calendar Year 2004	Report Required by the Ethics in Government Act of 1978 (5 U.S.C. app. §§ 101-111)

1. Person Reporting (Last name, First name, Middle initial)	2. Court or Organization	3. Date of Report
Seabright, John M	U.S. District Court, Hawaii	2/15/2005
4. Title (Article III Judges indicate active or senior status; magistrate judges indicate full- or part-time) U.S. District Judge - Nominee	5. ReportType (check appropriate type) (•) Nomination. Date 2/14/2005 ( ) Initial ( ) Annual ( ) Final	6. Reporting Period 1/1/2004 to 1/31/2005
7. Chambers or Office Address U.S. Attorney's Office 300 Ala Moana Blvd., Rm 6-100 Honolulu, HI 96850	8. On the basis of the information contained in this Report and any modifications pertaining thereto, it is, in my opinion, in compliance with applicable laws and regulations. Reviewing Officer_____ Date_____	

IMPORTANT NOTES: The instructions accompanying this form must be followed. Complete all parts, checking the NONE box for each part where you have no reportable information. Sign on last page.

I. POSITIONS. (Reporting individual only; see pp. 9-13 of filing instructions)

[ ] **NONE** - (No reportable positions.)

	POSITION	NAME OF ORGANIZATION/ENTITY
1.	Officer	State of Hawaii Disciplinary Board
2.	Officer	Homeowner's Association [name of Association redacted]

II. AGREEMENTS. (Reporting individual only; see pp. 14-16 of filing instructions)

[X] **NONE** - (No reportable agreements.)

	DATE	PARTIES AND TERMS
1.		

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Seabright, John M	2/15/2005

III. NON-INVESTMENT INCOME. (Reporting individual and spouse; see pp. 17-24 of filing instructions)

A. Filer's Non-Investment Income

☑ **NONE** - (No reportable non-investment income.)

	DATE	SOURCE AND TYPE	GROSS INCOME (yours, not spouse's)
1.			

B. Spouse's Non-Investment Income - (If you were married during any portion of the reporting year, please complete this section. (dollar amount not required except for honoraria)

☐ **NONE** - (No reportable non-investment income.)

	DATE	SOURCE AND TYPE
1.	2004	State of Hawaii Salary
2.	2005	State of Hawaii Salary

IV. REIMBURSEMENTS -- transportation, lodging, food, entertainment.

(Includes those to spouse and dependent children. See pp. 25-27 of instructions.)

☐ **NONE** - (No such reportable reimbursements.)

	SOURCE	DESCRIPTION
1.	Exempt	

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Seabright, John M	2/15/2005

V. GIFTS. (Includes those to spouse and dependent children. See pp. 28-31 of instructions.)

☐ **NONE** - (No such reportable gifts.)

	SOURCE	DESCRIPTION	VALUE
1.	Exempt		

VI. LIABILITIES. (Includes those of spouse and dependent children. See pp. 32-34 of instructions.)

☑ **NONE** - (No reportable liabilities.)

	CREDITOR	DESCRIPTION	VALUE CODE
1.			

FINANCIAL DISCLOSURE REPORT
Page 1 of 2

Name of Person Reporting	Date of Report
Seabright, John M	2/15/2005

II. INVESTMENTS and TRUSTS – income, value, transactions (includes those of the spouse and dependent children. See pp. 34-57 of filing instructions.)

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A-H)	B. (2) Type (e.g. div., rent, or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g. buy, sell, merger, redemption)	D. If not exempt from disclosure (2) Date: Month - Day	(3) Value Code 2 (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)
NONE (No reportable income, assets, or transactions)									
Fidelity Cash (UTMA)	A	Interest	K	T	exempt				
Honolulu Federal Employees Federal Credit Union Accounts	A	Interest	K	T	exempt				
Fidelity Cash Reserves (IRA)	A	Interest	J	T	exempt				
IBM Stock	A	Dividend	J	T	exempt				
Wind River Systems Stock (IRA)		None	J	T	exempt				
Strong Short Term Municipal Bond Fund	A	Dividend	K	T	exempt				
Fidelity Munipal Money Market Fund	A	Dividend	J	T	exempt				
Artisan International Mutual Fund (IRA)	A	Dividend	J	T	exempt				
Royce Low Priced Stock Mutual Fund (IRA)	A	Dividend	J	T	exempt				
Vanguard Inflation Protected Securities Mutual Fund (IRA)	A	Dividend	J	T	exempt				
Vanguard U.S. Value Mutual Fund (IRA)	A	Dividend	J	T	exempt				
Weitz Value Mutual Fund (two accounts - one IRA; one UTMA)	B	Dividend	K	T	exempt				
Marsico Focus Mutual Fund (IRA)		None	J	T	exempt				
Fidelity Diversified International Mutual Fund (UTMA)	A	Dividend	J	T	exempt				
Oakmark Select Mutual Fund (UTMA)	A	Dividend	J	T	exempt				
Artisan Midcap Mutual Fund (UTMA)		None	J	T	exempt				
Central Pacific Financial Corp stock (fka CPB)	A	Dividend	J	T	exempt				
Fidelity Dividend Growth Mutual Fund (UTMA)	A	Dividend			exempt				

Income/Gain Codes: A = $1,000 or less; B = $1,001-$2,500; C = $2,501-$5,000; D = $5,001-$15,000; E = $15,001-$50,000
(See Columns B1 and D4) F = $50,001-$100,000; G = $100,001-$1,000,000; H1 = $1,000,001-$5,000,000; H2 = More than $5,000,000
Value Codes: J = $15,000 or less; K = $15,001-$50,000; L = $50,001-$100,000; M = $100,001-$250,000
(See Columns C1 and D3) N = $250,000-$500,000; O = $500,001-$1,000,000; P1 = $1,000,001-$5,000,000; P2 = $5,000,001-$25,000,000
P3 = $25,000,001-$50,000,000; P4 = More than $50,000,000
Value Method Codes: Q = Appraisal; R = Cost (Real Estate Only); S = Assessment; T = Cash/Market
(See Column C2) U = Book Value; V = Other; W = Estimated

INANCIAL DISCLOSURE REPORT
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Name of Person Reporting	Date of Report
Seabright, John M	2/15/2005

II. INVESTMENTS and TRUSTS — income, value, transactions (includes those of the spouse and dependent children. See pp. 34-57 of filing instructions.)

Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A-H)	B. (2) Type (e.g. div., rent, or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g. buy, sell, merger, redemption)	If not exempt from disclosure (2) Date: Month - Day	(3) Value Code 2 (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)
Wastach Small Cap Value Mutual Fund (UTMA)	A	Dividend	J	T	exempt				
TIAA-Cref Growth Equity Mutual Fund (custodian accounts)	A	Dividend	J	T	exempt				
College Savings Plan of Nebraska (a 529 plan for child #2)		None	K	T	exempt				
State of Hawaii PTS Deferred Compensation Plans	A	Interest	K	T	exempt				
Property located in Honolulu, Hawaii		None	K	V	exempt				

Income/Gain Codes (See Columns B1 and D4)	A = $1,000 or less	B = $1,001-$2,500	C = $2,501-$5,000	D = $5,001-$15,000	E = $15,001-$50,000				
	F = $50,001-$100,000	G = $100,001-$1,000,000	H1 = $1,000,001-$5,000,000	H2 = More than $5,000,000					
Value Codes (See Columns C1 and D3)	J = $15,000 or less	K = $15,001-$50,000	L = $50,001-$100,000	M = $100,001-$250,000					
	N = $250,000-$500,000	O = $500,001-$1,000,000	P1 = $1,000,001-$5,000,000	P2 = $5,000,001-$25,000,000					
	P3 = $25,000,001-$50,000,000		P4 = $More than $50,000,000						
Value Method Codes (See Column C2)	Q = Appraisal	R = Cost (Real Estate Only)	S = Assessment	T = Cash/Market					
	U = Book Value	V = Other	W = Estimated						

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Seabright, John M	2/15/2005

VIII. ADDITIONAL INFORMATION OR EXPLANATIONS (Indicate part of Report.)

Value of property located in Honolulu, Hawaii is based on current selling price of comparable property.

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Seabright, John M	2/15/2005

IX. CERTIFICATION.

I certify that all information given above (including information pertaining to my spouse and minor or dependent children, if any) is accurate, true, and complete to the best of my knowledge and belief, and that any information not reported was withheld because it met applicable statutory provisions permitting non-disclosure.

I further certify that earned income from outside employment and honoraria and the acceptance of gifts which have been reported are in compliance with the provisions of 5 U.S.C. § 501 et. seq., 5 U.S.C. § 7353, and Judicial Conference regulations.

Signature John Michael Seabright Date February 15, 2005

NOTE: ANY INDIVIDUAL WHO KNOWINGLY AND WILFULLY FALSIFIES OR FAILS TO FILE THIS REPORT MAY BE SUBJECT TO CIVIL AND CRIMINAL SANCTIONS (5 U.S.C. app. § 104)

FILING INSTRUCTIONS

Mail signed original and 3 additional copies to:

Committee on Financial Disclosure
Administrative Office of the United States Courts
Suite 2-301
One Columbus Circle, N.E.
Washington, D.C. 20544

FINANCIAL STATEMENT

NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS				LIABILITIES			
Cash on hand and in banks	23	995	70	Notes payable to banks-secured	18	893	56
U.S. Government securities-add schedule				Notes payable to banks-unsecured			
Listed securities-add schedule	675	641	60	Notes payable to relatives			
Unlisted securities--add schedule				Notes payable to others			
Accounts and notes receivable:				Accounts and bills due (estimate)	5	000	00
Due from relatives and friends				Unpaid income tax			
Due from others				Other unpaid income and interest			
Doubtful				Real estate mortgages payable-add schedule	200	000	00
Real estate owned-add schedule	789	987	00	Chattel mortgages and other liens payable			
Real estate mortgages receivable				Other debts-itemize:			
Autos and other personal property (estimate)	85	000	00				
Cash value-life insurance							
Other assets itemize:							
				Total liabilities	223	893	56
				Net Worth	1,350	730	80
Total Assets	1,574	624	30	Total liabilities and net worth	1,574	624	30
CONTINGENT LIABILITIES	none			GENERAL INFORMATION			
As endorser, comaker or guarantor				Are any assets pledged? (Add schedule)	no		
On leases or contracts				Are you defendant in any suits or legal actions?	no		
Legal Claims				Have you ever taken bankruptcy?	no		
Provision for Federal Income Tax							
Other special debt							

FINANCIAL STATEMENT

NET WORTH

Listed Securities Schedule

Name of Security	Type of Security	Value
IBM	Stock	$3,581.33
Strong Short Term Municipal Bond Fund	Mutual Fund	$31,267.16
Fidelity Municipal Money Market	Money Market	$2,214.63
U.S. Government Thrift Savings Plan	G, C, S, & I funds	$414,409.86
Wind River Systems	stock - IRA	$3,408.60
Wind River Systems	stock - Roth IRA	$2,294.25
Fidelity Cash Reserves	Mutual Fund - IRA	$61.94
Fidelity Cash Reserves	Mutual Fund - IRA	$38.74
Artistan International	Mutual Fund - IRA	$11,801.21
Royce Low Priced Stock Fund	Mutual Fund - IRA	$14,310.20
Vanguard Inflation Protected Securities	Mutual Fund - IRA	$13,776.16
Vanguard U.S. Value Fund	Mutual Fund - IRA	$14,598.77
Weitz Value	Mutual Fund - IRA	$11,741.94
Fidelity Cash Reserves	Mutual Fund - Roth IRA	$8.02
Marsico Focus Fund	Mutual Fund - Roth IRA	$1,364.95
Fidelity Cash	Cash Account (UTMA)	$3,132.74
Fidelity Diversified International	Mutual Fund (UTMA)	$6,992.06
Oakmark Select	Mutual Fund (UTMA)	$8,123.19
Fidelity Cash	Cash Account (UTMA)	$41,903.04
Artisan Mid Cap	Mutual Fund (UTMA)	$12,328.62
Central Pacific Financial Corps (fka CPB)	Stock (UTMA)	$1,879.35
Establishments Delhaize Freres	Stock (UTMA)	$73.92
Wasatch Small Cap Value	Mutual Fund (UTMA)	$6,275.60
Weitz Value	Mutual Fund (UTMA)	$12,290.00
College Savings Plan of Nebraska	529 plan	$39,992.35
State of Hawaii PTS Deferred Compensation Plan	State Retirement Fund	$396.53
State of Hawaii PTS Deferred Compensation Plan	State Retirement Fund	$15,186.90
TIAA-Cref	Mutual Fund (UTMA)	$2,189.54
TOTAL		$675,641.60

FINANCIAL STATEMENT

NET WORTH

Real Estate Owned

Location	Interest in Property	Estimated Value
Honolulu, HI	Residence	$750,000
Honolulu, HI	14.81 % interest in apartment, after $80,000 paid to others (remainder owned by family members)	$39,987 ($350,00 market value, less $80,00 x 14.81% interest)
TOTAL		$789,987

Real Estate Mortgages Payable

Property	Mortgage Holder	Mortgage Balance
Residence in Honolulu, HI	EverHome Mortgage Company Atlanta, Ga.	$200,000
14.81% interest in apartment in Honolulu, HI	None	None

III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

   The comment to Rule 6.1 of the ABA Model Rules of Professional Responsibility recognizes that government attorneys may not be able to fulfill their pro bono responsibilities in the same manner as private attorneys. Rule 6.1(b) provides for alternative means for government lawyers to fulfill their obligation, such as "participation in activities for improving the law, the legal system or the legal profession."

   From 1995 to the present, I have served as a member of the Hawaii Supreme Court Disciplinary Board. The Disciplinary Board oversees the ethics of the members of the Hawaii State Bar, including hearing cases, recommending discipline to the Hawaii Supreme Court, and providing ethics opinions to the members of the Hawaii State Bar. I am presently Chair of the Disciplinary Board's Rules Committee and the Ethics 2000 Committee. The Ethics 2000 Committee is reviewing the recent amendments to the ABA Model Rules of Professional Responsibility, and suggesting changes to the Hawaii Rules of Professional Responsibility to the Hawaii Supreme Court. The full Disciplinary Board meets once a month for 1/2 day. The Ethics 2000 Committee, for a period in excess of one year, sat for 1/2 day or one full day per month. The Rules Committee meets as needed.

   From 1993 to 1999, I served as a member of the Hawaii State Board of Bar Examiners. This entity, appointed by the Hawaii Supreme Court, is responsible for the admission of new members to the Hawaii State Bar, including determinations of fitness to practice law and administering the bi-annual bar exam. The board met several times a year. I also sat on two panels examining the qualifications of attorney-applicants to sit for the bar.

2. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates -- through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What you have done to try to change these policies?

No.

3. Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).

There is no selection commission in the District of Hawaii to recommend candidates for nomination. When I became aware that there was an open seat on the court, I expressed my interest to the Governor of the State of Hawaii. My name was thereafter submitted to the White House. I then traveled to Washington, D.C., and had an interview with two attorneys from the White House Counsel's Office and one attorney from the Department of Justice, Office of Legal Policy. Since that time, I have had contact with an attorney from the White House Counsel's Office and two attorneys at the Department of Justice, Office of Legal Policy.

4. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as asking how you would rule on such case, issue, or question? If so, please explain fully.

No.

5. Please discuss your views on the following criticism involving "judicial activism."

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism

that alleges that the judicial branch has usurped-many of the prerogatives of other branches and levels of government.

Some of the characteristics of this "judicial activism" have been said to include:

a. A tendency by the judiciary toward problem-solution rather than grievance-resolution;

b. A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;

c. A tendency by the judiciary to impose broad, affirmative duties upon governments and society;

d. A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and

e. A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

Article III, § 1, of the United States Constitution provides that the judicial power of the United States is vested in the Supreme Court, and such other courts as created by Congress. Article III, § 2, then provides for the limitation of that judicial power to the resolution of "cases" and "controversies."

As an example of the case and controversy limitation, all plaintiffs must have standing to sue. Thus, as stated by the Supreme Court, a plaintiff must demonstrate an "injury in fact," which is "concrete," "distinct and palpable," and "actual or imminent." The ripeness doctrine, also rooted in Aricle III's case or controversy requirement, prevents courts, through premature adjudication, from engaging in disagreements over administrative policies, and protects the agencies from premature judicial interference until an administrative decision is formalized and its effects felt by the parties in a concrete way. These are well-established constitutional principles that I would apply as a district court judge.

In addition to adherence to these bedrock Article III principles, I would be guided by precedent and stare decisis as a district court judge. As a district court judge, I would be bound by the decisional law of the United States Supreme Court and the Ninth Circuit Court of Appeals. Principles of consistency and predictability form the foundation for a fair application of the law.

Chairman HATCH. Well, we are delighted to have all of you here. These positions are, to me, some of the most important positions in our country. One-third of the separated powers of this country happen to be the judiciary, so we take this very seriously. Everybody on this Committee takes it seriously. We have had all kinds of experiences over the last 28 years with regard to judicial nominees. I think it is important that we ask a few questions here. I believe that all three of you should be able to be confirmed.

Let me start with you, Mr. Griffith, since there has been some controversy with regard to some of the experiences that you have gone through. If you are confirmed, Mr. Griffith, your ability to work with other judges on the Circuit Court of Appeals for the District of Columbia will be an important element of your effectiveness.

Can you please tell us what you believe the role of a judge should be—well, the role and significance of collegiality is and how you will contribute to it once you become a judge?

Mr. GRIFFITH. Thank you. I think that is a critical question. I think it is a critical attribute that judges need to find ways to work with their colleagues. What they are about is administering laws fairly and justly. They are about a process that ought to be collaborative to get the benefit of colleagues' thoughts on nettlesome issues that have great impact on the lives of the parties.

So I think collegiality is an indispensable requirement of an appeals court judge, and I believe that I have demonstrated through my life that I have found ways to reach out to others, to collaborate, to come up with shared solutions.

Chairman HATCH. That has been my experience with you.

Mr. Crotty, how do you feel about that?

Mr. CROTTY. Well, Senator, thank you for the question. Collegiality, of course, is very important, but on a district court it is a little bit different. The importance there, I think, is collegiality between the bench and bar and having a district court judge being able to treat the litigants before him with courtesy and respect, while running a courtroom which is based on decorum and order so that the interests of justice are fairly served.

The role of collegiality in a district court is also supported by the collegiality that exists among the district court judges and it is an important attribute of the Southern District of New York. They have always gotten along well with one another. I know many of the judges based on my own personal experience and appearances in the courthouse, and I hope I would be able to contribute to that in a very positive vein so that there is collegiality not only among the district court judges, but more importantly collegiality between the judge and those appearing before the judge on matters of great importance to the litigants.

Chairman HATCH. Well, thank you.

Mr. Seabright.

Mr. SEABRIGHT. Thank you, Senator. Coming from Hawaii, we have a small district. We only have right now three full-time district court judges. If confirmed, I would be the fourth, and I know all three of the judges very well. I have tried many cases before them as a career Assistant United States Attorney in the District

of Hawaii. I get along well with all three of them and respect them greatly.

And I have no question that the collegiality among the four of us, if I was confirmed, would work greatly towards the benefit of the court in making it run smoothly and having the judges be able to work cooperatively to implement the various rules and procedures that are necessary in the court.

And I agree with Mr. Crotty, as well, that it is vitally important that a district court judge show civility towards the litigants that appear before that court. And I can assure you, Senator, and the Committee as a whole that in my practice of law I have always done that in the past and I will continue to do that as a district court judge.

Chairman HATCH. Well, thank you.

Now, Mr. Griffith, could you please speak about the importance of judicial temperament and indicate what elements of judicial temperament that you consider to be the most important?

Mr. GRIFFITH. Thank you. I think judicial temperament is critically important. A litigant ought to be able to have confidence that when he or she brings a dispute before a court and a judge is involved that that judge is thoughtful, is fair, is scrupulous in attention to fact, is diligent in identifying the principles of law that govern, and then is fair and impartial in applying that law to the dispute. Litigants deserve that when they come into the courts of the United States.

And so I think all of those elements are critical to judicial temperament. I think perhaps the most important is the willingness to withhold judgment until all arguments are heard, until all facts are explored, so that the decision the judge makes can be the most considered and most accurate.

Chairman HATCH. Thank you.

Do you agree with that, Mr. Crotty?

Mr. CROTTY. Yes, I do, Senator. I was going to quote Finley Peter Dunne, who was a great commentator around the time of Teddy Roosevelt, who, through is character, Mr. Dooley, said with regard to judicial temperament he has the judicial temperament; he hates work.

But I think today we have to be at the opposite end of that spectrum, and I think that temperament—to be a good district court judge, a good circuit court judge, you have to be willing to work, and work hard. And I think important in that is the willingness to listen and to learn from the advocates who appear before you, to give them an opportunity to make their case, and do that against the background of respecting the role of advocate, extending them courtesy and trying to be responsive. And many of the values that Mr. Griffith cites, of course, I agree with. That would be my answer.

Chairman HATCH. Thank you.

I think you agree with both of those, don't you?

Mr. SEABRIGHT. I do, Senator.

Chairman HATCH. That is great.

[Laughter.]

Mr. GRIFFITH. Maybe we could start at the other end and come down.

[Laughter.]

Chairman HATCH. It would have been the end of you if you didn't agree.

[Laughter.]

Chairman HATCH. All three of you, I take it, agree that it is important for lawyers to do pro bono work.

Mr. CROTTY. Yes, Senator.

Mr. GRIFFITH. Yes.

Mr. SEABRIGHT. Yes.

Chairman HATCH. Let me go to Mr. Griffith. Now, I don't want you two to feel excluded here, but there have been some issues raised about Mr. Griffith that I would like to clarify and resolve for the benefit of my colleagues. I have no doubt that all three of you are worthy of becoming Federal judges.

Let me just go to you, Mr. Griffith, and ask you these. Some have attempted to make much of the lapse of your bar license here in Washington, D.C. In fact, you have had some pretty vicious articles written about that.

Mr. GRIFFITH. I have noticed.

Chairman HATCH. Let me just read to you an excerpt of a letter sent to me and my good friend from Vermont, Senator Leahy, from Stephen Umin, of the law firm of Williams and Connolly, one of the most prestigious firms in this town.

Mr. GRIFFITH. Mr. Umin was here earlier today and had to leave.

Chairman HATCH. He was here to support you.

Mr. GRIFFITH. Yes.

Chairman HATCH. I won't read the whole letter. I will put it in the record, without objection. But he said, "Dear Chairman Hatch and Senator Leahy, we write in support of the nomination of Thomas B. Griffith to the United States Court of Appeals for the D.C. Circuit. We have worked with Tom in a variety of contexts and can attest to his outstanding character and legal ability. Recently, Tom was unfairly portrayed in the Washington Post for late payment of his D.C. Bar dues. The Post improperly equated Tom's situation to 'disciplinary suspension,' a rare sanction imposed only when a lawyer knowingly refuses to pay bar dues. It was nothing of the kind. When advised of the problem, Tom promptly paid his dues in full. Tom is an outstanding attorney who takes his responsibilities as a member..."

But more specifically, he says in this letter, "Each year, the D.C. Bar sends its members a reminder to renew their bar memberships. In this process, there is always potential for inadvertent oversight. As a result, the D.C. Bar Council notes that every year over 3,000 D.C. lawyers and a number of sitting judges are 'administratively suspended' for late payment of dues. This is what happened to Tom. By immediately paying his dues when he became aware of the oversight, Tom took the proper course of action. According to the D.C. Bar Council, such an oversight is entirely common and of no major concern, particularly where no reminder notice is sent."

Now, this letter from Mr. Umin is endorsed by over a dozen prominent District of Columbia lawyers. I have other letters from the likes of former Chief Judge of the U.S. Court of Appeals for the D.C. Circuit, Abner Mikva, Hofstra Professor of Law Monroe Freed-

man, and George Washington Professor of Law Thomas Morgan, experts in ethics, which I will make a part of this record, without objection. Each of these individuals point out the distinction between a technical administrative suspension and disciplinary suspensions.

Now, can you shed some light on this issue for us? Tell us what happened so that everybody knows and we get this put behind you, because you have been very unfairly treated on this issue.

Mr. GRIFFITH. I would be happy to, Senator Hatch, and thank you for the opportunity to respond to that question. First of all, it was an oversight on my part and I take full responsibility for it. I deeply regret that my bar dues were not paid in 1998 and for 2 years thereafter.

If you will allow me, maybe I can provide some context to explain what happened.

Chairman HATCH. Go ahead.

Mr. GRIFFITH. I graduated from law school in 1985, from the University of Virginia, and went to work in Charlotte, North Carolina, at a fine firm that you mentioned earlier today, Robinson, Bradshaw and Hinson. As an associate there, I learned that one of the things that law firms typically do for their lawyers is keep track of their bar membership dues. And in 1985, 1986, 1987, all the way through 1989, my law firm in Charlotte paid my bar dues. I can tell you right now, I did not give a single thought to that. They did it automatically and I was grateful for it.

Chairman HATCH. And you relied on it?

Mr. GRIFFITH. And I relied on them to do that.

When I came to Washington, D.C., in 1989, I was first associated and then became a partner at the law firm of Wiley, Rein and Fielding. I found out they did the same thing, as well. And so from 1989 to 1994, I relied on them and I really never gave a thought to whether my bar dues were going to be paid. I just delegated that to them and relied on that.

When I became Senate Legal Counsel in 1995, much to my chagrin I learned that the Senate does not pay one's bar dues. It is not an excessive amount. So that wasn't a major burden. I think at the time it was $120, $130, $140 or so. But when I learned that the Senate wouldn't pay, I notified the D.C. Bar to send the bar notices to my home, where I pay personal bills. They did so in '95, '96 and '97, and every time they sent a notice, I paid.

In 1998, Senator, I don't know what happened. I have no recall of ever receiving a notice from the D.C. Bar in 1998 that my bar dues were due or that they were past due or that they were about to, you know, cause my membership to lapse. I have no memory of receiving any such notice. And to my knowledge, I have been told that neither does the D.C. Bar have any record that they sent out any of those notices. And so in 1998, my bar membership lapsed due to my inadvertent failure to pay my bar dues.

In 1999, I left the Senate. After the impeachment trial, I left the Senate and returned to my law firm, at Wiley, Rein and Fielding, and expected that they again would pay my bar dues and keep me—

Chairman HATCH. As they had always done.

Mr. GRIFFITH. As they had always done, and keep me up to date. They did not, and they have acknowledged their error in it. When I returned to my firm, I had no idea that my membership had been suspended on a temporary basis for this lapse and was oblivious to the fact, assuming that my law firm was going to continue, as they had done before, to pay my bar dues.

I left Wiley, Rein and Fielding in 2000 to become Assistant to the President and General Counsel at Brigham Young University. I first learned that my bar dues had not been paid and that my membership had lapsed in 2001. I remember the day well.

Chairman HATCH. How did you remedy that?

Mr. GRIFFITH. My secretary came into the office and said she had just spoken with the D.C. Bar. We were inquiring about getting a certificate of good standing, and she said the D.C. Bar says it is fine; they will give you the certificate of good standing; you just got to pay the back dues you owe. And I said, what? And she said, but don't worry; they said that you have 5 years to pay them. And I said, well, no, I don't have 5 years to pay them; I have got a week. Let's cut the check and get this done, upon which I immediately paid. The D.C. Bar immediately sent me a certificate of good standing. They treated it, as Mr. Umin's letters suggest, as an administrative matter. It was certainly not a disciplinary matter.

Now, having said all that, I bear responsibility for the fact that my bar dues weren't paid. I relied on others and I should not have. I should not have relied on others to do it. And let me assure you today—it may not come as any surprise—I don't rely on anybody to pay my bar dues now. I know that D.C. Bar dues are due July 1st of each year, and if you talk to my current secretary, I think it is about beginning in April when I start hectoring her to say has it come in yet, has it come in yet?

I take my membership in the bar and the obligations of the bar seriously. I deeply regret that through my oversight that this problem happened. But I can assure you, Senator, that had I known in 1998 that my bar membership lapsed for an inadvertent failure to pay my bar dues, I would have immediately rectified it. In fact, when I did learn it, I immediately rectified it.

Chairman HATCH. I have no doubt about that.

Now, I notice the distinguished Senator from New York is here. We are grateful that you came, and I am going to interrupt this hearing.

I appreciate that explanation because that should wipe away any concerns, because that could happen to any of us, especially if you don't get a notice. I think we all rely on those notices.

Mr. GRIFFITH. I don't anymore.

Chairman HATCH. I can see that. Well, that is a good practice. I am going to have to start thinking about my own notices from here on in.

We are going to turn to the distinguished Senator from New York and show deference here. We are grateful that you would take time out of what we know is a really busy schedule to come and chat with us here today. If you would care to, you could do it from up here.

PRESENTATION OF PAUL A. CROTTY, NOMINEE TO BE DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF NEW YORK, BY HON. HILLARY RODHAM CLINTON, A U.S. SENATOR FROM THE STATE OF NEW YORK

Senator CLINTON. That is fine, Mr. Chairman. I am very appreciative of this opportunity to come and saw a few words on behalf of an excellent nominee, Paul Austin Crotty, who has been nominated to serve on the United States District Court for the Southern District of New York. It is a great pleasure for both Senator Schumer and myself to be such enthusiastic supporters of this nomination.

I know that there are a number of family members. I don't know if they have been introduced yet, Paul, but I think you can see by the strong support of the family who is here, as well as Paul's mother, who lives in Buffalo, New York, that this is a family of great distinction and service in New York.

There are few individuals who I believe the Senate could confirm or the President nominate who could bring such a breadth and depth of relevant professional and public community experiences. He has been, of course, a distinguished lawyer in the private sector. He has a great deal of experience also in the business world, having served as a very important executive for Verizon.

But in the business of his work, he has always found time to serve his community. He took time to serve on the Lower Manhattan Development Board, created after the September 11th terrorist attacks, to help Manhattan and New York recover from the devastation of those attacks. He has been active in a number of important organizations, like the New York Urban League and the City Bar Fund, the United Way.

You couldn't really do justice to his involvements without also mentioning that he has served both Republican and Democratic administrations in New York City. He certainly served with distinction both former Mayor Ed Koch and former Mayor Giuliani.

So without question, he has the intellect, demeanor, maturity and commitment to serve with distinction on the Federal bench. We are very fortunate to have a nominee of his standing that I am sure will be confirmed to begin service in New York. And he will not only make people from New York very proud, but I believe this Committee, the Senate and our country proud as well.

So I thank you for letting me come by and make a few brief remarks. I didn't want the moment to pass, Mr. Chairman, because it is not always the case that we have such enthusiastic support on both sides of the aisle for a nominee. This is one that I am very proud to be here to lend my voice to, and I thank you for the courtesy of this time.

Chairman HATCH. Well, thank you. It isn't always the case, so it is really wonderful to be able to see this kind of bipartisanship.

Mr. CROTTY. Mr. Chairman, could I express my thanks to the Senator for her encouragement and her endorsement this morning, which I am very appreciative of, and also for the many courtesies that she has extended to my family, especially my mother? The Senator was good enough to send her a nice note and give her a copy of her book when my mother turned 90. And I must say to

the Senator that she is a fan for life, and many more fans in the Crotty family.

So thank you very much, Senator.

Chairman HATCH. Yes. I want one of those autographed books, too.

[Laughter.]

Chairman HATCH. Remember that, Senator. We are honored to have you here.

Mr. Crotty, I think it is a real tribute to you to have both of these New York Senators of another party come and testify so graciously and so strongly for you.

Mr. CROTTY. Thank you, Mr. Chairman.

Chairman HATCH. If Schumer and Clinton are for you, then I am certainly for, is all I can say.

Mr. CROTTY. Thank you very much, Mr. Chairman.

Chairman HATCH. I want to go back to our questions to clarify some of these problems with which I think you have been unfairly treated, Mr. Griffith.

When you filled out your application to the Utah State Bar, question 52 asks whether you have previously been disbarred, suspended, censured, sanctioned, disciplined, or otherwise reprimanded or disqualified, whether publicly or privately, as an attorney. You answered no to this question.

Now, let me ask you, have you ever been disciplined in any way by any bar, including in D.C. or Utah?

Mr. GRIFFITH. No, Senator, I have not.

Chairman HATCH. Now, some have criticized you for answering no on that, since you did have this administrative suspension that 3,000 lawyers in D.C. commonly have from time to time. How would you answer that?

Mr. GRIFFITH. When I filled that out, the thought never crossed my mind that that question might relate to a temporary lapse due to an inadvertent failure to pay bar dues. The question—

Chairman HATCH. Some would say, well, it wasn't temporary, it was 3 years. But the fact is that you have explained it adequately that the only year really where you were personally responsible for it, or at least where you had the sole obligation to take care of it was 1998, when you didn't receive a notice.

Mr. GRIFFITH. Yes, sir, that is correct.

Chairman HATCH. And the bar admits they probably didn't send you a notice.

Mr. GRIFFITH. Yes, sir, that is correct.

Chairman HATCH. The other two, you had relied on your firm, which you had always done before. But go ahead.

Mr. GRIFFITH. I was just saying the thought never occurred to me that that might cover—that someone might argue that that had something to do with this administrative action that was taken.

And if I might add, this issue came to light when I filled out my Senate Judiciary Committee questionnaire, which we all labored over, a great labor of love. The question there I was asked—I don't remember the exact wording; I think it is question number 11. List your bar memberships and any dates in which your membership has lapsed. And I said my membership in D.C. had lapsed during this period of time and that is how the issue came to light. But I

never thought that what happened to me was in any way the gravamen of that question, which is clearly—I thought clearly having to do with a disciplinary matter.

Chairman HATCH. Okay, I think that is a good explanation that anybody should accept.

Have you ever been disciplined in any way by any bar association?

Mr. GRIFFITH. No, sir.

Chairman HATCH. As many have pointed out and as the letter from Mr. Umin pointed out, the D.C. Bar administratively suspends over 3,000 D.C. lawyers, including many sitting judges, for late payment of dues, and these are not considered disciplinary actions. Is that right?

Mr. GRIFFITH. That is my understanding.

Chairman HATCH. Now, you have been criticized by some for not being a member of the Utah Bar while assuming the position of Assistant to the President and General Counsel of Brigham Young University, the largest private university in the country.

Please tell us what efforts you made to ensure compliance with the Utah Rules of Professional Conduct and to avoid the unlawful practice of law.

Mr. GRIFFITH. Certainly, I would be glad to, Senator. I have never engaged in the unlawful practice of law. When I accepted the position to be Assistant to the President and General Counsel at Brigham Young University, it was my understanding that in Utah in-house counsel need not be licensed in Utah, provided that when legally advice is given, it is done so in close association with active members of the Utah Bar.

I was taking a position at a large institution that had a multijurisdictional presence. I knew that most of my legal work was going to be involved with Federal statutes, with Federal regulations, and so I organized my office accordingly.

When I am involved in legal matters—not all of the work that I do is legal work, but when I am involved in legal matters, I am very careful to closely associate myself with active members of the Utah Bar. I supervise an office that includes four other attorneys, each of whom is an active member of the Utah Bar.

I frequently hire outside counsel on matters, and so I am always closely associated with an active member of the Utah Bar. And I do that whenever I am anywhere close to doing legal work, and especially so on those rare instances when I have to get involved with a matter of distinctly Utah law.

But that was my understanding. That is the way I have organized my office and that is the way I have organized my work. That understanding was confirmed when I arrived in Utah and began to work at the university in conversations with other Utah lawyers, and that is still my understanding today.

I believe you made reference earlier to a letter to the Committee from five past presidents of the Utah Bar and the current executive director of the Utah Bar that say an in-house counsel in Utah need not be licensed in Utah, provided that he or she is closely associated with active members of the Utah Bar and makes no appearances in Utah courts or signs no Utah pleadings. And I haven't done either of those either.

So I have tried to be as careful as I can to—and I have been meticulous about making certain that when I am involved in legal matters, I only do so with active members of the Utah Bar.

Chairman HATCH. So you had four Utah lawyers who advised you on Utah Bar matters?

Mr. GRIFFITH. Yes.

Chairman HATCH. Utah legal matters?

Mr. GRIFFITH. Yes. I actually use—we use them for more than just Utah matters, but for any legal matter we work collaboratively.

Chairman HATCH. Yes, I am sure you use them for a variety of things.

So you are asserting here, and I think properly so, that you did not unlawfully practice law in Utah?

Mr. GRIFFITH. Absolutely not. And, Senator, let me tell you another reason why I wouldn't do that. I care too much about my clients to do anything consciously that would put them at risk, and if I thought for a moment that what I was doing for my client—and now my client is Brigham Young University—was in any way jeopardizing them, I wouldn't do it, I wouldn't do it. I have tried to be very careful about that throughout my career and I have been careful about that here.

Chairman HATCH. This position you held was also an administrative position, as well, where you particularly advised the president of the university on legal matters and other matters as well.

