

CONFIRMATION HEARING ON NOMINATIONS OF
ROBERT D. MCCALLUM, JR. TO BE ASSOCIATE
ATTORNEY GENERAL AND PETER D. KEISLER
TO BE ASSISTANT ATTORNEY GENERAL, CIVIL
DIVISION

HEARING
BEFORE THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
ONE HUNDRED EIGHTH CONGRESS

FIRST SESSION

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**NOMINATIONS OF ROBERT D. MCCALLUM, JR.
TO BE ASSOCIATE ATTORNEY GENERAL
AND PETER D. KEISLER TO BE ASSISTANT
ATTORNEY GENERAL, CIVIL DIVISION**

THURSDAY, MAY 8, 2003

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The Committee met, pursuant to notice, at 3:34 p.m., in Room SD-226, Dirksen Senate Office Building, Hon. Orrin G. Hatch, Chairman of the Committee, presiding.

Present: Senators Hatch and Chambliss.

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

Chairman HATCH. Today, it is my great pleasure to have two Department of Justice nominees before the Committee: Robert McCallum to be Associate Attorney General and Peter Keisler to be Assistant Attorney General for the Civil Division. Both Mr. McCallum and Mr. Keisler are currently serving the Justice Department with great distinction, and, coincidentally, each of them holds or has held the position for which the other has been nominated.

Let me first say a few words about Robert McCallum. Mr. McCallum is returning to the Committee for his second hearing in 2 years, and we welcome you back. On May 23, 2001, Mr. McCallum appeared before the Committee for a hearing for his current position as head of the Justice Department's Civil Division. He was reported favorably by the Committee by voice vote and also confirmed on the Senate floor by voice vote. I have no doubt that after today's hearing, Mr. McCallum will again be approved by this Committee and by the full Senate for his position at the Department.

The position of Associate Attorney General, as everybody knows, is an extremely important one. The Associate Attorney General advises both the Attorney General and the Deputy Attorney General and supervises many important components of the Department, including the Antitrust, Civil, Civil Rights, Tax, and Environmental and Natural Resources Divisions.

Mr. McCallum is well qualified for his position. After graduating from Yale Law School, he spent nearly 30 years litigating a wide range of complex matters and maintained a sophisticated civil trial and appellate practice. His clients included insurance companies,

banks, business corporations, partnerships, and individuals involved in commercial disputes, also regulatory issues and personal injury claims.

As head of the Civil Division, Mr. McCallum has shown that he is an enormously talented and committed public servant. Since his confirmation on September 17, 2001, just days after the September 11th tragedy, he has led the Civil Division with great skill, I think during very challenging times for our country. So I commend the President on his decision to promote Mr. McCallum to the position of Associate Attorney General, and I am certain that he will continue his exemplary public service once confirmed to his new post.

I know that Senator Chambliss is here to speak in further support of Mr. McCallum's nomination, and I will turn to Mr. Keisler after Senator Chambliss gives his remarks. And I just want to express to everybody how grateful I am to have this great former Member of the House on the Senate Judiciary Committee serving with me. I just feel really blessed to have you with us, Saxby, and we will turn the time over to you.

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

PRESENTATION OF ROBERT D. MCCALLUM, JR., NOMINEE TO BE ASSOCIATE ATTORNEY GENERAL, DEPARTMENT OF JUSTICE, BY HON. SAXBY CHAMBLISS, A U.S. SENATOR FROM THE STATE OF GEORGIA

Senator CHAMBLISS. Thank you, Mr. Chairman. It is indeed a privilege and a pleasure to be associated with you and to serve under you as a member of this very distinguished Committee, and your service speaks for itself. You are a great American and certainly a great leader of not just this Committee but of our Nation.

Mr. Chairman, I would like to introduce to you a fellow Georgian, Mr. Robert Davis McCallum, Jr., who is President Bush's nominee to be the Associate Attorney General. But before I do so, I would like to introduce his wife, Mimi, who is also with us today, and ask her to stand. Mimi, where did we go?

Chairman HATCH. We are sure happy to have you here, Mrs. McCallum.

Senator CHAMBLISS. Mr. McCallum has had a tremendous legal background and is exceptionally qualified for this position, which is a promotion for him within the Department of Justice. For almost 2 years now, Mr. McCallum has been the Assistant Attorney General for the Civil Division in the Department of Justice. Prior to joining the Department of Justice, Mr. McCallum worked as a partner in the Atlanta-based firm of Alston and Bird, which is one of the premier law firms in the country. It is a firm, Mr. Chairman, which I had the privilege of being associated with numerous times throughout my 26-year legal career in Georgia.

During the 1980's, while still working with Alston and Bird, Mr. McCallum served as a Special Assistant Attorney General for the State of Georgia, counseling the State in the area of eminent domain. He has co-authored the "Practice and Procedure" section of the Mercer Law Review three times and has written a chapter in the reference book "Gynecological Surgery: Errors, Safeguards, and Salvage."

Mr. McCallum has lectured at numerous continuing legal education seminars sponsored by the State Bar of Georgia on various topics, ranging from the lawyer-expert relationship, direct and cross-examination, voir dire issues, and environmental issues.

Mr. McCallum earned his bachelor's degree from Yale University where he graduated cum laude, earned his law degree from the Yale Law School.

As Associate Attorney General, Mr. McCallum will advise the Attorney General and the Deputy Attorney General on formulating and implementing DOJ policies and programs over a broad range of matters involving civil justice, Federal and local law enforcement, and public safety. His office will oversee several key divisions at DOJ, including Antitrust, the Civil Division, Civil Rights, Environmental and Natural Resources, the Tax Division, the Violence Against Women Office, the Office of Information and Privacy, the Executive Office of U.S. Trustees, and the Foreign Claims Settlement Commission. We are truly fortunate to have someone as qualified as Mr. McCallum to serve as Associate Attorney General, especially when you consider that he chose to leave private practice and certainly take a tremendous pay cut to work for the Federal Government.

I applaud his past service, his future service, and I welcome him here today, and I thank you for your consideration of his nomination.

Chairman HATCH. Well, thank you, Senator Chambliss. We really appreciate you taking time from what I know is a busy schedule, because I can't keep up with mine, and I know you are busy, too. We appreciate you coming, and it is an honor to Mr. McCallum. Thank you so much.

I am going to invite Peter Keisler to come to the table as well. Maybe you can switch those cards around. Let me also mention that I am going to take care of both of you in one sitting, if I can, if you don't mind.

Mr. Keisler is also a Yale Law School graduate. Following his D.C. Circuit clerkship, he was hired as an Assistant Counsel to President Reagan. Within 1 year, he was promoted to Associate Counsel to the President. In 1989, Mr. Keisler left the White House to enter private practice at what is now Sidley, Austin, Brown and Wood, a prestigious national law firm. He began as an associate and was elevated to partner in 1993. He remained in private practice until 2002, when he joined the Department of Justice as Acting Associate Attorney General. In March 2003, Mr. Keisler was appointed as Principal Deputy Associate Attorney General and currently serves in that position. There can be no doubt that Mr. Keisler's vast experience with civil litigation matters, both in private practice and at the Department of Justice, has more than adequately prepared him to head the Civil Division, where he will be responsible for management and oversight of the largest litigation department within the Government, or should I say component within the Government.

I have met with Mr. Keisler and believe that the President made a wise choice. I have known him for years, and I think the President has made a wise choice in nominating him to this position. But my colleagues need not take solely my word for it. I have re-

ceived several letters on Mr. Keisler's behalf that I would like to share.

Two former Clinton Department of Justice officials, Randolph Moss and Joseph Guerra, who served, respectively, as Assistant Attorney General and Deputy Assistant Attorney General of the Office of Legal Counsel, wrote that Mr. Keisler "is an extraordinary legal talent...Peter is equally prized for the other aspects of the professionalism he displays—such as personal integrity, a balanced temperament, a courteous and good-humored demeanor, and respectful treatment of others with whom he works, both colleagues and opposing counsel."

Professor Litman, a lifelong Democrat and former United States Attorney for the Western District of Pennsylvania during the Clinton administration, writes, "I can say from personal experience that Peter will treat all his colleagues, from support staff to Presidential appointees, with graciousness and respect. The Committee can have confidence that Peter will also be conscious of the impact of the Department's actions on people's lives, and will approach his responsibilities with a well-developed sense of fairness and compassion."

Stephen Sachs, former United States Attorney for the District of Maryland during the Johnson administration and Maryland's Democratic Attorney General from 1979 to 1987, wrote in enthusiastic support of Mr. Keisler's nomination. His letter states, "I am a lifelong liberal Democrat. Peter...is not." Well, I hardly knew that. "But while we have different views on some matters of public policy, I know that we both place a high value on the importance of public service and share a profound respect for the rule of law. I have no doubt whatsoever of Peter's dedication to the essentially apolitical mission of a great ministry of justice. Intellectual integrity is his calling card. For Peter Keisler, those lofty phrases etched on the walls at Justice are living commands, not empty rhetoric. The Department of Justice and the Nation will be well-served by this appointment."

These are just a few of the letters I have received on Mr. Keisler's behalf, demonstrating the strong bipartisan support he enjoys. Clearly, Mr. Keisler's legal ability and personal integrity have earned him admiration on both sides of the political spectrum.

Now, I would like to compliment both of these gentlemen on their nominations and offer them my full support, and I look forward to hearing from them.

So, Mr. McCallum, we will take you first. I hope you will introduce those who are with you, and then give any statement you care to give, and then maybe we will have a question for you.

**STATEMENT OF ROBERT D. MCCALLUM, JR., OF GEORGIA,
NOMINEE TO BE ASSOCIATE ATTORNEY GENERAL, DEPARTMENT OF JUSTICE**

Mr. MCCALLUM. Thank you, Mr. Chairman. My wife, Mimi, is the only family member that was able to make it to the hearing today, and I'm honored to appear before you and the Committee for consideration of my nomination.

Chairman HATCH. Mimi is my former dinner partner, so I want to tell you, you are a lucky guy. We welcome you, Mimi. We welcome you here.

Mr. MCCALLUM. I'm grateful to the Committee for the careful attention that it will give to my nomination and for allowing me this opportunity to answer any questions that you or other Committee members may have concerning my nomination. I'll look forward to providing you and the Committee members, not just at this hearing but also afterwards, with whatever information might be helpful to you and to the Senate in discharging the Senate's constitutional responsibilities to advise the President on his nominees.

I have introduced my wife, but I must say I need to recognize that she has supported me every step of the way on this decision to enter public service. Our decision to leave private practice and to leave our home of 30 years to come to Washington was, as you can well imagine, a joint decision. It's one that we both have enthusiastically embraced, and I must thank her for all that she's done to support me in that regard.

We do have two sons and a new daughter-in-law, and none of them can be here with us today, but they send their regrets to the Committee. My elder son, Davis, is a theater director in New York, and he's currently in Ashland, Oregon, assistant-directing plays for the next 4 months at the Oregon Shakespeare Festival. So it's been too far a distance for him to travel and get back there, given his schedule.

His wife, our new daughter-in-law, Sara, is currently clerking for the United States District Court, the Southern District of New York, with Judge Jed Rakoff, and her obligations with Judge Rakoff, who is known as a tremendous work horse on that very, very busy district, requires her to remain in New York.

And then my younger son, Bailey, is a teacher with the Gore Range Natural Science School in Red Cliff, Colorado, and, again, distance precludes his presence here today.

In addition to my wife, I'd also like to take this opportunity to thank Senator Zell Miller and especially Senator Saxby Chambliss for encouraging me and supporting me in this nomination for this new position. I am extremely proud of my home State and proud that it's represented by two such fine public servants in the United States Senate. And I am both appreciative of and humbled by their support of my nomination.

As I did in my first confirmation hearing, I would also like to take this opportunity to recognize and express my thanks to your former colleague, the late Senator Paul Coverdell. It was, in fact, Paul who, as a Georgia State Senator in the Georgia Legislature from my particular district, encouraged me to participate in local government activities, and I would like to think that Paul Coverdell is looking down and is proud of my nomination.

Mr. Chairman, over the past 19 months, I have been privileged to serve with the advice and consent of the Senate as Assistant Attorney General for the Civil Division of the United States Department of Justice. I took the oath of office on September 17, 2001, the Monday after the terrorist attacks. And as you can well imagine, those events have generated a significant overlay of new and different cases, new issues relating to the war on terrorism.

At the same time, the normal, usual litigation portfolio involving the interests of the United States has continued unabated. In those circumstances, I have done my utmost to provide the management direction, the supervision, and the leadership necessary to meet both those new challenges and those old ones. And I have been privileged to work with some of the finest attorneys, both political appointees and career staff, that I have ever encountered.

I certainly recognize that this Committee, in evaluating my nomination for Associate Attorney General, has the responsibility to review and assess my performance in my existing position, and I encourage the Committee to do so, and I will be as responsive as I possibly can be to any inquiries that the Committee cares to make.

Needless to say, I was honored to be asked by the Attorney General and the President to assume broader responsibilities in the position of Association Attorney General. If confirmed by the Senate in this new position, it would afford me the opportunity to work more closely, even more closely with the Attorney General and the Deputy Attorney General, two outstanding individuals who have provided the entire Department of Justice with inspiring leadership and very efficient management. It would afford me the opportunity also to work more closely with my current fellow Assistant Attorney Generals in Civil Rights, Environment and Natural Resources, Tax, Antitrust, and Justice Programs.

I'm ready, willing, and hopefully able, if the Senate sees fit to confirm me, to assume these new responsibilities and to meet these new challenges.

Thank you.

[The biographical information follows:]

I. BIOGRAPHICAL INFORMATION (PUBLIC)

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

Robert Davis McCallum, Jr.

2. Address: List current place of residence and office address(es).

Home address: Atlanta, Georgia

Weekend House: Highlands, North Carolina

Washington Address: Washington, DC 20008

Office Address: U.S. Department of Justice
Civil Division
950 Pennsylvania Avenue, NW
Washington, DC 20530

3. Date and place of birth.

January 30, 1946, Memphis, Tennessee

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

Married June 28, 1969 to Mary Rankin Weems McCallum

"Mimi" McCallum is not employed outside the home.

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

B.A., *cum laude*, History, Yale University, June 1968; attended September 1964 to June 1968.

B.A., First Class Honors, Jurisprudence, Christ Church, Oxford University, United Kingdom, November 1971; attended October 1969 to November 1971.

J.D., Yale Law School, January 1973; attended September 1968 to June 1969 and January 1972 to January 1973.

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.

Summer 1968	First National Bank of Memphis, Tennessee (now First Tennessee Bank), trainee;
Summer 1969	Canada, Russell & Turner, a law firm in Memphis, Tennessee (now the Memphis office of Wyatt, Tarrant and Combs), summer associate;
January 1973 September 2001	Alston, Miller & Gaines, predecessor firm to Alston & Bird LLP; associate and then partner in 1979;
September 2001 present	United States Department of Justice Assistant Attorney General, Civil Division Acting Associate Attorney General as of March 28, 2003;
June 1968 to June 1978	Yale Class of 1968; Treasurer;
1973 to September 2001	Yale Club of Georgia; President 1985-86;
June 1979 to September 2001	Yale Alumni Fund; Jonathan Edwards College Agent for Class of 1968; Twentieth Reunion Co-Chair Special Gifts Committee; Member of Special Gifts Committee for Twenty-fifth and Thirtieth Reunion;
October 1983 to 1987 and 1993 (approx) to September 2001	Yale Law School Alumni Association Board, Georgia Representative
1977 to 2001	Brookwood Hills Civic Association, Atlanta, Georgia; Board Member and President, 1981 - 83 (approx);

1990-1995 and 2000 to September 2001	YMCA Blue Ridge Assembly in Black Mountain North Carolina, Board Member;
1991-2001	Choate Rosemary Hall Foundation in Wallingford, Connecticut; Vice-Chair Board of Trustees;
1975-1976	National Junior Tennis League of Atlanta, Inc.; Board of Directors;
1998 to September 2001	Rhodes Scholarship Trust; Oxford, United Kingdom; Georgia Secretary and District Secretary for Selection Committee;
1979 - 1987	Special Assistant Attorney General for the State of Georgia; eminent domain counsel;

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.

National Merit Scholarship to Yale University; *cum laude* graduate;

Gordon Brown Prize, Yale University;

Rhodes Scholarship to Oxford University at Christ Church;

John Radcliffe Exhibition, Christ Church, Oxford University;

NCAA Post-Graduate Scholarship to Yale Law School;

Atlanta Bar Association Leadership Award, 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.

Georgia Bar Association, 1973 - present;

American Bar Association, 1982 - present;

Lawyers Club of Atlanta, 1980 - 2002;

Old War Horse Lawyers Club, Atlanta, 1990 (approx) - 2002;

The Lamar Inn of Court, Master, 1999 - 2002;

Author's Court, 1985 (approx) - 1995 (approx);

Litigation Section Council, American Bar Association, 2001-2002;

Advisory Committee for the Federal Rules of Civil Procedure, 2001-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.

I know of no organizations to which I belong, other than the Georgia Republican Party, the American Bar Association, the Georgia Bar Association, the Wilderness Society, and the Trust for Public Land, which are active in lobbying before public bodies. Other organizations to which I currently belong or have belonged since college include:

The Yale Club of Georgia, Atlanta, Georgia (former President);

The Yale Club of Washington, D.C.;

Yale Alumni Fund, New Haven, Connecticut;

Yale Law School Alumni Association, New Haven, Connecticut (Georgia representative);

Butler Street, YMCA, Atlanta, Georgia;

YMCA Blue Ridge Assembly, Black Mountain, North Carolina, Director;

Brookwood Hills Civic Association, Atlanta, Georgia (former President);

**Choate Rosemary Hall Foundation Board of Trustees, Wallingford,
Connecticut, Vice-Chair;**

**Rhodes Scholarship Trust, Oxford, United Kingdom, State and District
Secretary;**

Oxford Society of Washington, D.C.;

American Association of Rhodes Scholars, Vienna, Virginia;

Piedmont Driving Club, Atlanta, Georgia;

The Metropolitan Club, Washington, D.C.;

The Chattooga Club, Cashiers, North Carolina;

The Highlands Country Club, Highlands, North Carolina;

Ansley Golf Club, Atlanta, Georgia;

The Commerce Club, Atlanta, Georgia;

The Georgian Club, Atlanta, Georgia;

High Museum of Art, Atlanta, Georgia;

Atlanta Botanical Gardens, Atlanta, Georgia;

The Wilderness Society, Washington, D.C.;

The Trust for Public Land, San Francisco, California;

Atlanta History Center, Atlanta, Georgia;

Piedmont Park Conservancy, Atlanta, Georgia;

Friends of the Atlanta Public Library (spouse was Board Member in 1980s),

Atlanta, Georgia;

Georgian Republican Party, Atlanta, Georgia;

Atlanta Jewish Community Center;

Washington, D.C. Jewish Community Center.

To the best of my knowledge, none of the organizations discriminate on the basis of race, sex or religion at present or did so at the time I joined them.

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.

The Georgia Supreme Court, The Georgia Court of Appeals, and the Superior and State Courts of Georgia (1973 - present);

United States District Court for the Northern District of Georgia (1973 - present);

United States District Court for the Middle District of Georgia (1980 - present);

United States Tax Court, Washington, D.C. (1992 - present);

United States Eleventh Circuit Court of Appeals (1981 - present);

United States Fifth Circuit Court of Appeals (1981 - 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.

Other than my confirmation hearing before this Committee regarding my nomination for my current position, I have testified before a committee or subcommittee on only one other occasion. That one occasion was on September 25, 2002, before the House of Representatives Subcommittee on

Immigration, Border Security and Claims of the House Judiciary Committee, and the subject was HR 1198 entitled Justice for United States Prisoners of War Act of 2001. Copies of my statements are being provided.

My books, articles, and other published materials are listed below. However, to my knowledge, none of these materials are readily available except for the Georgia Appellate Practice Handbook. I am providing my only copies of the materials, and I would like to have them returned to me. I made several other seminar presentations on trial practice related issues in the 1970s or early 1980s, but I did not keep the materials and do not remember the subjects, the dates, or the events.

Co-Author, "Practice and Procedure," 29 Mercer Law Review 1037 (1978), 30 Mercer Law Review 925 (1979), and 31 Mercer Law Review 951 (1980) (copy provided);

Author of Chapter entitled "Gynecological Errors in Medical Malpractice" in *Gynecological Surgery; Errors, Safeguards, and Salvage*, Second Edition, January, 1981, Edited by John H. Ridley, M.D. (Williams and Wilkins Publisher) (copy provided);

Lecturer and author of written materials on eminent domain law at Georgia ICLE Seminars on "Condemnations under Georgia Law," 1981, 1985, 1989-1997 (copies of 1985, 89-92, 94-97 provided);

Lecturer on evidence to Georgia Superior Court Judges at Georgia Institute of Continuing Judicial Education, 1994, Athens, Georgia (I am unable to find a copy of these materials);

Lecturer on environmental issues in eminent domain litigation at Georgia ICLE Seminar for county and municipal attorneys in 1997 (copy provided);

Lecturer, 1992, American Bar Association Convention, San Francisco, on "Batson" Jury Strikes (copy provided);

Lecturer/Program Chairman, Georgia ICLE Seminar on Georgia Appellate Practice, 1996, 1997, 1999, 2000 (copy of Georgia Appellate Practice Handbook provided);

Panelist, 2002, American Bar Association Convention, Washington, D.C. on "Governments on Trial."; I prepared no written materials for this panel discussion and know of no transcript or other record of the program.

Prior to assuming my current position as Assistant Attorney General for the Civil Division, I made no speeches. Since assuming my current position, I have made seven speeches and copies of those speeches which I have retained are provided. I do not have copies of all these speeches. Some were from handwritten notes, now discarded. I know of no videos, transcripts, or press reports about those speeches.

