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S. HRG. 108–135, PT. 2

CONFIRMATION HEARINGS ON FEDERAL APPOINTMENTS

HEARINGS

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED EIGHTH CONGRESS

FIRST SESSION

FEBRUARY 5, FEBRUARY 12, MARCH 12, MARCH 27, AND APRIL 1, 2003

PART 2

Serial No. J–108–1

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NOMINATIONS OF JAY S. BYBEE, NOMINEE TO BE CIRCUIT JUDGE FOR THE NINTH CIRCUIT; RALPH R. ERICKSON, NOMINEE TO BE DISTRICT JUDGE FOR THE DISTRICT OF NORTH DAKOTA; WILLIAM D. QUARLES, JR., NOMINEE TO BE DISTRICT JUDGE FOR THE DISTRICT OF MARYLAND; AND GREGORY L. FROST, NOMINEE TO BE DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF OHIO

WEDNESDAY, FEBRUARY 5, 2003

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

The Committee met, pursuant to notice, at 9:34 a.m., in Room SD–226, Dirksen Senate Office Building, Hon. Orrin G. Hatch, Chairman of the committee, presiding.

Present: Senators Hatch, Kyl, DeWine, Graham, Craig, Leahy, and Kennedy.

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

Chairman HATCH. Okay, we are ready to go. Senator Leahy will be here shortly and we will begin.

I am pleased to welcome to the Committee this morning four excellent nominees for the Federal bench. All of you are to be commended for your impressive qualifications and accomplishments, and I think congratulated without question for your nominations. Our first panel today will feature an outstanding Circuit Court nominee, Jay S. Bybee, who has been nominated to the Ninth Circuit Court of Appeals. Mr. Bybee is no stranger to this Committee or to Committee hearings, having appeared most recently before the Committee in October of 2001. We will also hear from three District Court nominees, Judge Ralph R. Erickson for the District of North Dakota; Judge William D. Quarles, Jr., for the District of Maryland; and Judge Gregory L. Frost for the Southern District of Ohio. And of course I would also like to express appreciation for the members who have taken time to come and present their views on the qualifications of our witnesses today. We will hear from them in a moment.

I am especially honored to have Mr. Jay Bybee here today, who has been nominated by President Bush to serve on the Court of Appeals for the Ninth Circuit. Professor Bybee comes to us with a sterling resume and a record of distinguished public service.

Professor Bybee is currently on leave from UNLV's William S. Boyd School of Law, where he has served as a professor since the law school's founding in 1999. He has served as an Assistant Attorney General for the Department of Justice's Office of Legal Counsel, the OLC, since October 2001. Notably this is a post formerly held by two current Supreme Court Justices. As head of the Office of Legal Counsel, Mr. Bybee assists the Attorney General in his function there as legal advisor to the President and all Executive Branch agencies. The office is also responsible for providing legal advice to the Executive Branch on all constitutional questions and reviewing pending legislation for constitutionality. I am sure Professor Bybee can attest that his work has been more than challenging, especially since he joined the OLC soon after the events of September 11th, but without question our Nation is lucky to have him.

Professor Bybee is a Californian by birth, but he made the wise choice of attending Utah's own Brigham Young University, where he earned a bachelor's degree in economics, magna cum laude, and a law degree cum laude. While in law school he was a member of the BYU Law Review.

Following graduation, Mr. Bybee served as a law clerk to Judge Donald Russell of the Fourth Circuit Court of Appeals before joining the firm of Sidley & Austin. In 1984 he accepted a position with the Department of Justice, first joining the Office of Legal Policy, and then working with the appellate staff of the Civil Division. In that capacity Mr. Bybee prepared briefs and presented oral arguments in the U.S. Courts of Appeals. From 1989 to 1991 Mr. Bybee served as Associate Counsel to President George H.W. Bush.

Professor Bybee is a leading scholar in the areas of constitutional and administrative law. Before he joined the law faculty at UNLV he established his scholarly credentials at the Paul M. Hebert Law Center at Louisiana State University, where he taught from 1991 to 1998. His colleagues have described Professor Bybee as a first rate teacher, a careful and balanced scholar, and a hard-working and open-minded individual with the type of broad legal experience the Federal Bench needs.

The recommendations of two individuals in particular deserve special note. Bill Marshall, a professor of law at the University of North Carolina and a former Associate White House Counsel under President Clinton, who also participated in the judicial selection process for Clinton Administration appointments while at OLP, said of Mr. Bybee:

"The combination of his analytic skills along with his personal commitment to fairness and dispassion lead me to conclude that he will serve in the best traditions of the Federal Judiciary. He understands the rule of law and he will follow it completely."

Stuart Green, a law professor at Louisiana State University, who describes himself as a "liberal Democrat and active member of the ACLU" has written the committee:

"I have always found Jay Bybee to be an extremely fair-minded and thoughtful person. Indeed, Jay truly has what can best be described as a 'judicious' temperament, and I would fully expect him to be a force for reasonableness and conciliation on a court that has been known for its fractiousness."

We hear a great deal from some Committee members about the need for "balance" on the Federal Courts. Here we have a self-described liberal Democrat who testifies that Professor Bybee would bring some balance to the Ninth Circuit. I would welcome some balance on a court on which 14 of the 24 active judges, including 14 of the last 15 confirmed, were appointed by President Clinton. A court which is seldom out of the news and often seems to court controversy with its decisions needs some leavening once in a while.

We are all familiar with the Ninth Circuit's Pledge of Allegiance ruling this past summer, and the Ninth Circuit's high reversal rate by the Supreme Court is well documented, but less known is the Ninth Circuit's propensity for reversing death sentences, some judges voting to do so almost as a matter of course. No doubt the Ninth Circuit has some of the Nation's most intelligent judges, but some just seem to not be able to follow the law. Just this term the U.S. Supreme Court has summarily reversed the Ninth Circuit three times in a 1 day, and vacated an opinion 9–0.

With two judicial emergencies in the Ninth Circuit we need judges who are committed to applying and upholding the law. I firmly believe Professor Bybee represents this type of judge. I am very much looking forward to hearing from Professor Bybee today, and to working with this Committee to obtain the committee's positive recommendation to the full Senate, and to the full Senate's confirmation. He will be a terrific judge, I think by any measure.

In addition to the nomination of Professor Jay S. Bybee to the U.S. Court of Appeals for the Ninth Circuit, we have the privilege of considering three District Court nominees. Our nominee to the U.S. District Court for the District of North Dakota, Judge Ralph Erickson, has carved out a stellar legal career on both sides of the bench. Judge Erickson served as a private practice litigator for more than a decade before being elevated to the State Court Bench in North Dakota 8 years ago. According to a secret poll conducted by the Forum, Fargo's daily newspaper, in 2002, Judge Erickson was selected as "Best Judge in Cass and Clay Counties" by a survey of over 300 lawyers in those counties. He also has experience as a city prosecutor and attorney in private practice.

Judge William Quarles, our nominee to the U.S. District Court for the District of Maryland, has an impressive record in both the private and public sectors. Upon graduating from Catholic University Law School, Judge Quarles clerked for Hon. Joseph C. Howard of the U.S. District Court for the District of Maryland. In addition to private practice experience in complex commercial, corporate, antitrust and products liability litigation, Judge Quarles has served as an Assistant U.S. Attorney, primarily focusing on organized crime prosecutions. Judge Quarles is currently an Associate Circuit Judge for the Circuit Court of Baltimore City, where he has handled more than 4,000 criminal cases and tried more than 150 jury trials. That is a great record.

Judge Gregory Frost, our nominee for the Southern District of Ohio, has an impressive background in the private and public sectors. Upon graduation from Ohio Northern University Law School in 1974, Judge Frost served as an assistant Licking County prosecuting attorney. In this capacity he handled a variety of cases including juvenile and felony prosecutions. From 1974 to 1983 Judge Frost was a partner at Schaller, Frost, Hostetter & Campbell, where his practice consisted of civil litigation including domestic relations law, oil and gas law, estate planning and personal injury law. From 1983 to 1990 he served as a judge for the Licking County Municipal Court, and since 1990 he has served as a judge for the Licking County Common Pleas Court.

I am confident that all three of these fine nominees have the intellect, experience and temperament necessary to serve with distinction on the Federal Courts. I look forward to hearing from them today and to working with my colleagues to bring their nominations to a vote very soon.

So we welcome all of you here this morning. With the understanding that as soon as Senator Leahy arrives, we will give him the opportunity of giving his opening remarks.

I think what we will do is begin with you, Senator Sarbanes, and we will go across the table by seniority if I can. I am delighted to have you Senators here and Congress people here. It means a lot to us, and your recommendations are important to us.

PRESENTATION OF WILLIAM D. QUARLES, JR., NOMINEE TO BE DISTRICT JUDGE FOR THE DISTRICT OF MARYLAND BY HON. PAUL SARBANES, A U.S. SENATOR FROM THE STATE OF MARYLAND

Senator SARBANES. Thank you very much, Mr. Chairman and Members of the Committee.

I am very pleased to appear before you this morning to commend to you the nomination of William Quarles to become a U.S. District Judge for the District of Maryland.

You have already made comments about Judge Quarles, and I agree with those, Mr. Chairman. Judge Quarles is a native of Baltimore, a graduate of Catholic University Law School here in Washington. Following graduation he clerked for 2 years for Judge Joseph C. Howard, who I had the honor and privilege of recommending to this Committee many, many years ago. Judge Howard was the first African-American Judge to sit on the Federal District Court in our State.

Following his 2-year clerkship with Judge Howard, Judge Quarles practiced shortly with a firm here in the District of Columbia, with Finley, Kumble, Wagner, and then went into the U.S. Attorney's Office in Maryland and served 4 years as an Assistant U.S. Attorney. He then joined the very distinguished law firm of Venable, Baetjer and Howard, one of our State's leading firms, and practiced there for 10 years.

Both the experience in the U.S. Attorney's Office, trying complex criminal matters involving organized crime, and his very complex civil legal practice at Venable, Baetjer and Howard, obviously gave him I think a very important basis with which to handle trial matters. He then went on the Circuit Court in Baltimore City, which

is a trial court of general jurisdiction in our State, and he has been on that trial court since 1996. So I think he brings to this nomination to the Federal Bench the kind of experience in practice, both public practice in the U.S. Attorney's Office, private practice in a leading law firm, and then actually sitting on the State Bench himself now for the past 6–1/2 years. It would obviously stand him in good stead to be a Federal District Judge.

We are very proud of our Federal Bench in Maryland. Maryland Senators over the years, both Democratic and Republican, have worked assiduously to sustain the high quality of our Federal Bench. We have been fortunate that we have been able to appear before this Committee consistently in support of the nominees, and as a consequence I think our bench has gained a reputation as one of the finest District Court benches in the country. I believe that Judge Quarles will sustain and add to that reputation, and I am very pleased to come before the Committee this morning and recommend him to you. I very much hope that in the near future you will report him favorably to the floor of the United States Senate.

Chairman HATCH. Well, thank you so much, Senator Sarbanes. That is high praise indeed and we appreciate you being here.

I will turn to you, Senator Ensign, and then we will turn to Congressman Pomeroy.

PRESENATION OF JAY S. BYBEE, NOMINEE TO BE CIRCUIT JUDGE FOR THE NINTH CIRCUIT BY HON. JOHN ENSIGN, A U.S. SENATOR FROM THE STATE OF NEVADA

Senator ENSIGN. Thank you, Mr. Chairman. I appreciate you having this hearing today. I appreciate you bringing nominee Bybee before the Committee today.

I am here representing myself to recommend Jay Bybee, but also Senator Reid. Senator Reid is very strongly behind Jay Bybee as well. Both of us have gotten to know Jay on a personal level as well as on a professional level over the least several years.

I would ask that my full statement be made part of the record with your consent.

Chairman HATCH. Without objection.

Senator ENSIGN. Mr. Chairman, just a few thoughts and a few observations on Jay Bybee. First of all, the UNLV Boyd School of Law, which is a new law school, looks like it is going to get its full accreditation, one of the fastest law schools in history to do that. Jay Bybee was an outstanding member of the faculty at the Boyd School of Law.

It is interesting to note, when you talked about the balance needed on the Ninth Circuit, Jay Bybee provided a lot of balance at the Boyd School of Law, and talking to some of the people there that were more of the liberal professors at the Boyd School of Law, Jay Bybee was well thought of by conservatives in the legal community as well as liberals in the legal community in the State of Nevada

I think that the job that he has done since he has been at Justice has shown the type of temperament and the type of thoughtful person that he is going to be on the Ninth Circuit. For those of us who live in the West, we have not necessarily been pleased by a lot of the actions that the Ninth Circuit has brought forward, and I think that Jay Bybee is going to be an intellectual giant on that court.

And I do not say that lightly. I think that viewing and reading some of his statements and some of his publications that he has put out, you can tell how thoughtful he is, how he respects the law, and how he respects equal justice under the law.

So I am here to offer my strongest recommendation to this committee, that you favorably move Jay Bybee to the floor of the Senate, where hopefully we can approve him as quickly as possible.

I thank you, Mr. Chairman.

Chairman HATCH. Thank you so much, Senator Ensign. We appreciate that.

Because of his heavy duties, we will turn to Senator Reid at this time, so that he can get back to the floor.

PRESENTATION OF JAY S. BYBEE, NOMINEE TO BE CIRCUIT JUDGE FOR THE NINTH CIRCUIT BY HON. HARRY REID, A U.S. SENATOR FROM THE STATE OF NEVADA

Senator REID. Thank you very much, Mr. Chairman. These hearings are always very educational, not only for the people on the panel and of course the people that are appearing before the panel, but for Senators, because, John, I never realized we had a liberal member of the faculty at UNLV Law School.

[Laughter.]

Chairman HATCH. It would be a very rare faculty if you did not.

[Laughter.]

Senator REID. Mr. Chairman, Members of the Committee, I am very happy to be here to commend my friend, Jay Bybee, to be a member of the United States Court of Appeals for the Ninth Circuit. I am pleased that Mr. Bybee will be given an opportunity to discuss his excellent legal qualifications, judicial philosophy and other issues with the members of this committee.

The committee's work is vitally important to gathering a record upon which each and every Senator may rely on discharging the constitutional duty we have to consent to the President's judicial nominees.

Chairman Leahy is not here, but I wanted to commend him for his hard work during his 15-month tenure as Chairman of the committee, where he worked to approve 100 judges that were sent forward by President Bush. During Senator Leahy's chairmanship these nominees moved in the order the President sent them to the Senate. Time ran out in the 107th Congress without any action on Mr. Bybee's nomination. Under Chairman Hatch's leadership today the Committee will her that Mr. Bybee has received a well-qualified rating from the American Bar Association. His legal skills certainly merit this distinction.

Mr. Bybee served as legal advisor in the first Bush Administration, and has helped to each a generation of new lawyers as a former professor at the University of Nevada at Las Vegas Boyd School of Law. I was pleased to introduce with my friend, Senator Ensign, Mr. Bybee to the Committee just a short time ago for the position he now holds as Assistant Attorney General of the Office of Legal Counsel at the Department of Justice.

And something that is not in my prepared remarks but I think will, in my estimation, is more important than all these legal qualifications that this fine man has, and that is what a fine family man

he is. He has a wonderful family. I had the opportunity on a flight from Florida recently to spend some time with his wife. She is a lovely woman. She has a great understanding of what his job is.

So I, without any qualification, ask this Committee to approve as quickly as possible Jay Bybee to be a member of the Ninth Circuit Court of Appeals.

Chairman HATCH. Thank you, Senator Reid. You and Senator Ensign working together, I think make a tremendous difference with regard to an nominees that you bring forward, so we are very grateful to have both of you here, and grateful to have your testimony here.

Senator REID. Could we be excused, Mr. Chairman?

Chairman HATCH. Sure can.

Congressman Pomeroy, if you can just wait, I think I had better finish with Judge Quarles.

Senator MIKULSKI. Mr. Pomeroy, are you okay? Do you have a vote?

Mr. POMEROY. No, I am good. I am fine, Senator. Thank you.

Chairman HATCH. If you do, let me know, because I will interrupt anything.

Mr. POMEROY. I am just fine.

Chairman HATCH. If we can go to Senator Mikulski, then we will do that.

PRESENTATION OF WILLIAM D. QUARLES, JR., NOMINEE TO BE DISTRICT JUDGE FOR THE DISTRICT OF MARYLAND BY HON. BARBARA MIKULSKI, A U.S. SENATOR FROM THE STATE OF MARYLAND

Senator MIKULSKI. Good morning, Mr. Chairman, and colleagues on the Judiciary Committee.

I know that the advise and consent function that we perform in terms of the Judicial Branch is one of our highest and most important duties. When I always look at who should be a judge, I look at three criteria, their competence that they bring, their sense of integrity as individuals, and also their dedication to protecting core constitutional values and guarantees.

I come here today with real enthusiasm to recommend that this Committee approve the nomination for William Quarles to become a member of the Federal Bench. I wanted to nominate him 10 years ago. The Maryland system put forth his when—if you might, Bush I or Bush the Elder, or Bush 41, however we do it—Mr. Quarles was then up for nomination. Well, time ran out, politics changed. So here we are one decade later, and I come with enthusiasm to do this. We have a tradition in Maryland that regardless of who is the party in power, we really put forward the best of the best to be our judges.

Mr. Quarles brings great intellect and great integrity. He was born in Baltimore, attended Baltimore area schools, City College, Catholic University. He comes from a really wonderful family. His father was a stevedore and dock worker. He learned the values of hard work and the importance of education. His sister is a minister. His daughter, Eloise, is a successful securities lawyer. His dear wife, Mary Ann, works for the District Court of Maryland as a pretrial service specialist. So you can see what his roots are.

Having learned hard work and excellent education, he went on then to be a law clerk for Judge Joe Howard, who was a civil rights activist and was the first African-American appointed to the Federal Bench in Baltimore. But he comes not only with a background that is personal qualities and values; he comes with a great legal career.

Early on he worked as an Assistant U.S. Attorney in Baltimore, handling complex and civil litigation. He coordinated the President's Task Force on Drug Enforcement, got a lot of awards for that. He left that and then went to one of our most prestigious white-shoe law firms, Venable, Baetjer and Howard in Baltimore. You might recall, Mr. Chairman, that is the law firm that gave us Ben Civiletti, who was an Attorney General. At Venable he handled civil litigation, antitrust and appeals. He was promoted to manager of the D.C. litigation practice.

Then in 1996 he was placed on the Maryland Circuit Court in Baltimore City. This is Maryland's highest trial court, where he has now served with distinction, presiding over major civil and very serious and violent criminal matters. While on the bench he chaired the Sentencing Review Panel for the Eighth Circuit, coordinated the electronic filing project. He brings technology to the bench.

And also, how do his peers feel about him? Well, not only is he a member of all relevant bars in Maryland, but the American Bar Association, with the majority of evaluation, gives him "very qualified." He has written in Maryland Bar, Inside Litigation. He is active in his church and community and gets awards from everything from the Boy Scouts to the DEA.

So as you can see, I think we have really a wonderful and distinguished person to present to you from Maryland. I do it without reservation and with great enthusiasm, and I hope the Committee puts him forth to our colleagues. I think you will be proud as Senator Sarbanes and I are of Judge Quarles.

Chairman HATCH. Well, thank you, Senator Mikulski. Your recommendation means a lot to the committee, along with Senator Sarbanes, and we really appreciate you taking time to be with us today.

And I think, Judge Quarles, you have got some pretty heavy firepower behind you. And that is good.

Senator MIKULSKI. And we are saying this about a member of the other party, you know what I mean?

[Laughter.]

Chairman HATCH. That really is an exceptional thing, let me tell you. We are grateful to see you here.

Senator MIKULSKI. Thank you very much, Mr. Chairman.

And, Congressman, thank you for the courtesy.

Mr. POMEROY. Thank you.

Chairman HATCH. Senator Dorgan, Congressman Pomeroy has been waiting a long time. Can I just have him—

Senator DORGAN. Absolutely.

Chairman HATCH. I think he needs to get back over to the House. With your permission and deference, I would like to do that.

Senator DORGAN. Of course.

PRESENTATION OF RALPH R. ERICKSON, NOMINEE TO BE DISTRICT JUDGE FOR THE DISTRICT OF NORTH DAKOTA BY HON. EARL POMEROY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NORTH DAKOTA

Representative POMEROY. Mr. Chairman, thank you. I will be brief, but I do want to commend to your attention the President's nomination for the opening in the bench in North Dakota.

Judge Ralph Erickson is someone I have known for 23 years. Prior to his time as the District Bench in 1994, Ralph throughout those years was an active Republican and I have been an active Democrat, but we have maintained a close friendship. I have enormous respect for him. After assuming his role on the District Bench we have really been able to see what a wonderful jurist Ralph has proven to be. He is competent, fair minded, hard working, conscientious, has impeccable integrity, and as a result has really demonstrated a superb judicial temperament.

He has told me that his personal philosophy is to treat lawyers like he would like to be treated when he was a lawyer, and that means being prepared, listening, understanding the law as best as possible. As he has applied these values, it has shown, because he has run for re-election to the bench without opposition, and the lawyers in this poll you referenced in your introductory remarks, Mr. Chairman, a survey of Fargo/Morehead lawyers rated him simply the best, the best of the District Bench.

So I think the President has made a superb choice in advancing for your consideration Judge Ralph Erickson, and I echo my wholehearted support. He will be an excellent addition to the bench in North Dakota.

Chairman HATCH. Well, thank you, Congressman Pomeroy. We appreciate you taking time to come over to the lesser body and speak to us. We are grateful to have your testimony, and that weighs very heavily in favor of the Judge.

Representative POMEROY. Thank you, Mr. Chairman.

Chairman HATCH. Senator Dorgan, we are honored to have you here.

PRESENTATION OF RALPH R. ERICKSON, NOMINEE TO BE DISTRICT JUDGE FOR THE DISTRICT OF NORTH DAKOTA BY HON. BYRON DORGAN, A U.S. SENATOR FROM THE STATE OF NORTH DAKOTA

Senator DORGAN. Senator Hatch, thank you very much.

I am pleased to be here. I will not add too much to what Congressman Pomeroy said. Congressman Pomeroy, Senator Conrad and I feel all pretty much the same about this candidate. Judge Ralph Erickson has been nominated. I fully support and enthusiastically support his nomination. I think he will make an excellent Federal Judge in the U.S. District Court in North Dakota, on the east side of North Dakota.

He is a native of Thief River Falls, Minnesota. His J.D. was received with distinction from the University of North Dakota. He spent 9 years in private practice before becoming a District Judge, Cass County Magistrate first, then a District Judge for the East District Judicial District. He has presided over some of the most high profile cases in our region, and as you indicated, and as Con-

gressman Pomeroy did, the largest newspaper in our State indicated that he is the best in the region in their evaluation.

I think the staff on both sides of the Judiciary Committee received that word when they called around North Dakota as well. The kind of reaction they received, fair, hard working, even tempered, thoughtful, good reputation. Those are exactly the kinds of things you want to hear about a judge.

My understanding is he is one of the few people who will come before this Committee who has actually been in prison. He as an intern at Leavenworth when he was in law school.

[Laughter.]

Chairman HATCH. We like to hear that.

[Laughter.]

Senator DORGAN. He may want to tell you more about that, but he also is someone—I had about 2 months ago the opportunity to sit in his courtroom. I asked if I could be allowed to sit in the Youth Drug Court that he presides over. And I sat there I guess an hour and a half or so that day and watched, late afternoon, and watched Judge Erickson deal with some young offenders, young men and women who came before him. I must tell you, not only is that a terrific idea and a very important part of our system, but I was very impressed with the way Judge Erickson handled that. He is a credit to the Judiciary, and if we are able to put more and more people like Judge Ralph Erickson on the Federal Bench, the Judiciary in this country will be in very good hands.

So I am here to say that this is an excellent nomination. I am proud to support him. I think you all will be very proud to confirm that with an affirmative vote, and I know that he has been accompanied by his wife and his children and others, and I am sure he will introduce them at an appropriate time.

Mr. Chairman, thank you for holding the hearing and I hope we will move this nomination quickly.

Chairman HATCH. Thank you very much, Senator Dorgan. We really appreciate your taking time from what we know is a very busy schedule. Thanks for your honoring the judge.

We will now turn to the distinguished Democratic leader on the committee.

Senator LEAHY. Thank you, Mr. Chairman.

Like all of us, I was—

Chairman HATCH. Senator, could you—

Senator LEAHY. Sure.

Chairman HATCH. I forgot to do one thing. Senator Conrad very much wanted to be here today to introduce Judge Erickson, but unfortunately had a scheduling conflict he just could not change, so I am pleased to submit his written statement for the record in favor of Judge Erickson.

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

Chairman HATCH. I am sorry. I just thought that would be better to get that in at this time.

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

Senator LEAHY. And I am sorry I missed our colleagues, but each one of them have talked to me, at one time or another, about the nominees who are here. Like all of us, we end up with about three different committees going on at the same time. Here, we are going to hear four nominees for lifetime appointments to the Federal bench—one to the Ninth Circuit Court of Appeals, three to District Courts in North Dakota, Maryland and Ohio.

The arrangement, one Court of Appeals judge, three District judges, basically follows years of precedent in the way we schedule these. I think it is more reasonable and more sensible than what we faced last week, when we had three Circuit Court nominees at one time, all three controversial, and there in a hearing until about 10 o'clock at night, a rather rushed hearing. Here, having one Circuit Court nominee, we are able to give each of the people who have traveled here with their families and friends the kind of attention they deserve.

I compliment the Chairman for doing it this way, as compared to last week. I thought having three controversial nominees scheduled together meant that none were adequately discussed. At the same time, I do not want to go back to the days, for example, when this Committee did not hold a single hearing on a judicial nominee until mid–June, as was the case in 1999. I think we could work on more fair schedules, as we have had in the past 17 months, where we were able to get 100 judges through in that time.

Today, the Circuit Court nominee before us is Jay Bybee. He is currently serving in the Justice Department as an assistant attorney general for the Office of Legal Counsel, OLC, and the head of OLC serves as the Attorney General's lawyer, and advises him on legal issues underlying Administration and Department policies.

In the wake of September 11th, Mr. Bybee's responsibilities have included rendering opinions on many controversial decisions that have come from the Justice Department, including its ability to try terrorist suspects in military tribunals; its ability to use State and local police to make arrests for civil violations of immigration laws; its use of gun purchase databases to track terrorist suspects; its decision that, contrary to Secretary of State Colin Powell's opinion, they did not need to declare the al Qaeda and Taliban detainees prisoners of war under the Geneva Convention, and I assume other controversial policies.

So I am interested in his views on these questions of law. I am concerned the role he may have played in perpetuating the culture of secrecy that has enveloped the Justice Department over the past couple of years. The office which he heads has long been a leader in sharing its work with the American public, and in recent years that office even began publishing its legal opinions on a yearly basis. Many of these opinions are available in legal databases. I think they provide a very valuable tool for lawyers and nonlawyers, just to understand how the legal underpinnings of our Government work.

But of the 1,187 OLC opinions that have been published on the Lexis legal database since 1996, only three are from the period when Mr. Bybee headed the office. Up until now, there has also

been a history of OLC releasing numbers of opinions on the Department of Justice website, where all Americans, from students to retirees, can, with the click of a mouse, pick them up. They have also responded, of course, to requests by the Judiciary Committee, under either Republican or Democratic leadership, but that practice, too, has ended under Mr. Bybee's leadership at OLC.

A Government works best when it is open and answers questions, and I am worried that we see a change from both Republican and Democratic administrations of openness, and if we go to this nondisclosure, then I think it follows this pattern of an expansive view of executive privilege that has marked the time that Mr. Bybee has been in Government, and I want to hear from him on that issue. This is something, this lack of openness, concerns have been expressed by me, by Senator Specter, by Senator Grassley, by Senator Hatch, by Senator Schumer and by a number of other son this committee.

Now, the District Court nominees from North Dakota, Ohio, Maryland appear to be more moderate and bipartisan than the President's Circuit Court nominations.

Judge Erickson is currently a judge in the East Central District Court of North Dakota. He is supported by both of the Democratic home–State Senators, well-respected in his community as being a hardworking, thoughtful, fair, even-tempered judge. Incidentally, I was pleased to see, Mr. Chairman, that Judge Erickson has been involved in developing an initiative in Fargo to assist juveniles involved in drug crimes, and he will be joining the other judge from North Dakota that we approved when I was chairman, Judge Hovland.

We will hear from Judge Quarles, who is nominated in the U.S. District Court for the District of Maryland. He has served as an attorney in private practice, assistant U.S. attorney in Baltimore before becoming a Circuit Judge of the Circuit Court for the City of Baltimore. He is supported by both the Democratic Senators from his home State.

And Judge Frost, nominated to the U.S. District Court for the Southern District of Ohio, has been on the bench for 12 years. He is either currently or formerly a member of numerous charitable and civic organizations. I would like to note that he has been very principled in ensuring the organizations of which he is a member do not discriminate, including, if he thought that they did, to leave. I would also note that he is supported by both the Senators from his home State, both Senator DeWine, a valued member of this committee, and our friend, Senator Voinovich, a highly respected member of the Senate.

So thank you, Mr. Chairman.

Chairman HATCH. Thank you, Senator Leahy.

We will now turn, last, but not least, and very importantly, to our colleague on the committee, Senator DeWine, to speak about our judge from Ohio.

PRESENTATION OF GREGORY L. FROST, NOMINEE TO BE DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF OHIO BY HON. MIKE DEWINE, A U.S. SENATOR FROM THE STATE OF OHIO

Senator DEWINE. Thank you, Mr. Chairman, very much. It is certainly my pleasure to introduce to the Members of the Committee Judge Gregory Frost. My friend and colleague from Ohio, Senator Voinovich, certainly wanted to be here with us today, but unfortunately will not be able to attend, but he did ask me, Mr. Chairman, to submit his statement to the record, and I would ask, with unanimous consent, it be made part of the record.

Chairman HATCH. Without objection.

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

Senator DEWINE. Judge Frost, as has been pointed out, has been nominated by the President of the United States to serve as a United States District Judge for the Southern District of Ohio. He currently serves as judge on the Licking County Common Pleas Court of Newark, Ohio. So I would like to welcome to the Committee several people who are here to support Judge Frost:

First, his wife Kristina Dix Frost and his son Wes. We welcome both of them to the committee. Kris and Wes, thank you very much for being here with us today.

I would also like to welcome Judge Frost's mother Mildred; his mother-in-law Helen Dix; his sister Beth Thomas and her husband Kim; as well as Doug McMarlin, a good friend of the Frost family; Sarah Barrickman, Judge Frost's law clerk; and Shawn Judge, a friend of Judge Frost.

Also here to show their support are Mike Nicks, an attorney from Newark, as well as Nancy Dillon and a man named Leonard, both friends of the Frost family.

Judge Frost is a 1971 graduate of Wittenberg University. Judge Frost received his law degree in 1974 from Ohio Northern University. Judge Frost's long career in both public service and private practice makes him well-qualified for the District Court.

He has been a Licking County judge for the past 19 years, serving as Municipal Court judge from 1983 to 1990, and then, Mr. Chairman, as Common Pleas judge from 1990 until the present.

While serving on the bench, Judge Frost was selected to take the lead in writing the jury instructions for the entire State of Ohio. Mr. Chairman, of course, we all know the importance of jury instructions. These jury instructions, of course, provide the framework in which all jury cases in the State of Ohio are deliberated.

Prior to his service on the bench, Judge Frost was a partner in the law firm of Schaller, Frost, Hostetter and Campbell in Newark. While with that firm, he also served as an assistant Licking County prosecutor from 1974 until 1978.

Judge Frost is an excellent jurist whose dedication and graciousness have earned him the respect of those inside and outside of the courtroom.

Now, Mr. Chairman, I was particularly struck by a letter Gary Walters, the Clerk of Courts in Licking County, wrote to the Newark Advocate newspaper. This is what he said regarding Judge Frost, and I quote:

"He arrives to work well before daybreak and before anyone else in the courthouse. He works hard all day, and routinely is the last one to leave in the evenings." Similar to you, Mr. Chairman. I note that from having an office right next to yours.

Chairman HATCH. That is a very habit.

Senator DEWINE. I know. I do not think he plays music as loud as you do, though, Mr. Chairman. He probably does not write music either, I do not think.

[Laughter.]

Senator DEWINE. "His work ethic is second to none. As Clerk of Courts, I am in the courtroom with Judge Frost. He recognizes that jury service is difficult and sometimes unpleasant. With his sense of humor and his willingness to explain every step of the process, he puts the jurors at ease and makes the experience an educational one. Many jurors have made a point to tell me that their jury experience was extraordinarily valuable because of the attention Judge Frost devoted to preparing them for their duties."

Mr. Chairman, this statement provides, I believe, an excellent illustration of both Judge Frost's temperament in the courtroom and his dedication to his position.

In addition to that, Judge Frost has committed a great deal of time and energy to his Licking County community. He has served on the board of directors of the Licking County Alcoholism Prevention Program, and the Maryhaven Alcohol and Drug Addiction Treatment Center in Columbus.

He is also an Executive Committee member of the Central Ohio Council of the Boy Scouts of America. Indeed, as a lifelong resident of Licking County, Judge Frost has made significant contributions to his community. Without question, Judge Frost will be a fine addition to the District Court. He has the experience, Mr. Chairman, the temperament and the dedication to be an excellent Federal judge.

I might add, Mr. Chairman, on a personal note, that I have known Judge Frost for many, many years, and I believe that he is the type person that we need to serve on the Federal District Court. I strongly support his nomination, and I thank the chair for the time.

Chairman HATCH. Thank you, Senator.

Before we begin, let me just say that I want everybody here on the Committee and all staff to listen very good to what I have to say. I was outraged today to read all over the paper today, including in Al Kamen's column in the Washington Post, information that was contained in the "confidential" section of the committee's file on Mr. Bybee. This is wrong. It is outrageous, and it is dirty politics, and it is violative of Committee rules that are very, very important rules that have been abided by. This is the worst I have seen since the Clarence Thomas hearings.

Now, Senator Leahy, when he was chairman, changed the Committee questionnaire to move some of the nominees' information, normally in the FBI files, into the "confidential" section. Now, I want everybody to know that we are going to go back to what the Committee has always done before. The FBI files are to be held in confidence, and nobody is to breach that confidence, and I think this is a perfect illustration why we need to do that.

So, just so everybody is put on record, we are just not going to put up with that type of stuff, and I am going to investigate it and see if we can get to the bottom of it. No nominee should be treated any differently than we treated the nominees during the Clinton administration. They are to be treated exactly the same, whether they are President Bush's nominees or anybody else's.

Having said that, Mr. Bybee, if you could get ready to stand and raise your right arm to be sworn.

Do you swear that the testimony you are about to give before the Committee will be the truth, the whole truth and nothing but the truth so help you God?

Mr. BYBEE. I do.

Chairman HATCH. Thank you.

Senator KENNEDY. Mr. Chairman, I wanted to have the opportunity to inquire of Mr. Bybee. We are, as you know, there is an important conference on Haitian refugee policy, which is a matter of very important consequence to our Refugee Committee here, which I was at earlier today, and now I understand that the Secretary of State is going to be addressing the Security Council on one of the most important probably moments, in terms of American history, which will be very significant on the issues of war and peace.

So I am not going to be able to be here for the time of Mr. Powell's speech to the Security Council. I think I have a responsibility to do that, but I do have questions, so I will try and work this out with the chair. I do not have enormous numbers, but I do have questions that I would like to ask the nominee at some time.

Chairman HATCH. Well, we will accommodate the distinguished Senator and former Chairman of the committee, of course.

We would like to finish the hearings as soon as we can, but if you could come right back—

Senator KENNEDY. I would be glad to come over right after Mr. Powell's address when it is finished.

Chairman HATCH. If you will, that would be great. We will reserve that time for you.

Senator KENNEDY. Thank you.

Chairman HATCH. What we may do is ask some questions of Mr. Bybee and then bring up the other judges until you come back.

Senator KENNEDY. That is fine. Thank you. I thank you, Mr. Chairman.

Chairman HATCH. Thank you, Senator Kennedy.

Well, let us begin then, and we will reserve that time. I would like to see that myself, but I think we better move ahead here.

Mr. BYBEE. Thank you, Mr. Chairman.

Chairman HATCH. I will be able to see it on C–SPAN, I am sure. But I do not blame any Senator for wanting to see that. This is an historic moment, and I personally just want to express my regard for Colin Powell and the terrific job he is doing as Secretary of State and for his resolute strength in this administration. I have tremendous respect for him, always have, and it has grown in my eyes even more since he has been acting as Secretary of State. So this is an important, historic time, and I cannot blame any Senators for wanting to see that. I would like to myself.

But we are going to move ahead here so that we do not inconvenience our judges, and then what we will have to do, Mr. Bybee, if we finish with our questions, we will move ahead with the other judges and put you in abeyance until Senator Kennedy and any other Democrat or Republican who wants to question will come back.