Mr. GRIFFITH. That is right. Not all of what I do is legal work. I am an officer of the university and there is a fair amount of nonlegal work, but there is a lot of legal work as well. I am the general counsel as well.

Chairman HATCH. And you understand the distinctions here?

Mr. GRIFFITH. Yes.

Chairman HATCH. In fact, I don't think he would be offended, but one of the former presidents of the Utah Bar is here today, Randy Dreier.

Mr. GRIFFITH. That is my understanding.

Chairman HATCH. I said hello to Randy as I came into the meeting and he has been a very strong supporter of your nomination.

Mr. GRIFFITH. As you know, Mr. Dreier was one of the five past presidents of the Utah Bar who signed the letter I referred to. I had never met Mr. Dreier before today and so I was pleased to make his acquaintance.

Chairman HATCH. Well, it is my understanding that although there is no special exemption for general counsels, the Utah Bar advised you of what you could do in order to avoid the unlawful practice of law while remaining in your current position as General Counsel to Brigham Young University.

Now, have you adhered to those recommendations?

Mr. GRIFFITH. Absolutely. They were recommendations that I had been adhering to before the letter came and that I have since. They describe precisely what I have been doing since arriving in Utah.

Chairman HATCH. I have been here during all those years when you were counsel to the Senate, the Senate Legal Counsel, and some of those years were difficult years.

Mr. GRIFFITH. They were.

Chairman HATCH. One of the most important trials in the history of the country was held during your tenure as Senate Legal Counsel, and that was, of course, the impeachment trial of President Clinton. And I happen to know that both sides felt that you acted not only honorably, but effectively and professionally in every way during that very difficult time for all of us. I don't know of very many attorneys that have had—in fact, I don't know of any attorneys other than those that were here at the time that have had that experience.

My experience with you has been that you are a person of the highest ethical, moral and legal status. So, naturally, not just because of our friendship, I would support you for any court in this land, and I personally believe that you would add a great dimension to the Circuit Court of Appeals for the District of Columbia. And I think our colleagues understand that, as well. At least I am quite sure of that and I hope that is true. They should— let's put it that way—because many of them have had the experience of knowing you.

As far as I am concerned, you are a member of this Senate family and you deserve to be confirmed. So I am going to do everything in my power to see that you are, and I believe I will have help from others as well.

Mr. GRIFFITH. Thank you.

Chairman HATCH. Frankly, those were the major questions that I think had been raised about you, and I am sure you are pleased to have had an opportunity to explain them in public—

Mr. GRIFFITH. Very pleased, at long last.

Chairman HATCH.—since I think you haven't been treated fairly, perhaps because those who wrote about these just didn't have the information that we are bringing out here today.

I would put in the record at this point a wide variety of letters from Democrats and Republicans, who are top leaders of the bar and otherwise here in the District of Columbia and elsewhere, who are strong supporters of this nominee and who believe he will be an excellent addition to the Circuit Court of Appeals for the District of Columbia.

I also want to compliment you, Mr. Crotty, and you, Mr. Seabright. You come with the best of recommendations. I think the comments of your Senators have been very, very good. Frankly, I know a lot about both of you and I think that the President deserves great commendation for all three of you. We will do everything we can to try and get you through before the end of this session. We only have a week and so we will have to do that in the best way we can, and I will see what can be done to get this done. We are appreciative that you are all here today. I believe that our colleagues should be comforted by the answers to the questions that we have asked.

With that, I don't see any reason to continue this hearing. We are going to do our very best to get all three of you through, and hopefully we can do that before the end of this session of Congress. I will do my best to do that and I hope my colleagues will honor me with the respect of being able to do that.

Mr. CROTTY. Thank you very much, Mr. Chairman.

Mr. GRIFFITH. Thank you very much, Senator.

Mr. SEABRIGHT. Thank you, Mr. Chairman.

Chairman HATCH. Well, thank you, and we thank your families for being here. We appreciate all of you sitting through this and we are sorry we had to have this interruption in between, but I will always try and accommodate my colleagues, if I can. As much as it was an interruption, I think it has turned out to be a pretty good day. Thanks so much. Great to be with you.

Mr. SEABRIGHT. Thank you.

Mr. GRIFFITH. Thank you, Mr. Chairman.

Chairman HATCH. We will recess until further notice.

[Whereupon, at 12:00 p.m., the Committee was adjourned.]

[Questions and answers and submissions for the record follow.]

QUESTIONS AND ANSWERS

RESPONSES OF THOMAS B. GRIFFITH TO THE WRITTEN QUESTIONS OF SENATOR JOSEPH R. BIDEN, JR.

(1) Title IX – the landmark law that bars sex discrimination in education, including in athletic programs – has made a huge difference in the lives of girls and young women across the country. For instance, the number of female college athletes is now nearly five times the pre-Title IX rate. At the high school level, almost three million girls are playing competitive sports today, while fewer than 300,000 girls played prior to passage of Title IX. As you well know, Title IX cases continue to come before the courts, including the D.C. Circuit, and I am concerned that your views on Title IX illustrate an inclination to weaken considerably this tremendous law should you be confirmed. I am a stalwart supporter of Title IX and understandably, seek a better understanding of your position on this matter.

As a member of the Commission on Opportunity in Athletics (the "Commission") appointed by Secretary of Education Rod Paige, you made a self-described "radical" proposal that would have eliminated one of the three ways in which schools can comply with Title IX's requirements in the athletics area. You proposed to abolish the "substantial proportionality" test, which allows schools to comply by offering athletic opportunities to male and female students that are in substantial proportion to each gender's representation in the student body of the school. This test is a way to measure whether, in sex-segregated athletic programs, schools are providing female students and male students with equal opportunities to play.

You've tried to justify your position by arguing that the proportionality test violates the language and spirit of Title IX, that it violates the Equal Protection clause of the Constitution, that it is "illegal, unfair and wrong," and even that it is "morally wrong." How do you square your positions with the fact that every source of guidance on this important law - the Department of Education in every Administration since Nixon's (including the present one) and every Circuit Court to have examined the issue - says that that substantial proportionality is an acceptable way to demonstrate Title IX compliance and comports with the statute? Describe, if you will, how and why the proportionality test is illegal in your opinion.

RESPONSE: As a member of the Title IX Commission, I was acting as a policy adviser to the Secretary of Education. In that capacity, I came to the belief that substantial proportionality should not be used to pursue the worthy objective of expanding opportunities for women in intercollegiate athletics because of the inherent risk that it will be misused by some as a quota system. The Commission heard testimony that some had misused the concept of substantial proportionality and turned it, in some instances, into a quota system. I do not believe, however, that the use of substantial proportionality inevitably leads to the use of gender quotas.

While serving on the Commission, I argued that gender quotas should not be used in intercollegiate athletics for at least three reasons. First, the express language of Title IX forbids the use of gender quotas. Second, quotas are unfair. Third, using quotas creates a resentment that has served to undermine some popular support for Title IX. The language

of Title IX forbids discrimination and granting preferential treatment based on gender to correct imbalances. The language of the regulations speaks in terms of "[w]hether the selection of sports and level of competition effectively accommodate the interests and abilities of members of both sexes." 34 C.F.R. ' 106.41 (c)(1) (1998).

If confirmed as a federal appeals court judge, I would be required to look at the issue anew in keeping with my duty to apply the law impartially regardless of my personal policy preferences, in accordance with the precedents of the Supreme Court and the D. C. Circuit, in light of the facts of the particular dispute to be adjudicated, and with the benefit of the careful arguments of counsel. I have demonstrated throughout my career, and especially as Senate Legal Counsel, that I take an oath seriously. I would not allow my personal preferences to influence my duty as a judge. In my view, a judge is bound by oath to follow the law as set forth in statute, regulation, and binding precedent, regardless of his or her personal preferences. Furthermore, should the code of judicial conduct or any other rules on the recusal of judges require me to recuse myself in any matter, I would do so.

(2) In the course of discussing your views on Title IX's proportionality test, you stated that you are "unalterably opposed" to the use of "numeric formulas" to evaluate Title IX's compliance. I'm concerned that your opposition to so-called "numeric measures" in the Title IX athletics context suggests that you object to other core civil rights principles that involve numeric measurements of discrimination. Numeric measurements are frequently used to determine whether discrimination is occurring and to gauge progress in remedying discrimination. Disallowing the use of numeric measures would severely undermine our ability to eradicate ongoing discrimination.

Disparate impact cases under Title VII are an obvious example where statistical measures are used to determine whether facially neutral employment practices have a disproportionate, adverse impact on women or racial or ethnic minorities. Do you believe that disparate impact cases under Title VII are illegitimate because they rely on "numeric measures"? If you view disparate impact cases as legitimate under Title VII, how do you reconcile that view with your opposition to the proportionality test under Title IX?

RESPONSE: No. My limited criticism of the way some have misused substantial proportionality is not a criticism of the use of statistical evidence in civil rights disputes. As the Supreme Court has recognized in *Hazelwood School District v. United States* and *Griggs v. Duke Power*, statistical evidence can be effectively used to reveal illegal discriminatory conduct. If confirmed a federal appeals court judge, I would follow Supreme Court precedent regarding the use of statistical evidence.

(3) When you were on the Title IX Commission, you stated that the use of "numeric formulas" in the Title IX context violates the Equal Protection clause of the Constitution. However, all of the federal courts that have considered the issue have rejected challenges to the legality of the proportionality test. Indeed, nine federal Courts of Appeal have now deferred to and applied Title IX's athletics policies, and none have invalidated them. However, you dismissed the importance of these court decisions, saying that the courts "got it wrong" and that

you "don't believe in the infallibility of the judiciary." You were not just expressing your own policy preferences, but saying that in your opinion, as a legal matter these courts were wrong. Given your willingness in this instance to dismiss the conclusions of every Court of Appeal to consider the legality of the proportionality test, what assurances can you offer that, as a federal judge, you would appropriately respect and defer to the decisions of other federal courts?

RESPONSE: I appreciate this opportunity to further clarify my criticism of the courts of appeal opinions on substantial proportionality. In the Commission's discussions regarding the use and misuse of substantial proportionality, there were some who argued that the fact that a number of federal appeals courts had rejected challenges to substantial proportionality limited the ability of the Commission to make recommended changes. In response, I pointed out that the fact that the courts found the use of substantial proportionality permissible using *Chevron* deference did not mean that substantial proportionality was a required measure of compliance under the statute, and that the Commission was free to recommend other means to expand opportunities for women. I was trying to make the point that even if substantial proportionality is a permissible means, it is not a required means.

If confirmed as a judge on the D.C. Circuit, I would be bound by all applicable Supreme Court decisions. If there were no applicable Supreme Court precedent I would look to relevant opinions by other circuits. It would be my duty to apply the law impartially regardless of my personal policy preferences, in accordance with the precedents of the Supreme Court and the D. C. Circuit, in light of the facts of the particular dispute to be adjudicated, and with the benefit of the careful arguments of counsel. I have demonstrated throughout my career, and especially as Senate Legal Counsel, that I take an oath seriously. I would not allow my personal preferences to influence my duty as a judge. In my view, a judge is bound by oath to follow the law as set forth in statute, regulation, and binding precedent, regardless of his or her personal preferences.

(4) In addition to the Title IX policies and the substantial proportionality test, are there any other areas of current law in which the courts "got it wrong"? Can you give us three examples of current legal standards that you think are based on cases that were wrongly decided?

RESPONSE: As a nominee to the U.S. Court of Appeals for the D.C. Circuit it would be inappropriate for me to criticize any current legal standard as it would suggest that I had prejudged an issue.

(5) When you were on the Commission and after your work on the Commission had concluded, you criticized the procedure that the Department of Education used in adopting its current Title IX policies because the Department did not follow the formal notice-and-comment rulemaking procedure. Specifically, on January 29, 2003, you stated, "A good portion of the way Title IX is interpreted, enforced today, comes as a result of decisions that were made apart from the law-making, rule-making process. And that shouldn't stand." You continued: "It shouldn't be decisions that are made by career people or even political people at the Department of Education. Ought to be done through the rule-making process, or by Congress. You've got two

options here in our system. Congress can pass a statute telling us what the law is, or Congress can pass a statute telling us what the law is and then delegate to the Department of Education the authority to promulgate regulations consistent with that law." Is it your position that the Department of Education's Title IX athletics guidelines (its 1979 Policy Interpretation and subsequent reaffirmation of it) are invalid or not entitled to deference by the courts because they did not go through notice-and-comment rulemaking? What degree of deference do you think guidelines like these deserve?

RESPONSE: I have never stated that the guidelines are invalid or not entitled to deference, nor would it be appropriate for me to offer an opinion on a matter that might conceivably come before me if confirmed as a federal judge. The judicial deference the DOE guidelines are due is set forth by the Supreme Court in *Christensen v. Harris County*, which I would be bound to follow as a federal appeals court judge.

RESPONSES OF THOMAS B. GRIFFITH
TO THE WRITTEN QUESTIONS OF SENATOR RICHARD J. DURBIN

1. In 2003, the Utah Supreme Court Advisory Committee on the Rules of Professional Conduct issued a document entitled "Report on the Definition of 'The Practice of Law'" and wrote that the practice of law includes: "giving advice or counsel to another person as to that person's legal rights or responsibilities with respect to that person's facts and circumstances; selecting, drafting, or completing legal documents that affect the legal rights or responsibilities of another person; representing another person before an adjudicative, legislative, or executive body, including the preparation or filing of documents and conducting discovery; negotiating legal rights or responsibilities on behalf of another person."

In your letter to Chairman Hatch dated November 12, 2004, you wrote that "I have been careful not to provide legal advice except in close association with a current member of the Utah State Bar." However, as indicated above, Utah's definition of "the practice of law" includes much more than the provision of legal advice.

Have you ever engaged in any of the following activities without closely associating with current members of the Utah State Bar: (A) selecting, drafting, or completing legal documents that affect the legal rights or responsibilities of BYU, (B) representing BYU before an adjudicative, legislative, or executive body, including the preparation or filing of documents and conducting discovery, or (C) negotiating legal rights or responsibilities on behalf of BYU?

If your answer is no to A, B, or C, please provide examples of the ways in which you closely associated with current members of the Utah State Bar in performing each of these activities. If your answer is yes to A, B, or C, please provide examples and indicate why you did not closely associate with current members of the Utah State Bar in conducting these activities.

RESPONSE: No. I have practiced law in Utah since beginning my responsibilities as Assistant to the President and General Counsel at Brigham Young University in August 2000. I have engaged in some of the activities you mention in your question. I have not, however, appeared in court or signed any pleadings. There are four other attorneys in the Office of the General Counsel at Brigham Young University. Each is an active member of the Utah Bar. I have been careful since my arrival at the University to work closely with at least one of them or outside counsel who is a member of the Utah Bar on all legal matters in which I have been involved. It has been my practice since arriving at the University that I do not give any legal advice without consulting with another lawyer in the office. There are at least two reasons for this practice. First, it is a good means to insure that the University is getting the best legal advice possible. It is a practice I have followed throughout my legal career. That practice was especially important in my first years at the University when I was becoming acquainted with the law of higher education. Second, I followed this practice to comply with my understanding of the view of the Utah Bar regarding the role of in-house counsel. Early on in my service at the University, I also instituted regular meetings of the attorneys in the Office of the General Counsel where, in addition to the daily informal discussions we have on a variety of matters, we could discuss the legal

matters on which we were working. As a general matter, I copy the attorney or attorneys with whom I am working on a legal matter on any emails or other correspondence involving that matter. Whenever I attend a meeting at which legal matters are discussed, if I am not accompanied by a lawyer from my office, I will make it a point to discuss the meeting with a lawyer from my office following the meeting.

2. In an April 10, 2003 letter to the president of the Utah State Bar, you wrote: "I was told by my predecessor that the Utah Bar had created what he referred to as a 'general counsel exception' and that I didn't need to become a member of the Utah Bar to perform my responsibilities." By letter dated May 14, 2003, Katherine Fox, general counsel of the Utah State Bar, wrote that "I was somewhat surprised that you were informed by your predecessor at Brigham Young University's Office of General Counsel and perhaps others that Utah had created a 'general counsel rule exception' because "Utah does not have and has never had such a rule."

A. How, if at all, did you change the way you performed your job as BYU general counsel after the Utah State Bar informed you in May 2003 that your understanding of the State of Utah's general counsel exception was incorrect?

RESPONSE: I have not changed the manner in which I provide legal advice at BYU because Ms. Fox's letter, as well as subsequent letters to the Committee from current and former officials of the Utah Bar, confirmed that I could appropriately provide legal advice provided that I did so in close association with a lawyer who is a member of the Utah Bar, which was my practice.

B. Had you been aware from the start that Utah did not have a general counsel exception, which aspects of your BYU general counsel job would you have performed differently between August 2000 and May 2003?

RESPONSE: As noted in response to 2.A., current and former officials of the Utah Bar have affirmed in letters to the Committee that the manner in which I organized my office and provided legal advice at the University is appropriate.

C. Did any representative of the Utah State Bar ever indicate to you, in writing or by oral communication, that they believed you had been practicing unlawfully in Utah? If so, what specifically did they tell you, and how, if at all, did you change the way you performed your job as BYU general counsel?

RESPONSE: No. I did not change the way I performed my responsibilities at the University because I had been carrying out my legal work in direct association with Utah lawyers since I arrived in August 2000.

3. If you are confirmed to the D.C. Circuit, and the Utah State Bar subsequently determined through investigation that you had, in fact, engaged in the unauthorized practice of law while serving as BYU general counsel, would you resign from the bench?

RESPONSE: Given the consistent advice the Utah Bar has provided on this issue, I have not engaged in the unauthorized practice of law. The Utah Bar is aware of my circumstances and, to my knowledge, has taken no action.

4. Has there ever been a general counsel at BYU who has not been a member of the Utah State Bar? Has there ever been a general counsel at any university in Utah who has not been a member of the Utah State Bar? If the answer to either question is yes, please provide the names and dates of service of any such individuals.

RESPONSE: I do not know the answer to any of these questions.

5. In applying to take the Utah bar exam in 2003, you checked the "no" box in response to question #52: "Have you ever been disbarred, suspended, censured, sanctioned, disciplined or otherwise reprimanded or disqualified, whether publicly or privately, as an attorney?" Given the fact that you were administratively suspended from the D.C. Bar for three years when failing to pay your bar dues, your answer to this question seems erroneous. Do you believe you made a mistake in checking the "no" box? If you were filling out the Utah bar exam application today, would you check the "no" box or the "yes" box to this question?

RESPONSE: At the time I answered the question, I had no thought that the form was asking a question that would cover the lapse of my membership for an inadvertent failure to pay my bar dues. Rather, I read the question as calling for disciplinary measures, not administrative ones. Given the concern that has been expressed about my answer and out of an abundance of caution, were I to fill out the same application today, I would explain the lapse in my membership just as I did in response to Question 11 on my Senate Judiciary Committee Questionnaire where I was asked whether my bar membership had ever lapsed.

6. You have strongly held beliefs about Title IX of the Education Amendments of 1972. You believe not only that the U.S. Department of Education's policy interpretation of Title IX is wrong, but also that eight different federal circuits were wrong when they ruled that the Education Department policy interpretation is reasonable and lawful. You have stated "I think the courts got it wrong" and that "I for one don't believe in the infallibility of the judiciary." You have named two cases – the *Dred Scott* case and *Plessy v. Ferguson* – as examples of this. Do you believe that the eight appellate court decisions that have upheld the Title IX policy interpretation are akin to *Dred Scott* case and *Plessy v. Ferguson* and should be overturned? Please explain.

RESPONSE: As a member of the Commission, based on testimony that the substantial proportionality standard was sometimes interpreted in a way that resulted in the use of quotas, I believed that such use was contrary to Title IX. As a judge, I would put that prior view out of my mind, and would look at the issue anew in keeping with my duty to apply the law impartially, in accordance with the precedents of the Supreme Court and the D. C. Circuit, in light of the facts of the particular dispute to be adjudicated, and with the benefit

of the careful arguments of counsel. If my prior statements on this issue were to require my recusal from a case under rules governing recusal, I would recuse myself accordingly.

7. In your Senate questionnaire, you wrote: "I anticipate that my involvement as a member of the Secretary of Education's Commission on Opportunity in Athletics would limit my involvement for an appropriate period in matters that brought into issue the development of the enforcement mechanisms used by the Department of Education to determine whether compliance with Title IX has been achieved."

A. In your view, how long is "an appropriate period"?

B. Will you agree now to recuse yourself in all cases involving Title IX compliance that might come before you?

RESPONSE: If confirmed, I would fully comply with all applicable rules that govern recusal of a federal judge, including the Canons of Judicial Conduct.

8. You are a member of the Federalist Society. How long have you been a member of this organization? Have you paid your Federalist Society membership dues every year? Have you ever let your Federalist Society membership lapse, or have you paid your membership dues each and every year you have belonged to this organization?

RESPONSE: According to the records of the Federalist Society, I joined the organization on April 29, 1998, but have not paid dues since 1999.

9. The Federalist Society's mission statement asserts: "Law schools and the legal profession are currently strongly dominated by a form of orthodox liberal ideology which advocates a centralized and uniform society." Do you agree with this statement? Please explain.

RESPONSE: I have no real familiarity with the culture of American law schools or the legal profession in general. I have some familiarity with the culture of my alma mater, the University of Virginia School of Law, during the years I was a student, and with the culture of the J. Reuben Clark Law School at Brigham Young University during the years I have been at administrator at BYU. The quoted statement does not describe my experience at either of those law schools.

10. You served as Vice Chair of the Federalist Society's Federalism and Separation of Powers Practice Group from 1996-2002 and have served as a Senior Advisor to this practice group since 2002. Please describe the nature of your duties and responsibilities as Vice Chair and Senior Advisor of this practice group.

RESPONSE: I have participated in periodic conference calls of the leadership of the practice group during which upcoming activities are discussed. Typically, those calls take place on a monthly basis throughout the year.

11. The Federalist Society website maintains a list of individuals it considers "legal experts" on various subject matters. You are listed as a Federalist Society legal expert on federalism, the separation of powers, congressional powers, religious freedom, and education law.

A. As an expert on federalism and the separation of powers, do you agree with the U.S. Supreme Court's federalism case law of the past decade? Please indicate which decisions, if any, you disagree with, and provide an explanation.

RESPONSE: The Supreme Court's federalism case law is binding precedent for lower court judges, which I would be bound to follow if confirmed. It would be inappropriate for me, as a candidate for appointment to a circuit court of appeals, to express views on binding Supreme Court precedents.

B. As an expert on education law, do you agree with the U.S. Supreme Court's decisions in *Gratz v. Bollinger* and *Grutter v. Bollinger*? If the answer is yes, please explain why. If the answer is something other than yes, please indicate which concurrences or dissents best reflect your own views about these cases?

RESPONSE: As an appeals court judge, I would faithfully apply the Supreme Court's decisions in *Gratz v. Bollinger* and *Grutter v. Bollinger*. Again, it would be inappropriate for me to express a view on the decisions in these case.

12. In your Senate questionnaire, you wrote: "It is inappropriate for a judge to act as if he were a member of the Legislative or Executive branches." Please name three cases over the past fifty years in which you believe a majority of Justices on the U.S. Supreme Court acted as if they were members of the Legislative or Executive branches, and provide explanations.

RESPONSE: My statement was intended to describe the role of the judge, and not to imply criticism of any particular Supreme Court decision. As a nominee to the court of appeals, it would not be appropriate for me to criticize any binding Supreme Court precedent. If confirmed, I would apply all relevant Supreme Court precedent.

RESPONSES OF THOMAS B. GRIFFITH
TO THE WRITTEN QUESTIONS OF SENATOR RUSSELL D. FEINGOLD

1. Have you practiced law in the State of Utah? If yes, please list the years you practiced law and describe the nature of your work for each year that you consider yourself to have been practicing law.

RESPONSE: Yes. I have practiced law in Utah since beginning my responsibilities as Assistant to the President and General Counsel at Brigham Young University in August 2000. In that capacity, I serve as a senior administrator at the University and a member of the President's Council. The President's Council makes policy for the University consistent with the directives and subject to the authority of the Board of Trustees. When University policy involves legal matters, I advise the President's Council and its members on the legal issues implicated. I have also been active as an ambassador for the University in its relations with other colleges and universities especially with regard to common concerns with respect to federal law. In addition, I supervise the work of the Office of the General Counsel, which includes interpreting University policy, participating in transactions involving the University and outside entities, overseeing litigation, assuring compliance with law, and coordinating activities with other University offices whose work involves legal issues such as human resources, risk management, and internal audit.

2. You wrote in a letter dated April 10, 2003 to John Adams, President of the Utah Bar Association, that you were told by your predecessor that there was a General Counsel exception that exempted you from the requirement of being admitted to the Utah bar and allowed you to "perform my responsibilities"? You also wrote: "Subsequent conversations with people in your office as well as discussions with other general counsel around the state confirmed that understanding."

i. Who at the Utah Bar Association did you speak to about this matter prior to 2003?

RESPONSE: I do not recall any such conversations. It was my understanding at the time that my predecessor, Eugene Bramhall, had asked officials at the Utah Bar whether I needed to take the examination to become a member of the Utah Bar or whether I could join through some other means. He was told that I could only join the Bar by taking the examination. It was my understanding, however, that I did not need to become a member of the Utah Bar to perform my responsibilities at the University because it was the practice in Utah and elsewhere that in-house counsel need not be licensed in Utah so long as when performing legal services for their employer they did so in conjunction with members of the local bar.

ii. Were you ever told by anyone that as long as you merely consulted with an admitted attorney you were free to dispense legal advice without a licensed Utah attorney present? If yes, who gave you this advice?

RESPONSE: When I accepted the position as Assistant to the President and General Counsel at the University, it was my understanding that as in-house counsel I could give

legal advice despite not being a member of the local bar, provided that in giving legal advice I associated myself closely with a Utah-licensed lawyer. That understanding was formed over the course of the years of practicing law and as I had interacted with in-house counsel in a variety of settings, including other Utah in-house counsel who were not members of the Utah Bar.

As best as I can now recall, I had discussions about Utah Bar issues in the summer and fall of 2000 with Eugene Bramhall, my predecessor, Hal Visick, Mr. Bramhall's predecessor, and Boyd Black, an associate general counsel of the Church of Jesus Christ of Latter-day Saints (LDS Church). I may have also had discussions during that time period with other attorneys that I cannot now recall. In none of those conversations do I remember hearing or learning anything that contradicted my understanding that I could practice as in-house counsel without being a member of the Utah Bar provided that I closely associated with a Utah-licensed lawyer.

iii. Was Eugene Bramhall your predecessor?

RESPONSE: Yes

iv. When did you have the conversation with Mr. Bramhall referenced in your April 10, 2003 letter? Was the conversation by telephone, in-person or by e-mail? Do you have any records, notes or other recordings relating to this communication? Was anyone else present for this conversation?

RESPONSE: As I noted in response to Question ii. above, I recall that I had discussions with Mr. Bramhall in the summer and fall of 2000.

3. You received a letter dated May 14, 2003 from Katherine Fox, General Counsel to the Utah State Bar. In the letter, she explicitly told you that Utah does not have and never had a "general counsel" exception. She suggested steps you could take to act as General Counsel without having a license to practice law in Utah, until you took the Utah bar exam. The letter stated, in part, "Towards that end, it would be a prudent course of action to limit your work to those activities which would not constitute the practice of law. If such activities are unavoidable, I strongly urge you to closely associate with someone who is actually licensed here and on active status."

As you are aware, practicing law without being admitted to a state's bar is a possible ethical violation that could result in your disbarment or other penalty. What steps did you take to document your work in a manner that would allow you to explain to the Utah Bar or the Bar of any other state where you are admitted that your "arrangements" did not constitute practicing law without a license?

RESPONSE: I have taken no steps to document that my work has been done in close association with attorneys in my office or outside counsel who are active members of the Utah Bar. I have always done so, and attorneys in my office would attest to that practice.

4. You stated the following in a November 12, 2004 letter to Senator Hatch: "Accordingly, since assuming my responsibilities at the University, I have always been careful to organize my activities so that when I provide legal advice to the University I do so only in close association with at least one of the four attorneys in my office who are active members of the Utah Bar or with an outside counsel who is an active member of the Utah Bar."

i. Please identify the names and contact information for all of the attorneys you have worked with who are or have been employed in your office at BYU.

RESPONSE:

Hal Visick, 1754 North 1550 East, Provo, Utah 84604, 801 375-7594;
Michael R. Orme, A-357 ASB, BYU, Provo, Utah 84602, 801-422-3080;
David B. Thomas, A-350 ASB, BYU, Provo, Utah 84602, 801 422-04722;
Erik Davis, A-350 ASB, BYU, Provo, Utah 84602, 801 422-5941;
Paul Angerhofer, B-350 ASB, BYU, Provo, Utah 84602, 801-422-6727.

ii. Please identify the names and contact information for all of the outside counsel you have worked with during your tenure at BYU.

RESPONSE:

James Jardine, Ray Quinney & Nebeker, 36 South State, Salt Lake City, Utah 84145-385, 801-532-1500;
Bruce Olson, Ray Quinney & Nebeker, 36 South State, Salt Lake City, Utah 84145-0385, 801-532-1500;
Steven Call, Ray Quinney & Nebeker, 36 South State, Salt Lake City, Utah 84145-0385, 801-532-1500;
Janet Hugie Smith, Ray Quinney & Nebeker, 36 South State, Salt Lake City, Utah 84145-0385, 801-532-1500;
Rick Thaler, Ray Quinney & Nebeker, 36 South State, Salt Lake City, Utah 84145-0385, 801-532-1500;
Robert S. Clark, Parr Waddoups Brown Gee & Loveless, 185 South State Street, #1300, Salt Lake City, Utah 84111, 801-532-7840;
Juanita Brooks, Fish and Richardson, Juanita Brooks, Fish & Richardson, 12390 El Camino Real, San Diego, CA 92122, 858-678-4377;
Robert Cooper, Gibson, Dunn & Crutcher, 333 South Grand Avenue, Los Angeles, CA 90071-3197, 213-229-7179;
Wayne Barsky, Gibson, Dunn & Crutcher, 333 South Grand Avenue, Los Angeles, CA 90071-3197, 213-229-7000;
Boyd Black, Office of the General Counsel, The Church of Jesus Christ of Latter-day Saints, 50 East North Temple Street, Salt Lake City, Utah 84150, 801-240-6235;
Lance Wickman, General Counsel, The Church of Jesus Christ of Latter-day Saints, 50 East North Temple Street, Salt Lake City, Utah 84150, 801-240-5910;
Robert P. Hill, Ray Quinney & Nebeker, 36 South State, Salt Lake City, Utah

of the careful arguments of counsel. If my prior statements on this issue were to require my recusal from a case under rules governing recusal, I would recuse myself accordingly.

7. In your Senate questionnaire, you wrote: "I anticipate that my involvement as a member of the Secretary of Education's Commission on Opportunity in Athletics would limit my involvement for an appropriate period in matters that brought into issue the development of the enforcement mechanisms used by the Department of Education to determine whether compliance with Title IX has been achieved."

A. In your view, how long is "an appropriate period"?

B. Will you agree now to recuse yourself in all cases involving Title IX compliance that might come before you?

RESPONSE: If confirmed, I would fully comply with all applicable rules that govern recusal of a federal judge, including the Canons of Judicial Conduct.

8. You are a member of the Federalist Society. How long have you been a member of this organization? Have you paid your Federalist Society membership dues every year? Have you ever let your Federalist Society membership lapse, or have you paid your membership dues each and every year you have belonged to this organization?

RESPONSE: According to the records of the Federalist Society, I joined the organization on April 29, 1998, but have not paid dues since 1999.

9. The Federalist Society's mission statement asserts: "Law schools and the legal profession are currently strongly dominated by a form of orthodox liberal ideology which advocates a centralized and uniform society." Do you agree with this statement? Please explain.

RESPONSE: I have no real familiarity with the culture of American law schools or the legal profession in general. I have some familiarity with the culture of my alma mater, the University of Virginia School of Law, during the years I was a student, and with the culture of the J. Reuben Clark Law School at Brigham Young University during the years I have been at administrator at BYU. The quoted statement does not describe my experience at either of those law schools.

10. You served as Vice Chair of the Federalist Society's Federalism and Separation of Powers Practice Group from 1996-2002 and have served as a Senior Advisor to this practice group since 2002. Please describe the nature of your duties and responsibilities as Vice Chair and Senior Advisor of this practice group.

RESPONSE: I have participated in periodic conference calls of the leadership of the practice group during which upcoming activities are discussed. Typically, those calls take place on a monthly basis throughout the year.

RESPONSE: Both Presidents of the University under whom I have served know that I am not a member of the Utah Bar. The University was aware at the time I interviewed for the position that I was not a member of the Utah Bar and did not require that I become a member. The lawyers in the Office of the General Counsel as well as the President of the University and the senior administrators with whom I work most often can each attest that the legal work I have done for the University has been in collaboration with Utah lawyers. Likewise, any of the attorneys retained as outside counsel on a matter can attest that the legal work I have done for the University has been in collaboration with Utah attorneys.

vi. Please provide any contracts, documents, memos, briefs, or other documents that you signed in which a legal opinion, legal advice, legal analysis or a legal recommendation was provided.

RESPONSE: Any such documents would be in the control of the University and many would be privileged. Any such documents would have been the result of a collaborative effort with other lawyers in the Office of the General Counsel who are active members of the Utah Bar.

vii. Please provide all emails, letters, notes or other correspondence that demonstrate that you organized your activities so that when you provided legal advice to the University you did so only in close association with at least one of the four attorneys in your office who were active members of the Utah Bar or with an outside counsel who was an active member of the Utah Bar. I am particularly interested in, and specifically request, all such materials dated prior to 2003.

RESPONSE: Again, any such documents would be in the control of the University and many would be privileged. Any such documents would have been the result of a collaborative effort with other lawyers in the Office of the General Counsel who are active members of the Utah Bar.

viii. Did you have the attorneys in your office appear with you in person or participate in every phone call in which legal advice was dispensed? If not, state on how many occasions you were not accompanied by a member of the Utah Bar.

RESPONSE: No. Although I frequently have other Utah lawyers present in meetings and telephone conversations where legal matters are discussed, it has never been my understanding that their physical presence was required. I have no way of knowing nor do I recall how many times I have discussed a legal matter with a member of the University community and not had a Utah lawyer present. Without exception, however, whatever advice I have given has been the result of collaboration on that matter with a Utah lawyer.

ix. Please provide three specific examples of how you organized activities in your office prior to 2003 in order to not give legal advice except in conjunction with a Utah-licensed attorney.

RESPONSE: It has been my practice since arriving at the University that I do not give any legal advice without consulting with another lawyer in the office or outside counsel licensed in Utah. Accordingly, on any legal matter on which I work, I consult with an attorney in my office or outside counsel regarding the legal advice, I copy that attorney on all correspondence and e-mails regarding the matter, and if that attorney is not present at a meeting regarding the matter, I discuss the meeting with the attorney afterwards.

x. Did your activities in your office change at all after you were specifically given guidance on this issue by the Utah Bar in 2003? How?

RESPONSE: No, because my activities were already being conducted in accordance with the guidance of the Utah Bar.

5. In your June 17, 2004 letter to Senator Hatch, a letter that was written after a Judiciary Committee investigation into your bar membership began, you wrote: "Since I began my service at the University in August 2000, I have been careful to organize my work so that on those occasions when I provide legal advice I do so only in conjunction with the attorneys in my office who are active members of the Utah Bar." Why did you not mention the "General Counsel exception" that you cited in your earlier correspondence and conversations with the Utah Bar?

RESPONSE: At the time that I wrote to John Adams in April 2003, the phrase with which I was familiar that described the ability of an in-house counsel to provide legal services to his or her employer without being a member of the local bar, provided he or she did so in association with a Utah-licensed lawyer, was "the general counsel exception." To my knowledge, it was not a term of art or an express provision of any rules; rather, it described an interpretation of the Bar. My letter described the arrangement without using the particular phrase that I associated with it.

6. Section 78-9-01 of the Utah Code, entitled Practicing Law without a License Prohibited, clearly states that a person may not "practice law or assume to act or hold himself out to the public as a person qualified to practice law within this state if he is not admitted and licensed to practice law within this state."

i. Have you received any formal notice from the Board of Commissioners of the Utah State Bar that you will not be reprimanded or punished for your practice of law in the state of Utah without a license?

RESPONSE: No. Nor am I aware of any action initiated by the Utah State Bar with respect to me that could result in such a notice. I have acted in a manner deemed permissible by the Utah State Bar, as confirmed in Katherine Fox's letter to me of May 14, 2003 and several letters to the Committee from current and former officials of the Utah State Bar.

ii. Have you received any formal notification from the Board of Commissioners for D.C. or North Carolina, where you are currently admitted, that you will not be reprimanded for the unlawful practice of law in Utah?