The date, locations, and general subjects of the speeches are as follows:

- (1) October 17, 2001, Speech at a Conference of Civil Chiefs at the National Advocacy Center in Columbia, South Carolina on recent activities within the Civil Division of the Department of Justice and coordination and cooperation with U.S. Attorney offices; (handwritten notes were discarded);
- (2) November 29, 2001, Speech at the Third Annual National Institute on The Civil False Claims Act in Washington, D.C. on the importance and role of the False Claims Act in white collar law enforcement; (copy provided);
- (3) March 25, 2002, Speech at Atlanta Bar Association Leadership Award Ceremony; (notes were discarded);
- (4) May 8, 2002, Speech at the Sixth Annual Immigration Litigation Conference in Scottsdale, Arizona on Immigration and National Security Litigation after September 11; (text not retained);
- (5) September 30, 2002, Speech to American Health Lawyers Conference relating to the False Claims Act; (copy provided);
- (6) January 16, 2003, Speech to the DC Lawyers Federalist Society relating to the U.S. Department of Justice Civil Division and It's Role in the War on Terrorism; (copy provided);
- (7) January 30, 2003, Speech to Fourth Annual National Institute on the Civil False Claims Act in Washington, D.C. (copy provided).

(8) Today's Debate: War on Terror, USA Today, April 29, 2002

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

The general state of my health is excellent, other than arthritis in my hips. The date of my last physical examination was June 18, 2002.

14. 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.

I have not been a candidate for public office. Prior to my assuming my current position, the only appointed office which I held was Special Assistant Attorney General for the State of Georgia under Attorneys General Arthur Bolton and Michael Bowers, 1979-87. In that position, I represented the Georgia Department of Transportation in eminent domain matters. My current position is Assistant Attorney General for the Civil Division, and I assumed that position on September 17, 2001, and was appointed by President George W. Bush. On March 28, 2003, I was designated to serve as Acting Associate Attorney General.

15. 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; **No.**
2. whether you practiced alone, and if so, the addresses and dates;

No.

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;

Less than a week after graduating from Yale Law School in 1973, I began work as an associate at Alston, Miller & Gaines, the predecessor firm of Alston & Bird, LLP, and I engaged in the practice of law with that firm until September 15, 2001. I became a partner in 1979. This

firm was originally located at 1200 The Citizens & Southern Bank Building, 35 Broad Street, Atlanta, Georgia 30303 and is now located at One Atlantic Center, 1201 West Peachtree Street, Atlanta, Georgia 30309. I took the oath of office as Assistant Attorney General for the Civil Division on September 17, 2001, and currently hold that position. I was also designated to serve as Acting Associate General on March 28, 2003. The address is 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530.

- 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?

The general character of my law practice has been civil litigation throughout my entire career. My private practice focused upon commercial litigation including consumer class actions and RICO cases, regulatory matters involving insurance companies, real estate litigation including eminent domain matters, appellate practice (including Georgia state constitutional issues), fiduciary and estate litigation, and health care litigation including medical malpractice defense. My current practice involves similar civil matters including federal constitutional issues, immigration litigation, and federal regulatory matters.

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

Typical clients in my private practice have included insurance companies, banks, business corporations, partnerships, and individuals involved in commercial disputes, regulatory issues, or personal injury claims. Current clients are limited to federal agencies and current and former federal officials.

- 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. **Frequently.**

2. What percentage of these appearances was in:
 (a) federal courts;
 (b) state courts of record;
 (c) other courts.

I have appeared in court frequently throughout my entire career. I would estimate that 20% of my appearances have been in federal courts with the remaining 80% being in state court, predominantly within the State of Georgia.

3. What percentage of your litigation was:
 (a) civil;
 (b) criminal.

My litigation practice has been 100% civil litigation.

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 have not kept track of the number of cases which I have tried to verdict or judgment. If one were to include special master proceedings, administrative proceedings, and arbitrations as well as jury and non-jury civil trials, I would estimate in excess of 50 such verdicts, judgments, or final decisions. In the vast majority of those cases, I served as lead counsel.

5. What percentage of these trials was:
 (a) jury;
 (b) non-jury.

All of the special master proceedings, arbitrations, and administrative proceedings were "non-jury matters" by virtue of the nature of the proceeding. If one were to combine non-jury civil trials with special master proceedings, arbitrations and administrative hearings, I would estimate that 65% of those "trials" were jury trials and 35% non-jury.

16. 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 representations;
- (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.

In contrast to many litigators today who specialize in a narrow area, I have consciously attempted to maintain a true trial practice in a variety of areas. Rather than focus on 10 particular cases, I will describe the 10 most significant areas of my private practice with a few representative cases in each. Since assuming my current position, my litigation role has been limited to supervision and oversight, and I have personally argued as a member of the Department of Justice before a trial or appellate court in only three cases.

1. General Commercial Litigation

(a) *United Investors Life Insurance Company v. Waddell & Reed Financial, Inc., et al.*, Civil Action CV00-2720 in the Circuit Court of Jefferson County, Alabama, before the Hon. T. M. Smallwood, Jr.: I represented United Investors Life Insurance Company, an insurer of variable annuities and variable life insurance contracts in a suit filed in March, 2000, against the broker/dealer distributor of its variable products, Waddell & Reed, Inc., relating the wrongful appropriation by Waddell & Reed of approximately \$6 million per year of funds due to United Investors from Target United Funds, Inc. (a Waddell & Reed managed mutual fund). A partial summary judgment was granted to United Investors eliminating any continuing right of Waddell & Reed to the \$6+ million per annum. The remaining issues concerned approximately \$10 million of funds which Waddell & Reed continued to hold and the improper replacement by Waddell & Reed of United Investors existing \$2.3 billion block of variable business with unsuitable products. After I assumed my current position with the Department of Justice, a jury verdict in favor of United Investors for approximately \$50 million was rendered in the trial court. William Baxley (a former Attorney General of Alabama) of Baxley, Dillard, Dauphin & McKnight in Birmingham was co-counsel with me for United Investors along with William Sampson of Shook, Hardy & Bacon of Overland Park, Kansas. James Gewin, Hobart McWhorter and Michael

Pennington of Bradley, Arant, Rose & White in Birmingham were counsel for counterclaim defendants Torchmark Corporation and Ronald K. Richey. Waddell & Reed was represented by Perry Brandt of the Berkowitz, Feldmiller firm in Kansas City, Missouri, along with Robert Baugh of the Sirote, Permutt firm in Birmingham, Alabama and David Loper of the Campbell, Waller firm in Birmingham, Alabama. The addresses and phone numbers for these firms are:

Baxley, Dillard, 2008 Third Avenue South, Birmingham, Alabama 35233, (205) 271-1100;

Shook, Hardy, 84 Corporate Woods, 10801 Mastin, Suite 1000, Overland Park, Kansas 66210, (913) 451-6060;

Bradley, Arant, 2001 Park Place, Suite 1400, Birmingham, Alabama 35203, (205) 521-2000;

Berkowitz, Feldmiller, 2 Emanuel Cleever II Boulevard, Suite 550, Kansas City, Missouri 64112, (816) 561-7007;

Sirote & Permutt, 231 Highland Avenue South, Birmingham, Alabama 35205, (205) 9f30-5100;

Campbell, Waller, 200-A South Bridge Parkway, Suite 330, Birmingham, Alabama 35209, (205) 803-0051.

(h) *Katrina Stubbs v. Allstate Insurance Co., et al.*, Civil Action 1:99-CU-219-3 in the United States District Court for the Middle District of Georgia, Albany Division, before Judge W. Louis Sands: I represented the defendant Allstate Insurance Company as lead counsel in this matter filed in 2000 which asserted a RICO claim arising from an alleged "bad faith refusal to settle" a tort claim against an insured within the policy limits. The case had just entered the discovery phase when I joined the Department of Justice. I do not know its current status. Fife M. Whiteside, 3575 Macon Road, Suite F-23, Columbus, Georgia 31906 (706) 526-8709, represented the plaintiff, and William Erwin of th Hodges/Erwin firm, P.O. Box 2320, Albany, Georgia 31702 (912) 883-7463 represented a co-defendant.

(c) *Disaster Services, Inc. v. ERC Partnership*, 228 Ga. App. 739 (1997) before Judge Elizabeth Long in the Superior Court of Fulton County, Georgia: I represented the defendants against a claim of tortious interference with contractual relations. The court entered summary judgment in the defendants' favor and, after an appeal, also awarded approximately \$75,000 in attorneys'

fees to my clients on a counterclaim for abusive litigation. Disaster Services, Inc. was represented by Don Huprich of Huprich & Associates, 1726 Montreal Circle, Suite B, Tucker, Georgia 30084 (770) 934-4044.

2. Class Actions:

(a) *R. Lee Taylor III v. Holly Farms Corporation, Tyson Foods, Inc. and Wachtell, Lipton, Rosen & Katz*, Civil Action File No. 97621-3 in the Chancery Court of Shelby County, Tennessee, before Chancellor Alessandratos: I was lead trial counsel in this 1991 class action representing a plaintiff class of former employees of Holly Farms suing for certain stock plan benefits. Tyson Foods accomplished a hostile takeover of Holly Farms, and the takeover triggered certain benefits for various Holly Farms employees under a restricted stock bonus plan, drafted by Wachtell, Lipton in anticipation of the hostile takeover fight. Class claims were asserted against Tyson Foods and Holly Farms under the plan and, in the alternative, against Wachtell Lipton for errors and omissions in drafting the plan. The case was settled on terms favorable to the class through contributions by both Tyson Foods and Wachtell, Lipton. Thomas Cates of Burch, Porter and Johnson in Memphis, Tennessee, was co-counsel for the class. Anthony Clark of the Skadden, Arps firm in New York and Leo Bearman, Jr. of the Baker, Donaldson law firm in Memphis represented Tyson Foods and Holly Farms. Michael Schwartz of Wachtell, Lipton in New York and Saul Belz of the Waring, Cox firm in Memphis represented Wachtell, Lipton. James Moffitt of the Leitner, Warner firm in Chattanooga represented an intervening class of plaintiffs. The addresses and phone numbers for these firms are:

Burch, Porter & Johnson, 130 Memphis Court Avenue, Memphis, Tennessee 38103, (901) 524-5000;

Skadden, Arps, 919 3rd Avenue, New York, New York 10022, (212) 735-3000;

Baker, Donaldson, First Tennessee Bank Building, 20th Floor, Memphis, Tennessee 38103, (910) 526-2000;

Waring, Cox, Suite 1300, Morgan Keegan Tower, 50 North Front Street, Memphis, Tennessee 38103, (901) 543-8000;

Leitner, Warner, Third Floor, Pioneer Building, Chattanooga, Tennessee 37402, (615) 265-0214.

(b) *Gerald Crichlow, et al. v. Torchmark Corporation, et al.*, Civil Action 4:96-CV-0086-HLM in the United States District Court for the Northern District of Georgia, Rome Division, before the Honorable Harold L. Murphy: I represented the defendants as lead counsel in this national consumer class action filed in 1996 by insureds alleging breach of contract, fraud, and RICO violations in the development and sale of a surgical-benefits health insurance policy by Globe Life & Accident Insurance Company and United American Insurance Company. My clients obtained a summary judgment before the trial court. A similar state class action was filed by the same attorneys in 1998 as *Charlene Greco, et al. v. Torchmark Corporation*, Civil Action 1:98-CV-196-D-D in the United States District Court for the Eastern District of Mississippi, Aberdeen Division, before the Honorable Glenn H. Davidson, referred to Magistrate Judge Jerry A. Davis. Summary judgment in favor of the defendants in that action was obtained as well. The plaintiff class in each case was represented by John Klamann and Dirk Hubbard of the Klamann & Hubbard firm, Suite 120, 7101 College Boulevard, Overton Park, Kansas 66210, (913) 327-7600.

(c) *The Seckinger-Lee Company v. Allstate Insurance Company*, Civil Action No. 1:97-CV-0978-TWT in the United States District Court of the Northern District of Georgia, Atlanta Division, before the Honorable Thomas Thrash: I served as lead counsel for the defendant Allstate. George Fryhoffer and Al Pearson of the Butler, Wooten firm represented the plaintiff in this 1997 class action claim against Allstate Insurance Company alleging fraud in the settlement of claims relating to "stated value" or "stated amount" auto insurance. Allstate obtained a summary judgment in its favor. The Butler Wooten address and phone number is 2719 Buford Highway, Atlanta, Georgia 30324, (404) 321-1700.

3. Special Appeals:

(a) *Phoenix Airline Services, Inc. v. Metro Airlines, Inc.*, 260 Ga. 584 (1990); *Phoenix Airlines Services, Inc. v. Metro Airlines, Inc.*, 194 Ga. App. 120 (1989): Along with my then partner, G. Conley Ingram, I served as appeal counsel for Phoenix Airline Services, Inc., relating to an adverse \$34 million judgment which, at that time, was the largest jury verdict rendered in the State of Georgia. The plaintiff claimed fraud and the wrongful misappropriation of a corporate opportunity. The case had been tried before Judge William Daniel of the Superior Court of Fulton County. The case was reversed in part by the Georgia Court of Appeals and then reversed and remanded in its entirety by the Georgia Supreme Court. After the reversal, the case was settled on favorable terms prior to retrial. The trial counsel for Phoenix was David H.

Flint of Schreeder, Wheeler & Flint, Suite 1600, 127 Peachtree Street, N.E., Atlanta, Georgia 30303, (404) 681-3450. Appeal counsel for the plaintiff, Metro Airlines, Inc., was David Brown of Smith, Gambrell & Russell, Suite 3100, Promenade II, 1230 Peachtree Street, N.E., Atlanta, Georgia 30309, (404) 815-3564. G. Conley Ingram now serves as a Senior Judge on the Superior Court of Cobb County, 30 Waddell Street, Marietta, Georgia 30090, (770) 528-8153.

(b) *Mary Roden v. Care More Management Company, Inc.*, Civil Action No. 00SV152, in the State Court of Coweta County, Georgia, before Judge John Cranford: I represented as appeal counsel a nursing home defendant with respect to a \$3.3 million judgment entered on a jury verdict in a personal injury case. The plaintiff claimed that the injury was caused by patient neglect. The case was settled after my filing of post-trial motions and a hearing before the trial court. The trial counsel for Care More was Drew Graham of the Hall Booth firm, Suite 2500, 230 Peachtree Street, Atlanta, Georgia 30303, (404) 954-5000. The attorney for the successful plaintiff was Michael G. Kam, Esq., c/o Kam & Ebersbach, P.O. Box 17609, Newnan, Georgia 30264, (770) 251-7100.

4. Real Estate Litigation:

(a) *Earth Management, Inc. v. Heard County*, 248 GA. 442 (1981): I represented Earth Management, Inc., in the Superior Court of Heard County, Georgia, before Judge Jackson contesting the eminent domain "taking" of its property by the County in order to prevent the development by Earth Management of a hazardous waste disposal site. The action by the County was invalidated by the Georgia Supreme Court, establishing the seminal case in Georgia relating to a "bad faith taking" by an entity with the power of eminent domain. The County was represented by Ted Duncan of the Duncan Thomasson law firm, 18 North Lafayette Square, LaGrange, Georgia 30240, (706) 882-7731.

(b) *Blair Bishop, et al., v. Valley Holdings, Inc., et al.*, Civil action No. 86-1-4011-18, in the Superior Court of Cobb County, before the Honorable George Kreeger and *Valley Investors, Ltd., et al. v. Decatur Federal Savings & Loan Assoc., et al.*, Civil Action File No. 94A-1514-6, in the Superior Court of Gwinnett County, before the Honorable Fred A. Bishop, Jr.: I represented a real estate developer who purchased an undeveloped tract of land within a multi-phased and partially-built condominium project. When the developer attempted to sever certain undeveloped parcels from the developed tracts, protracted litigation ensued with the existing condominium owners. In the

middle of the litigation, I was retained to replace the existing counsel of record. The matter was resolved in 1997 through negotiations with the majority of condominium owners settling the complicated title issues, as well as the liability claims relating to my client's alleged obligation to develop the remaining tracts in accordance with the original condominium declaration. Judgments approving the settlements were entered in both these related cases despite objections from some owners. The condominium owners were represented by Wendell Willard, Suite 310, 400 North Park Town Center, 1000 Abernathy Road, Atlanta, Georgia 30328, (770) 481-7100.

(c) Other reported real estate cases of note include *F.W. Woolworth Co. v. Buford Clairmont Co.*, 769 F.2d 1584 (1985), which related to Woolworth's closing of all its "Woolco" stores nationwide and established Woolworth's entitlement under its form lease to sublease the vacated premises at a profit; and *Gallopy v. Bradco, Inc.*, 260 Ga. App. 311 (1990), affirming a trial court judgment relating to specific performance of an extraordinarily valuable twenty-year old option to purchase property. The *Woolworth* case was before Judge Robert Hall of the United States District Court for the Northern District of Georgia, and my opposing counsel was Dorothy Kirkley of Kirkley & Payne, 999 Peachtree Street, Suite 1640 Atlanta, Georgia 30309. The *Bradco* matter was before Judge Osgood Williams of the Superior Court of Fulton County, Georgia, and my opposing counsel was Joseph R. Manning, Morris, Manning and Martin LLP, 1600 Atlanta Financial Center, 3343 Peachtree Road, Atlanta, Georgia 30236, (404) 233-7000.

5. Georgia Constitutional Litigation:

(a) *Bowers v. Board of Regents*, 259 Ga. 221 (1989) and *Board of Regents v. The Atlanta Journal*, 259 Ga. 214 (1989): Through my firm's appointment by then-Governor Zell Miller, I was privileged, along with G. Conley Ingram, to represent the Board of Regents in a suit brought by Georgia Attorney General Michael Bowers. The Attorney General had provided legal advice to the Board of Regents regarding its obligations under an open records statute. After establishing an attorney-client relationship and without obtaining the approval or consent of the Governor, the Attorney General then sued his own client, the Board of Regents, when the Board rejected the Attorney General's legal advice and refused to produce for publication certain documents. In a related case, *The Atlanta Journal* sued the Board of Regents in order to enforce the same obligations under the open records statute. I was responsible for arguing the issues relating to the breach of ethical standards, the violation of the attorney-client privilege, and the lack of constitutional authority in the Attorney General to sue a state entity without authorization

from the Governor. The Supreme Court refused to decide the case on ground of mootness despite the potential for reoccurrence. This 1989 case was heard in the Superior Court of Fulton County, Georgia, before Judge Don Langham. The opposing counsel was Michael Bowers who is now in private practice at Meadows, Ichter, & Trigg, Suite 300, 8 Piedmont Center, 3525 Piedmont Road, Atlanta, Georgia 30305, (404) 261-6020.

(b) *Smith, et al. v. Miller, et al.*, 261 Ga. 560 (1991): I served as special counsel to Presiding Justice George T. Smith of the Georgia Supreme Court and Presiding Judge Harold Banke of the Court of Appeals to assist former Supreme Court Justice Hardy Gregory, their trial counsel, in challenging an administrative interpretation of a state employee retirement statute. This statute effectively required Judge Smith and Judge Banke to retire at age 75, rather than at the end of their elected terms, in order to avoid statutory penalties eliminating their retirement benefits. All of the sitting Justices of the Georgia Supreme Court disqualified themselves, and the three officers and four immediate past presidents of the Council of Superior Court Judges of Georgia were designated to hear and dispose of the matter. Although I was not counsel of record, I prepared the pleadings and briefing for Hardy Gregory. The Court determined that Justice Smith and Judge Banke had waived any right to pose a constitutional challenge to the plan's requirements, and both retired at the age of 75.

Justice Smith is now in private practice with Browning & Tanksley LLP, Suite 225, 166 Anderson Street, Marietta, Georgia 30060, (770) 424-1500. Judge Harold R. Banke served as a Senior Appellate Judge, c/o The Georgia Court of Appeals, State Judicial Building, Atlanta, Georgia 30303, (404) 656-3450, but is now, I believe, deceased.

Counsel of record for Justice Smith and Judge Banke was Hardy Gregory of the Davis, Gregory law firm, 708 16th Avenue East, Cordele, Georgia 31015, (229) 273-7150. Counsel for Governor Miller and the employees Retirement System of Georgia was then Attorney General Michael J. Bowers, whose current address is listed above.

(c) Other representative constitutional appeals of note include *Lutz v. Foran*, 262 Ga. 819 (1993) relating to the constitutionality of a tort reform "affidavit" statute; and *Smith v. Cobb County-Kennestone Hospital*, 262 Ga. 566 (1992) relating to the constitutionality of a statute of limitations.

6. Eminent Domain:

(a) *Concept Capital Corporation v. DeKalb County* 255 GA 452 (1986), 172 Ga. App. 838 (1984) ultimately tried before Judge Dan Coursey in the Superior Court of DeKalb County: I represented a property owner challenging the right of the Metropolitan Atlanta Rapid Transit Authority ("MARTA") to condemn air rights above its property for a surface parking lot. The case was based upon the assertion that MARTA was condemning more property than needed for the rapid rail system in order to "go into the real estate business" in future years through the leasing and development of "air rights" above MARTA stations and adjoining property. The Georgia Supreme Court held in favor of MARTA, and MARTA is now leasing and developing such property and utilizing the revenue to subsidize transit operations. MARTA was represented by Charles N. Pursley, Jr. of the Pursley Howell law firm, Suite 4540, SunTrust Plaza, 303 Peachtree Street, N.E., Atlanta, Georgia 30308, (404) 880-7180.