But let me just ask a few basic questions of you so that we uncover some of the things that I think are critical.

The Founding Fathers believed that the separation of the powers in the Government was critical to protecting the liberty of the people. Thus, they separated the legislative, the executive and the judicial powers into three different branches of Government, so-called co-equal powers: The legislative power being the power to balance moral, economic and political considerations and make law; the judicial power being the power only to interpret laws made by Congress and by other people, which sometimes involve the President, through Executive Order and otherwise; the judicial power being the power to interpret laws, something that we have really been concerned about on this Committee because of the actions of some of the judges and the various Circuit Courts of Appeals and, in particular, the Ninth Circuit Court of Appeals.

In your view, is it the proper role of a Federal judge, when interpreting a statute or a Constitution, to accept the balance struck by the Congress of the people or to rebalance the competing moral, economic and political considerations?

Mr. BYBEE. Thank you for that thoughtful question, Mr. Chairman.

The separation of powers was fundamental to our constitutional design, and fundamental to that design was the idea that neither of the branches, none of the branches, should exercise any of the power of the other branches. When the Federal Courts seek to balance important moral or political decisions, they usurp the power of this body, the Congress of the United States, and that is not the appropriate role of the courts of the United States.

They have been given substantial powers under our Constitution, but it is the power of interpretation, not the power of decision in the first instance, Mr. Chairman.

Chairman HATCH. Thank you. You know, I have been very rude here because I have not given you a chance to even make an opening statement and, above all, I would like you to introduce your family and your friends who are here. I apologize to you. I am so anxious to get you through that—

[Laughter.]

Chairman HATCH. I think sometimes I place that above everything else. So please forgive me, but I would like you to make any statement you care to make, and of course introduce your family and friends who are here.

STATEMENT OF JAY S. BYBEE, OF NEVADA, NOMINEE TO BE CIRCUIT JUDGE FOR THE NINTH CIRCUIT

Mr. BYBEE. Thank you, Mr. Chairman. I have many members of my family here that I would like to introduce, and I have many friends and colleagues who have attended as well. I will forebear

from introducing friends and colleagues in the interest of time, but I appreciate the opportunity of introducing my family.

Seated behind me is my lovely wife Dianna, my wife next week as of 17 years. We have four children, and I will ask them to stand because they may be a little short. My oldest, Scott, is 15; my son David is 12; my daughter Alyssa is 10; my son Ryan is 8.

Chairman HATCH. That is great. We are glad to have you young people with us, I will tell you.

Mr. BYBEE. My mother, Joan Bybee is here in the front row as well. Someplace in the back are my wife's parents, Harvey and Nada Greer, who came in last night from Sacramento, California. I appreciate them making the trip.

Chairman HATCH. Please stand as well so we can see you.

Great. Glad to have you here. Welcome.

Mr. BYBEE. I have all of my siblings and their spouses are here. My brother David and his wife Rene.

Chairman HATCH. Please stand. We want to look everybody over. These are important positions.

[Laughter.]

Mr. BYBEE. My sister Karen and her husband Jeff Holdaway, and two of their children, Christopher and Cameron Holdaway.

Chairman HATCH. Karen worked up here on Capitol Hill and did a great job while she was here.

Mr. BYBEE. My youngest brother Lynn and his wife Melissa.

Chairman HATCH. Welcome.

Mr. BYBEE. Have I left anybody out? Oh, my niece Kelli Frazier is here.

Chairman HATCH. Great. Nice to have you, Kelli.

Mr. BYBEE. We have additional extended family and additional friends in the audience, Mr. Chairman. Thank you very much.

Chairman HATCH. Yes, I see a lot of your friends out there in the audience. It is just great. Welcome to all of you. We are grateful that you here. I have tremendous respect for Mr. Bybee, and I think everybody who has had any contact with him also shares that respect.

Do you have anything else you care to say?

Mr. BYBEE. No, Mr. Chairman, but I do thank you for holding this hearing and affording me the opportunity of talking before the Committee today.

Chairman HATCH. We will give 10 minutes for each person to ask questions and maybe some more to others who want to ask some more.

The making of the law is a very serious matter. To make constitutional or statutory law, the text of a proposed amendment or statute must obtain a set number of formal approval of the people's elected representatives. Now, this formal approval embodies the express will of the people, through their elected representatives, and thus raises the particular words of a statute or constitutional provision to the status of binding law.

Would you agree that the further a judicial opinion varies from the text and original intent of a statute or constitutional provision, the less legal legitimacy it has?

Mr. BYBEE. Yes, Mr. Chairman. This is a very important question, and it is a very important challenge for the judiciary to recog-

nize that Congress is a collegial body, representing a diverse group of Americans and that Congress has come together and has undertaken a difficult process of arriving at consensus, and that ought not to be undone by a single judge or by even a single panel of judges who are not representative and have been given certain protections under our Constitution that indeed ensures that they will not be subject to the kind of political pressure that this body is rightfully subject to, that kind of—that's a check of the people.

And for a judge or for any panel of judges to undertake that responsibility is to assume the responsibility of the legislature and act as a political body.

Chairman HATCH. Do you think that it is the proper role of a Federal judge to uphold the legitimate will of the people, as expressed in the law, or to basically impose his or her own view of what that judge thinks the law to be?

Mr. BYBEE. Mr. Chairman, the responsibility of the judge, as Chief Justice Marshall said as early as *Marbury* v. *Madison*, it is to say what the law is.

Chairman HATCH. Well, under what circumstances do you believe it appropriate for a Federal Court to declare a statute enacted by Congress unconstitutional?

Mr. BYBEE. Mr. Chairman, that is a very good question. That is a question the law professors are always very excited to discuss in class, and I think it is a hard challenge for judges to undertake that responsibility to review for constitutionality statutes enacted by Congress.

On the one hand, Senator, any judge should begin from the assumption that legislation is constitutional. We must begin from that because you have taken the same oath to uphold the same Constitution that the judges have.

Now, aside from that, it is the responsibility of the Judicial Branch, from time-to-time, to strike down where it believes that Congress has overstepped its bounds in certain legislation. In those rare cases, the judiciary should examine carefully the text of the statute and ensure that it really does not comport with the plain text of the Constitution.

Chairman HATCH. In general, the Supreme Court precedents are binding on all lower Federal Courts and all Circuit Court precedents are binding on the courts within that particular circuit. Now, are you committed to following the precedents of higher courts faithfully and giving them full faith, and credit and effect, even if you personally disagree with these precedents?

Mr. BYBEE. Senator, any judge who assumes this responsibility must set aside his or her personal beliefs as they enter the courtroom door. They are not appointed in their personal capacity as a judge, and it is their responsibility to interpret the law faithfully.

Chairman HATCH. What would you do, if you conclude very honestly, and you believe that the Supreme Court or the Court of Appeals had seriously erred in rendering a decision, would you nevertheless apply that decision or would you apply your own best judgment on the merits?

Mr. BYBEE. Senator, one of the Framers commented that the Constitution was established that it might be a Government of laws and not a Government of men. I would faithfully apply the

precedent of my circuit and the precedent established by the Supreme Court. I think to do otherwise would be chaotic, and I think disserves the people who then cannot count on understanding what the law is. They have no way of knowing what law will be applied if a judge is free to ignore the dictates of higher courts.

Chairman HATCH. It would not be long for the Constitution to go down the drain if we had judges just doing what they felt within their souls was right, rather than applying the law, as the precedents demand.

Mr. BYBEE. It would be chaotic, Senator.

Chairman HATCH. Yes, it would.

Well, if there were no controlling precedent, dispositively concluding an issue with which you are presented in your circuit, to what sources would you apply to obtain persuasive authority?

Mr. BYBEE. Thank you, Mr. Chairman.

If I faced a situation in which there were no controlling precedents, then I would begin with the text of the statute. That is the clearest record of what Congress meant. I begin with the text of the statute.

In those cases in which there might be some ambiguity that cannot be resolved by referring directly to the text of the statute or to the broader structure of the act that it is a part of or to some clear understanding or history, then I would look to other tools that would help me understand what Congress meant.

Chairman HATCH. In what circumstances, if any, do you believe an appellate judge should overturn precedent within his or her own circuit?

Mr. BYBEE. Mr. Chairman, that's a hard question, and I think that's one that each judge will have to decide for himself or herself. The second Justice Harlan I think took the position that he would dissent three times to make his views known where he believed that the Court had erred, and then he would accept the circuit precedent or the Supreme Court's precedent.

In the case where you have a firm belief that the Court has plainly made a mistake Circuit Courts may revisit their decisions, but I think that would take a very, very careful weighing of what compelled the decision in the first place, how long it had been in place, what kind of reliance people or companies or States had placed upon that decision, and I think one would have to think very carefully, long and hard, before one would overturn it.

Nevertheless, Senator, there certainly are a number of instances in the Supreme Court and in the Courts of Appeals where courts have been compelled to overturn themselves where they believed that they did make a mistake.

Chairman HATCH. Thank you. My time is up. I am going to turn to Senator DeWine.

Senator DEWINE. Mr. Bybee, Senator Leahy raised some important points about some activities in which the Department of Justice has engaged. As you are aware, this Committee does have jurisdiction over oversight over the Department of Justice. Let me ask you whether you feel you have authority to answer questions today on behalf of the Department of Justice.

Mr. BYBEE. No, Senator, I do not.

Senator DEWINE. If you did have authority to answer these questions, would you be able to answer questions regarding your conversations or recommendations to the Attorney General?

Mr. BYBEE. Senator, it would be inappropriate for me to reveal confidences that have been placed in me by my clients. That is fundamental to an attorney's responsibility. In the event, Senator, that there were some kind of an oversight hearing, and the administration had asked me to appear officially here, there would be things that I could represent of the administration's position, but even in that circumstance, Senator, I believe it would be inappropriate for me as an attorney to reveal the conversations or confidences that have been placed in me by my client.

Senator DEWINE. Mr. Bybee, you served as a law professor, correct?

Mr. BYBEE. Yes, sir.

Senator DEWINE. You currently serve in the Office of Legal Counsel at the U.S. Department of Justice.

Mr. BYBEE. It's been my privilege, Senator, for the last year-and-a-half.

Senator DEWINE. And you aspire to serve on the Circuit Court.

Mr. BYBEE. If I am so fortunate as to be confirmed by this committee, Senator, it would be a great honor.

Senator DEWINE. Please, for me, compare and contrast those three positions. You have served in two of them. You would like to serve in a third. What would be the differences, difference in mindset, difference in role, difference in function.

Mr. BYBEE. Thank you, Senator. I think it's important—

Senator DEWINE. Difference in approach, excuse me.

Mr. BYBEE. I think it's important to remind myself of what those differences are. I have had the privilege of seeing many different aspects of the law. I have been fortunate enough to be an advocate. I was an advocate in private practice and with the Department of Justice. I was a law professor for 10 years, and now I find myself in a position of counsel to the Attorney General and to the White House counsel in my current role at the Department of Justice.

As an advocate, I had an important task to represent accurately, but vigorously, the interests of my client in courts of the United States. As a law professor, I had a different role. I took on a different set of responsibilities when I first went to LSU and then later to UNLV. My responsibility was to teach a new generation of law students about the Constitution, about administrative law, the Administrative Procedures Act and about civil procedure in the Federal Courts of the United States.

I worked very hard at teaching them what the law says, but one of the responsibilities of a law professor is to stretch the minds of his students. It is to probe, to push to prod, to make them think critically about the decisions that they are reading. That is a different kind of role.

And, as a faculty member, it was also my responsibility, as a responsible faculty member, to seek to publish. And as an academic, one thing that academics do is challenge each other. We seek to explore the law in a way that is not the same that we would in a judicial role. My role as a law professor is not necessarily to describe the law as it is, but again to examine critically, just as I

have encouraged my students to do, to encourage myself and my colleagues to think more critically about important and sometimes controversial topics in the law.

A judge is neither a vigorous advocate nor a law professor. A judge is not responsible for vigorously prodding the law and pushing it in directions that it hasn't been pushed, but rather for reflecting on what Congress has said and how the Supreme Court and other Federal Courts have interpreted that. It is a very, very different role, Senator, and I hope that I will always keep that role in mind.

Senator DEWINE. Mr. Bybee, did you feel that when you were a law professor that part of the requirement of being a law professor was to publish? You indicated that, and I have certainly heard that from other professors. Is that part of the job?

Mr. BYBEE. Yes, Senator DeWine. Most academic institutions have a "publish or perish" rule. It is generally a requirement for tenure that one have published in responsible law journals, and one way of attracting attention in the Nation's student-edited law journals is to take unusual positions or write about things that haven't been covered before, and that was a way, both of informing myself as a law professor and challenging my students.

Senator DEWINE. It is totally irrelevant to today's hearing, but I have always found that to be, as a consumer and a parent of eight children who are going to college or about to go to college, I always find that to be rather irritating.

[Laughter.]

Senator DEWINE. As a parent who wants teachers in the classroom who teach, and I like it that the teachers are challenging, but what they publish I find to be rather irrelevant, but that is just an aside from a crotchety parent, that is all.

Mr. BYBEE. As a law professor, Senator, it pains me to hear that, but I acknowledge the truthfulness, nonetheless.

Senator DEWINE. I want you in the classroom challenging my student. I do not care what you do outside of the classroom, frankly.

I found your writings to be rather interesting, and so that is why I asked the question about your writings and the difference between your role as a professor and your other two roles. So I think I have found your answer to be interesting, but you are in the process of stretching minds at that point.

Mr. BYBEE. That is exactly our role, and if I wasn't doing that as a law professor, Senator, I'm not doing my job.

Senator DEWINE. I understand.

Nothing further, Mr. Chairman.

Chairman HATCH. Thank you.

We will turn to Senator Saxby, at this point.

Senator CHAMBLISS. Thank you, Mr. Chairman.

Actually, my questions have already been asked and have already been answered by Mr. Bybee with the very probing questions that the Chairman had. My main concern, Mr. Bybee, is that both our District Court and our Circuit Court judges come before us to say that they are willing to interpret the Constitution as it reads, and I think you have answered that very succinctly, that you are

not going to be putting your personal impressions into the decisions you may make.

You are obviously very well-qualified, from an academic background, as well as your legal background. And it is encouraging to me, as a lawyer, to see individuals of your competence, your quality and your background willing to commit yourself to public service. We look forward to your confirmation.

Thank you, Mr. Chairman.

Chairman HATCH. Thank you, Senator Saxby. We appreciate that. Senator Chambliss, I mean. I am so used to calling him Saxby. But we are happy to have you on this committee. It is going to make a great deal of difference to all of us, I think.

Mr. Bybee, I do not have any further questions. I know you very well, and I know what a decent, honorable person you are, and I support your nomination very strongly, as I hope everybody will on this committee.

As you know from our meetings today, and earlier, you are aware of how thorough this review process on, especially Circuit of Appeals judges really is, but for all judicial nominees, and you put up with a great deal, with intrusive and invasive questions and interviews. You have passed very tough scrutiny by the White House, the Department of Justice, the FBI, the committee, and the American Bar Association as well, and you have satisfactorily and appropriately answered my questions today, and you will, no doubt, receive some written follow-up questions following today's hearing.

As you know, Senator Kennedy has asked to question you after the Secretary of State's remarks up at the U.N. Senator Schumer has also asked for time to ask you some questions. He said he will be here at 11 o'clock. So I will ask you at this point to step aside, so that we can move on to the other three judgeship nominees and hear from the second panel, and then we will have you return as soon as Senator Kennedy or Senator Schumer or any other Senator on the Committee desires to question you.

Mr. BYBEE. Thank you very much, Mr. Chairman.

[The biographical information of Mr. Bybee follows.]

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

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

   Jay Scott Bybee.

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

   Judge, United States Court of Appeals for the Ninth Circuit.

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

   Office:
   Assistant Attorney General, Office of Legal Counsel
   U.S. Department of Justice
   950 Pennsylvania Avenue, NW
   Washington, DC 20530
   (202) 514-2051

   Residence:
   Henderson, NV

4. **Birthplace**: State date and place of birth.

   October 27, 1953, Oakland, California.

5. **Marital Status**: (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es). Please also indicate the number of dependent children.

   Since 1986 I have been married to Dianna Jean Greer. Dianna teaches high school for Arlington County Public Schools at the Arlington Career Center, 816 South Walter Reed Drive, Arlington, VA 22204. We have four children, ages 14, 11, 10, and 8.

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

   I attended the J. Reuben Clark Law School at Brigham Young University from 1977-80. I received a J.D. (*Cum Laude*) in 1980.

   I attended Brigham Young University from 1971-73 and 1975-77. I received a B.A.

(*Magna Cum Laude*, and with Highest Honors) in economics in 1977.

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

2001-present	Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice, 950 Pennsylvania Avenue, NW, Washington, DC 20530
1999-2001	Professor of Law, William S. Boyd School of Law, University of Nevada, Las Vegas, 4505 Maryland Parkway, Las Vegas, NV 89154
1999-2001	Board of Directors, J. Reuben Clark Law Society, Las Vegas Chapter, Las Vegas, NV
1991-98	Professor of Law, Associate Professor of Law, and Assistant Professor of Law, Paul M. Hebert Law Center, Louisiana State University, Baton Rouge, LA 70803
1989-91	Associate Counsel to the President, The White House
1986-89	Attorney, Civil Division/Appellate Staff, U.S. Department of Justice, 950 Pennsylvania Avenue, NW, Washington, DC 20530
1984-86	Attorney-Advisor, Office of Legal Policy, U.S. Department of Justice, 950 Pennsylvania Avenue, NW, Washington, DC 20530
1982-98	Member, Advisory Editorial Board, *Sunstone Magazine*, 343 N. Third West, Salt Lake City, UT 84103
1981-84	Associate, Sidley & Austin (now Sidley, Austin, Brown & Wood), 1501 K Street, NW, Washington, DC 20005
1980-81	Law clerk, the Honorable Donald S. Russell, United States Court of Appeals for the Fourth Circuit, Donald Russell U.S. Courthouse, Spartanburg, SC 29301 and Lewis F. Powell U.S. Courthouse 100 East Main Street, Richmond, VA 23219
1980	Summer associate, Shearman & Sterling, 599 Lexington Avenue, New York, NY 10022

1979 Summer associate, Chapman, Duff & Paul, 1730 Pennsylvania Avenue, NW, Washington, DC 20006

1978 Summer associate, Ogden, Robertson & Marshall, 1200 One Riverfront Plaza Louisville, KY 40202

1977 Research assistant, Dr. Ronald Heiner, BYU Department of Economics, Provo, UT 84602
Laborer, Heritage Homes, 5200 South State Street, Salt Lake City, UT

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

None.

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

Professor of the Year (2000), William S. Boyd Law School, UNLV
Harry S. Redmon Professorship, Louisiana State University
Board of Editors and Member, *Brigham Young University Law Review*
University Scholar Honors, BYU
Edwin S. Hinckley Scholar, BYU
Phi Kappa Phi National Honor Society

10. **Bar Associations**: List all bar associations or legal or judicial-related committees, selection panels 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.

Member of the State Bar of Nevada and Bar Association of the District of Columbia. I served on the Board of Directors of the J. Reuben Clark Law Society (Las Vegas Chapter) from 1999 to 2001. I was a member of the American Bar Association.

11. **Bar and Court Admission**: List each state and court in which you have been admitted to practice, including dates of admission and any lapses in membership. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

State	Date
Nevada	May 31, 2001
District of Columbia	December 21, 1981

I was admitted to practice in Nevada in May 2001 under a new rule admitting full-time law faculty without sitting for the bar (Nevada has no reciprocity). In order to assume my present position at the Department of Justice, I was required to go on "inactive" status in Nevada.

Court	Date Admitted
Nevada Supreme Court	May 31, 2001
District of Columbia Court of Appeals	December 21, 1981
U.S. Supreme Court	March 25, 1985
U.S. Court of Appeals for the Second Circuit	March 23, 1987
U.S. Court of Appeals for the Fourth Circuit	June 4, 1983
U.S. Court of Appeals for the Fifth Circuit	August 1, 1986
U.S. Court of Appeals for the Ninth Circuit	December 9, 1987
U.S. Court of Appeals for the Tenth Circuit	February 5, 1987
U.S. Court of Appeals for the D.C. Circuit	January 28, 1987

12. **Memberships**: List all memberships and offices currently and formerly held in professional, business, fraternal, scholarly, civic, charitable, or other organizations since graduation from college, other than those listed in response to Questions 10 or 11. Please indicate whether any of these organizations formerly discriminated or currently discriminates on the basis of race, sex, or religion - either through formal membership requirements or the practical implementation of membership policies. If so, describe any action you have taken to change these policies and practices.

Educational Organizations
I served as advisor to the J. Reuben Clark Law Society and the Federalist Society at the William S. Boyd School of Law at UNLV (1999-2001)

I also served as advisor to the College Republicans at UNLV (2000-01).

I was advisor to the National Moot Court Team at the Paul M. Hebert Law Center at Louisiana State University (1994-97).

Civic Organizations
I have been affiliated with the Boy Scouts of America for several years in various capacities. I served as Cubmaster of a pack in Baton Rouge, Louisiana (1995-98). I also served as the advisor to an Explorer Post in Baton Rouge (1994-95).

Religious Organizations
My family and I are active members of The Church of Jesus Christ of Latter-day Saints. The church has a lay organization in which the regular members fill all of the local administrative positions. I have held numerous positions in the church over the past ten years. These positions include: stake mission president, member of stake high council,

ward young men's president, counselor in bishopric, Sunday School teacher, high priest's group leader. I currently serve as a Sunday School teacher.

Social Organizations
By virtue of our home ownership, we belong to the Sandy Ridge Community Association in Henderson, NV (1998-present) and previously belonged to the Woodstone Homeowners Association in Baton Rouge, LA (1991-98).

We belonged to a neighborhood pool in Baton Rouge, Magnolia Woods Pool (1994-98). From about 1988 to 1991, we belonged to the Vienna Woods Pool in Vienna, VA.

So far as I know, none of these organizations, either formally or in practice, discriminates on the basis of race, sex, or religion (except our church, which discriminates on the basis of religion).

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

Book and Book Contributions

"Domestic Violence Clause" and "Child Support Recovery Act (1992)" *in* ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION (Leonard W. Levy, Kenneth L. Karst & Adam Winkler, eds. 2d ed. 2000)

"George Sutherland" and "Owen J. Roberts" *in* THE SUPREME COURT JUSTICES: ILLUSTRATED BIOGRAPHIES, 1789-1993 (Clare Cushman, ed. 1993)

RELIGIOUS LIBERTY UNDER THE FREE EXERCISE CLAUSE, U.S. Department of Justice, Office of Legal Policy, 165 pp. (1986)(co-authored with Lowell V. Sturgill)

Articles

Printz, *the Unitary Executive, and the Fire in the Trash Can: Has Justice Scalia Picked the Court's Pocket?*, 77 NOTRE DAME L. REV. 269 (2001)

Common Ground: Robert Jackson, Antonin Scalia and a Power Theory of the First Amendment, 75 TUL. L. REV. 251 (2000)

The Tenth Amendment Among the Shadows: On Reading the Constitution in Plato's Cave 23 HARV. J.L. & PUB. POL'Y 551 (2000)

Agency Expertise, ALJ Independence, and Administrative Courts: The Recent Changes in Louisiana's Administrative Procedure Act, 59 LA. L. REV. 431 (1999)

Insuring Domestic Tranquility: Lopez, *Federalization of Crime and the Forgotten Role of the Domestic Violence Clause*, 66 GEO. WASH. L. REV. 1 (1997)

The Equal Process Clause: A Note on the (Non)Relationship Between Romer v. Evans *and* Hunter v. Erickson, 6 WM. & MARY BILL RTS. J. 201 (1997) (Symposium)

Who Executes the Executioner? Impeachment, Indictment and Other Alternatives to Assassination, 2 NEXUS 53 (1997) (Symposium)

Ulysses at the Mast: Democracy, Federalism and the Sirens' Song of the Seventeenth Amendment, 91 NW. U.L. REV. 500 (1997)

Substantive Due Process and Free Exercise of Religion: Meyer, Pierce *and the Origins of* Wisconsin v. Yoder, 25 CAP. U.L. REV. 887 (1996) (Symposium)

Taking Liberties with the First Amendment: Congress, Section 5 and the Religious Freedom Restoration Act, 48 VAND. L. REV. 1539 (1995)

Advising the President: Separation of Powers and the Federal Advisory Committee Act, 104 YALE L.J. 51 (1994)

Utah's Horseman: George Sutherland, XIII THE SUPREME COURT HISTORICAL QUARTERLY14 (No. 2 1992)

Note, *Reverse Political Checkoff Per Se Illegal as Violation of Federal Election Campaign Act*, 1980 B.Y.U. L. REV. 403

Comment, *Profits in Subrogation: An Insurer's Claim to Be More Than Indemnified*, 1979 B.Y.U. L. REV. 145, *reprinted in* 30 FED'N INS. COUNS. Q. 249 (1980)

Columns

"The Legal Intractability of Pornography," 10 *Sunstone* 32 (June 1985)

"Solemn Promises Under Seal," 10 *Sunstone* 38 (March 1985)

"The Lawyer's Conflict, " 10 *Sunstone* 28 (February 1985)

"The Litigation Explosion: Rights Versus Duties," 9 *Sunstone* 47 (January/February 1984)

"The Supreme Court and the Religion Clauses, 1982-83," 8 *Sunstone* 47 (July/August

1983)

"On the Constitution and the Family: From Status to Contract," 8 *Sunstone* 48 (July/August 1983)

"Oedipus Lex: The Law and Psychiatry," 8 *Sunstone* 48 (May/June 1983)

"Courts, Congress, and 'Pregnant Persons': The Logic of Discrimination," 8 *Sunstone* 78 (January/April 1983)

"Government-Sponsored Nativity Scenes: Getting Christ Out of Christmas," 7 *Sunstone* 63 (November/December 1982)

"Government Aid to Education: Paying the Fiddler," 7 *Sunstone* 61 (July/August 1982)

"The Supreme Court and the Religion Clauses, 1981-82," 7 *Sunstone* 61 (May/June 1982)

"Callister's Decision," 7 *Sunstone* 60 (March/April 1982)

"Judge Callister and the ERA," 7 *Sunstone* 59 (January/February 1982)

Book Reviews

Book Review, GREGORY A. PRINCE, POWER FROM ON HIGH: THE DEVELOPMENT OF MORMON PRIESTHOOD, 19 *Sunstone* 60 (December 1996)

Book Review, JOHN KENNETH GALBRAITH, THE AGE OF UNCERTAINTY, *Century II* 47 (1977)

Other Public Statements

I have attached copies of the following public speeches or presentations that I have given:

"War and Crime," Nevada District Court Conference, Reno, NV, April 26, 2002; Temple Beth Ami, Rockville, MD, April 13, 2002; J. Reuben Clark Law Society, Washington, DC, March 6, 2002

"War and the Constitution: We Are All Hamiltonians Now," The Federalist Society, Washington, DC, February 21, 2002

"The Due Process Clause in Theory and Practice," Nevada State Bar Administrative Law Seminar, Las Vegas & Reno, April 19-20, 2001

"Relations Between the Judiciary and the State Legislature: Some Themes in Separation of Powers," Nevada Limited Jurisdiction Judges Seminar, Mesquite, January 24, 2001

"We the People: The Citizen and the Constitution," Clark County Law-Based Teacher Education, Las Vegas, September 14, 2000

"The First Amendment in Television Journalism: Problem or Potential," World Television Journalism Conference, Las Vegas, June 27, 2000

"Liberty Versus Equality in the First Amendment: Some Recent Developments," Nevada State Bar Convention, San Francisco, June 22, 2000

"Federalism and the Shadows of State Power: On Reading the Constitution in Plato's Cave," Nevada Inn of Court, Las Vegas, June 7, 2000; J. Reuben Clark Law Society, Salt Lake City, January 25, 2000

"Separation of Powers in Nevada," Current Developments in Law and Public Policy, UNLV, June 1, 2000

"The Crumbling Wall Separating Church and State: Do School Vouchers Violate the Establishment Clause and Does Government Funding for Faith-Based Social Services Endanger Religious Freedom," Anti-Defamation League, Las Vegas, February 24, 2000.

"The U.S. Supreme Court and the Constitution: The Year in Review," Keynote Address, Constitutional Law Symposium, Brigham Young University Law School, October 17, 1997

Over the years, I have also given other speeches and participated in panel discussions. I do not have copies of my remarks. (For example, in March 2002, I participated on a panel at an ABA Judges Conference, held in cooperation with Federal Judicial Center and State Justice Institute, on "The Role of the Courts in a Changing Society.") From time to time I have been called by the media for background or interviews. For example, I was interviewed on a local cable news program, "Point of View Vegas" (LV-1), in November and December 2000 on the Florida presidential election. In April 2000, I was on the same news program to discuss advertising and "shadow jury" polling during the course of the Binion murder trial. In April 1994, I was interviewed on a nationally syndicated radio program, "The Gill Gross Show," on the Supreme Court's denial of certiorari in a case involving FCC regulation of profanity on the airwaves.

14. **Congressional Testimony**: List any occasion when you have testified before a committee or subcommittee of the Congress, including the name of the committee or subcommittee, the date of the testimony and a brief description of the substance of the testimony. In addition, please supply four (4) copies of any written statement submitted as testimony and the transcript of the testimony, if in your possession.

Testimony, Hearing before the House Government Operations Committee, February 14, 2002. I testified on the President's invocation of executive privilege with respect to

internal documents prepared by federal prosecutors.

Testimony on NextWave Settlement, Hearing before the House Judiciary Committee, December 6, 2001. I testified in favor of proposed legislation necessary to implement a settlement of litigation so that the FCC could release spectrum to telecommunications companies.

Testimony on Protecting Religious Liberty, Hearing on H.R. 1691, the Religious Liberty Protection Act, Before the Senate Judiciary Committee, September 9, 1999. I testified in favor of Congress's reliance on Section 5 of the Fourteenth Amendment to justify adoption of the proposed Religious Liberty Protection Act.

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

My health is excellent. I had a general physical in Fall 1998; I had a check-up in connection with my attendance at Boy Scout camp in June 2001. I have a general physical scheduled for May 28, 2002.

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

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

Not applicable.

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

Not applicable.

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

Not applicable.

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

17. **Public Office, Political Activities and Affiliations**:

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

Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice (2001-present). I was nominated by President George W. Bush and confirmed by the U.S. Senate.

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

In 2000, I served as Chairman of Nevada Lawyers for Bush-Cheney. My principal responsibility was to contact attorneys in Nevada and encourage them to vote for George W. Bush. I did not solicit any contributions and was not authorized to expend any campaign funds.

In 1972, I was Vice-President of College Republicans at BYU. I served on the Utah Valley Steering Committee for the Committee to Re-Elect the President and worked on the advance for Vice President Agnew's visit to BYU in October 1972.

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

(a) Describe chronologically your law practice and legal experience after graduation from law school including:

(1) whether you served as clerk to a judge, and if so, the name for the judge, the court and dates of the period you were a clerk;

From 1980-81, I served as law clerk to the Honorable Donald S. Russell of the United States Court of Appeals for the Fourth Circuit.

(2) whether you practiced alone, and if so, the addresses and dates;

No. 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 affiliated, and the nature of your affiliation with each.

From 1981 to 1984, I practiced law as an associate in the Washington, DC office of

Sidley & Austin (which is now Sidley, Austin, Brown & Wood), 1501 K Street, NW, Washington, DC 20005.

From 1984 to 1989, I was with the U.S. Department of Justice, 950 Pennsylvania Avenue, NW, Washington, DC. 20530. From 1984-86, I was an attorney-advisor in the Office of Legal Policy. From 1986 to 1989, I was an attorney on the Appellate Staff at the Civil Division.

From 1989 to 1991, I was Associate Counsel to the President, The White House, Washington, DC.

Between 1991 and 1998, I was on the faculty of the Paul M. Hebert Law Center at Louisiana State University, Campus Drive, Baton Rouge, LA 70803. I was Assistant Professor of Law from 1991 to 1994, Associate Professor of Law from 1994 to 1998, and Professor of Law in 1998.

From 1999 to 2001, I was Professor of Law at the William S. Boyd School of Law, University of Nevada, Las Vegas, 4505 Maryland Parkway, Box 451003, Las Vegas, NV 89154-1003.

Since November 2001, I have served as Assistant Attorney General for the Office of Legal Counsel, U.S. Department of Justice, 950 Pennsylvania Avenue, NW, Washington, DC 20530.

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

The Washington office of Sidley & Austin, where I practiced from 1981-84, handled largely regulatory and antitrust matters and represented corporations such as Norfolk-Southern Corporation, CSX Corporation, and AT&T. I worked on a broad range of matters, including issues connected with the breakup of the Bell System, deregulation of railroad rates on export coal, antitrust litigation, and export licensing. Most of my work involved civil litigation in federal courts or before the Interstate Commerce Commission.

As an attorney-advisor in the Office of Legal Policy at the Department of Justice (1984-86), I represented the office on various interagency and intra-departmental committees. I also worked for a time on judicial selection. Another attorney and I co-authored a study, subsequently published by OLP, on religious liberty under the Free Exercise Clause; I also worked on other matters involving religious liberty. Towards the end of my time at OLP, I wrote a brief and argued a case before the U.S. Court of Appeals for the Federal Circuit.

The Appellate Staff in the Civil Division of the Department of Justice represents the United States in civil matters before the U.S. Courts of Appeals and, occasionally, in

matters before state appellate courts. The staff also makes recommendations to the Solicitor General on cases that might be appealed to the U.S. Supreme Court and prepares first drafts of briefs. During my three years on the staff (1986-89), I was the principal author of the government's briefs in more than 25 cases. I also worked with other attorneys in the office and with attorneys in the office of the Solicitor General on seven matters that were filed in the U.S. Supreme Court. I argued cases before the Second, Third, Fifth, Ninth, Tenth, Eleventh and Federal Circuits.

As Associate White House Counsel (1989-91), I reviewed enrolled bills, executive orders, and proclamations to be signed by the President for form and constitutionality. I reviewed financial disclosure and FBI background checks for presidential appointees. I also worked on most litigation matters involving the White House (except for Iran-Contra) and served as the White House liaison to the Solicitor General's working group on civil justice reform.

At the law schools at both Louisiana State University (1991-98) and the University of Nevada, Las Vegas (1999-2001), I taught Civil Procedure I & II, Constitutional Law I & II, Administrative Law and seminars on religious liberty and separation of powers. I consulted occasionally with attorneys in Washington, DC; Louisiana; and Nevada–largely on appeals and petitions for writs of certiorari. In this capacity, I have represented individuals, a private school, and the Clarendon Foundation (a public interest foundation; all matters on which I worked for Clarendon were *pro bono*).

In my current position, I supervise a staff of about twenty-one attorneys. The Office of Legal Counsel (OLC) has principal responsibility for providing legal advice to the Attorney General on constitutional, statutory, and regulatory questions. OLC reviews orders to be issued by the President or the Attorney General for form and legality. We also advise the White House and executive branch agencies on constitutional and statutory matters, and OLC is frequently the final arbiter of legal disputes within the executive branch.

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

At Sidley & Austin, my primary clients were railroads, including Norfolk-Southern and CSX Corporation and their subsidiaries; AT&T; and various smaller corporations. I specialized in general litigation, antitrust counseling, and administrative practice under the Administrative Procedure Act.

As an attorney with the Department of Justice between 1984 and 1989, I represented the President, the Attorney General, and various executive agencies. I handled civil appellate litigation, which typically involved questions of constitutional and statutory construction. I worked on several matters involving the religion clauses of the First Amendment.

During the time I taught at LSU and UNLV, I served as co-counsel or as a consultant to

several attorneys. My assistance was sought on questions of constitutional and administrative law.

(c) (1) Describe whether you appeared in court frequently, occasionally, or not at all. If the frequency of your appearances in court varied, describe each such variance, providing dates.

During the time that I was with Sidley & Austin, I appeared in court once, on a *pro bono* matter. While I was with the Department of Justice (1984-89) I was frequently before U.S. Courts of Appeals. I have argued cases before the Second, Third, Fifth (three cases), Ninth (two cases), Tenth, Eleventh (two cases), and Federal Circuits (two cases). I was not before any court during the two years I served at the White House. During the period when I was teaching, I was involved in several cases as an attorney for a party, as an attorney for an amicus, or as a consultant.

(2) Indicate the percentage of these appearances in

(A) federal courts;

92%.

(B) state courts of record;

8%.

(C) other courts.

I argued twelve cases before federal courts of appeals and one case before the D.C. Court of Appeals. I have appeared as counsel (but have not argued) in several cases before the U.S. Supreme Court. I have served as a consultant or expert witness in cases before Nevada state courts.

(3) Indicate the percentage of these appearances in:

(A) civil proceedings;

100%.

(B) criminal proceedings.

0%.