RESPONSE: No. Nor am I aware of any action initiated by the D.C. or North Carolina Bars with respect to me that could result in such a notice. I have always acted consistent with the practice of the Utah State Bar and therefore have not engaged in the unlawful practice of law.

iii. Do you agree that there is no exception in this statute that allows an attorney who is not "admitted and licensed to practice law" in Utah to practice law in Utah as long as he or she is directly, closely, or otherwise associated with an active member of the Utah Bar? If you do not agree, please explain fully why not.

RESPONSE: There is no exception stated in the language of the statute.

iv. Do you agree that the Utah State Bar, acting on its own, has no authority to amend this statute or to create an exception to it that does not exist? If not, please explain.

RESPONSE: I am not aware of the authority of the Utah State Bar with respect to creating any exception. It is, however, my understanding that the Utah Bar interprets the rules governing the practice of law in Utah. The Utah State Bar has consistently advised that general counsel not licensed in Utah who must give legal advice should "directly associate with lawyers who are licensed in the state and on active status".

7. In your correspondence and in your appearance before the Judiciary Committee you have used a series of terms to describe your work as General Counsel. For the following words, could you please explain what you understand each word to mean, the basis for your interpretation and how if affected your ability to perform your responsibilities as general counsel?

i. "close association"

ii. "organize activities"

iii. "provide legal advice"

RESPONSE: I have organized my activities and worked in close association with Utah-licensed attorneys by taking the following steps. I instituted regular meetings of the attorneys in the Office of the General Counsel where, in addition to the daily informal discussions we have on a variety of matters, we could discuss the legal matters on which we were working. As a general matter, I copy the attorney or attorneys with whom I am working on a legal matter on any emails or other correspondence involving that matter. Whenever I attend a meeting at which legal matters are discussed, if I am not accompanied by a lawyer from my office, I will make it a point to discuss the meeting with a lawyer from my office following the meeting. I have used the term legal advice generally to mean any opinions I give on matters of law in my role as an attorney at the University. None of this

has adversely affected my ability to perform my responsibilities at the University. To the contrary, the regular involvement of other attorneys in the performance of legal matters is a best practice to which I have adhered throughout my legal career.

8. You testified at your hearing on November 16, 2004 that in 2000 when you accepted the position of General Counsel of Brigham Young University, it was your understanding at that time that in-house counsel in Utah did not have to be a member of the Utah Bar provided that when counsel gave legal advice, he or she did it in conjunction with a member of the Utah Bar. In written letters from the Utah Bar, you were informed of this in 2003. There is no indication in any of the written materials we have received however, that you were informed of this before 2003. Indeed, in your letter to John Adams on April 10, 2003, you stated that you were told by your predecessor that the Utah Bar had created a General Counsel exception, but you made no mention of your understanding that you needed to offer legal advice only in conjunction with a member of the Utah Bar.

Please state specifically how you came to understand in 2000 what you needed to do to fulfill your responsibilities as General Counsel without running afoul of the requirements of the Utah Bar. Include in your answer the specific Utah statutes and Utah Bar rules you consulted at the time, as well as the identity of any persons with whom you spoke about this and specifically what they told you, including all persons employed by the Utah Bar?

RESPONSE: I appreciate the opportunity to clarify the purpose of my April 10, 2003 letter to Mr. Adams. It was not intended to be a full exposition of my understanding of how I should conduct my affairs as in house counsel in Utah. To the contrary, it was an inquiry whether there was something I might have overlooked or of which I had not been aware in my determination that the only way for me to become a member of the Utah Bar was to successfully complete the Bar examination. At no time was I of the view that I needed to become a member of the Utah Bar to carry out my responsibilities at the University. My letter to Mr. Adams is consistent with that understanding.

When I accepted the position as Assistant to the President and General Counsel at the University, it was my understanding that as in-house counsel I did not need to be a member of the local bar. Although I do not recall specific conversations, research, or reading material that helped me come to this understanding, it was formed over the course of the years of practicing law and as I had interacted with in-house counsel in a variety of settings, including other Utah in-house counsel who were not members of the Utah Bar.

As best as I can recall, I had discussions about Utah Bar issues in the summer and fall of 2000 with Eugene Bramhall, my predecessor, Hal Visick, Mr. Bramhall's predecessor, and Boyd Black, an associate general counsel of the Church of Jesus Christ of Latter-day Saints (LDS Church). I may have also had discussions during that time period with other attorneys that I cannot now recall. In none of those conversations do I remember hearing or learning anything that contradicted my understanding that I could practice as in-house counsel without being a member of the Utah Bar provided that I closely associated with a Utah-licensed lawyer.

Although I have no specific recollection of doing so, I am confident that I looked at the rules governing admission to the Utah Bar. I recall a telephone conversation with the then-President of the Utah Bar, John Adams, sometime in spring of 2002, to which I refer in my April 10, 2003 letter to him. In that conversation, Mr. Adams and I discussed the possibility of my taking advantage of the reciprocity rule that was then being considered by the Utah Supreme Court. During our discussion I indicated that I would likely discontinue my plans to take the Bar examination that summer and see if I could take advantage of the reciprocity rule once promulgated. Mr. Adams knew that I was Assistant to the President and General Counsel at the University and that I was not a member of the Utah Bar, but he did not say anything to me during that conversation that led me to question in any fashion my understanding that I did not need to be a member of the Utah Bar to carry out my responsibilities at the University. Although there was not a question in my mind during that conversation whether I needed to be a member of the Utah Bar to carry out my responsibilities at the University, that conversation, in hindsight, further confirmed my understanding.

9. You testified that it is also your current understanding that as General Counsel of BYU you do not have to be a member of the Utah Bar so long as, whenever you are involved in legal matters, you do so in "close association" with a member of the Utah Bar. With respect to this understanding as to which you testified:

i. Please identify each and every Utah statute and Utah Bar rule that supports your understanding;

RESPONSE: As explained in response to Question 8, my understanding was based on my prior experience with general counsels, and my conversations with attorneys in Utah, including indirectly through my conversation with Mr. Adams, the Executive Director of the Utah Bar, referenced above, and the letter from Ms. Fox. My understanding was subsequently confirmed by current and former officials of the Utah State Bar through letters to the Senate Judiciary Committee.

ii. Please state whether it is your understanding that you may continue in this status indefinitely, that is, whether you may indefinitely or permanently continue to practice law in Utah as the General Counsel of BYU without becoming a member of the Utah Bar so long as you practice law in conjunction with a member of the Utah Bar. If so, please state specifically how and when you arrived at such an understanding, and identify all Utah statutes and Utah Bar rules that support this conclusion?

RESPONSE: Yes, based on the practice of the Utah Bar, and as set forth in my answers to Questions 8 and 9.i. above. I have always intended to become a member of the Utah Bar, and have never planned to continue indefinitely as Assistant to the President and General Counsel of the University without joining.

10. As far as I am aware, no Utah statute or rule of the Utah Bar contains an explicit exception for attorneys who are working as in-house or general counsel to a Utah corporation, university,

or other entity from the requirement that the attorney be licensed in Utah in order to practice law in Utah. Please identify each and every Utah statute, case, and rule of the Utah Bar that suggests such an exception.

RESPONSE: I am aware of no statute, case, or rule containing an explicit exception. I am only aware of the interpretation of the Utah Bar as set forth in my answers to Questions 8 and 9 above.

11. At your hearing, you testified that when you became General Counsel of BYU you believed you did not need to be licensed in Utah so long as, when you gave legal advice, it was in conjunction with a member of the Utah Bar. You added that you expected that most of your legal work at BYU would deal with federal law. Is it your contention that Utah law exempts an attorney not employed by the federal government who practices law in Utah from the requirement of being licensed in Utah so long as the attorney's practice is confined to matters of federal law? If so, please explain the basis for your contention, and identify each and every Utah statute, case and Utah Bar rule containing such an exception or that otherwise supports your contention. If not, please explain the relevance of this portion of your answer and why you included it in your testimony.

RESPONSE: No. The only purpose of the observation was to explain that familiarity with Utah law was not the principal focus of my duties as Assistant to the President and General Counsel, and that I therefore did not think that my lack of familiarity with Utah law would undermine my effectiveness.

12. As you know, Title IX of the Education Amendments of 1972 prohibits discrimination on the basis of gender in federally funded education programs, including athletic programs. Since Title IX was enacted, women's participation in sports has increased dramatically at both the college and high school level. Before Title IX, women were only 2% of the students competing at the college level, and 7% of the students competing in high school sports. Before Title IX, women collegiate athletes received only 2% of overall athletic budgets, and athletic scholarships were virtually nonexistent. According to the NCAA, between 1981-82 and 2000-01, NCAA female sports participation has increased from 74,239 to 150,916. As of 2001, nearly 2.8 million girls participated in high school athletic programs, comprising 41.5% of varsity athletes, an increase of over 847% from 1971. In addition, Title IX has been credited with encouraging much of the growth in women's sports in the United States and has had an impact on perceptions of women's sports elsewhere in the world.

The Department of Education uses a three part test to determine whether institutions have met Title IX's requirements. You have consistently voiced your opposition to one of the three tests, the substantial proportionality test, with regard to athletic programs, which allows schools to comply with Title IX by offering athletic opportunities to male and female students that are proportional to the amount of each gender's composition in the student body.

At a meeting of the Commission on Opportunity in Athletics on December 4, 2002, you stated that in some cases, Title IX's substantial proportionality test has created a "quota system." Please explain your characterization of Title IX as "a quota system."

RESPONSE: I do not believe that Title IX is a quota system. During the course of the work of the Secretary of Education's Commission on Opportunity in Athletics, we heard testimony from college and university administrators that some in the Department of Education were misusing the concept of substantial proportionality in a way that administrators were, in effect, imposing quotas in an effort to pursue the worthy objective of expanding opportunities for women athletes, but had the adverse effect of decreasing opportunities for male athletes.

13. You proposed requiring the Department of Education to use interest surveys instead of numeric measurements to assess whether discrimination is taking place. Your proposal was defeated 11 to 4. Yet, as Commissioner Foudy noted, using interest surveys as a basis for determining whether institutions are meeting Title IX requirements would simply maintain the status quo or, as she put it, "would freeze discrimination into place." If we had used interest surveys to make assumptions about discrimination based on the pre-Title IX numbers, opportunities for women in athletics would have been unfairly limited.

To what do you attribute the dramatic increase in participation in sports among women and girls following the enactment of Title IX? What role do you believe Title IX has had on women in sports? Given the large increase in women's participation in sports at athletic institutions in the thirty years since the enactment of Title IX, do you agree that interest often follows opportunity?

RESPONSE: Although I am not a social scientist, it seems logical to me that Title IX deserves credit and praise for helping achieve one of the most profound positive developments in the Nation's history: the dramatic increase in participation in sports among women and girls. I do agree that interest often follows opportunity. As a father of six children, including five daughters, and as a parent who believes that athletics should be a vital component of a child's education, I am deeply committed to Title IX. Please allow me to clarify again that my concern focused on the fact that some in higher education have sometimes misused substantial proportionality to create a quota system.

14. As a member of the Commission on Opportunity in Athletics, you stated that the use of "numeric formulas" in the Title IX context violates the Equal Protection clause of the Constitution. At a meeting in January 2003, you stated: "The fundamental evil Title IX combats is treating members of a class defined by their gender." You went on to assert that the Department of Education should never rely on numeric formulas, stating that "it is illegal, it is unfair, and it is wrong."

Do you object to the designation of gender as a class for purposes of Title IX challenges? Does this objection apply to all legal challenges using the equal protection clause or only to cases involving Title IX challenges?

RESPONSE: I appreciate the opportunity to clarify my statement. My concern was limited to those instances in which some have misused substantial proportionality as a quota system. I do not object to the use of gender as a class for purposes of Title IX

challenges. If confirmed, I will follow the precedents of the Supreme Court and the D.C. Circuit on this issue.

15. As you know, eight federal courts have upheld the substantial proportionality component of the Department of Education's three prong test. Yet, you argue that the use of numeric measurements with regard to the substantial proportionality test violates the equal protection clause of the Constitution, and is therefore "illegal." You have commented on the discrepancy between your views and the rulings of the courts, saying that the courts "got it wrong" and that you "don't believe in the infallibility of the judiciary."

a. How do you reconcile your position that the substantial proportionality test is unconstitutional and "illegal" with these court rulings and the position of the Department of the Education to the contrary?

RESPONSE: The Commission heard testimony from many college administrators who expressed concern that some had misused the concept of "substantial proportionality" and turned it, in some instances, into a quota system. That misuse of substantial proportionality influenced my views.

As a policy adviser to the Department of Education, I did not believe that substantial proportionality should be used to seek compliance with Title IX because of the inherent risk that it would be misused by some as a quota system. In discussions with my colleagues on the Commission I argued that a quota system violates Title IX. I pointed out that the fact that the courts found the use of substantial proportionality permissible using a *Chevron* deference did not mean that substantial proportionality was a required measure of compliance under the statute, and that the Commission was free to recommend other means to expand opportunities for women. I was trying to make the point that even if substantial proportionality is a permissible means, it is not a required means.

b. The President recently stated that it is important for judicial nominees to "not let their personal opinion get in the way of the law." Given your strong personal views on Title IX and the substantial proportionality test, what assurances can you give the Committee that as a federal judge you will not allow your own personal opinion on Title IX to "get in the way"?

RESPONSE: If confirmed, my role as a federal appeals court judge in a democratic society would be to follow the law regardless of any personal views I might have. As an appeals court judge on the D. C. Circuit, my commitment would include following the precedent declared by the United States Supreme Court and by the D. C. Circuit.

16. In addition to the Title IX policies and the substantial proportionality test, are there other current legal standards that you think are based on cases that were wrongly decided, particularly with regard to other civil rights principles that involve numeric measurements as a means of gauging whether discrimination is taking place?

RESPONSE: As a nominee to the U.S. Court of Appeals for the D.C. Circuit, I believe that it would be inappropriate for me to criticize any current legal standards, as it would

suggest that I had prejudged the issue. If confirmed, as a federal appeals court judge I would be bound to follow the precedent of the Supreme Court and the D. C. Circuit.

17. Affirmative action, which is used in education, employment, and government contracting to address the under-representation of minorities or women in a student body or workplace, requires numeric measurements. Do you also believe that the courts "got it wrong" with regard to the use of numeric measurements for affirmative action?

RESPONSE: The Supreme Court has recognized in *Hazelwood School District v. United States* and *Griggs. V. Duke Power*, that statistical evidence can be effectively used to reveal illegal discriminatory conduct. If confirmed, as a federal appeals court judge I would be bound to follow the precedent of the Supreme Court and the D. C. Circuit.

18. Please list two other areas of the law where in your opinion the courts whose decision is currently the law of the land "got it wrong."

RESPONSE: As a nominee to the U.S. Court of Appeals for the D.C. Circuit, I believe that it would be inappropriate for me to criticize any current legal standards, as it would suggest that I had prejudged the issue. If confirmed, as a federal appeals court judge I would be bound to follow the precedent of the Supreme Court and the D. C. Circuit.

RESPONSES OF THOMAS B. GRIFFITH
TO THE WRITTEN QUESTIONS OF SENATOR DIANNE FEINSTEIN

I) Bar Memberships:

In your 2003 Utah Bar Journal article, "Lawyers and the Rule of Law," you wrote "I am a relatively careful person." Yet there are a couple of troubling instances where you have allegedly been less than careful, which have been highlighted by the press, and which you mentioned at your hearing.

- First, for about three years, you let your D.C. law license lapse, and as a result you practiced law without a license. In your questionnaire to this Committee, you referred to the incident as "a clerical oversight," and you claimed personal responsibility for it during your November hearing.

- Second, even though you work as Brigham Young University's general counsel in Utah, you do not have a license to practice law in Utah.

1) Question: According to the Utah Supreme Court, the practice of law "not only consists of performing services in the courts of justice throughout the various stages of the matter, but in a larger sense involves counseling, advising, and assisting others in connection with their legal rights, duties, and liabilities." Utah State Bar v. Summerhayes & Hayden (1995). The Web site of Brigham Young University states that "The Office of General Counsel represents BYU in all legal matters and provides legal counsel and services to all university departments and personnel." Given that definition of your job, and given the Utah Supreme Court's Summerhayes & Hayden definition of the practice of law, do you agree that you have practiced law in Utah since moving there in 2000?

RESPONSE: Yes, although I have always done so in association with a Utah-licensed attorney, which is a practice approved by the Utah Bar.

2) Question: Mr. Griffith, the U.S. Court of Appeals for the D.C. Circuit is the second most important judicial tribunal in the country. The legitimacy of the judges' rulings stems from their ability to follow the law. Do you agree that if a nominee to that court—or any other—had engaged in the unauthorized practice of law, that action would cast serious doubts on the person's qualifications for the federal bench?

RESPONSE: Yes, assuming such a finding was made by the body charged with enforcing the relevant prohibition.

3) Question: Please explain exactly when and how you discovered that you had been suspended from the D.C. Bar, and please be sure to address whether this discovery occurred as part of an attempt to become a member of the Utah Bar.

RESPONSE: In October 2001, I asked my assistant to begin to assemble the materials I would need to apply to take the Utah Bar examination in the summer of 2002. She learned

that one of the documents called for in the application was a certificate of good standing from the District of Columbia Bar. She called the D.C. Bar on October 9, 2001 requesting the certificate and was told that it would be provided to me if I would simply pay my outstanding dues. She was also told reinstatement was simply a matter of paying past dues and a late fee if the lapse was not more than five years. That was the first time I learned that my D. C. Bar dues had not been paid. I paid all outstanding dues on November 7, 2001. I received a letter dated December 6, 2001 from the D.C. Bar stating that my membership had been reinstated to active status.

4) Question: You began your job at Brigham Young University in 2000. Did you ever begin the process of applying for membership in the Utah Bar in 2000 or 2001? (This includes gathering papers, references, etc., for an application, even if you never actually submitted the application to the Utah Bar.)

- If yes, then please fully explain how far the process proceeded; why you abandoned the process; and whether this is what prompted you to call the D.C. Bar to ask for a certificate of good standing, as you indicated at your hearing in your statement (quoted in the next section of this question).
- If no, then please explain your following statement from your hearing: "My secretary came into the office and said she had just spoken with the D.C. Bar. We were inquiring about getting a certificate of good standing."

RESPONSE: I first began the process of applying for membership in the Utah Bar in the fall of 2001. I determined that the best time for me to study for and take the Utah Bar examination was in the summer of 2002. That determination was based on the ebb and flow of my work at the University and personal considerations. In October 2001, I asked my assistant to contact the Utah Bar and learn what steps I needed to take to make application to the take the Bar examination in the summer of 2002. As I mentioned in response to Question 3, one of the documents called for in the application was a certificate of good standing from the District of Columbia Bar. I prepared an application to take the Utah Bar examination in the summer of 2002 including the required references. I did not submit the application, however, because I learned in the March 2002 *Utah Bar Journal* that the Utah Supreme Court was considering a recommendation to adopt a reciprocity rule that might allow me to join the Utah Bar without taking the examination. Around this same time, I placed a telephone call to the then President of the Utah Bar, John Adams, in which he confirmed what I had read in the *Utah Bar Journal*. Mr. Adams reported the conventional wisdom was that the Court was likely to adopt some form of a reciprocity rule in the near future. Believing that I might soon be eligible to join the Bar without taking the examination, I decided not to take the examination and await the outcome of the Supreme Court's deliberations. In 2002, the Court promulgated a reciprocity rule which I determined could not help me because it required residence in the prior jurisdiction from which reciprocity would be sought for three of the previous four years. By that time, I had resided in the District of Columbia for only two of the previous four years.

5) Question: In your November 12, 2004 letter to Senator Hatch, you wrote: "Upon my arrival in Utah in August 2000, I conferred with my predecessor and other attorneys in Utah to determine whether I needed to become a member of the Utah Bar to carry out my duties. These

attorneys told me that I need not become a member of the Utah Bar provided that when I gave legal advice, I did so in close association with active members of the Utah Bar."

- Please give the names of all attorneys who gave you this advice, along with the dates (as accurately as possible) that you spoke with them. If they gave you any advice on this issue in writing, please provide copies.

RESPONSE: As best I can recall, I had discussions about Utah Bar issues in the summer and fall of 2000 with Eugene Bramhall, my predecessor, Boyd Black, an Associate General Counsel of The Church of Jesus Christ of Latter-day Saints (LDS Church), and I may also have had discussions on these issues with Hal Visick, a former General Counsel at Brigham Young University. I may have had discussions with others that I cannot now recall. I received no advice from them in writing on this matter.

6) Question: Did you read the Utah Bar rules regarding licensing of attorneys, in 2000 or 2001?

RESPONSE: Although I have no specific recollection of doing so, I am confident that I looked at the rules governing admission to the Utah Bar.

7) Question: If you did read the Utah Bar rules in 2000 or 2001, state what section of the Utah Bar rules then allowed a general counsel to fail to obtain a Utah law license, but to continue to be authorized to practice law Utah in some sort of "close association" with an attorney licensed in Utah.

RESPONSE: I am aware of no sections of the Utah Bar rules that expressly permit an unlicensed attorney to practice in "close association" with a Utah-licensed lawyer.

8) Question: Please refer to any written opinion from the Utah Bar, or from a committee of the Utah Bar, or any Utah state court, stating in effect that a lawyer who is not a member of the Utah State Bar may legitimately practice law in the state in some sort of "close association" with a Utah-licensed attorney.

RESPONSE: I am aware of several letters to the Committee from current and former officials of the Utah Bar that state that the Utah Bar has advised that in-house counsel need not be a member of the Utah Bar provided that his or her legal work is done in association with a Utah lawyer and does not involve court appearances or filings.

9) Question: In 2000 or 2001, did you ever in writing request an advisory opinion from the Utah Bar association, asking whether you should take the Utah Bar exam?

RESPONSE: No.

10) Question: Was your predecessor as general counsel of Brigham Young University a member of the Utah Bar?

RESPONSE: Yes, but it is my understanding that he never took the Utah Bar examination. He was granted admission to the Utah Bar in 1981 without examination because he was a member of the Bar of the Trust Territory of the Pacific Islands. It is also my understanding that his predecessor at the University was also granted admission to the Utah Bar without examination.

11) Question: Are the general counsels of other universities in Utah members of the Utah Bar Association?

RESPONSE: I do not know, but I am aware of other in-house counsel in Utah who are not members of the Utah Bar.

12) Question: At your hearing, Chairman Hatch asked you: ". . . the Utah Bar advised you of what you could do in order to avoid the unlawful practice of law while remaining in your current position as General Counsel to Brigham Young University. Now, have you adhered to those recommendations?" You responded, "Absolutely. . . . They describe precisely what I have been doing since arriving in Utah." Please refer to the letter from Utah Bar General Counsel Katherine Fox to you, dated May 14, 2003, that advised you: "You are fortunate, however, to have a viable option remaining, i.e., admittance by examination and I would encourage you to start preparing your application as soon as possible."

- Given Ms. Fox's recommendation that you prepare to take the Utah Bar exam "as soon as possible," do you stand by your sworn testimony that you "absolutely" have done everything that the Utah Bar Association advised you do to?

RESPONSE: Yes, in view of Chairman Hatch's question. I understood Ms. Fox's advice to be that, until I became a member of the Utah Bar, it was necessary that when my responsibilities at the University required me to provide legal advice, I carry out those responsibilities in conjunction with a member of the Utah Bar. That describes the way I have organized my affairs at the University since my arrival in August 2000. In addition, several current and former officials of the Utah Bar have confirmed in letters to the Committee that I was conducting my activities appropriately.

13) Question: The May 14, 2003, letter from the Utah Bar stated that, if you fail to take the bar entrance exam as soon as possible, that "you should carefully review your current duties." Did you follow that advice from the Utah Bar? If so, what changes to your work did you make? Did you submit the changes to the Utah Bar for review? Did the Utah Bar approve the changes? Please submit all supporting documents.

RESPONSE: I did not because I had organized my work at the University consistent with this advice since my arrival in August 2000. There was no need, therefore, to make any changes to the way I did my work.

14) Question: At your hearing, you stated, "I knew that most of my legal work was going to be involved with Federal statutes, with Federal regulations, and so I organized my

office accordingly." Since you began work at the University, what percentage of your legal work at the University has pertained to federal law? What percentage has pertained to Utah State law? What percentage has pertained to other areas of law?

RESPONSE: I have no way of precisely identifying the percentages called for. My rough estimate is that less than 10% of my work at the University involves matters of Utah law. The overwhelming majority of my legal work at the University involves matters of federal statutory, regulatory, and constitutional law, and the interpretation of University policy.

15) Question: In the application to the Utah Bar that you submitted in February of 2004—meaning, this year—you checked "No" to Question Number 52: "Have you ever been disbarred, suspended, censured, sanctioned, disciplined or otherwise reprimanded or disqualified, whether publicly or privately, as an attorney?" You gave that answer even though the D.C. Bar had suspended you for years. At your hearing, you stated, "I was just saying the thought never occurred to me that that might cover--that someone might argue that that had something to do with this administrative action that was taken." What part of Question Number 52 do you find to be ambiguous?

RESPONSE: At the time, I had no thought that the form was asking a question that would cover the lapse of my membership for an inadvertent failure to pay my bar dues. Rather, I read the question as calling for discipline for misconduct, not a purely administrative sanction. Given the concern that has been expressed about my answer and out of an abundance of caution, were I to fill out the same application today, I would answer "Yes" and explain the lapse in my membership just as I did in response to Question 11 on my Senate Judiciary Committee Questionnaire where I was asked whether my bar membership had ever lapsed.

16) Question: Have you ever signed any affidavits for a client since August, 2000? If so, how did you represent yourself in each affidavit? Please provide supporting documentation, if available.

RESPONSE: I am not aware of any affidavits that I have signed for a client since August, 2000.

II) Title IX Funding for Women Athletes in Schools:

In 2002 and 2003, you served on a committee to advise Education Secretary Paige on Title IX and funding for women athletes in schools. One anchor of Title IX is the test to ensure that schools receiving federal money create opportunities for women's athletics in proportion to the number of women at the school.

Title IX and the "proportionality" test have had amazing success. According to the National Women's Law Center, the number of intercollegiate women athletes has grown from fewer than 32,000 nationwide in 1972, to over 150,000 today. You stated when we met that you do support

Title IX, and that as the father of daughters, you are proud of the advancement for women student athletes that Title IX has made possible.

Yet you have proposed eliminating the proportionality test. In fact, you have criticized the test in the harshest of terms. Specifically, you have stated: "Numeric formulas [for athletic opportunities for women at schools] violate the express terms of the statute. They violate the equal protection clause of the Constitution. They are morally wrong and logically flawed." (Source: Title IX Commission, Washington, DC, Jan. 30, 2003, at 26-27)

1) Question: Given that you have such strong and critical feelings about a civil rights law like the proportionality test – saying that the law is "morally wrong" is very sharp language – will you uphold other laws that you view as morally suspect, if you become a judge? How can you convince us that you will?

RESPONSE: If confirmed as a federal appeals court judge, my responsibilities would require me to apply the law impartially regardless of my personal policy preferences, following the precedents and instruction of the Supreme Court and the D. C. Circuit, in light of the facts of the particular dispute to be adjudicated, and with the benefit of the careful arguments of counsel. I have demonstrated throughout my career, and especially as Senate Legal Counsel, that I take an oath seriously. I would not allow my personal preferences to influence my duty as a judge.

2) Question: Given that you do not think women's sports should be funded in proportion to their attendance, there may be some concern about what some parties will think of your fairness. If you are confirmed, do you think that women who come before you with cases involving abortion, contraception, sexual harassment, sexual discrimination, and other women's issues can trust that you will be fair to them?

RESPONSE: I disagree with the premise of the question that "[I] do not think women's sports should be funded in proportion to their attendance." Nothing I have said supports that view. I have opposed using quotas as a means of measuring compliance with Title IX. Some have interpreted strict proportionality to mean quotas. If confirmed, women who appear before me in cases involving women's issues absolutely can trust that I will treat them fairly and according to the law. Those who know me best have written to the Committee about my fairness and commitment to the rule of law. Those letters also include expressions of support from women who know of and affirm my commitment to expand opportunities for women in all areas of our society.

3) Question: You stated that you think that the proportionality test is not fair. Your exact words were: "I don't dispute that numeric formulas are more efficient . . . but I don't think efficiency is the value here. Fairness is the value here. And I think when we slip into numeric formulas we compromise fairness . . . ." (Source: Title IX Commission, Transcript, January 30, 2003, at page 110-111). Mr. Griffith, others would say that the opposite seems true. They would say that it seems to be the very model of fairness for a school to support women's athletics at the same level that women are enrolled at the school. How would you respond?

RESPONSE: The Commission heard testimony from many college administrators who expressed concern that some had misused the concept of substantial proportionality and turned it, in some instances, into a quota system. It was this misuse of substantial proportionality that was the focus of my concerns. I supported a recommendation on substantial proportionality that addressed some of the issues relating to fairness. Recommendation 14 provided, "If substantial proportionality is retained as a way of complying with Title IX, the Office for Civil Rights should clarify the meaning of substantial proportionality to allow for a reasonable variance in the relative ratio of athletic participation of men and women while adhering to the nondiscriminatory tenets of Title IX." The purpose of the recommendation was to demonstrate that while a school that funds in proportion to enrollment may be fair, that does not mean that a school that fails to do so is necessarily being unfair and discriminatory.

4) Question: Again, to repeat the line that you used to describe the proportionality test on January 30, 2003, you said it is "morally wrong and logically flawed." Are there other civil rights statutes you think are "morally wrong"?

RESPONSE: **I appreciate this opportunity to clarify my statement. I do not think that Title IX is "morally wrong." To the contrary, I believe it is among the most profound advances in civil rights in the history of our Nation. I had stated only that the use of quotas in support of the worthy objective of expanding opportunities for underrepresented groups is wrong.**

If confirmed, my role as a federal appeals court judge in a democratic society is to follow the law regardless of whether I have any personal preference in a dispute. As an appeals court judge on the D.C. Circuit, my commitment would include following the precedent declared by the United States Supreme Court and by the D.C. Circuit.

5) Question: All eight of the U.S. Circuit Courts that have considered legal challenges to the proportionality test have upheld it. But you stated on the committee on January 30, 2003, that "I think they were wrong." (Source: Title IX Commission, Transcript, January 30, 2003, at page 106.) Mr. Griffith, if you are confirmed, will you view it as your constitutional obligation to correct mistaken precedents?

RESPONSE: No. If confirmed, my role as a federal appeals court judge in a democratic society is to follow the law regardless of whether I have any personal preferences in a dispute. As an appeals court judge on the D. C. Circuit, my commitment would include following the precedent declared by the United States Supreme Court and by the D. C. Circuit.

6) Question: You have also said "I don't believe in the infallibility of the courts." (Source: Title IX Transcript, at page 106.) Does that mean that there should be concern about how you will treat precedent, both of the D.C. Circuit and of the Supreme Court, if you are confirmed?

RESPONSE: No. If confirmed, my role as a federal appeals court judge in a democratic society is to follow the law regardless of whether I have any personal preferences in a

dispute. As an appeals court judge on the D. C. Circuit, my commitment would include following the precedent declared by the United States Supreme Court and by the D. C. Circuit.

7) Question: Your sharp opposition to the use of numbers, statistics, and "proportionality" also concerns me, because so many civil rights and anti-discrimination laws have some type of proportionality at their core. For instance, in employment discrimination cases, courts often look to similar "proportionality" statistics to decide whether a company's test for hiring has the effect of disqualifying minorities or women at a much higher rate than white or male applicants. The Supreme Court allowed this sort of analysis in Griggs v. Duke Power, 401 U.S. 424 (1971). How can you convince critics of your views that, given your extreme criticism of statistics and numeric standards in the realm of Title IX, you will respect other laws that use numeric standards?

RESPONSE: My limited criticism of the way some in the Department of Education have used substantial proportionality is not a criticism of the use of statistical evidence in civil rights disputes. Title IX itself expressly allows for the use of statistical evidence to show "an imbalance" exists in opportunities for men and women. And as the Supreme Court has recognized in *Hazelwood School District v. United States* and *Griggs v. Duke Power*, statistical evidence can be effectively used to reveal illegal discriminatory conduct. As an appeals court judge, I would be bound to follow Supreme Court precedent regarding the use of statistical evidence.

III) Regulatory Law and the D.C. Circuit

As you know, the D.C. Circuit is unique in that so much of its docket concerns legal issues involving federal regulatory agencies. However, looking at your background, there seems to be a relative lack of regulatory law experience.

Specifically, your regulatory experience seems to be limited to serving on a committee that advised the Secretary of Education, and some work you performed on the Line Item Veto Bill.

Given that relatively minimal experience in regulatory law, do you have the knowledge you will need to parse the extremely intricate disputes of regulatory law that come before the D.C. Circuit?

RESPONSE: I believe that I do. In addition to my experience as Senate Legal Counsel, which included representing the institutional interests of the United States Senate in the impeachment trial of President Clinton, in the two Line Item Veto Act cases that made their way to the Supreme Court, and in some of the most intricate and complex investigations in the history of the Senate, almost all of my experience at the Washington, D. C. law firm of Wiley, Rein & Fielding, first as an associate and later as a partner, involved regulatory matters. During 1999 and 2000, I served as General Counsel to the Advisory Commission on Electronic Commerce, which was created by Congress to make recommendations regarding the difficult issue of whether states should be allowed to levy

and collect sales tax on the purchase of goods over the Internet. During 1992, I was also the principal associate representing Ernst and Young in a highly publicized and complicated investigation by the Office of Thrift Supervision related to the firm's involvement in audit work done for failed thrifts. Prior to making Ernst and Young the target of an investigation, the OTS had successfully frozen the assets of the Kaye Scholer law firm following an investigation of its legal work for failed thrifts. As the principal associate in this representation, I supervised and coordinated a team of approximately 20 lawyers who were helping prepare a response to the OTS investigation. The investigation ended with a settlement that involved a $400 million payment from Ernst and Young to the government. As a litigator at Wiley, Rein & Fielding, many of my cases involved complex commercial disputes regarding the costs and liabilities associated with compliance with state and federal environmental protection statutes and regulations. As Assistant to the President and General Counsel at one of the Nation's largest universities, I am deeply involved on a regular basis with compliance issues related to federal statutes and regulations.

IV) Senate versus the Supreme Court

From your experience as Senate Legal Counsel, you are acutely aware of the centrality of Congress to our democracy. The Supreme Court, however, in recent years has chipped away Congress' ability to legislate. For instance:

- In United States v. Lopez (1995), the Supreme Court narrowed Congress' ability to legislate under the Constitution's Commerce Clause, by striking down a law that made it a crime to carry firearms near schools.

- In United States v. Morrison (2000), the Supreme Court also used the Commerce Clause, to strike down key sections of the Violence Against Women Act.

- In Kimel v. Florida Board of Regents (2001), the Court made the Age Discrimination in Employment Act inapplicable to the states, and narrowed Congress' ability to legislate under the 14th Amendment.

1) Question: From your work in the Senate, it is clear that you appreciate Congress' constitutionally broad power to legislate. But as a judge you will have to follow Supreme Court precedent that might lead you to strike down our laws. If you are confirmed to the D.C. Circuit, how will you reconcile that tension?

RESPONSE: As a federal appeals court judge, my oath of office would require me to follow the precedent of the Supreme Court of the United States and the District of Columbia Circuit where appropriate, which I would do.

2) Question: From 1996 through the present, you have served as a senior advisor of the "Federalism and Separation of Powers Practice Group" of the Federalist Society. In the name of Federalism and separation of powers, many conservatives, and many members of the Federalist Society, support legal theories that would effectively eliminate the

constitutional basis for many of our federal laws. As Jeffrey Rosen wrote recently in The New Republic, much is at stake: "This radical logic . . . would represent a declaration of war on Congress, preventing the legislature from prohibiting race and sex discrimination in programs that receive federal funds and calling into question Title VI of the 1964 Civil Rights Act and Title IX of the 1972 Education Amendments." What can you say to be clear that you will have a proper respect for the laws that Congress passes?

RESPONSE: I have a great respect for Congress. If confirmed, I would review all federal statutes with the initial presumption that they were constitutional. At the same time, the Supreme Court has stated that there are limits to Congress's powers. As a federal appeals court judge, my oath of office would require me to follow the Constitution, the laws of Congress, the regulations of federal agencies, and the precedent of the Supreme Court of the United States and the District of Columbia Circuit, which I would do.

V) Supreme Court Decisions:

1) Question: Do you think that the Supreme Court's decision in Griswold v. Connecticut was wrong?

2) Question: Do you think that the Supreme Court's decisions in Planned Parenthood v. Casey and Roe v. Wade were wrong?

3) Question: Do you think that the Supreme Court's decision in Lawrence v. Texas was wrong?