(b) Other representative eminent domain cases include *DeKalb County v. Perimeter Mall, Inc.*, Civil Action No. 93-11678-8, in the Superior Court of DeKalb County, which involved the acquisition in 1993 of property in a regional mall from the Rouse Company for a MARTA station; and *DeKalb County v. Exxon Corporation*, Civil Action File No. 965694-2 in the Superior Court of DeKalb County, which involved environmental contamination and safety issues arising from the condemnation of a road right-of-way through the middle of an existing gasoline distribution facility on the Colonial pipeline in Doraville, Georgia. I represented Rouse and Exxon, and both of these cases were resolved through negotiated settlements. Charles N. Pursley (whose address and telephone number are listed above) represented DeKalb County in the Perimeter Mall Case. Richard Carothers of Carothers & Richards, Suite 200, 4350 South Lee Street, Buford, Georgia 30518, (770) 932-3552, represented DeKalb County in the Exxon case.

7. Fiduciary and Estate Litigation

(a) *Frances Woodruff v. Trust Company Bank, et al. re the Estate of George Woodruff*; Civil Action File No. D42550 in the Superior Court of Fulton County, Georgia before Judge Don A. Langham. On the death of Coca Cola magnate George Woodruff in 1987, G. Conley Ingram, Robert G. Edge, and I were retained to represent six charitable beneficiaries of Mr. Woodruff's estate in litigation brought by his estranged daughter, Frances "Tut" Woodruff. Asserting a theory of "monomania", Ms. Woodruff sought to invalidate her father's estate plan (which eliminated her as a beneficiary), thereby

jeopardizing approximately \$150 million of charitable bequests. The charitable beneficiary clients included Egleston Hospital for Children, The Georgia Tech Foundation, the Woodruff Medical Center, Agnes Scott College, The Rabun Gap - Nacoochee School, and The Walter F. George School of Law at Mercer University. A negotiated settlement preserving the charitable bequests was achieved. Tut Woodruff was represented by Alex McLennon, and I understand that Mr. McLennon is now deceased. The Woodruff estate was represented by Frank Jones and Joseph Loveland of King & Spalding, 191 Peachtree, N.E., Atlanta, Georgia 30303, (404) 572-4600. One other charity was represented by Michael Egan (Associate Attorney General under Attorney General Griffin Bell) of Sutherland, Asbill & Brennan, Suite 2300, 999 Peachtree Street, Atlanta, Georgia 30309, (404) 853-8000. Other beneficiaries were represented by John T. Marshall of the Powell Goldstein firm, 191 Peachtree Street, Atlanta, Georgia 30303, (404) 572-6600; John J. Dalton of the Troutman, Sanders firm, Suite 5200, 600 Peachtree Street, Atlanta, Georgia 30308, (404) 885-3120; and J. Barrington Vaught of the Hatcher, Stubbs firm, P.O. Box 707, Columbus, Georgia 31902, (706) 324-0201.

(b) *Eric S. Murrah v. Patricia S. Hodgson et al.*, Civil Action No. 2000CV25012, in the Superior Court of Fulton County, before the Honorable Stephanie Manis: I represented a trustee of a charitable remainder trust in litigation filed in 2000 against his co-trustees seeking to obtain appropriate income distributions to the life beneficiary, the trustee's mother. The trustee's mother was the second wife of the deceased grantor of the trust, and the other trustees were children of the deceased grantor by his first wife. The trust corpus involved in excess of \$11 million. A satisfactory settlement of the dispute was negotiated and approved by the trial court through the entry of an appropriate consent judgment. The defendant co-trustees were represented by A. Stephens Clay of Kilpatrick, Stockton, Suite 2800, 110 Peachtree Street, Atlanta, Georgia 30309, (404) 815-6500. The charitable remainder trust was represented by John Wallace of King & Spalding, 191 Peachtree Street, N.E., Atlanta, Georgia 30303, (404) 572-4600. The charitable remainder beneficiaries were represented by Grace Evans Lewis of the Georgia Attorney General's Office, Department of Law, Suite 132, 40 Capitol Square S.W., Atlanta, Georgia 30334, (404) 651-9457.

8. Arbitrations:

(a) *John Hancock Life Insurance Company v. Fortis, Inc. et al.*, Civil Action No. 01CV-2469, in the United States District Court for the Southern District of New York before the Honorable John S. Martin: I represent Fortis, Inc., and related entities in an arbitration matter and in civil litigation relating

to an alleged \$14 million post-closing adjustment to actuarial loss reserves arising from the sale of a block of long-term care insurance policies. This matter was ongoing at the time I joined the Department of Justice. I do not know its current status. Opposing counsel was Donald F. Luke of Clifford, Chance, Rogers & Wells, 200 Park Avenue, New York, New York 10165, (212) 878-8000.

(b) *In re: Superior Sealants, Inc.*: In this arbitration proceeding relating to a 1991 sale of assets, I represented the seller of a caulk and sealant business against claims by the buyer alleging misrepresentations in the sale of the assets. The matter was arbitrated before Jack P. Etheridge, a former Judge of the Superior Court of Fulton County, Georgia, and Judge Etheridge issued a binding arbitration ruling in favor of my client. Judge Etheridge's address is 4715 Harris Trail, N.W., Atlanta, Georgia 30327, (770) 240-1582. Opposing counsel was William Boice of Kilpatrick, Stockton, 1100 Peachtree Street, Suite 2800, Atlanta, Georgia 30309, (404) 815-6500.

(c) *In re: Richard Howell v. Kenny Anderson*: I represented Richard Howell, an Atlanta sports agent, in a 1997 claim against Kenny Anderson, then an NBA "all-star" guard for the New Jersey Nets. My client had, with Mr. Anderson's authority and involvement, negotiated a contract extension with a value in excess of \$30 million. Mr. Anderson unexpectedly rejected the extension immediately prior to execution, fired my client, retained David Faulk, and agreed to a substantially similar contract with another NBA team after a trade. My client claimed compensation for the successful negotiation of his extension prior to termination. Under the rules of the NBA Players Association, the claim for compensation was subject to arbitration, and the arbitrator held, on a motion, that no compensation was owed unless and until a binding contract was signed regardless of the stage of the negotiations or the effort expended. The arbitrator was George Nicolau, 125 East 10th Street, New York, New York 10003, (212) 777-5032, and counsel for Mr. Anderson was Irwin Levy, 950 Third Avenue, New York, New York 10022, (212) 355-7220.

9. Regulatory Proceedings:

(a) *In re: Allstate Insurance Company*, No. 94C-075, in the Georgia Department of Insurance, before Molly Fleeman as Hearing Officer for the Georgia Insurance Commissioner Tim Ryles: I represented Allstate Insurance Company in this 1994 regulatory proceeding involving what was, at the time, the largest fine ever imposed by the Georgia Insurance Commission (\$3,547,000). The fine was based upon alleged violations of statutes and

regulations on the non-renewal of automobile liability policies. The matter was tried before the Commissioner's Hearing Officer to establish a record for an appeal to the Superior Court of Fulton County. After the administrative record was made, the matter was settled through a consent order on terms which involved no fine but other accommodations to former policyholders by the insurer. The Insurance Department was represented by Susan Hutcheson, Chief of the Enforcement Division, who now resides at 2650 Audubon Road, Norristown, Pennsylvania 19403, (610) 650-2372.

(b) *In re: MAG Mutual Insurance Company*, Case No. 87C-11 in Georgia Department of Insurance, before Warren D. Evans, Georgia Insurance Commissioner: I represented an insurer in this 1987 regulatory proceeding which was the first challenge by an insurer of a rejection by the Insurance Commissioner of a premium increase filing. The matter was settled favorably to the insurer after the Department's actuary on cross-examination eventually agreed that the proposed premium increases were justified by the actuarial data. The Insurance Department was represented again by Susan Hutcheson whose address is listed above and by Kirkland McGhee whose address is now Long, Aldridge & Norman, 303 Peachtree Street, N.E., Suite 5300, Atlanta, Georgia 30308, (404) 527-4934.

(c) Other representative regulatory cases includes: *Garamendi v. Ryles*, 204 Ga. App. 747 (1992), in which I represented the Insurance Commissioner of California in a dispute with the Insurance Commissioner of Georgia concerning the disposition of the assets of an insolvent insurer; and *Heritage Insurance Company of America v. Evans*, 205 Ga. App. 98 (1992), in which I represented the Insurance Commissioner of Illinois in a similar dispute concerning the disposition of assets of an insolvent insurer. In both cases, the Georgia Insurance Commissioner was represented by Thomas A. Cox, Jr., now practicing with the Johnson Freeman firm, 1069 Spring Street, Atlanta, Georgia 30309, (404) 873-0093. Terrence Croft of King & Croft, 707 The Candler Building, 127 Peachtree Street, Atlanta, Georgia 30303, (404) 577-8400, represented a claimant in the Heritage case.

10. Health Care Litigation:

(a) *U.S. ex rel. Mark Parker v. Apria Health Care Group, Inc., et al.*, in the United States District Court for the Northern District of Georgia, Atlanta Division, Civil action File NO. 1-95-CV-2142-FMH, before the Honorable Frank Hull: I represented Provident Memorial Hospital of El Paso, Texas in this *qui tam* action under the False Claims Act. The United States intervened in the action brought originally in 1995 by a relator, and the case was settled

through mediation by former Superior Court Judge Jack Etheridge whose address is listed above. The relator was represented by Michael Bothwell, 304 Macy Drive, Roswell, Georgia 30076, (770) 643-4606. The United States was represented by Daniel Caldwell, U.S. Attorney's Office, 1800 U.S. Courthouse, 75 Spring Street, S.W., Atlanta, Georgia 30335, (404) 581-6000 and by Laurie Oberembt of the Department of Justice, Civil Division, Washington, D.C. The co-defendant was represented by Stephen Cowen of King & Spalding, 191 Peachtree Street, N.E., Atlanta, Georgia 30303, (404) 572-4688, and by Robert Fabikant of Sidley & Austin, 555 West 5th Street, Suite 4000, Los Angeles, California.

(b) *Winter v. Ronald Roper, M.D.*, Civil Action File NO. 93A-001535-4, in the State Court of Cobb County, Georgia, before Judge A. Harris Adams: I represented the defendant physician in this medical malpractice case, a case which is representative of a number of "iatrogenic injury" cases that I have tried over the years. An "iatrogenic injury" is an injury indisputably caused by the doctor in his treatment of the patient, in this case the perforation of the patient's ureter during an endoscopic procedure to remove a kidney stone. The patient subsequently lost kidney function above that ureter, and the kidney was removed in a subsequent operation. A week long jury trial resulted in a defense verdict. The plaintiff was represented by James Poe of Drew, Eckl & Farnham, P.O. Box 7600, Atlanta, Georgia 30357, (404) 885-1400.

(c) *Lisa Clark v. Robert Palmer, M.D.*, Civil Action File No. 89-V-8860, in the State Court of Fulton County, Georgia, before Judge Dorothy Vaughn: Again, I represented the defendant physician in an iatrogenic injury claim, the perforation of the patient's bowel during a laparoscopic sterilization procedure. The bowel perforation was discovered only after the patient had been discharged from the hospital and developed a severe infection. The patient was readmitted for surgery which involved an ileostomy and a bowel resection. Several months after recovering from the surgery, the patient became pregnant. The suit sought damages not only for the bowel perforation but also for the "wrongful pregnancy." The case was tried to a defense verdict and then settled on a satisfactory basis after the trial judge ordered a new trial. The plaintiff was represented by an attorney with a medical degree, William Morton, M.D., 170 Beavers Road, Canton, Georgia 30115, (770) 345-6783, and by Tony L. Axam, Suite 310, 1280 West Peachtree Street, Atlanta, Georgia 30309, (404) 524-2233.

17. 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.)

Some of the significant non-litigation legal matters in which I have been involved include:

(a) I represented Trigon, Inc., (formerly Blue Cross/Blue Shield of Virginia) in connection with its negotiations for the purchase of Cerulean, Inc. (formerly Blue Cross/Blue Shield of Georgia) in an auction competition with Wellpoint, Inc. (formerly Blue Cross/Blue Shield of California). Wellpoint won the auction with a purchase price valued in excess of \$500 million. My role involved the "due diligence" monitoring and assessment of a class action filed by Blue Cross/Blue Shield policyholders in Georgia and the monitoring and assessment of the "Form A" regulatory proceedings filed by Wellpoint as a necessary prerequisite for any change in control of a licensed insurer. Corporate counsel for Trigon was Gordon Smith of McGuire, Woods firm, One James Center, 901 East Cary Street, Richmond, Virginia 23219, (804) 775-4347.

(b) I represented a nonprofit corporation in conjunction with the filing of amended federal tax returns to recognize "unrelated business income" which had, through an accountant's oversight, gone unreported and untaxed. My efforts were to obtain a waiver of any penalty and interest and to utilize tax loss carry-forwards to reduce as much as possible the tax due. The sums involved were substantial, and, ultimately, no interest or penalty was required. The identity of the entity is omitted because of the attorney-client privilege.

(c) I represented certain outside directors of a major corporation regarding their fiduciary obligations in investigating possible malfeasance by the company's chief executive officer and in acting upon the results of that investigation. The identity of the entity is omitted because of attorney-client privilege.

(d) I have served as the litigation partner on the legal team for Mohawk Industries, Inc. In addition to various litigation matters in which Mohawk was a party, I have provided general advice regarding "due diligence" evaluations of pending litigation in merger and asset purchase transactions, confidentiality obligations and rights under letters of intent, tortious interference with contractual relations issues, entitlement to "bust-up" fees in terminated transactions, and other contractual matters.

(e) In connection with a private placement of securities, I provided insurance and risk management advice to the Canadian parent of the issuer and to the broker-dealer regarding potential medical malpractice liability exposure for the operation of medical care facilities within the United States. The identities of the entities are omitted because of the attorney-client privilege.

(f) I served various management functions within my former law firm including Hiring Partner 1983-85; Assistant Financial Partner 1987-1989; Partner-in-Charge, Galleria Office 1990-93; Administrative Committee 1995-98 and 2000-2001; Chair, Associates Committee 2000-2001; Investment Committee 1995-2001.

(g) As Assistant Attorney General for the Civil Division, I have been responsible for the management and oversight of the largest litigation component within the Department of Justice having approximately 700 attorneys and a portfolio of over 25,000 active cases on a broad range of issues.

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.

When I joined the Department of Justice on September 17, 2001, I retired as a partner at Alston & Bird LLP. Under the partnership agreement, I am currently eligible for certain retirement benefits. Upon retirement, I received a lump sum payment of my capital account from the partnership, and I received at year-end a discretionary share of the firm profits for services performed through my retirement date. I have also elected to continue participation at my own expense in certain life insurance and health insurance programs applicable to retired partners. I have also elected leave my profit sharing/401(k) plan assets in place to be administered by First Union or whatever third party administrator may become responsible for the Alston & Bird, LLP plans. In addition, all retired partners are entitled to utilize certain office space and administrative and secretarial support designated for retired partners. Finally, I am currently eligible for retirement payments from the firm for a five-year period after retirement with the annual amount being equal to 30% of my average annual budgeted compensation determined from the highest five years of my budgeted compensation within the last ten years prior to my retirement. This annual compensation is payable monthly at age 60 or at my election beginning, at the earliest, in the January following my retirement date. In the event that I elect to receive such payments prior to attaining 60 years of age, a 7% annual discount rate applies for each year under the age of 60. Any such retirement payments remaining outstanding on my death are payable to my estate. I have elected to begin receiving such retirement payments in February, 2003.

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 intend to coordinate closely with the Departmental Ethics Office of the Department of Justice to identify and resolve potential conflicts of interest during the period of my service, if I am confirmed by the Senate.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service in the position to which you have been nominated? If so, explain.

I have no current plans to pursue outside employment during my service.

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.)

I am attaching a copy of the Form SF 278 Public Financial Disclosure Report.

5. Please complete the attached financial net worth statement in detail (add schedules as called for).

I am attaching a copy of a detailed financial 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 served as co-campaign chairman for John Lupton in his candidacy for and eventual election to a seat in the Georgia Legislature in two different campaigns in the late 1970's or early 1980's. I served on the Finance Executive Committee in Bill Campbell's first campaign for Mayor of Atlanta in 1992. I served on the Georgia Finance Committee for the George W. Bush Presidential Campaign in 1999-2000, and I served as an alternate delegate to the Republican National Convention in Philadelphia at which George W. Bush was nominated as the Republican Party candidate for President. I have also allowed my name to be associated with campaigns for local and state offices (especially judicial offices); however, I have not managed or played a significant role in any of those campaigns.

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.

I have not kept track of the precise number of hours devoted to pro bono activities for the disadvantaged as opposed to other pro bono activities. However, I have served each year over the last 5-10 years as a solicitor for the Atlanta Legal Aid Society in its annual fundraising campaign and participated in its first capital campaign in 2000. At the request of Douglas Eakeley, Chairman of the Legal Services Corporation, I arranged for my former firm to host various function relating to legal services programs, and I also arranged for my firm to be one of the ten law firms nationally to sponsor a special twenty-fifth anniversary annual report to be presented to Congress. Through my membership in the Butler Street YMCA (a historically African-American, inner-city "Y" which still maintains its separate existence from that of the Atlanta "Y"), I have over many years sponsored the memberships of 4-5 youngsters each year in that organization. I have also served on the Board of Directors of the YMCA Blue Ridge Assembly in Black Mountain, North Carolina, a YMCA convention center for "Y"'s throughout the Southeast, which sponsors various "leadership schools" for young people. Finally, as the member of my former firm's Administrative Committee with responsibility for young lawyers, I administered a merit bonus compensation system and an annual review/evaluation system to ensure that the "pro bono" activities of the firm's younger lawyers were recognized, encouraged, supported, and rewarded, such as a four month fellowship program at the Atlanta Legal Aid Society (initiated by my former firm in 1995) and at the Fulton County Public Defender's Office (initiated by my firm in 2000). In 2000, my former firm received the State Bar of Georgia Will Spann Award for community service (named for a deceased Alston & Bird partner) for starting the Legal Aid Fellowship program in which other firms are now participating. Another measure of my former firm's commitment to community service is reflected in the President's Award of the Atlanta Bar Association for community service which, when I retired from Alston & Bird, had been awarded fourteen times, and my former firm had been the recipient of that award seven times, the same number as all other Atlanta firms combined. Since joining the Department of Justice, I have not been involved personally as counsel in any pro bono litigation, and I have resigned many of my pro bono positions on the advice of the Ethics Office to avoid any appearances of a conflict of interest.

2. Do you currently belong, or have you belonged, to any organization which discriminates on the basis of race, sex, or religion – 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, other than all male fraternities and organizations at Yale when it was an all male institution.



U.S. Department of Justice

Washington, D.C. 20530

APR 09 2003

Ms. Amy L. Comstock
Director
Office of Government Ethics
Suite 500
1201 New York Avenue, NW
Washington, DC 20005-3919

Dear Ms. Comstock:

In accordance with the provisions of Title I of the Ethics in Government Act of 1978 as amended, I am forwarding the financial disclosure report of Robert D. McCallum, Jr. who has been nominated by the President to serve as Associate Attorney General, Department of Justice. We have conducted a thorough review of the enclosed report.

The conflict of interest statute, 18 U.S.C. § 208, requires that Mr. McCallum recuse himself from participating personally and substantially in a particular matter in which he, his spouse, or anyone whose interests are imputed to him under the statute has a financial interest. We have counseled him to obtain advice about disqualification or to seek a waiver before participating in any particular matter that could affect his financial interests.

As a retired partner of his former firm, Mr. McCallum is eligible to receive payments through the Alston & Bird supplemental retirement plan. Mr. McCallum also is eligible to use office space, secretarial assistance and email through his former firm. Mr. McCallum will recuse himself from any particular matter that would affect the ability or willingness of Alston & Bird to continue to provide these benefits.

We have advised Mr. McCallum that because of the standard of conduct on impartiality at 5 CFR 2635.502 he should seek advice before participating in a particular matter having specific parties in which a member of his household has a financial interest or in which someone with whom he has a covered relationship, including Alston & Bird, is or represents a party.

Ms. Amy L. Comstock

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Based on the above agreements and counseling, I am satisfied that the report presents no conflicts of interest under applicable laws and regulations and that you can so certify to the Senate Judiciary Committee.

Sincerely,

A handwritten signature in black ink, appearing to read "P. R. Corts", followed by a horizontal line.

Paul R. Corts
Assistant Attorney General
for Administration and
Designated Agency Ethics Official

Enclosure

Chairman HATCH. Thank you, Mr. McCallum.

Mr. Keisler, do you have any comments or introduce anybody who is here with you?

**STATEMENT OF PETER D. KEISLER, OF MARYLAND, NOMINEE
TO BE ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION, DE-
PARTMENT OF JUSTICE**

Mr. KEISLER. Thank you very much, Mr. Chairman. It's a great privilege for me to be able to appear before you today. Thank you for having me here, and I would love the opportunity to introduce my family, if that's all right.

Susan Gomory Keisler, my wife. I have had a lot of great opportunities as a result of obtaining a law degree, but far and away the greatest was that I met Sue at the law firm where we both started practicing.

Chairman HATCH. That is great. Sue, we are happy to have you here.

Mr. KEISLER. And my daughter, Sydelle.

Chairman HATCH. Hi.

Mr. KEISLER. Who is 8 years old and is in second grade. And my son, Alex.

Chairman HATCH. Hi, Alex. How are you doing?

Mr. KEISLER. Six years old and is in kindergarten. And my youngest son, Philip, who is 3 years old and is in nursery school.

Chairman HATCH. Well, that is great. They are pretty well behaved, is all I can say. I am not used to that in the Hatch family. [Laughter.]