All of the cases in which I argued before the court were in civil matters. Several of these cases, however, while technically on the civil docket, arose out of criminal investigations. I also consulted with a Nevada attorney on a *pro bono* basis in a criminal case; that case was resolved without going to trial.

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

All of the cases in which I argued were handled on appeal. Of the thirteen cases I have argued before federal courts of appeals or the D.C. Court of Appeals, we settled one case before the court issued an opinion and judgment. In all of the cases that I argued, I served as chief counsel.

(4) Indicate the percentage of these trials that were decided by a jury.

Not applicable.

(d) Describe your practice, if any, before the United States Supreme Court. Please supply four (4) copies of any briefs, amicus or otherwise, and, if applicable, any oral argument transcripts before the U.S. Supreme Court in connection with your practice.

I have been formally involved in the preparation of thirteen matters before the U.S. Supreme Court. I have worked on seven petitions for certiorari or jurisdictional statements and three briefs on the merits. I have filed two briefs as *amicus* and four oppositions to petitions for certiorari. I have provided copies of my briefs in the following cases:

United States v. Morrison, 529 U.S. 598 (2000) (Challenge to constitutionality of Violence Against Women Act) (Brief for Clarendon Foundation as Amicus Curiae; *pro bono*).

City of Boerne v. Flores, 521 U.S. 507 (1997) (Challenge to constitutionality of the Religious Freedom Restoration Act) (Brief for Clarendon Foundation as Amicus Curiae; *pro bono*).

Richard v. Hinson, No. 95-1469. (Equal Protection challenge to Equal Access to Justice Act restrictions on net worth) (Petition for Certiorari and Reply).

Branton v. Federal Communications Commission, No. 93-1047 (Challenge to FCC ruling on profanity in public broadcasts) (Petition for Certiorari and Reply).

Sakaria v. Trans World Airlines, No. 93-1498 (Suit for tort damages following terrorist attack) (Petition for Certiorari and Reply).

Sakaria v. Allstate Life Insurance Co., No. 92-489 (Challenge to Rule 11 sanctions) (Petition for Certiorari and Reply).

Bowen v. Kendrick, 487 U.S. 539 (1988) (Establishment Clause challenge to Adolescent Family Life Act) (Jurisdictional Statement, Brief on Merits, and Reply Brief).

United States v. Hohri, No. 88-215 (Suit for reparations by Japanese-American internees) (Opposition to Petition for Certiorari).

Christoffersen v. Collins, No. 88-1513 (Challenge to discharge from Air National Guard) (Opposition to Petition for Certiorari).

Nash v. Sullivan, No. 88-1906. (Challenge based on claim to ALJ decisional independence) (Opposition to Petition for Certiorari).

United States v. Hohri, 482 U.S. 64 (1987) (Suit for reparations by Japanese-American internees) (Petition for Certiorari, Reply Memorandum, Brief on the Merits, and Reply Brief).

Kurtz v. Baker, No. 87-1581 (Free speech challenge to congressional chaplains) (Opposition to Petition for Certiorari).

Russoniello v. Olagues, No. 86-1217 (Equal protection challenge to U.S. Attorney election fraud investigation) (Petition for Certiorari, Brief on the Merits, and Reply Brief).

(e) Describe legal services that you have provided to disadvantaged persons or on a *pro bono* basis, and list specific examples of such service and the amount of time devoted to each.

During the time that I was at Sidley & Austin, I worked on a couple of matters, two were small; one, more substantial. In my first year of practice I was approached by a friend who was a student at Georgetown University and had been sued in small claims court by a former roommate. She was quite nervous because her former roommate was a law student and was making all kinds of demands. I worked through the list of demands with my friend and accompanied her to small claims court. In the District, small claims court claimants were required to meet with a mediator. We spent an hour or two with the mediator and worked out a settlement of all the claims. Although this was a small case, I have never had a more appreciative client, and I learned a valuable lesson (which I have tried to convey to my students) about the value of alternative dispute resolution. I probably spent four to five hours on the matter.

I also worked briefly with another friend, a Jamaican restaurant worker who had been arrested for carrying a knife and possession of marijuana. My friend maintained that the marijuana was planted on him; he admitted that he was carrying a knife, which he used in his restaurant job to open boxes. I took him to my apartment and got him cleaned up and fed. Later, we helped him move apartments. I talked briefly with his case worker in the

public defender's office and offered my legal assistance. I lost track of my friend after that and do not know what became of his case. I spent a couple of hours on this matter.

While I was an associate at Sidley & Austin, another associate and I accepted an appeal in a case that had been handled at trial by Neighborhood Legal Services. In this landlord-tenant case, I represented Muriel Cardenas, the last tenant of a building on Sixteenth Street in the District of Columbia. According to Ms. Cardenas, the owner of the building, the Jonathan Woodner Co., wished to convert the building to condominiums and rather than offering Ms. Cardenas and others the accommodations required by the D.C. condominium conversion law, it tried to force the tenants out. Ms. Cardenas resisted, but Woodner eventually closed and fenced the building. The trial court had held that Ms. Cardenas had relinquished her lease. We argued on appeal that she had been forced out and emphasized that relinquishment is a voluntary act, and Ms. Cardenas had not left her apartment voluntarily. We were concerned that if the judgment stood, Ms. Cardenas's rights in a related tort suit against the Woodner Co. might be affected. The D.C. Court of Appeals affirmed the trial court, but in a concurring opinion one of the judges stated that the judgment should not affect Ms. Cardenas's rights in other litigation. Ms. Cardenas and other tenants subsequently won a multi-million dollar judgment against Woodner Co. I spent over 200 hours on her appeal. My appeal of Ms. Cardenas's case was not reported in a published opinion, but her plight and subsequent tort suit were described in newspaper articles. *See* "Tenant Clings to Apartment in Empty Building," Wash. Post, April 18, 1981, p. B1; "Damages Awarded In Condo Lawsuit; Jury Gives Park Tower Tenants $15.9 Million," Wash. Post, May 13, 1989, p. E1.

As an attorney at the Department of Justice or at the White House, I did not engage in litigation-related *pro bono* activities. I did, however, judge several intra-mural moot court competitions at Georgetown University Law Center, spending several hours reading briefs and judging oral arguments. During the time I taught at Louisiana State University, I was not a member of the of the Louisiana bar, so I did not engage in any *pro bono* local litigation-related activities. In 1996, I filed an amicus brief in the U.S. Supreme Court in *City of Boerne v. Flores*, 521 U.S. 507 (1997), on behalf of the non-profit Clarendon Foundation. I probably spent thirty to forty hours on the project. I participated as a speaker or panelist at CLE programs and conferences for administrative judges, serving without compensation. I spent from two to twenty hours in preparation for each presentation.

Shortly after I joined the faculty at UNLV in January 1999, I was approached by a young attorney in Las Vegas about advising him in a criminal matter. The client had been arrested under one of the old vagrancy statutes still on the books in Nevada (specifically, the crime of "annoying or molesting a minor"). The client was accused of talking with a sixteen year old in a boorish fashion in a book store and sandwich shop, but he did not touch or threaten her, nor did he make any attempts to call her or talk with her again. My analysis was that he had not "molested" her in any way in which we usually use that term; the city, evidently, was charging him with "annoying" a minor. In my view, the statute gave no notice of what kind of conduct was prohibited, and the statute was

unconstitutionally vague and overbroad. I worked with the principal counsel to develop our strategy. I called the director of the local office of the American Civil Liberties Union and invited the ACLU to attend a meeting with the prosecuting attorneys. The ACLU sent a representative to our meeting. We met with the prosecuting attorneys and urged them to drop the case. I took the lead in those discussions. Initially, the prosecuting attorneys refused to drop the charges, so we went to court and set a briefing schedule for the issue. I drafted a brief challenging the constitutionality of the statute. The city ultimately offered to dismiss the charges before we filed our brief. (For reasons of client confidentiality, I would prefer not to name the client. I would be happy to disclose the names of the principal counsel and counsel for the ACLU.) I spent at least forty hours on the case. In December 1999, I also filed an amicus brief in *United States v. Morrison*, 529 U.S. 598 (2000), on behalf of the non-profit Clarendon Foundation. I spent thirty to forty hours on the brief.

I have offered my services as a teacher to community and civic groups and have spoken on many occasions to Girl Scouts, Boy Scouts, Cub Scouts, churches and synagogues, elementary school classes, high school students, and history and government teachers. I have also spoken to law students, lawyers groups, the Nevada Inns of Court, and civic groups such as the Rotary. In both Louisiana and Nevada, I taught *pro bono* in Continuing Legal Education (CLE) programs on matters involving administrative and constitutional law.

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

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

(b) a detailed summary of the substance of each case outlining briefly the factual and legal issues involved;

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

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

For each of the following cases, I was the principal author of at least one of the briefs filed in the case. Where possible, I have listed the most recent address available in the Martindale-Hubbell directory; otherwise, I have listed the last address I have for principal counsel of other parties in the case.

1. *Hohri v. United States*, 847 F.2d 779 (Fed. Cir.), *cert. denied*, 488 U.S. 925 (1988). This was a class-action suit for reparations by 120,000 Japanese-Americans interned during World War II. The suit was originally filed in the U.S. District Court in the District of Columbia. The district court dismissed the suit on the grounds that the statute of limitations had run. The D.C. Circuit reversed on the grounds that the statute of limitations had been tolled because the Solicitor General had misled the U.S. Supreme Court in the cases of *United States v. Hirabayashi* (1943) and *United States v. Korematsu* (1944). I became involved in the government's suggestion for rehearing en banc and then worked on the brief in the Supreme Court. The Court reversed on the grounds that the appellants should have appealed to the Federal Circuit, not the D.C. Circuit. I wrote the brief for the United States on remand to the Federal Circuit, and on March 8, 1988, I argued the case before the Federal Circuit. In a split decision, the Federal Circuit dismissed the suit on the grounds that the statute of limitations had run. In August 1988, Congress voted reparations to the Japanese Americans in Pub. L. No. 100-383. The panel in the Federal Circuit consisted of Judges Rich, Nies, and Baldwin. Principal counsel for the plaintiffs was Benjamin Zelenko, Baach, Robinson & Lewis, One Thomas Circle, Washington, DC 20005. (202) 833-8900.

2. *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549 (9th Cir. 1990). This was a class-action by Salvadorans intercepted by U.S. immigration officials. The plaintiffs sought various relief against INS; probably the most prominent relief sought was a requirement that INS give Salvadorans notice of their right to apply for political asylum, thereby requiring that INS treat Salvadorans differently from other aliens. The district court found against the United States on nearly all claims. I co-authored the brief for the United States (the named defendants included Attorney General Dick Thornburgh and the Immigration and Naturalization Service) and argued the appeal before the U.S. Court of Appeals for the Ninth Circuit on September 12, 1989. The panel consisted of Judges Schroeder, Beezer and Vukasin, and it affirmed the decision of the district court. Lead counsel for the plaintiffs was Mark Rosenbaum, ACLU Foundation of Southern California, 1616 Beverly Blvd, Los Angeles, California 90005. (213) 977-9500.

3. *High Tech Gays v. Defense Industrial Security Clearance Organization*, 895 F.2d 563 (9th Cir.), *rehearing denied*, 909 F.2d 375 (9th Cir. 1990). This was a challenge to the Defense Department's security clearance procedures for DoD contractors. Under DoD procedures, the Defense Investigative Service conducts background checks before DoD will issue a security clearance to the employees of DoD contractors working on classified projects. If the Service finds adverse information, it will conduct an expanded background investigation and a personal interview. The expanded investigation could delay the issuing of the security clearance for weeks or months. The plaintiffs argued that DoD considered evidence of homosexual behavior to be adverse information and challenged DoD's procedures under the Equal Protection Clause of the Fifth Amendment. The district court held in favor of the plaintiffs. I briefed the case for the Defense Industrial Security Clearance Organization and its director, the Defense Investigative Service and its director, and the Secretary of Defense, and argued it December 16, 1988, before a panel consisting of Judges Brunetti, Leavy and Curtis. The Ninth Circuit

reversed the judgment of the district court and held in favor of the DoD defendants. Lead counsel for the plaintiffs was Richard Gayer, 5 Lindsay Circle, San Francisco, California 94114. (415) 821-1716.

4. *National Grain and Feed Association v. Occupational Safety and Health Administration*, 858 F.2d 1019 (5th Cir. 1988), *on rehearing*, 866 F.2d 717 (5th Cir. 1989) (*per curiam*), *on petition for enforcement*, 903 F.2d 308 (5th Cir. 1990). This was a challenge to a final rule issued by OSHA dealing with grain handling. The rule provides minimum requirements for the control of fires, explosions, and related hazards in grain handling facilities I represented OSHA and the Secretary of Labor, briefed the case, and argued it on June 8, 1988, before a panel of Judges Garza, Williams and Smith. The Fifth Circuit upheld most of the rule. We filed a petition for rehearing and a suggestion for rehearing en banc, and the court issued an amended opinion that responded to our petition. Lead counsel for the numerous parties involved in the appeal were Marc Fleischaker, Arent, Fox, Kintner, Plotkin & Kahn, 1050 Connecticut Avenue, NW, Washington, DC 20036. (202) 857-6000; Randy Rabinowitz, 5818 Sherrier Place NW, Washington, DC 20016. (202) 362-3817; and David Vladeck, Public Citizen Litigation Group, Suite 700, 2000 P Street, NW, Washington, DC 20036. (202) 588-1000.

5. *DeCuellar v. Brady*, 881 F.2d 1561 (11th Cir. 1989), *cert. denied*, 498 U.S. 895 (1990). In this suit, Mrs. DeCuellar sought a writ of mandamus against the Secretary of Treasury to issue her a license to redeem bonds issued by the Republic of Cuba in 1937. These bearer bonds had been frozen by presidential order under the Trading With the Enemy Act and the Cuban Assets Control Regulations. The district court held that Mrs. DeCuellar was entitled to a license under the regulations. The Eleventh Circuit, in a panel of Judges Fay, Hatchett, and Hoffman, reversed. I represented the Secretary of the Treasury, briefed the case, and argued it on May 23, 1989. Principal counsel for the other parties were Alexander Arandia, Arandia & Perez, 1313 Coral Way, Miami, Florida 33145, and Christian Keedy, Aran, Correa & Guarch, 710 South Dixie Highway, Miami, Florida 33146. (305) 665-3400.

6. *Medical Center Hospital v. Bowen*, 839 F.2d 1504 (11th Cir. 1988). The Medical Center Hospital of Punta Gorda, Florida sought reimbursement under the Medicare program for certain expenses. HHS allowed reimbursement under its regulations, but denied payment of the hospital's costs in excess of the amount provided by regulation. The district court held in favor of the hospital, and the Eleventh Circuit affirmed. The panel consisted of Judges Tjoflat, Anderson and Moore. Representing the Secretary of HHS, I briefed the case and argued it on August 3, 1987. Opposing counsel was Carel Hedlund, Ober, Kaler, Grimes & Shriver, 120 East Baltimore Street, Baltimore, Maryland 21202. (410) 685-1120.

7. *Piechowicz v. United States*, 885 F.2d 1207 (4th Cir. 1989). Mr. and Mrs. Piechowicz were employed at a hotel in Baltimore when they witnessed drug activity. Shortly before they were called to testify during a suppression hearing, the Piechowiczes were threatened. They reported the threat to a DEA agent and an Assistant U.S. Attorney. A

week before they were scheduled to appear as government witnesses in a criminal trial, Mr. Piechowicz and his sister (who evidently was mistaken for Mrs. Piechowicz) were murdered at the hotel. Mrs. Piechowicz brought suit against the United States, the DEA agent and the Assistant U.S. Attorney under *Bivens* and the Federal Torts Claims Act for failure to protect the Piechowiczes and to place them in the Federal Witness Protection Program. The district court dismissed the *Bivens* claims against the individual defendants on the basis of qualified immunity; it dismissed the suit against the United States under the FTCA on the basis of the "discretionary function" exception in the FTCA. I briefed the case for the United States and its employees but did not argue the case because of a conflict in my schedule. The court of appeals (Judges Ervin, Murnaghan, and Young) affirmed the judgment of the district court. Opposing counsel was Stephen N. Goldberg, Cohn, Goldberg & Deutsch, 600 Baltimore Avenue, Towson, MD 21286. (410) 296-2550.

8. *Williams v. Secretary of the Navy*, 787 F.2d 552 (Fed. Cir. 1986). Williams was a member of the U.S. Navy who was court-martialed for drug use. He brought this suit as a collateral attack on his general discharge. His appeal raised issues as to whether he had exhausted his administrative remedies, whether a unit sweep urinalysis violated the Fourth Amendment, and whether introduction of a urinalysis test violated the Fifth Amendment. Representing the Secretary of the Navy, I briefed the case and argued it December 1, 1985, before Judges Markey, Baldwin and Nies of the Federal Circuit. The court upheld the court martial. Opposing counsel was Edward F. Halloran, 5233 Princess Anne Road, Virginia Beach, Virginia 23452. (757) 456-5757

9. *Trichilo v. Secretary of Health and Human Services*, 832 F.2d 743; 823 F.2d 702 (2d Cir. 1987); and *Allen v. Bowen*, 821 F.2d 963 (3d Cir. 1987). These were cases in the Second and Third Circuits raising identical issues. The issue was whether under the Equal Access to Justice Act, which provides that attorneys fees may be awarded against the United States when the government's position was not substantially justified, inflationary adjustments to the $75 cap were to be calculated by reference to the original date of enactment (1981) or the effective date of the present act (1985). In *Trichilo*, we also disputed whether the Act required the United States to pay for counsel's time litigating the attorney's fees question as well. I represented the Secretary of HHS, and briefed and argued these cases, which were argued on consecutive days, May 15-16, 1987, before panels of the Second (Judges Van Graafeiland, Pratt and Altimari) and Third (Judges Gibbons, Mansmann and McCune) Circuits. Both courts ruled against our position. Counsel were James Baker, Baker & Clark, 1104 State Tower Building, Syracuse, New York 13202; and Eric Fisher, Community Legal Services, Law Center North Central 3638 N. Broad Street, Philadelphia, Pennsylvania 19140. (215) 923-4357.

10. *Fleetwood Enterprises, Inc. v. United States Department of Housing and Urban Development*, 818 F.2d 1188 (5th Cir. 1987) and No. 87-1987 (5th Cir.). HUD brought an action under the National Manufactured Housing Construction and Safety Standards Act against Fleetwood for inadequate construction. Fleetwood sought an injunction against the HUD proceeding in a federal district court in Texas on the grounds that HUD

had announced that it would conduct a formal, adversarial hearing; Fleetwood argued that HUD could only conduct an informal, nonadversarial hearing. I represented HUD and briefed and argued this case on March 15, 1987, before a panel (Judges Rubin, Randall and Johnson) of the Fifth Circuit. We prevailed in that case. On remand, the district court again enjoined HUD, so we returned to the Fifth Circuit to enforce the mandate. I argued the case a second time before the same panel on September 7, 1988. HUD and Fleetwood settled the case, and we withdrew our appeal. Opposing counsel was Lawrence Henneberger, Arent, Fox, Kintner, Plotkin & Kahn, 1050 Connecticut Avenue NW, Washington, DC 20036. (202) 857-6000.

I would like to add to this list attorneys and academics with whom I have worked since I entered teaching in 1991. These are familiar with my scholarly work and/or my work as a consultant.

William R. Corbett, Paul M. Hebert Law Center, Louisiana State University, Baton Rouge, LA 70803-1000. (225) 578-8701. (Professor Corbett is a former colleague who is familiar with my teaching and scholarship.)

Frederick M. Gedicks, J. Reuben Clark Law School, Brigham Young University, Provo, UT 84602 (801) 378-4533. (Professor Gedicks is familiar with my scholarship.)

Stuart P. Green, Paul M. Hebert Law Center, Louisiana State University, Baton Rouge, LA 70803-1000. (225) 388-8701. (Professor Green is a former colleague who is familiar with my teaching and scholarship.)

John T. Kelleher, Kelleher & Kelleher, 700 South Third Street, Las Vegas, NV 89101. (702) 384-7494. (I worked, *pro bono*, with Mr. Kelleher on a criminal case brought under a Nevada statute we believed was unconstitutional.)

Ronald D. Maines, Maines & Loeb, 1827 Jefferson Place, NW, Washington, DC 20036. (202) 223-2817. (I consulted with Mr. Maines on several matters in the courts of appeals and the U.S. Supreme Court.)

John O. McGinnis, Benjamin N. Cardozo School of Law, Yeshiva University, 55 Fifth Avenue, New York, NY 10003. (212) 790-0318. (Professor McGinnis is familiar with my scholarship. He is also a former Deputy Attorney General for the Office of Legal Counsel.)

Steven D. Smith, Robert & Marion Short Professor of Law, Notre Dame Law School, P.O Box R, Notre Dame, Indiana 46556-0780. (219) 631-3090. (Professor Smith is familiar with my scholarship.)

Carl Tobias, William S. Boyd School of Law, University of Nevada, Las Vegas, 4505 Maryland Parkway, Box 451003, Las Vegas, NV 89154-1003. (702) 895-2405. (Professor Tobias is a former colleague who is familiar with my teaching and

scholarship.)

20. **Criminal History**: State whether you have ever been convicted of a crime, within ten years of your nomination, other than a minor traffic violation, that is reflected in a record available to the public, and if so, provide the relevant dates of arrest, charge and disposition and describe the particulars of the offense.

No.

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

None.

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

I will, of course, recuse myself from any matter in which I or my wife or my children would have a financial interest. In the event that any matter came before me that would present a potential conflict of interest, I would consult with appropriate ethics officials at the Administrative Office of the U.S. Courts. I intend to adhere to the guidelines of the Code of Judicial Conduct.

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

I have a contract for a book (for which I am a co-author) with Greenwood Press of Westport, Connecticut. I will be surprised if there are any royalties from this project. This is an academic book and part of a larger series on the U.S. Constitution. The book is likely to find its way only into academic libraries.

It is conceivable, though I have not entered into any agreements or arrangements, that I would teach a law school class from time to time.

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

Please find attached a copy of Form AO-10(w), "Financial Disclosure Report."

25. **Statement of Net Worth**: Complete and attach the financial net worth statement in detail. Add schedules as called for.

I have attached the net worth statement and appropriate schedules.

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

No.

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

Not applicable.

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

In November 2001, Judge Procter Hug of the Ninth Circuit announced that he would take senior status in January 2002. In January or February, the White House contacted me and asked whether I would be interested. Sometime in April, the White House informed me that if I successfully completed the background investigation that I would be nominated.

(c) Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as asking or seeking a commitment as to how you would rule on such case, issue, or question? If so, please explain fully.

No.

FINANCIAL STATEMENT

NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS		LIABILITIES	
Cash on hand and in banks	46,000	Notes payable to banks-secured	6,500
U.S. Government securities-add schedule		Notes payable to banks-unsecured	
Listed securities-add schedule	13,500	Notes payable to relatives	
Unlisted securities–add schedule		Notes payable to others	
Accounts and notes receivable:		Accounts and bills due	
Due from relatives and friends		Unpaid income tax	
Due from others		Other unpaid income and interest	
Doubtful		Real estate mortgages payable-add schedule	170,500
Real estate owned-add schedule	276,000	Chattel mortgages and other liens payable	
Real estate mortgages receivable		Other debts-itemize:	
Autos and other personal property	32,000		
Cash value-life insurance	13,000		
Other assets itemize:			
Retirement/IRA's (see schedule)	253,000		
Buena Lanes	500		
		Total liabilities	177,000
		Net Worth	457,000
Total Assets	654,000	Total liabilities and net worth	654,000
CONTINGENT LIABILITIES		GENERAL INFORMATION	
As endorser, comaker or guarantor		Are any assets pledged? (Add schedule)	
On leases or contracts		Are you defendant in any suits or legal actions?	
Legal Claims	None	Have you ever taken bankruptcy?	None
Provision for Federal Income Tax			
Other special debt			

JAY SCOTT BYBEE
Financial Statement
Net Worth Schedules (rounded to nearest $500)

ASSETS	
Cash in Bank Accounts	
Bank of America	$ 7,000
UBS/PaineWebber Money Market	11,000
Campus Federal Credit Union (children's accounts)	20,000
Campus Federal Credit Union (our accounts)	2,000
Department of Justice Federal Credit Union	6,000
Listed Securities	
Common Stocks	
Walt Disney Co. Common Stock	2,500
General Electric Co. Common Stock	4,000
Intel Corp. Common Stock	6,000
Southern California Edison Common Stock	1,000
Insurance	
Acacia Life Insurance/Whole Life Policy (cash surrender value)	12,000
American General Insurance	1,000
Retirement/IRA	
Washington Mutual Investors (IRA)	11,000
Fidelity Destiny (IRA)	6,000
TIAA-CREF (retirement fund)	60,500
VALIC (retirement fund)	93,000
Canseco Annuity	17,000
Thrift Savings Program (TSP)	65,500
Partnership	
Buena Lanes (Spouse; passive income only)	500
Real Estate Owned	
Residence, Henderson, NV	275,000
Tahoe Seasons, South Lake Tahoe, CA (time share)	500
LIABILITIES	
Real Estate Mortgages	
Bank of America (Henderson, NV residence)	170,500
Note payable to Bank (secured)	
Campus Federal Credit Union (car loan)	6,500

AO-10 (w)
Rev. 1/2000

FINANCIAL DISCLOSURE REPORT
Nomination Report

Report required by the Ethics in Government Act of 1978, as amended (5 U.S.C. App. 4, Sec. 101-112)

1. Person Reporting (Last name, first, middle initial)	2. Court or Organization	3. Date of Report
Bybee, Jay S.	U.S. Court of Appeals, Ninth C	05/22/2002

4. Title (Article III judges indicate active or senior status; magistrate judges indicate full- or part-time)	5. Report Type (check type)	6. Reporting Period
U.S. Court of Appeals Judge	X Nomination, Date 05/22/2002 Initial Annual Final	01/01/2001 to 05/01/2002

7. Chambers or Office Address	8. On the basis of the information contained in this Report and any modifications pertaining thereto, it is in my opinion, in compliance with applicable laws and regulations.
Office of Legal Counsel, 3266 U.S. Department of Justice Washington, DC 20530	Reviewing Officer _____ Date _____

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

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

☐ NONE (No reportable positions.)

	POSITION	NAME OF ORGANIZATION / ENTITY
1	Professor of Law	William S. Boyd Law School, University of Nevada, Las Vegas
2	Consultant	Terry Care, Esq. of Hunterton & Associates
3		

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

☐ NONE (No reportable agreements.)

	DATE	PARTIES AND TERMS
1	2001	Leave of absence from University of Nevada, Las Vegas
2	1999	Contract with Greenwood Press as co-author for book on constitution
3	1991	TIAA-CREF, academic retirement program

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

☐ NONE (No reportable non-investment income.)

DATE	SOURCE AND TYPE	GROSS INCOME (yours, not spouse's)
2001	University of Nevada, Las Vegas	$114,000
2001	Olson/Ballard	
2000	University of Nevada, Las Vegas	108,000
2000	Hunterton & Associates	7,100

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Bybee, Jay S.	05/22/2002

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

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

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

V. GIFTS

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

	SOURCE (NONE: No such reportable gifts.)	DESCRIPTION	VALUE
1		Exempt	
2			
3			

VI. LIABILITIES

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

	CREDITOR (NONE: No reportable liabilities.)	DESCRIPTION	VALUE CODE
1	Bank of America	Mortgage on home/rental in Henderson, NV	M
2			

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

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting Bybee, Jay S.	Date of Report 05/22/2002

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

A. Description of Assets (including trust assets) *Place "(X)" after each asset exempt from prior disclosure.*	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period				
	(1) Amount Code (A-H)	(2) Type (e.g., dividend, rent or interest)	(1) Value Code (J-P)	(2) Value Method Code (Q-W)	(1) Type (e.g., buy, sell, partial sale, merger, redemption)	If not exempt from disclosure (2) Date: Month-Day	(3) Value Code (J-P)	(4) Gain Code (A-H)	(5) Identity of buyer/seller (if private transaction)
NONE (No reportable income,assets, or transactions.)									
1 Rental property, Henderson, NV (1998 $252,000)	D	Rent	N	R	Exempt				
2 UBS/PaineWebber	A	Interest	J	T					
3 Bank of America	A	Interest	J	T					
4 Campus Federal Credit Union	A	Interest	K	T					
5 Department of Justice Federal Credit Union	A	Interest	J	T					
6 Walt Disney Common Stock	A	Dividend	J	T					
7 GE Common Stock	A	Dividend	J	T					
8 Intel Common Stock	A	Dividend	J	T					
9 Minimed Common Stock	A	Dividend							
10 Southern California Edison Common Stock	A	Dividend	J	T					
11 Fidelity Destiny IRA	A	Dividend	J	T					
12 Washington Mutual IRA	A	Dividend	J	T					
13 Acacia Life Insurance	A	Interest	J	T					
14 American General Insurance	A	Interest	J	T					
15 TIAA-CREF(retirement)	B	Interest	L	T					
16 VALIC (retirement)	B	Interest	L	T					
17 Fixed Account Plus									

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

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

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

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting Bybee, Jay S.	Date of Report 05/22/2002

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

A. Description of Assets (including trust assets) *Place "(X)" after each asset exempt from prior disclosure.*	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period				
	(1) Amount Code (A-H)	(2) Type (e.g., dividend, rent or interest)	(1) Value Code (J-P)	(2) Value Method Code (Q-W)	(1) Type (e.g., buy, sell, partial sale, merger, redemption)	If not exempt from disclosure (2) Date: Month-Day	(3) Value Code (J-P)	(4) Gain Code (A-H)	(5) Identity of buyer/seller (if private transaction)
☐ NONE (No reportable income,assets, or transactions.)									
18 Vanguard Lt Treasury									
19 Vanguard Wellington									
20 Core Equity									
21 Putnam New Opportunity									
22 Stock Index									
23 Vanguard Windsor II									
24 Templeton Foreign									
25 Canseco Annuity	A	Interest	K	T					
26 Buena Lanes (passive partnership)	A	Distribut ion	J	W					
27									
28									
29									
30									
31									
32									
33									
34									

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

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

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

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Bybee, Jay S.	05/22/2002

VIII. ADDITIONAL INFORMATION OR EXPLANATIONS.
(Indicate part of report.)

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Bybee, Jay S.	05/22/2002

SECTION HEADING. (Indicate part of report.)
Information continued from Parts I through VI, inclusive.

PART 2. AGREEMENTS (cont'd.)

Line	Date	Parties and Terms
4	1999	VALIC, academic retirement program

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

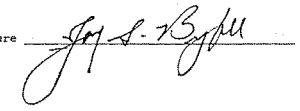
Line	Date	Source and Type	Gross Income
5	2002	Arlington County Public Schools	

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Bybee, Jay S.	05/22/2002

IX. CERTIFICATION

I certify that all the information given above (including information pertaining to my spouse and minor or dependent children, if any) is accurate, true, and complete to the best of my knowledge and belief, and that any information not reported was withheld because it met applicable statutory provisions permitting non-disclosure.

I further certify that earned income from outside employment and honoraria and the acceptance of gifts which have been reported are in compliance with the provisions of 5 U.S.C. app. 4, section 501 et. seq., 5 U.S.C. 7353 and Judicial Conference regulations.

Signature  Date May 22, 2002

Note: Any individual who knowingly and wilfully falsifies or fails to file this report may be subject to civil and criminal sanctions (5 U.S.C. App. 4, Section 104).

FILING INSTRUCTIONS

Mail original and three additional copies to:

Committee on Financial Disclosure
Administrative Office of the United States Courts
One Columbus Circle, N.E.
Suite 2-301
Washington, D.C. 20544

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

AFFIDAVIT

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

Jay S. Bybee

SUBSCRIBED AND SWORN TO before me this 24 day of May, 2002.

Patricia C Miller
Notary Public

My Commission Expires: February 1, 2004

Chairman HATCH. Thank you so much.

If we could call our three other nominees to the witness table, and if you would all raise your hands. Please raise your hands to be sworn.

Do you swear that the testimony you are about to give before the Committee will be the truth, the whole truth, and nothing but the truth so help you God?

Judge ERICKSON. I do.

Judge QUARLES. I do.

Judge FROST. I do.

Chairman HATCH. Thank you very much.

We are delighted to welcome all of you here. It is a signal honor to be recommended by this President or any President for a position in the Federal Courts, and we feel very grateful that the three of you are willing to accept these positions. We know there is a degree of sacrifice in serving in the Federal judiciary, and you do become kind of very much isolated after a while, but we are grateful to all of you for doing that.

Why do we not start with you, Judge Erickson, then you, Judge Quarles, and then you, Judge Frost. Introduce your family and friends here and make any statement you would care to make.

STATEMENT OF RALPH R. ERICKSON, NOMINEE TO BE DISTRICT JUDGE FOR THE DISTRICT OF NORTH DAKOTA

Judge ERICKSON. Thank you, Chairman Hatch. I have no statement that I would like to make at this time, but I would like to introduce some members of my family that are present.

My wife, Michele, and my two daughters, Elizabeth, age 5, and Hannah, age 7; my sister Robyn Gonitzke and her daughter—

Chairman HATCH. Good to have you here.

Judge ERICKSON. —her daughter, my niece Brittany.

Chairman HATCH. Brittany.

Judge ERICKSON. My brother Paul and my lovely sister-in-law Katie, and a very dear friend of mine, a member of the bar from North Dakota, who is also a priest and teaching in Baltimore, Father Phil Brown.

Chairman HATCH. Father, we are happy to have you here. We are happy to have all of you here, and we hope you enjoy these proceedings. I anticipate that you will.

Judge Quarles?

STATEMENT OF WILLIAM QUARLES, NOMINEE TO BE DISTRICT JUDGE FOR THE DISTRICT OF MARYLAND

Judge QUARLES. Good morning, Mr. Chairman.

I, too, have no prepared speech, but I would like to thank you and the members of the Commission for providing me and the rest of the nominees this opportunity to be heard this morning.

I also want to thank Senator Sarbanes and Mikulski. They spoke about the tradition that they have followed in recommending nominations to the District Court. They have both been extremely helpful and supportive, and I do want to thank them for that.

I also want to introduce my wife, Mary Ann Quarles, who is here.

Chairman HATCH. Happy to have you here, Mrs. Quarles.

Judge QUARLES. We spared you the trial of bringing our terrier Nellie here in the interest of a quieter hearing.

[Laughter.]

Judge QUARLES. Thank you for the opportunity, sir.

Chairman HATCH. Well, thank you, Judge. We welcome you, Mrs. Quarles, to the committee.

Judge Frost?

STATEMENT OF GREGORY L. FROST, NOMINEE TO BE DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF OHIO

Judge FROST. Mr. Chairman, thank you for having us here today and having this hearing.

I recognize the hard work that this Committee does. It's a privilege and an honor for me to be here, and I appreciate all of your hard work.

Although Senator DeWine, in his fine remarks, introduced my family and friends, I would like to reintroduce them because if I do not, I will hear about it later.

Chairman HATCH. That is very judicious of you.

[Laughter.]

Judge FROST. First, my wife, Kris. Thank you.

Chairman HATCH. Nice to have you here.

Judge FROST. My mother Mildred Frost and my mother-in-law Helen Dix are present.

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

Judge FROST. My son Wes Frost and his friend Amanda Leonard are present.

Chairman HATCH. Good. Welcome to the hearing.

Judge FROST. Beth Thomson, my sister, and my sister-in-law Kim Thomson.

Chairman HATCH. Nice to you have Thomsons here.

Judge FROST. Shawn Judge, a friend, is here, and Sarah Barrickman, my law clerk, is here.

Chairman HATCH. Welcome. Glad to have you.

Judge FROST. Nancy Dillon is a friend who is here, Doug McMarlin, who I believe just arrived and is in the back of the room, is here.

Chairman HATCH. Welcome, Nancy and Doug.

Judge FROST. And then, finally, Mike Nicks, who is a practicing attorney in my hometown of Newark, Ohio.

Chairman HATCH. Nice of you to come, Mike. Glad to have you here.

Judge FROST. Thank you, Mr. Chairman.

Chairman HATCH. I am going to turn the hearings over to Senator DeWine. And I am hopeful I can get back, but until I do, Senator DeWine is going to be in charge.

Senator DEWINE. [Presiding] Let me welcome each one of you. Thank you very much for joining us. Let me assure you this will be a rather painless experience.

I am not familiar with two of your States, the judicial system, but each one of you, I assume, is the initial trial court judge; is that correct? Each one of you has the felony trials?

Judge ERICKSON. That's correct.

Judge QUARLES. Yes. As Senator, I believe, Mikulski said, we have two trial levels in the State of Maryland; one is the District Court level, which is essentially misdemeanors and certain civil matters. The next level, the level in which I serve, is the Circuit for Baltimore City. Those are the jury trials, serious felonies, and general civil jurisdiction.

Senator DEWINE. Judge Erickson, that would be the same?

Judge ERICKSON. Yes, our District Court is a general jurisdiction court. I like to say we take cases from dog-at-large to murder.