4) Question: If it were up to you, would the Constitution guarantee a right to privacy?

RESPONSE: As a federal appeals court judge, my oath of office would require me to follow the precedents of the Supreme Court of the United States in *Griswold v. Connecticut*, *Planned Parenthood v. Casey*, *Roe v. Wade*, and *Lawrence v. Texas*. The Supreme Court has recognized a right to privacy in these and other cases. I would follow that precedent.

5) Question: Will your personal views prevent you from upholding and interpreting fairly the Constitution's guarantees of the right to contraception; women's right to choose; adults' right to private, consensual intimate relations; and Americans' right to privacy?

RESPONSE: My personal views would play no role in my decisions as a judge. As a federal appeals court judge, my oath of office would require me to follow the precedents of the Supreme Court of the United States in *Griswold v. Connecticut*, *Planned Parenthood v. Casey*, *Roe v. Wade*, and *Lawrence v. Texas*. The Supreme Court has recognized a right to privacy in these and other cases. I would follow that precedent.

6) Question: Please name three constitutional Supreme Court decisions from the last thirty years or so that you disagree with, and please state the basis for your disagreement.

RESPONSE: I believe that it would be inappropriate for me to answer this question. If confirmed as a federal appeals court judge, I would be obligated to follow the precedent of the Supreme Court. Were I to make a comment expressing personal disagreement with a decision of the Supreme Court, which I am bound by oath to follow, it would reduce the confidence and trust in my impartiality that a litigant who might appear before me is entitled to have as he or she enters into a federal court.

VI) Personal Political Views:

Mr. Griffith, you wrote last year in the Utah Bar Journal, that your "personal political views are closely aligned with those of Senator Rick Santorum." (Source: Utah Bar Journal, "Lawyers and the Rule of Law," 2003, at Page 16)

Senator Santorum is a respected member of the Senate. And he has also made some very strong comments about the constitutional right to privacy.

1) Question: In an interview with the Associated Press on April 7, 2003, Senator Santorum stated: "If the Supreme Court says that you have the right to consensual sex within your home, then you have the right to bigamy, you have the right to polygamy, you have the right to incest, you have the right to adultery. You have the right to anything." Do you agree with Senator Santorum? If not, why not?

RESPONSE: To my knowledge, the Supreme Court has not ruled that the right to privacy includes "the right to bigamy, . . . the right to polygamy, . . . the right to incest, . . . the right to adultery, . . . the right to anything." It would not be appropriate for me to discuss the ramifications in other contexts of a particular ruling, as those matters could conceivably come before me if confirmed as a judge. If confirmed, I would follow the precedent of the Supreme Court.

2. Question: In a September 17, 2003 Senate speech, Senator Santorum said: "I refer to Roe v. Wade as Dred Scott II because it is exactly the same principle upon which Dred Scott was decided. Dred Scott was decided saying that the rights of a human being were subject to the rights of another person." Do you agree with Senator Santorum? If not, why not?

RESPONSE: It is not my understanding that *Roe v. Wade* and *Dred Scott* were decided by the same Supreme Court on the same legal basis. The *Roe* decision was based, in part, upon the right to privacy. If confirmed as a federal appeals court judge, I would follow the precedent of the Supreme Court including *Roe v. Wade* as modified by *Planned Parenthood v. Casey* and its progeny.

RESPONSE OF THOMAS B. GRIFFITH
TO THE WRITTEN QUESTIONS OF SENATOR EDWARD M. KENNEDY

1. While you served on the Department of Education's Commission on Opportunity in Athletics ("Title IX Commission"), you offered a proposal that would have eliminated the "substantial proportionality" test for compliance with Title IX, the landmark law barring sex discrimination in education, including in athletic programs. You have admitted that your proposal to eliminate the substantial proportionality test was "radical," and, in fact, the Commission rejected it by a vote of 11 to 4. Nonetheless, you defended your position on the substantial proportionality test in the strongest possible terms, stating that you were "unalterably opposed to any numeric formulas which attempt to capture the spirit of Title IX" and that the substantial proportionality test is "illegal, unfair, and wrong" and even "morally wrong."

    a. Every federal court of appeals to consider the issue, and the Department of Education in every Administration since Nixon's, have all concluded that the substantial proportionality test reflects an appropriate means of measuring Title IX compliance. Yet in defending your opposition to the substantial proportionality test, you stated that it violates the language and spirit of Title IX, as well as the Equal Protection Clause of the Constitution. How do you reconcile your statements with the fact that every significant source of guidance on the interpretation of Title IX has concluded that the substantial proportionality test comports with the statute and Constitution?

    b. Please explain in detail why you believe the substantial proportionality test is inconsistent with Title IX and why you view that test as unconstitutional.

    c. The transcript of the Commission meeting at which your proposal on the substantial proportionality test was discussed shows that you defended your proposal based on your personal and policy views – disregarding the legal reasoning of courts that have upheld the substantial proportionality test. As noted above, all of the federal appellate courts that have considered the issue have rejected challenges to the legality of the substantial proportionality test. You dismissed the importance of these court decisions, saying that the courts "got it wrong" and that you "don't believe in the infallibility of the judiciary."

    I am troubled by your willingness to advocate what you admit is a "radical" change in well-established interpretation of a landmark civil rights law based on your personal views, rather than on detailed legal reasoning. What assurance can you give this Committee that, if confirmed, you will decide cases based on the law, rather than your personal opinion?

RESPONSE: As a member of the Title IX Commission, I was acting as a policy adviser to the Secretary of Education. In that capacity, I came to the belief that substantial proportionality should not be used to pursue the worthy objective of expanding

opportunities for women in intercollegiate athletics because of the inherent risk that it will be misused by some as a quota system. The Commission heard testimony that some had misused the concept of substantial proportionality and turned it, in some instances, into a quota system. While serving on the Commission I argued that gender quotas should not be used in intercollegiate athletics for at least three reasons. First, the express language of Title IX forbids the use of gender quotas. Second, quotas are unfair. Third, using quotas creates a resentment that has served to undermine some popular support for Title IX.

In the discussions surrounding the use and misuse of substantial proportionality, there were some who argued that the fact that a number of federal appeals courts had rejected challenges to substantial proportionality limited the ability of the Commission to make recommended changes. In response, I pointed out that the fact that the courts found the use of substantial proportionality permissible using *Chevron* deference did not mean that substantial proportionality was a required measure of compliance under the statute, and that the Commission was free to recommend other means to expand opportunities for women. I was trying to make the point that even if substantial proportionality is a permissible means, it is not a required means.

If confirmed as a federal appeals court judge, I would be required to look at the issue anew in keeping with my duty to apply the law impartially regardless of my personal policy preferences, in accordance with the precedents of the Supreme Court and the D. C. Circuit, in light of the facts of the particular dispute to be adjudicated, and with the benefit of the careful arguments of counsel. If my prior statements on this issue were to require my recusal from a case under rules governing recusal, I would recuse myself accordingly. I have demonstrated throughout my career, and especially as Senate Legal Counsel, that I take an oath seriously. I would not allow my personal preferences to influence my duty as a judge. In my view, a judge is bound by oath to follow the law as set forth in statute, regulation, and binding precedent, regardless of his or her personal preferences.

2. Given your willingness to dismiss the conclusions of every federal appellate court to consider the legality of the substantial proportionality test, what assurances can you offer that, as a federal judge, you would give due consideration to the opinions of other federal courts? What assurance can you give that you would respect legal precedent?

RESPONSE: If confirmed as a judge on the U.S. Court of Appeals for the D.C. Circuit, I would be bound to follow all applicable Supreme Court and D.C. Circuit precedent, and would do so. If there were no applicable precedent from the Supreme Court or D.C. Circuit, I would look to other circuits for guidance. I have demonstrated throughout my career, and especially as Senate Legal Counsel, that I take an oath seriously. I would not allow my personal preferences to influence my duty as a judge. In my view, a judge is bound by oath to follow the law as set forth in statute, regulation, and binding precedent, regardless of his or her personal preferences.

a. You've used the term "quota" to describe the Department of Education's Title IX athletics guidelines, or at least the substantial proportionality test they

adopt. But this test says only that because Title IX allows gender segregation on sports teams and schools decide the number of slots allotted to students of each gender, one way for schools to show they treat both male and female students fairly is to show that female students are receiving opportunities in proportion to their enrollment. Thus if half or the students are female, a school may show compliance with Title IX by allocating half of athletic slots to girls. Please explain why this is not simply a way to show fairness?

RESPONSE: I do not believe that the use of substantial proportionality inevitably leads to the use of gender quotas. The focus of my concern on the Commission was the misuse of substantial proportionality. The Commission heard testimony that some were misusing substantial proportionality by turning it into a quota system. During my service on the Commission I argued that the language of Title IX forbids discrimination and granting preferential treatment based on gender to correct imbalances. The language of the regulations speaks in terms of "[w]hether the selection of sports and level of competition effectively accommodate the interests and abilities of members of both sexes." 34 C.F.R. § 106.41 (c)(1) (1998). Those principles should guide the enforcement of Title IX because they are the law.

b. I'm concerned that your opposition to "numeric measures" in the Title IX context may extend to core civil rights principles in other areas. You have stated that use of numeric measures of discrimination is a "fundamentally unfair way of going about remedying discrimination." Yet courts have long recognized that gross statistical disparities may constitute evidence of intentional discrimination in the employment context.

   a. Please explain in detail whether you believe the use of statistical evidence to prove intentional discrimination is wrong, "fundamentally unfair," or unconstitutional, and the reasons why or why not.

   b. If you do believe that use of statistical evidence to show intentional discrimination is wrong or unconstitutional, please explain how you reconcile that view with the Supreme Court's decision in Hazelwood School District v. United States.

RESPONSE: My limited criticism of the way some have misused substantial proportionality is not a criticism of the use of statistical evidence in civil rights disputes. Title IX itself expressly allows for the use of statistical evidence to show "an imbalance" exists in opportunities for men and women. And as the Supreme Court has recognized in *Hazelwood School District v. United States* and *Griggs v. Duke Power*, statistical evidence can be effectively used to reveal illegal discriminatory conduct. As an appeals court judge, I would follow Supreme Court precedent regarding the use of statistical evidence. As a member of the Commission, I pointed out that in the language of Title IX itself, Congress recognized that statistical evidence could be used to show an imbalance, but that numeric formulas could not be used to grant members of one sex preferential treatment to correct an imbalance.

c. Title VII of the Civil Rights Act of 1964, as amended, provides for disparate impact cases, in which statistical measures are used to determine whether employment practices that may appear neutral have a disproportionate, adverse impact based on race, national origin, gender, or religion.

   a. Do you believe that Title VII's disparate impact provisions are illegitimate or unconstitutional because they rely on "numeric measures"? If so, please explain how you reconcile that view with Supreme Court cases such as Griggs v. Duke Power Company.

   b. If you believe that disparate impact cases are legitimate, how do you reconcile that view with your staunch opposition to the substantial proportionality test for measuring compliance with Title IX? .

   c. If you find numeric measures "unfair" and "wrong" even in sex-segregated settings, where they are simply a means of determining whether discrimination is occurring in the allocation of opportunities to men and women, please describe in detail whether (and in what circumstances, if any) you believe the use of numeric measures of discrimination is ever acceptable.

RESPONSE: No, I do not believe that Title VII's disparate impact provisions are illegitimate or unconstitutional because they rely on "numeric measures". My limited criticism of the way some have misused substantial proportionality is not a criticism of the use of statistical evidence in civil rights disputes. Title IX itself expressly allows for the use of statistical evidence to show "an imbalance" exists in opportunities for men and women. And as the Supreme Court has recognized in *Hazelwood School District v. United States* and *Griggs v. Duke Power*, statistical evidence, including "numeric measures," can be effectively used to reveal illegal discriminatory conduct. As an appeals court judge, I would follow Supreme Court precedent regarding the use of statistical evidence. As a member of the Commission, I pointed out that in the language of Title IX itself, Congress recognized that statistical evidence could be used to show an imbalance, but that numeric formulas could not be used to grant members of one sex preferential treatment to correct an imbalance.

d. The Supreme Court has upheld the use of affirmative action measures to remedy the effects of discrimination. Is it your view that any use of numerical measures to fashion affirmative action programs is illegitimate or unlawful?

RESPONSE: It is my understanding that the Supreme Court has permitted the use of numerical measures in the fashioning of some affirmative action programs. If confirmed as a federal appeals court judge, I would be bound to follow the precedent of the Supreme Court.

7. When you were on the Title IX Commission and after your work on the Commission had concluded, you criticized the Department of Education's procedure in adopting its current Title IX policies because the Department did not follow formal notice-and-comment rulemaking. Specifically, on January 29, 2003, you stated, that "a good portion of the way Title IX is interpreted, enforced today, comes as a result of decisions that were made apart from the law-making, rule-making process. And that shouldn't stand." You also remarked that "[i]t shouldn't be decisions that are made by career people or even political people at the Department of Education. . . . You've got two options here in our system. Congress can pass a statute telling us what the law is, or Congress can pass a statute telling us what the law is and then delegate to the Department of Education the authority to promulgate regulations consistent with that law."

    a. Do you believe that the Department of Education's Title IX athletics guidelines (its 1979 Policy Interpretation and subsequent reaffirmation of it) are invalid or not entitled to deference from the courts because those guidelines were not promulgated pursuant to notice-and-comment rulemaking? Do you believe that these federal guidelines are due any deference from courts interpreting Title IX?

    b. If you do not believe the Title IX guidelines are invalid, what degree of deference do you think guidelines like these deserve? If you believe that federal guidelines adopted using procedures like those used in adopting the Title IX guidelines are due some degree of deference by the courts, how do you reconcile that view with your previous statements suggesting that the process used to adopt the Department of Education's Title IX guidelines is invalid?

    c. If you think the Department of Education's Title IX athletics guidelines are due no deference by the courts, please explain how this can be reconciled with established Supreme Court precedents holding that agency actions are entitled to some degree of deference, even if they were not subjected to notice and comment rulemaking? For instance, in the 2000 case Christensen v. Harris County, Justice Thomas wrote that agency interpretations that do not go through notice-and-comment rulemaking "do not warrant Chevron-style deference, but are still "'entitled to respect.'" What assurances can you offer that you would comply with Supreme Court precedent on this issue?

RESPONSE: I have never stated that the guidelines are invalid or not entitled to deference, nor would it be appropriate for me to offer an opinion on a matter that might conceivably come before me if confirmed as a federal judge. The judicial deference they are due is set forth by the Supreme Court in *Christensen v. Harris County*, which I would be bound to follow as a federal appeals court judge.

8. If confirmed, what degree of deference would you give to other agency guidance that did not go through notice and comment rulemaking, such as EEOC guidance on sexual harassment?

RESPONSE: The judicial deference the agency guidance is due is set forth by the Supreme Court in *Christensen v. Harris County*, which I would be bound to follow as a federal appeals court judge.

RESPONSES OF THOMAS B. GRIFFITH
TO THE WRITTEN QUESTIONS OF SENATOR PATRICK J. LEAHY

D.C. BAR DUES

1. At your hearing on November 16, 2004, you testified that when you began your job as Senate Legal Counsel you notified the D.C. Bar of a change of address. Do you have any records reflecting that notification?

RESPONSE: I have attached a copy of the Annual Registration Statement for the D.C. Bar that I sent to the D.C. Bar on June 30, 1995 along with a personal check for my dues covering the 1995-96 Bar year. According to the statement, I notified the D.C. Bar of my new office address and requested that I receive mail at my home address.

2. You testified that you received and paid dues notices from the D.C. Bar in 1995, 1996 and 1997. Do you have any records reflecting that you received and paid these notices?
You did not testify whether you paid your dues on time during that period or whether you were previously late in paying your dues and whether such late payment previously resulted in your D.C. Bar membership lapsing. What are the facts regarding your bar membership in 1995, 1996 and 1997?

RESPONSE: I have attached the only records I have, which show that I paid my D.C. Bar dues in a timely fashion in 1995 with a personal check and that I paid my D.C. Bar dues in 1996 when I received notice from the D.C. Bar. From the records of the D. C. Bar, which I understand have been made available to the Committee, and as I set forth in my November 12, 2004 letter to the Committee, "While working as Senate Legal Counsel, I was late in the payment of my bar dues in 1996 and 1997. My 1997 dues were not paid until January 1998, causing a temporary suspension of a little over a month." I have no recollection of any of this and base my answer on the records I have attached and on what I have been told about the records of the D. C. Bar.

3. You testified that you do not recall having received a dues notice from the D.C. Bar in 1998. Do you have any reason to believe that such a notice and follow up notices of nonpayment were sent by the D.C. Bar as part of its normal course of business?

RESPONSE: I have no information regarding whether the D. C. Bar sent me a dues notice and any follow-up notices of nonpayment for 1998. I have no recollection of receiving any such notices. It is my understanding that the D. C. Bar has no record of sending me such notice.

4. a. From the time you were suspended from the D.C. Bar in the fall of 1998 through the time in 1999 when you left the Senate, did you sign any pleadings that were submitted to any court of law in the District of Columbia?

RESPONSE: Yes. I was suspended from the D.C. Bar for my inadvertent failure to pay dues on November 30, 1998. I left my office as Senate Legal Counsel on April 18, 1999. Between those dates, I signed papers filed with courts in the District of Columbia in the following matters: *William L. Singer v. Office of the Senate Sergeant at Arms v. Office of Senate Fair Employment Practices*, No. 98-6002, 98-6003 (Fed. Cir.); and *Lois E. Adams, et al. v. William Jefferson Clinton, et al.*, C.A. No. 98-1665 (D.D.C.).

b. Did you move in any court to be admitted to practice pro hac vice in any other jurisdiction? c. Did you personally appear in any court in any jurisdiction during that period of time? d. Did you make any arguments before any court in any jurisdiction during that period of time?

RESPONSE: No.

5. You testified that when you began your job as Senate Legal Counsel you notified the D.C. Bar of a change of address. a. When you moved back to private practice at Wiley, Rein and Fielding in 1999, did you again notify the D.C. Bar of a change of address? b. If so, do you have any records reflecting that notification? c. If you did not notify the D.C. Bar of a change of address, why not?

RESPONSE: I have no recollection of doing so, and Wiley, Rein & Fielding has no record of doing so. I do not know why that was not done other than that it was an unintentional oversight.

6. During the time that you were back at Wiley, Rein and Fielding in 1999 and 2000, did you ever discuss with anyone at the firm, either lawyers or administrators or anyone else, the subject of the payment of your D.C. Bar dues and whether or not the firm would pay them?

RESPONSE: I have no recollection of the matter.

7. During the time that you were back at Wiley, Rein and Fielding in 1999 and 2000, were there other attorneys who joined or left the firm whose bar membership and dues would have had to be tracked by the firm or were you the only one?

RESPONSE: According to Wiley, Rein & Fielding, in 1999, 31 attorneys joined the firm and 39 left; in 2000, 35 attorneys joined the firm and 22 left.

8. During the time that you were back at Wiley, Rein and Fielding in 1999 and 2000, were you ever asked to sign any documents affirming or to affirm orally your membership in the D.C. Bar? If so, did you affirm such membership?

RESPONSE: I have no recollection of being asked by my firm to affirm my membership in the D. C. Bar. During 1999 and 2000, I was unaware that my membership in the D. C. Bar had been administratively suspended because of the inadvertent failure to pay my dues. To my knowledge, I was a member in good standing of the D. C. Bar during this time and held myself out as such.

9. a. From the time in 1999 when you returned to the firm until the time in 2000 when you left for BYU, did you sign any pleadings that were submitted to any court of law in the District of Columbia?

RESPONSE: My name appeared on the Petition for a Writ of Certiorari and the Petitioner's Reply Brief in *Loral Fairchild Corporation v. Sony Corporation and Sony Electronics, Inc.*, which were filed in the Supreme Court of the United States on, respectively, October 14, 1999 and December 8, 1999.

b. Did you move in any court to be admitted to practice pro hac vice in any other jurisdiction?

RESPONSE: I cannot recall. To the best of my knowledge, I was involved in representing the interests of an insurance carrier in multi-party litigation in federal court in Philadelphia and in state court in Ohio, but I do not recall whether the nature of my representation required me to move for admission *pro hac vice.*

c. Did you personally appear in any court in any jurisdiction during that period of time? d. Did you make any arguments before any court in any jurisdiction during that period of time?

RESPONSE: I cannot recall making any court appearances or arguments before any court during this time.

10. a. Once you discovered that you had been suspended from the D.C. Bar from 1998 through 2001, did you contact your former employers at the Senate or your former partners at Wiley, Rein and Fielding to advise them that you had been practicing law with a suspended license during that time? b. If so, who did you contact and what more did you or they do? c. Did you contact an attorney? d. Did you contact anyone at any insurance company or any insurance agent to discuss the possibility of malpractice actions against you? e. Did you discuss that possibility with anyone at the law firm? f. At the university? g. At the Senate or anywhere else? h. If not, why not?

RESPONSE: No, because upon the payment of my outstanding dues and late fee alone, my administrative suspension was lifted, and I was once again a member in good standing. The D.C. Bar sent me a letter to that effect on December 6, 2001.

11. You testified that when you began your job as Senate Legal Counsel you notified the D.C. Bar of a change of address. a. When you moved to Utah to begin the job as General Counsel at Brigham Young University, did you again notify the D.C. Bar of a change of address? b. If so, do you have any records reflecting that notification? c. If you did not notify the D.C. Bar of a change of address, why not?

RESPONSE: I did not do so until November 2001 after I learned that my membership had lapsed due to the inadvertent failure to pay my dues. The change of address notice I sent the D.C. Bar in 2001 is attached. My failure to do so earlier was an unintentional oversight.

12. a. When you were hired by BYU, were you required to provide any proof or affirmation that you were a member in good standing of the D.C. Bar?

RESPONSE: I was not required to provide proof that I was a member in good standing of the D.C. Bar, but I believed that I was and represented in my resume that I was.

b. Did you ever discuss with anyone at the university, either lawyers or administrators or anyone else, the subject of the payment of your D.C. Bar dues and whether or not the university would pay them?

RESPONSE: I have no specific recollection of any conversation about the matter, but I was aware that the University paid the bar dues of the attorneys in the Office of the General Counsel.

13. a. From the time in 2000 when you arrived at BYU until the time in 2001 when your bar membership was reinstated, did you sign any pleadings that were submitted to any court of law in the District of Columbia? b. Did you move in any court to be admitted to practice pro hac vice in any other jurisdiction? c. Did you personally appear in any court in any jurisdiction during that period of time? d. Did you make any arguments before any court in any jurisdiction during that period of time?

RESPONSE: No.

14. Government lawyers pay their own bar dues. John Nowaki, a spokesman for the Department of Justice, is quoted in news reports saying that you, "relied on the administrative staff at both the large law firm he was at and when he was working for the Senate to handle the payment of . . . bar dues." a. Is that accurate? b. On which administrative staff in the Senate did you rely to pay your bar dues? c. Had the government in fact paid your bar dues at any time while you were employed by the U.S. Senate? d. Who paid your bar dues in 1995, 1996, 1997? e. Did you rely on Senate personnel during those years to handle the payment of your bar dues?

RESPONSE: Mr. Nowacki's statement is accurate when he refers to my reliance on administrative staff at my law firms to handle the payment of bar dues. His statement is inaccurate when he says that I relied on the administrative staff at the Senate to handle the payment of bar dues. Because I learned shortly after I began work in the Senate in 1995 that the Senate would not pay my bar dues, I did not rely on any Senate employees to pay or keep track of my bar dues during the time I was employed by the Senate from March 1995 through April 1999. In June 1995, shortly after I began to work for the Senate, I requested that the D.C. Bar send all payment notices to my home address, a request consistent with my understanding that while working for the Senate I would be personally responsible for the payment of my dues. I recall personally paying my D.C. Bar dues in 1995. Although I have no recollection of doing so, I must have personally paid my D.C. Bar dues in 1996 and 1997 as well because the Senate does not do so.

15. a. In your November 7, 2001, letter to the D.C. Bar seeking reinstatement, you wrote that you were admitted to the D.C. Bar in 1989. Isn't it true that although you moved and began

practicing law in D.C. in 1989, you did not become a member of the D.C. Bar until 1991? b. When did you apply to become a member of the D.C. Bar? c. Why did you wait until 1991 to become a member of the D.C. Bar?

RESPONSE: I left my law firm in Charlotte, North Carolina in December 1989 and became associated with the law firm of Wiley, Rein & Fielding in Washington, D. C. that same month. After discussing the matter with a supervising attorney and administrative staff at Wiley, Rein & Fielding shortly after I began work there, I learned that the easiest way for me to become a member of the D.C. Bar was to apply for admission under the provision of its rules that would allow me to become a member by virtue of having been an active member of another state's Bar for the five years immediately preceding application. Because I became a member of the North Carolina State Bar in September 1985, I began the process of applying for the D.C. Bar five years later. The D.C. Bar confirmed the propriety of this approach to administrative staff at Wiley, Rein & Fielding as reflected in the attached memorandum of April 20, 1990 from Irena McGrath to Richard Gordin, my supervising attorney, and me. After assembling the requisite information, I applied for admission to the D. C. Bar on November 14, 1990 and was admitted to the D. C. Bar on March 20, 1991.

d. From the time in 1989 when you arrived in D.C. until you were admitted to the D.C. Bar in 1991, did you sign any pleadings that were submitted to any court of law in the District of Columbia? e. You represent to the Committee that at least one of your 10 most significant cases occurred during this period. How many appearances did you make in D.C. courts from 1989 when you arrived in D.C. until you were admitted to the D.C. Bar in 1991? f. You indicate to the Committee that in connection with Credit International Bank v. Lucey, you were the principal associate in a trial of an employment contrast dispute in the D.C. Superior Court. Did you appear in that case? Did your name appear on pleadings, motions and briefs? Did you appear pro hac vice in that case?

RESPONSE: *Credit International v. Lucey* is the only matter I can recall in which I made an appearance in a court in the District of Columbia. Although I was the principal author of all pleadings, motions, and briefs filed in the matter, apparently my name appeared on no papers other than certificates of service. I was present at counsel's table and advised the lead counsel throughout the trial, but I questioned no witnesses and made no arguments. My memory is that I was admitted to appear *pro hac vice* on oral motion to the court.

g. You indicate in your Committee questionnaire that you "also made appearances in state and federal courts on various motions." In what other state and federal courts did you appear from the time in 1989 when you arrived in D.C. until you were admitted to the D.C. Bar in 1991?

RESPONSE: During that time, I can only recall appearing in Tarrant County, Texas district court to argue various motions in the *Houston General Insurance Co. v. American General Lloyds* matter.

h. During that time from 1989 when you arrived in D.C. until you were admitted to the D.C. Bar in 1991 in what courts did you seek to be appear pro hac vice?

RESPONSE: I cannot recall, other than my admission *pro hac vice* in the *Credit International Bank* and *Houston General* matters discussed above.

i. When did you first become involved in your firm's representation of Joseph Patrick Payne? When did you first make an appearance in court in connection with that matter? Did you appear pro hac vice?

RESPONSE: I first became involved in the *Joseph Patrick Payne* matter in November 1990. My only court appearance in that matter was at the state habeas corpus hearing on October 17, 18, and 25, 1991, after I had been admitted to the D.C. Bar. I appeared *pro hac vice* along with a fellow Wiley, Rein & Fielding attorney who also appeared *pro hac vice* and Ned Mikula, a member of the local bar.

16. In your November 7, 2001 letter to the D.C. Bar, in which you sought reinstatement you represent that the "notice for payment of dues was evidently sent to my former law firm which I left in 2000." Why and on what factual basis did you make that representation?

RESPONSE: That was an assumption I made because, at the time, I could not imagine any other reason how this might have happened. I knew that I had no recollection of ever receiving any notices to which I failed to respond. At the time I wrote the November 7, 2001 letter, I was not aware of what I have learned only recently, that the D. C. Bar does not continue to send dues notices to those who have been administratively suspended for non-payment of dues.

NORTH CAROLINA BAR MEMBERSHIP

17. On your Committee questionnaire you represent that your membership in the North Carolina Bar "lapsed when I moved my practice from North Carolina to the District of Columbia." a. Please provide a complete account of your North Carolina Bar membership and any periods in which it lapsed, was suspended or was otherwise not active since 1985. b. When in 1989 you moved to D.C. to practice at Wiley, Rein and Fielding, did you notify the North Carolina Bar of your change of address? c. If so, do you have any records reflecting that notification? d. If you did not notify the North Carolina Bar of a change of address, why not? e. Who paid your North Carolina Bar membership dues in 1990? f. Who paid your North Carolina Bar membership dues in 1991? g. How and why did your membership in the North Carolina Bar "lapse" in 1992?

RESPONSE: My statement on the Questionnaire is technically inaccurate. My membership in the North Carolina State Bar has never "lapsed". I joined the North Carolina State Bar in September 1985. In September 1990 I requested and received a certificate of good standing from the North Carolina State Bar in connection with my application for reciprocal admission to the D.C. Bar. My dues were paid at the North Carolina State Bar through 1992 by Wiley, Rein & Fielding. I requested and was granted

inactive status by the North Carolina State Bar in July 1992, which status I currently retain. According to the membership clerk of the North Carolina State Bar, I am currently an inactive member in good standing. I saw no need, given my legal practice at the time, to maintain active status. I notified the North Carolina State Bar of my change of address in early 1990 shortly after I began to work at Wiley, Rein & Fielding. A letter reflecting this is attached.

18. According to the North Carolina Bar's website in order to become an inactive member of the State Bar you "must complete and file a petition with the membership department of the State Bar entitled 'Petition for Transfer to Inactive Status to the Council of the North Carolina State Bar.' a. When you moved to the Washington area to practice at Wiley, Rein and Fielding in 1989, did you file such a petition? b.If so, could you produce a copy of that petition and any related correspondence between you and the North Carolina Bar? If not, did you ever file such a petition at any other time? c. If you never filed such a petition, why not?

RESPONSE: I did so in June 1992 and a copy of the petition and the response of the North Carolina State Bar are attached.

UTAH BAR MEMBERSHIP

19. You told Committee investigators that you discovered that you had been suspended from the D.C. Bar for non-payment of dues in November 2001 while preparing an application to the Utah Bar. a. Why were you preparing an application to the Utah Bar? b. Were you hoping to be admitted without taking the exam? c. If you didn't believe you had to be a member of the Utah Bar, why apply for admission? d. Did you submit an application for membership in the Utah Bar in 2000, 2001 or 2002? If not, why not?

RESPONSE: From the time I arrived in Utah to begin my duties at the University, I was interested in joining the Utah Bar although I did not believe that I needed to do so to fulfill my responsibilities at the University. I desired to join the Utah Bar so that I could more fully participate in the legal community of my new home. I was in hopes that I could join the Utah Bar without taking the examination. By nature and practice, I prepare intensely for such experiences, and I knew that it would be extremely difficult for me to prepare to take the Bar examination while attempting to carry out my significant responsibilities at the University in a subject matter area with which I had not had much prior experience. I explored whether there were other means by which I could join the Utah Bar. From my predecessor, I learned soon after my arrival at the University that the Utah Bar did not yet have a reciprocity rule. I also learned that Utah did not have a rule to allow in-house counsel to join the Utah Bar without examination. From conversations with my two predecessors, I was aware that each had moved to Utah to work at the University after having practiced law in other jurisdictions, and that each had become a member of the Utah Bar without examination. I asked my immediate predecessor whether he would approach Utah Bar officials to determine whether there was any way that I, too, could join the Utah Bar without taking the examination. He reported to me that he had such conversations, but that it appeared that the only way that I could join the Utah Bar was

through examination. I determined that the best time for me to study for and take the Utah Bar examination was in the summer of 2002. That determination was based on the ebb and flow of my work at the University and personal considerations. In October 2001, I asked my assistant to contact the Utah Bar and learn what steps I needed to take to make application to the take the Bar examination in the summer of 2002. I prepared an application to take the Utah Bar examination in the summer of 2002 including obtaining the requisite references. I did not submit the application, however, because I learned in the March 2002 *Utah Bar Journal* that the Utah Supreme Court was considering a recommendation to adopt a reciprocity rule that might allow me to join the Utah Bar without taking the examination. Around this same time, I placed a telephone call to the then President of the Utah Bar, John Adams, in which he confirmed what I had read in the *Utah Bar Journal*. Mr. Adams reported that the conventional wisdom was that the Court was likely to adopt some form of a reciprocity rule in the near future. Believing that I might soon be eligible to join the Bar without taking the examination, I decided not to take the examination and await the outcome of the Supreme Court's deliberations. In 2002, the Court promulgated a reciprocity rule, which I determined could not help me because it required residence in the prior jurisdiction from which reciprocity would be sought for three of the previous four years. By that time, I had resided in the District of Columbia for only two of the previous four years.

20. You testified at your hearing that when you took the job as General Counsel at BYU, "it was [your] understanding that in Utah in-house counsel need not be licensed in Utah, provided that when legal advice is given, it is done so in close association with active members of the Utah Bar." Would you please state specifically when and how you came to that understanding and include in your answer the specific Utah statutes and Utah Bar rules you consulted at the time, as well as the identity of any persons with whom you spoke about this and specifically what they told you, including without limitation all persons employed by the Utah Bar.

RESPONSE: When I accepted the position as Assistant to the President and General Counsel at the University, it was my understanding that as in-house counsel I did not need to be a member of the local bar. That understanding was formed over the course of the years of practicing law and as I had interacted with in-house counsel in a variety of settings including other Utah in-house counsel who were not members of the Utah Bar.

As best as I can recall, I had discussions about Utah Bar issues in the summer and fall of 2000 with Eugene Bramhall, my predecessor, Hal Visick, Mr. Bramhall's predecessor, and Boyd Black, an associate general counsel of the Church of Jesus Christ of Latter-day Saints (LDS Church). I may have also had discussions during that time period with other attorneys that I cannot now recall. In none of those conversations do I remember hearing or learning anything that contradicted my understanding that I could practice as in-house counsel without being a member of the Utah Bar provided that I closely associated with a Utah-licensed lawyer.

Although I have no specific recollection of doing so, I am confident that I looked at the rules governing admission to the Utah Bar. As mentioned above, I recall a telephone conversation with the then-President of the Utah Bar, John Adams, sometime in the spring

of 2002, to which I refer in my April 10, 2003 letter to him. In that conversation, Mr. Adams confirmed what I had read in the March 2002 *Utah Bar Journal* notice that the Utah Supreme Court was considering a recommendation to adopt a reciprocity rule. I remember telling Mr. Adams during that conversation that, given the assessment that the Court was likely to adopt some form of a reciprocity rule in the near future, I would likely discontinue my plans to take the Bar examination that summer and see if I could take advantage of the reciprocity rule once promulgated. Although Mr. Adams knew that I was Assistant to the President and General Counsel at the University and that I was not a member of the Utah Bar, he did not say anything to me during that conversation that led me to question in any fashion my understanding that I did not need to be a member of the Utah Bar to carry out my responsibilities at the University. Although there was not a question in my mind during that conversation whether I needed to be a member of the Utah Bar to carry out my responsibilities at the University, that conversation, in hindsight, further confirmed my understanding.

21. On your November, 2003 application to the Utah Bar, in answer to Question 52 you answered "no" to the question: "Have you ever been disbarred, suspended, censured, sanctioned, disciplined or otherwise reprimanded or disqualified, whether publicly or privately, as an attorney?" You testified at your hearing that it never occurred to you to include what you called an "administrative action" by the D.C. Bar in answer to that question. In a letter you wrote to the D.C. Bar on November 7, 2001 and produced to the Committee earlier this year, you explained: "I was admitted to the District of Columbia Bar in 1989 and was **suspended** for non-payment of dues. . ." (emphasis added). Your letter to the D.C. Bar indicates that you were well aware that what happened to you was a "suspension" from the D.C. Bar. In completing the Utah Bar application, did you consider advising them of the suspension of your D.C. Bar membership with an explanation that it was for non-payment of dues? If not, why not?

RESPONSE: I did not because when answering the question, the thought did not occur to me that I was being asked information to which the administrative suspension would have been responsive. Rather, I read the question as calling for information whether the applicant had ever been sanctioned for misconduct by a disciplinary authority, which I have never been.

22. You wrote in a letter to Senator Hatch dated June 17, 2004 that, "since I began my service at the University in August 2000, I have been careful to organize my work so that on those occasions when I provide legal advice I do so only in conjunction with the attorneys in my office who are active members of the Utah Bar." But when you wrote to the Utah Bar in April 2003 seeking their advice whether there was a way for you to avoid taking the bar exam, you never mentioned any such careful organization. If you had, in fact, organized your work as you now say from the time you began your job at BYU, why did you not mention that fact in your April 2003 letter to John Adams?