Mr. KEISLER. I am not entirely used to it either, Senator. We promised them ice cream if all goes well.

Chairman HATCH. Well, that is good.

[Laughter.]

Chairman HATCH. That is good.

Mr. KEISLER. I am also very, very pleased to have my father Bill Keisler here who came down from New York this morning. It means a great deal to me to have him here.

Chairman HATCH. We are honored to have you here. You have a great son. I have known him for a long time.

Mr. KEISLER. And I certainly wish my mother could have been here as well. She passed away many years ago.

Chairman HATCH. I am sorry to hear that.

Mr. KEISLER. A few months after I received my law degree. I think of her often, and particularly at moments like these.

I would also like to introduce my niece, who is holding Philip, Sarah Seitz. She is on leave from Wellesley and is living with us while she interns for a non-profit which helps victims of domestic violence; and my father-in-law, Ralph Gomory, and his wife, Lillian Wu, who have also come down here, and it means so much to me to have them here.

Chairman HATCH. We are honored to have all of you here.

Mr. KEISLER. I'd also like to take this opportunity, Mr. Chairman, to thank the President for nominating, to thank the Attorney General for his confidence in me, and to thank you and the Committee for having me here today. I'd also like to thank you and

Senator Durbin for taking time out of your busy schedules to meet privately with me earlier. I very much appreciate that.

The Civil Division, as you know, Mr. Chairman, has broad litigating responsibilities on behalf of the United States in areas as diverse as torts, contracts, constitutional law, administrative law, fraud, bankruptcies, and many others. I always felt it a great privilege when I was in private practice to be able to participate in the legal process and stand up in court as an advocate for a client. But I think it is a special privilege to do that on behalf of the United States, to stand up in the courts of the United States on behalf of the people of the United States. And I think that that client in particular is entitled to the highest levels of professionalism, integrity, skill, and hard work from its lawyers, and I think the thing that has most impressed me in the approximately 1 year I've served at the Justice Department is to see that level of advocacy and professionalism delivered every day by the 700-plus men and women who serve as attorneys in the Civil Division and by the hundreds and hundreds of other attorneys at the Department of Justice. And if I'm fortunate enough to be confirmed, I want to pledge to do my utmost to uphold that great tradition.

I also want to commit that, in addition to addressing any questions you may have today, that if I'm confirmed I want and intend to make myself personally available to the Committee, to provide it with whatever information it needs to further its legislative and oversight responsibilities.

Again, Mr. Chairman, thank you so much for having me here, and I'd certainly be happy to address any questions you might have in evaluating my nomination.

[The biographical information follows:]

I. BIOGRAPHICAL INFORMATION (PUBLIC)

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

Peter Douglas Keisler
2. Address: List current place of residence and office address(es.)

Residence
Bethesda, Maryland

Office
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530
3. Date and place of birth.

October 13, 1960
Hempstead, New York
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 Susan Gomory Keisler. Her maiden name was Susan Gomory. She is not presently employed outside the home.
5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

Yale Law School (1982-1985) J.D. (June 1985)
Yale College (1977-1981) B.A., Political Science, *magna cum laude* (May 1981)

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.

2002-present	United States Department of Justice Principal Deputy Associate Attorney General and (from October 7, 2002 to March 28, 2003) Acting Associate Attorney General
1989-2002	Sidley Austin Brown & Wood (formerly Sidley & Austin) Partner (1993-2002), Associate (1989-1993)
1989-1990	Yale Law School Alumni Association of Washington, D.C. Secretary
1988	Chambers of Justice Anthony M. Kennedy United States Supreme Court Law Clerk
1986-1988	Office of the Counsel to the President, The White House Associate Counsel to the President (1987-1988), Assistant Counsel (1986-1987)
1985-1986	Chambers of Judge Robert H. Bork U.S. Court of Appeals, D.C. Circuit Law Clerk
Summer 1984	Simpson Thacher & Bartlett Summer Associate
Summer 1983	Center for Research on Institutions and Social Policy Summer Intern
1983-2000	Federalist Society Director and Secretary
1982 (estimate)	Committee for Responsible Youth Politics Board member (I have no records relating to this, and am not certain of either the position or the date)
1981-1982	Leadership Institute Executive Vice President

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.

Note Editor, *Yale Law Journal*

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
D.C. Bar Association
Pennsylvania Bar Association (formerly)
Federalist Society (Director and Secretary, 1983-2000)
State and Local Legal Center (Advisory Board, 1991-1998)

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.

Organizations that lobby before public bodies:

American Bar Association
D.C. Bar Association
Westmoreland Citizens Association

Other organizations to which I belong (all family memberships):

Temple Sinai
Little Falls Swimming Club
Friends of the National Zoo
Discovery Creek

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 Supreme Court (admitted April 20, 1992)
 United States District Court for the District of Columbia (admitted January 8, 1990)
 United States Court of Appeals for the District of Columbia Circuit (admitted November 27, 1989)
 United States Court of Appeals for the Second Circuit (admitted December 29, 2000)
 United States Court of Appeals for the Seventh Circuit (admitted November 22, 1991)
 United States Court of Appeals for the Eighth Circuit (admitted July 30, 1991)
 United States Court of Appeals for the Tenth Circuit (admitted July 14, 1997)
 United States Court of Appeals for the Eleventh Circuit (admitted August 22, 1994)
 District of Columbia Court of Appeals (admitted January 27, 1989)

In addition, I was admitted to the Pennsylvania Bar on November 21, 1985, and therefore admitted to practice before the Pennsylvania courts. My status there has been "non-resident active" or "voluntarily inactive" since 1995, because I do not live or practice law in Pennsylvania.

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.

Remarks to the Seventh Annual Immigration Litigation Conference (speech) (April 23, 2003)
 "The Need for National Rules to Foster Local Competition in Telecommunications," *Legal Times*, November 11, 1996 (co-authored)
 "Yale Lit: Literary, legal flap," *Washington Times*, January 3, 1984 (co-authored)
 "Solidarity and Dissent," Institute for Government and Politics (1984)
 "Corporate PACs: How to Distinguish Friends from Foes," *Human Events*, April 17, 1982
 "U.S. Interests Jeopardized by Law of Sea Treaty," *Human Events*, January 23, 1982
 "Yale's Giamatti and the Moral Majority," *Human Events*, November 28, 1981
 Letter to the Editor, *New York Times*, June 7, 1980

In addition, while at Yale I wrote and edited some college newspaper pieces, but did not save any of them, and sometime in 1996 I made informal remarks at a meeting of the State and Local Legal Center on *Printz v. United States*, but they were never written down.

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

I am in excellent health. My last physical examination was June 13, 2002.

14. 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.

Acting Associate Attorney General (October 7, 2002 - March 28, 2003) (appointed)
Principal Deputy Associate Attorney General (June 2002 - present) (appointed)
Associate Counsel to the President (June 1987-February 1988) (appointed)
Assistant Counsel, Office of the Counsel to the President (Sept. 1986-June 1987) (appointed)
National Advisory Council on Women's Educational Programs (late 1984 - mid 1985) (appointed)

I have never been a candidate for elective office.

15. 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;

Beginning in June 1985, I clerked for approximately one year for Judge Robert H. Bork of the United States Court of Appeals for the D.C. Circuit.

Beginning in February 1988, and through the end of that calendar year, I clerked for Justice Anthony Kennedy of the United States Supreme Court.

2. whether you practiced alone, and if so, the addresses and 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 approximately September 1986, I joined the Office of the Counsel to the President in the White House as an Assistant Counsel. On June 5, 1987, I was promoted to Associate Counsel to the President.

In February 1989, I joined the Washington, D.C. office of Sidley & Austin as an Associate. In 1993, I became a partner. Sidley & Austin is now known as Sidley Austin Brown & Wood, and the current address of its Washington, D.C. office is 1501 K Street, NW, Washington, D.C. 20005.

In June of 2002, I left Sidley Austin Brown & Wood to join the United States Department of Justice as Principal Deputy Associate Attorney General. From October 7, 2002, to March 28, 2003, I also served as Acting Associate Attorney General.

- 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.

My first experience as a practitioner was as an attorney in the Office of the Counsel to the President. I shared generally in the work of that office in providing legal advice as a member of the White House staff from the fall of 1986 through early 1988.

My subsequent private practice focused on litigation and regulatory matters. In particular, I specialized in general appellate litigation, telecommunications regulation and litigation, and to a lesser extent, professional liability. My professional liability work was largely confined to the period 1992 through 1996; my work in both appellate litigation and telecommunications regulation and litigation spanned the entirety of my years in private practice.

Some of my former clients are AT&T Corp., the National Cable & Telecommunications Association, Deloitte and Touche, Stroock & Stroock & Lavan, Ashland Oil, the United States General Accounting Office, Microsoft, the late Mr. Elhadi Omer Abdelhalim, and Mr. Judd Hirschberg.

Since joining the Department of Justice in 2002, the nature of my practice has changed substantially. Its focus is now on civil litigation in which the United States, and/or its departments and agencies, are parties.

- 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.

In my first three years in private practice (1989-1991), I did not appear in court at all, although I did appear in an arbitration proceeding. I began arguing cases in court in 1992, and have done so before the United States Supreme Court, the United States Courts of Appeals for the Second, Seventh, Eighth, and D.C. Circuits, and the United States District Court for the Eastern District of Virginia. I also appeared frequently in adjudications and rulemaking proceedings before the Federal Communications Commission.

2. What percentage of these appearances was in:
- (a) federal court (100%);
 - (b) state courts of record (0%);
 - (c) other courts (0%).

All of my court appearances have been in federal court.

3. What percentage of your litigation was:
- (a) civil (99%);
 - (b) criminal (1%).

Almost all of the litigation I have handled has been civil. I have argued only one criminal case.

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 have not tried any cases in courts of record to verdict or judgment, although I have obtained judgments in federal district court through summary judgment and through dismissal (both as chief counsel and as associate counsel) in approximately half a dozen cases.

5. What percentage of these trials was:
 - (a) jury;
 - (b) non-jury.

Not applicable.

16. 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. *National Cable & Telecommunications Association v. Gulf Power*, 534 U.S. 327 (2002)

(a) 2000–2002

(b) United States Supreme Court

(c) Co-counsel:

Paul J. Zidlicky
 Sidley Austin Brown & Wood
 1501 K Street N.W.
 Washington, D.C. 20005
 (202) 736-8013

Daniel L. Brenner
 National Cable & Telecommunications Association
 1724 Massachusetts Avenue, N.W.
 Washington, D.C. 20036
 (202) 775-3550

Paul Glist
Cole Raywid & Braverman
1919 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 659-9750

Counsel for Federal Communications Commission:

James Feldman
Assistant to the Solicitor General
United States Department of Justice
Washington, D.C. 20530
(202) 514-4277

Counsel for Respondent electric utility companies:

Thomas P. Steindler
McDermott Will & Emery
600 13th Street, N.W.
Washington, D.C. 20005
(202) 756-8000

Robert P. Williams
Troutman Sanders LLP
401 9th Street, N.W., Suite 1000
Washington, D.C. 20004
(202) 274-2950

This case concerned the Pole Attachment Act, 47 U.S.C. § 224, which grants cable operators the right to obtain access on reasonable terms to telephone and electric utility poles in order to attach their cable equipment. In *Gulf Power Co. v. FCC*, 208 F.3d 1263 (11th Cir. 2000), a divided panel of the 11th Circuit held that cable operators forfeit the protections of the Pole Attachment Act if they choose to use their cable attachments to provide high-speed Internet access services to their subscribers in addition to the more traditional video programming.

I began representing the National Cable Television Association (NCTA) – which subsequently changed its name to the National Cable & Telecommunications Association – when it decided to ask the Supreme Court to grant certiorari and review the decision. I filed the petition for certiorari and the reply brief on that petition and, after the Supreme Court granted the petition, filed the merits briefs and presented the oral argument on behalf of NCTA. The Supreme Court reversed the 11th Circuit, and held that cable operators continue to

enjoy the rights conferred by the Pole Attachment Act when they add high-speed Internet service to their offerings.

2. *TCG New York, et al. v. City of White Plains*, 305 F.3d 67 (2nd Cir. 2002)

(a) 2001-2002

(b) United States Court of Appeals for the Second Circuit (Judges Walker, Newman, and F. Parker)

(c) Co-counsel:

Stephen B. Kinnaird
Sidley Austin Brown & Wood
1501 K Street N.W.
Washington, D.C. 20005
(202) 736-8153

Robert G. Scott, Jr.
Cole Raywid & Braverman
1919 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 659-9750

Counsel for City of White Plains:

Philip W. Horton
Arnold & Porter
555 Twelfth Street NW
Washington, D.C. 20004
(202) 942-5000

This case concerned the efforts of TCG, a competitive provider of telecommunications service, to offer telephone service in White Plains, New York. A local ordinance in White Plains imposed a series of requirements that had to be met before a competitive provider of telephone service could be granted a franchise, including a requirement that the provider agree to pay the City annually a franchise fee equal to 5 percent of its gross revenues. The District Court invalidated some of the requirements, but upheld the most onerous, including the 5 percent gross revenues fee.

After the issuance of the District Court decision, I was retained to argue the appeal before the Second Circuit. The Second Circuit reversed the District Court and

held that the franchise fee, as well as many of the City's other requirements, were preempted by federal law and therefore unlawful.

3. *Conboy v. AT&T*, 241 F.3d 242 (2d Cir. 2001)

- (a) June 2000 -- January 2001
- (b) United States Court of Appeals for the Second Circuit (Judges Kears, Jacobs, and Cabranes)
- (c) Co-counsel:

Virginia Seitz
 Stephen Kinnaird
 Sidley Austin Brown & Wood
 1501 K Street N.W.
 Washington, D.C. 20005
 (202) 736-8000

Counsel for AT&T Universal Card Services Corp.:

George Zimmerman
 Skadden Arps Slate Meagher & Flom
 4 Times Square
 New York, NY 10036
 (212) 735-3000

Counsel for Edward and Eileen Conboy:

Henry H. Rossbacher
 Rossbacher & Associates
 444 S. Flower Street, Suite 2100
 Los Angeles, California 90071
 (213) 895-6500

This case was initiated by a class-action complaint against AT&T Corp. and the Universal Card Services Corp. The plaintiffs alleged that AT&T had improperly given proprietary customer information derived from its provision of long-distance services – such as unlisted telephone numbers, and information about the amount and destination of its subscribers' calls – to the Universal Card Services Corp. to assist it in collecting credit card debts. Plaintiffs claimed that this conduct violated the Communications Act, the Fair Debt Collection Practices Act, and various provisions of New York law.

The District Court dismissed the complaint for failure to state a claim on which relief could be granted. *Conboy v. AT&T*, 84 F. Supp. 2d 492 (S.D.N.Y. 2000). I began representing AT&T in this matter at the appellate stage, and argued the case before the Second Circuit. The Second Circuit affirmed the dismissal of the case.

4. *AT&T v. FCC*, 292 F.3d 808 (D.C. Cir. 2002)

(a) 2000-2002

(b) United States Court of Appeals for the D.C. Circuit (Judges Ginsburg, Randolph, and Tatel)

(c) Co-counsel:

David Carpenter
Sidley Austin Brown & Wood
Bank One Plaza
10 South Dearborne Street
Chicago, Illinois 60603
(312) 853-7237

James F. Bendernagel, Jr.
Daniel Meron
Michael Hunseder
Sidley Austin Brown & Wood
1501 K Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Counsel for FCC:

Richard K. Welch
Federal Communications Commission
445 12th Street SW
Washington, D.C. 20554
(202) 418-7225

This case was an outgrowth of a series of cases filed against AT&T in federal district court in the Eastern District of Virginia by a group of competitive local telephone service providers. The plaintiffs claimed that AT&T had failed to pay for certain services it had received from them. AT&T responded by arguing that it had not ordered the plaintiffs' services and therefore had no obligation to pay for them. The plaintiffs contended that AT&T was required by federal law to order their services, and the District Court referred this question to the FCC.

The FCC then issued an order siding with the plaintiffs, concluding that AT&T had been obligated to order plaintiffs' services under 47 U.S.C. 201(a), a provision of the Communications Act. I argued the appeal of that order before the D.C. Circuit, which reversed the FCC and held that it had misconstrued the Communications Act.

5. *United States v. Hirschberg*, 988 F.2d 1509 (7th Cir. 1993).

(a) November 1991 – June 1993

(b) United States Court of Appeals for the Seventh Circuit (Judges Bauer, Cudahy and H. Wood)

(c) Co-counsel:

Carter Phillips
Paul Kalb
Sidley Austin Brown & Wood
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Edward Genson
Genson Steinback & Gillespie
53 W. Jackson Blvd.
Chicago, IL 60604
(312) 726-9015

Counsel for co-defendant/appellant:

Jeffrey Cole
Cole & Staes
321 S. Plymouth Court
Chicago, IL 60604
(312) 697-0200

Counsel for the United States:

Jerome Krulewitch
Winston & Strawn
35 West Wacker Drive
Chicago, IL 60601
(312) 558-5600

This was a criminal case. Judd Hirschberg and Richard Lowrance were accused of staging a phony “theft” of Mr. Hirschberg’s car and defrauding the insurance company. They were charged with, and convicted of, several counts of mail fraud and tampering with a vehicle identification number. Both defendants appealed.

I represented Mr. Hirschberg in the appeal, and argued on his behalf before the Court of Appeals for the Seventh Circuit. We contended that the evidence was insufficient to support his convictions. The panel unanimously threw out the convictions for tampering with vehicle identification numbers, but in a split vote (with Judge Cudahy dissenting) upheld the mail fraud convictions.

6. *Association of Communications Enterprises (ASCENT) v. FCC*, 235 F.3d 662 (D.C. Cir. 2001)

(a) September 1998 – January 2001

(b) United States Court of Appeals for the D.C. Circuit (Judges Edwards, Rogers, and Silberman)

(c) Co-counsel:

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C. Frederick Beckner III
Sidley Austin Brown & Wood
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Counsel for ASCENT:

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Counsel for FCC:

John Ingle
Deputy Associate General Counsel
Federal Communications Commission
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(202) 418-1746

Counsel for SBC Communications:

Michael Kellogg
Kellogg Huber Hansen Todd & Evans
Sumner Square
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Washington, D.C. 20036
(202) 326-7900

This case related to the merger of SBC Communications, Inc., and Ameritech Corp. The FCC granted approval of the merger, subject to certain conditions. One such condition was that the merged entity, for a period of time, would not provide "advanced telecommunications services" such as DSL except through a separate affiliate. In establishing this condition, the FCC held that the separate affiliate would not be considered a "successor" or an "assign" of SBC or Ameritech under the Communications Act, and therefore would not be subject to the same statutory and regulatory obligations as SBC, Ameritech, and other incumbent local exchange carriers under that Act. ASCENT appealed that holding to the Court of Appeals for the D.C. Circuit, and AT&T intervened on the side of ASCENT.

I represented AT&T before the FCC in opposing the merger, and argued the appeal before the D.C. Circuit on AT&T's behalf. The Court held that the FCC's interpretation of the Telecommunications Act of 1996 was unreasonable, and vacated the portion of the FCC's order that had held that the advanced services affiliate would not be a successor or assign of SBC and Ameritech.

7. *Southwestern Bell Telephone Co. v. FCC*, 153 F.3d 597 (8th Cir. 1998)

(a) August 1997 – August 1998

(b) United States Court of Appeals for the Eighth Circuit (Judges Bowman, Wollman, and Hansen)

(c) Co-counsel:

David Carpenter
Sidley Austin Brown & Wood
Bank One Plaza
10 South Dearborne Street
Chicago, Illinois 60603
(312) 853-7237

Daniel Meron
Sidley Austin Brown & Wood
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Petitioner U S WEST:

William Lake
Wilmer, Cutler & Pickering
2445 M Street, NW
Washington, D.C. 20037
(202) 663-6000

Counsel for FCC:

James Carr
Federal Communications Commission
445 12th Street SW
Washington, D.C. 20554
(202) 418-1762

In this case, U S WEST and SBC Communications petitioned for review of an order of the FCC that required them, and other local telephone companies, to make the transport facilities used in their telephone networks to carry their own traffic (known as "shared transport") available to be leased by competitors. U S WEST and SBC claimed that the FCC order was both contrary to the Telecommunications Act of 1996 and arbitrary. AT&T intervened in the appeal on the side of the FCC.

I participated in the original proceedings at the FCC that led to the FCC's decision on this issue, and argued the appeal before the Eighth Circuit on AT&T's behalf. The Eighth Circuit held that the FCC's decision was consistent with the statute and not arbitrary, and therefore upheld it.

8. *Resolution Trust Corporation v. Stroock & Stroock & Lavan and Richard Savitt*, 853 F.Supp 1422 (S.D. Fla. 1994)

(a) September 1992 – November 1995

(b) United States District Court for the Southern District of Florida (Judge Gonzalez)

(c) Co-counsel:

Robert D. McLean (deceased)
David Lawson
Paul Kalb
Sidley Austin Brown & Wood
1501 K Street, N.W.
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(202) 736-8000

Alan Greer
Richman Greer Weil Brumbaugh Mirabito & Christensen
Miami Center, 10th Floor
201 South Biscayne Blvd.
Miami, Florida 33131
(305) 373-4000

Counsel for Resolution Trust Corporation:

The principal counsel for the Resolution Trust Corporation was Mr. William F. Duker of Duker & Barrett. Subsequent to this case, Mr. Duker pled guilty to a federal criminal charge and was disbarred and sentenced to a term of imprisonment. I do not know where he is today. His former partner, Mr. David Barrett, handled the appeal of this case until it was settled. He can be reached at:

Mr. David Barrett
Boies Schiller and Flexner
570 Lexington Avenue
New York, NY 10022
(212) 446-2300

This was a professional liability action brought by the Resolution Trust Corporation (RTC), as receiver for Commonwealth Savings & Loan Association, a failed thrift, against the law firm of Stroock & Stroock & Lavan ("Stroock") and Richard Savitt, the former managing partner of its Miami office. The RTC maintained that Stroock and Mr. Savitt, who had represented Commonwealth, had negligently failed to advise Commonwealth that its junk bond investments were contrary to Florida law. The RTC sought approximately \$200 million in damages.