Senator DEWINE. Of course, Judge Frost, our Common Pleas is basically the same.

Judge FROST. Felony jurisdiction and all civil cases over $10,000.

Senator DEWINE. Let me ask each one of you, and maybe I will start with you, Judge Frost, what, during your time on the bench, you have learned that you think will prepare you to serve on the District Court? When I look at your background for each one of you, what stands out, of course, as your experience?

I think there are many ways and many different backgrounds that people bring when they come to the District Court judge, and there is no one given set of backgrounds that is preferable over another, but the advantage each one of you has I think is that you do have a record and that we can look at that record, and we can judge you, and your peers can judge you, and we can ask your peers how do they do on the bench, and so that is at least the advantage that we have with each one of you.

So let me start with you, Judge Frost, and I would just ask you what you have learned in your time on the bench that you think will help you to be a better District Court judge?

Judge FROST. Thank you, Senator.

Senator DEWINE. And maybe some of the mistakes you have made and what you have learned.

Judge FROST. Thank you, Senator DeWine.

You do learn from your mistakes. There is no doubt about that. I think one of the main lessons I have learned is just to simply, on the 20 years of trial-level benches that I have been serving, is to treat everyone fairly, to allow the attorneys to do their job, to have firm control over the docket, which is I think important and will be just as important on the District Court, and to work hard.

I expect a lot out of the attorneys who appear before me and, conversely, I think they expect a lot out of me, and so hard work is also that.

And then, finally, patience, patience, patience.

Senator DEWINE. Judge?

Judge QUARLES. One of the blessings of working at the Circuit Court for Baltimore City for 6 years is that it is a very busy court. We have 24 judicial circuits in the State of Maryland. Our circuit handles 24 percent/24 to 25 percent of the criminal matters, and an equally large number of the civil matters.

In any particular week, we have a thousand trials that are scheduled in the felony courts. That is 10 judges who have a thousand trials scheduled per week. Obviously, they cannot all be heard.

In the time that I have served, I have served in the various divisions of that court, and whether the matter has been simple or

complicated, whether it has been a relatively minor misdemeanor appeal from the District Court or, as in the case that I presided over 2 years ago, a quintuple murder, each of the cases is important to the people involved in them, and I think that's one of the things for judges to remember is that there is no routine case to the litigants or to the victims or to those who are there.

The only experience or impressions of the courts are formed by these people who are there, and these things are very important to them and their lives, and they're under a particularly great amount of stress. As a judge, you have, of course, the responsibility of deciding the immediate case fairly.

You also have a sort of systemic responsibility to make sure that each litigant, each witness, each observer of the court leaves with a sense that, regardless of the outcome of the case, it has been tried fairly, the matter has received serious attention and that they have had an opportunity to be heard.

I would hope to carryover those feelings and those understandings into the Federal District Court.

Senator DEWINE. Good.

Judge Erickson?

Judge ERICKSON. I would echo much that Judge Frost and Judge Quarles have said here this morning. It seems to me that one takes the bench with the attitude that every case is important, that everyone has the opportunity to be heard, that the lawyers will be afforded the opportunity to argue their case fully, that you'll be prepared, that you will have done the work necessary to take the bench prepared to make a decision that's just, fair and equitable in its premises.

I also think that one of the things that a judge really needs to keep in mind is a legal maxim that the law is no respecter of persons. The law doesn't care whether you're the most important or influential person who lives in the land or you're a person that's homeless and living under a bridge. The law only cares that you're given a fair and full opportunity to be heard and that the decision rendered is consistent with the law.

And as a judge, if you can do those two things, treat everyone the way you want to be treated and make sure that everyone has a fair opportunity to be heard, I think that, in the final analysis, things will work out the way they are supposed to.

Senator DEWINE. Judge Erickson, could you comment about settlement procedures and how you do that now and how you would anticipate doing that on the Federal bench; pretrials, how do you move a civil docket.

Judge ERICKSON. We work very hard at trying to get our civil cases settled. We have settlement conferences in which the judge who is not trying the case actually sits down and tries to assist the parties in arriving at a resolution of the case.

There is a more formalized procedure that exists in the Federal District, in the District of North Dakota. In that case, the Magistrate Judge spends a great deal of time working on settling those cases. There is an active ADR program in our district that has, in fact, been well-spoken of around the country, and I would certainly embrace those principles.

I look forward to having someone more knowledgeable in those areas who can teach me some of those techniques.

Senator DEWINE. Judge Quarles?

Judge QUARLES. In our settlement practice in the Circuit Court for Baltimore City, we try to view every opportunity where we got the parties together as an opportunity to resolve the case. We have scheduling conferences fairly early on in civil litigation. This is where the cases are assigned to track, depending on the complexity of the case, the number of witnesses, how much discovery is anticipated.

We also have attorney mediators who serve as volunteers who come in and agree to take two or three settlement conferences per month. We also then have a final pretrial conference, and it is understood that at the pretrial conference, not only will the attorneys be present, but they will have their clients or their client's representatives, and there will be someone on each side who has settlement authority.

Our civil cases in our court are no different from anywhere else. We expect to resolve 85 to 90 percent of the civil cases as, indeed, we do 85 to 90 percent of the criminal cases by settlements, pleas, negotiations. So there has to be a lot of opportunities along the scheduling track to get parties to talk to each other, and you have to view each of those opportunities as a possibility for settlement. So maybe, again, as a discovery discussion, but the discovery discussion or discovery conference can, of course, turn to, if guided, can turn to the subject of settlement.

Senator DEWINE. Judge Frost?

Judge FROST. I'm proud of our settlement programs in Licking County and on the State bench, in general. We do settle about approximately the same, 80 to 85 percent, or we expect to settle those many cases in the civil arena.

Basically, we have three ways in which settlement is worked in Licking County. We have private attorneys who volunteer their time, and I am grateful, they do a great job, and we are very happy with that program. The attorneys sometimes wish to hire a private mediator, and that works out rather well, but only in specialized cases where the funding is there for private mediation.

And then, finally, sometimes the attorneys and the parties ask the judge himself to get involved, and on rare occasions I do that.

I have taken training myself in mediation, and I think that I have some background in that, and we have been somewhat successful.

Senator DEWINE. Judge Frost, how would you describe yourself, as far as allowing lawyers to try their own case?

Judge FROST. That's a good question.

Senator DEWINE. You know, the common complaint.

Judge FROST. It is, and that's a good question, Senator.

I think you can ask any of the attorneys in my county, and who practice before me from other counties—actually, I think this Committee has asked most of them that.

[Laughter.]

Judge FROST. You have got to allow the attorneys to do their job. They have a job in the courtroom, just like the judge has a job in the courtroom, just like the court reporter has a job. You have to

allow them to do their job, too. The system works best when everyone is allowed to perform their functions and function well.

So, as far as I'm concerned, the courtroom is not my courtroom, the case is not my case. It's up to the attorneys to present their case, and I allow them to do so.

Senator DEWINE. Judge Quarles, where do you come down on that?

Judge QUARLES. I agree with Judge Frost.

First of all, as you know from my background materials, I was an active litigator, an active trial attorney.

Senator DEWINE. You have seen it from that side.

Judge QUARLES. And I've seen it from that side, and, for some reason, the wisdom echoes in my mind, "Judge, if you're going to try my case, please don't lose it for me."

[Laughter.]

Judge QUARLES. No attorney wants the judge to be overly involved in trying the case, and I'm not that far removed from being an active trial lawyer as to change that.

We have a wonderful privilege as judges. We get to see the entire range of the legal community. We see very good lawyers; we see very bad lawyers. Each of them has something to teach the judge, as a judge, and I enjoy the vantage point of getting up there and an opportunity to watch the process. I enjoy watching the process. I feel no need to get in and try the cases any more.

Senator DEWINE. Judge Erickson?

Judge ERICKSON. Mr. Chairman, I agree with everything that Judge Quarles just said in the sense that when I used to try cases I was not always overly pleased when the judge interjected himself too forcefully into my case.

One of the things that a judge needs to remember is that, in fact, you are the least-informed person in the courtroom. You know less about the facts than anybody else there, other than the jury, and if decide to interpose yourself into the case, you can rest assured that you will probably make a mess of it.

So I have learned, through experience, that it is best to stay inside the role that I have, and that is to be the judge.

Senator DEWINE. You are all in charge, though.

Judge ERICKSON. Yes.

Senator DEWINE. I do not think any of you are shrinking violets who will not be in charge.

Judge Erickson, why do you want to be on the Federal bench?

Judge ERICKSON. You know, I love being a trial judge. I get up every morning, and I think this is the best job in America, and I have an active caseload that's both criminal and civil. I can't think of anything else that I'd rather do, except be a Federal trial judge.

Why? I have a firm belief that the Federal Courts provide a judge an opportunity to do this job in the best possible world, a place where you have complex cases, with adequate staff and adequate time to make the decisions the right way, to have available to you the resources that are necessary to decide those cases in an appropriate fashion, and I find it all very exciting.

And the most important thing is I think the opportunity to do this job right.

Senator DEWINE. I hope you are not disappointed on the time.

[Laughter.]

Senator DEWINE. I just pray that you have the time.

Judge Quarles?

Judge QUARLES. Judge Erickson puts it so well. There are moments when I sort of figuratively step out of myself and look and think what a wonderful privilege this is to be a judge. And like him, I also anticipate having the joy of doing the job with resources that our local court system just can't spare.

As I mentioned, we 1,000 criminal cases a week scheduled for trial. My average day when I am sitting in a felony assignment is somewhere between 15 and 20 cases scheduled for trial. I am sitting in a misdemeanor assignment now. My average day is 20 to 30 cases scheduled for trial.

I effectively have lost the morning. I spend the morning trying to get pleas and trying to get other cases resolved. So I am reduced essentially to trying a half day of cases each week, the afternoon, and I am trying hard to save the afternoon.

There is a luxury in Federal court with criminal matters and civil matters in that the cases come one at a time. They come prepared for trial and I have the understanding that I will, in fact, be going to trial.

The facilities—and I don't mean to disparage the court that I serve on. I love the court that I serve on, the people I associate with, and I—as Judge Erickson says, you know, I can't wait to get to work every morning to do the job. But it will be nice having the greater resources of the Federal system and a little more time to spend on each of the elements of the case.

Senator DEWINE. Judge Frost?

Judge FROST. I was a municipal court judge for 7 years and I found that to be a great job, an exhilarating job. I then left there and went on to the common pleas bench and I have been there for 12 years now and I have found that to be a great job.

I have been blessed to have a job that I enjoy and really enjoyed the people that I work with. But there are times when it is time to move on and this opportunity came about, and I think I would agree with Judge Quarles is one of the main things is to have the resources to study the law well and hard, and to make the decisions in a proper manner.

Too many times now, I think we are all rushed to get to the judgment and then get to the next case. And so I think this will allow us more time for reflection, which I think is important. I want the job because I just think it is going to be a great opportunity for me to give something back.

Senator DEWINE. Well, Judge Quarles, Judge Frost, Judge Erickson, thank you very much. This Committee has been very impressed by all three of you. I have been very impressed by all three of you. I think you are the type of people that should be on the Federal bench. You want to be on the Federal bench. All three of you have a very good track record. We know what you have done in the past. It is a very good predictor of what you will do in the future.

I cannot speak for the chairman, but I think that the Committee will move fairly quickly—by Senate standards, at least, fairly

quickly on your nominations and you will certainly be hearing from the committee.

So we appreciate your time. We appreciate you coming to Washington, and thank you very much.

Judge QUARLES. Thank you, Senator.

Senator DEWINE. There is a possibility that written questions will be submitted to you in the next few days and we would just urge you, if that does occur—it may not, but if that does occur, that you get those questions back to us immediately, get the answers back to us immediately because, of course, that will speed up the nomination process.

So we thank you and you are free to go or free to stay, whichever you would like to do, but you are finished for the day. Thank you very much.

The Committee will recess subject to the call of the Chair as far as our circuit court nominee. This could occur at any time, so I would remind everyone that the nomination of our circuit court judge—the Committee could come back into session at any moment.

Thank you very much.

Judge FROST. Thank you, Senator, and thank you, staff.

[The biographical information of Judges Erickson, Quarles and Frost follow.]

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

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

   ANSWER: **Ralph Robert Erickson**
   No former names or aliases.

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

   ANSWER: **United States District Judge for the District of North Dakota**

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

   ANSWER: **East Central District Court**
   Cass County Courthouse
   211 9th St. So.
   PO Box 2806
   Fargo, ND 58108-2806
   (701) 241-5680

4. **Birthplace**: State date and place of birth.

   ANSWER: **DOB: 04/28/1959**
   Thief River Falls, MN 56501

5. **Marital Status**: (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es). Please also indicate the number of dependent children.

   ANSWER: **Married**

Wife:	**Michele Mae Steinberger Erickson**
Occupation:	**Self Employed Doctor of Optometry**
Place of Business:	**Cashwise Optical** **1401 33rd St. S.** **Fargo, ND 58103**

   Dependent Children: **2**

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

ANSWER:

School	Dates Attended	Degree	Date Conferred
University of North Dakota	**8/81-5/84**	**J.D. *With Distinction***	**5/84**
Jamestown College, N.D.	**8/77-12/80**	**B.A. *Magna Cum Laude***	**12/80**

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

ANSWER:

Employer	Position	Dates of Service
State of North Dakota East Central Judicial District PO Box 2806 Fargo, ND 58108	**District Judge**	**1/95 - Present**
Traill, Steele, Nelson & Griggs Counties of ND Traill County Courthouse 114 W. Caledonia Ave. Hillsboro, ND 58045 (701) 436-4454	**County Judge**	**7/94 - 12/94**

Cass County, N.D. **Cass County Courthouse** **211 9th St. S.** **Fargo, ND 58108-2806**	**County Magistrate**	**2/93 - 7/94**
Erickson Law Office **120 West Main Avenue** **West Fargo, ND 58078**	**Attorney in Sole Practice**	**2/92 - 7/94**
Ohnstad Twichell, P.C. **901 13th Ave. E** **PO Box 458** **West Fargo, ND 58078** **(701) 282-3249**	**Attorney/Shareholder**	**10/84 - 11/92**
Ohnstad Twichell, P.C. **Address same as above**	**Law Clerk**	**5/84 - 10/84**
Villa Nazareth **3004 11th St. S.** **Fargo, ND 58103** **(701) 235-8217**	**Board of Directors**	**2000-present**
West Fargo Public Library **401 7th St. E.** **West Fargo, ND 58078** **(701) 282-0415**	**Board of Directors**	**1987-93**

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

ANSWER: I have never been in the armed forces.

9. Honors and Awards: List any scholarships, fellowships, honorary degrees, academic or professional honors, honorary society memberships, military awards, and any other

special recognition for outstanding service or achievement.

ANSWER:

Selected "Best Judge in Cass and Clay Counties" by survey of over 300 lawyers who practice in the counties according to secret poll conducted by *The Forum* (the daily newspaper in Fargo). Published March 31, 2002.

UND School of Law–Academic Scholarship 1983-84.

UND School of Law–President of Student Bar Association 1983-84.

UND School of Law–Best Brief, Moot Court Competition 1983.

UND School of Law–Winner of "Book Award"–best grade in Business Associations 1983.

UND School of Law–Graduated "*With Distinction.*"

UND School of Law–Member Law Review, published note: *Aboriginal Land Claims in the United States and Canada,* N.D. LAW. REV. (1984).

Jamestown College–Graduated "*Magna Cum Laude.*"

Jamestown College–President's Scholarship 1977-80
Athletic Scholarship (football) 1977-80

Jamestown College–College Fellow in History-Political Science

AV Rating (Outstanding legal skills, very high ethics) by Martindale-Hubbell

Instructor Minnesota State University-Moorhead "Fundamentals of Banking Law" 1988-89.

Who's Who in American Law (uncertain of dates).

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

ANSWER:

American Bar Association 1984-89(uncertain of exact dates of membership) 2000 - Present

American Bar Association Judicial Division 2000 - Present

Member ABA Judicial Division Working Group on First Amendment 2002-present

ABA Young Lawyers Division 1984-89 (Young Lawyers Division Regional Representative 1986-88)

State Bar Association of North Dakota, 1984 - Present (Sec./Treas. 1990-93)

State Bar Association of North Dakota (SBAND) Legislative Committee (1985-90)

SBAND Committee on Attorney Standards, 1992-94.

Joint Commission on Attorney Standards, 1994-96.

Joint Committee on Attorney Standards, 1996-2001 (Chair 2001).

ND Supreme Court Committee on Technology, 1995-97; UCIS subcommittee 1995-1997.

Joint Task Force on Family Law, 1999-2000.

Joint Committee on Family Law, 1995-1999. Chair subcommittee on statutory review.

SBAND Ad Hoc Family Courts Study Commission, 1993-94.

SBAND Ethics Committee, 1994-95.

N.D. Supreme Court Juvenile Drug Court Study Commission, 1997-98.

N.D. Supreme Court Juvenile Drug Court Project Implementation Committee, 1998-1999.

N.D. Juvenile Drug Court Advisory Committee, 1999 - 2002. Chair subcommittee on Strategic Planning.

N.D. Juvenile Drug Court Pilot Project Judge, 2000 - present. (Presided over first juvenile drug court in state)

N.D. Supreme Court Judicial Planning Committee, 1995 - 2001.

N.D. Supreme Court Judicial Planning Commission, 2001-2002.

N.D. Supreme Court Case Flow Management Committee, 2001-02.

N.D. Commission on the Unfair Criticism of the Judiciary, 1988 - 89.

North Dakota Judicial Conference Committee on Judicial Compensation, 1995 - 2002 (Co-Chair 2000 - present).

N.D. Trial Lawyers Association, 1984-94 (Board of Governors 1988 - 1994) (Sec. 1990 - 91, Treas. 1991-92, Vice Pres. 1992-93).

Ronald N. Davies Inn of Court, 1997 - 2002 (Sec. 1998-2000, Vice Pres. 2000-01, President 2001-02, Immediate Past President 2002 - present).

Instructor SBAND People's Law School, 1998-2002.

Cass County Bar Association, 1984 - Present (Sec./Treas. 1988, Vice Pres. 1989, President 1990-92).

Minnesota Bar, 1986 - 2001.

North Dakota Judicial Conference, 1994-present.

11. **Bar and Court Admission**: List each state and court in which you have been admitted to practice, including dates of admission and any lapses in membership. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

ANSWER:

Admitted to Bar in North Dakota, October 10, 1984. Continuously in good standing.

Admitted to Bar in Minnesota, March 5, 1986. Took inactive status in June, 2001 because I did not want to pay the fees to certify the Continuing Education classes that I had taken outside of Minnesota.

Admitted to Bar for the U.S. District Court of North Dakota, October 30, 1984. Continuously in good standing.

I have never formally been admitted to the bar for the United States District Court of Minnesota, but I was admitted *pro hoc vice* on a couple of occasions in order to appear in U.S. Bankruptcy Court in the District of Minnesota. I have never practiced regularly in the U.S. District Court or U.S. Bankruptcy Courts in Minnesota.

12. **Memberships**: List all memberships and offices currently and formerly held in professional, business, fraternal, scholarly, civic, charitable, or other organizations since graduation from college, other than those listed in response to Questions 10 or 11. Please indicate whether any of these organizations formerly discriminated or currently discriminates on the basis of race, sex, or religion - either through formal membership requirements or the practical implementation of membership policies. If so, describe any action you have taken to change these policies and practices.

ANSWER:

Board of Directors, Villa Nazareth/Friendship Village. (2000 - Present) Villa Nazareth is a charitable corporation owned by Catholic Health Initiatives and the Presentation Sisters. The corporation operates group homes for the developmentally disabled and a residential retirement center.

Diocesan Pastoral Council, Catholic Diocese of Fargo. (Member 1993-94, *emeritus member* 1994 - 2002). The pastoral counsel is an organization which is designed to assist the Bishop of Fargo on spiritual and pastoral matters relating to the administration of the Diocese of Fargo. It consists of priests, nuns, and lay members appointed at the pleasure of the Bishop. I resigned from the pastoral counsel as an active member shortly after I assumed the bench in 1994. Since that time I have been an *emeritus* member, non-voting. I have rarely attended meetings over the past few years. The pastoral council is designed to address spiritual issues and does not engage in any financial, administrative or legal affairs of the diocese. It is involved primarily in advising the Bishop on spiritual issues, ecumenical issues, social justice and charitable outreach issues.

North Dakota Judicial Conference, 1994 - present. The N.D. Judicial Conference exists by statute and membership consists of all District Judges and Supreme Court Justices, a Municipal Court representative and two lawyer representatives. The N.D. Judicial Conference has certain duties, primarily administrative and educational, assigned to it by law.

West Fargo Library Board, 1987-93 (President 1992-93)

West Fargo Exchange Club, 1985-93 (Treas. 1989, Vice Pres. 1990, Pres. 1991).

Friends of Cardinal Meunch Seminary, 1992-2001.

United Way of Cass Clay West Fargo Division Chair 1988-90.

Chesterton Society of Fargo. 1993-96. The Chesterton Society is a group of men and women who meet six times a year to discuss assigned readings in philosophy, music, literature, and theology. It is essentially a literary society with a primary emphasis on philosophy and theology.

North Dakota Right to Life Association. I occasionally paid dues to the N.D. Right to Life Association between 1984 - 94. I am not certain how many years I paid dues. I never actually attended any meetings of the organization.

North Dakota Life League. At various times I made contributions to the North Dakota Life League. I have not contributed to them since assuming the bench in 1994. I never attended any meetings of the organization.

I served between 1993 and 1994 on the North Dakota Commission on the Status of Women. I resigned in 1994 upon my appointment to the bench.

Knights of Columbus, Blessed Sacrament Catholic Church, West Fargo. I have been a member of the Knights of Columbus for about ten years. I have never been very active, confining my membership to paying dues and occasionally helping with group activities. I understand that all members are male and Catholic. I have never attempted to dissuade them from this practice.

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

ANSWER:

I authored a Law Review note published in the NORTH DAKOTA LAW REVIEW in 1984 and entitled: *"Aboriginal Land Title in the United States and Canada."*

I wrote an article in the *Dakota Farm and Ranch Guide* on no fault insurance and automobile liability insurance that was published in 1986 or 1987. So far as I have been able to ascertain no copies of it are currently in existence.

I wrote three letters to the editor of the Fargo *Forum* that were published while I was either a candidate for the North Dakota House of Representatives in 1992 or while I was the District 13 Republican Chairman. One of the articles related to an endorsement of Warren "Duke" Albrecht for North Dakota Attorney General. One of them related to means testing Social Security in order to save the system from bankruptcy. As I recall, the letter encapsulated some of the arguments made by Pete Peterson, former Commerce Secretary in a book on the impending Social Security Crisis and some ideas that Ben Wattenburg had raised in his book, *The Birth Dearth*. The final letter was on a topic I don't recall at this point. I never kept any of the letters and without some more specific dates I am unable to retrieve them without going through a number of years of archives at the *Forum*.

During my tenure as a member or chair of various bar committees I have from time to time written reports on bar activities in North Dakota, most recently on the status of a pay equity bill for judges which was passed in the 2001 legislative session. These articles were entirely informational, status-type reports and appeared in various newsletters of the State Bar Association of North Dakota. I never kept copies of any of these articles.

I have spoken frequently to bar association groups and CLE groups, usually on the topics of professional responsibility and ethics, evidence, workers compensation, drug courts and courtroom practices. No transcripts of these talks were ever prepared.

I speak frequently to service clubs and church groups on our judicial system, usually describing our system of justice, the jury system, judicial compensation, juvenile courts and drug courts. I would estimate that I speak to such organizations five or six times a year minimum. I usually work from a few notes and no written versions of the speeches exist.

I gave the commencement address to Chaffee High School in the early 1990's when the scheduled speaker was unable to attend. I believe that the class motto dealt with daring to dream great dreams and that is what my speech was based on. No written version of the speech exists.

I gave a Memorial Day Address in Donnybrook, North Dakota some time in the mid

1990's. As I recall the speech, I spoke of the great sacrifices made by the three pivotal war generations in the history of the republic: the Revolutionary Generation, the Civil War generation, and the World War II generation. Given that most of the members of the legion post that sponsored the event were veterans of World War II, the focus of the speech was about the great debt that the citizens of the United States owe to these three generations–and that the debt owed to the World War II generation was perhaps the greatest of all. No written version of the speech exists.

I have made presentations to the State Bar Association general assembly on Judicial Compensation issues and the Juvenile Drug Courts.

I have given various and sundry nominating speeches in conventions of all sorts, bar, political, and service clubs. None of them exist in any written form.

I have spoken on numerous occasions to the SBAND Convention and the N.D. Judicial Conference on the issue of judicial improvement, particularly urging (unsuccessfully so far) that North Dakota adopt a systematic approach to reviewing the quality of the judiciary. I have specifically urged that a system of judicial evaluations be adopted and that a mentorship program be established to help improve the quality of judging in our state courts.

I have on a couple of occasions in my capacity as a chair of a committee appeared before the North Dakota Supreme Court to urge the adoption of a rule proposed by the committee. The most recent occasion for this was on June 6, 2000 relating to Rule 8.4(d) of the North Dakota Rules of Professional Conduct which deals with bias and prejudice in connection to the practice of law.

14. **Congressional Testimony**: List any occasion when you have testified before a committee or subcommittee of the Congress, including the name of the committee or subcommittee, the date of the testimony and a brief description of the substance of the testimony. In addition, please supply four (4) copies of any written statement submitted as testimony and the transcript of the testimony, if in your possession.

ANSWER: I have never testified before Congress or a sub-committee, although I once assisted a partner of mine who represented various water boards in North Dakota in writing a letter on Garrison Diversion and the Pick-Sloan Act which was presented to a congressional subcommittee. I believe that the work on that matter was done in 1985 or 1986. No copy of the letter is currently available as the firm's file has been purged.

15. **Health**: Describe the present state of your health and provide the date of your last

physical examination.

ANSWER:

My last complete annual physical examination was undertaken in October 2001. My overall physical health is excellent.

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

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

ANSWER:

During the past nine years I have written an estimated 400 to 500 opinions on issues ranging from the mundane to the significant. It is difficult to assess any of them as being "the most significant" because, as a practical matter, even the most routine cases may present interesting legal issues and complex factual issues. Rather than attempt to categorize these 500 opinions as "more important" I am attaching a representative sample of my work in areas that are most commonly litigated. I have not attempted to cull my decisions to find my "best" examples of my research and writing, as it seems to me that the real issue is what kind of work have I done on a day to day basis. I believe that these cases represent a fair sampling of the sort of issues I have dealt with and the manner in which I have resolved disputes.

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1. ***F/S Manufacturing v. First Bank*** ***Cass County CV96-385*** ***Negotiable Instruments***

F/S manufacturing was a case of first impression under the U.C.C. apparently in the entire country, as far as Professor White was able to ascertain. In F/S Manufacturing the plaintiff employed a bookkeeper who embezzled a substantial sum of money from the plaintiff. The employee accomplished the embezzlement by depositing checks made payable to the corporation into her personal account through the use of an ATM. The defendant bank accepted the deposits through their ATM even though they had a written policy that corporate checks could not be deposited into personal accounts through an ATM. The issue was whether or not the items had been accepted in "an automated fashion". The UCC provides in relevant part "in the case of a bank that takes an instrument for collection or payment by automated means, reasonable commercial standards do not require the bank to examine the instrument." The evidence

established that each of the instruments was in fact viewed by a bank employee who placed PICR and routing information on the items through the use of a PICR machine. I held that the process, because it required human involvement was not fully automated and did not fall within the exception set forth in the UCC. The case settled pending appeal.

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2. *VanValkenburg, et al. v. Paracelsus* ***Cass County CV-98-608*** ***Contract***

This case arose out of an ongoing dispute between a local hospital and clinic. The physicians at the clinic elected to build a hospital which would compete with the hospital with which they had previously been affiliated. During the pendency of the construction of the new hospital, the former hospital elected to terminate emergency room services with the physicians who were employed by the clinic that intended to compete with the hospital. The emergency room physicians sued alleging a breach of contract. A temporary injunction issued. At the conclusion of hearings on motions for summary judgment I ruled that the hospital had not breached the contract and that they had sole responsibility for staffing the emergency room. This ruling was affirmed by the North Dakota Supreme Court at *VanValkenburg v. Paracelsus,* 2000 ND 38, 606 N.W.2d 908.

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3. E.W. Wylie v. TAG Investments ***Cass County CV99-2045*** ***Real Estate***

E.W. Wylie (now Matrix) sued TAG Investments seeking specific performance of an option to purchase certain real estate. TAG Investments asserted that Wylie had failed to exercise the option in timely fashion. Essentially TAG argued that the term "purchase" meant a bargained for exchange in cash and that in order for the option to be exercised an exchange of cash had to take place before the option expired. Wylie asserted that the term "purchase" included an unconditional promise to be bound made within the option period, even though the closing date was not to take place until after the time for exercising the option had expired. I ruled that under North Dakota law an unconditional promise to be bound was sufficient to constitute a purchase. This decision was affirmed by the North Dakota Supreme Court at *Wylie v. TAG Investments,* 2000 ND 88, 609 N.W.2d 737.

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4. Hagen v. Nodak Mutual ***Cass County CV99-3562*** ***Insurance***

The only issue in this case was whether a motor vehicle was an underinsured motor vehicle within the meaning of North Dakota's no fault law. I determined that under North Dakota law and the language of the policy that the vehicle in question was an underinsured

vehicle. This decision was affirmed by the North Dakota Supreme Court at *Hagen v. Nodak Mutual,* 2001 ND 94, 626 N.W.2d 693.

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5. Hilborn v. Nodak Mutual ***Cass County CV99-3562*** ***No Fault***

This case involves various motions in *limine* and summary judgment issues. The issues related to whether or not the conduct of the insurer amounted to bad faith, whether the insurer had breached its contract by failing to pay the past and future medical expenses and whether an action for exemplary damages would lie. I ruled on all issues and the case ultimately settled. A copy of the opinion is attached.

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6. N.D. Life & Health Guaranty Assoc. v. Dain Bosworth ***Cass County CV 95-1436*** ***Breach of Contract***

This case involved a derivative suit in which the N.D. Life and Health Guaranty Association claimed that Dain Bosworth had breached its duty to various policy holders on a single premium life insurance annuity product when the sold a captive life insurance company ostensibly to unreliable operators. The action lay in breach of fiduciary duty and deceit. I ruled that there were factual issues that precluded the defendants claim that a previous judge had dismissed the claims.

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7. Peterson v. Dougherty Dawkins ***Cass County CV96-1074*** ***Class Action Securities***

This case involved a securities class action suit. The motion that the opinion is on is the issue of choice of laws. The issue was which state's blue skies laws would be applied to claims within the class. I ruled that within the class, the claims by North Dakota plaintiffs would be governed by North Dakota law. All other claims would be governed by Minnesota law, as Minnesota was the site where all of the alleged misrepresentations were made. The case settled shortly after the ruling.

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8. Hawkinson v. Hawkinson ***Cass County CV88-1586*** ***Child Visitation***

Hawkinson involved visitation and a request by a custodial parent for leave to move out of state and to take the minor child. I held that the visitation schedule could be crafted to continue to provide similar visitation by the non-custodial parent and that leave to relocate

should be granted. This was affirmed by the North Dakota Supreme Court at *Hawkinson v. Hawkinson,* 1999 ND 58, 591 N.W.2d 144.

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9. In re Notary Commission of Dvorak ***Cass County CV97-699*** ***Admin. Appeal***

In this opinion I affirmed a ruling by the North Dakota Supreme Court in suspending the notary commission of a licensed North Dakota lawyer. The most significant issue in the case was wether or not the notarization of several documents at the same time constituted a single or multiple case of misconduct. The Secretary of State has informed me that he has found the opinion very useful and that whenever there are questions about this issue he sees that a copy of it is forwarded to the interested parties.

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10. Horsley v. N.D. Worker's Compensation Bureau ***Cass County 99-2864*** ***Admin Appeal***

A fairly significant portion of the work that we do as district judges involves the review of administrative appeals. Such appeals are on the record established before the administrative agency. In Horsley, the claimant raised six issues. I reviewed each of the six issues, found five of them to be without merit and found the sixth issue–whether or not the Bureau should have received additional medical information not offered at hearing but offered by Horsley after the hearing should have been received and considered. I found that the Bureau had taken an unnecessarily adversarial role in refusing to allow the supplementation of the record as the failure to actually offer the evidence was plain error on the part of the claimant. The case was remanded for further proceedings before the Bureau.

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

ANSWER:

I have been reversed eight times in the nine years I have served as a trial judge and as a magistrate.

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1. ***State v. Keilen,* 2002 ND 133, 649 N.W.2d 224 (N.D. Aug. 15, 2002)**
***State v. Dykhoff,* 2002 ND 133, 649 N.W.2d 224 (N.D. Aug. 15, 2002)**

Summary: Keilen and Dykhoff were charged with possession of controlled substances and controlled substance paraphernalia arising out of an incident which took place at their residence. The Police received a phone call from the Keilen and Dykhoff's neighbor indicating that a loud argument had been taking place, that there had been the crashing of glass, then a loud crash after which the residence had become silent. The police dispatched officers to the scene. The officers approached the door, heard voices coming from inside the residence and then knocked on the door. Keilen came to the door looked out the window and than retreated back into the residence without opening the door. The police, believing that a possibility existed that there was an injured party in the residence, entered the home. The State conceded that the officers lacked probable cause to believe that a crime of sufficient magnitude had taken place so as to allow entry into the residence on a theory of exigent circumstances. Although the state raised the issue of exigent circumstances in its initial argument, the issue was never briefed and was abandoned at the hearing on the merits of the motion. Instead the state argued that the entry into the residence was authorized on a grounds of a community caretaker function or an emergency aid exception. The Defendants argued that the community caretaker function had no applicability to cases arising outside the use of an automobile and that the emergency aid exception needed to be supported by probable cause and that the admission of the State that they lacked probable cause sufficient to justify application of the exigent circumstances exception controlled the case. I ruled that the entry was authorized by the Community Caretaker function relying on a previous North Dakota case, State v. DeCoteau. The North Dakota Supreme Court ruled that because there was no evidence of any emergency existing at the time that the officers reached the scene, they had no basis for believing that someone might need assistance at the residence. It was undisputed that at the time that the officers were at the scene the only sound they heard was a conversation taking place in an ordinary and conversational tone. Under those circumstances the community caretaker function was unavailable to enter the house.

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2. ***State v. Perreault,*** **2002 ND 14, 638 N.W.2d 541 (N.D. 2002)**

Summary: Perreault was charged with theft arising out of the alleged conversion of partnership property to his own use. Perreault contended he had permission to take a draw against the funds for services rendered. I dismissed the charges finding a want of probable cause on a theory that the action ran afoul of North Dakota's civil disputes doctrine. The Supreme Court ruled that the Perreault's contentions might constitute a defense to the charge of theft but did not render the dispute a civil dispute within the meaning of the civil dispute doctrine. This resolved a previously unresolved issue as to what the parameters of the Civil Dispute Doctrine were under North Dakota law. The case was tried to the bench to a conviction in June, 2002.

3. ***Rodenburg v. Hart and FM YMCA*, 2001 ND 139, 632 N.W.2d 407 (N.D. 2001)**

Summary: Rodenburg was shot numerous times by Hart, a previously convicted felon unlawfully in possession of a firearm, while Rodenburg was working out at the local YMCA. Rodenburg also attempted to serve two Iowa defendants in North Dakota for unlawful entrustment of a dangerous instrumentality because they had allegedly lent Hart the handgun in question when Hart indicated that he was going to North Dakota to "get the money Rodenburg owed him." It was undisputed that the Iowa defendants were aware that Hart was out on bail for some offense. I ruled that the contacts between North Dakota and the Iowa defendants were so minimal that an exercise of personal jurisdiction over them violated the minimum contacts standards of the due process clause. The Supreme Court reversed holding that the exercise of jurisdiction did not offend traditional notions of justice and fair play.

4. ***Powers v. Job Service of North Dakota*, 1999 ND 162, 598 N.W.2d 817 (N.D. 1999)**

Summary: Powers appealed to district court from an opinion by Job Service of North Dakota dismissing his unemployment compensation claim on the grounds that he had failed to file his claim card in a timely manner. The evidence in the record given by Powers was inconsistent. Powers, who was unrepresented at the hearing, contended that the questions put to him were confusing, leading and that if his answers regarding the filing of the card were inconsistent it was because the questions were misleading and confusing and that the representatives of Job Service were putting words in his mouth. The record indicated that the only inconsistent evidence that Powers gave was the result of a single leading question and that he might well have been confused as to the timing that the question referred. I held that there was sufficient evidence in the transcript to sustain the conclusion of the agency. The Supreme Court reversed holding that the ambiguous testimony was insufficient to resolve the matter and remanded to the agency to conduct further hearing to resolve the fact question.