RESPONSE: It is difficult for me to reconstruct my precise thinking at the time I wrote the April 10, 2003 letter to Mr. Adams, but this much I recall, and the text of the letter supports that recollection. At the time I wrote the letter to Mr. Adams, I did not believe that I needed to become a member of the Utah Bar to perform my responsibilities at the

University. I state that in the letter. I felt no need to explain to Mr. Adams, therefore, how I had organized my work to be consistent with my understanding of how the Utah Bar approached in-house counsel.

23 a. Why did you write to John Adams in April 2003?

RESPONSE: I wrote to Mr. Adams to see if there was any way that I could become a member of the Utah Bar without examination. In particular, I was interested in whether there was any interpretation by the Utah Bar of the newly promulgated reciprocity rule that might apply to my circumstance.

b. What motivated you to seek membership in the Utah Bar in 2003?

RESPONSE: Although I never felt that it was necessary to do so to fulfill my duties at the University, I had wanted to join the Utah Bar since my arrival in Utah in 2000, and I had looked for ways to do so short of taking the examination. When it became apparent that under the existing interpretation of the rules, I could only join the Utah Bar by successfully completing the Bar examination, I began to make preparations to take the examination. I first determined that the best time for me to study for and take the Utah Bar examination was in the summer of 2002. That determination was based on the ebb and flow of my work at the University and personal considerations. In the fall of 2001, I began to make preparations to take the Bar examination in the summer of 2002. As described in response to Question 19, I determined not to take the examination at that time only after learning from a notice in the March 2002 *Utah Bar Journal* and a subsequent telephone conversation with then-President of the Utah Bar John Adams that the Utah Supreme Court was likely to promulgate some form of a reciprocity rule in 2002. Ultimately, I could not meet the new rule's requirement of practicing law in the jurisdiction from which I would be seeking reciprocity, the District of Columbia, for three of the last four years. At the time the rule was promulgated in 2002, I had been practicing law in Utah as in-house counsel at the University for two of the last four years. So, in the spring of 2003, I wrote Mr. Adams to see if my reading of the new rule was consistent with the view of the Utah Bar and whether there were any means to join the Utah Bar of which I was unaware other than taking the examination.

c. What was your impression of the possibility of your obtaining a judicial appointment when you wrote Mr. Adams in 2003?

RESPONSE: None.

24. You applied to take the Utah bar exam in February 2004. a. Why did you not follow through and take the exam in February 2004? b. In July 2004? c. Have you applied to take the exam in February 2005?

RESPONSE: I began to study for the February 2004 Bar examination in December 2003. I tried to arrange my work schedule to provide sufficient time for study. After several weeks of attempting to study for the examination and still pay attention to the most

pressing demands of my work, it became apparent to me that I could not do both during that time of the year. Furthermore, I had some reason to believe that President Bush might soon nominate me for a position on the D. C. Circuit. Had my nomination occurred then, as I reasonably thought it might, it would have further limited my ability to prepare for the examination. The President nominated me in May 2004. With the prospect of confirmation hearings and the possibility that I might no longer be practicing law in Utah, I determined that I would not take the Bar exam in July 2004 or February 2005.

25. The explanations your offer in your April 10, 2003 letter to John Adams raise lots of questions. You say variously that you relied on the word of your predecessor (who himself was a member of the Utah Bar while serving as BYU General Counsel), on the word of unnamed people who work for the bar, and on the speculative possibility of changes in the laws on bar admission for your decision not to seek membership in the Utah Bar. a. Other than relying on the word of others and unenacted rule changes, did you ever do anything affirmative to determine what the actual rules governing Utah bar membership were? b. Did you ever research the rules on Utah bar admission yourself? c. Did you ever assign any of the attorneys working for you to do such research?

RESPONSE: Although I have no specific recollection of doing so, I am confident that I looked at the rules governing admission to the Utah Bar to see if there was some way that I could join the Bar other than through examination. As mentioned above, I reviewed the newly promulgated rule on reciprocity. In January 2004, I asked a second-year law student who was working part-time in the Office of the General Counsel at Brigham Young University to research the Utah laws and practice on bar admissions regarding in-house counsel. Though she did not complete her research, she still reported her view that there was no clear guidance on the matter. She recommended, therefore, that the safest course for a Utah corporation would be to ask its in-house lawyers to join the Utah Bar. I didn't question that advice since it was always my intention to join the Utah Bar. Her research did not identify the consistent advice reflected in the views of the current and former officials of the Utah Bar who have written the Committee that in-house counsel in Utah need not join the local bar provided that they are associated with Utah lawyers and make no appearances or filings in court.

d. If you were a judge and a defendant before you indicated that he did not act to comply with the law because he thought and hoped the law would be changing, would that excuse or justify his unlawful conduct?

RESPONSE: No. In fairness, that does not accurately describe my circumstance because I was in compliance with the Bar's guidance, and the Bar has never suggested otherwise. The pending rule change was relevant only because I intended to join the Bar.

26. In your Committee questionnaire you describe your work at BYU as part of your legal career and involving legal activities. You tell us that you practice "higher education law" and you include your work on litigation at BYU as one of the most significant legal activities you have pursued.

On its website, BYU says the General Counsel and Secretary, "is responsible for advising the Administration on all legal matters pertaining to the University," and that:

> All contracts, other legal documents and legal questions pertaining to the University or its personnel shall be presented to the Office of General Counsel or its staff members as directed for approval and/or recommendation. The General Counsel directs and manages all litigation involving the University and decides when to engage outside counsel and the terms and duration of outside counsel's representation. The General Counsel delegates the University's legal work among the lawyers in the office and supervises the work of the office.

In Utah State Bar v. Summerhayes (905 P.2d 867, 869-870 (Utah 1995)), the Utah Supreme Court gave a very broad definition of the practice of law, saying:

> The practice of law, although difficult to define precisely, is generally acknowledged to involve the rendering of services that require the knowledge and application of legal principles to serve the interests of another with his consent. It not only consists of performing services in the courts of justice throughout the various stages of a matter, but in a larger sense involves counseling, advising, and assisting others in connection with their legal rights, duties, and liabilities. . . .

a. In your 2003 application to take the Utah bar exam, you answer "YES" to the following question: "Have you ever given legal advice and/or held yourself out as an attorney, lawyer, or legal counselor in the state of Utah?" Please provide a complete account for when you have given legal advice in the state of Utah.

RESPONSE: As Assistant to the President and General Counsel of the University, I routinely give legal advice to the President of the University, members of the President's Council (the principal policymaking body at the University), and administrators, staff, and employees of the University. I do so only in conjunction with the active members of the Utah Bar with whom I am associated in the Office of the General Counsel or with active members of the Utah Bar who have been retained by the University on a particular matter.

b. Please provide a full account for when you have held yourself out as an attorney, lawyer or legal counselor in the state of Utah.

RESPONSE: Every time I introduce myself as Assistant to the President or General Counsel of the University, I consider that I am "[holding myself] out as an attorney, lawyer or legal counselor in the state of Utah." The only client to whom I have offered my services as an attorney since August 2000 is Brigham Young University, which hired me with knowledge that I was not a member of the Utah Bar, as is made clear in the June 29, 2004 letter to the Committee of Reese Hansen, chair of the search committee which recommended my appointment to the President of the University.

c. Is it your position that you engaged in the practice of law at BYU while relying on there being a "general counsel" exception recognized in Utah?

RESPONSE: I have practiced law at Brigham Young University relying on my understanding, confirmed in the letters to the Committee by current and past officers of the Utah Bar, that I may do so without being a member of the Utah Bar provided that I do so in association with Utah lawyers and make no court appearances or filings.

d. Are you now taking the position that since joining BYU in 2000 you have not engaged in the practice of law, not given legal advice and not held yourself out as an attorney, lawyer or legal counselor?

RESPONSE: No, and I have never taken that position.

e. How do reconcile your various assertions regarding your practicing law in Utah without ever having become a member of the Utah bar?

RESPONSE: As Assistant to the President and General Counsel at Brigham Young University, I have practiced law in a manner that complied with the Utah Bar's guidance and consistent practice.

f. Among your responsibilities as General Counsel of BYU is to advise the President of the University and other University officials on legal matters. Are you representing to the Committee that on every single occasion over the past four years when you have given legal advice to otherwise discussed legal matters with BYU's President, other University officials, or any other person whom you considered to be your client, that you have always had a member of the Utah Bar present for each such discussion?

RESPONSE: No, because it has not been my understanding that it is necessary to have a Utah lawyer present on each of those occasions, but on every legal matter on which I have worked and with regard to all legal advice that I have provided at the University, I have consulted with the other lawyers in my office, each of whom is an active member of the Utah Bar, or with outside counsel who is an active member of the Utah Bar.

27. I think a fair reading of the letter to you dated May 14, 2003, from the General Counsel of the Utah State Bar is that given your position at BYU, you should take the bar exam and become a member of the Utah Bar. She writes that she is "surprised" that you were told to rely on non-existent general counsel exception, and that it is "unfortunate" that you "anticipated relying on [a change in the reciprocity] rule without have an understanding of the restrictions it imposed." That letter told you that you have one "viable option remaining, i.e., admittance by examination and I would encourage you to start preparing your application as soon as possible." Indeed, in the final few sentences, she warns you that until that time you may well have been engaged in the unauthorized practice of law, telling you that practicing without a Utah license may be an issue for you in the character and fitness assessment portion of the admissions process.

You seem to have twisted the letter to serve your interests. Please state specifically how and when you arrived at such an understanding that you never have to become a member of the Utah Bar to practice law in Utah and identify all Utah statutes and Utah Bar rules that support it.

RESPONSE: My responses to Questions 19 and 20 set forth how I arrived at such an understanding. In letters to the Committee, current and former officials of the Utah Bar have confirmed that I was conducting myself appropriately.

28. You testified at your hearing that you had noticed "vicious articles" about your nomination. To what articles were you referring?

RESPONSE: I believe that Chairman Hatch characterized newspaper articles on my nomination as "vicious" during my confirmation hearing. I did not use that term. I have been dismayed, however, by the quality of the reporting on my nomination. It is my understanding that the Committee has received copies of letters to editors from highly respected attorneys complaining about their coverage of this matter.

29. In your Questionnaire response you characterize the work of the Title IX Commission on which you served as producing a report "that contained a number of modest recommendations for ways to improve the enforcement of Title IX. How would you characterize the positions you took and the recommendations that you made to the Commission? Would you call them "modest" or "moderate" or "radical" or "extreme" or what?

RESPONSE: With one exception, I would characterize the positions I took and supported on the Commission as "modest" or "moderate." Three of the four recommendations I sponsored or supported regarding substantial proportionality received the unanimous support of the Commission. The exception would be my proposal to discontinue the use of substantial proportionality out of concern that it has been misused by some who have used it as a quota system. I referred to that proposal with some hyperbole as "radical". I recognized at the time I made the proposal that it would not succeed, but I felt a need to create a record of my concern about what the Commission had heard from many about the way some had misused substantial proportionality.

SUBMISSIONS FOR THE RECORD

LAW OFFICES
Albright, Stoddard, Warnick & Palmer
A PROFESSIONAL CORPORATION
QUAIL PARK I, SUITE D-41
801 SOUTH RANCHO DRIVE
LAS VEGAS, NEVADA 89106

TELEPHONE
(702) 384-7111
FACSIMILE
(702) 384-0605
E-MAIL ADDRESS

G. VERN ALBRIGHT
WILLIAM H. STODDARD
WHITNEY B. WARNICK*
G. MARK ALBRIGHT
WILLIAM B. PALMER II†
GARY G. BRANTON†
D. CHRIS ALBRIGHT
BRADLEY M. BALLARD
TAMI C. BUDD**
C. ADAM BUCK
TONY M. MAY, P.E.††
MICHELLE L. ANDERTON
ROBERT W. CURTIS, J.D.
ANTHONY W. STIRLING, J.D.
BRENT D. QUIST, J.D.

* ALSO LICENSED IN UTAH
† ALSO LICENSED IN CALIFORNIA
** ALSO LICENSED IN ARIZONA
†† ALSO LICENSED IN IOWA

August 18, 2004

SENT VIA FACSIMILE - (202) 228-1698
The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Re: Confirmation of Thomas R. Griffith

Dear Mr. Chairman:

It has been my distinct pleasure over the last thirty (30) years to have been a close friend and associate of Thomas R. Griffith. We worked together as young men and I followed his professional career with interest in Washington, D.C. with a private law firm, as counsel for the U.S. Senate, and finally as General Counsel for Brigham Young University.

Our law firm has worked with Tom on legal matters including a suit brought by an airline against Brigham Young University. I have always found Tom to be one of the most capable and outstanding lawyers that I have had the pleasure to be associated with. Our firm is currently serving as local counsel for dozens of national law firms and we have represented and acted as local counsel in dozens of national class action suits dealing with attorneys from throughout the United States.

It is my personal opinion that Thomas Griffith is one of the finest attorneys in the Country. He is articulate and knowledgeable on legal matters impacting our society and economy. He is a credit to the bar and the Nation. It is my opinion that he would be an excellent Appellate Judge who would uphold the highest standards expected by the legal profession. His honesty and integrity are

beyond reproach. He is a man of dignity. I highly recommend Thomas Griffith as a person who would serve with distinction on the D.C. Circuit Court. He is ethical, hard working, and scholarly in his analysis of complex legal issues. Please do not hesitate to call should your office have any questions regarding the foregoing.

Very truly yours,

ALBRIGHT, STODDARD, WARNICK & ALBRIGHT

G. MARK ALBRIGHT, ESQUIRE

GMA:caa
cc: The Honorable Patrick J. Leahy via facsimile (202) 224-9516
Office of Legal Policy, United States Department of Justice via facsimile (202) 514-5715

ShawPittman LLP

A Limited Liability Partnership Including Professional Corporations

WALTER J. ANDREWS
703 770 7642
walter.andrews@shawpittman.com

June 22, 2004

VIA FACSIMILE

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Mr. Chairman:

I write to inform the Senate Judiciary Committee of my strong support for the judicial nomination of Thomas Griffith to the United States Court of Appeals for the District of Columbia Circuit. I have known Tom for over 15 years and cannot think of anyone who has more integrity and character and is better qualified to sit on this Court. Through our professional association, I am intimately familiar with Tom's litigation experience and abilities.

Tom first worked with me as an associate at Wiley, Rein & Fielding and, later, I had the privilege to be his partner, at the same firm. Tom's approach to the practice of law always invoked the highest ethical and professional standards and he was a role model for those who strived to practice with such a degree of integrity and professionalism.

I have since left Wiley, Rein & Fielding, and am now a partner and Co-Chair of the Litigation Practice, at Shaw Pittman, but I have stayed in touch with and followed Tom's career, and my confidence in and respect for his abilities and strength of character have not changed. I wholeheartedly support his nomination and urge the Committee to do the same

If I can be of any assistance to the Committee in this process, by answering any questions or providing any additional details, please do not hesitate to contact me.

Sincerely yours,

Walter J. Andrews

cc: The Honorable Patrick J. Leahy (via facsimile)
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, DC 20510
202-224-9516

Office of Legal Policy (via facsimile)
United States Department of Justice
202-514-5715

June 27, 2004

via facsimile: 202-228-1698

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Re: Confirmation of Thomas Griffith to the U.S. Court of Appeals for the D.C. Circuit

Dear Mr. Chairman:

I write to support the confirmation of Thomas Griffith as a judge on the D.C. Circuit Court of Appeals. I am a professor of law at the J. Reuben Clark Law School, Brigham Young University, where, among other classes, I teach courses in feminist legal theory and race and race relations. My research centers primarily around gender and citizenship issues. Prior to becoming a law professor, I practiced administrative law with Covington & Burling in Washington, D.C. for three years. In 1992, I graduated *magna cum laude* from Harvard Law School.

I have known Tom in both personal and professional capacities since the summer of 1990, in North Carolina, Washington D.C., and Utah. With more than a decade of interaction in mind and my feminist convictions at heart, I can best describe Tom as fair. His commitment to fairness is exactly what will make him an excellent judge as he patiently and openly listens to the cases and issues presented to him. On numerous occasions, Tom has been instrumental in bringing to the J. Reuben Clark Law School different speakers, including Gregory Craig, former White House Special Counsel during the Clinton impeachment, and most of the still-living individuals who served as Solicitor General of the United States. I have been impressed by the wide range of view points those speakers represent and their unequivocal respect for Tom, despite their differing political views. Tom engages both people and ideas with uncommon fairness and respect.

Tom and I have differing views on some significant political issues, which should make my endorsement of him particularly valuable. Whatever our political differences, I am convinced that Tom will be a judge who carefully engages with the issues before him. I am convinced of that both because of my long interaction with him and because of the people with whom Tom chooses to associate. In his service to our shared religious community, Tom has the opportunity to staff various organizations with individuals of his choosing. He chose a tough-minded feminist to serve with him. He chose a professor with

significant liberal commitments to serve with him. Tom sought out individuals with independent minds and spirits and excellent credentials rather than those who would simply agree with him. He will offer the same equal opportunity as a judge, both in the cases he hears and to the people he hires. When equal opportunity issues have arisen on campus, I have felt completely comfortable calling Tom directly to express my thoughts and concerns. He listens, evaluates, and acts with good judgment.

If I can be of any further assistance in supporting Tom's confirmation to the D.C. Circuit Court of Appeals, I would be happy to do so.

Sincerely,

Kif Augustine-Adams
Professor of Law
J. Reuben Clark Law School
Brigham Young University
Provo, UT 84602
Voice (801) 422-3712
Fax (801) 422-0390

cc: The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, DC 20510
via facsimile: 202-224-9516

Office of Legal Policy
United States Department of Justice
Main Justice Building
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001
via facsimile: 202-514-5715

Utah State Bar

645 South 200 East, Suite 310 • Salt Lake City, Utah 84111-3834
Telephone: 801-531-9077 • 1-800-698-9077 • Fax: 801-531-0660

John C. Baldwin
Executive Director

July 2, 2004

Hon. Orrin G. Hatch
Chairman, Judiciary Committee
United States Senate
224 Dirksen Senate Office Building
Washington, D. C. 20510

Via Fax: 202-228-1698

Dear Senator Hatch,

I am writing to confirm representations made by this office in response to inquiries regarding our policy on the appropriateness of activities engaged in by persons acting as general counsel in the state who are otherwise not licensed to practice law in Utah.

Those who engage in the practice of law in Utah must be licensed by the Utah Supreme Court through the Utah State Bar. There is no general counsel exception rule which allows persons who serve in such positions to practice law without licensure. We are aware of the variety of duties performed by persons who engage in general counsel activities and understand that the duties they regularly perform may or may not actually involve the type of advice or counsel which would constitute what has historically been interpreted as the practice of law.

To those general counsel who cannot avoid circumstances which approach or may cross that line, we have consistently advised that under such circumstances they should directly associate with lawyers who are licensed in the state and on active status. Our policy has also consistently been that those who follow that advice are not engaged in the unauthorized practice of law.

Sincerely,

John C. Baldwin
Executive Director

cc: Debra J. Moore, President
U.S. Department of Justice Office of Legal Policy

ThomasJeffHatch

June 28, 2004

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United State Senate
224 Dirksen Senate Office Building
Washington, D. C. 20510

RE: Thomas Griffith, Esq., Nominee

Dear Mr. Chairman:

It is with a sense of responsibility and honor that this letter supporting the nomination of Thomas Griffith to the United States Court of Appeals for the District of Columbia is written. Having worked in D.C. for approximately ten years, the last four at the Supreme Court of the United States, I realize the importance of this appointment to the D.C. Court of Appeals. It is also with a knowledge of the long hours that justices spend in the decision-making process that I send this recommend.

Mr. Griffith is a man of outstanding moral character who has served in a number of legal positions with dedication and commitment. His service to the United States Senate as legal counsel is commendable. He has filled other professional assignments with equal dedication. My association with Mr. Griffith has been since he came to Brigham Young University as its General Counsel, a little less than four years ago. Since that time, he has been involved in the Human Resources/General Counsel monthly meeting, where issues facing all segments of the BYU campus community are discussed. He has been vocal in his support of Title VII of the Civil Rights Act and of Title IX of the Education Amendments. His standard is to be fair and to be conscientious in the review of all issues. He is committed to resolving positively those issues surrounding discrimination, especially those involving women and minorities.

I appreciate this opportunity to give my support to Mr. Griffith. Should you or any member of the committee desire to contact me for further information, I can be reached at 801-422-6878 or by fax at 202-422-0306. My email address is delora-bertelsen@byu.edu.

Sincerely,

Delora Bertelsen

Delora P. Bertelsen
Managing Director
Employee Relations and Equal Opportunity
Brigham Young University

CC: The Honorable Patrick J. Leahy, Ranking Member of the Committee on the Judiciary
Office of legal Policy

ROBINSON BRADSHAW & HINSON

LOUIS A. BLEDSOE, III
CHARLOTTE OFFICE

DIRECT DIAL: 704.377 8339
DIRECT FAX: 704.373 3939
LBLEDSOE@RBH.COM

June 23, 2004

VIA FACSIMILE AND REGULAR MAIL

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Re: Statement in Support of the Nomination of Thomas B. Griffith to the United States Court of Appeals for the District of Columbia Circuit

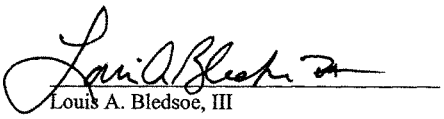
Dear Mr. Chairman:

We write this letter in support of the nomination of Thomas B. Griffith to the United States Court of Appeals for the District of Columbia Circuit. Tom practiced law with our firm, Robinson, Bradshaw & Hinson, P.A., in Charlotte, North Carolina after his graduation from the University of Virginia Law School in 1985 until he joined the law firm of Wiley, Rein & Fielding LLP in Washington, D.C. in December 1989.

While he was with our firm, Tom impressed us all as an outstanding lawyer, a caring and compassionate counselor, and an honest and fair-minded advocate. Tom combines a scholar's mind with a keen understanding of people and institutions. As we served our firm's clients alongside Tom, we observed his ability to express his views with conviction but without insult, and to persuade the courts with force of logic and of reason, ever mindful of his duty as an officer of the Court. An accomplished legal scholar, Tom also knows how to build bridges and find solutions – important traits we believe necessary to distinguished service on the bench.

A dedicated family man and long an active and devoted member of his church, Tom is scrupulously honest, and his character and integrity are beyond reproach. If confirmed, we believe Tom's strong sense of fundamental fairness and his commitment to impartial justice under the law will ensure that he will approach every dispute with an open mind and provide each litigant before him an equal opportunity to be heard. In sum, we firmly believe that Tom will be an outstanding appellate judge and urge the United States Senate to confirm Tom's nomination to the United States Court of Appeals for the District of Columbia Circuit.

Very truly yours,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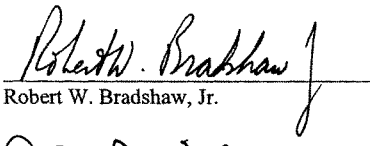
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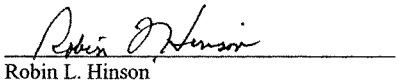
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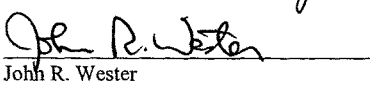
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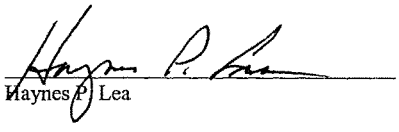
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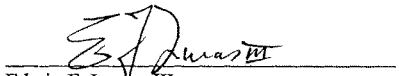
Brent A. Torstrick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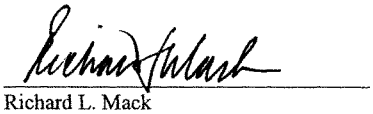
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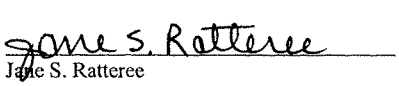
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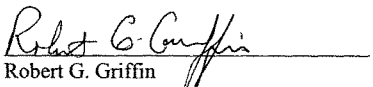
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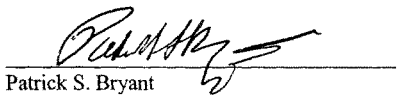
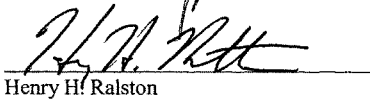
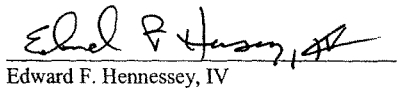
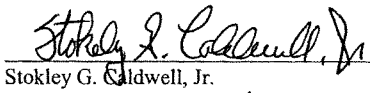

Patrick S. Bryant


Henry H. Ralston


Edward F. Hennessey, IV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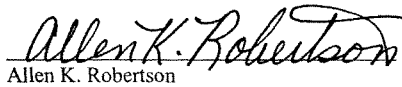
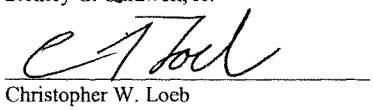

Allen K. Robertson


Christopher W. Loeb

Benjamin W. Baldwin

David C. Wright, III

Robert M. Bryan

Allain C. Andry, IV

Robert W. Fuller

Mark W. Merritt

D. Blaine Sanders

LAB,III:ltm
cc: The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary

Office of Legal Policy
United States Department of Justice

IOWA HAWKEYES

The University of Iowa
Carver-Hawkeye Arena
Iowa City, IA 52242-1020

July 9, 2004

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Mr. Chairman:

I am writing to you to support the nomination of Thomas Griffith to the United States Court of Appeals for the District of Columbia. I had the good fortune to serve with Mr. Griffith on the Commission on Opportunities in Athletics which was appointed by Secretary Paige.

During more than a year of frequent meetings and hearings, I came to admire Mr. Griffith's insight as well as his wisdom. Tom is very committed to equal access, equal opportunity and to all of the principles which are embodied in Title IX. I also found Tom to be highly devoted to ensuring that the intentions of the authors of the law were not misinterpreted.

I believe that Tom's role as the father of five daughters provided the basis for his fervent desire to guarantee fairness, however, he also understands that equitable treatment must extend to all who are affected by the law.

I have found Mr. Griffith to be considerate, thoughtful and open-minded in his review of potential outcomes. Further I believe that Mr. Griffith contributed significantly to the dialog regarding Title IX and was instrumental in shaping the eventual report which forwarded 15 recommendations that were unanimously adopted by the Commission. Mr. Griffith is exceptionally committed to the preservation of the progress which Title IX has afforded and to the advancement of equal opportunity for all Americans.

I would be happy to provide further information if requested by you or your committee.

Sincerely,

Robert A. Bowlsby
Director

RAB/mo

Wiley Rein & Fielding LLP

1776 K STREET NW
WASHINGTON, DC 20006
PHONE 202.719.7000
FAX 202.719.7049

Virginia Office
7925 JONES BRANCH DRIVE
SUITE 6200
McLEAN, VA 22102
PHONE 703.905.2800
FAX 703.905.2820

www.wrf.com

June 22, 2004

Thomas W. Brunner
202.719.7225
tbrunner@wrf.com

VIA FACSIMILE

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Senator Hatch:

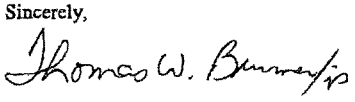
I am writing to endorse in the strongest possible terms the nomination of Thomas B. Griffith, Esquire to the United States Court of Appeals for the District of Columbia Circuit. I worked with Tom Griffith for many years at Wiley, Rein & Fielding as hands-on litigating lawyers working together on large commercial lawsuits. He and I exchanged ideas, edited each others drafts and jointly formulated strategy on numerous cases. I know Tom to be an exceptional lawyer, energetic, dynamic and intelligent in the representation of his client but simultaneously thoughtful, careful and judicious. He is also a caring, engaged member of the larger community and served as a committed member of our law firm -- and of all of the institutions he has ably served. He would be a credit to an already distinguished bench on the DC Circuit.

I offer these views from the perspective of a life-long and politically active Democrat. While Tom and I don't always agree on partisan political issues, I have the highest regard for his integrity and for his open-mindedness. As a judge, he would approach each case without prejudice, with a willingness to be educated about considerations he did not previously understand and a rock-solid commitment to fairness. He is precisely the kind of legitimately Republican, thoroughly distinguished and philosophically mainstream judicial nominee that the country should receive from this White House -- and regrettably in some instances has not.

Please let me know if I can provide any further information.

Thank you for considering my views.

Sincerely,



Thomas W. Brunner

cc: The Honorable Patrick J. Leahy (via facsimile)
Office of Legal Policy (via facsimile)

PARR WADDOUPS BROWN
GEE & LOVELESS A Professional Corporation
Attorneys at Law

ROBERT S. CLARK

June 18, 2004

Via Facsimile Transmission to 202-228-1698

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Re: Thomas B. Griffith

Dear Mr. Chairman:

I write in support of the nomination of Thomas B. Griffith to the United States Circuit Court of Appeals for the District of Columbia. I am well acquainted with Tom both personally and professionally. Our friendship spans more than thirty years. I also have had the pleasure of working with him on a professional basis in his capacity as General Counsel for Brigham Young University. Only rarely does one encounter a person whose overall character and ability are so outstanding.

Tom is ideally suited to join the ranks of this country's finest jurists. He is a person of complete integrity. Intelligence may be common among lawyers considered for such a position, but his brilliance also includes great wisdom and insight. His temperament is friendly, even and good-humored. High principles are at the core of Tom's character, yet he is never prone to dogmatic or narrow-minded ideology. He speaks with reverence about the rule of law, and shows absolute commitment to that principle in his approach to the law.

I add my whole-hearted support to Tom's nomination, and request that the United States Senate confirm his nomination.

Sincerely,

Robert S. Clark

185 South State Street • Suite 1300 • Salt Lake City, Utah 84111-1537
Telephone (801) 532-7840 • Facsimile (801) 532-7750 • Website: www.pwlaw.com
e-mail: rsc@pwlaw.com

PARR WADDOUPS BROWN
GEE & LOVELESS A Professional Corporation
Attorneys at Law

ROBERT S. CLARK

June 24, 2004

Via Facsimile Transmission to 202-228-1698

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Re: Further comments relating to the nomination of Thomas B. Griffith

Dear Mr. Chairman:

This is my second letter in support of the nomination of Thomas B. Griffith. Everything stated in my prior letter, dated June 18, 2004, is still correct. This letter responds to recent media reports relating to Utah bar licensing issues. In particular, I note that the Washington Post carried a story on June 21 that bears the title: "Judicial Nominee Practiced Law Without License in Utah." I believe that accusation is untrue. I do not believe that anything Tom has done constitutes "practicing law without a license." Consistent with statements attributed to the Executive Director of the Utah Bar Association, John Baldwin, I understand that a lawyer need not be admitted to practice in Utah if he or she is merely assisting other lawyers who are admitted to practice in Utah.

From the time Tom accepted the position as Assistant to the President and General Counsel at BYU, he has carefully avoided activities that would create any possible concern regarding admission to the Utah bar. BYU's Office of General Counsel employs several well-qualified individuals who are licensed to practice in Utah. In addition, BYU also relies upon various Utah law firms, including my firm, as outside counsel. Tom's role at the University includes many responsibilities, including administrative and government relations duties. His activities as General Counsel have been tailored to make certain that lawyers actively licensed in Utah are involved in every matter where legal advice must be given or where the practice of law is involved. Never, to my knowledge, has Mr. Griffith been involved in providing legal advice without the direct involvement of Utah lawyers.

I have personal knowledge and experience with many situations where BYU has required legal advice. In every instance I am aware of Tom has fully complied with Utah laws regarding the practice of law. In December, 2000, not long after his arrival in Utah, I was contacted and engaged to represent BYU as outside legal counsel with respect to a specific matter. Other

185 South State Street • Suite 1300 • Salt Lake City, Utah 84111-1537
Telephone (801) 532-7840 • Facsimile (801) 532-7750 • Website: www.pwlaw.com
e-mail: rsc@pwlaw.com

lawyers employed by the University (members of the Utah bar) had prior and continuing involvement in that matter and in each of the other matters in which I have been involved. From that time through the present I have represented BYU on a number of other matters. In every instance a member of BYU's legal staff with Utah bar membership has had primary responsibility to coordinate the matter and provide legal advice to the University. In every matter that I am familiar with Mr. Griffith's role has been primarily administrative, where he has consulted Utah lawyers and, based on the advice of Utah lawyers, has deliberated concerning decisions on those issues.

In every instance where a court appearance was necessary on behalf of BYU, a duly licensed lawyer has appeared. To my knowledge, Tom has never made a court appearance in the State of Utah, or handled any legal matter without the primary involvement of persons admitted to practice in the State of Utah. In every instance, the primary legal work has been done by others. To the best of my knowledge, Tom's activities have always complied with Utah laws regulating the practice of law.

I continue to support this nomination, and again urge that the United States Senate confirm the nomination. If I can provide any further information or assistance in this regard please let me know.

Sincerely,

Robert S. Clark

cc:

Via Facsimile Transmission to 202-224-9516
The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, D.C. 20510

Via Facsimile Transmission to 202-224-9516
Office of Legal Policy
United States Department of Justice

Helms Mulliss & Wicker, PLLC Attorneys at Law
Charlotte Raleigh Wilmington www.hmw.com

HELMS MULLISS WICKER

direct: (704) 343-2196
fax: (704) 343-2300
jack.cobb@hmw.com

201 North Tryon Street
Charlotte, NC 28202
P.O. Box 31247 (28231)
704.343.2000
ƒ704.343.2300

June 18, 2004

VIA FACSIMILE (202-228-1698)
The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Mr. Chairman:

I am writing in support of Thomas D. Griffith's nomination to the United States Court of Appeals for the District of Columbia. By his temperament, acumen, and integrity, Tom is extraordinarily well qualified for the position, and I hope the Committee will act expeditiously on his nomination.

I have known Tom for nearly fifteen years and have at different times been both a colleague and client of his. We first worked together in a Charlotte, North Carolina law firm many years ago. More recently, while he served as the Senate Legal Counsel, I was a frequent client of Tom's as an attorney for the Senate's Permanent Subcommittee on Investigations and then the Governmental Affairs Committee. I turned to Tom and his office for assistance on many issues, including enforcement and interpretation of Committee subpoenas, extraordinary writs to secure the testimony of incarcerated witnesses, and testimonial privileges asserted by witnesses. Tom always provided fair, timely, thoughtful, and good advice. I might add that Tom is a delightful, welcoming friend. In short, Tom is an unusually well-qualified candidate professionally and personally.

Though I am five years now removed from Capitol Hill, I recall that Presidential election years can create problems for the consideration of appellate court nominees. I am delighted, therefore, that the Committee is scheduled to hold a hearing soon on Tom's nomination, and I

urge the Committee to vote Tom's nomination out promptly thereafter. It would be an unfortunate irony if factors unrelated to his many merits held up the nomination of someone who served the Senate so faithfully and well.

Very truly yours,

HELMS MULLISS & WICKER, PLLC

John H. Cobb

cc (via facsimile):

The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, DC 20510
202.224.9516

Office of Legal Policy
United States Department of Justice
Washington, DC
202.514.5715

the global voice o
the legal professio

The Honorable Orrin G Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

June 22, 2004

Dear Mr Chairman

I am an American citizen living in London. I am a registered democrat and view myself as a moderate liberal. As a U.S. lawyer, I maintain a keen interest in our country's judicial and legislative process. As Executive Director of the International Bar Association (IBA), I watch these same developments from the perspective of the international community. Thus, the appointment of a judge to the U.S. Court of Appeals for the District of Columbia Circuit, viewed by many as the most influential federal court, is of immense importance to me.

With this background in mind, I am honored to write this letter in support of the nomination of Thomas Griffith to the DC Circuit Court. I have known Tom for over ten years and worked with him directly when I was Executive Director of the American Bar Association's Central and East European Law Initiative (CEELI) and he served on CEELI's Advisory Board. During my association with Tom while in Washington DC, I came to know him as an extraordinary person in so many ways. Tom's honesty was irreproachable and his sense of fairness when dealing with people was inspiring.

In a political environment defined more by pernicious attacks and acrimonious debate, Tom Griffith always strives for a different approach. Rather than eschew diversity, Tom embraces it. Instead of disregarding opposing views, he listens to them. While others erect walls that reinforce political division, Tom builds bridges that lead to greater understanding and acceptance. He is neither verbose nor belligerent and his self-effacing attitude easily disarms people. These characteristics are immeasurable.

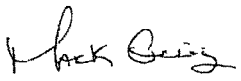
People instinctively trust Tom Griffith as a person and they will respect him as a judge. Citizens of different economic backgrounds, religions, ethnic groups, and political convictions will consent to his judicial authority, not because of the power of his position, but because of his unwavering commitment to what is just and lawful. The duty of a judge is to administer justice according to law, without fear or favor, and without regard to the wishes or policy of the governing majority. Tom Griffith will fervently adhere to this principle. As is natural in a democracy, people will not always agree with Tom's decisions from the bench. I will certainly not always agree with those decisions. However, there will never be a question as to the veracity behind them. I suspect for any judge, this type of acknowledgement by so many would be the pinnacle of his or her judicial career. There is no doubt in my mind that Tom will achieve this milestone.