The late Mr. Robert McLean was lead counsel for Stroock and Mr. Savitt in this matter, and I functioned as his deputy on the case. I supervised approximately

six other attorneys throughout the extensive pre-trial proceedings, including the preparation of a motion for summary judgment that was granted a few days before trial was set to commence. The RTC then appealed and both sides filed briefs with the Court of Appeals for the Eleventh Circuit, but the case settled before the appeal was argued.

9. *Competitive Telecommunications Association v. FCC*, 87 F.3d 522 (D.C. Cir. 1996)

(a) March 1995 – July 1996

(b) United States Court of Appeals for the D.C. Circuit (Judges Edwards, Silberman, and Ginsburg)

(c) Co-counsel:

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Bank One Plaza
10 South Dearborne Street
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Counsel for Competitive Telecommunications Association:

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Counsel for FCC:

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Deputy Associate General Counsel
Federal Communications Commission
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Washington, D.C. 20554
(202) 418-1746

Counsel for Intervening Local Exchange Carriers:

Michael Shortley
Global Crossing
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Rochester, New York 14646
(716) 777-1028

This case concerned a complex set of regulatory proceedings in which the FCC established an interim rate structure that would govern the charges that local telephone companies could impose on long-distance carriers for transmitting portions of long-distance calls over "local transport" facilities. The Competitive Telecommunications Association and AT&T each petitioned for review of these orders, challenging different aspects of the FCC's decisions. The Competitive Telecommunications Association, a trade association of smaller long-distance carriers, challenged aspects of the orders that it believed disadvantaged its members. AT&T challenged different aspects of the rate structure. The cases were consolidated and heard together.

I began representing AT&T in this matter at the appellate stage, and argued the case on AT&T's behalf. The Court vacated as arbitrary and therefore unlawful the aspects of the FCC's orders that AT&T challenged, as well as some of the aspects of the orders that the Competitive Telecommunications Association had challenged.

10. *Bell Atlantic Network Services v. AT&T*, Docket No. 98-1818-A (E.D.Va.), decided by unpublished order March 5, 1999

(a) December 1998 – March 1999

(b) United States District Court for the Eastern District of Virginia (Judge Hilton)

(c) Co-counsel:

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Dabney Carr
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Counsel for Bell Atlantic:

Richard C. Sullivan, Jr.
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Falls Church, Virginia 22042
(703) 641-4200

In this action, Bell Atlantic claimed that AT&T had breached a prior settlement agreement and sought approximately \$7 million in damages. (The parties contracted to keep the terms of the settlement agreement confidential, and the filings in the case was made under seal, so I cannot provide further detail on the issues involved.)

I represented AT&T from the beginning of this action, and argued the motion to dismiss before the District Court. The District Court granted the motion and dismissed the complaint, holding that the FCC had primary jurisdiction over the matter and any complaint by Bell Atlantic should be filed there. Bell Atlantic did not pursue its claim further.

17. 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).

(a) I joined the Department of Justice in June 2002 as Principal Deputy Associate Attorney General. When the Associate Attorney General, Jay B. Stephens, left the Department in early October, 2002, I became Acting Associate Attorney General, a position in which I continued to serve until March 28, 2003. In those capacities, I have participated substantially in the work of the Department in representing the United States in civil litigation. The Associate Attorney General's office works directly with several departmental components, and I have had the privilege of working with several of the Department's litigating division on a broad diversity of matters, including enforcement cases, commercial litigation, challenges to the lawfulness of actions by government departments and agencies, and many others. This work has involved, among other responsibilities, participating in overall strategic decisionmaking with respect to cases, reviewing briefs, dealing with client agencies, and reviewing and passing upon proposed settlements. Moreover, while government litigation has been my principal focus at the Department, the Associate's office also shares in some of the general management responsibilities of the Department, and I have been called upon to address budgetary and similar matters as the need has arisen.

(b) As a member of my former law firm's informal Appellate Resource Group, I frequently provided conceptual and strategic assistance in appellate matters to other attorneys in my office, both partners and associates, by reviewing and commenting on briefs and by assisting attorneys in their preparation for oral arguments through moot courts or other discussions. These cases involved a wide range of legal issues and subject matters before the Supreme Court and circuit courts, including, for example, antitrust law, criminal law, tax law, health care law, constitutional law, contract law, and commercial law.

(c) In addition to the types of court-litigated matters described in the responses to the questions above, I have also had a substantial practice in administrative and regulatory proceedings before the Federal Communication Commission. These proceedings have included both rulemakings and adjudications. They have typically involved extensive briefing and often involved either formal on-the-record oral arguments or less formal oral presentations. Such proceedings have included, for example:

- the merger of Bell Atlantic and GTE (*see Order, Application of GTE Corporation, Transferor and Bell Atlantic Corporation, Transferee, For Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations*, 15 FCC Rcd. 14032 (2000))

-- litigated complaint proceedings (*see, e.g., AT&T v. Ameritech*, 13 FCC Rcd. 21438 (1998); *AT&T, et al. v. Bell Atlantic, et. al.*, 14 FCC Rcd. 556 (1998); *Total Telecommunications, et al. v. AT&T*, File No. E-97-03 (released March 13, 2001))

-- rulemakings concerning the rules that should be adopted to implement the local competition provisions of the Telecommunications Act of 1996 (*see, e.g., First Report and Order, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd. 15499 (1996); *Order, Petition of MCI for Declaratory Ruling that New Entrants Need Not Obtain Separate License or Right-to-Use Agreements Before Purchasing Unbundled Elements*, 15 FCC Rcd. 13896 (2000))

-- rulemakings concerning the rules that should be adopted to spur deployment of advanced, high-speed telecommunications services (*see, e.g., First Report and Order, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 14 FCC Rcd. 4761 (1999); *Second Report and Order, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 14 FCC Rcd. 19237 (1999); *Order on Remand, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 15 FCC Rcd. 385 (1999))

-- rulemakings concerning the rules that should be adopted to prevent anticompetitive conduct by carriers with market power (*see, e.g., First Report and Order, Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, 11 FCC Rcd. 21905 (1996))

-- proceedings adjudicating applications by Bell Operating Companies to offer long-distance service (*see, e.g., Memorandum Opinion and Order, Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region InterLATA Services in Michigan*, 12 FCC Rcd. 20543 (1997))

-- proceedings to determine whether provisions of state law are or should be pre-empted by federal law (*see, e.g., Memorandum Opinion and Order, Public Utility Commission of Texas*, 13 FCC Rcd. 3460 (1997))

(d) I have been involved in litigated and non-litigated *pro-bono* matters, which are described in more detail in Part III of this questionnaire.

(e) I served as Hiring Partner for the Washington, D.C. office of my former law firm, Sidley Austin Brown & Wood, from approximately 1995-2002.

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.

-- *Sidley Austin Brown & Wood Savings and Investment Plan*. Balance as of 3/26/03 is \$165,170.09. This is a Defined Contribution Plan. The balance available for distribution to me in the future cannot be known now. My contributions are invested as follows: 15% in Vanguard Equity Income Fund, 50% in Harbor Capital Appreciation Fund, 15% in Harbor International Fund, and 20% in State Street S&P 500 Index Fund. I may elect at any time to receive my balance, and it will be distributed as a lump sum cash payment. After I reach the age of 65 (October 13, 2025), the lump sum may be distributed to me without my consent. This lump sum cash payment may not be deferred past April 1, 2032.

-- *Sidley Austin Brown & Wood Retirement Plan for Partners*. Balance as of 3/26/03 is \$115,823.34. The balance available for distribution to me in the future cannot be known now. My contributions are invested as follows: 15% in Vanguard Equity Income Fund, 50% in Harbor Capital Appreciation Fund, 15% in Harbor International Fund, and 20% in State Street S&P 500 Index Fund. I may elect at any time to receive in a lump sum payment or installments the portion of the balance attributable to contributions made prior to 1994 and earnings thereon. The remaining portion of my balance may be distributed to me only after I reach the age of 55 (Oct. 13, 2015) and only as a lump sum payment. Distributions may be made in cash or, upon my request and the trustee's approval, in-kind. I may elect to defer distribution until April 1, 2032.

-- *Sidley Austin Brown & Wood 1994 Retirement Plan for Partners*. Balance as of 3/26/03 is \$82,043.01. The balance available for distribution to me in the future cannot be known now. My contributions are invested as follows: 15% in Vanguard Equity Income Fund, 50% in Harbor Capital Appreciation Fund, 15% in Harbor International Fund, and 20% in State Street S&P 500 Index Fund. I may elect at any time to receive my balance only after I reach the age of 55 (Oct. 13, 2015). Distribution will be a lump sum payment and may be made in cash or, upon my request and the trustee's approval, in-kind. I may elect to defer distribution until April 1, 2032.

-- *Sidley Austin Brown & Wood Retirement Plan for Secretarial Staff* (a successor to the Sidley & Austin Retirement Plan which split in two in 1994). This is a Defined Benefit Pension Plan. I am entitled to receive a monthly pension in the

amount of \$1,387.85 starting on November 1, 2025 (the first day of the month after my 65th birthday) and continuing until my death. If I elect to commence pension payments earlier than November 1, 2025, the benefit will be reduced by a formula described in the plan documents. I may elect at any time after I reach the age of 55 to receive my benefit in the form of a monthly pension or an actuarial equivalent single lump sum payment. The approximate lump sum value of my benefit is \$35,650.

-- *Sidley Austin Brown & Wood Cash Balance Retirement Plan for Partners*. This is a pension plan adopted in 2000. My account balance as of 3/28/03 is \$49,148.59. My balance will continue to increase at a rate generally equal to the 30-year Treasury security rate. The plan benefits are payable to me after I reach the age of 55. The benefits are paid out in the form of an annuity unless I elect to receive the distribution in a lump sum.

-- *Sidley Austin Brown & Wood Savings and Investment Plan*. Balance as of 3/26/03 for my wife, a former associate at Sidley & Austin, is \$39,161.86. This is a Defined Contribution Plan. The balance available for distribution to my wife in the future cannot be known now. Her contributions were invested as follows: 30% in Vanguard Equity Income Fund, 50% in Harbor Capital Appreciation Fund, and 20% in State Street S&P 500 Index Fund. She may elect at any time to receive her balance and it will be distributed as a lump sum cash payment. After she reaches the age of 65 (October 29, 2027), the lump sum may be distributed to her without her consent. This lump sum cash payment may not be deferred past April 1, 2034.

-- *SA Investment Partnership*. As a benefit of being a partner at Sidley & Austin, I had the opportunity to elect to participate in the "SA Investment Partnership." I pledged to invest \$100,000 pursuant to capital calls which may be made from time to time. I have thus far invested approximately \$24,000 of that \$100,000. The future benefits from this investment partnership are uncertain.

-- *Thrift Savings Plan*. This is the retirement plan for government employees. As of 2/28/03, my account balance was \$2,984.20. It has been invested in the Government Securities Investment Fund – a fund of short-term, risk free U.S. Treasury Securities that are specially issued to the Thrift Savings Plan.

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 adhere to the requirements of 18 U.S.C. § 208, and to the applicable

regulations implementing those requirements. Categories of litigation that may present potential conflict-of interest issues include those involving entities in which I have financial interests, and cases in which my former law firm, Sidley Austin Brown & Wood, or recent former clients from private practice, are involved. I intend to consult with the appropriate Department of Justice ethics officials about potential conflicts as such matters arise.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service in the position to which you have been nominated? 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.)

I am attaching my financial disclosure report.

5. Please complete the attached financial net worth statement in detail (add schedules as called for).

See 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.

I have never held a paid or full-time position in a campaign. I played small volunteer roles in the 2000 Bush campaign, the 1996 Dole campaign, and the 1980 Reagan campaign, as well as once helping to organize a fundraiser for former Congresswoman Connie Morella.

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.

I represented *pro bono* Dr. Elhadi Omer Abd Elhalim in applying for political asylum and then permanent residency in the United States. This case was referred to me by the Washington Lawyers Committee for Civil Rights and Urban Affairs. Dr. Elhadi had been Senior Medical Officer at Kober Prison in Sudan, where the Sudanese government sent many of its most prominent political prisoners. Dr. Elhadi covertly helped the imprisoned party and trade union leaders communicate with their supporters outside, and also prepared an official medical report describing the injuries inflicted by the government's torture of political prisoners at Kober, which was later published in an Egyptian newspaper and used by human rights groups protesting the policies of the Sudanese government. When the Sudanese government began to suspect Dr. Elhadi, he fled to the United States. His application for asylum attracted the support of Senators Kennedy and Lugar, and then-Senator Kassebaum, and was granted. I devoted approximately 200 hours to this representation. In addition, I also worked with other attorneys at Sidley Austin Brown & Wood who represented aliens seeking political asylum by reviewing and editing their work and helping them prepare for INS interviews.

Along with two of my former colleagues at Sidley Austin Brown & Wood, I also represented before the Court of Appeals for the 11th Circuit two indigent aliens who had been deported by the INS – Fequiere Theodore and Rallin Moultain. See *Theodore v. Immigration and Naturalization Service*, No. 98-3048 (11th Cir.); *Moultain v. Immigration and Naturalization Service*, No. 98-3504 (11th Cir.). The two cases raised several issues in common, and I devoted approximately 120 hours collectively to working on the briefs in both cases. We lost both cases.

I also was part of a team at my former firm that represented *pro bono* the Vietnam Veterans of America in *Vietnam Veterans of America v. Department of the Navy*, 876 F.2d 164 (D.C. Cir. 1989), which involved an unsuccessful attempt to gain access under the Freedom of Information Act to certain legal opinions issued by the Judge Advocate Generals of the Army and Navy that were of importance to veterans.

I assisted in preparing for oral argument the attorney (a former partner of

mine at Sidley Austin Brown & Wood) who was appointed by the United States Supreme Court to represent Scott Carmell in *Carmell v. Texas*, 529 U.S. 513 (2000). Carmell was an indigent criminal defendant who successfully challenged some of his convictions as violating the Constitution's *Ex Post Facto* clause.

I also worked *pro bono* to help develop and implement the federal Police Corps program, in which highly qualified applicants are awarded college scholarships in exchange for a commitment to serve a term as trained police officers. Beginning in law school and continuing following my graduation, I worked with Adam Walinsky, who conceived of the program, in developing, writing, and promoting the legislation that established it.

2. Do you currently belong, or have you belonged, to any organization which discriminates on the basis of race, sex, or religion - 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.

Chairman HATCH. Well, thank you. Thank you both.

Basically you have answered my questions in your statements, and I don't see any reason—I know you both so well, and I have such respect for you, and I believe other members of the Committee do as well. That is why I think they are not here, because normally they show up to really give you a rough time, and they are not here doing that. So I will tell you what we are going to do. It is no secret I am going to support both of you for these excellent positions. They are very important positions. You have covered them. You have talked about some of the things that are on my mind. And we are going to keep the record open until next Tuesday at 5:00 p.m. for any questions any other members of the Committee desire to submit to you.

I would ask you to get the answers back as soon as you can. Wednesday would be soon enough because we will put you on the next markup, which will be next Thursday.

Now, you may be put over for a week because anybody has that right on the Committee, but I doubt that anybody will put you over. But if they do, we will live with that. But the key is to get those answers to questions back.

I have been informed that there are no other Senators coming, so I don't see any reason to keep you or your families any longer. I believe both of you will serve with tremendous distinction in these very important jobs at this time in our country's history. I know both of you have the legal acumen and ability to do it. I know both of you have the integrity and the sense of purpose and realism to be able to handle these jobs in ways that would make all of us proud.

And I know that both of you will do so without regard to politics and do it in a way that really benefits everybody in this country, regardless of where they come from or what their particular ideological beliefs are. If I didn't know that, I would have a lot of questions for you.

So we have seen both of you in action. We know both of you, and I have known you, Peter, since you graduated from Yale. And I just want to compliment both of you for being willing to serve, leave your private practices and your homes and for your willingness to come here and be part of this team at Justice, which I happen to believe is a pretty darn good team doing a very good job under very trying times.

So, with that, we will recess until further notice. Thank you for being here, and thanks to all your family members for being here.

Mr. KEISLER. Thank you, Mr. Chairman.

Mr. MCCALLUM. Thank you, Mr. Chairman.

[Whereupon, at 3:55 p.m., the Committee was adjourned.]

[Question and answers and a submission for the record follow.]

QUESTIONS AND ANSWERS



U. S. Department of Justice

Civil Division

Assistant Attorney General

Washington, D.C. 20530

May 15, 2003

The Honorable Orrin Hatch
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

Enclosed please find my submissions responsive to questions asked of me by Senator Patrick Leahy, Senator Richard Durbin, Senator Charles Grassley and Senator Herb Kohl.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert D. McCallum, Jr.", written in a cursive style.

Robert D. McCallum, Jr.

cc: The Honorable Patrick J. Leahy
Ranking Minority Member

Responses to Senator Leahy's Questions for Robert McCallum

1. As Associate Attorney General, you will have authority over the Civil Rights Division. Since the September 11 attacks, we have seen many acts of violence against those who are or are thought to be Arab, Muslim, or South Asian. I believe that the Federal authority to act against these crimes is too weak, and am proud to be a cosponsor of the hate crimes legislation, S. 966, that Senators Kennedy, Specter, and many others introduced last week. This bill is precisely the same as the bill that the Senate considered in both the 106th and 107th Congress. The Justice Department declined to offer its views on this bill throughout the 107th Congress, even as it was considered in this committee and on the Senate floor.

(A) What are your views on this well-known and highly-publicized legislation?

Response: I have not had an opportunity to review the current bill or its predecessor bills and therefore can not provide you with any meaningful comments. In addition, I am constrained by my current position from expressing publicly whatever personal views I might have on specific pending legislation about which the official views of the Department of Justice have been requested. In such circumstances, my responsibilities dictate that I provide any comments internally within the Department of Justice as part of its deliberative process. However, rather than commenting on any specific bill, I can and will provide below my general views on hate crimes legislation and the role of the federal government in combating and prosecuting such crimes.

(B) If you are unable to provide your views today, could you make them available in writing before the committee considers your nomination?

Response: As indicated above, I generally favor legislation which provides federal assistance in the investigation or prosecution of any violent crime that constitutes a felony and is motivated by animus against the victim by reason of the membership of the victim in an appropriately defined class or group. Subject to budget constraints and priorities, this assistance could include federal grants to state and local law enforcement entities to assist in the investigation and prosecution of such crimes. As with any legislation, the devil is in the details, and so I would need to consider the particular statutory language and structure of any specific bill to determine the detailed advice that I would give to the Attorney General in confidence regarding my recommendations for an official Department of Justice position.

(C) What steps, if any, will you take under the existing law to increase the Department's role in addressing hate crimes?

Response: With respect to your concerns about hate crimes against Arabs, Muslims or South Asians, the Justice Department has responded to such attacks with an aggressive program of enforcement of civil rights laws and outreach to vulnerable or at-risk communities. Through the Civil Rights Division and the Community Relations Service, I intend, if confirmed by the Senate, to support continued efforts in the prosecution and prevention of such crimes. These efforts include:

- The Civil Rights Division, the Federal Bureau of Investigation, and United States Attorneys' offices have investigated nearly 500 incidents involving violence or threats against individuals perceived to be Muslim or of Middle Eastern or South Asian origin.
- Federal charges have been brought in 13 cases against 18 Defendants, yielding 15 convictions to date. The Division's conviction rate is 100%.
- Nearly 100 local criminal prosecutions have been initiated. Civil Rights Division attorneys have coordinated with local prosecutors and provided substantial assistance in many cases.
- The Justice Department has engaged in a comprehensive outreach program to the Muslim, Sikh, Arab, and South Asian communities, either participating in or conducting more than 250 town and community meetings and forums around the country.

With respect to other hate crimes, the Civil Rights Division charged more defendants (313) and successfully prosecuted more defendants (234) for criminal civil rights violations during the first two years of the Bush Administration than the number of defendants charged (276) and successfully prosecuted (197) during the final two years of the previous administration. The Division also increased its enforcement activity with respect to non-color-of-law criminal civil rights violations (not including individual police misconduct cases) such as bias and hate crimes (as well as human trafficking and FACE actions), filing cases against more defendants (66) in FY 2002 and FY 2001 (94) than in FY 2000 (56). If confirmed, I intended to support continuation of such enforcement actions.

2. In many states, the level of funding available to counsel for indigent defendants is woefully inadequate. There may be caps on the total amount available per case, resulting in minimum-wage levels of compensation. Commonly, there are limits on the amount that can be spent on expert witnesses. Reforming the system is critical to ensuring that real criminals are convicted, but is always a politically unpopular expenditure of funds.

As Associate Attorney General, with oversight of the Office of Justice Programs, you would have an opportunity to set the tone on this issue at the federal level, and to support the states' efforts to improve their individual systems. How would you act – whether through funding programs, research, or other programs – to overcome the crisis in indigent defense?

Response: Adequate representation of the indigent in both the civil and criminal proceedings is an important issue that needs to be addressed by both governmental and private entities. Over many years as a civil practitioner, I have been an active supporter of the Atlanta Legal Aid Society and the Legal Services Corporation. If confirmed as Associate Attorney General, I would work with the Congress, the Department of Justice (including, but not limited to, the Office of Justice Programs), state and local entities, and the private sector to ensure that indigents have access to appropriate representation in order to ensure the proper functioning of both our civil and criminal justice systems.