5. ***Stuart v. Stammen*, 1999 ND 38, 590 N.W.2d 224 (N.D. 1999).**

Summary: Stuart appealed from a grant of summary judgment dismissing his action for specific performance of a contract right of first refusal for the purchase of certain real estate owned by Larry and Mary Stammen. While drinking in a tavern, Stammen and Stuart had a discussion about an offer Stammen was anticipating from a third party to purchase the property for $140,000. Stuart countered that he was unwilling to pay anywhere near that price and that Stammen should "go for it." Stammen understood Stuart to be informing him that Stuart was not really interested in the property. Stammen

eventually entered into a contract to sell the property to a third party for $117,000. I found that the conversation constituted a waiver of the option. The Supreme Court reversed holding that the conversation did not constitute a waiver.

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6. ***Daley v. American States Preferred Ins.*, 1998 ND 225, 587 N.W.2d 185 (N.D. 1998)**

Summary: Defendant American States appealed from a motion for summary judgment wherein I ruled that Minnesota law applied to a choice of laws question because the situs of the accident was Minnesota. The accident involved a single car accident in Minnesota involving a driver and a passenger who were both residents of North Dakota. The plaintiffs argued that Minnesota law applied as their no-fault laws were more generous than North Dakota's no fault law. American States countered that applying the balancing of factors test as had been embraced in most North Dakota choice of laws cases the appropriate law to apply should have been North Dakota law. In a previous case, American Family Insurance v. Farmers Insurance Exchange, 504 N.W.2d 307, the North Dakota Supreme Court acknowledged the five factor balancing test that it had applied in previous cases but went on to note "the strong territorial nature of no fault laws" and that the location of the accident was an "overridingly significant contact." I understood American Family as recognizing that because of the territorial nature of no fault laws and that the site of an accident was an "overridingly significant contact" that the Court had intended to abandon the strict application of the previous standard announced in Apollo Sprinkler v. Fire Sprinkler Suppliers, 382 N.W.2d 386 (N.D. 1986). The Supreme Court held that Apollo Sprinkler's five prong balancing test was the appropriate choice of law standard to be applied. It is worthy of note that both parties argued at the summary judgment that American Family constituted a modification, if not an outright abandonment, of Apollo Sprinkler in no fault cases. The plaintiff argued that a pure site of the accident rule prevailed and the defendant that a modified version of the factors set forth in Apollo Sprinkler applied in which the site of the accident was only one of the factors to be considered, albeit a somewhat weightier factor than the other four. The Supreme Court indicated that all parties had misread their intentions in American Family.

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7. ***City of Fargo v. Sivertson*, 1997 ND 204, 571 N.W. 2d 137 (N.D. 1997)**

Summary: The City of Fargo appealed from an order suppressing evidence. The arresting officer had been called to the scene of an accident on a two-lane one-way street in the City of Fargo. An ambulance was on the scene with flashing red lights. The officer turned on his flashing red lights and parked behind the accident scene. There were vehicles with flashing red lights both in front of the accident and behind the accident scene. The cars involved in the accident blocked the right hand lane of traffic. The left hand lane was still open. Sivertson came upon the accident scene and stopped. The

officer thought it was unusual that Sivertson had come to a stop and testified at an administrative hearing that he thought that Sivertson's stop was unlawful. In fact a Fargo city ordinance provided that persons happening upon an accident scene with emergency vehicles displaying red lights were to "stop and remain stopped until directed by an emergency officer to proceed." The officer approached Sivertson, smelled an odor of alcohol and commenced an investigation. Ultimately Sivertson was arrested, administered a blood alcohol test which yielded a .10 blood alcohol concentration, the legal limit. At the suppression hearing the officer changed his testimony stating that he approached the vehicle with an intent to conduct a "community caretaker stop" to determine that everything was alright and that the defendant did not need assistance. I ruled that the change in testimony indicated that the officer's testimony at the suppression hearing was pretextual and that the inconsistent testimony was "very troubling." The Supreme Court reversed indicating that the defendant had not produced a transcript of the prior testimony and that the stop was a valid caretaker stop.

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8. ***State v. Holecek*, 545 N.W.2d 800 (N.D. 1996).**

Summary: The state appealed from an order dismissing charges of violating a judicial order against Holecek and his co-defendants on the grounds that the temporary injunction had expired by operation of law. Section 32-06-03 of the North Dakota Century Code provides, in relevant part, as relates to temporary injunctions that: "In no case shall a longer period than six months elapse before the hearing of the merits of the case shall be had for the purpose of deciding the question as to the justice or necessity of making the temporary restraining order permanent." It was undisputed that the injunction underlying the criminal action was issued on September 17, 1992 and that the criminal act took place on November 22, 1994. The North Dakota Supreme Court held that the failure to conduct the hearing did not render the injunction ineffectual by operation of law, rather the parties who are named in the injunction would need to take some affirmative legal action to dissolve the injunction, either by requesting a hearing or obtaining an order to dissolve for want of prosecution.

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9. ***State v. Osier*, 1997 ND 170, 569 N.W.2d 441 (N.D. 1997)**

In addition to those cases in which I have been expressly reversed, I have been reversed by implication in another case. In *State v. Osier*, 1997 ND 170, 569 N.W.2d 441 (N.D. 1997), the Supreme Court reversed an order that adopted in its entirety a ruling I had made in an initial trial. Osier was charged with gross sexual imposition with his 15 year old daughter. The case was originally tried by me to a hung jury. I subsequently rotated into the civil division of our court and Judge Norman Backes succeeded to the case. Judge Backes affirmed a ruling I had made in the first trial that certain prior acts of sexual contact by the defendant with minors would be admissible on the grounds that they

showed a *modus operandi* on the part of the Defendant. In an earlier incident involving a niece, the niece alleged that Osier had fondled her after showing her pornography and telling her he wanted to teach her how to resist the amorous advances of males, stating "this is where you should say no." And at the conclusion informing the niece not to tell Osier's wife (the girl's aunt) because she would "be jealous." Osier's daughter alleged a nearly identical course of conduct (the use of pornography, "teaching" her when to say "no" and telling her not to tell her mother because she "would be jealous"). The North Dakota Supreme Court ruled that the use of this testimony was inappropriate and that the prior bad acts should not have been admitted because of the risk that the jury would convict the defendant on the basis of the prior bad act.

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

ANSWER: I have written numerous issues that relate to the federal or state constitution. Most commonly, these are issues relating to suppression. The following cases are representative.

N.D. Fair Housing Council & Kippen v. Peterson, Cass County CV-99-2563

The North Dakota Fair Housing Council and Kippen asserted that the defendants unlawfully discriminated against them on the basis of their marital status. During the course of depositions the Kippens admitted that they intended to live together in an apartment and that they had in the past and intended to engage in sexual relations at the apartment. Petersons inquired about their marital status and refused to rent to them claiming (1) that to rent to them would make them an accomplice to the crime of unlawful cohabitation; and (2) that to rent to them violated their religious scruples. I determined that the N.D. cohabitation statute did apply and that the Petersons could not be compelled by the N.D. Human Rights Act to participate in an unlawful act. I did not reach the religious scruples argument. This was affirmed by the N.D. Supreme Court at *ND Fair Housing Council v. Peterson,* 2001 ND 81, 625 N.W.2d 551.

***State v. Heick*, Cass County CR-09-01-K-0720**

Heick claimed that there was not probable cause to charge him with the offense of gross sexual imposition because the state was unable to establish sexual contact. The undisputed testimony was that Heick had masturbated in the presence of a sleeping juvenile female and that his ejaculate ended up on the face and hair of the young girl. I held that under North Dakota's

law this was sufficient to establish probable cause. The case was not formally appealed but did reach the North Dakota Supreme Court on a Petition for Certiorari at *Heick v. Erickson, 2001 ND 200, 636 N.W.2d 913.*

State v. Johnson, CR 09-01-K-1373

This case involved the scope of a consent to enter premises and the observation of criminal activity in plain view. I ruled that once the officers had been afforded permission to enter a party, they were not required to stand at a spot by the threshold and ignore apparent criminal activity (minors consuming alcoholic beverages) in their presence.

State v. Ruben Hernandez, CR-09-01-K-1686

The Drug Task Force obtained a search warrant to search the residence of Robert Dietrich. Dietrich was observed to possess a large amount of cash and there were numerous calls from defendant Hernandez while the police were completing the search, as identified through Dietrich's caller ID machine. Hernandez was known to be a person to be engaged in the business of dealing in narcotics. The police spoke to Dietrich and he admitted that he was to purchase marijuana and cocaine from Hernandez and that he was supposed to be meeting with Hernandez at that very time. Dietrich agreed to cooperate. Hernandez was called and he agreed to come to Deitrich's apartment with the drugs. When Hernandez arrived at the scene he was immediately ordered to the floor and to drop a bag he was carrying. While one of the officers took Hernandez for questioning, another officer opened the bag and found four pounds of marijuana. Unbeknownst to the officer who opened the bag, the other officer was at that moment informing Hernandez he was not under arrest. The officer searching the bag assumed that Hernandez would be immediately arrested for conspiracy to deliver a controlled substance. The state asserted that the search was valid as a search incident to a lawful arrest, the defendant asserted that since the search preceded his arrest, it could not be a search incident to an arrest. I ruled in favor of the state.

***State v. Guemple*, Cass County District Court, 1995.**

This was a case to suppress the fruits of a search. The defendant's rental garage was searched pursuant to a probation search. In the garage certain items of stolen automobile parts were found. In addition the officer found a locked file cabinet. The officer broke into the cabinet and discovered numerous items of contraband including false titles, false drivers' licenses and information relating to another storage garage. A search of the second storage space yielded more evidence. I held that the entry into the locked cabinet without a warrant was not authorized under the constitution and suppressed the subsequent information under the fruit of

the poisonous tree doctrine.

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

ANSWER: See attached opinions.

17. **Public Office, Political Activities and Affiliations**:

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

ANSWER: In 1993 I was appointed by Governor Edward T. Schafer to the N.D. Commission on the Status of Women. When I was appointed County Judge in 1994 I resigned my seat because sitting judges are prohibited by North Dakota Law from serving on commissions unless they directly relate to improvement of the law.

As I have indicated elsewhere, I was an unsuccessful candidate for the North Dakota House of Representatives from District 13, which primarily encompasses the City of West Fargo, North Dakota.

I was appointed to two terms on the West Fargo Library Board by the Mayor of West Fargo, Florenz Bjornson. (1987-93). I served one term as chair of the Library Board. (1992-93)

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

ANSWER: I worked as a volunteer on many political campaigns prior to my appointment to the bench in 1994. I engaged in such activities as fund raising, door to door campaigning for myself and other candidates for elective offices, polling, get out the vote drives, literature drops, making speeches, writing newsletters to other volunteers, inviting friends and neighbors to become active in campaigns and committees. I was a rather typical "grass roots volunteer." At no time was I ever paid by any campaign, committee or political action committee. I worked on various statewide and local campaigns as an unpaid volunteer on several occasions between 1978 and 1994.

I do not know whether or not this question seeks information on involvement in political organizations other than election campaigns. I hold a judgeship that is non-partisan and am prohibited by law from indicating a current membership in any political organization. This information is provided as a historical reference. It should not be interpreted in any fashion that would violate the Canons of the North Dakota Code of Judicial Conduct. I was in the past an active member of the North Dakota Republican Party. At various times I contributed to the North Dakota Republican Party beginning in about 1980 and concluding with my assuming the bench in 1994. I was a member of the 13th District Executive Committee (1986-94), Precinct 13-1 committeeman (1986-88), 13th District vice-chair (1989-92), a candidate for the North Dakota House of Representatives in District 13 in 1992, 13th District Chair (1992-94), a member of the State Republican Committee (1992-94), and a member of the executive committee of the Unified Republican Committee of Cass County (1992 - 94). Prior to taking the bench I contributed time and funds to political causes and campaigns of various sorts. I have refrained from all political activity since I have been a full-time judge with the exception of my work as Co-Chair of the Judicial Conference Committee on Judicial Compensation. The political activity that I engaged in as a member of the Judicial Conference Committee on Judicial Compensation consists largely of soliciting the support of state legislators and the governor on issues relating to judicial salaries, retirement and other benefits.

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

(a) Describe chronologically your law practice and legal experience after graduation from law school including:

(1) whether you served as clerk to a judge, and if so, the name for the judge, the court and dates of the period you were a clerk;

ANSWER: I never clerked for a judge or court.

(2) whether you practiced alone, and if so, the addresses and dates;

ANSWER: I had a sole practice in a building located at 120 Main Avenue, West Fargo, ND from 1992 until I took the bench in 1994. I office shared with Scott Griffeth, who still practices law in West Fargo and can be reached at (701) 282-3732.

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

ANSWER: The only law firm that I have ever been associated with since graduation from law school is Ohnstad Twichell, P.C. and its predecessors. I started out as a law clerk with the firm between my second and third year of law school and then went to work for them upon graduation. I was a law clerk from May 1984 until October 1984, when I became licensed and an associate attorney. I became a shareholder in January of 1989 and continued in that capacity until I left the firm in November of 1991.

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

ANSWER:

During the time that I was at Ohnstad Twichell, P.C., I tried four or five jury trials to verdict and tried approximately 2,500 misdemeanor bench trials during my tenure as city prosecutor for the City of West Fargo. I would estimate that about 2,300 were tried in Municipal Court and approximately 200 were tried in County Court, with a very small number (five or fewer) being tried *de novo* on appeal in the district court. The vast majority of these bench trials were held in West Fargo Municipal Court. During that same time period (1984-92) I tried another seven or eight family law bench trials. I also tried a number of collection trials and approximately 25 forcible detainer (eviction trials) to verdict before the bench. In addition to that work, during my time in private practice I frequently represented parties before the N.D. Workers Compensation Bureau (and it's predecessor the N.D. Workmen's Compensation Board). I believe that I tried approximately 10 to 15 Worker's Compensation claims to decision before either a hearing officer or an administrative law judge. I have tried approximately 4 or 5 social security actions before an Administrative Law Judge, and I believe that I tried one Railroad Retirement Claim before an Administrative Law Judge, although the case may have been settled after a scheduling conference before the Administrative Law Judge. I recall litigating two adversary actions in bankruptcy court, one of which was tried.

It should be noted that nearly all of my calculations relating to my private practice experience are the result of my recollection as the law offices of Ohnstad Twichell, P.C. has a practice of purging files that are more than 10 years old and I have been separated from the firm for approximately ten years. I have been informed by the Managing Partner for the Ohnstad Twichell Law Firm, Brian Neugebauer, that the only files of mine that remain with the firm are those which were opened in the last year or two that I was in practice. Most of those files were files on which I did very little work as I decided to leave Ohnstad Twichell in September or October of 1991 in anticipation of making a run for the North Dakota House of Representatives. Thus, virtually all of my substantial work must be recreated from memory.

During the time that I was in sole practice I was engaged in the general practice of law with a primary emphasis in family law, personal injury, workers compensation, real estate and wills. While in sole practice I tried a few contested workers compensation hearings to an ALJ, two or three divorce bench trials, and one misdemeanor jury trial.

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

ANSWER: By sheer number while I was in private practice the vast bulk of my cases were municipal cases in which I represented the City of West Fargo, ND, the City of Riverside, ND, and the City of Moorhead, MN. On average these cases consumed about 20% of my time. The rest of my work was almost entirely research and writing in the first two or three years of practice and workers compensation, family law, other administrative law, personal injury and plaintiff's medical malpractice (although on most of the malpractice cases I was the "second chair" attorney). Nearly all of my non-municipal work was spent representing private individuals, although I did some litigation work for Northwestern Bell Telephone Company (personal injury) and some for the Insurance Reserve Fund of North Dakota.

(c) (1) Describe whether you appeared in court frequently, occasionally, or not at all. If the frequency of your appearances in court varied, describe each such variance, providing dates.

ANSWER: I have appeared in court frequently as a trial lawyer.

(2) Indicate the percentage of these appearances in

(A) federal courts;

ANSWER: Including administrative hearings, about 5%. I have not appeared in any federal court since taking the bench in 1994, although on occasion been asked by the Federal Court to conduct arraignments on their behalf as a magistrate. I believe that I have presided over two or three arraignments/bail hearings in Federal Court since I have been a state judge.

(B) state courts of record;

ANSWER: While in private practice, about 50%.

(C) other courts.

ANSWER: While in private practice 45%–almost all of it municipal court work.

(3) Indicate the percentage of these appearances in:

(A) civil proceedings;

ANSWER: While in private practice approximately 20%.

(B) criminal proceedings.

ANSWER: While in private practice approximately 80%. It should be noted that these represent percentages of appearances not amount of time. I would guess that my civil work constituted about 80% of my time and the municipal prosecution work constituted about 20% of my time.

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

ANSWER: I would estimate that I have tried some 200 cases to verdict in courts of record. The vast majority of these cases would have been traffic infractions tried as transfer cases or appeals to the District Court while I was the city prosecutor for the City of West Fargo. I also tried approximately 7 or 8 family cases to verdict, 25 forcible detainer actions (evictions) to verdict. I believe that I tried approximately 10 workers compensation claims to formal hearing before an ALJ or hearing officer. I also tried approximately five social security actions before an ALJ. I believe that I may have tried one Railroad Retirement Board case before an ALJ, although it may have settled on the eve of hearing. I litigated two adversary actions in Bankruptcy Court, one of which was tried.

It should be noted that since most of these matters either (1) never even resulted in the opening of a file (I kept a current litigation file on traffic cases which was constantly purged once the cases were resolved) or (2) are files that were purged at Ohnstad Twichell consistent with their destruction of files policy these numbers are estimates based on my recollection of my cases.

(4) Indicate the percentage of these trials that were decided by a jury.

ANSWER: 2% of the total number of cases I tried to verdict in court of record were tried to a jury. If one includes the number of cases I tried to verdict in courts not of record the percentage is approximately .267 %. During the time I practiced law I had, on average, one jury trial every 18 months or so.

(d) Describe your practice, if any, before the United States Supreme Court. Please supply four (4) copies of any briefs, amicus or otherwise, and, if applicable, any oral argument transcripts before the U.S. Supreme Court in connection with your practice.

ANSWER: I have never practiced before the United States Supreme Court.

(e) Describe legal services that you have provided to disadvantaged persons or on a *pro bono* basis, and list specific examples of such service and the amount of time devoted to each.

ANSWER: I have done substantial pro bono work during my tenure as a practicing lawyer. Most of my *pro bono* work involved family law cases, usually divorces, although occasionally I was involved in a protection order case for an abused person. It is impossible for me to give exact times and dates since all of my records have been purged. I would note that I believe that I received on a couple of occasions the pro bono participation award from State Bar Association of North Dakota. In addition to cases formally assigned by the *pro bono* panel, I took a fairly large number of *pro bono* cases that came through the door. I would estimate that at any given time I had 4 or 5 open *pro bono* files.

Since taking the bench I have taught at various CLE seminars (usually on drug courts, evidence, professional responsibility, or judicial ethics). I have also taught classes on the courts to citizen groups as part of the local adult education program. I have conducted mock trials and judged moot court competitions with University of North Dakota law students. I have participated in the ABA Freedom Forum presentations at local high schools. I have also occasionally guest lectured high school students in government classes on the courts. I have presided over numerous "My Day in Court" events (a program in which 6th graders come to criminal court and observe and then have a question and answer session along with a mock arraignment). I have also been a frequent speaker to service clubs on court issues.

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

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

(b) a detailed summary of the substance of each case outlining briefly the factual and

legal issues involved;

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

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

***1. Grace v. N.D. Workers Compensation Bureau*, 395 N.W. 2d (N.D. 1986)**

James Grace was a mason who was employed as a job foreman on a construction site for the Northern Plains Crop Institute on the grounds of the North Dakota State University in Fargo. Grace did not have recent experience as a foreman, had recently spent some period of time unemployed and the then existing construction climate was very poor. Construction was running behind on the project and work was being pushed on the project in order to avoid significant cost overruns. The crew led by Grace was working on an elevator shaft in the hot sun and temperatures in the shaft exceeded 140 degrees. In addition a crane was working overhead and Grace testified that working under an operating crane was an exceptionally dangerous and worrisome thing. Grace suffered a heart attack. Grace filed a claim for workers compensation benefits and the case proceeded to hearing. The Workers Compensation Bureau denied the claim indicating that there was no unusual stress or exertion, which is required for an award of benefits for a heart attack or stroke under North Dakota law. After the hearing Grace's original lawyer was disbarred and the disciplinary counsel for the Supreme Court approached me and asked if I would represent Grace on appeal. I agreed to take the case. On appeal the issue was whether or not the facts constituted unusual stress. In a 3-2 decision the North Dakota Supreme Court held that masons work under all kinds of pressure and conditions in North Dakota and that no unusual stress or exertion had been proven. The state was represented by Dean Haas, 905 S. Fillmore, Ste. 400, PO Box 9418, Amarillo, TX 79105-9418; Tel. No. (806) 345-6332.

***2. Jepson v. N.D. Workers Compensation Bureau*, 417 N.W. 2d 184 (N.D. App. 1988)**

I represented Russell Jepson in a workers compensation claim. Jepson suffered a dislocation of his shoulder in the course of his employment. He had a previous history of a single shoulder separation in the past, but he reported and medical records confirmed that he had a full recovery and was suffering no loss of functionality after the recovery. The Bureau agreed to a percentage of disability and that the incident was work related. The only issue for litigation was whether or not the aggravation statute should be applied to reduce Jepson's benefits. The hearing officer ruled in favor of the Bureau, which ruling was affirmed by the district court. Jepson appealed and the case was assigned to the intermediate court of appeals. The Court of Appeals ruled that Jepson's lack of a loss of functionality after recovery from the first injury was such that the aggravation statute did not apply. Subsequent to the ruling the legislative assembly

changed the law to require the application of the aggravation statute to cases like Jepson's. The trial judge was Michael O. McGuire, East Central Judicial District Judge, Fargo, ND; Tel. No. (701) 241-5680. The Court of Appeals panel consisted of Vernon R. Pederson, Eugene Burdick and Douglas Heen. Judges Burdick and Heen are deceased. Justice Vernon Pederson is now fully retired, he resides in Fargo, ND; Tel. No. (701) 237- 9566. Justice Pederson is currently 83 years of age and I am unaware of the status of his health. The state was represented by Dean Haas, 905 S. Fillmore, Ste. 400, PO Box 9418, Amarillo, TX 79105-9418; Tel. No. (806) 345-6332.

***3. In re the Matter of Kyle Smith*, 199 B.R. 714 (Bankr. D.N.D. 1990)**

I represented Kyle Smith in a personal injury claim that he had arising out of a car/motorcycle accident. Smith was on his motorcycle and struck by a pick-up truck that failed to yield the right of way. Smith did not have no-fault coverage on his motorcycle (not required at the time) and had no medical insurance. Smith was in a coma for a number of weeks and suffered a serious brain injury as a result of the accident. Smith's short term memory was dramatically impacted. The operator of the truck had a $100,000 policy limit on liability. Smith had large medical bills, both hospital and physician. As a result of Smith's serious mental limitations arising out of his injuries, Smith's father was appointed his guardian to represent his interests in the suit. In reviewing North Dakota's exemptions I discovered that an annuity was an exempt asset in bankruptcy and informed the insurance company that we would like to structure the settlement in an annuity and that we intended to file bankruptcy in the hopes of avoiding some of the medical bills. The reason for this was that given the debilitating nature of Smith's injuries it was apparent that he would not be able to handle his affairs and that unless some effort was made to provide for him, he would likely become a ward of the County. Because I was able to settle the case without suit for the full policy limits, the fees charged were actual fees incurred and costs expended plus $750 to cover the bankruptcy and filing fees. Smith received the balance of the first $10,000 and the remaining $90,000 was used to purchase an annuity. The settlement was approved in County Court, Judge Frank Racek, Cass County Judge presiding. In the subsequent bankruptcy the hospital, clinic and physicians commenced an adversary action asserting fraud and that the settlement contravened their attorney's lien, which had not been actually perfected. Smith countered that the failure to perfect the lien by filing was a fatal flaw, that no fraud could be found and that the proceeds should have been exempt from levy. Shortly before trial, Smith's father and guardian suffered a stroke and at the trial he was unable to recall any details of the conversations that we had about the settlement. Kyle Smith had only a vague recollection and testified that he had no choice in the settlement as his guardian had made the decision for him. Because no one was able to testify as to what had happened, I ended up being called as a witness in the case. At the conclusion of the case, Bankruptcy Judge William Hill ruled that even though the lien had not been perfected by filing, the parties were aware of the existence of the hospital bills and that there was actual knowledge of the existence of a statutory hospital lien. A separate issue existed as to whether or not the hospital lien covered the

physicians and clinics bill. The Court ruled that the lien did not extend to physicians bills or clinic bills and that that portion of the settlement was not subject to levy. The Court ruled that all transactions had been open and approved by the County Court and that no fraud lay in the action. At trial Kyle Smith was represented by Dean Rindy, 15 Broadway, Ste. 15 Fargo, ND; Tel. No. (701) 280-5801. Brad Sinclair, 10 Roberts St., PO Box 6017 Fargo, ND; Tel. No. (701) 232-8957 represented the plaintiff, St. Luke's Hospital. Jon Brakke, 502 1st Ave. N. Fargo, ND; Tel. No. (701) 237-6983 represented the clinic and physicians. Lowell Bottrell, 3100 13th Ave. SW, Ste. 202 Fargo, ND Tel. No. (701) 235-3300 represented the Bankruptcy Trustee.

***4. Sellie v. N.D. Insurance Guaranty Assoc.*, 494 N.W. 2d 151 (N.D. 1992)**

I represented Mildred Sellie in a personal injury claim for damages arising out of an incident that occurred while Sellie was on a senior citizen's bus tour of New England. Sellie was 74 at the time of the injury. While in a crowded hotel lobby, an employee of the tour company SCR, Inc. pushed a loaded four-wheeled luggage cart into her. Sellie suffered a serious back injury which effectively limited all of her life activities. SCR did not have a comprehensive general liability policy and the only insurance available was a motor vehicle policy. The insurance company went bankrupt before the action was commenced. The N.D. Insurance Guaranty Association succeeded to the liability of SCR's insurer but declined to defend the claim. They asserted that the policy did not provide coverage as the incident did not "arise out of the use of an automobile." The policy did however provide:

> This Insurance does not apply to . . .8. Bodily injury or property damage resulting from the movement of property by a mechanical device (other than a hand truck) not attached to the covered auto.

The Insurance Guaranty Association declined to all coverage. Sellie entered into a settlement of all claims with SCR for the sum of $128,000 under a Shuggart v. Miller agreement under which SCR agreed to the settlement and Mrs. Sellie agreed to look only to the Insurance Reserve Fund for satisfaction. We provided the Insurance Guaranty Association with three separate notices of our intention to enter into the settlement and they continuously declined to become involved in the defense of the claim or to pay on any claim. After entering into the settlement a declaratory judgment was sought seeking to enforce the settlement. A trial was held before South Central District Judge Dennis Schneider in Bismarck, ND. (Judge Schneider is deceased). By the time the case came to trial I had left Ohnstad Twichell and the case was tried by Steven McCullough of West Fargo, ND. Michael Morley of Grand Forks, ND represented the Insurance Guaranty Association. There were three issues, whether the settlement was the product of collusion, whether the settlement was excessive and whether or not the policy provided coverage. The defendant asserted that a hand truck was by definition a two-wheeled cart and that the four wheeled vehicle was not a hand truck, that the settlement was excessive and that the settlement was the product of collusion. The trial court found that the settlement was reasonable, that there was no collusion as the defendants had notice of all negotiations and were invited on numerous occasions to defend the claim, and that a four wheeled vehicle was not a hand truck. On appeal to the North Dakota Supreme Court, the Court held that the hand truck exception was an

affirmative grant of coverage as it was an exclusion to an exclusion, that the settlement was reasonable and free from collusion and that a hand truck consisted of either a four wheeled or two wheeled cart. The Court ordered that judgment be entered in favor of Mrs. Sellie for the amount in the settlement agreement plus interests and costs. Ms. Sellie was represented at trial by Steven McCullough PO Box 458 West Fargo, ND; Tel. No. (701) 282-3249. The Insurance Guaranty Association was represented by Michael Morley, 215 3rd St. N. Ste. 208, PO Box 14519 Grand Forks, ND Tel. No. (701) 772-7266.

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5. City of Devils Lake v. Dennis Larson and Violet Larson, **Northeast District Court of North Dakota, Ramsey County, Civ. # 13130**

Dennis Larson and Violet Larson sued the City of Devils Lake, North Dakota, which is situated in Northeastern, ND, for damage caused to their residence when a torrential downpour overwhelmed the sanitary sewer system causing raw sewage to backup into their basement. Shortly before the storm, which was described by experts as "a hundred year rain", the City of Devils Lake had undertaken a "total" separation of the storm and sanitary sewers. During the course of the sewer separation project, at least three storm sewers that emptied into the sanitary sewer system were overlooked. The plaintiffs asserted that the design of the sewer system was negligent. The City asserted that it was not under any obligation to produce a total separation of sanitary and storm sewers and that the city need only provide a sewer system of at least customary quality. The case was tried to a jury verdict in Devils Lake, ND, the Hon. Lee Christofferson, Northeast District Judge, presiding Tel. No. (701) 662-7072. The case took 3 or 4 days to try to a defense verdict. I represented the Defendant City of Devils Lake. Thomas Rutten, 509 5th St., PO Box 838 Devils Lake, ND Tel. No. (701) 662-4077 represented the plaintiffs.

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6. David C. Engstrom v. Renee Engstrom, **East Central Judicial District Court, Cass County, Civ. # 87-170**

David Engstrom, M.D. commenced an action for divorce from his long-term spouse Renee Engstrom. Mrs. Engstrom did not work outside the home and suffered from agoraphobia and depression. The issues at trial were property division and spousal support. The case was settled on the day of trial immediately after the first witness was sworn. I represented Dr. Engstrom. Robert Feder of Fargo, ND represented Mrs. Engstrom. Mr. Feder is deceased. The case was presided over by East Central Judicial District Judge Lawrence Leclerc of Fargo, ND; Tel. No. (701) 241-5680.

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7. Kindred State Bank v. Vernon Arneson, et al., **East Central Judicial District Court, Cass**

County, Civ. # 87-1155

Kindred State Bank had lent a sum of money to the defendants believing the loan was secured by various certificates of deposit. The certificates of deposit were never taken into custody by the bank, and the defendants, three brothers and a sister who were in the business of farming, eventually cashed in the notes in order to secure operating capital. This left the bank in an unsecured position. The Bank commenced an action for collection. The defendants appeared but failed to defend. The Bank took a default judgment and sold farm land owned by the defendants at public auction subject to an interest of the Federal Land Bank. The defendants unwittingly allowed the redemption period to run, which resulted in the bank having outright ownership of land with a value of over $300,000 to cover an indebtedness of something less than $125,000. When the Federal Land Bank found that the redemption period had run and that the bank now owned the property, they contacted the Arneson brothers. Arnesons the Land Bank, and the Kindred State Bank eventually worked out a three party arrangement, where in the Kindred State Bank was made whole, including their attorneys fees, the land was deeded back to the Arnesons by the bank subject to an agreement to restructure on the part of the Land Bank. I represented the Kindred State Bank, Robert Orseth, PO Box 3289 Fargo, ND; Tel. No. (701) 298-9897 represented the Land Bank and Cheryl Ellis (since disbarred–current whereabouts unknown) and David Overboe 1042 14th Ave. E. West Fargo, ND (701) 282-6111 represented the Arnesons.

***8. Van Douglas Johnson, v. Wade W. Allen, et al.*, United States District Court, Southeastern Division of the District of North Dakota, Civ. # A3-89-65**

Van Johnson brought suit against the defendant police officers and the Cities of West Fargo, ND and Riverside, ND pursuant to 42 U.S.C. § 1983 for injuries he suffered during an altercation with police officers in West Fargo, ND. At approximately 11:00 p.m. an obviously intoxicated person was observed jaywalking across Sheyenne Street in West Fargo (one of the busiest thoroughfares in town). The police were called as Johnson's jaywalking appeared to be placing him in physical danger. The West Fargo police on duty were all otherwise engaged and the dispatcher asked that police officers from the adjacent city of Riverside assist in investigating Mr. Johnson's welfare. When the officer responded to the call he found Mr. Johnson heading toward a dead end in the street with the only exit available would have been by trespassing into the school bus yard. Officer Allen approached Johnson and asked him to stop. Johnson swore at Allen and kept walking. Allen took up a position between Johnson and the bus yard and asked Johnson where he was going. Johnson replied by swearing again and indicating that he was "going home." Allen attempted to stop Johnson (who was a very large man) and Johnson swore again and pushed Allen. Allen then attempted to physically stop Johnson and an altercation took place. During the course of the altercation Allen struck Johnson with a flashlight "numerous times" and attempted to bring him into custody. Eventually Johnson was handcuffed and arrested for disorderly conduct. At the ensuing criminal trial, Johnson was acquitted. Johnson subsequently sued Allen and the West Fargo officers who came to assist and the cities of West

Fargo and Riverside. He asserted a claim for medical damages, pain and suffering, and emotional distress. Our firm represented the defendants. Depositions were taken and during the course of a settlement conference in District Court the case was settled, leaving open the issue of attorneys fees. The case settled for a sum of less than $20,000 and the District Court, after hearing, awarded approximately $25,000 in attorney's fees. I was the primary attorney on the case for the defendants, although the settlement was actually negotiated by Steven McCullough of West Fargo, ND because I was out of the country at the time of the settlement conference. The Plaintiff was represented by Brian Nelson, 111 9th St. S. Fargo, ND Tel. No. (701) 237-4433.. U.S. District Judge Rodney Webb, Fargo, ND Tel. No. (701) 297-7040 presided.

***9. Gwen Berg-Nistler v. Northwestern Bell Telephone Company,* East Central Judicial District, Cass County, Civ. # 91-1503**

This case involved an intersection collision involving a Northwestern Bell service truck and an automobile operated by Ms. Berg-Nistler. Ms. Berg-Nistler alleged injuries to her back and neck. Prior to the auto accident, Ms. Berg-Nistler had previous back problems. The issues litigated related to liability and damages, with the primary question involving prior injuries and the extent and nature of the injuries that could be attributed to the accident. The case settled prior to trial. I represented Northwestern Bell Telephone Company and Paul Grinnell 215 30th St. N., Moorhead, MN Tel. No. (218) 236-6462 represented Ms. Berg-Nistler.

***10. In re the Worker's Compensation Claim of Margaret Bankers,* Claim # 89-334,529T**

Margaret Bankers was employed as a color printer in various photo-processing labs over a period of some 25 years. During the course of her employment she developed problems with carpal tunnel syndrome and a similar repetitive motion injury to the feet. At first, the Bureau claimed that the conditions were chronic and degenerative and unrelated to her employment. We contacted Ms. Banker's physician and had her provide the physician with a detailed explanation of the work related activities that Mrs. Bankers engaged in. During the course of these discussions the doctor was made aware that operating a color processing machine required the use of both feet and both hands on a repetitive basis. Once made aware of Ms. Banker's job duties and the number of years that she had worked in the field, the physician modified his report to indicate that the conditions were likely a result of repetitive motion at work. The Bureau continued to deny the claim, but offered to pay the claim under the aggravation statute. We litigated the claim to hearing and eventually settled the case. I represented Ms. Bankers. Dean Haas, 905 S. Fillmore, Ste. 400, PO Box 9418, Amarillo, TX 79105-9418; Tel. No. (806) 345-6332. and Clare Hochhalter, 220 E. Rosser Ave. PO Box 699 Bismarck, ND, Tel. No. (701) 530-2420 represented the State of North Dakota.

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20. **Criminal History**: State whether you have ever been convicted of a crime, within ten years of your nomination, other than a minor traffic violation, that is reflected in a record available to the public, and if so, provide the relevant dates of arrest, charge and disposition and describe the particulars of the offense.

ANSWER: None.

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

ANSWER:

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date of filing	Nature	Parties	Court	Zip
04/1998	Civil	Michele Erickson and Ralph Erickson v. Judy Oxton, et al.	Cass County ND Dist. Ct. Fargo, ND	58108

Case History: This action arose out of an automobile accident my wife, Michele Erickson was involved in. She sought money damages for injuries received in a rear-end accident. My claim was derivative and for money damages for loss of services only. The case was commenced on April 28, 1998 and settled on January 14, 2000. The settlement involved the payment of a sum of money without any admission of wrongdoing on the part of any of the defendants.