271 Regent Street, London W1B 2AQ, United Kingdom tel: +44 (0)20 7629 1206 fax: +44 (0)20 7409 0456 www.ibanet.org

Tom Griffith will make an unprecedented contribution to our country as a judge and if moral principle is the foundation of law, then he will serve it well.

Please do not hesitate to contact me if I can provide you with any further insight regarding Tom's nomination.

Sincerely,



Mark S. Ellis
Executive Director
International Bar Association

cc: The Honorable Patrick J. Leahy

Office of Legal Policy, United States Department of Justice

Wiley Rein & Fielding LLP

1776 K STREET NW
WASHINGTON, DC 20006
PHONE 202.719.7000
FAX 202.719.7049

Virginia Office
7925 JONES BRANCH DRIVE
SUITE 6200
McLEAN, VA 22102
PHONE 703.905.2800
FAX 703.905.2820

www.wrf.com

November 15, 2004

Fred F. Fielding
202.719.7320
ffielding@wrf.com

The Honorable Orrin G. Hatch
Chairman, Judiciary Committee
United States Senate
Washington, D.C. 20510

Re: Thomas Griffith

Dear Mr. Chairman:

I understand that during this "lame duck" session your Committee will hold a hearing and consider the nomination of Thomas Griffith as a judge for the U.S. Court of Appeals for the District of Columbia Circuit.

I wish to express my unqualified and enthusiastic support of this nomination.

I have known Mr. Griffith since he became associated with my law firm, Wiley Rein & Fielding, LLP, in December 1989 and later was admitted into the partnership. As his practice primarily involved commercial litigation and white-collar defense work, he and I worked closely together. From March 1995 through April 1999, he was Senate Legal Counsel. In that capacity, Mr. Griffith served with non-partisan distinction, and represented the institutional interests of the United States Senate in litigation, proceedings, interactions with other branches of the federal and state government and an impeachment trial. In April 1999 he returned as a partner to Wiley Rein & Fielding, LLP where he renewed his practice in commercial litigation. Much to my personal and our collective regret, but with our personal blessings and support, he left the firm in August 2000 to accept the appointment as General Counsel of Brigham Young University.

Mr. Chairman, as you know, Tom Griffith is a very special individual and a man possessed of the highest integrity. He is a fine professional who demands of himself the very best of his intellect and energies. His temperament is what we would want of all our jurists.

Our Nation would be the beneficiary of his service on this Bench; I strongly recommend and urge your Committee's consent to his nomination, so that he may so serve.

With my highest regards,

Sincerely,

Fred F. Fielding

wrf Wiley Rein & Fielding LLP

1776 K STREET NW
WASHINGTON, DC 20006
PHONE 202.719.7000
FAX 202.719.7049

Virginia Office
7925 JONES BRANCH DRIVE
SUITE 6200
McLEAN, VA 22102
PHONE 703.905.2800
FAX 703.905.2820

www.wrf.com

June 22, 2004

Laura A. Foggan
202.719.3382
lfoggan@wrf.com

VIA FACSIMILE

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Re: Support for the Confirmation of Thomas B. Griffith

Dear Mr. Chairman:

I write in support of the confirmation of Thomas B. Griffith for an appointment to the United States Court of Appeals for the District of Columbia Circuit. Before accepting his current position as Assistant to the President and General Counsel of Brigham Young University, Tom Griffith was a partner at Wiley, Rein & Fielding LLP.

At Wiley, Rein & Fielding LLP, I worked with Tom Griffith both before he became counsel to the U.S. Senate and when he returned from that post to our firm until he went to Brigham Young University. Not only were Tom and I colleagues at the firm, we worked closely together on a variety of legal matters for clients of the firm. From these experiences, I know that Tom Griffith possesses the competence, as well as the temperament and demeanor that are sought after in a judicial nominee. He is a role model for all of us in his consistently positive outlook and collegial attitude. Accordingly, I am pleased to support his nomination to the U.S. Court of Appeals for the D.C. Circuit.

Very truly yours,

Laura A. Foggan

Laura A. Foggan

cc: The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary

Office of Legal Policy
United States Department of Justice

HOFSTRA UNIVERSITY

SCHOOL OF LAW
FACULTY

June 29, 2004

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington DC 20510

Re: Nomination of Thomas B. Griffith
to the United States Court of Appeals
for the District of Columbia Circuit

Dear Mr. Chairman:

This letter has been prompted by news reports that Thomas B. Griffith is being criticized for having practiced law in the District of Columbia and in Utah without a license. When I read those reports, I telephoned Mr. Griffith to get the facts. Based on those facts, it is my opinion that the criticisms of Mr. Griffith are without merit and are irrelevant to his confirmation as a federal judge.

Briefly, my qualifications to express an opinion on this issue are the following. I have specialized in lawyers' and judges' ethics for almost four decades. During that time, I have been invited to testify before the Senate Committee on the Judiciary several times, and have frequently testified as an expert witness on lawyers' and judges' ethics in federal and state courts. In addition to teaching professional responsibility at Hofstra University Law School, I have lectured on the subject twice a year for the past quarter of a century at Harvard Law School. In 1998, I received the American Bar Association's Michael Franck Award, the highest professionalism award conferred by the ABA, which was given for "outstanding contributions to the field of professional responsibility" and "a

lifetime of original and influential scholarship in the field of lawyers' ethics."

I first met Mr. Griffith in January of this year, at a dinner party with seven other people present. He and I talked for about an hour at dinner, and since then we have exchanged reprints of articles. That is the extent of our acquaintance. Although Mr. Griffith has impressed me as highly intelligent and conscientious, I am limiting this opinion to the ethical issue that has been raised.

In my opinion, the issue relating to Mr. Griffith's practice without a license has no relevance to whether the Senate should confirm his nomination to the D.C. Circuit. First, Mr. Griffith's failure to maintain his bar dues in the District of Columbia showed no disrespect for the rule, but was the result of oversight and the apparent lack of notification by the D.C. Bar. Second, while practicing as general counsel for Brigham Young University, Mr. Griffith made no court appearances and acted at all times in conjunction with one or more members of the Utah bar.

Third, and most important, the requirement of membership in a particular bar is not in itself a rule of *ethical* professional conduct. At worst, the requirement is one that has been characterized as a lawyers' "guild rule" (like minimum fee schedules and restrictions on advertising), designed to restrict competition. At best, on the other hand, the requirement of a license is intended to assure that one who holds himself out to the public as a lawyer is indeed competent to serve as a lawyer. In that regard, there is no question about Mr. Griffith's competence, which is the only *ethical* issue that is material here.

In the District of Columbia, Mr. Griffith had in fact been a member of the bar in good standing; the only problem was a temporary lapse in the payment of dues, which he promptly remedied when he became aware of it. He thereby once again became, and

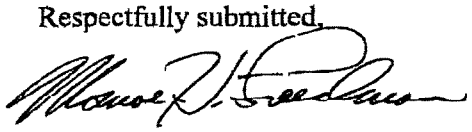
remains, a member of the D.C. bar in good standing. Neither the bar nor anyone else has ever questioned Mr. Griffith's competence to practice law.

In Utah, Mr. Griffith's bar status was known to the University of Utah, the only client for whom he did work as a lawyer. His legal work there was always in association with one or more members of the Utah bar, and he never appeared in court. Neither the bar nor anyone else has ever questioned Mr. Griffith's competence to practice law.

The issue for the Senate, of course, is Mr. Griffith's fitness to serve as a federal appellate judge. Matters of judicial ethics are critical to that determination, and the most important concern of judicial ethics is whether a judge can be impartial. *See* M.H. Freedman & A. Smith, UNDERSTANDING LAWYERS' ETHICS, Chapter 10 ("The Impartial Judge") (3rd ed., 2004). I am aware of nothing concerning Mr. Griffith – and certainly not the bar license issue – that raises any question whatsoever about his ability to render impartial justice to litigants who would appear before him.

I therefore respectfully urge that the Committee and the Senate disregard the irrelevant issue of bar membership, and focus instead on the true merits of Mr. Griffith's qualifications to serve as a federal appellate judge.

Respectfully submitted,



Monroe H. Freedman
Professor of Law

cc: The Honorable Patrick J. Leahy
cc: Office of Legal Policy

HOFSTRA UNIVERSITY

SCHOOL OF LAW
FACULTY

July 14, 2004

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington DC 20510

Re: Nomination of Thomas B. Griffith

Dear Mr. Chairman,

I am enclosing for your information a copy of a letter that Professor Thomas D. Morgan and I sent to the *New York Times* on July 4, 2004, regarding the nomination of Thomas B. Griffith to the United States Court of Appeals for the District of Columbia Circuit.

Sincerely,

Monroe H. Freedman
Professor of Law

cc: The Honorable Patrick J. Leahy
Office of Legal Policy

HOFSTRA UNIVERSITY

SCHOOL OF LAW
FACULTY

July 4, 2004

Editor
The New York Times

Re: Editorial: A Nominee With No License

Thomas Griffith's practice without a license has no relevance to whether the Senate should confirm his nomination to be a judge in the D.C. Circuit. First, Mr. Griffith's temporary lapse in payment of bar dues in the District of Columbia showed no disrespect for the license rule, but was the result of oversight and the apparent lack of notification by the D.C. Bar. Second, as confirmed by five former presidents of the Utah bar, Mr. Griffith was not required to have a license while serving as general counsel for Brigham Young University, because he made no court appearances and acted at all times in conjunction with one or more members of the Utah bar.

Third, and most important, the requirement of membership in a particular bar is not in itself a rule of *ethical* professional conduct, but a lawyers' "guild rule" (like minimum fee schedules and restrictions on advertising), designed to restrict competition. At best, the requirement of a license is intended to assure that one who holds himself out to the public as a lawyer is indeed competent to serve as a lawyer. In that regard, there is no question about Mr. Griffith's competence, which is the only *ethical* issue that is material.

In the District of Columbia, Mr. Griffith had in fact been a member of the bar in good standing; the only problem was a temporary lapse in the payment of dues, which he promptly remedied when he became aware of it. He thereby once again became, and remains, a member of the D.C. bar in good standing. Neither the bar nor anyone else has ever questioned Mr. Griffith's competence.

The issue for the Senate, of course, is Mr. Griffith's fitness to serve as a federal appellate judge. Matters of judicial ethics are critical to that determination, and the most important concern of judicial ethics is whether a judge can be impartial. We are aware of nothing concerning Mr. Griffith – and certainly not the bar license issue – that raises any question whatsoever about his ability to render impartial justice to litigants who would appear before him.

We therefore believe that the Senate should disregard the irrelevant issue of bar membership, and focus instead on the true merits of Mr. Griffith's qualifications to serve as a federal appellate judge.

Sincerely,

Monroe H. Freedman
Professor of Law
(212) 258-3393

Thomas D. Morgan
Oppenheim Professor of Law
George Washington University
Law School

RANDY T. AUSTIN
LORIN C. BARKER
ANTHONY L. BENTLEY, JR.
ROLF H. BERGER
JASON BEUTLER
BRYAN H. BOOTH
BERNE S. BROADBENT•
DIANE D. CARD
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RANDY K. JOHNSON#
RICHARD G. JOHNSON, JR.
VON G. KEETCH
RAEBURN G. KENNARD
MICHAEL F. KRIEGER•
KARINA F. LANDWARD
ROMAINE C. MARSHALL
DANIEL S. MCCONKIE
DAVID M. MCCONKIE
OSCAR W. MCCONKIE

KIRTON & McCONKIE
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
1800 EAGLE GATE TOWER
60 EAST SOUTH TEMPLE
SALT LAKE CITY, UTAH 84111-1004
P.O. BOX 45120
SALT LAKE CITY, UTAH 84145-0120
TELEPHONE (801) 328-3600
TOLL FREE 1 (866) 867-5135
UTAH COUNTY (801) 223-9666
FAX (801) 321-4893
www.kmclaw.com

OSCAR W. MCCONKIE, III
DANIEL J. MCDONALD
LYNN C. MCMURRAY
SAMUEL D. MCVEY
WILLIAM A. MEADERS, JR.
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THOMAS L. MONSON
DENIS R. MORRILL
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MERRILL F. NELSON
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DAVID M. WAHLQUIST
THOMAS D. WALK
ROBERT R. WALLACE
STUART F. WEED
DAVID A. WESTERBY•
TIMOTHY M. WHEELWRIGHT
STEVEN L. WHITEHEAD
LEE A. WRIGHT•
TODD E. ZENGER•
OF COUNSEL:
MICHAEL CHEN#&
COLE DUNHAM
HISAKA YAMAMOTO
• REGISTERED PATENT ATTORNEY
•• LICENSED TO PRACTICE ONLY IN CALIFORNIA
ALSO LICENSED TO PRACTICE IN CALIFORNIA
& ALSO LICENSED TO PRACTICE IN CHINA
WILFORD W. KIRTON (1934-2003)

June 24, 2004

VIA FACSIMILE: 202-228-1698

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Re: Thomas B. Griffith

Dear Mr. Chairman:

I am writing a letter in support of the nomination of Thomas B. Griffith to the DC Court of Appeals. I am currently Chairman of the International Section of Kirton & McConkie, a Salt Lake City law firm. I was previously head of the International Law Department of the Bristol-Myers Squibb Company in New York City.

For the last two years, I have been a close personal associate of Tom Griffith. We have discussed in detail his work at BYU and his nomination to the Bench. I have come to know that Tom is a man of great integrity, incredible intellect and considerable skill.

On behalf of this firm, I strongly recommend confirmation of Tom's nomination. The country will be extremely fortunate to have a Judge of his caliber.

Sincerely,

KIRTON & McCONKIE

Conan P. Grames
Chairman, International Section

CPG/wtc
cc (via fax): The Honorable Patrick J. Leahy
Office of Legal Policy, United States Department of Justice
Thomas B. Griffith

RMR/jsm
cc: The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary

Office of Legal Policy
United States Department of Justice

OFFICE OF THE GENERAL COUNSEL
THOMAS B. GRIFFITH
Assistant to the President
General Counsel

April 10, 2003

John Adams, President
Utah Bar Association
c/o Ray Quinney & Nebeker
36 South State Street, Suite 1400
Salt Lake City, Utah 84111

FAX: 801-532-7543

Dear John:

I need your advice. When I moved to Utah to accept the position of Assistant to the President and General Counsel of Brigham Young University, I was told by my predecessor that the Utah Bar had created what he referred to as a "general counsel exception" and that I didn't need to become a member of the Utah Bar to perform my responsibilities. Subsequent conversations with people in your office as well as discussions with other general counsel around the state confirmed that understanding. I have, however, always been active in bar associations where I have practiced – Washington, D.C. and North Carolina – and I determined that I wanted to be admitted to the Utah Bar. To that end, I prepared to take the bar exam last summer. During the course of preparing my application materials, I learned that the Utah Supreme Court was then actively considering the reciprocity rule that it has only recently adopted. In discussions with the Utah Bar Association (maybe even you – my memory is not entirely accurate on this point), I was advised that the conventional wisdom was that the Court would in fact promulgate a reciprocity rule. For that reason, I suspended my preparations and did not submit my application nor take the bar exam last summer.

I have now read the reciprocity rule recently adopted by the Court and, as far as I can tell, it may not be helpful to me. The requirement that an applicant for admission under the reciprocity rule has been practicing law in the jurisdiction from which he or she is seeking reciprocity for three of the last four years is a bar to me inasmuch as I have been in Utah and not practicing in Washington, D.C. or North Carolina for the last two and one-half years. I am writing you to see if there might be some interpretation of which I am unaware that would allow me to be admitted to the Utah Bar without taking the exam. If there is not, I will prepare to take the bar exam next summer.

I look forward to hearing from you.

Sincerely,

Thomas B. Griffith

kk
Enc.

BRIGHAM YOUNG UNIVERSITY · A-357 ASB · PROVO, UTAH 84602-1333
PHONE: (801) 422-1217 / FAX: (801) 422-0265 · E-MAIL: tom_griffith@byu.edu

THOMAS B. GRIFFITH
A-357 ASB
Brigham Young University
Provo, Utah 84602-1333
(801) 422-1217

EMPLOYMENT

Brigham Young University. Provo, Utah. August 2000-present. Assistant to the President and General Counsel.

Wiley, Rein & Fielding. Washington, D.C., 1989-1995, 1999-2000. Partner in the firm's White Collar Defense, Internet, and Litigation practices. Particular experience with government investigations and complex litigation involving constitutional law and the separation of powers, administrative law, insurance coverage law, and commercial disputes.

Senate Legal Counsel of the United States. Washington, D.C., 1995-1999. As chief legal officer of the United States Senate, represented the Senate, its committees, Members, officers, and employees in litigation relating to their constitutional powers and privileges, and advised committees about their investigatory powers and procedures. Represented institutional interests of the United States Senate in the impeachment trial of President Clinton, the Line Item Veto Act litigation, and the Senate's investigations into the Whitewater, campaign finance, and China missile technology transfer matters.

Robinson, Bradshaw & Hinson. Charlotte, North Carolina, 1985-1989. Practice included commercial, corporate, employment, and First Amendment litigation and corporate and finance transactions.

The Church of Jesus Christ of Latter-day Saints, Church Educational System. Baltimore, Maryland, 1979-1982. Director of Church Educational System programs in three-stake area.

EDUCATION

University of Virginia School of Law, J.D., 1985. Editor, *Virginia Law Review* (1983-85). Author, *Beyond Process: A Substantive Rationale for the Bill of Attainder Clause*, 70 Va.L.Rev. 475 (1984).

Brigham Young University, B.A., 1978. *Summa cum laude*; Valedictorian, College of Humanities; *High honors with distinction*, Honors Program; Edwin S. Hinckley Scholar.

OTHER ACTIVITIES

Member, District of Columbia, North Carolina, and American Bar Associations.

Member, The Secretary's Commission on Opportunity in Athletics, 2002-2003.

General Counsel, Advisory Commission on Electronic Commerce, 1999-2000.

Advisory Board, Central and East European Law Initiative of the American Bar Association, 1995-present.

Ex officio Council Member, Section of Administrative Law and Regulatory Practice of the American Bar Association, 1996-1999.

Vice-Chairman, Federalism and Separation of Powers Practice Group of the Federalist Society, 1996-present.

Stake President, The Church of Jesus Christ of Latter-day Saints, BYU 9th Stake, 2001-present.

PERSONAL

Born, Yokohama, Japan, July 5, 1954. Married, six children.

Utah State Bar

645 South 200 East, Suite 310 • Salt Lake City, Utah 84111-3834
Telephone: 801-531-9077 • 1-800-588-9077 • Fax: 801-531-0660

ohn C. Baldwin
xecutive Director

May 14, 2003

MAY 16 2003

Thomas B. Griffith, Assistant to the President
Office of the General Counsel
A-357 ASB
Brigham Young University
Provo UT 84602-1333

Dear Mr. Griffith:

I have been provided with a copy of your letter dated April 10, 2003 and would like to respond on behalf of the Bar to a few issues which you raised. First, I was somewhat surprised that you were informed by your predecessor at Brigham Young University's Office of General Counsel and perhaps others that Utah had created a "general counsel rule exception". As you are now aware from speaking with Joni Dickson Seko, the Bar's Deputy General Counsel in charge of admissions, Utah does not have and has never had such a rule. Second, although we were optimistic that the Utah Supreme Court would approve the proposed reciprocity rule, there was no guarantee that it would happen or that the rule would emerge in the format we submitted.

It is unfortunate that you anticipated relying on the rule without having an understanding of the restrictions it imposed. However, I know of no other jurisdiction where a reciprocity rule has no conditions or restrictions such as a years of practice requirement. For instance North Carolina's reciprocity rule requires applicants to have been physically practicing law elsewhere for at least four out of the last six preceding years.[1]

Your reading of the new reciprocity rule is accurate and admission to the Utah State Bar requires a minimal number of years of active practice in the reciprocating jurisdiction. As both Ms. Seko and her assistant Christy Abad have informed you, the Rules for Admission do not provide for Bar staff or our governing body, the Board of Bar Commissioners, to make any exceptions to uniform application of the rules. If an applicant seeks a waiver of a rule, it can only be granted by

[1] Other restrictions (not relevant to your inquiry) also apply to those seeking admission without examination, e.g. a scaled score of 133 or more and the Multistate Bar Examination, etc.

the Utah Supreme Court through a petition. This route, however, historically has not proven very fruitful for those seeking waivers[2]. See, e.g., In re Larry Gobelman, 31 P.3d 535 (Utah 2001).

You are fortunate, however, to have a viable option remaining, i.e., admittance by examination and I would encourage you to start preparing your application as soon as possible. The application is an extensive one and it takes time to complete including making arrangement for the necessary supporting documentation. While I know you spoke with Joni about your inability to meet the May 1st deadline, I wanted you to realize that the final (and again, non-waivable) deadline (with a $300 late fee) is December 1st for the February 2004 exam. Earlier deadlines are October 1st (no late fee) and November 1st ($100 late fee).

Finally, while I regret any misunderstandings or assumptions that may have occurred, I also would strongly encourage you to carefully review your current duties as Assistant to the President in the Office of General Counsel. As noted above, we have no general counsel exception rule allowing individuals who serve in such positions to actually practice law without Utah licensure. Towards that end, it would be a prudent course of action to limit your work to those activities which would not constitute the practice of law. If such activities are unavoidable, I strongly urge you to closely associate with someone who is actually licensed here and on active status. Finally, just so you know, all applicants are required to undergo a character and fitness assessment prior to being permitted to take the examination. Practicing law without a Utah license has been an issue for some applicants in the past and has resulted in delayed admission or even denial.

Very truly yours,

Katherine A. Fox
General Counsel

KAF/dlg

cc: John A. Adams
John Baldwin
Joni Dickson Seko

[1] Although I have only been at the Bar for seven years, I am unaware of the Court waiving strict application of admission rules absent one extraordinary time when the Court directed the Bar to create a Foreign Legal Graduate Rule permitting such individuals to apply for admission under limited circumstances not applicable in your case.

DAVIS POLK & WARDWELL

1300 I STREET, N.W.
WASHINGTON, D.C. 20005

1600 EL CAMINO REAL
MENLO PARK, CA 94025

99 GRESHAM STREET
LONDON EC2V 7NG

15, AVENUE MATIGNON
75008 PARIS

450 LEXINGTON AVENUE
NEW YORK, N.Y. 10017
212 450 4000
FAX 212 450 3800

WRITER'S DIRECT
212-450-4239

MESSETURM
60308 FRANKFURT AM MAIN

MARQUÉS DE LA ENSENADA, 2
28004 MADRID ESPAÑA

1-6-1 ROPPONGI
MINATO-KU, TOKYO 106-6033

3A CHATER ROAD
HONG KONG

June 21, 2004

Re: **Thomas B. Griffith**

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

I strongly support the President's nomination of Mr. Thomas B. Griffith to serve as a judge on the United States Court of Appeals for the District of Columbia Circuit. I urge the Judiciary Committee to approve his nomination promptly and to forward his name to the full Senate for a prompt confirmation.

I have known Mr. Griffith for more than twenty years. We met in law school when he was a class behind me at the University of Virginia. He was an outstanding student and served on the law review. As a member of the Managing Board, I had the chance not only to review Mr. Griffith's work, but to hear others talk about him. He was widely regarded by his peers and by members of my class as the most well-rounded and thoughtful, and possibly the brightest, member in his class. We enthusiastically selected him to serve on the Articles Review Board following our graduation.

During our respective careers, I have had many opportunities to see Mr. Griffith in action both professionally and personally. We both practiced in Washington, D.C. for several years. We often discussed the most important legal and judicial issues of our time. He was keenly interested in the health of our nation's government, and in particular our judicial system. Tom's commitment to public service led him to serve as Chief Counsel to the Senate during the late 1990's and to accept his present position as General Counsel of Brigham Young University, even though he could have made a lot more money continuing in private practice, where he had established himself as an outstanding litigator and partner at Wiley Rein & Fielding.

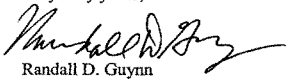
As a judge, Tom will be a careful and thoughtful interpreter of law, without an ounce of judicial activism from either side of the political divide. He is an unusually gifted writer, who will be able to write opinions that are to the point, understandable and useful for the parties to the case and for others that need to rely on them for precedent. He is deeply committed to the rule of law and in particular our Constitution and our system of government, can be expected to interpret laws and not to substitute his views for those of Congress, and will have a strong respect for precedent and honest reasoning. He is also a man of impeccable integrity and high ethics; if I had to entrust my life, liberty, property and ability to pursue happiness to any single person, I would gladly entrust them to Tom Griffith because I have complete confidence in his wisdom, intelligence, goodness and honesty.

I am a partner and head of the Financial Institutions Group at Davis Polk & Wardwell. During my career, I have had the privilege of working closely with some of our nation's best judges. I was a law clerk to Chief Justice Rehnquist, the year before he was confirmed Chief, and clerked for the Honorable J. Clifford Wallace the year before. I worked with Mike Luttig, now a judge on the U.S. Court of Appeals for the Fourth Circuit, when he was an associate in the Washington, D.C. office of Davis Polk. I was a roommate in college with Jay Bybee, who is now a judge on the U.S. Court of Appeals for the Ninth Circuit. As a result, I have had the privilege of closely observing many judges in action both before and after becoming judges. I have understandably developed views about the sort of qualities that make a judge great, and Tom Griffith has all of those qualities.

The District of Columbia Circuit needs another excellent judge. I cannot think of a more highly qualified, better candidate, for that position than Tom Griffith.

I therefore urge the Senate Judiciary Committee to approve his nomination promptly, and forward it to the full Senate for a prompt confirmation.

Very truly yours,



Randall D. Guynn

cc: The Honorable Patrick J. Leahy
Office of Legal Policy, Department of Justice

J. REUBEN CLARK LAW SCHOOL
BRIGHAM YOUNG UNIVERSITY
341 JRCB
PROVO, UTAH 84602-8000
(801) 422-4274 / FAX: (801) 422-0389

June 29, 2004

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

via FAX: 202-228-1698

re: Thomas B. Griffith, nominee to the United States Circuit Court of Appeals for the District of Columbia Circuit

Dear Mr. Chairman:

I understand questions are being raised concerning whether Thomas Griffith may have been in violation of Utah State Bar regulations because he has not been admitted to practice law in Utah while serving as Assistant to the President and General Counsel to Brigham Young University. I would like to share my perspective regarding Mr. Griffith and the Utah Bar. I have been a member of the law faculty at BYU since June 1974 and served as dean of the Law School for the past fifteen years, stepping down as dean on June 1, 2004. I served as chair of the search committee which recommended Mr. Griffith to the President of the University for appointment to his present position. I have been a member of the Utah State Bar continuously since 1972. Throughout the fifteen years of my service as dean of the Law School, I served as an *ex officio* member of the Utah Bar Commission and for many of those years served as a member of the Bar's Committee on Admissions to the Bar.

1. The fact that Mr. Griffith was not a member of the Utah Bar was, of course, well known to all relevant decision makers when he was recommended for and hired as Assistant to the President and General Counsel to BYU.

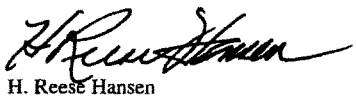
2. Brigham Young University is the largest private University in the United States and maintains its central campus in Provo, Utah. In addition to its Provo campus, the University also has a major campus in Hawaii and smaller campus locations in Washington, DC; London, England; Jerusalem, Israel; and Nauvoo, Illinois. In addition, the University maintains a wide variety of programs in many locations throughout the world. Many of its students are earning credit toward graduation while living temporarily in several states and many foreign countries. The University offers courses of study to students located throughout the world who receive instruction and study materials on-line via the internet. The University maintains an alumni organization which has local chapters in scores of cities in the United States and abroad. Its athletic teams and performance groups regularly perform in many states and in foreign countries. The University's world-wide presence is strikingly similar to a major corporation which conducts business in many states of the United States and throughout the world. A lawyer who is employed as General Counsel to such an entity and who provides legal and other services only to his or her employer is obviously not licensed to practice law in every jurisdiction where the entity has suppliers, customers, or shareholders or where its advertisements may reach. I view BYU's Assistant to the President and General Counsel in exactly the same situation in regard to his bar membership.

3. During the many years I served on the Bar Admissions Committee there were discussions in the Committee about a wide range of related bar admissions issues including, as examples, multi-jurisdictional law practice, admission on motion, reciprocity rules governing bar admission, attorney examinations, and the status of corporate in-house lawyers working in Utah. Some of these issues were brought to recommendation for action by the Bar Commission. The question of license requirements for in-house corporate lawyers was never felt to have a high enough priority to warrant more that brief discussion although it was generally acknowledged that many in-house lawyers located in Utah were not members of the Utah Bar. No recommendation was ever made by the Committee that these lawyers should be prosecuted for unauthorized practice of law. Given the number of important bar membership issues confronting the Committee, it is not at all surprising to me that the corporate counsel "issue" was not viewed as a matter warranting enforcement action. The American Bar Association and many state bar associations, including Utah, are currently developing formal recommendations regarding the above mentioned issues. These recommendations recognize, among other things, the reality that many entities' legal needs reach across state boundaries and national borders. They also acknowledge the existing customary practices of many state bar associations, including Utah, with respect to the licensing requirements of in-house counsel.

4. It is my belief and understanding that Thomas Griffith has been meticulous in adhering to the advice given by Utah Bar Counsel that he be closely associated with Utah lawyers when delivering legal advice. Furthermore, I believe that Mr. Griffith has conducted his professional service to his sole client, Brigham Young University, in a completely appropriate manner in all regards and consistent with common practices of general counsel to large U.S. entities who conduct multi-state and international activities.

Thank you for considering these views. If I can be of additional help, please let me know.

Very truly yours,



H. Reese Hansen

cc: The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, DC 20510
via FAX: 202-224-9516

Office of Legal Policy
United States Department of Justice
via FAX: 202-514-5715

Statement of Chairman Orrin G. Hatch
before the United States Senate Committee on the Judiciary
Hearing on the Nomination of

THOMAS B. GRIFFITH TO BE UNITED STATES JUDGE FOR THE DISTRICT OF COLUMBIA CIRCUIT

Good morning. I am pleased to introduce and welcome to the Committee a member of the Senate family, Thomas B. Griffith. Many of us know Tom from his distinguished service as the Senate Legal Counsel.

As the chief legal officer of the Senate, Tom represented the Senate, its committees, Members, officers and employees in litigation relating to their constitutional powers and privileges. He advised committees about their investigatory powers and procedures, represented the institutional interests of the Senate in the impeachment trial of President Clinton, in the Line Item Veto Act litigation, and in numerous committee investigations.

Despite the difficult and often divisive issues Tom encountered in his role as Senate Legal Counsel, he consistently exercised sound judgment, objectivity, and fairness – qualities that are essential to service as a federal judge. Tom's possession of these qualities earned him the respect and admiration of members on both sides of the aisle.

Along these lines, I'd like to take a couple moments to share just a few excerpts from the many letters we received in support of his nomination.

Richard Wiley of the firm Wiley Rein and Fielding and former law partner of Tom Griffith wrote that "Tom is an outstanding lawyer, with keen judgment, congenial temperament and impeccable personal integrity."

Seth Waxman said of Tom's nomination, "I have known Tom since he was Senate Legal Counsel and I was Solicitor General, and I have the highest regard for his integrity. For my own part, I would stake most everything on his word alone. Litigants would be in good hands with a person of Tom Griffith's character as their judge."

Glen Ivey, former counsel to Senate Democratic Leader Tom Daschle, wrote to this Committee, stating, "I believe Mr. Griffith is an exceptional nominee and would make an excellent judge. Although Mr. Griffith and I have different party affiliations and do not agree on all political matters, I learned during the Senate's Whitewater and Campaign Finance Reform investigations that Mr. Griffith took seriously his oath of office. Even when we were handling sensitive and politically charged issues, he acted in a non-partisan and objective manner. I believe Mr. Griffith has the intellect and the temperament to make an outstanding jurist."

Fred Fielding was the White House Council for President Reagan. Fred helped found the reputable firm, Wiley, Rein and Fielding. Mr. Fielding has described Tom as "a very special individual and a man possessed of the highest integrity. He is a fine professional who demands of himself the very best of his intellect and energies."

According to David Kendall, personal counsel to President and Senator Clinton, "For years Tom has been a leader in the bar and has shown dedication to its principles. The federal bench needs judges like Tom, an excellent lawyer who is supported across the political spectrum. . . . [W]e support Tom and believe he has the intellect and judgment to be an excellent judge."

Harvard Law Professor William Stuntz has known Tom for over twenty years. He wrote, "Few people I know deserve to be called wise; very few deserve to be called both wise and good. Tom is a wise and good man. I believe he will be one of this nation's finest judges."

Tom's nomination is also whole-heartedly supported by a man who is uniquely qualified to say who would be good fit for the U.S. Court of Appeals for the D.C. Circuit. Abner Mikva, a former White House Counsel for President Clinton and a former Chief Judge of that court, wrote, "I have known Tom Griffith in the public sector and in the private sector, and I have never heard a whisper against his integrity or responsibility."

Finally, Senator Dodd of Connecticut noted that Tom handled his difficult responsibilities as Senate Legal Counsel with great confidence and skill ... impressing all who knew him with his knowledge of the law and never succumbing to the temptation to bend the law to partisan ends."

I could go on and on reading comments received by the Judiciary Committee in praise of Tom Griffith. In all my years in the Senate, I have rarely seen such a broad outpouring of support for a nominee from so many distinguished individuals on both sides of the aisle. Tom has been a dedicated public servant and has demonstrated the sound judgment and temperament necessary to be an outstanding federal appellate judge. It is no wonder that the President chose to nominate Tom Griffith for the D.C. Circuit Court of Appeals.

Prior to coming to work in the Senate, Tom also earned an impressive record of achievement. He distinguished himself academically, graduating *summa cum laude* from Brigham Young University and valedictorian of his college. Tom earned his law degree from the University of Virginia, where he was a member of the law review. He also has experience in the private sector, working at the North Carolina law firm of Robinson, Bradshaw and Hinson, and subsequently as a partner in the litigation and government affairs practice areas in the Washington firm of Wiley, Rein and Fielding.

Tom has also given back to the community throughout his legal career. While in private practice, he undertook the significant *pro bono* representation of a death row

inmate, which led to a commutation of the inmate's sentence by the Governor of Virginia. He has also frequently volunteered his time to *pro bono* and public service groups.

Today, Tom serves as Assistant to the President and General Counsel of the largest private university in America, his *alma mater* and mine, Brigham Young University. I understand that some have raised questions about whether he was required to take the Utah Bar exam to serve in his current position as BYU General Counsel. This criticism can be put to rest by a letter I received from five former Utah Bar Presidents. They stated that "a general counsel working in the State of Utah *need not be a member of the Utah bar* provided that when giving legal advice to his or her employer that he or she does so in conjunction with an associated attorney who is an active member of the Utah bar and that said general counsel makes no Utah court appearances and signs no Utah pleadings, motions or briefs." In addition, the ABA has thoroughly examined Mr. Griffith's record and made the determination that he is qualified to serve on the bench.

A prominent Salt Lake City attorney, James Jardine, has described what Mr. Griffith would bring to the court: "He is a skilled, thoughtful, experienced lawyer....He is extraordinarily thoughtful. His intelligence is tempered by his judgment. He engenders trust and confidence among colleagues. His integrity, balance and patience are genuine virtues. He will in every way enhance the Court." Mr. Jardine concluded: "I think in a time of divisiveness, his appointment can be a point of agreement."

I could not agree more. This important court needs this good man to serve, and I hope that the Senate will treat a member of the Senate family with all due respect and move quickly to confirm the President's nominee, Tom Griffith, to this long vacant seat.

Statement of Chairman Orrin G. Hatch
Before the United States Senate Committee on the Judiciary
Hearing on the Nomination of

J. MICHAEL SEABRIGHT TO BE UNITED STATES JUDGE FOR THE DISTRICT OF HAWAII

J. Michael Seabright is our nominee for the District of Hawaii. A distinguished graduate of George Washington University Law School, Mr. Seabright has had an equally distinguished legal career and brings over 20 years of experience to the federal bench. After a short tenure in private practice, he entered the public sector first as an Assistant U.S. Attorney for the District of Colombia, then as an Assistant U.S. Attorney for Hawaii. Since 2001, he has served as the Supervisory Assistant U.S. Attorney in Hawaii. The seat to which he has been nominated has been vacant for nearly five years. I am hopeful that the Senate will move quickly on his nomination, and I am confident that Mr. Seabright will ably fill that long vacant seat.