With respect to the defense of indigents in criminal matters, the Department of Justice, through the Office of Justice Programs, has supported extensive analysis on this issue and administers a formula grant program that can be used by the states to fund indigent criminal defense. For instance, OJP's Bureau of Justice Assistance (BJA) provided nearly \$800,000 to fund a multi-year, Harvard University Executive Session on Public Defense (ESPD) to identify ways to refocus the defense bar on indigent representation and strengthen the role of public defenders, assigned counsel, and contract lawyers in providing quality representation. This session produced a series of electronic bulletins, including *Bolder Management for Public Defense: Leadership in Three Dimensions* (11/2001); *Cultural Revolution: Transforming the Public Defense's Office* (8/2002); and *What Policymakers Need to Know to Improve Public Defense Systems* (12/2001). These publications are available on BJA's Website, <http://www.ojp.usdoj.gov/bja>, and the ESPD Website, http://www.ksg.harvard.edu/criminaljustice/executive_sessions/espdc.

BJA also published an Indigent Defense mini-monograph series (prepared by The Spangenberg Group) including: *Contracting for Indigent Defense Services: A Special Report* (4/2000); *Improving State and Local Criminal Justice Systems: A Report on How Public Defenders, Prosecutors, and Other Criminal Justice System Practitioners Are Collaborating Across the Country* (10/1998); *Indigent Defense and Technology: A Progress Report* (11/1999); and *Keeping Defender Workloads Manageable* (1/2001).

BJA also has a bulletin currently in development, *Indigent Defense: Best Practices for Public and Private Defenders*.

In FY 2003, BJA will provide almost \$150,000 to the National Legal Aid and Defender Association for a National Defender Leadership Training Project, which is designed to support innovative management and leadership training for all levels of defenders in public defense agencies. The Leadership Institute seeks to provide public defender and assigned counsel leaders with cutting-edge management training, build a national network of leaders in this area, and support research and data collection efforts to inform national discourse.

OJP's Bureau of Justice Assistance administers the Edward Byrne Memorial State and Local Law Enforcement Assistance (Byrne Formula Grant Program). Congress has established 29 legislatively authorized purpose areas that may be funded under the Byrne Formula Grant Program. Indigent defense is a permitted use of these funds. Indigent criminal defense would also be an eligible use of funds under our proposed Justice Assistance Grant (JAG) Program, which would merge the Byrne Formula Grant Program and the Local Law Enforcement Block Grant Program under a single funding stream. While states are free to determine how they will distribute their Byrne funds, the Department encourages them to consider the full panoply of criminal justice system needs in the development of their strategic plans for the expenditure of their block grant funding.

Subject to budget constraints and priorities, I would, if confirmed, continue to support such initiatives.

3. You have been a staunch defender of the Department's blanket policy of closing the immigration hearings of those who were taken into custody as part of the investigation into the September 11, 2001, attacks. This policy has received a mixed review in the courts, and has called many observers to question why, at the very least, decisions to close hearings that had heretofore been public could not be made on a case-by-case basis.

(A) Do you oppose making case-by-case evaluations of immigration cases to determine whether they should be closed? Why?

Response: I did oppose and continue to oppose case-by-case determinations by the courts of closure for administrative deportation proceedings for out-of-status aliens of special investigative interest in the circumstances presented after the 9/11 terrorist attacks. As indicated in my column in USA Today, the opening of all or many of those administrative proceedings would have, in the aggregate, provided valuable intelligence information to terrorist organizations seeking to do harm to this nation and its citizens, would have impaired and impeded the ongoing investigations, and would have violated the privacy interests of many aliens who chose to remain anonymous, exposing them to both stigma and potential physical danger. The identification of certain cases for closure and the

introduction of evidence in support thereof would expose the same sort of intelligence data to terrorist organizations.

(B) Among the justifications you gave in a column you wrote last year for USA Today was that “the hearings themselves could become the targets of terrorists.” Are you aware of any intelligence or other evidence suggesting that terrorists might seek to disrupt the immigration court system? Would the same argument not support closing all criminal trials related to terrorism? Would you support such a step?

Response: It would be inappropriate for me to discuss intelligence information, but the Civil Division did present evidence through declarations of terrorist experts that such risks existed. This concern with respect to administrative proceedings does not serve as an argument to close criminal trials which are, under the Sixth Amendment, to be both speedy and public. Administrative proceedings are distinctly different from criminal trials, and I would not support closed, non-public criminal trials, regardless of the alleged crime.

(C) How many immigrants have had closed hearings under this DOJ policy? Of that number, how many do you believe had links to terrorism?

Response: Approximately 625 out-of-status aliens had administrative deportation proceedings that were closed to the public. Of course, every such alien had the right to legal representation at the proceeding and to publicize and disclose voluntarily the nature and character of those proceedings, both before and afterwards. The vast majority chose not to do so. All of those aliens were deemed to be of interest to the ongoing terrorist investigation.

(D) In response to Judge Kessler’s ruling that the Department was required to release the names of the more than 1000 people it arrested or detained in its effort to fight terrorism, you have been quoted as saying that the ruling “harms our efforts to bring to justice those responsible for the heinous attacks of September 11 and increases the risk of future terrorist threats to our nation.” Can you point to any actual harms, or increased risks, as a result of that ruling?

Response: Judge Kessler stayed her ruling pending the government’s appeal to the Court of Appeals for the District of Columbia Circuit. No decision has been issued on appeal, and therefore Judge Kessler’s ruling remains stayed and has had no actual impact as yet.

4. When you were last before this Committee, as a nominee to head the Civil Division at the Department of Justice, we had a number of questions for you about the Department's tobacco litigation. At the time, it seemed that the Administration and the Attorney General might abandon that very important lawsuit, and that millions of people who have been deceived by the longstanding fraud of the tobacco companies – and who have suffered devastating health consequences as a result – would have no redress. I am heartened at the reports I have heard that the Department is continuing to provide the resources, both financial resources and personnel, to continue this critical battle. I understand that the case is now, after some delays, set for trial before Judge Kessler in September 2004. Can you provide this Committee with assurances that this critical matter will continue to receive the resources within the Department that it needs to be successful?

Response: As I indicated in response to questions as a nominee for Assistant Attorney General for the Civil Division, I will seek resources necessary to proceed vigorously and effectively with any meritorious claim of significance initiated by the Civil Division, and I have done so with the tobacco case. If confirmed as Associate Attorney General, I will continue to be guided by that principle.

5. With crime again on the rise, and the states facing their worst budget crisis in decades, the Crimes Victims Fund is needed now more than ever. But for several years, deposits to the fund have been on the decline. In 2002, disbursements from the Fund exceeded the previous year's deposits by \$6 million. In 2003, the deficit will exceed \$80 million. Do you have any thoughts as to how we can ensure the financial health of the Crime Victims Fund?

Response: The Crime Victims Fund (Fund) is financed through fines from federal criminal cases, bond forfeitures, penalty assessments, gifts, bequests, and donations. The bulk of the funding comes from offenders convicted of federal crimes, not from taxpayer dollars.

By far the largest source of deposits in the Fund comes from criminal fines. Last year percentages for each source of recovered criminal debt for the Fund by United States Attorneys Offices were as follows:

- Criminal Fines 98.19%
- Bond Forfeitures .66%
- Special Assessments 1.15%

In 1999, the Fund collected nearly \$1 billion. This unprecedented collection prompted the Congress to place an obligation limitation on the use of these resources in 2000. The Department is supportive of the obligation limitation and believes it serves as a sound management tool to ensure the financial health of the Fund. Bountiful years permit reasonable growth in Crime Victims programs

while also providing a “cushion” in the Fund that can be drawn upon when collections decline. This concept is important, as unprecedented increases in collections in one fiscal year that are not sustained in a following years place States in the position of having continually to “retool” programs and services. This is an expensive and disruptive process that can result in discharging employees and eliminating or reducing victim services from year to year.

As mentioned above, the obligation limitation on the Fund was originally imposed by the FY 2000 Appropriations Act (P.L. 106-113). The 2000 limitation was \$500 million, an increase of \$176 million (or 54 percent) above the amount available from the Fund in 1999. The FY 2001 Appropriations Act (P.L. 106-553) continued the limitation on obligations and set the “cap” at \$537.5 million. This “cap” provided an increase of \$37.5 million for Crime Victims programming over the 2000 level. The FY 2002 Appropriations Act (P.L. 107-77) obligation limitation on the Fund was \$550 million. It is important to note, however, that this amount was in addition to the \$68.1 million provided to the Fund following the September 11 attacks.

At the start of FY 2003, there was a total of \$1.3 billion available in the Fund. However, the FY 2003 Appropriations Act (P.L. 108-07) set the “cap” at \$600 million—leaving approximately \$714 million as a cushion for future use. In addition to the \$600 million mentioned above, \$17.6 million continues to be available for use under the Anti-Terrorism Reserve Fund.

Through the end of April 2003, approximately \$162.6 million has been deposited into the Fund. With five months remaining in the collection cycle, it is projected that total collections will only reach \$278.7 million. If this is the case, the Department will be able to draw the remaining \$367.7 million from amounts previously collected but not available for expenditure to provide program funding at the \$625 million cap recommended in the President’s Budget.

The continuation of the cap on the Fund, as well as pursuing other possible funding sources to stabilize and increase funding for victim services, is a priority for the Department. If confirmed, I would look forward to working with Congress to determine appropriate management and budgetary structures for these resources benefiting crime victims through this unique funding mechanism.

6. In February of 2003, Judge Royce Lamberth ordered you and five other DOJ attorneys to pay sanctions in connection with a Native American trust fund class action case. Press reports have declared that the Civil Division’s actions forced the other side to re-depose witnesses. What role did you play in this case, why were you sanctioned, and how do you explain the actions you took, or were responsible for?

Response: Your question refers to a February 5, 2003 Order entered by the district court relating to a discovery dispute in the long-running *Cobell v. Norton*

litigation. This litigation has been extraordinarily contentious, with three Cabinet-level officials having been held in contempt. The contempt orders against Secretary Norton and Assistant Secretary McAleb, as well as orders relating to other issues, are currently on appeal to the District of Columbia Circuit Court of Appeals.

With respect to my role in this case, I perform a management or supervisory function over aspects of this litigation when my involvement is requested by the client agency or the trial team or when the particular issues or circumstances warrant my personal attention and participation. I was not involved personally in the deposition or briefing that resulted in this award of attorneys fees against me and other Civil Division attorneys.

The particular order identified in your question concerns the district court's granting of plaintiffs' motion to compel the Acting Special Trustee, Donna Erwin, to respond to certain questions in a deposition regarding communications with lawyers at the Department of Justice. The particular questions do not relate to the merits of the litigation, but instead concern a dispute over the scheduling and location of a deposition. In ruling on the motion to compel, the district court rejected the government's privilege objections to the questions and awarded the plaintiffs their fees incurred in filing the motion and in the renewed deposition of Ms. Erwin. Although I did not draft, review, or sign the opposition brief, my name appeared at the top of the list of names of Civil Division attorneys on the signature page, as it does for every brief filed by the Civil Division. The district court awarded the fees against all the attorneys personally whose names appeared on the government's opposition brief.

Upon receipt of the order, I immediately notified the Office of Professional Responsibility (OPR) within the Department of Justice. Every sanction order against a Department of Justice attorney merits an independent internal review by OPR, and I initiated that review to determine the propriety of my actions and of all the other DOJ attorneys. After review, OPR provided me with a written memorandum of its determination that I had not engaged in any professional misconduct or exercised poor judgment. I have provided the Committee with a copy of that memorandum.

In addition, I then reviewed the briefs, including the opposition filed by the Civil Division, as well as the district court's Order. I must respectfully disagree with the district court's ultimate conclusions and imposition of attorney's fees not only against me but also against the other Civil Division lawyers. In my view, the issue presented was not one free from doubt but one upon which vigorous advocates could reasonably disagree. Given the potential for a subject matter waiver of the attorney-client privilege, requiring a ruling from the district judge was substantially justified in the circumstances. After this personal review, I remain extremely proud of the legal work and professionalism exhibited by the Civil Division lawyers working on this case. The order is not currently

appealable, but I intend to urge an appellate review of this order at the appropriate time. Any ultimate decision on an appeal will, of course, be made by the Solicitor General.

Reponses to Senator Richard J. Durbin's Questions for Robert McCallum

1. The Justice Department's tobacco case is scheduled to go to trial on September 15, 2004. I want to make absolutely certain that the Justice Department will dedicate adequate resources to permit the effective prosecution of this case.

A. Can you provide an overview of the current and future funding of the Tobacco Litigation Team?

Response: For FY 2003, over \$27 million has been made available for the tobacco litigation, including about \$7 million for Tobacco Litigation Team personnel, \$16 million for automated litigation support services required to process, access and search millions of pages of evidentiary documents, and \$4 million for the services of experts and consultants. As the focus of the case shifts from discovery to trial presentation, significant funding will continue to be required. We anticipate resource needs of approximately \$34 million in FY 2004.

B. How many attorneys and support staff are currently working on the tobacco litigation?

Response: Presently, there are 46 Department of Justice employees working on the case. This figure does not include contractor personnel providing support services.

C. Presumably, additional human resources will be needed as the trial date approaches. What are the anticipated staffing needs for the Tobacco Litigation Team before and during the trial?

Response: The staffing needs for the Tobacco Litigation Team are dependent, in large part, upon the trial plan implemented by the court and by the issues to be tried. Various motions for partial summary judgment are pending by both sides and will impact the structure of the trial. At present, my trial team considers itself adequately staffed for the trial phase. It is possible that the trial team may expand up to 50 full time DOJ employees if circumstances warrant.

D. Will you commit to work to ensure that the Tobacco Litigation Team is adequately funded and staffed at the levels necessary to permit vigorous pursuit of the litigation?

Response: If fortunate enough to be confirmed, I will continue to seek adequate resources to pursue vigorously every meritorious case of significance initiated by the Civil Division, and the tobacco case, under the district court rulings, is one of those cases.

2. I am very concerned about some Justice Department counterterrorism efforts that may infringe upon civil liberties. The Civil Division has defended many of these counterterrorism efforts, including the designation of two American citizens as enemy combatants and refusal to grant these men access to counsel.

A. It is the role of the Civil Division to defend government enforcement actions, but it is also the responsibility of the Associate Attorney General and the Assistant Attorney General of the Civil Division to advise the Attorney General when those actions are possibly illegal. How have you advised the Attorney General regarding the legality of these detentions? Generally speaking, do you believe that it is legal to designate American citizens as enemy combatants with no judicial review and no access to counsel?

B. Aside from the questionable legality of these detentions, there is the question of whether they are good policy. It is the Associate Attorney General's role not just to defend government actions, but to advise the Attorney General on policy issues. Do you think that these detentions are good policy? Do you think that our criminal or military justice systems are incapable of handling these cases? Do you agree that we are putting Americans abroad at risk of similar treatment by detaining these men and others without charge and without access to counsel?

Response: I believe the two cases to which you are referring involve Yaser Esam Hamdi, a Saudi national who may have been born in the United States and who was captured on the battlefield in Afghanistan carrying an AK-47 with a Taliban unit, and Jose Padilla, an American citizen who was plotting with Al Qaeda to develop and detonate a radiological or "dirty" bomb inside the United States. Both of those cases have been handled principally by attorneys in the Office of the Solicitor General, with the Department of Defense and other agencies. Because the Civil Division has not been significantly involved in those cases, my knowledge about them is limited.

It is my understanding that the United States Court of Appeals for the Fourth Circuit, in Hamdi v. Rumsfeld, 296 F.3d 278 (4th Cir. 2002), has upheld Mr. Hamdi's detention as an enemy combatant as a lawful and fully constitutional exercise of the President's Commander-in-Chief powers during wartime. It is also my understanding that the United States District Court for the Southern District of New York in Padilla v.

Rumsfeld, ___ F. Supp. 2d ___, 2003 WL 1858157 (April 9, 2003), held that the President has the authority to detain a United States citizen as an enemy combatant during wartime, where that citizen, like Mr. Padilla, has plotted with the enemy to kill innocent Americans. There is an issue in the Padilla case about access to counsel that is currently on appeal to the United States Court of Appeals for the Second Circuit, but as I indicated, the Civil Division is not handling that matter.

Both courts relied upon the well-established power of the President as Commander-in-Chief to capture enemy combatants, including United States citizens who conspire with enemy forces, and detain them during wartime. This power is separate from the President's law-enforcement role, and the purpose of the detention is not punitive, but to prevent the enemy combatant from assisting enemy forces and to obtain intelligence about the enemy's activities that may be vital to the prosecution of the war. As the government's submissions in those cases make clear, it has been and remains the determination of the President, the military, and other national security experts in the Administration that these detentions are necessary to protect American lives and to implement effectively the war on terrorism.

To the extent that your question seeks any internal Department of Justice advice that may or may not have been given to the Attorney General, that information, if it exists, would be protected by various privileges. However, the case law discussed above supports the legality of the government's action.

These detentions support national security interests in a time of war. Although the criminal and military justice systems may be capable of processing charges against such enemy combatants, the constitutional role of the Commander-in-Chief permits the deferral of a law enforcement decision on criminal or military proceedings until a later date. Such action, in my opinion, does not put Americans at any greater risk of similar treatment abroad.

3. In March 2002, the *Washington Post* published an article entitled "Ashcroft Personnel Moves Irk Career Justice Lawyers." The article discussed the involuntary transfer of Katherine Baldwin, a senior manager in the Civil Rights Division, to the Civil Division, to work on a new employment discrimination Task Force. At an oversight hearing last year, Ralph Boyd called it a "very significant" Task Force.

A. You were head of the Civil Division at the time this Task Force was created. What was your role in its creation? Whose idea was it to create this Task Force? Do you agree that it is a "very significant" Task Force? Why or why not?

Response: I had an instrumental role in creating the Employment Discrimination Task Force (EDTF). I was my idea. I determined such an effort was necessary after meeting with the Civil Chiefs Working Group for United States Attorneys and learning of their critical needs for centralized and focused resources and expertise in litigating employment discrimination cases. I took as a model the Tort Branch's focus in Federal Tort Claim Act cases. In addition, such an initiative would allow coordination in this constantly evolving legal area between the Civil Rights Division, which is responsible for enforcing the nation's anti-discrimination laws, and the Civil Division, which is responsible for defending federal agencies when an employee alleges unlawful discrimination or retaliation. It also allows each Division to get the benefit of the experience and perspective of the other Division. I agree that the work of the EDTF is very significant.

B. The Task Force has been in existence for nearly a year and a half. What are the accomplishments of the Task Force to date?

Response: The Task Force was created on March 14, 2002, although staff were not in place until early May 2002. In the first year of its existence, the Task Force has produced and finalized six treatises (referred to as monograph chapters) on substantive areas of employment law. Three additional monograph chapters are in the process of being reviewed before distribution in final form, and three other chapters are in preliminary draft stages. Each monograph chapter presents an overview of a particular area of law (such as Retaliation, Sexual Harassment, Title VII Remedies, or Jury Instructions), with cases and analysis pertaining to each Circuit. The chapters also present practice pointers. The Task Force prepares and issues quarterly newsletters containing updates on pertinent policy, regulatory and legal developments, and litigation practice advice. The Task Force also has established a DOJ intranet web site for access by DOJ attorneys to Task Force materials, including the monograph chapters, quarterly newsletters, and draft motions or other court filings. In addition, Task Force participants keep DOJ attorneys informed about recent developments by conducting training and by providing advice nationwide in response to telephone or e-mail inquiries from DOJ components, United States Attorneys' offices, and other government agencies. The Task Force has presented training at the Department's National Advocacy Center as well as at a number of U.S. Attorneys' offices. Finally, the Task Force is directly handling several cases, including large class actions that raise issues with nation-wide implications, as well as certain individual cases.

C. How many people serve on the Task Force? Were those individuals assigned to the Task Force on a voluntary or involuntary basis?

Response: Presently, a total of 11 people serve on the Task Force. As with any work assignment, individuals assigned to the Task Force in each Division were selected on the basis of experience and relevant legal expertise in relation to the project. Although individuals were assigned to work on the Task Force, no one objected to me to an assignment to work on this new initiative. In fact, the attorneys assigned to the Task Force with whom I have interaction appear to have enthusiastically embraced the project.

4. President Bush's budget for Fiscal Year 2004 eliminates all funding for police hiring. The Administration characterizes the COPS program as "Mission Complete," and says "the program's impact on crime is inconclusive." Do you agree with the Administration's position that the COPS program's mission is complete and that its impact on crime is inconclusive? Why or why not?

Response: Since 1994, COPS has dedicated \$9.6 billion to advance community policing through grants, training, technical assistance and other resources to state, tribal and local law enforcement. COPS grants have been awarded to two-thirds of the law enforcement agencies in the nation, and more than 116,000 law enforcement positions have been funded through these grants. The original goal was 100,000 law enforcement positions, and so the original goal has been met.

My understanding is that the impact of the COPS program on crime is under study by various outside groups and that opinions may differ. I am reserving judgment on its impact pending further studies and analysis.

Responses to Senator Grassley's Questions for Robert McCallum

1. At the hearing on your nomination to be the Assistant Attorney General for the Civil Division, you committed to me that you would fully enforce the False Claims Act (FCA). You also stated that you viewed the Assistant Attorney General for the Civil Division as having an "obligation to enforce and defend the duly enacted federal statutes," including the FCA. Please tell me how many FCA cases the Civil Division has actually tried in each of the last five years, and how many FCA cases the Division has settled without trial in that same time frame. Also, please give me your opinion on what could be done to increase the number of FCA cases brought.