Full Detail: My wife was the fourth or fifth car stopped at a red light. She was subsequently rear-ended by three or four cars. My wife understood that the first car to strike her came to an abrupt stop causing the other three cars to collide with her. Her car struck the car immediately ahead of her as a result of the accident. The driver of the second car asserted that she, too, had come to a normal stop, and that she had been rear ended by the cars following her. The driver of the fourth car into the collision admitted that he was not watching the road, that he had not come to a stop and that he struck the car in front of him at something only slightly slower than normal road speed. The other drivers conflicted as to whether the second driver's abrupt stop caused the accident or whether the fourth driver's inattention started the chain reaction. All admitted that my wife was stopped well in advance of any of the cars approaching the scene. As a result of the accident my wife, who was five months pregnant, went into pre-term labor. She was

transported to the hospital and labor was stopped using medications. She spent some time in the hospital on observation and was then sent home and continued to take anti-labor medications for some time. She also suffered a low back injury as a result of the accident, and a shoulder injury as a result of clenching the steering wheel following the first impact. The case was settled for approximately $25,000. My claim was for loss of consortium, but limited to economic losses. As a result of my wife's difficulties we hired a cleaning service to provide some assistance around the house. The case was sued out and settled before trial and before my deposition was ever taken.

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

ANSWER: I do not anticipate that there will be significant conflicts, as I have been a judge for the past eight years. I will provide the Clerk of Court with a list of those attorneys that I currently have on my conflict list because the either represent me or an immediate family member. I will comply fully with the requirements of the Code of Judicial Conduct.

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

ANSWER: No

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

ANSWER: See attached Financial Disclosure Report.

25. **Statement of Net Worth**: Complete and attach the financial net worth statement in detail. Add schedules as called for.

ANSWER: See attached Net Worth Statement.

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

ANSWER: No.

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

ANSWER: N/A.

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

ANSWER: I filled out an on-line application to the White House and forwarded a copy of my filing and a resume to the Governor's Office. I was invited to interview at the White House for the position. After the interview I forwarded copies of some opinions to the White House on cases on which I had been reversed. All of those cases have been disclosed in this statement and copies of those opinions are attached. I was interviewed by the Federal Bureau of Investigation and the Department of Justice on several occasions. I was nominated on November 12, 2002.

(c) Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as asking or seeking a commitment as to how you would rule on such case, issue, or question? If so, please explain fully.

ANSWER: No.

FINANCIAL STATEMENT

NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS			LIABILITIES		
Cash on hand and in banks	13	336	Notes payable to banks-secured		0
U.S. Government securities-add schedule		0	Notes payable to banks-unsecured		0
Listed securities-add schedule	16	377	Notes payable to relatives		0
Unlisted securities–add schedule	1	000	Notes payable to others		0
Accounts and notes receivable:		0	Accounts and bills due	2	000
Due from relatives and friends		0	Unpaid income tax		0
Due from others		0	Other unpaid income and interest		0
Doubtful		0	Real estate mortgages payable-add schedule	177	478
Real estate owned-add schedule	344	200	Chattel mortgages and other liens payable		0
Real estate mortgages receivable		0	Other debts-itemize:		0
Autos and other personal property	79	000			
Cash value-life insurance	89	891			
Other assets itemize: pending inheritance	2	500			
Ralph 401k	21	297			
Ralph 457b	38	745			
Michele--Keough	97	923	Total liabilities	179	478
Ralph NDPERS Pension	36	880	Net Worth	561	671
Total Assets	741	149	Total liabilities and net worth	741	149
CONTINGENT LIABILITIES			GENERAL INFORMATION		
As endorser, comaker or guarantor		0	Are any assets pledged? (Add schedule)		No
On leases or contracts		0	Are you defendant in any suits or legal actions?		No
Legal Claims		0	Have you ever taken bankruptcy?		No
Provision for Federal Income Tax		0			

Other special debt			0				

Schedule–Real Estate Owned

Description	**Value**
Primary Residence Fargo, ND	$344,200

Schedule–Real Estate Mortgages Payable

Description	Mortgage Holder	Amount Owed
Purchase Money Mortgage on Primary Residence	Washington Mutual	$164,478
Home Equity Loan on Primary Residence	Gate City Federal Savings Bank	$ 13,000

Schedule–Listed Securities

Security	Symbol	# of Shares	Value
Proctor & Gamble Co.	PG	17	$ 1460.98
Wells Fargo & Co.	WFC	25	$ 1171.75
Avaya	AV	6	$ 14.70
Community First Bankshares	CFBX	78	$ 2063.88
Intel Corp	INTC	100.75	$ 1568.68
Lucent Technologies	LU	74.466	$ 93.83
Washington Mutual Investors A	AWSHX	153.553	$ 3610.03
Oakmark Select Fund	OAKLX	268.402	$ 6393.34
TOTAL			**$ 16377.19**

Schedule–Unlisted Securities

Security	# of Shares	Value
Digital Broadcast Corporation (common stock)	500	$1000
TOTAL		**$1000**

QUESTIONNAIRE OF

WILLIAM DANIEL QUARLES, JR.

BEFORE THE COMMITTEE ON THE JUDICIARY,
UNITED STATES SENATE

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

Answer: William Daniel Quarles, Jr.

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

Answer U.S. District Judge for the District of Maryland

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

Circuit Court for the City of Baltimore
111 N. Calvert Street
Suite 550E
Baltimore, MD 21202
(410) 545-3766

4. **Birthplace**: State date and place of birth.

January 16, 1948
Baltimore, MD

5. **Marital Status**: (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es). Please also indicate the number of dependent children.

Married to Mrs. Mary Ann Pirog Quarles
Operations Specialist
Pretrial Services Office
U.S. District Court for the District of Maryland
101 W. Lombard Street
Baltimore, MD 21201

no dependent children

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

Catholic University of America, 1976 to 1979
Washington, DC
Juris Doctor, 1979

University of Maryland, 1975 to 1976
College Park, MD
Bachelor of Science, 1976

Johns Hopkins University, 1967 to 1969
Baltimore, MD

Community College of Baltimore, 1965 to 1967
Baltimore, MD
Associate of Arts, 1976.

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

1996 to present
Circuit Court for Baltimore City
111 N. Calvert Street
Baltimore, MD 21202
Associate Circuit Judge

Board of Trustees, Library Corporation of Loyola and
Notre Dame Colleges, 1992 to 1995. This was an unpaid position.

1986 to 1996
Venable, Baetjer and Howard
210 Allegheny Avenue
Towson, MD 21204
(1994 to 1996)

Venable, Baetjer, Howard & Civiletti
1201 New York Avenue, NW
Washington, DC 20005
(1986 to 1994)
Associate and Equity Partner (elected to partnership 10/87)

Board of Directors, Washington Theater Awards Society
("Helen Hayes Awards"), 1989. This was an unpaid position.

Executive Council of Parents, Loyola College of Maryland, 1988 to 1990. This was an unpaid position.

1982 to 1986
US Attorney's Office
US Courthouse
101 W Lombard Street
Baltimore, MD 21201
Assistant US Attorney

1981 to 1982
Finley, Kumble, Wagner, Heine, Underberg & Casey
1100 Connecticut Avenue, NW
Washington, DC 20036
Associate

Law Clerk
The Honorable Joseph C. Howard
US District Judge for the District of Maryland
US Courthouse
101 W Lombard Street
Baltimore, MD
1979 to 1981

1977 to 1979
Linowes & Blocher
1010 Wayne Avenue
Silver Spring, MD 20910
Law Clerk in firm's DC office

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

None

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

Nominated by President Bush to United States District Court for the District of Maryland, June 1992.

Governor's Citation for Membership on Governor's Commission On Service and Volunteerism, 2000

Martindale-Hubbell AV rating

U.S. Drug Enforcement Administration ("DEA") Award for Outstanding Contributions to Drug Law Enforcement, 1986.

DEA and Anne Arundel County Police Award for Scallio Prosecution, 1986.

Postal Inspectors' Award, 1986.

U.S. Attorney General's Special Achievement Award, for service as Deputy Coordinator, Presidential Organized Crime and Drug Enforcement Task Force, 1984.

Hats Off Award, Boy Scouts of America Baltimore Area Council, 1983, 1985.

Corpus Juris Secundum Award, 1979.

Who's Who in American Law, since 1987.

As an Assistant US Attorney, I also received commendations from the Attorney General's Advocacy Institute, the FBI, the DEA, the US Customs Service, the US Secret Service, the Immigration and Naturalization Service, and the Inspector General of the Department of Health and Human Services.

10. **Bar Associations**: List all bar associations or legal or judicial-related committees, selection panels 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, Section of Litigation, Federal Procedure Committee, 1986 to 1997.

National Bar Association, 1980 to 1997.

Permanent Member, Judicial Conference, U.S. Court of Appeals for the Fourth Circuit, 1985 to 1998.

Committee to Revise Local Rules of the U.S. District Court for the District of Maryland, 1989.

Federal Bar Association, 1981 to 1983.

Maryland State Bar Association, since 1991

Monumental City Bar Association, 1981 to 1998.

Bar Association of Baltimore City, 1992 to 1995.

Baltimore County Bar Association, 1994 to 1998.

American Bar Association, 1979 to 1997.

Selden Society, since 1992

Serjeants Inn, Baltimore, Maryland, 1985-1990.

11. **Bar and Court Admission**: List each state and court in which you have been admitted to practice, including dates of admission and any lapses in membership. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

Maryland Court of Appeals	December 6, 1991
DC Court of Appeals	December 17, 1979
US District Court for the District Of Maryland	June 12, 1980
USCA (4th Cir.)	June 12, 1980
US District Court for the District Of Maryland	November 2, 1981
USCA (DC)	April 24, 1981
US Bankruptcy Court (MD)	January 8, 1982

There have been no lapses in membership.

12. **Memberships**: List all memberships and offices currently and formerly held in professional, business, fraternal, scholarly, civic, charitable, or other organizations since

graduation from college, other than those listed in response to Questions 10 or 11. Please indicate whether any of these organizations formerly discriminated or currently discriminates on the basis of race, sex, or religion - either through formal membership requirements or the practical implementation of membership policies. If so, describe any action you have taken to change these policies and practices.

Board of Trustees, Library Corporation of Loyola and Notre Dame Colleges, 1992 to 1995.

Board of Directors, Washington Theater Awards Society ("Helen Hayes Awards"), 1989.

Executive Council of Parents, Loyola College of Maryland, 1988 to 1990.

None of these organizations discriminated or currently discriminates on the basis of race,sex, or religion.

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

Summary Adjudication: Dispositive Motions and Summary Trials (John Wiley & Sons, 1991), with Hon. Joseph C. Howard and Roger T. Scully.

"End of Mass Tort Class Actions? Dismissal of the *Castano* Cigarette Smokers Suit," *Inside Litigation*, July 1996.

"*Georgine*: Will Federal Settlement Class Actions Survive?" *Inside Litigation*, June 1996.

"Will Federal Settlement Class Actions Survive *Georgine*?" *Defense Line*, Summer 1996.

"Health-Care Prosecution in a Reformed (or Unreformed) System," with Geoffrey R. Garinther, *Maryland Bar Journal*, January/February 1995.

"Health-Care Prosecutions: A Review of the Federal Law Enforcement Implications of Health-Care reform," with Geoffrey R. Garinther, *White-Collar Crime Reporter*, July August 1994.

"High Court States Flexible Standard for the Admission of Expert Testimony," *Inside Litigation*, August 1993.

"Disclosure of Expert Testimony would Influence Other Reform Measures," *Inside Litigation*, November 1991.

"The Judicial Improvements Act of 1990 -- Incremental Reform," *Inside Litigation*, December 1990.

"Proposed Revisions to Rule 56 Continue Trend Toward Summary Adjudication," with Roger Scully, *Inside Litigation*, March 1990.

"First, Read the Instructions," with Roger Scully, *Inside Litigation*, May 1989.

"Increased Amount in Controversy Creates Opportunities for Successful Motions to Dismiss," *Inside Litigation*, March 1989.

No speeches have been given over the past 10 years.

14. **Congressional Testimony**: List any occasion when you have testified before a committee or subcommittee of the Congress, including the name of the committee or subcommittee, the date of the testimony and a brief description of the substance of the testimony. In addition, please supply four (4) copies of any written statement submitted as testimony and the transcript of the testimony, if in your possession.

Answer: None

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

Good. Last physical was in December 2001.

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

(a) a short summary and citations for the ten (10) most significant

opinions you have written;

Answer: It is difficult to assign significance to a trial court's rulings; each case is important to the litigants. The following is a summary of cases which reflect the diversity of the case load of the Circuit Court for Baltimore City.
Copies of the opinions are attached.

Allen v. Allen, Case Nos. 95138021 CE197036; 95122067/CE197036 (Cir. Ct. Balto. City July 14, 1998). This is an opinion calculating and awarding pension benefits, indefinite alimony and a monetary award in a divorce after remand from the Maryland Court of Special Appeals.

Armiger v. St. Ambrose Housing Aid Ctr. Case No. 94053043/C176347 (Cir. Ct. Balto. City July 13, 1998). In this case, the trial court determined whether laches barred arbitration; the court determined that arbitration was appropriate.

Bowers v. Callahan, Case No. 24-C-99-000582 OT (Cir. Ct. Balto. City June 29, 1999) *reversed Callahan v. Bowers*, 131 Md. App. 163, 748 A.2d 499 (2000) *reinstated* 359 Md. 395, 754 A.2d 388, (2000). In this case, Callahan, a security guard, sought summary judgment against the personal representative of Bowers' estate. The trial court denied summary judgment, holding that a reasonable jury could have determined that Bowers' shooting death had been caused by Callahan's inept handling of a shoplifter's arrest--the arrestee had grabbed Callahan's gun and Bowers, a store employee, had been shot. The Court of Special Appeals held that summary judgment should have been granted on the basis of Callahan's limited immunity. The Court of Appeals vacated the opinion of the Court of Special Appeals citing cases holding that limited immunity questions should usually be decided by fact finders.

Eid v. Duke, Case No. 24-C-98-100019 CN (Cir. Ct. Balto. City June 29, 1999) *affirmed* No. 2200 (Md.App. Nov. 15, 2000). In this case, the court construed the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001, *et seq*. And granted summary judgment on the basis of preemption.

Ford v. Balto. City Sheriff's Ofc., Case No. 24-C-99-001000 OC (Cir. Ct. Balto. City June 1999). In thhis case, the court construed the U.S. and Maryland constitutional protections against unreasonable searches.

Harris v. Caplan, Case No. 24-C-97-246035 OT (Cir. Ct. Balto. City June

1999). In this lead paint case, the court construed the Maryland summary judgment rule and correclt predicted that the Maryland courts would not follow the federal "sham affidavit" doctrine.

Hudgins v. Blodgett, Case No. 24-C-97-344027 OT (Cir. Ct. Balto. City May 1999). In this case, the court examined sovereign immunity issues.

Johns Hopkins Bayview Physicians, P.A. v. Morrill, Case No. 24-C-00-005174 (Cir. Ct. Balto. City Oct. 16, 2001). In this case the determined that an arbitration agreement did not bar the defendant physician's counterclaim.

Knight v. Div. of Corrections, Case No. 24-C-01-000651 (Cir. Ct. Balto. City Dec. 7, 2001). In this case, the court affirmed the administrative decision to terminate the plaintiff's employment as a correctional officer for misconduct (i.e., permitting the operation of a drug distribution ring from her home).

Nizer v. Johns Hopkins Bayview Med. Ctr., Case No. 24-C-98-419246 OT (Cir. Ct. Balto. City July 3, 1999) *affirmed* No. 2599 (Md.App. Mar. 1, 2001). In this premises liability case, the court granted summary judgment to the defendant.

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

Allen v. Allen, No. 370 (Md.App. Dec. 31, 1997). In this unreported opinion, the Maryland Court of Special Appeals vacated the trial court's award of pension and remanded the case

Bradley v. Maryland, No. 1237 (Md.App. July 24, 2001). In this unreported opinion, the Maryland Court of Special Appeals reversed the appellant's robbery conviction because the trial court permitted the prosecutor to cross-examine the defendant about the fact that he had provided exculpatory evidence to his attorney only the day before he testified. Although the trial court thought the questioning had been invited by the appellant's testimony, he appellate court held that the cross-examination impermissibly implicated the appellant's post-arrest silence.

Callahan v. Bowers, 131 Md. App. 163, 748 A.2d 499 (2000) vacated 359 Md. 395, 754 A.2d 388, (2000). In this case, Callahan, a security guard,

sought summary judgment against the personal representative of Bowers' estate. The trial court denied summary judgment, holding that a reasonable jury could have determined that Bowers's shooting death had been caused by Callahan's inept handling of a shoplifter's arrest–the arrestee had grabbed Callahan's gun and Bowers, a store employee, had been shot. The Court of Special Appeals held that summary judgment should have been granted on the basis of Callahan's limited immunity. The Court of Appeals vacated the opinion of the Court of Special Appeals citing cases holding that limited immunity questions should usually be decided by factfinders.

Eastern Outdoor Advertising v. Mayor and City Council of Baltimore, 128 Md. App. 494, 739 A.2d 854 (1999). In this opinion, the Court of Special Appeals reversed the trial court's affirmance of Baltimore City's Board of Zoning Appeals denial of a conditional use application for a billboard. The appellate court held that the Board's action was not supported by substantial evidence.

Johnson v. Maryland, No. 1234 (Md. App. April 11, 2001) reversed, No. 50, ___Md. ___ (January 9, 2002). In this case, Johnson was convicted of conspiracy to commit first degree murder and related offenses. In post trial motions, he argued that a new trial on the conspiracy charge had to be granted because the named coconspirators had been acquitted in a previous trial. Holding that the rule of consistency did not apply to separate trials, the trial court denied the motion for judgment of acquittal or a new trial. The Court of Special Appeals reversed and held that the rule of consistency barred Johnson's conspiracy conviction. The Court of Appeals reversed the Court of Special Appeals and held that the rule of consistency was inapplicable in separate trials of coconspirators.

Oliver v. University of Maryland Medical System, No. 748, (Md.App. Aug.10, 2000). In this unreported opinion, the Court of Special Appeals reversed the trial court's grant of summary judgment against Oliver on the Workers Compensation Commission finding that he was 35 percent permanently disabled and held that he was entitled to attempt to prove at trial that he was 55 per cent permanently disabled.

Parker v. Housing Authority of Baltimore City, 129 Md. App. 482, 742 A.2d 522 (1999). In this case, the Court of Special Appeals reversed the trial court's grant of an apparently unopposed motion to dismiss in a lead paint case.

Swartz v. Maryland Parole Commission, No. 1348 (Md.App. Mar. 21,

2000). In this unreported decision, the Court of Special Appeals reversed the trial court's affirmance of the parole commission's denial of Swartz' parole and directed that the case be remanded to the commission for a new hearing.

Webb v. Maryland, ___Md.App.___ (June 10, 2002). In this opinion, the Court of Special Appeals reversed the conviction of a pro se litigant because the arraignment court had requested that the prosecutor inform the appellant of the charges and penalties he faced. Although the court noted that there had been substantial compliance with Maryland Rule 4-246, it held that the rule required the judge to inform the appellant of the offenses and the penalties he faced.

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

Answer: *Bowers v. Callahan*, Case No. 24-C-99-005852 OT (Cir. Ct. Balto. City June 29, 1999) *reversed Callahan v. Bowers*, 131 Md. App. 163, 748 A.2d 499 (2000) *reinstated* 359 Md. 395, 754 A.2d 388, (2000). In this case, Callahan, a security guard, sought summary judgment against the personal representative of Bowers' estate. The trial court denied summary judgment, holding that a reasonable jury could have determined that Bowers' shooting death had been caused by Callahan's inept handling of a shoplifter's arrest–the arrestee had grabbed Callahan's gun and Bowers, a store employee, had been shot. The Court of Special Appeals held that summary judgment should have been granted on the basis of Callahan's limited immunity. The Court of Appeals vacated the opinion of the Court of Special Appeals citing cases holding that limited immunity questions should usually be decided by fact finders.

Eid v. Duke, Case No. 24-C-98-100019 CN (Cir. Ct. Balto. City June 29, 1999) *affirmed* No. 2200 (Md.App. Nov. 15, 2000). In this case, the court construed the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001, *et seq*. And granted summary judgment on the basis of preemption.

Ford v. Balto. City Sheriff's Ofc., Case No. 24-C-99-001000 OC (Cir. Ct. Balto. City June 1999). In thhis case, the court construed the U.S. and Maryland constitutional protections against unreasonable searches.

Hudgins v. Blodgett, Case No. 24-C-97-344027 OT (Cir. Ct. Balto. City May 1999). In this case, the court examined sovereign immunity issues.

These opinions have been provided.

17. **Public Office, Political Activities and Affiliations**:

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

Answer: Governor's Commission on Service, 1994 to 1995; 1997 to 2000; Vice-Chair 1999-2000. I was initially appointed by Maryland Governor William Donald Schaefer; I was reappointed by Maryland Governor Parris N. Glendening.

Attorney Grievance Commission of Maryland, Inquiry Committee for Baltimore City, 1993-1996. I was appointed by the Attorney Grievance Commission.

Law Revision Commission of the District of Columbia, 1989-1991. I was appointed by the D.C. Council.

Assistant Special Counsel for the State of Maryland, 1984-1986. I was appointed by the Hon. Joseph H.H. Kaplan, the Administrative Judge of the Circuit Court for Baltimore City.

In 1992, I was nominated to the U.S. District Court for the District of Maryland; the Senate adjourned before reaching my nomination.

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

In 1988, I was a member of the Board of Maryland Lawyers for Bush

In 1996, I ran in a retention election for the Circuit Court for Baltimore City.

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

(a) Describe chronologically your law practice and legal experience after graduation from law school including:

(1) whether you served as clerk to a judge, and if so, the name for the judge, the court and dates of the period you were a clerk:

Law Clerk
The Honorable Joseph C. Howard
US District Judge for the District of Maryland
US Courthouse
101 W Lombard Street
Baltimore, MD
1979 to 1981

(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 affiliated, and the nature of your affiliation with each.

1977 to 1979
Linowes & Blocher
1010 Wayne Avenue
Silver Spring, MD 20910
Law Clerk in firm's DC office

1981 to 1982
Finley, Kumble, Wagner, Heine, Underberg & Casey
1100 Connecticut Avenue, NW
Washington, DC 20036
Associate

1982 to 1986
US Attorney's Office
US Courthouse
101 W Lombard Street
Baltimore, MD 21201

Assistant US Attorney

1986 to 1996
Venable, Baetjer and Howard
210 Allegheny Avenue
Towson, MD 21204
(1994 to 1996)

Venable, Baetjer, Howard & Civiletti
1201 New York Avenue, NW
Washington, DC 20005
(1986 to 1994)
Associate and Equity Partner (elected to partnership 10.87)

1996 to present
Circuit Court for Baltimore City
111 N Calvert Street
Baltimore, MD 21202
Associate Circuit Judge

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

From 1979 to 1981, I served as a law clerk to The Honorable Joseph C. Howard, US District Judge for the District of Maryland.
From the Fall 1981 to May 1982, I was a litigation associate in the Washington, DC office of Finley, Kumble, Wagner, Heine, Underberg & Casey, a large New York law firm. I practiced in antitrust, corporate, commercial, and bankruptcy litigation.

From May 1982 to August 1986, I was an Assistant US Attorney. My practice was primarily organized crime prosecutions. From 1984 to 1986, I was Deputy Coordinator, then Coordinator of the Presidential Organized Crime and Drug Enforcement Task Force for the Mid Atlantic Region.

From September 1986 to November 1996, I practiced with the Venable, Baetjer and Howard law firm. I was elected to equity partnership in October 1987. I served as head of the DC office litigation practice group from 1992 to 1994. My practice included complex commercial, corporate, antitrust and products liability litigation. I also served on the firm's

partner compensation and associate hiring committees.

From November 18, 1996 to the present, I have served as an associate circuit judge on the Circuit Court for Baltimore City. During that time, I have handled more than 4,000 criminal cases and tried more than 150 jury trials. I have also served as back-up civil and criminal discovery judge, coordinated the court's electronic filing project, chaired the sentence review panel, and served on the Technology Oversight Board and the *Justice Matters* editorial board.

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

Typical clients included banks, defense contractors, home builders, healthcare providers, and manufacturing companies. My specialty practice areas included the litigation of business disputes, professional malpractice, products liability, and civil and criminal antitrust matters.

(c) (1) Describe whether you appeared in court frequently, occasionally, or not at all. If the frequency of your appearances in court varied, describe each such variance, providing dates.

Answer: In the last six years, I have served as an associate circuit judge. From 1992 to 1996, my last years as an attorney, I appeared in court frequently as a civil trial lawyer. Previously, as a federal prosecutor and law clerk, I appeared in court daily.

(2) Indicate the percentage of these appearances in

(A) federal courts;

Answer: none in the past 10 years

(B) state courts of record;

Answer: 100 per cent in the past 10 years

(C) other courts.

Answer: none in the past 10 years

(3) Indicate the percentage of these appearances in:

(A) civil proceedings:

Answer: about 100 percent as an attorney from 1992 to 1996.

(B) criminal proceedings.

Answer: none from 1992 to 1996

(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.

Answer: As a trial attorney, I tried more than 30 cases to jury verdict and more than 10 to judgment as sole or chief counsel.

(5) Indicate the percentage of these trials that were decided by a jury.

Answer: See answer immediately above.

(c) Describe your practice, if any, before the United States Supreme Court. Please supply four (4) copies of any briefs, amicus or otherwise, and, if applicable, any oral argument transcripts before the U.S. Supreme Court in connection with your practice.

Answer: None

(d) Describe legal services that you have provided to disadvantaged persons or on a *pro bono* basis, and list specific examples of such service and the amount of time devoted to each.

Answer: More than half of my legal career has been spent in public service. In addition, from 1978 to1980, I served as an unpaid legal advisor to the provincial planning committee of the Holy Name Province (North America) of the Order of Friars Minor ("Franciscans") as the committee planned the move of the Franciscan Monastery from North East Washington, D.C. to Bethesda, Maryland. I have also served as an instructor for: *Trial Advocacy* and *Federal Practice* for the U.S. Attorney General's Advocacy Institute, 1984-1986 and Maryland Institute for Continuing Professional Education for Lawyers ("MICPEL"); *Professionalism* course for new admittees to Maryland Bar; National Institute for Trial Advocacy; *Summary Judgment* for the Maryland Judicial Institute.

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

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

(b) a detailed summary of the substance of each case outlining briefly the factual and legal issues involved;

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

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

ACandS, Inc. v. Abate, 121 Md. App. 590, 710 A.2d 944 (1998) ("*Abate II*"). *Abate II*, was tried before the Honorable Richard T. Rombro. Abate II tried the cases of five trial plaintiffs to full and final judgments. It also tried: common issues, identical to those common issues tried in *Abate I*, as to approximately 13,004 cases filed between October 1, 1990 and October 1, 1993; the cross-claims and third-party claims severed from the *Abate I* proceeding; and cross-claims and third-party claims from Abate II.

This consolidated asbestos trial involved numerous defendants and complex legal, factual, and scientific issues. The plaintiffs' verdicts against my client were settled.

Date:	June 1994 to February 1995
Court:	Circuit Court for Baltimore City, Maryland
Judge:	Hon. Richard Rombro
My Client:	Rapid-American Corporation
Co-counsel:	M. King Hill, III, Esquire Venable, Baetjer and Howard 210 Allegheny Avenue Towson, MD 21204 (410) 494-6200
Opposing Counsel:	Theodore Flerlage, Esquire Law Offices of Peter G. Angelos

One Charles Center
100 N. Charles Street
Suite 2200
Baltimore, MD 21201
(410) 649-2000

Israeli Aircraft Industries v. AAI Corporation, Civil Action No. 91-0436A (E.D. Va.). On March 25, 1991, Israeli Aircraft Industries ("IAI") sued my client, the Maryland-based AAI Corporation ("AAI") asserting various contractual breaches, trade secret misappropriation, and other claims. The suit stemmed from a Teaming Agreement under which IAI and AAI supplied the U.S. military with Pioneer remotely piloted vehicles("RPV"s), i.e., drones or pilotless surveillance aircraft which were extensively used in Operation Desert Storm.

I led a team of eight lawyers who worked literally night and day to file AAI's opposition to IAI's Motion for a Preliminary Injunction. On March 28, 1991, I argued AAI's case before Judge Albert V. Bryan, Jr. who denied the injunctive relief sought by IAI. The suit was subsequently settled.

Date:	March 28, 1991
Court:	U.S. District Court for the Eastern District of Virginia
Judge:	Hon. Albert V. Bryan, Jr.
My client:	AAI Corporation
Co-counsel:	Thomas J. Madden, Esquire Venable, Baetjer, Howard & Civiletti, LLP 1201 New York Avenue, N.W. Suite 1000 Washington, D.C. 20005 (202) 962-4800
Opposing Counsel:	Henry A. Hubschman, Esquire Fried, Frank, Harris, Shriver & Jacobson 1001 Pennsylvania Avenue, N.W. Washington, D.C. 20004 (202) 639-7230

Carroll Lee Walker v. John P. Leachman, CL 89-66, 89-67, (Cir. Ct. City of Alexandria, Va.). In this defamation action, I was chief counsel for plaintiffs, a Virginia lumberman and his company. Defendant, a supplier to, and competitor of, Walker, sent a defamatory letter to

Walker's bank, which refused further credit extensions to Walker. After a three day trial, the jury returned an $11 Million verdict for Walker. The case was subsequently settled.

Date:	August 1-5, 1991
Court:	Circuit Court for the City of Alexandria, Virginia
Judge:	Hon. Donald M. Haddock
My client:	Carroll Lee Walker
Co-counsel:	David W. Goewey, Esquire Venable, Baetjer, Howard & Civiletti, LLP 1201 New York Avenue, N.W. Suite 1000 Washington, D.C. 20005 (202) 962-4800
Opposing counsel:	Robert S. Corish, Esquire Slenker, Brandt, Jennings & Johnston 5026 Javier Road Fairfax, VA 22033 (703) 849-8600

M. Leo Storch Family Ltd Partnership v. Erol's, 95 Md. App. 253, 620 A.2d 408 (1993). M. Leo Storch Family Limited Partnership and M. Leo Storch Management Corp. ("Storch"), sued my clients Erol's, Inc. ("Erol's"), BF Holding Co. ("BF Holding"), Blockbuster Holding Corp., and Blockbuster Entertainment Corp., in the Circuit Court for Prince George's County for, *inter alia*, breach of a continuous operation clause of its lease with Erol's and sought interlocutory and permanent injunctive relief. On February 3, 1992, the trial court denied Storch's motion for an ex parte and/or interlocutory injunction. The trial court then issued a show cause order. On April 29, 1992, a hearing was held on the show cause order, and the trial court denied Storch's request for an interlocutory injunction.

The appellate court affirmed the trial court and held that the trial court did not abuse its discretion because the injunction could have required the continuous supervision of the court over an extended period of time and would have made effective enforcement unreasonably difficult.

Date:	February 29, 1992
Court:	Circuit Court for Prince George's County, Maryland
Judge:	Hon. David Gray Ross

My client:	Erol's, Inc, et al.
Co-counsel:	Fred Federici, Esquire Venable, Baetjer, Howard & Civiletti, LLP 1201 New York Avenue, N.W. Suite 1000 Washington, D.C. 20005 (202) 962-4800
Opposing counsel:	Edward J. Tolchin, Esquire 10615 Judicial Drive Suite 502 Fairfax, VA 22030 (703) 385-9500

Harbor East, LP v. Silver, Case No. 89047065 CL93255. This was a commercial real estate dispute between my client Harbor East, the assignee of a contract for the sale of real property and a developer, the assignor. The case involved complex assignment issues which had to be presented intelligibly to a jury. The substantial plaintiff's verdict is an indication of the jury's good grasp of the issues.

Date:	April 11 to 17, 1991
Court:	Circuit Court for Baltimore City, Maryland
Judge:	Hon. Meyer Cardin
My Client:	Harbor East, LP
Opposing Counsel:	Lawrence L. Hooper, Esquire The Adams Express Company 7 St. Paul St. Suite 1140 Baltimore, MD 21202 (410) 752-5900

St. Charles Associates, L.P. v County Comm'rs of Charles County, CV 89-720. This was a suit for a judgment declaring the rights of my client, a new town developer, under the agreements and course of dealings with the Commissioners of Charles County Maryland. In this protracted litigation, various levels of Maryland's courts upheld the developer's interpretations of the agreements defining its rights.

Date: 1989 through 1996
Court: Circuit Court for Charles County

Judge: Hon. David Gray Ross

My client: St. Charles Associates, L.P.

Opposing counsel Kurt J. Fischer
Piper & Marbury
6225 Smith Avenue
Baltimore, MD 21229
(410) 580-4148

United States v. Scallio, HAR-85-0508. This was the prosecution of a large-scale cocaine distributor based in Anne Arundel County, Maryland. The prosecution of this multimillion dollar drug conspiracy was, at the time, one of the largest in Maryland's history. I was chief counsel for the government. Scallio received a 38-year prison sentence.

Date: March 3-18, 1986

Court: U.S. District Court for the District of Maryland

Judge: Hon. John R. Hargrove

My client: U.S. government

Opposing counsel: James W. Parkman, III, Esquire
Parkman & Adams
401 N. Foster Street
Dothan, Alabama
(205) 793-9009

United States v. Melvin Williams, 753 F.2d 329, 331-31 (4th Cir. 1985). This multi-jurisdiction narcotics prosecution involved one of the first appellate constructions of the 1984 Bail Reform Act which permitted pretrial detention. I supervised the joint state and federal investigation which led to the successful prosecution of Williams and several of his gang members. I represented the government at the detention hearing which led to the Fourth Circuit decision upholding the constitutionality of the Act.

Hearing: December 6, 1984

Court: U.S. District Court for the District of Maryland

Judge: Hon. Daniel E. Klein, Jr.

My client: U.S. government

Opposing counsel: Howard L. Cardin, Esquire
10 E. Mulberry Street
Baltimore, MD 21202
(410) 727-3868

Cole v. Commanding Officer, U.S.S. L.Y. Spear, 747 F.2d 217 (4th Cir. 1984). In this *habeas corpus* case, I served as co-counsel to the U.S. Navy. Cole enlisted in the Navy and subsequently filed for conscientious objector status. After seeing the movie *Gandhi*, she refused to wear her uniform or report for duty. The Fourth Circuit entered an en banc opinion in which it stated criteria for resolving conflicts between the military's need to maintain order and discipline through its discharge proceedings and an enlisted person's rights to avoid military service which contravenes his or her religious beliefs

Date: April 1983

Court: U.S. District Court for the District of Maryland

Judge: Hon. Walter E. Black, Jr.

My client: U.S. government

Opposing counsel: Harold Buchman, Esquire (Deceased)

Bozman v. Office of Finance, 52 Md. App. 1, 445 A.2d 1073 (1982). I served as appellate counsel in this case in which my client, from whom funds and a quantity of marihuana had been seized by the police, contested whether the funds had been found in "close proximity" to the marihuana. In upholding the forfeiture, the appellate court construed the state's forfeiture statute.

Date: June 3, 1982

Court: Maryland Court of Special Appeals

Judge: Chief Judge Richard Gilbert

My client: William Bozman

Opposing counsel: Michael J. Moran, Esquire
401 Allegheny Avenue

Towson, MD 21204
(410) 828-4800

20. **Criminal History**: State whether you have ever been convicted of a crime, within ten years of your nomination, other than a minor traffic violation, that is reflected in a record available to the public, and if so, provide the relevant dates of arrest, charge and disposition and describe the particulars of the offense.

Answer: None

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

Answer: None

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

Answer: There are no categories of litigation or financial arrangements which are likely to present potential conflicts of interests. In addressing potential conflicts of interest, I will follow the guidelines of the *Code of Judicial Conduct*.

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

Answer: None

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

Answer: See attached Financial Disclosure Report.

25. **Statement of Net Worth**: Complete and attach the financial net worth statement in detail. Add schedules as called for.

Answer: See attached net worth statement and Financial Disclosure Report.

26. **Selection Process**: Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? To my knowledge there is no formal selection commission.

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

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

Answer: I informed Congressman Ehrlich of my interest and applied through the White House web site. I was interviewed at the White House by the Honorable Alberto R. Gonzales. I underwent an FBI background investigation and my qualifications and background were also reviewed by the Office of legal Policy. I was nominated On September 12, 2002.

(c) Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as asking or seeking a commitment as to how you would rule on such case, issue, or question? If so, please explain fully.

Answer: No

FINANCIAL STATEMENT NET WORTH
William Daniel Quarles, Jr.