PAUL CROTTY TO BE UNITED STATES JUDGE FOR THE SOUTHERN DISTRICT OF NEW YORK

Paul Crotty is our other distinguished district nominee, for the Southern District of New York. He has impeccable credentials, having graduated from Cornell Law School with the highest honors and a two-year clerkship with the Honorable Lloyd MacMahon in the Southern District of New York. He was a partner with the renowned firm of Donovan, Leisure, Newton & Irvine. Mr. Crotty has had an illustrious career in the public sector as well. He has served as a New York City Commissioner in two mayoral administrations: first for Democrat, Ed Koch, and later for Republican, Rudy Guiliani. He is currently the group president for New York and Connecticut of Verizon Communications. I am confident he will be a fine addition to the federal bench.

THE OHIO STATE UNIVERSITY

Moritz
College of Law

Dave B.

Steven F. Huefner
Assistant Professor of Law &
Legislation Clinic Director
Direct Line: 614-292-1763
huefner.4@osu.edu

June 21, 2004

BY FACSIMILE AND FIRST CLASS MAIL

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Re: Thomas B. Griffith

Dear Mr. Chairman:

I am writing in wholehearted support of the nomination of Thomas B. Griffith to be a judge on the United States Court of Appeals for the District of Columbia Circuit. I have known Tom since the fall of 1995, when I began working for him as an Assistant Senate Legal Counsel in the Office of Senate Legal Counsel. For the next four years, until Tom completed his service as Senate Legal Counsel in 1999, I worked closely with him on a daily basis. After I departed the Senate in 2000 to begin teaching law at the Ohio State University, I have continued to keep in regular touch with Tom and to follow his work at Brigham Young University. Throughout my association with him, I have found Tom to be a careful, reflective thinker with both a thorough grounding in legal principles and the ability to appreciate the practical impact of those principles. I have every confidence that he will be an outstanding judge and a dedicated public servant.

As you know, the Office of Senate Legal Counsel is a small office, notwithstanding the wide range of matters that it handles. During all of my time working there with Tom, the office consisted of no more than four attorneys. Thus, it was essential to our success that we work well together, both in our professional duties and in our interpersonal relationships. Tom was an effective leader who took the time to understand issues completely. In devoting himself to producing the highest quality product, Tom was both assiduous in his own work and attentive to the views and expertise of his staff. Furthermore, the office was frequently called upon to provide neutral legal advice in connection with politically charged matters. In this potentially challenging context, working with Tom was always a delight. Tom worked especially closely, and amicably, with the Deputy Senate Legal Counsel to get the law right, notwithstanding often contrasting political views.

Tom also was wonderful at setting a collegial tone in the office. Of course, Tom's professionalism in conducting the Senate's legal work contributed to this collegiality. But complementing his legal judgment and professional skill were Tom's characteristic thoughtfulness

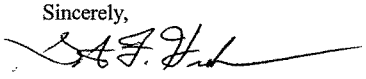
Drinko Hall • 55 W. 12th Avenue • Columbus, OH 43210-1391
Phone 614-292-2631 • Fax 614-292-1383 (Admin. Office)
Fax 614-688-4202 (2d Fl. Fac.) • 614-292-2035 (3d Fl. Fac.) • 614-688-8422 (4th Fl. Fac.)

and warmth. His response to the occasional personal crises of members of the office staff provided additional evidence that Tom is a caring and humble person who leads by example.

Tom is exceptionally well-suited to serve on the bench. In all my interactions with Tom, I have found him to be both wise and temperate. In addition, he is a person of great integrity who strives to treat everyone justly. Having once myself served as a judicial clerk on the D.C. Circuit, I can easily picture Tom as a judge there. Not only will he relate well with his colleagues and help to build the court as an institution, but more importantly he will serve with wisdom and fairness in resolving matters before the court. I hope the Committee on the Judiciary will quickly recommend his confirmation to the full Senate.

Please feel free to contact me if I can provide further information.

Sincerely,



Steven F. Huefner

cc: The Honorable Patrick J. Leahy, Ranking Member, Committee on the Judiciary
Office of Legal Policy, United States Department of Justice

Glenn F. Ivey

June 18, 2004

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Hatch:

I write this letter in support of Thomas B. Griffith's nomination to the United States Court of Appeals for the District of Columbia Circuit. I believe Mr. Griffith is an exceptional nominee and would make an excellent judge.

During Mr. Griffith's tenure as Senate Legal Counsel, I served as Democratic Counsel to the Senate Banking Committee and, subsequently, as Counsel to Senate Democratic Leader Tom Daschle. Although Mr. Griffith and I have different party affiliations and do not agree on all political matters, I learned during the Senate's Whitewater and Campaign Finance Reform investigations that Mr. Griffith took seriously his oath of office. Even when we were handling sensitive and politically charged issues, he acted in a non-partisan and objective manner. He offered excellent legal advice and demonstrated sound legal judgment on a variety of complex matters. I believe that Mr. Griffith has the intellect and the temperament to make an outstanding jurist.

Sincerely,

Glenn F. Ivey

cc: The Honorable Patrick J. Leahy
The Honorable Paul Sarbanes
The Honorable Tom Daschle
Office of Legal Policy

14735 Main Street, Suite 349M, Upper Marlboro, MD 20772
301-952-4295 gfivey@co.pg.md.us

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Mr. Chairman: June 30, 2004

I write today in strong support of President Bush's nomination of Thomas Griffith for the U.S. Circuit Court of Appeals for the District of Columbia. Tom has served the past few years as the general counsel of Brigham Young University, where I am an associate professor of political science. Tom has done a sterling job, and as a liberal Democrat, I have no reservations whatsoever about his suitability for the Court. Tom and I sometimes disagree about what the law should say, but I have never had any question about his devotion to seeing the laws of the land enforced.

On our campus, I have especially appreciated Tom's articulate, sustained, and public defense of those civil rights principles raised through amendment to constitutional status in the 1950s and 1960s. He has also shown real dedication to pluralistic debate – for example, he helped open the way to a very large campus forum on the Iraq War in which several speakers were able to express grave reservations about the Bush Administration's policy prior to the beginning of the war. Tom has also helped our department immensely by inviting prominent speakers from across the entire political spectrum to address our students and faculty. He is open-minded, broadly read, and utterly scrupulous.

I anticipate that many concerns about the licensing issues have since been addressed. Nevertheless, I should add that my own experience fits well with Tom's *modus operandi* as outlined in various newspaper stories. Certainly, the pattern that he referred legal questions to his staff attorneys is entirely consistent: When the BYU Center for the Study of Europe, which I direct, needed the general counsel's office to advise on liability questions related to the development of three new internships in Sarejevo, Belgrade, and Pristina, I turned to Tom for advice and was told to speak to Erik Davis, on Tom's staff, about the specifics. Erik then did the research and relayed an official position to me, which I then relayed to the interested potential internship sponsor in Belgrade.

In short, I am eager to see Tom confirmed for the job to which he has been nominated, and I thank the committee for holding this hearing in a timely manner.

Best wishes,

Wade Jacoby
Director, Center for the Study of Europe
Brigham Young University

cc: The Honorable Patrick J. Leahy; Office of Legal Policy, United States Department of Justice

RAY QUINNEY & NEBEKER

May 28, 2004

SALT LAKE CITY OFFICE
PO Box 45385
Salt Lake City, Utah
84145-0385

36 South State Street
Suite 1400
Salt Lake City, Utah
84111

801 532-1500 tel
801 532-7543 fax
www.rqn.com

PROVO OFFICE
101 North University Ave.
Suite 200
[illegible], Utah
[illegible]-2833
[illegible] 2400 tel
801 375-6379 fax

VIA FACSIMILE
(202) 228-3028

Honorable Charles Schumer
United States Senate
Washington, D.C.

Dear Chuck:

I am writing to add my support and recommendation for the nomination of Tom Griffith to the D.C. Court of Appeals to fill the seat of Judge Pat Wald. Of some historical interest, over 20 years ago, I wrote Orrin Hatch to strongly recommend Pat Wald, a Democrat with whom I worked at the Department of Justice, for the D.C. Circuit. Now I am writing you to recommend Tom, a Republican, for that seat.

The D.C. Circuit, as you know, holds a special status among the courts of our country. Its history is marked by distinguished jurists of both parties. I believe Tom would add to the stature of that court.

You may know Tom from his prior service to the Senate as its Legal Counsel. From all I know, he was respected on both sides of the aisle for his service and his non-partisanship. He is a skilled, thoughtful, experienced lawyer. He is widely respected by people across the political spectrum, as I suspect you know. Prominent and distinguished Democratic lawyers, such as Seth Waxman and David Kendall, support his nomination. I think in a time of divisiveness, his appointment can be a point of agreement.

I have worked with Tom the past few years in his current position as General Counsel of Brigham Young University. I have the highest regard for his abilities as a lawyer and his qualities as a person. He is extraordinarily thoughtful. His intelligence is tempered by his judgment. He engenders trust and confidence among colleagues. His integrity, balance and patience are genuine virtues. He will in every way enhance the Court.

I hope you may be able to support his nomination. I would be glad to provide additional information.

Best wishes to your family and in all that you do.

Very truly yours,

RAY, QUINNEY & NEBEKER

James S. Jardine

cc: Senator Orrin Hatch
(202) 228-1178

768813

UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF THE GENERAL COUNSEL

THE GENERAL COUNSEL

July 2, 2004

The Honorable Orrin G. Hatch
Chairman
Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510-6275

Dear Mr. Chairman:

As the General Counsel of the United States Department of Education and a former counsel to the Judiciary Committee, I write enthusiastically to support the nomination of Thomas Griffith of Utah to be a judge on the United States Circuit Court for the District of Columbia Circuit.

Tom and I served together as members of the Secretary of Education's Commission on Opportunity in Athletics, which was charged by the Secretary to examine the Department of Education's enforcement of Title IX of the Education Amendments of 1972, specifically as it relates to intercollegiate athletics.

It is my interaction with Tom during our service on the Commission that causes me to support his nomination. During the Commission's months of deliberation it was quite clear that every member of the Commission – including Tom – *strongly* supports Title IX and is immensely proud of the progress brought about by its passage. Nevertheless there were strong, and sometimes differing, convictions about the effectiveness of the Department of Education's enforcement efforts over the years. Tom was consistently a member of the Commission who was not only willing but also eager to engage every commissioner's opinions – listening and deliberating in a thoughtful manner, in a sincere effort to bridge disagreements and seek consensus where possible. Tom could often be found during the Commission's breaks and recesses thoughtfully discussing testimony with members of the Commission with whom he had public disagreements. Indeed, I was personally involved in a number of conversations with Tom in which he forcefully but cordially criticized the Department, the entity that I represented on the Commission.

In the end, it is important to emphasize that the Commission produced a report containing 23 recommendations for strengthening the Department's Title IX enforcement efforts, 15 of which were unanimously agreed upon. Tom was a critically important factor in ensuring that the Commission could reach such broad consensus on a generally contentious public policy issue. His erudition, thoughtfulness, courtesy and willingness to constructively engage commissioners with whom he might have some disagreement helped propel the Commission's work toward the constructive consensus it ultimately achieved. These attributes would, of course, serve Tom well as a judge of the United States Circuit Court of Appeals.

Thank you for your attention to this important nomination and I urge the Committee's prompt approval of this most extraordinary public servant.

Very truly yours,

Brian W. Jones

cc: The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, DC 20510

Office of Legal Policy ✓
United States Department of Justice

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Mr. Chairman,

As you consider Mr. Tom Griffith's appointment, I wish to share my opinions developed by serving on the Secretary's Commission on Opportunity in Athletics. It is my belief that the cause of equal opportunity in sport has no better friend.

Throughout the work of our commission, Mr. Griffith demonstrated his strong support for the goals of Title IX and his sense that it comprises a great landmark of civil rights. Everything in the work I observed on that commission convinced me of his genuine concern, and that his frustrations dealt with how the law was too often being applied.

Mr. Griffith's position as a legal advocate for his university provided him with a close view of the realities of Title IX implementation, a benefit he shared with the entire commission. What we all learned in the process was that many of the actions being taken in defense of Title IX were actually serving to undercut its support in the broader community.

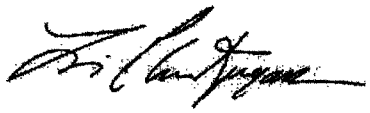
I was constantly amazed by the suggestions made by those whose ends were not met in our conclusions, that anybody on that commission lacked a full hearted support for the intentions of Title IX. It simply was not the case. As a woman and nationally competitive athlete during younger days, I was particularly amused to hear that I was not a supporter of women's participation in sports.

I can remember reading one group's conclusion about Mr. Griffith, wherein they dismissed his opinions as uninformed. An egregiously silly statement. In addition to providing a major university with legal advice on the matter, those of us working with Tom on the commission knew him to have five daughters active in sports, several of whom he had coached in softball himself.

It is not news to you that people will distort another's intentions in order to advance their own, and I am sure it is happening to Tom again now. What I can report to you is that beyond his support for Title IX, which I happened to share, I found Mr. Griffith to be extremely thoughtful, respectful of others' opinions, and possessive of a clear talent for distilling issues to their essence so they could be acted upon. While I am certain that he and I would not share an identical philosophy on all matters, I can certainly think of few people I would trust more than Mr. Griffith with making a well reasoned and balanced judgment.

I appreciate your taking the time to read my thoughts regarding Mr. Griffith's nomination and would gladly respond further to any questions you may have in this regard.

Sincerely,



Lisa Graham Keegan

Cc: The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, DC 20510, and

Office of Legal Policy
United States Department of Just

Wiley Rein & Fielding LLP

1776 K STREET NW
WASHINGTON, DC 20006
PHONE 202.719.7000
FAX 202.719.7049

Virginia Office
7925 JONES BRANCH DRIVE
SUITE 6200
McLEAN, VA 22102
PHONE 703.905.2800
FAX 703.905.2820

www.wrf.com

June 21, 2004

Paul F. Khoury
202.719.7346
pkhoury@wrf.com

VIA FACSIMILE

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Re: Support for the Confirmation of Thomas B. Griffith

Dear Mr. Chairman:

As Chairman of the Pro Bono program at the Washington D.C. firm of Wiley Rein & Fielding LLP and a life-long democrat, I write to offer my wholehearted support for our former law partner Thomas B. Griffith in his confirmation proceedings for a seat on the United States Circuit Court of Appeals for the District of Columbia.

While at the firm, Tom served as co-counsel with me in our representation of Joseph Patrick Payne, Sr., an inmate formerly on death row in Virginia for a crime we became convinced he did not commit. Tom demonstrated a remarkable tenacity and commitment to the case. He played a key role in our presentation of evidence at the state habeas corpus hearing and then throughout the following appellate process. Even after he left the firm to become Senate Legal Counsel, Tom offered invaluable assistance to us as we initiated a campaign seeking clemency for our client from then Virginia Governor George Allen. Ultimately, in November 1996, Governor Allen commuted the sentence three hours before the scheduled execution, citing "a substantial question involving the reliability of evidence presented at or after the trial." I do not think we would have achieved this result without Tom's dedicated help.

Tom demonstrated exemplary legal skills in this and other cases he handled at the firm. What impressed me even more, however, was his passionate pursuit of a just result. I believe that this unfailing desire to ensure that justice is served is the most important quality for an appellate court judge to possess.

I understand that the confirmation process is often subject to partisan politics. As a democrat, I hope for the sake of our judicial system that such matters do not cloud the consideration of a man who would be an outstanding addition to the bench.

I consider it a privilege to have worked with Tom and am honored to support him. I would be delighted to provide any further information you may require.

Sincerely,

Paul F. Khoury

cc: The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington D.C. 20510

Office of Legal Policy
United States Department of Justice

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ATTORNEYS AT LAW

RODNEY H. LAWSON
TEL: 214.855.3064
FAX: 214.758.3764
E-MAIL: RLAWSON@CCSB.COM

June 22, 2004

Via Fax 202/228-1698
The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Re: Mr. Thomas Griffith

Dear Mr. Chairman:

I am writing this letter on behalf of Tom Griffith, who has been nominated by President Bush for the United States Court of Appeals for the D.C. Circuit.

I want to preface my remarks by saying that I am a Democrat. I have supported John Kerry financially and intend to vote for him in November.

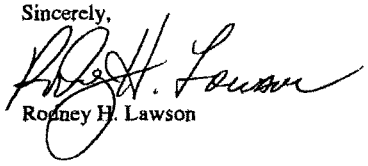
Tom Griffith has been my colleague and friend for approximately ten years. Even though I am confident that we disagree on many judicial issues, I strongly recommend and endorse his nomination. As I suspect you know, Tom is not only very bright and capable, but also very ethical and judicious. By any objective or subjective standard, he has the "right stuff" to sit on the federal bench.

By way of brief background, I first met Tom when he was an associate with the Wiley, Rein & Fielding firm in Washington. I have kept in touch with him and followed his career from his election into the partnership of that fine firm, his work as counsel for the United States Senate, and his current position as general counsel for Brigham Young University.

I cannot think of a more qualified candidate than Tom to break this partisan log jam regarding judicial appointments, which seems to have persisted for at least two administrations. While I am confident that, if appointed to the D.C. Circuit, I will disagree

with some of Tom's rulings, I have no doubt that with respect to every matter before him, he will thoughtfully consider the positions of all sides and render a well-reasoned, fair, and impartial decision.

Sincerely,



Rodney H. Lawson

/ta

cc: The Honorable Patrick J. Leahy *(via fax 202/224-9516)*
Office of Legal Policy *(via fax 202/514-5715)*

U.S. SENATOR PATRICK LEAHY

CONTACT: David Carle, 202-224-3693 VERMONT

Statement Of Senator Patrick Leahy
On The Nomination Of Thomas B. Griffith To The
United States Court Of Appeals For The D.C. Circuit
November 16, 2004

Today we meet in a somewhat unusual hearing during a very brief post-election lame-duck session of Congress to consider a controversial nominee to the second highest court in the country.

I acknowledge it is the Chairman's prerogative to hold this hearing as he chooses. I recall during the lame-duck session in 2002, while I was chairing this Committee, I utilized the time after the election and before adjournment to continue working on judicial nominations of this President. I fulfilled my commitment to Senator Thurmond to proceed on the nomination of Judge Dennis Shedd even though I did not support that nomination. We were also able to report the nomination of Judge Michael McConnell of Utah, as a courtesy to Senator Hatch. With the help of Majority Leader Daschle and Assistant Majority Leader Reid, we were able to proceed to confirm Judge John Rogers to the 6th Circuit, on the strong recommendation of Senator McConnell, as well as Judge Shedd to the 4th Circuit and Judge McConnell to the 10th Circuit. We also confirmed an additional 17 lifetime appointments to the federal district courts around the country.

Working together there remain a number of relatively non-controversial judicial nominations on whom we might be able to make progress this week.

There are, however, serious questions about Thomas Griffith's nomination. They require careful examination and deliberation. Given the results of the election, this President will have the option of renominating Mr. Griffith in January. Perhaps Mr.Griffith will take advantage of this time to utilize his next opportunity to gain admission to the Utah bar.

As was reported this summer in *The Washington Post*, and confirmed through Committee investigation, Mr. Griffith has spent the last four years as the General Counsel to Brigham Young University but has not been licensed to practice law in Utah during that time. I have concerns as a result of examining all of the materials and documents provided to us by Mr. Griffith and the Utah Bar. Practicing law without a license, or as the bars call it, unauthorized practice of law, is not a technicality, like forgetting to pay your bar dues. In some States it is a crime – in Texas it is a third-degree felony. It is a serious dereliction of a lawyer's duty. It is a commonplace of American jurisprudence that no one is above the law. If the American people are to have confidence in our system of laws that must include the lawyers, and beyond question, it must include the judges.

Democratic Senators have established a record of bipartisanship on consensus nominees, and we remain willing to work across the aisle to continue that progress. We have cooperated to a remarkable degree, given the many ideological nominees who have been sent here and the bending, breaking and changing of rules and precedent to force them through the Senate.

This process starts with the President. This President has all too often chosen to divide the American people, the Senate and this Committee with his controversial, ideological and unilateral choices for the independent federal judiciary. In the last few days President Bush has indicated that he plans to work with us in the coming year. I hope that he and his staff are sincere in that pledge and that they truly intend to work with us. We have already reduced judicial vacancies to the lowest number and percentage in decades. With cooperation from the Administration we could achieve even more.

# # # # #

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June 30, 2004

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United State Senate
223 Dirksen Senate Office Building
Washington, DC 20510

Dear Mr. Chairman,

I write to support the nomination of Thomas B. Griffith for the United States Court of Appeal for the District of Columbia Circuit. I have known Mr. Griffith for a little over two years and we met when we served as Commissioners of the "Secretary's Commission on Opportunities in Athletics". As Co-Chair, I had the opportunity to observe Mr. Griffith in a number of different situations and can recommend for the U.S. Court of Appeal without reservation!

The Commission on Opportunities in Athletics had a tough job: to evaluate, after 30 years, Title IX's effectiveness in serving the American public and to see if there were any "consensus" ways the government could adjust its administration to make the law even more beneficial. During our numerous public meetings, I found Mr. Griffith not only a diligent commission member but a staunch supporter of Title IX. While Mr. Griffith and other commission members engaged in spirited public debate regarding the many public policy issues associated with the implementation of equal athletic opportunities for women, Mr. Griffith was consistent in his support of the law.

The report of our commission submitted to the Secretary of Education in February of 2003, strongly supported the law and its general implementation and interpretations that had developed since 1979. In fact, our report led directly to a further "clarification letter" to be issued by the Secretary of Education and Office of Civil Rights in the summer of 2003 which further strengthened the government's commitment to Title IX, equal opportunities for women, and its enforcement policies. It was a victory for all who believe in equal opportunity!

Mr. Griffith served the American people with thoughtfulness, courage and integrity during his time on the commission and I am proud to have shared this duty with him. In fact, I think Mr. Thomas Griffith is exactly the kind of courageous and thoughtful citizen we need serving on the federal bench.

Sincerely,

Ted

Ted Leland
The Jaquish & Kenninger
Director of Athletics

TL/jc

cc: The Honorable Patrick J. Leahy
Office of Legal Policy

CONSTANCE LUNDBERG
Associate Dean / Law Librarian
J. Reuben Clark Law School

BRIGHAM YOUNG UNIVERSITY
277B JRCB
PROVO, UTAH 84602-8000
(801) 422-6385 / FAX: (801) 422-0404

June 25, 2004

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Re: Nomination of Thomas B. Griffith

Dear Mr. Chairman:

Thomas B. Griffith has been nominated for the United States Court of Appeals for the District of Columbia Circuit. From my years in law school to today, I have been impressed that this court is the most critical court in the United States outside the Supreme Court itself. For that reason, appointment of lawyers of Thomas Griffith's caliber is more important here than anywhere except the Supreme Court itself.

I have worked with Mr. Griffith as a lawyer, a teacher, a colleague, and in discussions of government and policy. I know of no more thoughtful and conscientious person. It is not that we are always of the same political views. I am a Democrat and an environmentalist. Our views meet or diverge in ways that always provoke thoughtful discussion and, at least for my part, new insights and growth. I know that his positions are thoughtfully taken. They are not knee jerk or pre-set. His understanding of the Constitution and legal process is extraordinary. His broad education and insights into legal, social, and political history, philosophy and ethics would grace the bench and inform his judgment. He is firm in his political beliefs. He is also a lawyer of unexcelled ability. He understands the difference between law and policy and has a deep understanding of the powers and prerogatives of each of the three branches of government. He is immensely fair and compassionate. The laws and Constitution of the United States could not be in better hands. I urge speedy approval of his nomination.

Sincerely,

Constance L. Lundberg

Constance Lundberg
Associate Dean and Professor of Law
Cc: Honorable Patrick J. Leahy and the Office of Legal Policy

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SALT LAKE CITY, UTAH 84145-0120
TELEPHONE (801) 328-3600
TOLL FREE 1 (866) 867-5135
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STEVEN L. WHITEHEAD
LEE A. WRIGHT
TODD E. ZENGER•

OF COUNSEL:
MICHAEL CHENG
COLE DURHAM
HISAKA YAMAMOTO

• REGISTERED PATENT ATTORNEY
† LICENSED TO PRACTICE ONLY BY CALIFORNIA
# ALSO LICENSED TO PRACTICE IN CALIFORNIA
$ ALSO LICENSED TO PRACTICE IN OHIO

WILFORD W. KIRTON (1925-2000)

June 21, 2004

The Honorable Orrin G. Hatch (Fax) 202-228-1698
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington DC 20510

RE: Support for Confirmation of Thomas Griffin

Dear Mr. Chairman:

As you know, I am the Chairman of the Board of Directors of Kirton & McConkie, one of the major law firms in the Intermountain West. I have practiced law in the State of Utah and in the Federal Courts for more than fifty years.

I am writing to urge the confirmation of Thomas Griffith to the United States Second Circuit Court of Appeals.

I know Thomas Griffith. He is eminently well qualified to be a circuit court justice. He has the proper judicial temperament. He has a broad understanding. He is presently the General Counsel for the largest private university in the United States. You and the Judiciary Committee know of his service to the United States Senate.

Thomas Griffith and I are not of the same political party. I am the former President of the Utah State Senate as a Democrat. He is a Republican. This should not have anything to do with his confirmation. He is a man of reasoned judgment. He has a reputation for fairness and integrity. All who know him respect him.

In my opinion, Thomas Griffin is an ideal candidate for confirmation to such an important post. I think his confirmation is in the best interests of the Federal Judiciary.

Sincerely,

KIRTON & McCONKIE

Oscar W. McConkie

OWM:cb
cc: Honorable Patrick J. Leahy
Office of Legal Policy

June 28. 2004

Via Facsimile (202) 228-1698

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Mr. Chairman:

This letter responds to recent newspaper articles and editorials that have addressed Thomas B. Griffith's service as Assistant to the President and General Counsel at Brigham Young University without being a member of the Utah State Bar. We feel that our service as former Utah Bar Presidents, and as Utah attorneys who frequently work with in-house general counsel, makes us uniquely qualified to comment on the issue.

While there is no formal "general counsel" exception to the requirement that Utah lawyers must be members of the Utah bar, it has been our experience that a general counsel working in the state of Utah need not be a member of the Utah bar provided that when giving legal advice to his or her employer that he or she does so in conjunction with an associated attorney who is an active member of the Utah bar and that said general counsel makes no Utah court appearances and signs no Utah pleadings, motions, or briefs.

We cannot opine on whether Mr. Griffith lived up to this standard, but wanted to provide the Committee with our perspective on this matter.

We would be pleased to answer any questions you or any member of the United States Senate Committee on the Judiciary might have.

Very truly yours,

John A. Adams
John A. Adams

Charles R. Brown
Charles R. Brown

Scott Daniels
Scott Daniels

Randy L. Dryer
Randy L. Dryer

Dennis V. Haslam
Dennis V. Haslam

600625.1

July 2, 2004

Brigham Young University

Women's Intercollegiate Athletics

Elaine Michaelis
Director
228-B Smith Fieldhouse
Provo, UT 84602
Phone 801-422-4225
Fax 801-422-0697
elaine_michaelis@byu.edu

Teresa Peugnet
Assistant Controller
229 Smith Fieldhouse
Provo, UT 84602
Phone 801-422-6165
Fax 801-422-0697
teresa_peugnet@byu.edu

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510
Fax: 202-228-1698

Dear Mr. Chairman:

It is my understanding that President Bush has nominated Thomas Griffith to be a federal appeals court judge. As a colleague of Mr. Griffith at Brigham Young University, I have had the opportunity to work with him and know of his abilities, values and professional expertise. He is a man of integrity, rational thinking and commitment to the principles representative of the individual freedoms and beliefs upon which this country were founded. Tom has excellent interpersonal skills, intelligence, and professional expertise to handle the demands of his profession at any level.

As the Executive Director of Women's Athletics at Brigham Young University, I have been involved with the Title IX Compliance process of the University. As General Counsel at the University, Mr. Griffith has provided legal assistance in this effort. The University is now essentially in compliance with Title IX. The General Counsel has been very helpful to the administration as they provided the support needed to comply with the law.

Tom has been very supportive of our women's athletic program, the coaches, and the athletes. I believe he is committed to women and minorities and to fairness in all aspects of the law. He is a critical thinker and will explore new avenues to meet the needs of the people he serves.

Tom Griffith is a great American and would serve the Country well as a federal appeal court judge. I have no reservation in recommending him for this position. He is qualified and committed to the ideals a judge should possess.

If I can be of any assistance, please contact me.

Sincerely,

Elaine Michaelis
Executive Director
BYU Women's Athletics

cc: The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, DC 20510
Fax: 202-224-9516

Office of Legal Policy
United States Department of Justice
Fax: 202-514-5715

Brigham Young University
Women's Intercollegiate Athletics

Elaine Michaelis
Director
228-B Smith Fieldhouse
Provo, UT 84602
Phone 801-422-4225
Fax 801-422-0697
mail elaine_michaelis@byu.edu

Teresa Peugnet
Assistant Controller
229 Smith Fieldhouse
Provo, UT 84602
Phone 801-422-6165
Fax 801-422-0697
mail teresa_peugnet@byu.edu

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www.law.uchicago.edu

Abner Mikva
Visiting Professor

June 8, 2004

Letters to the Editor,
Washington Post
1150 15 th Street, NW
Washington, DC

Editors,

I cannot believe that your newspaper or anyone else thinks that the inadvertent failure to pay bar dues because no bill was sent is a mark of a lawyer's character. I have known Tom Griffith in the public sector and in the private sector, and I have never heard a whisper against his integrity or responsibility.

As soon as he found out about his error, Mr. Griffith promptly paid all monies due, although he was no longer performing legal services in D.C. Indeed, his Senate service probably did not require membership in the D.C. bar. I joined the D.C. bar after several terms as a Congressman from Illinois, because I thought I might want to end up practicing in Washington. Even though it was some years before I was nominated to the Court of Appeals for this Circuit, I had difficulty explaining why I wanted to join the D.C. bar. Many if not most government employees do not do so.

There may be some good or political reasons for not confirming Mr. Griffith's nomination. Only 5 months remain before the people get to elect a President who might have a majority of the people supporting him. Lifetime judicial appointments by such a President would have a lot more legitimacy. But to use a clerical ommission of such a slight order and try to puff it up into a character flaw does violence to the confirmation process, to treating the canons of ethics seriously, and to common sense.

Abner J. Mikva
Former Chief Judge, U.S. Court of Appeals
for the D.C. Circuit.

THE UNIVERSITY OF CHICAGO
THE LAW SCHOOL

1111 East 60th Street | Chicago, Illinois 60637
phone 773-834-5852 | fax 773-702-2063
e-mail amikva@law.uchicago.edu
www.law.uchicago.edu

Abner Mikva
Visiting Professor

November 11, 2004

The Honorable Patrick Leahy
United States Senate
Washington, D.C. 20510

Dear Pat,

I understand that an effort might be made to confirm Thomas Griffith as a judge for the U.S. Court of Appeals on the D.C. Circuit during the lame duck session. I write as an enthusiastic supporter. As I think you know, I was opposed to any court of appeals judges being confirmed until after the election, since I thought t hat President Bush's previous election did not give him a sufficient mandate to make such lifetime appointments. While you and I would have wished for a different result, I think t hat the people clearly conferred such power last week.

Tom Griffith will be a very good judge. I have worked with him, indirectly while he was Counsel to the Senate, and more directly as a major supporter of C.E.E.L.I., the Central and Eastern European Law Initiative of the American Bar Association. Tom was an active member of C.E.E.L.I.'s Advisory Board, and he and I participated in many projects and missions on behalf of C.E.E.L.I. I have always found Tom to be diligent, thoughtful, and of the greatest integrity. I think that the bar admission problems that have been raised about him do not reflect on his integrity. Rather, they appear to be understandable mistakes and negligence which cannot be raised to the level of ethical misbehavior.

Tom has a good temperament for the bench, is moderate in his views, and worthy of confirmation.

I hope all is well with you and that our paths cross soon.

Kindest Personal Regards,

Abner J. Mikva

THE GEORGE WASHINGTON UNIVERSITY LAW SCHOOL
WASHINGTON DC

June 28, 2004

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Ref: Nomination of Thomas B. Griffith to be a Judge on the
United States Court of Appeals for the D.C. Circuit

Dear Mr. Chairman:

I write in the hope that I might shed some useful light on an issue that I understand has arisen in connection with the nomination of Mr. Griffith. The issue concerns whether or not it is common and understood to be appropriate that the general counsel of a business or educational corporation not be admitted to the bar of the state in which he or she regularly advises the corporation.

My background on this question is based on over thirty years work on the subject of lawyer professional responsibility. I am co-author of a law school casebook, *Professional Responsibilty: Problems and Materials*, first published in 1976 and now in its eighth edition. I was one of the three Reporters for the American Law Institute's *Restatement of the Law, Third, The Law Governing Lawyers*, published in 2000. I was also an Associate Reporter for the American Bar Association's Ethics 2000 Commission that produced major changes to the *Model Rules of Professional Conduct* in 2002 and 2003. This letter is not written on behalf of the ABA or ALI, but I mention my prior work to suggest that what I say in this letter is based on considerable prior experience in the field.

Rules against the unauthorized practice of law are fundamentally based on two concerns. First, courts are properly concerned that the lawyers who appear before them be subject to their disciplinary jurisdiction as well as familiar with the relevant substantive and procedural rules. Second, states have a legitimate consumer protection concern that when a layperson answers an advertisement or knocks on a door marked "lawyer" that the person consulted is not an imposter, i.e., that the person has been tested and certified knowledgeable about the kinds of issues a client is likely to raise.

The practical reality for many if not most corporations is that their general counsels never appear in local courts and certainly do not hold themselves out as available to represent local clients. A general counsel is typically a corporate officer, and to the extent he or she gives legal advice, it is typically as to general legal principles, federal or international law, and the like. When a question of local law or a need to appear in a local court arises, the general counsel contacts a local lawyer.

Local bar officials sometimes have been reluctant to embrace this general understanding and practice, largely because it is not popular with local lawyers, but that does not make it any less true or less appropriate. Indeed, it is based on this widespread understanding that the ALI *Restatement*, referenced above, explained the prevailing law and practice as follows in its Section 3, Comment *f*:

> "*f. Multistate practice by inside legal counsel.* States have permitted practice within the jurisdiction by inside legal counsel for a corporation or similar organization, even if the lawyer is not locally admitted and even if the lawyer's work consists entirely of in-state activities, when all of the lawyer's work is for the employer-client and does not involve appearance in court. Leniency is appropriate because the only concern is with the client-employer, who is presumably in a good position to assess the quality and fitness of the lawyer's work. In the course of such work, the lawyer may deal with outsiders, such as by negotiating with others in settling litigation or directing the activities of lawyers who do enter an appearance for the organization in litigation."

In the same spirit of recognition of the propriety of the practice the *Restatement* described, when the American Bar Association amended its Model Rules of Professional Conduct in 2002, it added Model Rule 5.5(d)(1) that says:

> "(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:
>
> > "(1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission."

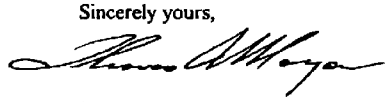
Comment 16 to Model Rule 5.5 explains:

> "Paragraph (d)(1) applies to a lawyer who is employed by a client to provide legal services to the client or its organizational affiliates, i.e., entities that control, are controlled by, or are under common control with the employer. This paragraph does not authorize the provision of personal legal services to the employer's officers or employees. The paragraph applies to in-house corporate lawyers, government lawyers and others who are employed to render legal services to the employer. The lawyer's ability to represent the employer outside the jurisdiction in which the lawyer is licensed generally serves the interests of the employer and does not create an unreasonable risk to the client and others because the employer is well situated to assess the lawyer's qualifications and the quality of the lawyer's work."

It is my understand that, while Utah has not yet adopted the amended ABA Model Rule, the activities of the nominee, Thomas B. Griffith, as Assistant to the President and General Counsel of Brigham Young University fit well within the principles and guidelines that these statements of law, policy and practice represent.

These independent, authoritative, non-partisan statements of the law are fully consistent with my own experience and make clear the propriety of Mr. Griffith's conduct while at Brigham Young. I respectfully urge your Committee not to let any issue about his not being licensed to practice in Utah distract your Committee from prompt and affirmative consideration of his nomination.

Sincerely yours,



Thomas D. Morgan
Oppenheim Professor of Antitrust
and Trade Regulation Law

cc: The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, DC 20510

Office of Legal Policy
United States Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

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655 FIFTEENTH STREET, N.W., SUITE 900
WASHINGTON, D.C. 20005-5701
202.626.5800 FAX: 202.626.0858
WWW.MILLERCHEVALIER.COM

HOMER E. MOYER, JR.
202.626.6020
hmoyer@milchev.com

June 4, 2004

Letters to the Editor
The Washington Post
1150 15th Street, N.W.
Washington, D.C. 20071

The Post reported on Friday that Tom Griffith, a recent nominee to the U.S. Court of Appeals in the District of Columbia, disclosed in his nomination questionnaire that in 2001 he paid DC Bar dues that had been due, but not paid, for the three preceding years. Although we lawyers bear ultimate responsibility for payment of our individual Bar dues, it is important to note, as *The Post* did, that the bar dues of law firm partners are commonly paid by their firms and that Mr. Griffith's firm has acknowledged its administrative error in failing to do so in his case. To his credit, Mr. Griffith promptly corrected the lapse as soon as he discovered it.