Response: As I indicated during my previous confirmation process, I have taken seriously my responsibility to enforce vigorously the False Claims Act since I became Assistant Attorney General. I have spoken at two ABA Qui Tam Institutes and the American Health Lawyers Association Annual Meeting to emphasize the Civil Division's False Claims Act enforcement policies and priorities. In addition, I have met separately with groups of lawyers representing relators' counsel and defense counsel in order to discuss False Claims Act and qui tam issues.

The Civil Division's dedication to vigorous enforcement of the False Claims Act is borne out by the record. By the end of FY02, the Civil Division, in conjunction with the U.S. Attorneys' offices, has recovered over \$10 billion in civil fraud claims since the False Claims Act was amended in 1986, including over \$6 billion in claims associated with qui tam suits. The last five years account for over half -- \$5.4 billion -- of these recoveries. The table below identifies the recoveries and settlements and judgments by year.

Fiscal Year	Number of Settlements/Judgments	Fraud Recoveries
2002	112	\$1.2 billion
2001	175	\$1.6 billion
2000	186	\$1.5 billion
1999	148	\$.5 billion
1998	135	\$.6 billion

We do not keep separate statistics on cases that are resolved through trial rather than through settlements, but anecdotally, the Civil Division has averaged a few trials per year not including cases tried solely by U.S. Attorneys' offices. Many cases, however, are settled only after there has been extensive discovery and/or complete or partial disposition on summary judgment. In addition, many cases are not resolved until after there have been efforts at alternative dispute resolution with either a judicial officer or a private mediator presiding.

I believe there are adequate incentives and publicity to encourage the filing of meritorious qui tam cases. I encourage Congress to continue its support of the audit and investigative functions at agencies to ensure that federal programs are appropriately policed for fraud and that referrals of allegations of waste, fraud, and abuse are made to the Civil Division.

2. *Some FCA whistleblowers have complained that the Department of Justice (DOJ) is forcing whistleblowers to waive their rights to amend their complaints as a condition for allowing them to assist the DOJ in the prosecution of FCA cases. Is this complaint valid and what would you be willing to do to modify or eliminate this counterproductive practice, if it is true?*

Response: The qui tam provisions of the False Claims Act were designed to provide a monetary incentive to those aware of fraud to bring that information forward and to work with the Department of Justice in investigating that fraud. The Department and the Civil Division have embraced that purpose. During the course of an investigation, the government, using its subpoena powers and investigative authority, may develop on its own evidence of a different fraud that was unknown to the relator and is distinct from the fraud alleged by the relator. Under such circumstances, the government should control and direct the investigation of the separate fraud and any claims related to it. When it is in the interest of the taxpayers to share such evidence of a different fraud with the relator, the Civil Division has required that relators and their counsel agree not to use the government's evidence to file new actions or to amend their qui tam complaints to add fraudulent schemes about which they were previously unaware. This Civil Division's practice is consistent with its obligation to enforce the False Claim Act as reflected in the Ninth Circuit's holding in Seal I et al. v. Seal A, 255 F.3d 1154, 1162-63 (9th Cir. 2001).

Of course, a relator remains free to argue to a court that a different fraud alleged by the government is directly related to the fraud alleged in the relator's original complaint or that any amended complaint the relator may file does not incorporate and is not based upon information provided to the relator by the government. Thus, the relator's claim to a share of any recovery will properly succeed or fail on the merits of the relator's original complaint and the information that he or she provided or developed.

3. *As part of the checks and balances in our federal system, Congress has a right and duty to monitor, investigate, and oversee Executive Branch departments. Specifically, this Committee must oversee how the Department of Justice administers its various programs, including the program to enforce the FCA. Do you agree that the Congress has the right and duty to monitor, investigate, and oversee the process and procedures by which the DOJ resolves FCA cases, whether through settlement or otherwise?*

Response: The False Claims Act is the government's principal civil tool to recover federal funds that have been fraudulently expended. I appreciate the importance of

oversight in providing congressional committees with information about how federal statutes are enforced, including, of course, the False Claims Act. Accordingly, the Department has provided information on our law enforcement efforts pursuant to the False Claims Act. I have personally committed to you in our conversations that I am willing to provide information that will help the Committee to understand the enforcement priorities and objectives of the Civil Division. In addition, I will also continue my efforts to accommodate the information needs of congressional committees conducting False Claims Act oversight by providing briefings and appropriate documentary materials regarding closed matters.

4. Does the DOJ have any procedures as criteria that it applies to proposed FCA settlements? For example to what degree will the DOJ discount statutory treble damages when settling?

Response: The Department does not have written or fixed criteria that it applies mechanically to False Claims Act matters when it makes a determination to settle a case. Each case is examined on an individual basis. The facts are investigated, and the current state of the law is considered. The Department will usually consider a presentation from the defendant and from relators regarding the facts and applicable law. Our touchstone for settling matters is the litigation risk in establishing the facts, proving the requisite scienter under the statute, and establishing good case precedents. In strong cases, any settlement is likely to be closer to the full treble damages as provided for in the statute. In cases where the litigation risk may be higher, a lower "multiplier" to the single damages may be appropriate for the purpose of our settlement evaluation. In addition, we also take into account the financial capacity of the defendant, particularly in the bankruptcy context, but only after sworn financial statements and other necessary financial information about the defendant's financial position are provided for review and analysis.

5. Has the DOJ had any problems obtaining investigators from other departments or agencies to work on FCA cases?

Response: There are always more allegations of fraud than there are investigators or auditors to investigate them, both in the Department of Justice and in the client agencies. To allocate its scarce resources, the government must concentrate on the most egregious cases of fraud and those with substantial damages. Following the terrorist attacks of September 11, a number of agencies appropriately diverted investigative resources from fraud matters to terrorism investigations. For the most part, those resources have now returned to fraud investigations. As I set forth earlier, I would like to encourage Congress, in conjunction with its other priorities, to continue its support for investigators and auditors to examine government programs for waste, fraud, and abuse.

6. How does the DOJ evaluate the losses to various programs caused by defendants in FCA cases? How does the DOJ double check assessments of such losses made by other departments and agencies?

Response: Determining the loss to a federal program or on a federal contract because of fraudulent activity can often be a complex and very time-consuming undertaking, depending on the programs or contracts involved. We rely on the expertise of the personnel who manage these programs or contracts in explaining them to the Department's lawyers and analysts and providing us with their best thoughts on financial damage to their program or the contract. In addition, we use auditors employed by Inspector General offices, who are separate and independent from the program or contract itself, in verifying or calculating the loss to a particular program or contract. Finally, the Civil Frauds Branch has auditors on staff to review damage calculations and, in appropriate cases, the attorneys assigned to a case will contract outside expert accountants, statisticians, and consultants.

7. In your judgment, what agencies and departments could productively be more supportive of investigations and prosecutions of FCA cases?

Response: As I said in response to question 5, there are more allegations of fraud than there are personnel to investigate them. This statement applies not only as a general principle but also within each agency. Different agencies have differing numbers of individuals available for fraud investigations. For the most part, the support the Civil Division receives from our client agencies is good, especially considering the resources available.

8. In your answers to my written questions after your first nominations hearing, you expressed that you "look[ed] forward to working with the various U.S. Attorneys and their staff attorneys in assisting and coordinating with Civil Division attorneys in litigation matters," specifically with regard to FCA cases. What have you done as the head of the Civil Division to improve the working relationships with US Attorneys in FCA cases?

Response: Civil fraud matters are not only a high priority for the Civil Division; they are also a high priority for the U.S. Attorneys' offices. Many of the U.S. Attorneys' offices have very strong Affirmative Civil Enforcement Programs. In particular, the Civil Division has worked with the attorneys in Boston, New York, Philadelphia, the District of Columbia, Illinois, St. Louis, and California, as well as many other offices on large False Claims Act cases. I have also attended numerous meetings of the Civil Chiefs Working Group, and I have twice attended the annual Civil Chiefs Conference to reinforce the commitment of the Civil Division at Main Justice to working with our colleagues in the U.S. Attorneys' offices. I can also report that the excellent working relationships that

have existed between the Civil Fraud section at Main Justice and the various U.S. Attorneys' offices continue to thrive.

Each qui tam matter is the subject of discussion between the Civil Division and a U.S. Attorneys' office about the most appropriate way for the case to be handled so the government gets the best representation possible. There are a higher percentage of False Claims Act cases that are worked jointly, that is with an attorney assigned from both Main Justice and the U.S. Attorneys' office, than any other type of case for which the Civil Division has responsibility. Even in those cases handled primarily by a U.S. Attorneys' office, Civil Division attorneys are available for consultations, offering advice, model briefs and pleadings, and strategy ideas. In addition, the Civil Frauds Branch runs an annual training program for AUSAs who handle False Claims Act matters. Finally, since I took office, the Civil Frauds Branch has created and run an on-line intranet False Claims Act Research Site available to all Department of Justice attorneys, including AUSAs, with weekly on-line updates on the most recent developments.

9. The qui tam provisions of the False Claims Act are intended to encourage relators and their counsel to dedicate their private resources to recover damages for the Treasury. For that reason in 1986, Congress provided that where the Government intervenes in a case, the relator is entitled to 15% to 25% of any recovery, depending upon the relator's contribution.

A. In your answers to my written questions after your first nomination hearing you stated that "It is important that relators providing substantial litigation assistance to the Department of Justice receive appropriate compensation as reflected in the guidelines established by Congress." Does that mean that you agree that such awards should average 20% over time? What have they averaged since the 1986 Amendments were adopted? If that number is below 20%, please explain why?

Response: Since 1986 the percentage of all qui tam recoveries awarded to relators, including major cases that have recently been negotiated but are not yet final, is 16.5 %. The average percentage awarded reflects those situations in which there may be serious questions about the relator's status and legal right to any share, yet in a compromise, the Department agrees to a reduced share well below 15%. I would note that the relator's share percentage for FY 2002 and this year, including major cases recently negotiated but not yet final, is 19%. The vast majority of awards to relators have been the result of negotiated settlements. In the nearly 17 years since the 1986 amendments, only a relatively small number of relator's awards have been the subject of judicial resolution.

B. In your answers to those same written questions, you committed to me to "work with Civil Division attorneys and with U.S. Attorneys to ensure that financial incentives within the range intended by Congress are provided to relators in a manner consistent with the fiduciary obligations of Department of Justice attorneys to ensure that all federal funds, including those recovered in False Claims Act actions, are not inappropriately disbursed." Please explain how

you did that as the Assistant Attorney General for the Civil Division. Also, please explain what you would do as the Associate Attorney General to see that whistleblower awards average 20% in intervened cases.

Response: As Assistant Attorney General, I have worked with my lawyers in the Civil Frauds Branch to provide shares to relators which (1) recognize the contribution of a relator and (2) encourage the continued filing of meritorious qui tam cases. That policy goal is balanced by my obligation to approve disbursement of taxpayer funds responsibly and consistently. My direct involvement and experience in relator FCA share matters as Assistant Attorney General will serve me well in the review and evaluation of settlements if I am fortunate enough to be confirmed as the Associate Attorney General.

10. When you were confirmed to be the Assistant Attorney General for the Civil Division you committed to "work to promote an appropriate cooperative working relationship" between relators, relators' counsel, and Department of Justice attorneys, since you recognized that relators "serve a vital function in alerting the Department of Justice to potential fraud against the taxpayer." What have you done as the Assistant Attorney General for the Civil Division, and what will you do as the Associate Attorney General to better integrate the relators and their counsels into the Justice Department's FCA case activities? Also, what can the DOJ do to make better use of the resources of whistleblowers and their counsels?

Response: As I indicated in my earlier answers and in my public speeches, the vigorous enforcement of the False Claims Act has been one of my highest priorities. I have worked to establish relationships with the relators' bar, the defense bar, interested industry participants, and client agencies. In addition to the programs and meetings I mentioned, I have made myself available for discussions with Taxpayers Against Fraud. Similarly, I have encouraged my subordinates to participate in conferences, meetings, and discussions to publicize the remedies available under the FCA so that both potential relators and potential defendants know that fraud against the United States will be vigorously investigated and pursued by the Department of Justice.

11. What, in your view, can be done to enhance the performance of DOJ in pursuing FCA cases? Also, what actions will you take as the Associate Attorney General to support and strengthen the DOJ's programs to prosecute FCA violations?

Response: I believe the single greatest factor that will continue the Department's strong False Claims Act enforcement is having a core of dedicated career public servants to investigate and litigate these cases. These individuals, in the client agencies, in Main Justice and in the U.S. Attorneys' offices, have the experience and expertise to enforce the False Claims Act vigorously and fairly. If confirmed as Associate Attorney General, I will continue my strong support for the Department's anti-fraud effort and do my best to ensure that necessary resources are available.

Responses to Senator Kohl's Questions for Robert McCallum

SAFE EXPLOSIVES ACT

As you know, the Safe Explosives Act, which I wrote with Senator Hatch, passed last year in the legislation creating the Homeland Security Department. The bill will limit the proliferation of explosives to would be terrorists and criminals by creating a permitting scheme for the intrastate purchase of explosive materials.

How is the implementation of this law proceeding? The Fourth of July is less than two months away. Although the Safe Explosives Act does not affect consumer fireworks, such as bottle rockets and roman candles, fireworks hobbyists who use regulated explosive materials are preparing for the holiday and applying for permits. Are permits and licenses being issued? If so, how long, on average, does it take to process them?

Response: As Assistant Attorney General for the Civil Division, I have been responsible for certain litigation relating to consumer fireworks through the Civil Division's Office of Consumer Litigation. However, no Civil Division branch has been involved in the implementation of the Safe Explosives Act or the permitting and licensing process under it. For that reason, I have not been involved in the implementation of this new law or the processing of permits and licenses.

It is my understanding that permits and licenses are being issued as of this date and that ATF will make every effort to issue, by May 24, 2003, any license/permit for which a timely and accurate application is filed. The amount of time it takes to process an explosive application for a license or permit depends on the specific circumstances of the individuals involved. ATF is committed to issuing timely and accurate applications, provided no derogatory information is discovered during investigation, within the 90-day processing time allowed by the statute.

If confirmed by the Senate, I would be pleased to work with the Committee and any component or agency to ensure proper implementation of this new act and the efficient processing of permit and license applications.

WHITE COLLAR CRIME

When the news of the Enron scandal broke nearly 18 months ago, our nation was shocked and corporate America was shaken. We had no idea that the news of one scandal would bring the revelation of a spate of corporate wrongdoing. A year and a half later, it seems the worst is still not yet behind us. The Boston Globe reported on May 6 that the FBI is opening three to five investigations each month into suspected corporate fraud of \$100 million or more.

How many investigations have been opened by the corporate fraud task force to date? How many cases have been brought? What kinds of resources are devoted to the task force? Are the devoted resources sufficient to address the problem at hand?

What deterrent effects do you think these cases have on current and future corporate behavior? Are the relevant sentencing guidelines strict enough to adequately punish those who have masterminded and carried out these corporate scandals?

Response: As Assistant Attorney General for the Civil Division, I do not have responsibility for or involvement in criminal investigations by the Corporate Fraud Task Force. If confirmed as Associate Attorney General, I would be assuming responsibility for supervision of certain criminal investigations in the Tax Division, the Civil Rights Division, the Antitrust Division, and the Environment and Natural Resources Division, and the investigation of corporate wrongdoing in these four areas will be one of my top priorities.

On July 9, 2002, President Bush signed Executive Order 13271 creating the Corporate Fraud Task Force. The Task Force is led by Deputy Attorney General Larry D. Thompson. The Corporate Fraud Task Force comprises both a Department of Justice group that focuses on enhancing the criminal enforcement activities within the Department, and an inter-agency group that focuses on maximizing cooperation and joint regulatory and enforcement efforts throughout the federal law enforcement community. The Tax Division is actively involved with the Task Force. Since its inception, the Task Force has overseen more than 200 investigations of corporate fraud matters and more than 200 charges against individuals and corporations, with more than 75 convictions to date. I understand your question to be directed at the work of this Task Force.

The Task Force has at its disposal the resources of all of its members, including, in addition to the Department of Justice, the Department of the Treasury, the Department of Labor, the Securities and Exchange Commission, the Commodities Futures Trading Commission, the Federal Energy Regulatory Commission, the Federal Communications Commission and the United States Postal Inspection Service. The FY 2003 budget added substantial resources to both the S.E.C. and the Department of Justice specifically for the purpose of combating corporate fraud. In FY 2004, the Department of Justice is seeking approximately \$25 million specifically to enhance corporate fraud enforcement.

I anticipate that the criminal investigations initiated by the Corporate Fraud Task Force and by other Department of Justice divisions will have a strong deterrent effect on future corporate behavior.

The Department strongly supported the enhanced criminal penalties provided by the Sarbanes-Oxley Act of 2002, specifically the increased statutory maxima for Securities Fraud from 10 years to 25 years and for Mail and Wire Fraud from 5 years to 20 years. The Act directed the United States Sentencing Commission to

review and enhance current Guidelines penalties in light of those changes. Although the Department advocated that the Commission implement broader and more substantial penalty increases than it ultimately adopted in April, the amendments, coupled with the statutory increases, were a substantial step toward ensuring that most white collar and fraud criminals face real prison time rather than probation or “split sentences.” The Department will carefully monitor the effects of the amended Guidelines to determine whether further enhancements or refinements should be considered by the Commission or by Congress in the future.

ANTITRUST – RULE OF REASON

Mr. McCallum, one of my priorities on the Judiciary Committee is my role on the Antitrust Subcommittee. Strong antitrust enforcement is essential to ensuring that competition flourishes throughout our economy, benefiting consumers through lower prices and better quality products and services. The federal courts are essential to the firm enforcement of our antitrust laws, and to ensuring that anticompetitive conduct is sanctioned.

Many antitrust questions are decided under what is known as the “rule of reason,” in which the harm caused by the business conduct at issue is balanced against pro-competitive justifications. This doctrine gives a great deal of discretion to the courts to determine whether or not the antitrust laws have been violated.

What will be your approach to deciding antitrust issues under the “rule of reason?” More generally, please explain your views regarding the role of the judiciary with respect to the enforcement of antitrust law.

Response I agree that strong antitrust enforcement is essential to the economy and consumers. As the Supreme Court has stated, “The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.” Northern Pacific Railway Co. v. United States, 356 U.S. 1, 4-5 (1958). The rule of reason is an essential component of that “charter of economic liberty” ensuring that the antitrust laws are enforced against conduct harming competition, while protecting from condemnation conduct that promotes competition. It requires an analysis of both the pro-competitive and anticompetitive effects of the conduct, condemning only conduct in which the anticompetitive effects outweigh the beneficial effects of the conduct. Under the rule of reason, I will seek to enforce the antitrust laws to challenge any conduct that, on balance, is anticompetitive.

With respect to your question regarding the judiciary, the Department of Justice is a law enforcement agency that pursues its antitrust cases in the courts. While that necessarily gives courts discretion and may lead to a decision in a particular case that differs from that advocated by the government, our judicial system, including the appellate system, conscientiously addresses those antitrust issues in an appropriate manner. Overall, the common law development of antitrust through the courts has served the United States well, as it has been able to adapt, over time, to changes in the economy, changes in technology, and changes in economic theories and data.

ATF TRANSITION

As you know, the Bureau of Alcohol, Tobacco, Firearms and Explosives has recently been transformed. The law enforcement and regulatory functions were moved to the Department of Justice while the alcohol and tobacco revenue collection portions remained at Treasury. When the move was being discussed, many at the Department, as well as outside experts, expressed concerns that the FBI would attempt to impede on the ATF's authority where the two intersect.

Can you tell us about the transfer so far and whether jurisdictional issues between ATF and the FBI, specifically with respect to explosives, have been resolved?

Response: As with the Safe Explosives Act, I have not been personally involved in the integration of the Bureau of Alcohol, Tobacco, Firearms and Explosives into the Department of Justice. However, one of my priorities as Assistant Attorney General in the Civil Division was to ensure that strong working relationships, close coordination, and effective cooperation exist between my attorneys, the offices of the various U.S. Attorneys, and the client agencies. If confirmed as Associate Attorney General, I would work with the former ATF and all Justice Department components, including the FBI, to ensure close cooperation and coordination between the components.

As a general observation, the Department has been very pleased with the transfer of ATF from the Department of the Treasury into the Department of Justice. The transfer has gone smoothly, due in large measure to the professional manner in which ATF, FBI and all of our law enforcement components conduct their business.

With the transfer of ATF and the concomitant amendment of the law to afford DOJ exclusive jurisdiction over those bombing and arson statutes for which Treasury and Justice previously exercised joint investigative authority, the Department has been presented with a unique opportunity to develop a more-fully-coordinated federal response to arson and bombing incidents, and the Department intends to take full advantage of this opportunity. Explosives

jurisdictional issues are already closely monitored by Department leadership and any differences, should they arise, can be quickly resolved.

CIGARETTE SMUGGLING

A recent GAO report estimated that billions of dollars are being lost to state governments because of cigarette smuggling and Internet sales of cigarettes. Further, recent Bureau of Alcohol, Tobacco, Firearms and Explosives investigations have revealed that some are using proceeds from cigarette smuggling to fund terrorist groups like Hezbollah. I will be introducing legislation soon to strengthen the Contraband Cigarette Trafficking Act and the Jenkins Act, which requires those who sell and ship cigarettes across state lines to report the transactions to state tax officials.

Given the ATF has recently undergone a split with some revenue functions remaining at Treasury and the remainder going to DOJ, does ATF have the resources they need to adequately investigate cigarette trafficking?