ASSETS

Cash on hand and in banks	166,000.00
U.S. Government securities	
–US Savings Bonds	4,700.00
Listed securities	
–Constellation Energy	500.00
Unlisted securities- add schedule	
Accounts and notes receivable	
--Due from relatives and friends	6,000.00
--Due from others	-0-
Real estate owned	
–Residence	150,000.00
Real estate mortgages receivable	-0-
Autos and other personal property	82,000.00
Cash value-life insurance	-0-
Other assets itemize:	
–retirement accounts (401k, etc.)	173,000.00
Total Assets	582,200.00
CONTINGENT LIABILITIES	-0-
As endorser, comaker or guarantor	-0-
On leases or contracts	-0-
Legal Claims	-0-
Provision for Federal Income Tax	-0-
Other special debt	-0-

LIABILITIES

Notes payable to banks-secured	-0-
Notes payable to banks-unsecured	$46,000.00
Notes payable to relatives	-0-
Notes payable to others	-0-
Accounts and bills due	15,800.00
Unpaid income tax	-0-
Other unpaid income and interest	-0-
Real estate mortgages payable	
Baltimore American FSB	89,000.00
Chattel mortgages and other liens payable	-0-
Other debts- itemize	-0-
Total liabilities	150,800.00
Net Worth	431,400.00
Total liabilities and net worth	582,000.00
GENERAL INFORMATION	
Are any assets pledged? (Add schedule)	No
Are you defendant in any suits or legal actions?	No
Have you ever taken bankruptcy?	No

OCTOBER 25, 2002
SUPPLEMENTAL QUESTIONNAIRE OF

William Daniel Quarles, Jr.

BEFORE THE COMMITTEE ON THE JUDICIARY,
UNITED STATES SENATE

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

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

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

Answer:

Knight v. Division of Pretrial Detention and Services, No. 02156 (Md. App. Oct 17, 2002). In this unreported opinion, the Maryland Court of Special Appeals reversed the trial court's affirmance of the adminstrative agency's dismissal of a correctional officer whose home was used for drug trafficking.

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

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

   Gregory Lynn Frost

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

   United States District Court, Southern District of Ohio

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

   Licking County Common Pleas Court, Courthouse, Newark, Ohio 43055
   (740) 349-6186

4. **Birthplace**: State date and place of birth.

   April 17, 1949 - Newark, Ohio

5. **Marital Status**: (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es). Please also indicate the number of dependent children.

   Married to Kristina Mary Frost (Dix)
   Vice Chancellor for Operations and In-House Counsel
   Ohio Board of Regents
   30 East Broad Street, 36th Floor
   Columbus, Ohio 43215

   I have no dependent children. All three adult children are in college.

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

   Law School:
   Ohio Northern University Law School
   1971-1974
   Graduated June, 1974
   Juris Doctor Degree

   Undergraduate School:

Wittenberg University
1967-1971
Graduated June, 1971
Bachelor of Arts Degree - Political Science major

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

Licking County Common Pleas Court (1990 - present)
Employer – State of Ohio / Licking County
Address – 20 South Second Street, Newark, Ohio 43055
Position – Judge

Hydroseed Plus (2000 - present)
Address – 1136 Hilltop Drive, Newark, Ohio 43055
Position - Partner in family-owned partnership involved in residential, commercial, and industrial hydroseeding.

Central Ohio Council of Boy Scouts of America (1986 – present)
Address – 1901 East Dublin-Granville Road, Columbus, Ohio 43229
Position – Executive Committee Member

Licking County Bar Association (1999 – 2000)
Address – Licking County Courthouse, Newark, Ohio 43055
Position - President

Maryhaven Alcohol & Drug Addiction Treatment Center (1991 – 1996)
Address – 1791 Alum Creek Drive, Columbus, Ohio 43207
Position - Board of Directors

Shephard Hill Foundation (1990 – 1991)
Address – 200 Messimer Drive, Newark, Ohio 43055
Position - Board of Directors

Licking County Municipal Court (1983 – 1990)
Employer – State of Ohio / Licking County / City of Newark
Address – 40 West Main Street, Newark, Ohio 43055
Position – Judge

Licking Alcoholism Prevention Program (1983 – 1990)
Address – 62 East Stevens Street, Newark, Ohio 43055

Position – Board of Directors

Heath Civil Service Commission (1979 – 1982)
Employer – City of Heath, Ohio
Address – 1287 Hebron Road, Heath, Ohio 43056
Position - Clerk

W.K. Frost, Inc. (1976 – present)
Address – 130 North Vernon Avenue, Newark, Ohio 43055
Position - Member of Board of Directors in family-owned oil and gas business.

Schaller, Frost, Hostetter, & Campbell (1974 – 1983)
Address – 32 North Second Street, Newark, Ohio 43055
Position - Member and partner of law firm

Licking County Prosecuting Attorney's Office (1974 – 1978)
Employer – Licking County
Address – 20 South Second Street, Newark, Ohio 43055
Position – Assistant Licking County Prosecuting Attorney

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

I did not serve in the military.

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

Ohio Supreme Court Judicial Conduct Award
Who's Who in American Law (1987, 1988)
Who's Who in the World (1986, 1990)
Who's Who in the Midwest (1985)
Outstanding Young Men in America (1984, 1985)
International Men of Achievement (1986)
Personalities in America (1987)
Who's Who in Emerging Leaders in America (1987, 1st edition)
Directory of Distinguished Americans (1988)
Jaycee's Outstanding Young Man of the Year (1983)
Sertoma Service to Mankind Award (1983)
Boy Scouts of America - Silver Beaver Award (1988)
Ohio Department of Natural Resources - Wildlife Award (1984)
Boy Scouts of America - Order of Merit (1986)
Scholarship Recipient to National Judicial College (2000)
Maryhaven Treatment Center - Board of Directors

Licking Alcoholism Prevention Program - Board of Directors

10. **Bar Associations**: List all bar associations or legal or judicial-related committees, selection panels 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 Judicature Society
Ohio Judicial Conference - Executive Committee (1989 – present)
Ohio Municipal Judges Association - Trustee (1988 - 1992)
Ohio State Bar Association (1974 – present)
Ohio Municipal Judges Association - Legislative Chairman (1989 - 1991)
Ohio Jury Instructions Editorial Board - Chairman (1989 - present)
Ohio Traffic Rules Committee (1987 - 1989)
Ohio Common Pleas Judges Association - Executive Committee (1990 - present)
Banks-Baldwin Handbook Editorial Advisory Board (1989 - 1999)
Licking County Bar Association - President (1999)
South Carolina Bar Association (2000 - present)

11. **Bar and Court Admission**: List each state and court in which you have been admitted to practice, including dates of admission and any lapses in membership. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

Admitted to practice in Ohio - 1974
Member in good standing, no lapse in membership
Admitted to practice in U.S. District Court, Southern District Ohio - 1976
Member in good standing, no lapse in membership
Admitted to practice in United States Supreme Court - 1979
Member in good standing, no lapse in membership
Admitted to practice in South Carolina - 2000
Member in good standing, no lapse in membership

12. **Memberships**: List all memberships and offices currently and formerly held in professional, business, fraternal, scholarly, civic, charitable, or other organizations since graduation from college, other than those listed in response to Questions 10 or 11. Please indicate whether any of these organizations formerly discriminated or currently discriminates on the basis of race, sex, or religion - either through formal membership requirements or the practical implementation of membership policies. If so, describe any action you have taken to change these policies and practices.

Masonic Acme Lodge #554
Teheran Grotto
Licking County Shrine Club
Ancient and Accepted Scottish Rite
Ducks Unlimited
Honorable Order of Kentucky Colonels

Newark Elks Club
Moundbuilders Country Club
Capital Club
DeBordieu Club
Rotary Club of Newark - past member
Newark Moose Lodge - past member
Big Red Touchdown Club, Denison University - past member
Symposiarcs - past member and former national president
Newark High School Quarterback Club - past member
Newark Maennerchor – past member

For approximately four years, I was a member of the Newark Moose Lodge, the Newark Maennerchor, and the Newark Elks Lodge. When it became apparent that those organizations discriminated against women in their membership practices, I resigned. In 2000, I was asked to re-apply for membership in the Newark Elks Lodge. I advised that organization that I could not subscribe to their membership tenets as a result of their continued discrimination against women. In part, because of my position on this issue, I am proud to say that the Newark Elks Lodge has changed its practices and now permits women as full members. I do not currently belong to any organization which discriminates on the basis of race, color, religion, sex, disability or national origin.

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

Copies of the published writings listed below are included in Appendix 1.

Branzburg v. Hayes-Newsmen's Privilege
(1973), Ohio Northern University Law Review, Vol. 111, No. 1

City of Newark v. Dick Sherman Disposal
(1983), 4 Ohio Bar Reports 447, Vol. 56, No. 19

Heath Education Association v. Rebecca Bell
(1986), 23 Ohio Misc.2d 1

City of Newark v. Garfield Development Corporation
(1986), 25 Ohio Misc.2d 4

Simpson v. Smith

(1987), 34 Ohio Misc.2d 7

Judicial Notebook
(1988-1990), Weekly articles on the law published in the Newark Advocate, the daily newspaper in Newark, Ohio*

West American Insurance v. Carter
(1990), 50 Ohio Misc.2d 20

Civil and Criminal Procedure for Clerks in Ohio
(1990), A manual for municipal court clerk of courts - co-authored*

Ohio Mayors' Courts
(1990), A manual for mayors' courts - co-authored*

State v. Hughes
(1992), 62 Ohio Misc.2d 361

Cincinnati Ins. Co. v. Rose
(1992), 63 Ohio Misc.2d 1

Central Mutual Ins. Co. v. Faller
(1995), 71 Ohio Misc.2d 58

State v. Knight
(1997), 83 Ohio Misc.2d 79

Bd. Of Trustees v. Columbia Gas Transm.
(1997), 116 Ohio App.3d 349

Miebach v. Mathias
(1998), 91 Ohio Misc.2d 72

Scarberry v. Board of Zoning Appeals
(1998), 99 Ohio Misc.2d 78

State v. Williams
(1999), 104 Ohio Misc.2d 27

McGill v. Newark Surgery Ctr.
(2001), 113 Ohio Misc.2d 21

*Copies are not attached. I have not maintained copies.
All cases listed above were decided and written by me and not by a law clerk,

magistrate, or staff attorney.

I have not maintained copies of any speeches given on constitutional law or legal policy, however, I have been an instructor for the Ohio Judicial College, Ohio CLE Institute (Ohio State Bar Association), and Licking County Peace Officers Training Academy (Central Ohio Technical College). I was also an instructor for Ohio Justice Services (1990 - 1992). I have presented courses to judges, clerks, mayors, attorneys, and law enforcement officers throughout Ohio on various constitutional and legal topics. Below is a summary of the courses I have presented:

Ohio Judicial College (1986 - present)
- New Judges Orientation
- The D.U.I. Trial
- The Compleat Jury
- Felony Sentencing
- Evidence
- Federal Housing
- Capital Offense Cases
- Update D.U.I.
- Senate Bill 2 Sentencing
- Summary Judgments
- Courts and the Media
- Civil Procedure

Ohio CLE Institute (1992 - present)
- A View from the Bench
- Trial Objections
- Evidence Workshop

Licking County Peace Officers Training Academy (1990 - 2001).
- Evidence
- Search and Seizure
- Search Warrants
- Use of Force
- Laws of Arrest
- Interview and Interrogation

Ohio Justice Services (1990 - 1992)
- Mayors' Courts in Ohio
- Clerk of Courts Procedures
- Search and Seizure
- Sobriety Checkpoint Procedures

14. **Congressional Testimony**: List any occasion when you have testified before a committee or subcommittee of the Congress, including the name of the committee or subcommittee, the date of the testimony and a brief description of the substance of the testimony. In addition, please supply four (4) copies of any written statement submitted as testimony and the transcript of the testimony, if in your possession.

I have not testified before a committee or subcommittee of the Congress.

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

My present state of health is excellent. My last physical examination was in May, 2002.

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

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

State ex rel. Attorney General, et al. v. Buckeye Egg Farm, et al., Licking County Common Pleas Court Case No. 99-CV-756. My decisions provided environmental standards with regard to operating and maintaining large egg farms in several counties in Ohio. See Appendix 2.

Heath Education Assn. v. Bell (1986), 23 Ohio Misc.2d 1. My decision involved the strict construction of a contract between a board of education and a bargaining unit. I required a non-member to exhaust procedural remedies when protesting a portion of membership dues which were used for political purposes. See Appendix 1.

Simpson v. Smith (1987), 34 Ohio Misc.2d 7. The decision clarifies certain provisions of Ohio Consumer Sales Practices Act and the Ohio Administrative Code in the context of automobile repair issues. See Appendix 1.

West American Ins. Co. v. Carter (1989), 50 Ohio Misc.2d 20. I held that parents having custody and control of a minor, who commits a "theft offense" and in doing so damages property, are liable for the damage regardless of whether the acts of the minor were intentional or negligent. See Appendix 1.

State v. Hughes (1992), 62 Ohio Misc.2d 361. As a case of first impression in Ohio, I found that an attempt by a defendant who is suspected of shoplifting to leave a closed room in which the defendant was placed by a storekeeper constitutes the offense of escape. See Appendix 1.

Cent. Mut. Ins. Co. v. Faller (1995), 71 Ohio Misc.2d 58. In interpreting R.C. 5321.12, I found that a tenant who did not have the use or possession of leased residential property was liable to the landlord for damages caused by a co-tenant. See Appendix 1.

State v. Knight (1997), 83 Ohio Misc.2d 79. I reviewed Fourth Amendment issues involving package profiling by postal workers and the reliability of drug-detecting dogs for the establishment of probable cause. See Appendix 1.

Miebach v. Mathias (1998), 91 Ohio Misc.2d 72. I distinguished the law in Ohio between guardianships and conservatorships. It was a matter of first impression in Ohio. See Appendix 1.

State v. Williams (1999), 104 Ohio Misc.2d 27. As an assigned judge in Wayne County, Ohio, I found that an assistant prosecuting attorney could not be charged with coercion as a result of certain plea negotiations. See Appendix 1.

State of Ohio v. Ashworth, Licking County Common Pleas Court Case No. 96-CR-356. I devised a procedure to accept a plea of guilty and to permit the defendant to waive mitigation evidence in death penalty cases involving "volunteers." The procedure was affirmed by the Ohio Supreme Court in *State v. Ashworth (2000), 85 Ohio St.3d 56.* See Appendix 2.

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

Copies of the court of appeals decisions listed below are included in Appendix 3.

Semine v. Bd. of Education Fifth District Court of Appeals Case No. 93-CA-6, September 6, 1994. A teacher's limited three-year contract was not approved by the board of education. An appeal was taken arguing that the school board failed to include a second plan of improvement and means of assistance in conjunction with the second evaluation despite the fact that the teacher had not made the recommended improvements listed in his first evaluation. I held that the board of education substantially complied with Ohio's statutes. The court of appeals reversed holding that strict compliance was required pursuant to a previous decision of the court of appeals that had been filed after I filed my decision.

Manogg v. Spangler Fifth District Court of Appeals Case No. 94-CA-10, June 6, 1994. After the dismissal of a civil lawsuit, the prevailing party requested sanctions against the non-prevailing party. I denied the requested sanctions but awarded attorney fees to the prevailing party. An appeal to the original dismissal had been filed that divested me of jurisdiction to rule on the attorney fees issue. The court of appeals therefore reversed the award of attorney fees.

In the Matter of: Special Grand Jury Fifth District Court of Appeals Case No. 93-CA-77, May 9, 1994. It was alleged that information provided to a grand jury was unlawfully disclosed to the public. In a case of first impression in Ohio, I attempted to devise a procedure for the court's investigation of the allegations striking a balance between a full investigation and the necessity to protect secret information presented to a grand jury from being disclosed at the court hearing. The court of appeals reversed my procedure and suggested a different procedure. The Ohio Supreme Court ordered a completely different procedure.

Jellison v. Bd. of Commissioners Fifth District Court of Appeals Case No. 93-CA-36, May 9, 1994. A county employee received an employment termination which was subsequently converted to a 30-day suspension. The employee appealed the suspension. I found that her testimony at the State Personnel Board of Review was inconsistent with her previous testimony and was unreliable. The court of appeals reversed holding that the scope of review is limited to determination of whether the order appealed from is supported by reliable, probative and substantial evidence and is accordance with law. The court of appeals found that there was sufficient reliable evidence to uphold the State Personnel Board of Review's decision.

State v. Courson Fifth District Court of Appeals Case No. 93-CA-15, July 30, 1993. A criminal defendant sentenced to prison and whose trial and sentence had been previously affirmed by the court of appeals, filed a petition for relief after judgment. I denied the petition. The court of appeals reversed finding that it was necessary to hold a hearing and/or be more specific in the court order denying the petition.

Manogg v. Spangler Fifth District Court of Appeals Case No. 92-CA-84, February 1, 1993. In a long, protracted, and litigious case I awarded to the plaintiffs 16% of a judgment issued to the defendant by another county's court. Of the six assignments of error claimed by the plaintiff on appeal, the court of appeals affirmed my decision in five of the six assignments but reversed one finding based upon a mathematically incorrect calculation.

State v. Garren Fifth District Court of Appeals Case No. 92-CA-23, December 23, 1992. A police officer was convicted of felonies. I ordered the forfeiture of the defendant's truck to the State of Ohio. The court of appeals reversed finding that the truck was not used in the commission of the crimes.

Holmes v. Spahr, Judge Fifth District Court of Appeals Case No. 96-CA-27, April 4, 1996. A criminal defendant appealed my order dismissing a declaratory judgment action filed against the defendant's sentencing judge

and the county prosecuting attorney. The dismissal was reversed by the court of appeals because it was subsequently determined that the Ohio Attorney General had not been served with a copy of the pleadings as required by statute.

State v. Parsley Fifth District Court of Appeals Case No. 96-CA-46, October 23, 1996. I found that although the defendant formed the intent to commit a theft offense after she was granted permission to enter a home, the defendant could be found guilty of aggravated burglary because the trespass which is an element of aggravated burglary was a continuing offense and the defendant's permission to enter the home was terminated once the defendant formed the intent to commit the theft offense. I based my decision on two Ohio Supreme Court decisions. The court of appeals reversed holding that the trespass and the purpose to commit a theft offense must occur contemporaneously when the defendant entered the home.

Manogg v. Stickle Fifth District Court of Appeals Case No. 97-CA-104, April 8, 1998. I found that township trustees violated Ohio's Sunshine Law. Both sides appealed. The court of appeals affirmed my findings that the Sunshine Law had been violated on two occasions but remanded the case for a finding as to whether the Sunshine Law was violated on a third occasion. Additionally, the court of appeals rendered void any business transacted by the township trustees at one meeting.

State v. Leach Fifth District Court of Appeals Case No. 97-CA-148, March 15, 1999.

State v. Ridenbaugh Fifth District Court of Appeals Case Nos. 97-CA-149, 97-CA-150, 97-CA-153, 97-CA-154, May 27, 1999.

State v. Scammicca Fifth District Court of Appeals Case No. 98-CA-1, May 7, 1999.

State v. Moore Fifth District Court of Appeals Case No. 98-CA-4, March 29, 1999.

State v. Tracy Fifth District Court of Appeals Case No. 98-CA-9, March 29, 1999.

State v. Trott Fifth District Court of Appeals Case No. 98-CA-11, April 12, 1999.

State v. Hoskinson Fifth District Court of Appeals Case No. 98-CA-13, April 26, 1999.

State v. Schimpf Fifth District Court of Appeals Case No. 98-CA-14, March 19, 1999.

State v. Bradley Fifth District Court of Appeals Case No. 98-CA-16, March 29, 1999.

State v. Thompson Fifth District Court of Appeals Case No. 98-CA-26, March 29, 1999.

State v. Bingman Fifth District Court of Appeals Case No. 98-CA-27, April 26,

1999.

State v. Green Fifth District Court of Appeals Case No. 98-CA-30, September 2, 1999.

I held in all of the above-stated cases that the community notification provision of Ohio's new sexual predator law was unconstitutional when applied retroactively. The court of appeals reversed my decisions based upon an Ohio Supreme Court decision that was filed after my decisions.

State v. Ayers Fifth District Court of Appeals Case No. 97-CA-58, December 17, 1997. The defendant was found guilty of two counts of rape, one count of gross sexual imposition, and one count of felonious sexual penetration. The court of appeals reversed the felonious sexual imposition conviction finding that the prosecution failed to submit sufficient evidence regarding the specific date of the crime.

State v. Telthorster Fifth District Court of Appeals Case No. 97-CA-87, December 24, 1997. I suppressed evidence in a drug-related case finding that the contents of a tied-off piece of plastic was not "immediately apparent" and therefore the search of the container did not fall within the "plain view" exception to the Fourth Amendment warrant requirement. While commending my courage and dedication to the principles of law, the court of appeals reversed holding that the tied-off piece of plastic was a "single purpose" container in which no innocent item is commonly carried when viewed by a trained, experienced officer.

State v. Peters Fifth District Court of Appeals Case Nos. 98-CA-118, 98-CA-119, May 13, 1999.

State v. Sherman Fifth District Court of Appeals Case No. 99-CA-20, July 2, 1999.

I sentenced the defendants to prison but did not give the defendants jail-time credit for the period of time the defendants were placed in a community-based correctional facility. The court of appeals held that the defendants should receive credit for the number of days spent in the facility based upon their statutory interpretation of "detention facility."

Traikovich v. McCabe v. Bd. of Health Fifth District Court of Appeals Case No. 98-CA-135, July 2, 1999. I found that the board of health was not immune from suit based upon the allegations of the third-party complaint which, if believed, would provide a basis for finding that the political subdivision caused injury by the negligent performance of acts by its employees. The court of appeals reversed finding that the governmental entity was immune from suit based upon its analysis of Ohio's governmental immunity statute.

Williams v. Phillips Fifth District Court of Appeals Case No. 98-CA-72, June 3, 1999. On a motion for summary judgment I found that the plaintiff did not

have an easement by prescription or necessity over the defendants' property. Although the court of appeals affirmed my decision that the plaintiff could not prove that he had an easement by prescription, the court reversed on the grounds that a question of fact existed concerning whether the plaintiff had access to the property by other means thus preventing summary judgement on the issue of an easement by necessity.

State v. Jenkins Fifth District Court of Appeals Case No. 99-CA-96, May 22, 2000. The court of appeals remanded the case to clarify that the defendant's four-year prison sentence was "mandatory."

State v. Burton Fifth District Court of Appeals Case No. 00-CA-13, July 14, 2000. I denied the suppression of evidence obtained from a traffic stop and did not suppress the statements made by the defendant. The court of appeals affirmed my ruling that the evidence should not be suppressed but reversed my ruling that the statements made by the defendant should not be suppressed. The court of appeals held that the defendant in the backseat of a police cruiser was "in custody or deprived of his freedom of action in a significant way" when the officer asked the defendant questions.

State v. Smith Fifth District Court of Appeals Case No. 00-CA-19, September 14, 2000. The court of appeals held that a "hold order" from a mayor's court does not toll the speedy trial requirements and therefore the defendant's trial was conducted twenty-one days beyond the speedy trial deadline.

Sayer v. Eppler Fifth District Court of Appeals Case Nos. 00-CA-76, 00-CA-85, July 9, 2001. I found that the doctrine of *lis pendens* did not apply in a case involving the purchase of real estate and found the defendants to be bona fide purchasers for value who obtained their interest in the property without notice of a pending lawsuit. The court of appeals reversed holding that the doctrine of *lis pendens* did apply to the facts as presented. The decision was appealed to and accepted by the Ohio Supreme Court. Pending appeal the case was settled.

Holman v. Licking County Fifth District Court of Appeals Case No. 94-CA-50, October 6, 1995. The jury held that the defendant, Licking County, was not liable for injuries sustained by a child who was struck by a car. The issue was whether the governmental entity could be held responsible for failing to cut and remove obscuring vegetation. The court of appeals reversed the jury's verdict holding that the trial court improperly instructed the jury on the issue of governmental immunity and contributory negligence.

Dardinger v. Anthem Blue Cross Fifth District Court of Appeals Case Nos. 99-CA-127, 99-CA-136, May 22, 2001. Following a jury verdict against the

defendants for breach of contract, bad faith, and punitive damages, the defendants appealed. The court of appeals, in a divided opinion, found that the parent company, Anthem Insurance Company, could not be held liable for punitive damages based upon the acts of the subsidiary, Community Insurance Company. The majority of the court of appeals also held that the trial court erred in permitting the introduction of the parent company's executive salaries in support of an award for punitive damages. The minority opinion held that the trial court did not commit reversible error during the trial but held that the trial court should have remitted the punitive damages award. The Ohio Supreme Court accepted an appeal of the court of appeal's decision and is expected to render an opinion within the next three months.

Prince, Adr. v. Wilson Fifth District Court of Appeals Case No. 99-CA-91, December 20, 1999. I found that the voluntary dismissal of claims in one action and the re-filing of a separate action violated the rule regarding compulsory counterclaims and dismissed the second complaint. The court of appeals, in construing the rule involving counterclaims, found that I misinterpreted the rule and re-instated the complaint.

Helfrich v. City of Pataskala Fifth District Court of Appeals Case No. 00-CA-82, February 22, 2001. The plaintiff applied for a lot split and the City of Pataskala denied the application. The decision was appealed to the Licking County Common Pleas Court and the matter was remanded back to the City of Pataskala for a determination of certain issues. However, prior to filing his appeal to the Licking County Common Pleas Court on the first lot split decision, the plaintiff filed a second lot split application which was denied and this appeal was taken. I found that *res judicata* applied and dismissed the second appeal. The court of appeals found that *res judicata* did not apply and the plaintiff could pursue the second appeal.

Kenney v. Rutter Fifth District Court of Appeals Case No. 00-CA-87, April 27, 2001. The plaintiffs appealed my ruling that they failed to prove by clear and convincing evidence that the decedent orally promised to pay the plaintiffs for services rendered to the decedent before his death. The court of appeals reversed holding that although the plaintiff was a nephew but not living with the decedent, the "family member" rule did not apply requiring that the plaintiffs prove their case by "clear and convincing" evidence. Instead, the court held that the standard of proof was by a "preponderance of the evidence." Since I applied the wrong standard of proof, the matter was remanded for a new trial however the court of appeals urged the Ohio Supreme Court to re-examine the "family member" rule.

Village of Granville v. Bd. of Commissioners Fifth District Court of Appeals Case

No. 95-CA-32, November 20, 1995. I held that the board of commissioners could not act upon an annexation petition until a petition for merger of portions of the property in question was ruled upon by the board of elections. The court of appeals reversed my decision and found that since the annexation petition was filed first, the board of commissioners could proceed to determine whether the annexation petition should be granted despite the fact that the merger petition was pending before the board of elections.

State v. Erwin Fifth District Court of Appeals Case No. 95-CA-82, June 10, 1996. The defendant was convicted of felonious sexual assault and gross sexual imposition. The conviction and sentence was appealed and upheld by the court of appeals. The defendant filed an application to re-open his appeal on the grounds of ineffective assistance of counsel and the court of appeals denied that application. The Ohio Supreme Court affirmed. The defendant then filed a post-conviction relief petition in my court. I denied the petition. The court of appeals reversed and remanded requiring me to hold an evidentiary hearing on the issue of juror misconduct raised by the defendant.

Oliver v. Midland Title Fifth District Court of Appeals Case No. 96-CA-47, December 26, 1996. Midland Title Insurance Company appealed my decision that it was obligated to pay for expenses incurred to obtain additional, fractional interest in real estate from persons who were not disclosed during the title search conducted by Midland Title. The court of appeals reversed my decision holding that the title policy insuring against adverse "conditions of record" does not include fee simple interests but rather conditions such as easements, right-of-ways, and other conditions that do not compromise a fee simple interest.

Truckly v. Hand, Exr. Fifth District Court of Appeals Case Nos. 96-CA-57, 96-CA-81, September 12, 1996. Because the plaintiff in a personal injury action failed to appear for two independent medical examinations to determine the extent of the plaintiff's injuries, I refused to allow the plaintiff to present his own medical testimony at trial. While sympathizing with the court's frustration, the court of appeals reversed holding that the proper sanction was an award of attorney fees, medical fees, and costs.

State v. Brown Fifth District Court of Appeals Case No. 96-CA-83, December 31, 1996. During trial, counsel for the defendant requested that I permit counsel's associate to ask questions. I permitted the associated to ask questions of the witness. Thereafter, it was discovered that the associate was not licensed to practice law. I offered to strike the testimony and questioning and to re-institute questioning by the defendant's licensed attorney. The defendant declined the offer, admitted that he knew the

associate was not licensed, and waived any error. The court of appeals reversed holding that I should have declared a mistrial.

Gottke v. Diebold, Inc. Fifth District Court of Appeals Case No. 3727, May 20, 1992. The decedent during her employment was exposed to a harmful chemical. She filed a workers' compensation claim and was successful on that claim. Five years later, she died and her estate filed a wrongful death action based upon allegations that the chemical caused her death. I held that the decedent was required to pursue the personal injury action within the two-year statute of limitations from the discovery of the fact that the chemical had caused her injury or harm. The court of appeals reversed and held that the wrongful death statute applied and held that the suit could be filed within two years of the decedent's death.

Stewart v. State Farm Ins. Cos. Fifth District Court of Appeals Case No. 92-CA-20, November 5, 1992. The court of appeals reversed my jury instruction that the plaintiffs had the burden of proving that the endorsements to an insurance policy were not effective because they had not been received by the plaintiffs. The court of appeals held that the jury instruction should have placed the burden of proof on the insurance company to prove the affirmative defense that the insurance contracts were modified by virtue of an endorsement.

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

Copies of the cases involving constitutional issues listed below are included in Appendix 4.

State v. McClain (1998), Licking County Common Pleas Court Case No. 98-CR-331 - In a sexual assault case, I found that the defendant was "not in custody or otherwise deprived of his freedom" in the context of a confession taken at a police department. No appeal taken.

State v. Thompson (1998), Licking County Common Pleas Court Case No. 98-CR-478 - I defined the parameters of a *Terry v. Ohio* stop and frisk situation. No appeal taken.

State v. Offenbaker (1999), Licking County Common Pleas Court Case No. 99-CR-191 - I found that a statutory violation as opposed to a constitutional violation does not require the application of the exclusionary rule. No appeal taken.

State v. Godbolt (1999), Licking County Common Pleas Court Case No. 99-CR-

330 - The case involved the waiver of *Miranda* rights and inducements or promises by law enforcement officers. No appeal taken.

State v. McCrae (1999), Licking County Common Pleas Court Case No. 99-CR-438 - My decision articulates the difference between a stop-and-frisk and an arrest. It further explains the "plain feel" exception to the warrant requirement. No appeal taken.

State v. Baum (1999), Licking County Common Pleas Court Case No. 99-CR-474 - The issue in this case involved the warrantless entry into a residence under exigent circumstances. No appeal taken.

State v. Seitters (2000), Licking County Common Pleas Court Case No. 00-CR-71 - The issue involved a confession without the benefit of *Miranda* warnings during a polygraph examination. No appeal taken.

State v. McCrae (2000), Licking County Common Pleas Court Case No. 00-CR-115 - In a murder case, I decided the issue of re-initiation of interrogation after an invocation of *Miranda* rights. No appeal taken.

State v. Young (2000), Licking County Common Pleas Court Case No. 00-CR-274 - In a case involving an interrogation of a suspect at a hospital, I found that *Miranda* warnings were unnecessary. Affirmed by Fifth District Court of Appeals on 4/26/01 in Case No. 00-CA-84.

State v. Hoffman (2000), Licking County Common Pleas Court Case No. 00-CR-492 - I reviewed the issues of reasonable suspicion to stop and probable cause in the context of a D.U.I. arrest. Affirmed by the Fifth District Court of Appeals on 9/21/01 in Case No. 01-CA-22.

State v. Ford (2000), Licking County Common Pleas Court Case No. 00-CR-472; *State v. Fisher* (2000), Licking County Common Pleas Court Case No. 00-CR-478 (consolidated) - I reviewed the issue of the odor of marijuana giving rise to probable cause to search a motor vehicle. Affirmed by the Fifth District Court of Appeals on 9/ 25/01 in Case No. 01-CA-46.

State v. West (2001), Licking County Common Pleas Court Case No. 01-CR-71 - The case involved probable cause to stop a vehicle for a minor traffic violation under circumstances which were clearly pretextual. No appeal taken.

State v. Adams (2001), Licking County Common Pleas Court Case No. 01-CR-55 - I held that reasonable suspicion that a student in a school possessed contraband supported a full search of the student rather than a limited pat-down. Affirmed by the Fifth District Court of Appeals on 1/3/02 in Case

No. 01-CA-76.

State v. Campbell (2001), Licking County Common Pleas Court Case No. 01-CR-75 - In the context of a traffic stop, I found that the officers' search of a defendant was illegal due to the lack of probable cause. No appeal taken.

State v. Miller (2001), Licking County Common Pleas Court Case No. 01-CR-120 - I found that the initial stop of a vehicle and the search of the vehicle were justified based upon the facts of the case. Affirmed by the Fifth District Court of Appeals on 4/22/02 in Case No. 01-CA-79.

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

17. **Public Office, Political Activities and Affiliations**:

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

Public offices held (non-judicial)

Assistant Licking County Prosecuting Attorney - Appointed (1974 - 1978)
Appointed by Neil M. Laughlin, Prosecuting Attorney

Heath, Ohio Civil Service Commission Clerk - Appointed (1979 - 1982)
Appointed by Chet Geller, Mayor

Unsuccessful candidacies

Candidate for Licking County Prosecuting Attorney (1980)
Candidate for Judge of Fifth District Court of Appeals (1988)

(2) 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.

Campaign Chairman for Jon R. Spahr, candidate for Licking County Municipal Court. I organized and managed the county-wide campaign. The campaign was unsuccessful. (1977)

Campaign Chairman for Judge Jon R. Spahr, candidate for Licking County

Municipal Court. I organized and managed the county-wide campaign. The campaign was successful. (1979)

Campaign Chairman for Gerry Billy, candidate for Licking County Sheriff. I organized and managed the county-wide campaign. The campaign was successful. (1980)

Campaign Chairman for Judge Jon R. Spahr, candidate for Licking County Common Pleas Court. I organized and managed the county-wide campaign. The campaign was successful. (1982)

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

(a) Describe chronologically your law practice and legal experience after graduation from law school including:

(1) whether you served as clerk to a judge, and if so, the name for the judge, the court and dates of the period you were a clerk;

I did not serve as a clerk to a judge.

(2) whether you practiced alone, and if so, the addresses and dates;

I did not practice alone as a sole practitioner. I was a member/partner in the law firm listed below.

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

Licking County Prosecuting Attorney's Office (1974 - 1978)
Assistant Prosecuting Attorney
22 North Second Street
Newark, Ohio 43055

As an assistant prosecuting attorney, I was assigned to juvenile prosecutions, civil representation of governmental agencies, appellate practice and felony prosecutions.

Schaller, Frost, Hostetter & Campbell (1974 - 1983)
Partner
32 North Park Place
Newark, Ohio 43055

As a member/partner, my practice consisted of civil representation including oil and gas issues, probate, domestic relations, corporate and partnership issues, and

personal injury cases.

Licking County Municipal Court (1983 - 1990)
Judge
40 West Main Street
Newark, Ohio 43055

Licking County Common Pleas Court (1990 - present)
Judge
Courthouse
Newark, Ohio 43055

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

The character of my law practice was criminal prosecutions (1974 - 1978) as an assistant prosecuting attorney. As an assistant prosecuting attorney, my duties first included juvenile prosecution and representation of county school boards and township trustees. Thereafter, I was assigned to felony prosecutions and appellate practice. I was in a general private practice as a member/partner of the law firm (1974 - 1983). As a private practitioner, I practiced domestic relations law, oil and gas law, and personal injury law representing plaintiffs. I also represented clients in estate planning and had a small workers compensation practice.

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

Typical clients – As an assistant prosecutor, my clients included almost all county agencies such as school boards, township trustees, zoning boards of appeals, childrens' services, and township fire departments. This was in addition to prosecuting juveniles charged with delinquency, unruliness, or neglect. As a private practitioner, I represented private individuals in domestic relations court with respect to divorce, dissolution, child custody, child support, and visitation issues. I represented plaintiffs in personal injury actions involving car accidents, and other injury-related claims. I represented some companies and individuals involved with oil and gas issues.

(c) (1) Describe whether you appeared in court frequently, occasionally, or not at all. If the frequency of your appearances in court varied, describe each such variance, providing dates.

I appeared in court frequently. Because I was an assistant prosecuting attorney and a civil practitioner, I appeared in court more frequently than most young attorneys. The frequency of my appearances in court decreased when I was no longer an assistant prosecuting attorney.

(2) Indicate the percentage of these appearances in

(1) federal courts;
(2) state courts of record 100%;
(3) other courts.

(3) Indicate the percentage of these appearances in:

(1) civil proceedings;
(2) criminal proceedings.

Percentage of appearances:
Civil - 50% Criminal - 50% (1974 - 1978)
Civil - 100% (1978 - 1983)

(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 can not state the exact number of cases tried to a verdict or judgment. I can estimate the number of cases in courts of record I tried to a verdict or judgment:

Number of trials:
1974 - 1978 approximately 25 civil trials and approximately 100 criminal trials as member/partner of law firm and assistant prosecuting attorney as sole counsel.
1978 – 1983 approximately 75 civil trials as sole counsel.

(5) Indicate the percentage of these trials that were decided by a jury.