Far more important is that Tom Griffith is the type of lawyer and individual who would be an outstanding federal judge. At a time when the judicial appointment process has become lamentably politicized - by both political parties - the nomination of an outstanding lawyer of great integrity who commands respect and support from across the political spectrum should be welcomed. The federal judiciary will be enhanced if, consistent with the views of both Democrats and Republicans who know Tom Griffith, *The Post* endorses and Senate promptly confirms this nomination.

Sincerely,

Homer E. Moyer, Jr.

Home:
[redacted]

cc: The Honorable Orrin G. Hatch
The Honorable Patrick J. Leahy

ERIC C. OLSON
E-MAIL: colson@kmclaw.com

KIRTON & McCONKIE
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
1800 EAGLE GATE TOWER
60 EAST SOUTH TEMPLE
P.O. BOX 45120
SALT LAKE CITY, UTAH 84145-0120
www.kmclaw.com

FAX (801) 321-4893
TELEPHONE (801) 328-3600

June 21, 2004

VIA FAX (202-228-1698) AND U. S. MAIL

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

RE: Nomination of Thomas B. Griffith

Dear Mr. Chairman:

I write in support of the nomination of Thomas B. Griffith to the United States Court of Appeals for the District of Columbia Circuit.

My acquaintance with Tom goes back to my second year in law school (1981) at the University of Virginia in Charlottesville, Virginia, at the time Tom commenced his legal studies at the University. What impressed me most about Tom then, and continues to distinguish him to this day, was his combination of intellect and fundamental humanity. Tom has a mind that grasps the intricacies of the law. At the same time, he has a humility and generosity that keep his understanding of the law always in a real world perspective. He is not a prisoner of any ideology or disposition.

As a person, Tom is accessible, down to earth, optimistic, and dignified. It comes as no surprise to me that he has enjoyed such success, and made such a vital contribution for good, during the course of his legal career. I would particularly note that, in the midst of his professional attainments, he has demonstrated a sensitivity to public service and has lent his name and skills to many worthy causes.

I believe that the United States Senate has a unique opportunity to place on the federal bench one who is not only more than qualified to deal with the legal issues constantly before any

appellate court, but one also qualified by character and disposition to arrive at truly just results for the benefit of all.

Sincerely,

KIRTON & McCONKIE

Eric C. Olson

ECO:bb

cc: The Honorable Patrick J. Leahy – via fax (202-224-9516) and U.S. Mail
Office of Legal Policy – via fax (202-514-5715)

762604

KATHY D. PULLINS
Associate Dean
J. Reuben Clark Law School

BRIGHAM YOUNG UNIVERSITY
342 JRCB
PROVO, UTAH 84602-8000
(801) 422-5576 / FAX: (801) 422-0389

June 28, 2004

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Mr. Chairman:

We are faculty and administrators at the J. Reuben Clark Law School who wish to endorse Thomas B. Griffith's nomination to the D.C. Circuit Court of Appeals. It has been our good fortune to associate frequently with Tom since he became general counsel at Brigham Young University on August 1, 2000.

Tom brought a rare blend of professionalism and personable style to his role. Early in his service, he met with a number of us at the Law School to discuss better ways to serve us as a college and ideas for bringing prominent legal figures to speak to our students. In every interaction, we found him inclusive and respectful of all perspectives; indeed, he has specifically sought our counsel on a number of important issues.

In specific instances of which we have personal knowledge, he has fought for promotion and recognition of women, including ethic minorities. His support has been vigorous even when faced with substantial administrative roadblocks.

Tom has been equally supportive of women students. For example, as soon as he learned that Justice Sandra Day O'Connor had accepted the invitation to be the University's Forum speaker, he contacted us to brainstorm about ways to allow large and small groups of female law students to meet with Justice O'Connor. Using his position as a member of the President's Leadership Council, he was able to facilitate several meetings between Justice O'Connor and women law students.

In our experience, some men in similar roles are not comfortable working with women as colleagues. Tom, on the other hand, seeks out and respects women's opinions. Indeed, if every person in university administration were as evenhanded on gender issues as Tom, Title IX and other ameliorative measures would be moot.

Thank you for the opportunity to allow us to share our high regard for Tom.

Very truly yours,

Constance K. Lundberg
Associate Dean
Professor of Law

Katherine D. Pullins
Associate Dean

Mary H. Hoagland
Assistant Dean

Cc: The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, DC 20510, and

Office of Legal Policy
United States Department of Justice

ROBINSON BRADSHAW & HINSON

RUSSELL M. ROBINSON, II
CHARLOTTE OFFICE

DIRECT DIAL: 704.377.8311
DIRECT FAX: 704.373.3911
RROBINSON@RBH.COM

June 22, 2004

VIA FACSIMILE

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Re: Statement in Support of the Nomination of Thomas B. Griffith to the United States Court of Appeals for the District of Columbia Circuit

Dear Mr. Chairman:

I am writing this letter in support of the nomination of Thomas B. Griffith to the United States Court of Appeals for the District of Columbia Circuit. Tom practiced law with our firm, Robinson, Bradshaw & Hinson, P.A., in Charlotte, North Carolina after his graduation from the University of Virginia Law School in 1985 until he joined the law firm of Wiley, Rein & Fielding LLP in Washington, D.C. in December 1989.

While he was with our firm, I was very impressed with his abilities. He proved to be an outstanding lawyer with a keen intellect. Tom was also a caring and compassionate human being. He was honest and fair-mind; his character and integrity are beyond reproach. Our firm was fortunate to have had him as a partner. Tom was also a dedicated family man and an active and devoted member of his church.

I firmly believe that Tom will be an outstanding appellate judge and urge the United States Senate to confirm his nomination to the United States Court of Appeals for the District of Columbia Circuit.

Very truly yours,

Russell M. Robinson, II

Russell M. Robinson, II

SANDRA ROGERS
International Vice President

1 July 2004

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Mr. Chairman:

I have worked closely with Mr. Thomas B. Griffith for the last three years in my assignment at Brigham Young University. I have mixed feelings about his nomination for a judgeship simply because as fine a judge as I believe he will be, I will miss his leadership and good judgement here at the university.

One of the things I will miss most if Tom is appointed, is his refreshing and empowering philosophy on the role of women at the university and in society in general. He was consistently supportive of my efforts and an advocate for including the wisdom and perspectives of women on critical questions facing the university. In fact, he reminds me very much of my own father who believed nothing was impossible for his daughter.

The experience that exemplifies this attitude for me came as I gave a plenary talk at the Brigham Young University Women's Conference. In the talk I encouraged women to know of their worth for themselves, not as reflected by others. Afterwards, Tom and I had a long discussion about the importance of women, his hopes for his own daughters, and his desire that the contributions of women be valued and supported.

I do not have the legal background to assess Tom's potential as a judge. But I have found him to be fair, consistent, well-prepared, and articulate in every circumstance. And I have seen personally his commitment that all individuals be treated fairly and equally.

Please know of my strongest support for Tom's nomination.

Sincerely,

Sandra Rogers

Sandra Rogers

BRIGHAM YOUNG UNIVERSITY · A-387 ASB · PROVO, UTAH 84602-1335

cc: The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, DC 20510

Office of Legal Policy
United States Department of Justice

JANET S. SCHARMAN
Student Life Vice President

June 29, 2004

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Mr. Chairman,

I have known Tom Griffith since he was appointed to the position of Assistant to the President and General Counsel at Brigham Young University four years ago. As Student Life Vice President at BYU, I have responsibility for our special interest support offices such as the Women's Services and Resources, Multicultural Student Services, International Student Services, and the University Accessibility Center. Frequently, I call upon the help of Tom and the attorneys in his office with respect to those responsibilities.

I have come to rely heavily on Tom's advice and support. He is a very bright, experienced, and reasonable individual whose judgment I trust and greatly value. While we do not see the world from identical perspectives, I know that I will always get balanced feedback from him with important concerns. Where our views are extremely similar are with issues relating to the offices I mentioned above. Tom cares deeply about the rights of women, racial minorities, and those with disabilities.

Tom does not believe in supporting programs that might perpetuate negative stereotypes. He passionately believes in the innate potential of people, and he channels his creativity and energy towards opportunities that will allow all individuals to develop and grow regardless of their race, religion, or gender. He has been a forceful advocate for protecting and expanding opportunities for all.

I am not anxious for Tom to leave the university. At the same time, it would be a great loss for our judicial system if he were not to be considered for a position with the federal court over reasons which are ludicrous to all who know him well.

Thank you for your consideration of these thoughts.

Sincerely yours,

Janet S. Scharman

Janet S. Scharman
Student Life Vice President

cc: The Honorable Patrick J. Leahy
Office of Legal Policy

BRIGHAM YOUNG UNIVERSITY · A-333 ASB · PROVO, UTAH 84602
(801) 422-2387 / FAX: (801) 422-0646

Dear Mr. Chairman:

I am writing to endorse the nomination of Tom Griffith for a seat on the U.S. Circuit Court of Appeals for the District of Columbia. I know Tom in a professional capacity as an associate at Brigham Young University. In addition, he is my neighbor with whom I participate in service to our local community. Highly energetic, forward thinking, and steady in judgment, it is difficult to imagine a better choice for the bench.

I pause to note that I do not give my support lightly. I am a politically active liberal Democrat. I am also an Associate Professor of English Literature and Women's Studies specializing in Renaissance Culture and Gender Theory. My work is intimately bound up with issues of gender and social justice. As a member of the American Association of University Women, as well as the American Association of University Professors, I am constantly mindful of the need for fairness in our institutions. I am an especially fierce advocate of equality for women, and of the civil liberties that lend themselves to the expansion and development of women's opportunities. Over the past decade, I have not hesitated to put my own employment in peril when these issues were in question.

Moreover, I am a former college athlete and continue to be an enthusiastic amateur athlete. I still compete regularly in a variety of sports, and I am a staunch supporter of Title IX.

In short, my support for Tom Griffith is well informed by the very issues some may see as reason to question his nomination. Let me address this directly: Tom is and has been a steadfast and enthusiastic advocate for women. In a local context in which there is tremendous social pressure to gloss over gender issues, he has spoken out repeatedly in support of fairness and justice. His support has been constant and resolute, and his words are founded on deeds of practical service. From the local Center for Women and Children in Crisis, to the LDS Women's Relief Society, Tom has worked tirelessly to sustain women in the most vulnerable of circumstances as well as those who enjoy more extensive networks of social support and affiliation.

I should add that Tom's daughter, Chelsea, was in one of my classes a few years ago. Even if I had not come to know Tom both professionally and personally, even if I had not seen him engaged in local community service of benefit to women, I would have found it tempting to support his nomination on the evidence of his daughter's well-developed awareness of gender issues, her strong and articulate sense of selfhood, and her happy eagerness to have her father meet the person many believed to be a troublesome feminist on campus.

More generally, my support for Tom Griffith's nomination to the bench is based on my confidence in his agile intellect, his profound respect for the humanity of those around him, and the stunning energy he brings to any work at hand. I have sometimes worried that our judges too easily lose sight of the relationship between the generalizations of the law, and the particular circumstances of the people whom the law is meant to serve. I do not have this concern with Tom. He engages people with intensity, listens without distraction, and never divorces even the most typical problem from the particularity of those struggling to solve a meaningful question.

Writing as a feminist, an educator, and an athlete, I wholeheartedly support Tom Griffith's nomination to the bench. A more talented and even-handed candidate would be difficult to find.

If I may be of further service to you in your deliberations, do let me know.

Sincerely,

B. R. Siegfried

cc: The Honorable Patrick J. Leahy / The Office of Legal Policy

AMERICAN UNIVERSITY
WASHINGTON, DC

DEPARTMENT OF JUSTICE, LAW AND SOCIETY

July 1, 2004

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

RE: Nomination of Thomas Griffith for U.S. Court of Appeal for District of Columbia

Dear Mr. Chairman:

I write this letter to support the nomination of Thomas B. Griffith for the United States Court of Appeals in the District of Columbia Circuit.

I met Tom Griffith for the first time when I served with him on the Commission on Opportunity in Athletics appointed by the Secretary of Education. While I was impressed with the dedication and hard work that all of the members of the Commission demonstrated, I found that Tom Griffith often asked the most penetrating questions of the witnesses called to testify about Title IX and made the most careful assessments of the mountains of documents we were asked to read. Tom is a strong supporter of Title IX both in principle and perhaps because he is the father of five daughters, all of whom are active in sports and some of whom he coaches in softball.

Both Tom and I did raise questions during the hearings about the dangers of Title IX being used as an excuse to cut or weaken men's minor sports such as wrestling and gymnastics by several universities, but these questions in no way diminished Tom's support for Title IX and his overall strong commitment to equal opportunity for women and men in high school and collegiate sports. Tom Griffith stated many times during the hearings that Title IX was one of the great landmarks in the Civil Rights legislation that has been passed over the past half century.

Sincerely,

Rita J. Simon
University Professor
Title IX Commissioner

SCHOOL OF PUBLIC AFFAIRS
4400 MASSACHUSETTS AVENUE, NW WASHINGTON, DC 20016-8043 202-885-2948 FAX: 202-885-2907

PENNSTATE

Graham B. Spanier
President

The Pennsylvania State University
201 Old Main
University Park, PA 16802-1589
814-865-7611
814-863-8583 (Fax)
E-mail: gspanier@psu.edu

June 28, 2004

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

RE: Nomination of Thomas Griffith for U.S. Court of Appeal for District of Columbia

Dear Mr. Chairman:

I write to support the nomination of Thomas B. Griffith for the United States Court of Appeal for the District of Columbia Circuit. I am the president of The Pennsylvania State University, former Chancellor of the University of Nebraska-Lincoln, a former Chair of the Division I Board of Directors of the NCAA, and the immediate past chair of the Big 10 Athletic Conference. My principal association with Mr. Griffith is that we served as colleagues on the Commission on Opportunity in Athletics appointed by the Secretary of Education.

I write because of my concern that the Senate Judiciary Committee may have received objections from some individuals who might claim that Mr. Griffith is unsupportive of Title IX, the legislation that mandated equality of educational opportunity for women. I believe that such objections are unfounded and should not be given credence. During the many months that Mr. Griffith served on the Commission charged with reviewing Title IX, I found him to be supportive of the law that established Title IX. He was, in fact, outspoken in his support for the law while thoughtfully reflecting on matters of interpretation and commenting on potential refinements to enforcement protocols.

The Commission was charged to carefully examine opportunities in athletics, and Mr. Griffiths was among the most incisive and analytical Commissioners. He listened to and reviewed the testimony of hundreds of witnesses, was compassionate in reacting to what he heard, kept an open mind about the options before the Commission, and always focused on the law and its interpretations. I was impressed with his service.

During our work, Mr. Griffith stated his belief that Title IX was one of the great landmarks in civil rights in our Nation. I also have heard him speak of his deep personal interest, as the father of five daughters, each one of whom has been active in sports. Moreover, he has had the good fortune of coaching some of his girls. He and I both had some criticisms of the way the Department of Education has at times gone about enforcing Title IX. Virtually all of the Commissioners had suggestions for refinement after hearing testimony from individuals and schools.

It is my opinion that Mr. Griffiths has served his country with integrity during his career, including his service on the Commission. I saw in him the qualities one would desire in a federal judge.

Sincerely,

Graham B. Spanier

Copies:

The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, DC 20510, and

Office of Legal Policy
United States Department of Justice

UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF POSTSECONDARY EDUCATION

THE ASSISTANT SECRETARY

July 12, 2004

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

RE: Nomination of Thomas Griffith for U.S. Court of Appeals for the District of Columbia Circuit

Dear Mr. Chairman:

I write to support the nomination of Thomas B. Griffith for the United States Court of Appeals for the District of Columbia Circuit. I consider Tom a friend and a colleague. We share a common interest in increasing opportunities for all our citizens, young and old alike, to pursue postsecondary education.

During 2002, as an ex officio member of the Commission on Opportunity in Athletics established by Secretary of Education Rod Paige, I had the privilege of working with Tom and other members of the Commission as we studied Title IX and ways to make it better. Throughout the six months that the Commission met and heard testimony about Title IX and its impact on the lives of individual student athletes, I always found Tom to be outspoken in his support for the law. He provided thoughtful and reasoned comments with respect to differing interpretations of the law and its enforcement by the Department of Education.

Tom's deep personal interest as the father of five daughters, each one of whom has been active in sports, was clear throughout the Commission's proceedings. He shared his criticisms of the way the Department of Education has, at times, gone about enforcing Title IX in a professional manner and was always willing to hear other points of view. Tom, and virtually all of the other Commissioners, had suggestions for improvements and refinements to the Department's enforcement practices after hearing testimony from individuals and schools.

Tom was a valued member of the Commission for both his candor and his passion for increasing athletic opportunities for women and men. Tom has all the qualities one would desire in a federal judge.

Sincerely,

Sally L. Stroup

Copies:

The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, DC 20510, and

Office of Legal Policy
United States Department of Justice

HARVARD LAW SCHOOL
CAMBRIDGE · MASSACHUSETTS · 02138

WILLIAM J. STUNTZ
Professor of Law
617-496-0555
stuntz@law.harvard.edu

June 21, 2004

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Mr. Chairman:

I write in support of Tom Griffith, who has been nominated for a seat on the D.C. Circuit. I've known Tom for more than twenty years; he and I went to law school together at the University of Virginia, and we've kept in touch ever since. I believe I know him well. Few people I know deserve to be called wise; *very* few deserve to be called both wise and good. Tom is a wise and good man. I believe he will be one of this nation's finest judges.

There are two sets of characteristics to look for in a prospective appellate judge. The first is intellectual horsepower. Federal courts of appeal handle problems of incredible range and complexity; judges must be able to analyze and break down those problems quickly and correctly. Tom is more than qualified on that score. He was one of the smartest people I knew during my time at Virginia, and he is more than just smart — he is genuinely *thoughtful*. He understands that he doesn't understand everything (a rare characteristic among smart lawyers, in my experience). He also understands that law is not an abstract mind game, that real lives are at stake in legal decisions. And that a just legal system cannot decide cases by running them through some partisan or ideological grid. Those understandings lie at the heart of wisdom. Few people have it. Tom does.

The second set of traits goes to character. This is where Tom really shines. When we were in law school together, I thought Tom was the finest human being I knew, and his decency and integrity have only grown since then. He is unfailingly modest and moderate, decent and empathetic. He does not have an arrogant bone in his body. (There are not very many talented

lawyers about whom one could write that last sentence.) His integrity and selflessness are evident to all who know him.

I know a great many talented men and women in America's legal profession; I've taught more than three thousand students at three top law schools, and I have friends scattered across the country in various kinds of law practice and in academics. I do not know *anyone* whom I would rather see on the federal bench than Tom Griffith. If he is confirmed, he will not just be a good judge. He'll be a great one. This is one vote of which you will always be proud.

Sincerely yours,

William J. Stuntz

cc: The Honorable Patrick J. Leahy
Office of Legal Policy

United Nations
Nations Unies

International Criminal Tribunal for the former Yugoslavia

Tribunal Pénal International pour l'ex-Yougoslavie

22 June 2004

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

VIA FACSIMILE 202-228-1698

Dear Mr. Chairman:

I am very pleased to recommend Mr. Thomas C. Griffith for appointment to the United States District of Columbia Court of Appeals. Mr. Griffith is a lawyer of the highest character and legal ability and would make an excellent addition to the Court.

I have had the good fortune of working with Mr. Griffith for a number of years during my tenure as the Executive Director of the American Bar Association Central European and Eurasian Law Initiative (CEELI). In addition to serving on the CEELI Advisory Board, Mr. Griffith traveled with me to a number of countries on behalf of the CEELI program, including Croatia, Serbia, Russia, Czech Republic and several other countries, participating in our work training of judges and lawyers in these countries. He showed considerable legal skill and knowledge during these visits and was very helpful to us in explaining legal concepts to these legal professionals as well as demonstrating a very fair-minded approach to the law. He has been particularly active in working to establish a regional judicial training institute in Prague (the CEELI Institute) and without his tireless efforts and commitment, this important project would not gotten off the ground.

I have also had the pleasure of attending many meetings with Mr. Griffith with Congressional leaders in both the United States Senate and House of Representatives, including members of both major political parties. He is clearly highly respected by Members of Congress and their staff, no doubt due to his manifest integrity as well as his outstanding abilities as a lawyer. I would also note that he and I also started our legal practices in the same city (Charlotte, North Carolina) and while I did not know him personally at that time, I can attest that he enjoyed a very high reputation in the legal profession there as well.

As the Deputy Registrar of the International Criminal Tribunal for the former Yugoslavia in The Hague, Netherlands and in my previous work as the Chief of Staff to the Tribunal's President, as well as my twenty-plus years of experience as a practicing lawyer, international legal academic, UN official and in non-governmental legal world, I have dealt with many lawyers and judges from throughout the United States and the world, including all the major legal systems. Mr. Griffith is without question one of the best professionals with whom I have worked, given not only his capability as a lawyer but his integrity as a person. He also shows an open-minded approach to legal and other issues, and I have discussed many issues with him, a number of which we come at somewhat different angles, and his intellectual honesty and integrity are outstanding.

I am thus pleased to highly recommend Mr. Griffith. He would make an outstanding judge for the Court. His strong legal abilities, high character and integrity and strong commitment to the Constitution would serve the Court extremely well.

Sincerely,

David Tolbert
Deputy Registrar

cc: The Honorable Patrick J. Leahy, Ranking Member, Committee on the Judiciary
Office of Legal Policy, United States Department of Justice

LAW OFFICES
WILLIAMS & CONNOLLY LLP
725 TWELFTH STREET, N.W.
WASHINGTON, D. C. 20005-5901
(202) 434-5000

EDWARD BENNETT WILLIAMS (1920-1988)
PAUL R. CONNOLLY (1922-1978)

STEVEN M. UMIN
(202) 434-5047
FAX (202) 434-5099
sumin@wc.com

June 14, 2004

United States Senate
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Hatch and Senator Leahy:

We write in support of the nomination of Thomas B. Griffith to the United States Court of Appeals for the D.C. Circuit. We have worked with Tom in a variety of contexts and can attest to his outstanding character and legal ability.

Recently, Tom was unfairly portrayed in the *Washington Post* for late payment of his D.C. Bar dues. The *Post* improperly equated Tom's situation to "disciplinary suspension," a rare sanction imposed only when a lawyer knowingly refuses to pay bar dues. It was nothing of the kind. When advised of the problem, Tom promptly paid his dues in full. Tom is an outstanding attorney who takes his responsibilities as a member of the bar seriously. As the attached Letters to the Editor demonstrate, Tom is supported by many people on this issue.

In 1998, while he was serving as the United States Senate Legal Counsel, Tom did not receive his D.C. Bar invoice. Indeed, the D.C. Bar has confirmed that there is no record of a standard "certified receipt," that would have been returned in September 1998 had such a reminder letter been sent to Tom. After 1998, the D.C. Bar sent no statements either to Tom or to his law firm regarding any late bar dues. When Tom returned to Wiley Rein & Fielding in 1999 for sixteen months, he assumed that the firm was paying his bar fees, as it did for all other attorneys.

Each year, the D.C. bar sends its members a reminder to renew their bar memberships. In this process there is always potential for inadvertent oversight. As a result, D.C. Bar counsel notes that every year over 3,000 D.C. lawyers (and a number of sitting judges) are "administratively suspended" for late payment of dues. This is what happened to Tom. By immediately paying his dues when he became aware of the oversight, Tom took the proper course of action. According to the D.C. Bar counsel, such an oversight is entirely common and of no major concern, particularly where no

reminder notice is sent out. In fact, Tom was promptly reinstated after he paid his accrued dues, without any question raised about possible sanctions.

Those whose names appear below are all experienced lawyers and active in the organized bar. In our opinion, this matter does not raise a question concerning Tom's fitness to serve on the bench. Each of us has had extensive contact with Tom and believes him to be extremely well qualified for service on the D.C. Circuit. For years Tom has been a leader in the bar and has shown dedication to its principles. The federal bench needs people like him, one of the best lawyers the bar has to offer. We urge the Senate to confirm his nomination.

Sincerely,

Steven M. Umin
Williams & Connolly LLP
725 Twelfth St., N.W.
Washington, DC 20005
202-434-5047 (office); 202-434-5029 (fax); sumin@wc.com

R. William "Bill" Ide
McKenna Long & Aldridge, LLP
(President of the ABA, 1993-94)
303 Peachtree Street, NE, Suite 5300
Atlanta, GA 30308
404-527-4650 (office); 404-892-4667 (home)
404-527-4198 (fax); bide@mckennalong.com

Talbot "Sandy" D'Alemberte
President Emeritus
(President of the ABA, 1991-92)
Florida State University
Tallahassee, FL 32306
850-644-0800 (office); dalember@mailer.fsu.edu

Dean Michael K. Young
George Washington University Law School
2000 H Street, N.W.
Washington, DC 20052
202-994-6288 (office); 703-532-9046 (home)
202-994-5157 (fax); myoung@law.gwu.edu

Homer E. Moyer, Jr.
Miller & Chevalier Chartered
655 15th Street, NW, Suite 900
Washington, DC 20005
202-626-6020 (office); 301-951-9595 (home)
202-628-0858 (fax); hmoyer@milchev.com

Professor Stephen A. Saltzburg
George Washington University Law School
2000 H Street, N.W.
Washington, DC 20052
202-994-7089 (office); 202-797-9028 (home)
202-994-9811 (fax); ssaltz@law.gwu.edu

Professor Thomas D. Morgan
George Washington University Law School
2000 H Street, N.W.
Washington, DC 20052
202-994-9020 (office); 703-312-0001 (home)
202-994-9811 (fax); tmorgan@law.gwu.edu

Jim Slattery
Wiley, Rein & Fielding
1776 K Street NW
Washington, DC 20006
202-719-7264 (office); 202-255-3102 (cell)
202-719-7049 (fax); jslattery@wrf.com

Kirk L. Jowers
Caplin & Drysdale
One Thomas Circle, N.W.
Washington, DC 20005
202-862-5057 (office); 202-429-3301 (fax); klj@capdale.com

Trevor Potter
Caplin & Drysdale
One Thomas Circle, N.W.
Washington, DC 20005
202-862-5092 (office); 202-429-3301 (fax); tp@capdale.com

Gene C. Schaerr
Sidley Austin Brown & Wood LLP
1501 K Street, N.W.
Washington, DC 20005
202-736-8141 (office); 301-963-4122 (home)
202-736-8711 (fax); gschaerr@sidley.com

Jay T. Jorgensen
Sidley Austin Brown & Wood LLP
1501 K Street, N.W.
Washington, DC 20005
202-736-8020 (office); 703-255-4818 (home)
202-736-8711 (fax); jjorgensen@sidley.com

Ryan D. Nelson
Sidley Austin Brown & Wood LLP
1501 K Street, N.W.
Washington, DC 20005
202-736-8055 (office); 703-751-3198 (home)
202-736-8711 (fax); rnelson@sidley.com

June 11, 2004

BY E-MAIL (letters@washpost.com)

Editor
Letter to the Editor
The Washington Post
1150 15th Street, N.W.
Washington, DC 20071

Dear Editor:

We write in response to the June 4th article on the nomination of Thomas B. Griffith to the D.C. Circuit. We have worked with Tom in a variety of contexts. Contrary to the *Post's* implication, Tom is an outstanding attorney who takes his responsibilities as a member of the bar seriously. Tom did not receive his D.C. Bar bill as an attorney for the federal government in 1998. Thereafter, the D.C. Bar sent no statements either to Tom or to his law firm. As soon as he realized that bills were unpaid, he paid them. Tom took the common and proper course of action under the circumstances. This innocent oversight has no bearing on his ability to serve as a judge.

For years Tom has been a leader in the bar and has shown dedication to its principles. The federal bench needs judges like Tom, an excellent lawyer who is supported across the political spectrum, including by Dean Michael Young, Steve Umin, Jim Slattery, Kirk Jowers, Trevor Potter and Gene Schaerr, and law professors Stephen Saltzburg and Tom Morgan. With them, we support Tom and believe he has the intellect and judgment to be an excellent judge.

David E. Kendall
Williams & Connolly LLP
725 Twelfth Street, N.W.
Washington, DC 20005
202-434-5145
dkendall@wc.com

Lanny A. Breuer
Covington & Burling
1201 Pennsylvania Avenue, NW
Washington, DC 20004-2401
202-662-5538
lbreuer@cov.com

Samuel D. Walker, Esq.
5330 South Marshall Street
Littleton, Colorado 80123

June 18, 2004

VIA FACSIMILE: 202-228-1698

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Mr. Chairman:

I am pleased to support the nomination of Thomas B. Griffith to the United States Court of Appeals for the District of Columbia Circuit.

Tom and I began law practice on the same day in 1985, joining the law firm of Robinson, Bradshaw & Hinson in Charlotte, North Carolina. Tom has been a close personal friend and professional colleague ever since. I left Charlotte to join the Bush-Quayle administration in 1989. Tom came to Washington shortly thereafter and eventually recruited me to join his law firm, Wiley Rein & Fielding LLP, in 1992. We practiced together until he became counsel to the U.S. Senate, and again until he became general counsel at Brigham Young University. (I left Wiley Rein in 2002 to become the U.S. and worldwide chief legal officer and public affairs vice president for Coors Brewing Company in Golden, Colorado, my current job.)

I can think of no finer candidate than Tom for this all-important judgeship. He has an uncommonly keen mind. His expertise in administrative law, refined in the crucible of the U.S. Senate, will make a unique contribution to the D.C. Circuit. Moreover, I have witnessed Tom's commitment to integrity and ethics in countless situations over the years. Never once have I seen him display anything less than a rigorous commitment to the truth.

On a personal note, Tom is patient and fair. He will bring an excellent demeanor to the bench.

I hope these observations are of assistance to your Committee.

Very Truly Yours,

Samuel D. Walker

cc: The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, DC 20510
VIA FACSIMILE: 202-224-9516

Office of Legal Policy
United States Department of Justice
VIA FACSIMILE: 202-514-5715

Lynn D. Wardle
3359 Cherokee Lane
Provo, UT 84604
TEL. (801)375-9591 (h); 422-2617 (o); FAX 801-422-0391; Email: wardlelm@joimail.com or wardlel@lawgate.byu.edu

June 18, 2004

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510
via fax- 202-228-1698

Dear Mr. Chairman:

I write to express my strong personal support for the nomination of Thomas B. Griffith to serve as a Judge on the U.S. Court of Appeal for the District of Columbia. I have some professional and personal knowledge of Mr. Griffith, and of the court to which he has been nominated. I am a law professor at the J. Reuben Clark Law School at Brigham Young University, and have known Tom well as a neighbor, fellow-lawyer, member of the university community, and fellow church service volunteer for the past four years.

Tom has set an outstanding example of professional excellence while serving as the General Counsel at Brigham Young University. He is committed to the highest standards of legal service and of legal education, and he has contributed significantly to helping our law students understand the importance of setting high standards and of working hard to prepare to accomplish their highest professional aspirations. He has made exceptional presentations to our students about his own remarkable legal experiences, and he has brought a number of remarkable professional leaders to speak to the law school and university, including present and former members of the Office of Counsel to the President (of both political parties), Senators, members of the President's Cabinet, and other persons of significant experience and influence in Washington, D.C., with whom he has contact. He was the moving force behind the convening of an outstanding symposium of former U.S. Solicitors General that met here at Brigham Young University. It was his vision and encouragement that initiated the conference, and it was through his great personal effort that we were able to get every living Solicitor General except one to attend and participate. The resulting law review issue provided the most comprehensive glimpse into the operation of that most important government legal office, and into the work of the U.S. Supreme Court's "Tenth Justice," as the Solicitor General has been called. Tom has made these extraordinary contributions without any official position in or remuneration from the law school, and on top of the heavy responsibilities he has as a "working lawyer," the General Counsel for Brigham Young University. That exemplifies his commitment to excellence in the legal profession.

Second, I have had occasion to discuss many difficult legal issues with him, and I have discovered that Tom Griffith has a very sharp, well-trained legal mind. His analysis of complex legal issues is very cogent and insightful. Despite his own brilliance and significant experience, he is not just willing but anxious to consider new perspectives. He is very respectful of others, and is comfortable working with and listening to those who have different views. He is a rare true intellectual, alive intellectually, anxious to learn, and teachable. Tom also is a respecter of

the rule of law, and of the institutions and processes of our government, but he is not a rigid, and resists "perfectionism" as well as laziness and lawlessness.

Third, Tom Griffith has a kind and gentle heart and a genuinely friendly personality. Time and again in our volunteer service I have seen Tom show exceptional kindness, mercy, and tolerance. He has a great sympathy for those on the margins of society, the poor, the disadvantaged, the sick, the wounded, the discouraged, and the deprived. He is quick to note unfairness and to criticize abuse of power. Near the top of his list of personal heroes is Mother Teresa of Calcutta and the Sisters of Charity because of their selfless dedication to serving "the least" in society, with no thought of personal gain. One of Tom's favorite writer is C.S. Lewis, who combined great intellect with genuine morality and great faith. Tom strives to unite his tremendous legal skill and great intellect with commitment to the highest standards of ethical professionalism and high principle.

Finally, I myself was first admitted to the bar of the District of Columbia, while I was clerking for Judge John J. Sirica of the U.S. District Court for the District of Columbia. The Court of Appeals sat a few floors above our court, and the appellate and district judges had their chambers in the same building. I understand the complex regulatory and administrative matters that often are on the docket of federal courts in the District of Columbia. Tom Griffith is exceptionally well qualified to serve on that particular court and to address the kinds of issues that come before it. I have total confidence that Tom Griffith will make an outstanding contributions to the work of the U. S. Court of Appeals for the District of Columbia, and his appointment will enhance the judicial branch of our national government. I also realize how important it is that the D. C. Circuit have enough qualified judges to operate effectively, and believe that it is in the country's interest to not delay any further filling the vacancy for which Mr. Griffith has been nominated.

Thus, I recommend that the Senate Judiciary Committee and the full Senate act promptly to confirm Thomas B. Griffith to serve as a Judge on the U. S. Court of Appeals for the District of Columbia.

Sincerely,

Lynn D. Wardle

Lynn D. Wardle
Professor of Law

cc: The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, DC 20510, and
via fax- 202-224-9516

Office of Legal Policy
United States Department of Justice
Washington, DC
via fax - 202-514-5715

June 7, 2004

To the Editor:

Friday's article by Carol D. Leonig about the nomination of Thomas Griffith ("Appeals Court Nominee Let His Bar Dues Lapse"), prompts this letter in praise of Mr. Griffith's nomination. I have known Tom since he was Senate Legal Counsel and I was Solicitor General, and I have the highest regard for his integrity. While his reported lapse in the payment of D.C. Bar dues should certainly be explored by the Senate Judiciary Committee, Tom's account of the circumstances is eminently reasonable and largely corroborated. What is more, for my own part I would stake most everything on his word alone. Litigants would be in good hands with a person of Tom Griffith's character as their judge.

Yours sincerely,

Seth P. Waxman

Wiley Rein & Fielding LLP

1776 K STREET NW
WASHINGTON, DC 20006
PHONE 202.719.7000
FAX 202.719.7049

7925 JONES BRANCH DRIVE
SUITE 6200
McLEAN, VA 22102
PHONE 703.905.2800
FAX 703.905.2820

www.wrf.com

June 21, 2004

Richard E. Wiley
202.719.7010
rwiley@wrf.com

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Hatch:

As a former law partner of Tom Griffith, and as a long time observer of his legal career, I write to urge Senate confirmation of his appointment to the U.S. Court of Appeals for the District of Columbia Circuit. Tom is an outstanding lawyer, with keen judgment, congenial temperment and impeccable personal integrity. He would bring great expertise and fair-minded impartiality to the bench and, in my judgment, would be a considerable credit to the D.C. Circuit and the Federal Judiciary as a whole.

During his tenure at our firm, both as an associate and partner, Tom was universally liked and respected by his colleagues, whatever their professional background or political identification. He brought remarkable intellectual vigor to his work, and was considered by all as one of our most talented litigators. Speaking personally, I also admired his dedication to family and various public and religious activities. In short, Tom is a wonderful person and an exceptional professional, and I recommend him to you without qualification.

Thank you for your consideration of this letter and best regards.

Sincerely yours,

Richard E. Wiley
cc: The Honorable Patrick J. Leahy
Office of Legal Policy, United States Department of Justice