Response: As Assistant Attorney General for the Civil Division, I was actively engaged in the financial war on terrorism, and I both sought and obtained the necessary resources to pursue that priority. If confirmed as Associate Attorney General, I would certainly support the dedication of appropriate resources to investigate and prevent cigarette smuggling which could fund terrorist groups such as Hezbollah and other criminal enterprises. The number of such contraband cases initiated by the ATF has increased from less than 10 in 1998 to approximately 160 in 2002, and I understand that ATF is presently considering the resources needed to support this level of activity on cigarette smuggling.



U.S. Department of Justice

Office of the Associate Attorney General

Washington, D.C. 20530

May 15, 2003

The Honorable Orrin G. Hatch
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20530

Dear Mr. Chairman:

Enclosed please find my submissions responsive to questions asked of me by
Senator Patrick Leahy and Senator Richard Durbin.

Sincerely,

A handwritten signature in dark ink, appearing to read "Peter D. Keisler".

Peter D. Keisler
Principal Deputy Associate
Attorney General

Enclosure

cc: The Honorable Patrick J. Leahy
Ranking Minority Member

Questions for Peter D. Keisler
From Senator Patrick Leahy
May 15, 2003

1. You were a director of the Federalist Society for seventeen years, from 1983, when I gather you were still in law school, through 2000, when a cadre of Federalist Society members was so instrumental in producing the outcome in the Bush v. Gore case. There can be no doubt that the Federalist Society has an enormous influence in this administration. There can be no doubt that its members are disproportionately represented among the President's nominees for important executive and judicial posts. And there can be no doubt that the philosophies espoused by the Federalist Society give many of us cause for genuine concern, especially when they are carried into the institutions of government that affect all Americans, not just the conservative right.

How can any of us be assured that the views of the Federalist Society – especially those concerning states' rights in relation to the federal government, property rights, and civil rights – will not be simply substituted for a responsible evaluation of the rule of law?

Specifically, can you possibly give me any confidence that, despite the fact that you have spent the bulk of your adult life as a Director of this organization, you will be both able and willing to make decisions as the head of the Civil Division that reflect principles of law and judgment independent of those proclaimed by that Society?

As the question notes, I have previously served as a Director of the Federalist Society. The Federalist Society does not take positions as an organization on specific issues before the Justice Department. It does not endorse or oppose legislation, or file *amicus* briefs taking legal positions in court cases. It instead organizes conferences, sponsors debates, and hosts other public events at which a range of speakers and viewpoints are presented. There are accordingly no positions of that organization that could create a potential conflict with any matter pending before the Civil Division.

More fundamentally, however, I strongly agree that the responsibility of the Civil Division, and the Department of Justice as a whole, is to act completely independently of any outside organization. The Civil Division's role is to represent faithfully and responsibly the broad interests of the United States in court, and to adhere to the legal principles and standards established under federal law in doing so. I am currently serving in the Department of Justice, and have been doing so for almost one year, in a position in which I participate in the work of the Civil Division and several other litigating divisions. I have followed that approach during my tenure at the Department thus far, and I hope and believe that my performance to date confirms my commitment to it.

2. Your resume indicates that you served on the Board of the “Committee for Responsible Youth Politics” in 1982. What is – or was – that organization, and what did you do in connection with it?

The Committee for Responsible Youth Politics was a political action committee. When it contributed to a political campaign, it did so largely, if not exclusively, by funding the work of a campaign staffer who would coordinate efforts to organize young people on college campuses and elsewhere in support of the candidate. Although I am not absolutely certain, my best recollection is that I served for a relatively short period of time as a member of the board and did so sometime in the early 1980s. (The year I specified in response to the question on the Committee’s questionnaire – 1982 – was, as I indicated there, an estimate. I have not been able to find any personal records that would more precisely pin down the exact period of time.) I have had no subsequent connection with this organization.

3. Between college and law school, you devoted a year to serving as Executive Vice President of the “Leadership Institute.” What is – or was – that organization, and what did you do in connection with it?

The Leadership Institute, during the time in which I was employed there, organized weekend programs at which young people (generally college age) could learn techniques for organizing students for campaigns of their choice and similar purposes, and develop leadership skills generally. I started working there sometime in the fall of 1981 and left sometime in the summer of 1982. My role was to assist in arranging those programs and signing up students for them, and to assist in the management of the organization.

4. You spent much of your career in private practice, specializing in telecommunications issues, and your clients included some of America’s largest telecommunications companies. If you are confirmed, however, you will move from the role of civil advocate for the powerful to civil prosecutor for the vulnerable. How will gain the broader perspective necessary to this job on a variety of issues when so much of your work over the last 13 years has been with companies whose interests sometimes conflict with those of the U.S. Government?

Although a significant part of my work in private practice involved the representation of corporate clients, it did not exclusively involve such work. I also had the privilege of representing individuals – for example, in *pro bono* immigration matters. Indeed, in my thirteen years in private practice, the matter on which I derived by far the greatest personal satisfaction was the successful representation of Dr. Elhadi Omer Abd Elhalim in his application for political asylum, and then permanent residency, in the United States. Dr. Elhadi had acted heroically when, as Chief Medical Officer of Kober prison in the Sudan, he

documented, and then transmitted outside his country, important information about the abusive treatment of political prisoners. It was a great privilege to represent him.

I enjoyed private practice and learned a great deal from it, but I left that practice and re-entered public service precisely because I wanted to serve the broader public interest rather than limiting myself to the representation of private clients. I have served at the Department of Justice for almost one year now, and have not found it at all difficult to change perspectives from that appropriate for private practice to that appropriate for public service. It has been helpful in this regard that I previously served in government positions in the executive and judicial branches, and so the experience of serving the interests of the public as a whole is not a new or unfamiliar one. It is also helpful that the Department of Justice is filled, at all levels, with attorneys who are deeply committed to public service and who understand the Department's great traditions, and that these attorneys are my close colleagues and available to work through difficult questions collaboratively and with a sense of shared responsibility to the public.

5. Without meaning to impugn Mr. McCallum, I think we can agree that many, both inside and outside the government, have raised concerns about the tension – or conflict – that can exist between protecting civil liberties and fighting terrorism. If you are confirmed as head of the Civil Division, how do you propose to resolve this tension, and how will you assure the public that the law enforcement actions of the government of the United States will not breach the constitutional guarantees afforded those within America's borders?

Addressing the dangers posed by terrorism and protecting civil liberties must both be central objectives of the Department. The government must be vigorous in responding to possible terrorist threats, but has no warrant to violate the constitutional rights of its citizens in order to do so. If confirmed to head the Civil Division, I will be sensitive to these limitations on government power. Ultimately, however, I believe that the most important source of assurance members of the public have that their constitutional rights will be respected is not the good faith or intentions of any single government official, but rather the broader institutional features of our system of government that create checks and balances and public accountability.

6. The federal lawsuit against the tobacco companies has the potential to recover millions of taxpayer dollars for health care costs paid by the federal government because the tobacco industry knew for years that tobacco use increases the risk of disease and death, but hid the facts from the American public. I am heartened by the progress that has been made on that suit during Mr. McCallum's tenure in the Civil Division, but to be successful, this litigation must continue to receive the benefit of the attention of the Assistant Attorney General, the expertise of the line attorneys, and the resources of the

entire Department. Will you commit to continuing that effort, as the case moves toward trial in September of 2004?

In United States of America v. Philip Morris Incorporated, et al., the United States seeks disgorgement of ill-gotten gains from the tobacco companies under civil RICO statutes due to the defendants' unlawful targeting of the youth market and concerted decision to suppress information relating to the addictive qualities of nicotine. This is an important piece of litigation for the Department, as evidenced by the substantial resources of the Civil Division, supplemented with assistance from the Criminal Division, that have been utilized in the conduct of the case. In the course of my duties as the Acting Associate Attorney General, I have had an opportunity to become familiar with the allegations made in the litigation. If fortunate enough to be confirmed as the Assistant Attorney General for the Civil Division, and subject of course to the rulings of the Court, I have every intention of continuing my support for this important case as it moves toward trial in September 2004.

**Follow-up Questions for Peter Keisler
Senator Richard J. Durbin
May 15, 2003**

1. The Justice Department's tobacco case is scheduled to go to trial on September 15, 2004. I want to make absolutely certain that the Justice Department will dedicate adequate resources to permit the effective prosecution of this case.

A. Can you provide an overview of the current and future funding of the Tobacco Litigation Team?

I am advised that more than \$27 million was made available for United States v. Philip Morris for FY 2003. The largest portion of this – approximately \$16 million – has gone to automated litigation support services, in light of the large volume of documents at issue in the case. The remainder has funded personnel for the trial team (approximately \$7 million) and experts and consultants (approximately \$4 million). As you note, trial has been set for September 2004, and the case will therefore continue to require significant funding. I am told that the anticipated needs for FY 2004 will be approximately \$34 million.

B. How many attorneys and support staff are currently working on the tobacco litigation?

There are presently 36 attorneys and 10 additional Department of Justice support employees working on the case.

C. Presumably, additional human resources will be needed as the trial date approaches. What are the anticipated staffing needs for the Tobacco Litigation Team before and during the trial?

The precise staffing needs will depend on the pre-trial rulings to be made by the Court and its trial plan. As motions are ruled upon, we will know more precisely the triable issues of fact and will be in a better position to determine an efficient plan for trial preparation. It is possible that additional human resources will be needed, and I will continue to keep abreast of case developments in order to address staffing requirements appropriately.

D. Will you commit to work to ensure that the Tobacco Litigation Team is adequately funded and staffed at the levels necessary to permit vigorous pursuit of the litigation?

Any meritorious case in which the Department decides to engage should have the resources needed for it to be vigorously pursued, and the tobacco litigation is such a case.

2. I am very concerned about some Justice Department counterterrorism efforts that may infringe upon civil liberties. The Civil Division has defended many of these counterterrorism efforts, including the designation of two American citizens as enemy combatants and refusal to grant these men access to counsel.

A. It is the role of the Civil Division to defend government enforcement actions, but it is also the responsibility of the Associate Attorney General and the Assistant Attorney General of the Civil Division to advise the Attorney General when those actions are possibly illegal. How have you advised the Attorney General regarding the legality of these detentions? Generally speaking, do you believe that it is legal to designate American citizens as enemy combatants with no judicial review and no access to counsel?

Whether legal advice has been provided to the Attorney General on a specific matter, and, if it has, the content of that advice, is generally treated as privileged and confidential, and so I must respectfully refrain from addressing whether I have provided the Attorney General with legal advice on any particular subject. With respect to the substance of the issue, however, the Court of Appeals for the Fourth Circuit addressed many of the issues implicated by the designation of enemy combatants in its decision in Hamdi v. Rumsfeld. That case was brought and argued by counsel for Mr. Hamdi's father as "next friend." Notably, the Court did not hold that the designation and detention of a citizen as an "enemy combatant" was subject to no judicial review. To the contrary, it held that a court addressing a challenge to such a designation must examine both the source of authority for the designation and the justification for the exercise of that authority, subject to a degree of deference to the executive and legislative branches. The Court further held that a citizen who takes up arms against the United States in a foreign theater of war may properly be designated as an enemy combatant and treated as such. The litigation of these matters has been led by the Solicitor General's office, rather than the Civil Division. If leadership of the matter were reassigned to the Civil Division, however, and if I were confirmed as Assistant Attorney General for the Civil Division, I would defend the Court's holding in further proceedings.

B. Aside from the questionable legality of these detentions, there is the question of whether they are good policy. It is the Associate Attorney General's role not just to defend government actions, but to advise the Attorney General on policy issues. Do you think that these detentions are good policy? Do you think that our criminal or military justice systems are incapable of handling these cases? Do you agree that we are putting Americans abroad at risk of similar treatment by detaining these men and others without charge and without access to counsel?

The Hamdi Court concluded that the detention of enemy combatants can serve “at least” two “vital purposes”: preventing the individual from “continuing to fight against America and its allies,” and “reliev[ing] the burden on military commanders of litigating the circumstances of a capture halfway around the globe.” I understand that a declaration was also filed by Colonel Donald Woolfolk in that litigation describing additional policy justifications relating to intelligence gathering for the designation and detention of enemy combatants. I have no independent expertise on these policy issues, and defer to those in the Defense Department and elsewhere in the government who have such expertise.

3. I understand that you are a co-founder of the Federalist Society. As a co-founder of this organization, I would appreciate your response to the following.

A. The Federalist Society’s website says the organization is founded on a number of principles, including “that the state exists to preserve freedom.” Do you think that the Justice Department’s detention of American citizens without charge and denial of meaningful judicial review and access to counsel are consistent with this principle?

First, to clarify one point: the Federalist Society was founded a year before I entered law school by students who started chapters at the law schools at Yale, Harvard, Stanford, and the University of Chicago, so I have not thought of myself as a “founder.” Four other individuals have that distinction. I have sometimes been described as a “founding director” because I subsequently entered law school and became – approximately one year later -- one of the first directors. Whatever description one uses, however, I was certainly active in the organization in its early days.

The question relates to the designation and detention of “enemy combatants,” and the relationship between the government’s specific position on that issue and the government’s more general responsibility to protect and preserve the liberty of its citizens. As I noted in response to the prior question, the leading appellate decision on the subject is the Fourth Circuit’s decision in Hamdi. The Hamdi Court addressed that specific relationship with two significant and related observations that speak directly to this question.

First, the Court regarded liberty and security as mutually reinforcing values. It emphasized that “[t]he nation has fought since its founding for liberty without which security rings hollow and for security without which liberty cannot survive.” I understand this to mean that a certain level of personal and collective security is a necessary precondition for liberty; and at the same time that security, standing alone, has little or no value if it comes at the price of liberty. I agree with both of those propositions.

Second and relatedly, the Hamdi court resolved what it regarded as “tensions” between, on the one hand, the principle that “[t]he detention of United States citizens must be subject to judicial review” and, on the other hand, the principle that courts must show “deference” to the political branches in cases “implicating sensitive matters of foreign policy, national security, or military affairs.” It resolved these tensions by holding that a citizen challenging his or her designation as an “enemy combatant” is entitled to judicial review, but that such judicial review must be characterized by a significant degree of deference to the political branches. In explaining why principles of separation of powers support this conclusion, the Court stated that “[t]he deference that flows from the explicit enumeration of powers protects liberty as much as the explicit enumeration of rights.” The Court thus concluded that the liberties both of the individual citizen before it, and of the citizenry as a whole, are best protected by the balance the Constitution strikes in providing this form of judicial review in such cases. The general notion that individual liberty is protected both by the kinds of personal rights that are reflected in, for example, the Bill of Rights, and by the structural diffusion of power among the various branches of government, is one that I share.

- B. According to the Federalist Society’s mission statement, “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 that “[l]aw schools and the legal profession are currently strongly dominated by a form of orthodox liberal ideology”? Why or why not?**

I have no significant exposure any more to the nation’s law schools, and therefore cannot fairly characterize them. I do not agree that the legal profession is dominated by a “liberal ideology,” or, for that matter, by any particular ideology. The attorneys I know hold a wide range of views, and I think that is reflected in the profession generally.

- C. The Federalist Society mission statement also states that one of its goals is “reordering priorities within the legal system to place a premium on individual liberty, traditional values, and the rule of law.” Do you believe that certain priorities within the legal system need to be reordered? If so, which ones? On which traditional values would you place a premium, and why?**

The quoted statement is very general, and does not identify specific aspects of liberty or particular values that the legal system should emphasize. I think that reflects that the Federalist Society sought to promote discussion and debate about what the content of those general phrases should be without itself prescribing any particular answers to such broad questions. There are no particular priorities within the legal system that I believe should be changed, but I believe that the profession should always be ready and willing to

examine whether and how the system can be improved to best support and protect values such as liberty, community, fairness, security, compassion, and tolerance. I place a premium on those particular values because I believe that, when taken as a whole and incorporated within a legal system that emphasizes a neutral application of the rule of law, they promote personal dignity and achievement, and discourage the abuse of power.

4. President Bush's budget for Fiscal Year 2004 eliminates all funding for police hiring. The Administration characterizes the COPS program as "Mission Complete," and says "the program's impact on crime is inconclusive." Do you agree with the Administration's position that the COPS program's mission is complete and that its impact on crime is inconclusive? Why or why not?

I believe that the specific mission of funding 100,000 more police officers is effectively complete. I understand that, at the end of the last fiscal year, COPS had funded over 116,000 officers. COPS is continuing to fund other projects, however – involving, for example, training and technical assistance, strengthening tribal law enforcement, fighting methamphetamine, and promoting police integrity – so it continues to have other significant missions. I also understand that the specific impact of the 100,000 additional officers on crime is being actively studied. I think it is therefore correct to describe the evidence as "inconclusive" for the moment.

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News Release
JUDICIARY COMMITTEE

United States Senate • Senator Orrin Hatch, Chairman

May 8, 2003

Contact: Margarita Tapia, 202/224-5225

**Statement of Chairman Orrin Hatch
Before the United States Senate Committee on the Judiciary
Hearing on the Nominations of**

**Robert McCallum to be Associate Attorney General
and
Peter Keisler to be Assistant Attorney General for the Civil Division**

Today it is my great pleasure to have two Department of Justice nominees before the Committee: Robert McCallum to be Associate Attorney General and Peter Keisler to be Assistant Attorney General for the Civil Division. Both Mr. McCallum and Mr. Keisler are currently serving the Justice Department with great distinction, and, coincidentally, each of them holds or has held the position for which the other has been nominated.

Let me first say a few words about Robert McCallum. Mr. McCallum is returning to the Committee for his second hearing in two years, and we welcome him back. On May 23, 2001, Mr. McCallum appeared before the Committee for a hearing for his current position as head of the Justice Department's Civil Division. He was reported favorably by the Committee by voice vote, and also confirmed on the Senate floor by voice vote. I have no doubt that after today's hearing, Mr. McCallum will again be approved by this Committee and by the full Senate for his new position at the Department.

The position of Associate Attorney General is an extremely important one. The Associate Attorney General advises both the Attorney General and the Deputy Attorney General and supervises many important components of the Department, including the Antitrust, Civil, Civil Rights, Tax, and Environmental and Natural Resources Divisions.

Mr. McCallum is well qualified for this position. After graduating from Yale Law School, he spent nearly thirty years litigating a wide range of complex matters and maintained a sophisticated civil trial and appellate practice. His clients included insurance companies, banks, business corporations, partnerships, and individuals involved in commercial disputes, regulatory issues, and personal injury claims.

As head of the Civil Division, Mr. McCallum has shown that he is an enormously talented and committed public servant. Since his confirmation on September 17, 2001, just days after the September 11 tragedy, he has led the Civil Division with great skill during challenging times for our country. I commend the President on his decision to promote Mr. McCallum to the position of Associate Attorney General, and I am certain that he will continue his exemplary public service once confirmed to his new post.

I know that Senator Chambliss is here to speak in further support of Mr. McCallum's nomination, so I will now turn to Mr. Keisler.

Mr. Keisler is also a Yale Law School graduate. Following his D.C. Circuit clerkship, he was hired as an Assistant Counsel to President Reagan. Within one year, he was promoted to Associate Counsel to the President. In 1989, Mr. Keisler left the White House to enter private practice at what is now Sidley, Austin, Brown, and Wood, a prestigious D.C. law firm. He began as an associate and was elevated to partner in 1993. He remained in private practice until 2002, when he joined the Department of Justice as Acting Associate Attorney General. In March 2003, Mr. Keisler was appointed as Principal Deputy Associate Attorney General and currently serves in that position. There can be no doubt that Mr. Keisler's vast experience with civil litigation matters, both in private practice and at the Department of Justice, has more than adequately prepared him to head the Civil Division, where he will be responsible for management and oversight of the largest litigation component within the Department.

I have met with Mr. Keisler and believe that the President made a wise choice in nominating him to this position, but my colleagues need not take solely my word for it. I have received several letters on Mr. Keisler's behalf that I would like to share.

Two former Clinton Department of Justice officials, Randolph Moss and Joseph Guerra, who served, respectively, as Assistant Attorney General and Deputy Assistant Attorney General of the Office of Legal Counsel, wrote that Mr. Keisler "is an extraordinary legal talent... Peter is equally prized for the other aspects of the professionalism he displays – such as personal integrity, a balanced temperament, a courteous and good-humored demeanor, and respectful treatment of others with whom he works, both colleagues and opposing counsel."

Professor Harry Litman, a life-long Democrat and former United States Attorney for the Western District of Pennsylvania during the Clinton Administration, writes, "I can say from personal experience that Peter will treat all his colleagues, from support staff to Presidential appointees, with graciousness and respect. The Committee can have confidence that Peter will also be conscious of the impact of the Department's actions on people's lives, and will approach his responsibilities with a well-developed sense of fairness and compassion."

Stephen Sachs, former United States Attorney for the District of Maryland during the Johnson Administration and Maryland's Democratic Attorney General from 1979 to 1987, wrote in enthusiastic support of Mr. Keisler's nomination. His letter states, "I am a lifelong liberal Democrat. Peter ... is not. But while we have different views on some matters of public policy, I know that we both place a high value on the importance of public service and share a profound respect for the rule of law. I have no doubt whatsoever of Peter's dedication to the essentially apolitical mission of a great ministry of justice. Intellectual integrity is his calling card. For Peter Keisler, those lofty phrases etched on the walls at Justice are living commands, not empty rhetoric. The Department of Justice and the Nation will be well-served by this appointment."

Those are just a few of the letters I have received on Mr. Keisler's behalf, demonstrating the strong bi-partisan support he enjoys. Clearly Mr. Keisler's legal ability and personal integrity have earned him admiration on both sides of the political spectrum.

I would like to congratulate these two gentlemen on their nominations and offer them my full support. I look forward to hearing from them.

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