Jury trials - 25%
Non-jury trials - 75%

(d) Describe your practice, if any, before the United States Supreme Court. Please supply four (4) copies of any briefs, amicus or otherwise, and, if applicable, any oral argument transcripts before the U.S. Supreme Court in connection with your practice.

I have not practiced before the United States Supreme Court.

(e) Describe legal services that you have provided to disadvantaged persons or on a *pro bono* basis, and list specific examples of such service and the amount of time devoted to each.

As a legal intern while in law school, I provided pro bono legal services as a result of my association with the Allen County Legal Aid Society. Most of the pro bono legal services were provided to inmates at the Lima Mental Hospital. I cannot estimate the amount of time devoted to providing this service.

Throughout the nine years of private practice I provided pro bono legal services to various clients who could not afford legal representation and who were not eligible for Licking County Legal Aid services. Most of the legal services performed were in the area of domestic relations. I can only estimate that I provided pro bono legal services in this regard to over 50 clients.

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

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

(2) a detailed summary of the substance of each case outlining briefly the factual and legal issues involved;

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

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

Because I have been on the trial bench for oyer nineteen years, I am unable to identify the cases, parties, judges and opposing counsel involved in litigation when I was a private practitioner and an assistant prosecuting attorney. However the following individuals have knowledge of my practice:

Judge Jon R. Spahr
Licking Common Pleas Court
Courthouse
Newark, Ohio 43055
(740) 349-6181

Glenn A. White, Esq.
33 West Main Street
Newark, Ohio 43055
(740) 345-9611

Stephen E. Schaller, Esq.
32 North Park Place
Newark, Ohio 43055
(740) 349-8505

A. Terrance Treneff, Esq.
33 West Main Street
Newark, Ohio 43055
(740) 345-9611

James W. Hostetter, Esq.
30 West Locust Street
Newark, Ohio 43055
(740) 345-8092

B. Herbert Koehler, Esq
2 North First Street
Newark, Ohio 43055
(740) 345-9801

R. William Meeks, Esq.
511 South High Street
Columbus, Ohio 43215
(614) 228-4141

Judge Russell Steiner
Licking County Common Pleas Court,
Domestic Relations Division
East Main Street
Newark, Ohio 43055
(740) 349-1675

20. **Criminal History**: State whether you have ever been convicted of a crime, within ten years of your nomination, other than a minor traffic violation, that is reflected in a record available to the public, and if so, provide the relevant dates of arrest, charge and disposition and describe the particulars of the offense.

None.

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

William T. Garren, a Newark police officer, was arrested, indicted and convicted of certain theft offenses. While in prison, he filed a civil action in the U.S. District Court, Southern District, Eastern Division alleging that his constitutional rights had been violated as a result of the forfeiture of his vehicle. Garren v. Muller et. al., Case No. C2-93-508. The claims against me were dismissed by Judge Beckwith.

Kay Dawson and Bruce Dawson, unsuccessful civil litigants in an action tried before me, sued others and me in the Knox County Common Pleas Court alleging several causes of action. Dawson et. al. v. Walker et. al., Case No. 94OTO40082. Judge Eyster dismissed all claims against me.

William Roberson, an unsuccessful civil litigant and an incarcerated criminal defendant, filed a civil action against others and me in the Licking County Common Pleas Court. Roberson v. Eichenberger et. al., Case No. 00-CV-353. The matter was dismissed by Judge Martin, who was assigned to the case.

As a visiting judge in Montgomery County Common Pleas Court, I was assigned to NBD Mortgage Co., et. al. v. Marzocco et. al., Case No. 99-CV-552. As a result of one of my many rulings in that case, the defendant, Ralph Marzocco, joined me as a party to the action and filed suit against me. The claims against me were dismissed by Judge Donovan and I was reassigned to the case.

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

If an area of concern arises, I will make a full disclosure in writing to the parties involved and will recuse myself from the case. I am faced with these same decisions in my present position and I have utilized the same procedure with no problems. I do not foresee any potential conflicts of interest during my service in the position for which I am applying. I will resolve all potential conflicts of interest pursuant to the Guidelines of the Code of Judicial Conduct.

23. **Outside Commitments During Court Service**: Do you have any plans, commitments,

or arrangements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

If permitted by the Code of Ethics, I plan to remain as a stockholder and member of the board of directors of W.K. Frost, Inc., a family-owned corporation. I also plan to remain as a partner in Hydroseed Plus, a family-owned partnership.

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

A copy of the financial disclosure report is attached.

25. **Statement of Net Worth**: Complete and attach the financial net worth statement in detail. Add schedules as called for.

A copy of the financial net worth statement is attached.

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

Yes.

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

The committee recommended several names including mine to Senators DeWine and Voinovich for further consideration.

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

In the Summer of 2001, I learned that a vacancy would occur on the United States District Court, Southern District of Ohio as a result of the retirement of Judge George Smith. Senators DeWine and Voinovich provided to me an application which I completed and returned to their office. The application was referred to a committee that interviewed all applicants. Several names were submitted to the Senators. I then interviewed with the Senators' staff and with Senator DeWine. Thereafter, I was selected by Senators DeWine and Voinovich and they submitted my name to the President. I then interviewed with two Deputy White House Counsel and after the FBI background investigation, President Bush nominated me for this position. I found the process to be deliberate and

professional. I was impressed with the entire process.

(3) Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as asking or seeking a commitment as to how you would rule on such case, issue, or question? If so, please explain fully.

No.

[The Committee stood in recess from 11:05 a.m. to 11:58 a.m.]

Chairman HATCH. Well, if I can have everybody's attention, Senator Kennedy is not coming, I have been informed. Senator Schumer is not going to come, as well. Senator Feingold was the last one we thought would come.

So with that, I think the three district court nominations and you, Mr. Bybee, have had a pretty nice day. We will allow enough time for our colleagues to write written questions to you, and I am sure a number of these colleagues will do that.

I have to say that I had to be gone for a while and I caught just the last end of Secretary of State Powell's remarks before the UN and I am telling you they were devastating. I have already chatted with a few people who heard the whole speech and they said he really laid it out, as I expected him to do.

Let me just say this, Mr. Bybee. I have seen a lot of people around here and a lot of judges. Virtually everybody in the Federal judicial system has come through here during my 27 years of service and we have had a lot of really wonderful, outstanding people who are now serving on the Federal bench.

I don't know of anybody who has any more qualifications or any greater ability in the law than you have, and that is counting some pretty exceptional people. And I think that is one reason why this particular hearing has not been as much an ordeal as some of the ones others have had. I think there is a tremendous amount of respect for you, as there should be.

We will try to put your nomination on next Thursday's, after tomorrow, markup. It has almost become a general rule that the Democrats or somebody on the Committee will put over the nominations for at least one week. And generally, if the questions haven't been answered, that will probably occur.

There is a belief by some that there is a real effort to slow down this process. Now, I would be the last who would think that that has real merit. Come to think of it, there has been some of that, but I am hopeful that in your case and in the case of many, many others that we can get you through, get you on the bench and get you doing your life's work, which is really what that will be, in the best interests of our country. And I have absolutely no doubt that your efforts will be in the best interests of our country.

The other three district court nominees, we are very proud of them as well.

So with that, we will close the hearing and thank you all for being here.

[Whereupon, at 12:01 p.m., the Committee was adjourned.]

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

QUESTIONS AND ANSWERS

Senator Joseph R. Biden, Jr.
Questions for Jay Bybee
February 14, 2003

Question One

As you know, the Justice Department recently announced its intention to maintain the Violence Against Women Office within the Office of Justice Programs, requiring its Director to report to the Assistant Attorney General, rather than creating a separate and distinct office within the Department, with its Director reporting directly to the Attorney General, as required by the 21st Century Department of Justice Appropriations Authorization Act, Pub. L. 107-273, 116 Stat. 1758 (Nov. 2, 2002) ("DOJ Authorization Act"). The Department has represented to me that its decision rested solely on a legal interpretation supplied by the Office of Legal Counsel ("OLC"). That legal opinion was contained, in part or in whole, in a February 7, 2003 letter to me from Acting Assistant Attorney General Jamie E. Brown.

Question (a). Did you author the OLC legal opinion contained, in part or in whole, in the February 7th letter?

Answer: As head of the Department's Office of Legal Counsel, I am obligated to keep confidential the legal advice that my Office provides to others in the executive branch. I therefore cannot comment on whether or not my Office provided any of the legal analysis reflected in Acting Assistant Attorney General Brown's letter or on what role, if any, I may have played in such analysis.

I understand that the Department has explained to your staff the policy reasons underlying the decision to keep the Violence Against Women Office within the Office of Justice Programs ("OJP"). Indeed, upon review, I do not think that Acting Assistant Attorney General Brown's February 7th letter offers any legal argument as to where the Violence Against Women Office should be located within the Department.

Question (b). If you did not directly author the legal opinion, did you approve it in your capacity as Assistant Attorney General?

Answer: See my response to Question 1(a).

Question Two

The February 7th letter states that "[t]he sparse legislative history [of the DOJ Authorization Act] is consistent with our conclusions." It then cites to a floor statement from a House subcommittee chairman. Significantly, the letter contains no citations to the Conference Report or the floor statements of other Members of Congress. I assume that OLC attorneys thoroughly reviewed the legislative history before making the previous statement.

A review of the legislative history includes a number of other statements, beyond the sole

statement cited by the Department's letter. For example, the letter fails to cite to the Conference Report for the DOJ Authorization Act issued by House Judiciary Committee Chairman James Sensenbrenner and signed by all the Conferees. The Sensenbrenner Conference Report states:

> *Section 2002 creates a **separate and independent** Violence Against Women Office* (hereinafter the "Office") in the Department of Justice, under the general authority of the Attorney General. *The Office shall be headed by a Director who reports **directly** to the Attorney General* and has final authority over all grants, cooperative agreements and contracts awarded by the Office.

Conf. Rep. 107-685 (Sept. 25, 2002), at 180 (emphasis added).

In addition, the February 7 letter fails to cite to a number of other statements by House members made the same day as the sole statement included in the Department's letter. For example, Representative Henry Hyde -- the former Chairman of the House Judiciary Committee and a member of the Conference Committee on H.R. 2215 -- stated that "[t]he Office will be headed by a Director *who reports **directly** to the Attorney General. . . .*" H6748 (Sept. 26, 2002) (emphasis added). See also Statement of Representative Conyers ("important compromises were reached between the House and Senate . . . to establish an independent Violence Against Women Office within the Department of Justice. This provision raises the profile of the Office by having its Director report directly to the Attorney General instead of through other subordinates.") H6750 (Sept. 26, 2002); Statement of Representative Slaughter ("The conference report creates an independent Violence Against Women Office within the Department of Justice, rather than making the office simply a subsidiary part of the office of the Office of Justice Programs.") H6746 (Sept. 26, 2002); Statement of Representative Nadler (The legislation "enhance[s] the Violence Against Women Office") H6748 (Sept. 26, 2002).

The Department's letter also fails to include any mention of legislative history in the Senate. Significantly, while citing to a statement from the House Crime subcommittee chairman, the letter omits my floor statement, made in my capacity as Chairman of the Senate subcommittee with jurisdiction over the Violence Against Women Office. I explained that the DOJ Authorization Act created

> [a] permanent and independent Violence Against Women Office, a proposal I first introduced in the Senate in March, 2001, and is now established in the Conference Report. This provision means that the Office will be removed from its current location inside the Office of Justice Programs, and become its own free-standing entity. . . . It also requires that the Director be nominated by the President, confirmed by the Senate and report directly to the Attorney General.

S9701 (Oct. 1, 2002). My remarks were echoed in a colloquy I entered into with Senator Patrick Leahy, then Chairman of the Senate Judiciary Committee with jurisdiction over the DOJ Reauthorization Act:

> [T]he pending Justice reauthorization conference report establishes an independent Violence Against Women Office [which] will be an autonomous and separate office within the Department of Justice and no longer underneath the jurisdiction of the Office of Justice Programs. . . . [T]he statute is unequivocal. The director shall report directly to the Attorney General -- do not pass go, do not get out of jail free. The law is clear that the director is not to report to various deputies or assistants, but rather straight to the Attorney General.

Id.

Question (a). Did the OLC opinion on this issue consider the discussion of the Violence Against Women Office contained in the Sensenbrenner Conference Report or any of statements contained above?

Answer: As the head of the Department's Office of Legal Counsel, I am obligated to keep confidential the legal advice that my Office provides to others in the executive branch. I cannot comment on whether or not I have provided any advice on this matter and, if so, the substance of that advice. I can say, however, that ideally all OLC advice would be based on a review of all relevant legal resources, including pertinent legislative history. In addition, I agree with you that insofar as legislative history is concerned, the statements that you cite would merit full consideration along with the statement included in Acting Assistant Attorney General Brown's letter.

Question (b). Why did the Department's February 7th letter omit any mention of the Sensenbrenner Conference Report or these other statements?

Answer: As the head of the Department's Office of Legal Counsel, I am obligated to keep confidential the legal advice that my Office provides to others in the executive branch. Upon reviewing Acting Assistant Attorney General Brown's letter, however, I will note that it sets forth the legal analysis and conclusion before addressing any legislative history. The structure of the letter would thus indicate that legislative history had no significant bearing on its analysis or conclusion. I do agree with you, though, that if the letter is to cite legislative history on one side of the question, it would have been better for the letter to cite legislative history on the other side as well.

Question (c). Did you personally review the February 7th letter? If so, were you aware that the letter contained these significant omissions? If not, who in your office did review the February 7th letter?

Answer: As the head of the Department's Office of Legal Counsel, I am obligated to keep confidential the legal advice that my Office provides to others in the executive branch. I cannot comment on whether or not my Office provided assistance in the preparation of Acting Assistant Attorney General Brown's letter or on what role, if any, I may have played.

Question (d). To the extent that you were not aware – prior to the issuance of the OLC opinion and/or the February 7th letter – of the Sensenbrenner Conference Report and the other statements cited above, do you still agree that the legislative history is "sparse" and "is consistent with [DOJ's] conclusions?"

Answer: As the head of the Department's Office of Legal Counsel, I am obligated to keep confidential the legal advice that my Office provides to others in the executive branch. I therefore cannot comment on whether or not my Office provided any of the legal analysis reflected in Acting Assistant Attorney General Brown's letter or on what I was aware of, or not aware of, in connection with rendering any such advice. I can say, however, that the legislative history that you cite, together with the legislative history cited in Acting Assistant Attorney General Brown's letter, indicates that there was legislative history on both sides of the question.

Question (e). To the extent that you were aware – prior to the issuance of the OLC opinion and/or the February 7th letter – of the Sensenbrenner Conference Report and the other statements cited above, is it still your view that the legislative history is "sparse" and "is consistent with [DOJ's] conclusions?"

Answer: As the head of the Department's Office of Legal Counsel, I am obligated to keep confidential the legal advice that my Office provides to others in the executive branch. I therefore cannot comment on whether or not my Office provided any of the legal analysis reflected in Acting Assistant Attorney General Brown's letter or on what I was aware of, or not aware of, in connection with rendering any such advice. I can say, however, that the legislative history that you cite, together with the legislative history cited in Acting Assistant Attorney General Brown's letter, indicates that there was legislative history on both sides of the question.

Question Three

(a). Do you agree that on occasion, when called upon to construe a statute, federal judges may resort to an examination of the legislative history to assist them?

Answer: Yes.

(b). Do you agree that a federal judge should consider the legislative history as a whole, rather than relying on, for example, a single statement of an individual legislator?

Answer: Yes.

(c). In construing an act of Congress, would you give more weight to, for example, analysis contained in the Conference Report than to statements by individual members of Congress?

Answer: Yes.

Questions for Jay S. Bybee, Nominee for the Ninth Circuit
Submitted by Senator John Edwards

1. Have you advised the administration on its Enemy Combatant policy?

Answer: I appreciate the question and your concern with the legal issues involved in this policy. As an attorney at the Department of Justice, I am obligated to keep confidential the legal advice that I provide to others in the executive branch. I cannot comment on whether or not I have provided any such advice and, if so, the substance of that advice.

2. Do you agree with the administration's stance on enemy combatants?

Answer: The President has determined the Administration's position on the classification and treatment of enemy combatants. As a member of the Administration, it is my responsibility to support the President's decision. To the extent that I might have a different personal view on this matter (or any other matter of Administration policy), it would be inappropriate for me to express publicly a personal view at variance with the President's position.

3. Do you believe that the administration – or any administration – should have the unfettered authority to lock up U.S. citizens, indefinitely, without charging them with any crime, with no independent review?

Answer: No. As an American, I consider it beyond the pale that any administration would have the unfettered authority to lock up U.S. citizens for indefinite periods.

These questions concern your 1982 article published in Sunstone Magazine, in which you criticized the IRS decision to deny tax exempt status to Bob Jones University because of its racially discriminatory policies. Among other things, you argued that the IRS policy "illustrates well how capriciously the government may make use of its leverage." You also claimed that the IRS improperly sought to remove the University's tax immunity "because some things which BJU taught and encouraged its students to practice did not comport with social ideas currently held by others all loosely defined as 'public policy'."

I am concerned about your dismissal of the federal government's effort to combat discrimination as merely an "alleged public policy" choice rather than a legitimate governmental interest. Your implication that the compelling government interest in and a consistent bipartisan policy of prohibiting discrimination is nothing more than a "loosely defined public policy" rather than an unfaltering part of the American constitutional fabric is very troubling.

4. Do you still believe that restricting government benefits to institutions like Bob Jones University that choose to discriminate in violation of long standing governmental policy exemplified by, for example, the Civil Rights Act of 1965, is a "capricious" use of

governmental power?

Answer: I appreciate the opportunity to clarify what I wrote in my article in Sunstone Magazine. I have never criticized the Supreme Court's decision in *Bob Jones* or otherwise suggested that it was wrongly decided. Indeed, my article "Government Aid to Education: Paying the Fiddler," was written prior to the Supreme Court's decision. I did not criticize the IRS's tax exemption policy which the Supreme Court upheld in *Bob Jones*, nor did I state that ending discrimination at educational and religious institutions was "capricious." I stated, instead, that the government's *change in position in the middle of the litigation* -- from first opposing a tax exemption for Bob Jones University to then supporting it -- was capricious. I oppose racial discrimination of any kind. Indeed, my Sunstone Magazine article referred pejoratively to "fundamentalist colleges *rationalizing* discrimination by appealing to the Bible." What my article addressed was a concern that colleges and universities might accept government aid without knowing in advance what the conditions of the aid would be.

5. If denying tax exemption status to an institution that blatantly discriminates in its policies is a capricious use of governmental power, what would be a legitimate use of governmental leverage?

Answer: My article described the government's change in position in the middle of the litigation as capricious, not the IRS's policy. With respect to your question, there are many instances where the federal government has used its authority under, for example, the Spending Clause to encourage state and local governments and private institutions to adopt certain programs or standards. The courts have approved the use of such federal leverage in support of -- to list just a few examples -- social security, health care, services to the poor, environmental standards, and privacy.

6. What criteria would you use, if confirmed to the Court of Appeals, for determining whether the conditions placed on a religious or educational institution are a legitimate exercise of governmental power or, as you suggest, simply coercive leverage that is subject to the whims and caprices of each administration?

Answer: The Supreme Court has given additional guidance on this question since I wrote my article on aid to higher education in 1982. For example, five years after my article appeared, the Supreme Court decided *South Dakota v. Dole*. Among other things, the Court stated that any exercise of the spending power must be in pursuit of the general welfare, any conditions must be stated unambiguously, and conditions may be illegitimate if they are unrelated to the federal interest in the project. The Court added that "financial inducement offered by Congress might be so coercive as to pass the point at which pressure turns into compulsion" (483 U.S. at 211; quotation marks and citation omitted), but the Court held that the conditions placed on South Dakota's receipt of federal highway funds did not pass

that point.

7. What factors would you examine to determine whether a policy decision of an administration was more than a "loosely defined social idea" characterized as public policy?

Answer: I would use whatever factors the statutes of the United States or the precedents of the Supreme Court required. In general, to have the force of law, an agency will express its policies in its regulations or enforcement policies. Such regulations or policies place people – and courts – on notice of what the law requires.

8. What do you think is the proper role of the courts in such circumstances?

Answer: The judge's role is not to judge what are good policies and what are bad policies. Those judgments must be made by the legislature. Rather, the judge's role is to decide whether a policy determination is permissible under the Constitution and laws of the United States.

Questions for Jay S. Bybee, Nominee for the Ninth Circuit
Submitted by Senator Russell Feingold

1. During your confirmation hearing before the Judiciary Committee on October 4, 2001, in connection with your nomination to your current position, you spoke about your experience having represented the government in the reparations lawsuit filed against the government by the more than 110,000 Japanese-American victims detained during World War II. As you are aware, almost two-thirds of the detainees were U.S. citizens. At your confirmation hearing, you told the Committee that you believed "the United States made a very bad decision under very difficult circumstances. And I believe that the Supreme Court made a very difficult – made a very bad decision under very difficult circumstances."

   a. In your testimony, were you referring to the Supreme Court cases of *U.S. v. Hirobayashi*, 320 U.S. 81 (1943) and *U.S. v. Korematsu,* 323 U.S. 214 (1944)? If so, why do you believe that those cases were wrongly decided?

   Answer: Yes, I was referring to *Hirabayashi* and *Korematsu*. Based on my understanding of the factual record, I do not believe that the government's racial classification, which resulted in the internment of Japanese-Americans, would satisfy the Court's strict scrutiny standard.

   b. If you were a judge on the Court of Appeals during World War II and the cases of *Hirobayashi* and *Korematsu* had come before you, how would you have ruled as a judge?

   Answer: I have not studied the state of Supreme Court law before *Hirabayashi* and *Korematsu* were decided, nor have I studied what Ninth Circuit precedent was at that time. I therefore do not have a view as to how a court of appeals judge, obligated to faithfully apply Supreme Court and circuit precedent, should have ruled.

   c. Would you agree that it was wrong for the U.S. government to label and treat all Japanese-Americans as "enemies" simply because they shared the same ethnicity as one of our main adversaries during World War II?

   Answer: Yes.

2. According to a *New York Times* article published last week, the FBI has ordered field supervisors to begin counting the number of mosques and Muslims in their areas as part of the Justice Department's anti-terrorism efforts.

   a. What role did you have in developing this new Department of Justice policy, or in providing legal analysis of it, or legal justification for it?

   Answer: I appreciate your concern over this question. As an attorney at the

Department of Justice, I am obligated to keep confidential the legal advice that I provide to others in the executive branch. I cannot comment on whether or not I have provided any such advice and, if so, the substance of that advice. I can state that my office, the Office of Legal Counsel, does not determine matters of policy.

b. If you did not have a role in developing this program, since learning of the policy, what advice and legal analysis, if any, have you provided on this issue? Please provide copies of any OLC memos or opinions you have authored or approved on this topic.

Answer: I cannot comment on whether or not I have provided any such advice and, if so, the substance of that advice, nor am I at liberty to provide copies of any written advice that OLC may have prepared. With respect to providing my OLC opinions or memoranda, I can state that the Office of Legal Counsel does not make its opinions public as a matter of course. The office has a well-established procedure for reviewing opinions for publication. That process gives consideration to the interests of our clients, the interests of other executive agencies that might benefit from the advice we have given, and the interests of the public. In no case will OLC make its opinions public without client consent.

c. There is concern that the counting of mosques and Muslims is a possible prelude to a mass detention plan akin to the ethnic census-taking during World War II that was a precursor to internment of Japanese-Americans. In a speech to the Federalist Society entitled *War and the Constitution "We are All Hamiltonians Now,"* you said "[w]e shouldn't think that we have the power any more than we should think that the war powers or the commerce authority or some combination of the two justifies the detention and imprisonment of large numbers of American citizens who have not been charged with nor convicted of any crime." Do you believe that the government would never be justified in detaining all Muslims in the U.S., without charges and without any particularized suspicion, other than the fact that the individuals share the same religion as members of Al Qaeda?

Answer: I believe that it would be grossly irresponsible for any government official to propose that the United States detain all Muslims based merely on their religion. I do not believe that any such detention would be justified.

3. In your speech entitled *War and Crime in a Time of Terror* you wrote that "persons accused of being enemy combatants have no right to counsel, at best a limited right to a military tribunal and, if found to [be] an enemy combatant, indefinite imprisonment – at least until the conflict is over, after which the combatant has the right to be returned to his homeland." Jose Padilla is a U.S. citizen who was arrested on U.S. soil. He has been detained as an enemy combatant. The Administration has argued that he has no right to counsel and can be held until the end of the war on terrorism.

a. In a time of national crisis, how do you distinguish between the rights of an individual like Jose Padilla and the rights of a group of people like the Japanese-Americans during

World War II?

Answer: Without commenting on any individual case, I can state that individual citizens who conspire to wage war on the United States may properly be treated differently from those who have not been accused of any wrong-doing.

b. If you believe that Korematsu was wrongly decided, how do you reconcile that view with the present Administration's position to deny enemy combatants legal representation and any meaningful judicial review?

Answer: The Administration's position, which has been briefed in federal courts, is based upon well-established precedent. The Japanese-Americans interned during World War II were neither charged with crimes nor declared enemy combatants under the laws of war. Their situation was very different from American citizens (during World War II or any other conflict) determined to be enemy combatants.

c. Do you believe that the problem with the way that the Court decided internment cases during World War II was that the Supreme Court followed public emotions and incorrectly deferred to the Executive branch?

Answer: I do not have sufficient information on which to form a judgment. Any speculation on my part as to why the Court decided as it did would be an uninformed guess.

d. In your October 20th confirmation hearing, you stated: "In my conversation with members in White House Counsel's Office and in my conversations with the Attorney General, both of those offices have made it very clear to me that if I am confirmed for this position that what they want is my objective, frank and honest legal opinion." What do you believe is the appropriate role of the courts in reviewing the Administration's decision to detain U.S. citizens?

Answer: The appropriate role of the courts is to faithfully apply the Constitution and laws of the United States. In general, as one federal court recently observed, "the Supreme Court has shown great deference to the political branches when called upon to decide cases implicating sensitive matters of foreign policy, national security, or military affairs." *Hamdi v. Rumsfeld*, 296 F.3d at 281. More specifically, the Supreme Court has stated that decisions to detain citizens as enemy combatants -- when "ordered by the President in the declared exercise of his powers as Commander in Chief of the Army in time or war and of grave public danger – are not to be set aside by the courts without the clear conviction that they are in conflict with the Constitution or laws of Congress constitutionally enacted." *Ex Parte Quirin*, 317 U.S. at 25.

e. In your opinion, at present, what conflict should be used as a basis when declaring an individual as an enemy combatant? What conflict should be used to determine if an

individual should no longer be detained as an enemy combatant? Who makes the determination if the conflict is over and an enemy combatant should be released?

Answer: To the extent that I have a personal opinion on such matters, it would be inappropriate for me to comment publicly on matters facing the Administration and on which I may have been asked for legal advice. As an attorney at the Department of Justice, I cannot comment on whether or not I have provided any advice in this area and, if so, the substance of that advice.

4. The Seventeenth Amendment was ratified in 1913 and provides for the direct election of Senators by the people. For nearly 100 years, U.S. Senators have been elected by the people of their respective states, not by state legislatures. One of the first Senators to serve my home state, Wisconsin, and the nation, Bob La Follette, was a strong advocate for passage of the Seventeenth Amendment.

You, however, appear to believe that adoption of the 17th Amendment was a mistake. In a law review article entitled, "Ulysses at the Mast: Democracy, Federalism, and the Sirens' Song of the Seventeenth Amendment," 91 Nw. L. Rev. 500 (1997), you state that we should consider repealing the amendment and returning the power of selecting Senators to state legislatures.

a. Do you continue to believe that Senators should not be popularly elected?

Answer: Senators should be popularly elected. The Seventeenth Amendment requires it and was adopted for a number of reasons, many of which are discussed at length in my article.

b. What is your current view of the Seventeenth Amendment?

Answer: In *Garcia v. San Antonio Metropolitan Transit Authority* the Supreme Court observed that "changes in the structure of the Federal Government have taken place since 1789, not the least of which has been the substitution of popular election of Senators by the adoption of the Seventeenth Amendment in 1913, and that these changes may work to alter the influence of the States in the federal political processes." For reasons more fully explained in my article, I agree with the Supreme Court's observation.

c. Are there any other Amendments to the Constitution that you believe were mistakenly adopted? If yes, could you please list the amendment and the reason why you believe it was mistakenly adopted.

Answer: No.

Questions for Jay Bybee, Nominee for the Ninth Circuit
Submitted by Senator Edward Kennedy

Background for Questions #1 through #3

Last April, the Justice Department announced that it was considering a legal opinion that apparently came from the Office of Legal Counsel, the office which you oversee, that stated that state and local police officers have the "inherent legal authority" to arrest people for civil and criminal immigration law violations. It appears now that the Justice Department has in fact accepted the OLC opinion, and has been attempting to implement it.

Despite the fact that this opinion changed the nature of law enforcement and seems to enjoy only limited legal support, it has not been made public. This means the public affected by it cannot examine it and decide for themselves whether or not they agree with its conclusions.

This new opinion is not just a departure from precedent, it is bad policy. It would increase the risk of racial profiling and civil rights abuses, against both non-citizens and citizens who are deemed not to look "American." It would also seriously undermine the ability of police departments to establish effective working relations with immigrant communities, and would deter many immigrants from reporting acts of domestic violence and other violent crime.

For these reasons, police chiefs and police associations across the country have come out against your proposal. Chief Charles Moose of Montgomery County, Maryland has said it "is against the core values of community policing: partnerships, assisting people, and being there to solve problems." Sacramento, California Police Chief Arturo Venegas has said that "to get into enforcement of immigration laws would build wedges and walls that have taken a long time to break down." In fact David Keene, chairman of the American Conservative Union and Grover Norquist, president of Americans for Tax Reform have spoken out against this policy as setting a dangerous precedent.

1. Why did your office depart from the previous OLC memo, approved in 1996, which disallowed the practice of having state and local law enforcement officers make arrests for immigration violations, and what is the legal and policy basis of your determination that state and local police may enforce the nation's immigration laws?

Answer: I understand your particular interest in this legal issue. As an attorney at the Department of Justice, I am obligated to keep confidential the legal advice that I provide to others in the executive branch. I cannot comment on whether or not I have provided any such advice and, if so, the substance of that advice. To the extent that your question seeks the policy basis for the Department's decision, I can state that OLC does not determine questions of policy.

2. The war on terror has not changed what constitutes good policing: building relationships with communities and serving the public. If anything, it has made the relationship between police and the immigrant communities they serve more important to domestic security. From a law enforcement perspective, aren't the police chiefs and police associations correct that police cannot build trusting relationships with immigrant communities under your policy?

Answer: My responsibility at the Department of Justice is to provide legal advice, not to make policy. It would be inappropriate for me, as the government's attorney, to comment on matters of policy relating to any legal matters faced by the Department of Justice.

3. Why has the OLC not made this important opinion public?

Answer: As I stated in response to Question 1, I am obligated to keep confidential the legal advice that I provide to others in the executive branch. Accordingly, the Office of Legal Counsel does not make its opinions public as a matter of course. The office has a well-established procedure for reviewing opinions for publication. That process gives consideration to the interests of our clients, the interests of other executive agencies that might benefit from the advice we have given, and the interests of the public. In no case will OLC make its opinions public without client consent. During my tenure, the process for the review of OLC opinions has been consistent with the longstanding traditions of the office.

Background for Question #4

Education is a key to ensuring that every American has an equal opportunity to succeed. Because they help to further this goal, educational institutions are given a tax exemption under section 501 of the Tax Code. Thus, these institutions receive many of the same government services other entities do, but they effectively receive them for free.

Institutions, educational or otherwise, that discriminate based on race do not reflect our society's values and do not further the national goal of equal opportunity. We thus have no business subsidizing their discrimination with a tax exemption. The Supreme Court has said as much. In the 1983 case Bob Jones University v. United States, the Supreme Court said that the government could deny a tax exemption to educational institutions that practice racial discrimination.

I welcomed that opinion, but you seem to think it was wrongly decided. You have stated in an article in Sunstone Magazine that the government has tremendous leverage over educational and religious institutions and the denial of the section 501 tax exemption in Bob Jones illustrated "how capriciously the government may make use of the leverage."

4. Do you still believe that ending discrimination at educational and religious institutions is good public policy, or is it, as you said, "capricious"?

Answer: I appreciate the opportunity to clarify what I wrote in my article in Sunstone Magazine. I have never criticized the Supreme Court's decision in *Bob Jones* or otherwise suggested that it was wrongly decided. Indeed, my article "Government Aid to Education: Paying the Fiddler," was written prior to that decision. I did not criticize the IRS's tax exemption policy which the Supreme Court upheld in *Bob Jones*, nor did I state that ending discrimination at educational and religious institutions was "capricious." I stated, instead, that the government's *change in position in the middle of the litigation* -- from first opposing a tax exemption for Bob Jones University to then supporting it -- was capricious. I oppose racial discrimination of any kind. Indeed, my Sunstone Magazine article referred pejoratively to "fundamentalist colleges *rationalizing* discrimination by appealing to the Bible."

What my article addressed was a concern that colleges and universities might accept government aid without knowing in advance what the conditions of the aid would be. The Supreme Court has since addressed some of the concerns I raised in my article in 1982. For example, five years after my article appeared, the Supreme Court decided *South Dakota v. Dole*. Among other things, the Court stated that any exercise of the spending power must be in pursuit of the general welfare, any conditions must be stated unambiguously, and conditions may be illegitimate if they are unrelated to the federal interest in the project. The Court added that "financial inducement offered by Congress might be so coercive as to pass the point at which pressure turns into compulsion" (483 U.S. at 211; quotation marks and citation omitted), but the Court held that the conditions placed on South Dakota's receipt of federal highway funds did not pass that point.

Background for Questions #5 and #6

The Equal Protection Clause is critically important to protect the civil rights of all Americans. The promise of equal justice under law, in the end, is secured only through a judicial system that ensures that the laws are applied and enforced equally. Given the majoritarian nature of the executive and legislative branches of our federal government, it is essential that the federal judiciary scrupulously ensure the opportunity of minorities, the powerless and the disenfranchised to pursue and obtain justice.

In Romer v. Evans, the Supreme Court struck down a Colrado statute that invalidated any local ordinances that protected the rights of gays and lesbians. In 1997, you noted that it would have been logical in deciding Romer for the Supreme Court to have relied on Hunter v. Erickson. In Hunter, the Supreme Court struck down an amendment to the Akron City Charter that required any ordinance regulating use, on the basis of race, color, religion, national origin or ancestry, of real property to be first submitted to public referendum. The Supreme Court held that the amendment was unconstitutional under the Equal Protection Clause of the Fourteenth Amendment because it "treated racial housing matters differently from other racial and housing matters." You have suggested that the Court did not cite Hunter because it was wary of declaring sexual orientation a suspect classification, which it would have had to do had it relied on Hunter. You have further

suggested that you believe that discrimination against a group defined by sexual orientation is not worthy of scrutiny under the Equal Protection Clause.

5. What would be necessary to consider gays and lesbians a suspect class or quasi-suspect class under the equal protection clause?

Answer: I appreciate the chance to explain my article, *The Equal Process Clause: A Note on the (Non)Relationship Between* Romer v. Evans *and* Hunter v. Erickson. The article does not suggest that the Equal Protection Clause does not protect groups defined by sexual orientation. Rather, my article points out that the Supreme Court avoided deciding whether sexual orientation defined a class protected by strict or heightened scrutiny under the Equal Protection Clause, and it argued that the Court should have addressed that issue.

With respect to the standards for determining whether sexual orientation will define a class protected by strict or heightened scrutiny, the Supreme Court has identified several criteria that courts should use when considering whether a group constitutes a suspect or quasi-suspect class under the Equal Protection Clause. These include whether the group is defined by obvious, immutable characteristics; has suffered a history of discrimination; and is politically powerless. The question whether sexual orientation constitutes a class entitled to strict or heightened scrutiny under the Equal Protection Clause may be decided by the Court this Term in *Lawrence v. Texas*.

6. You have compared the Court's ruling in Romer to protecting "the illiterate" or "persons with communicable diseases." You have also defended the Defense Department's policy of performing intrusive background investigations before granting gay contractors security clearances because of their sexual orientation and you have contributed to a brief claiming that "a homosexual may be emotionally unstable." Does this brief represent your opinion of lesbian and gay people?

Answer: The question addresses both a law review article I wrote as a law professor and a brief that I filed as an attorney at the Department of Justice. First, I disagree with the characterization that my article on *Romer* was disrespectful to gays and lesbians. I value my association with my gay and lesbian friends, neighbors, colleagues and students. I did not compare the Court's ruling on gays and lesbians to protecting "the illiterate" or "persons with communicable diseases." When read in context, my references will be understood as illustrative of "all kinds of categories" of people that a legislature might seek to protect through legislation. I wrote in *The Equal Process Clause: A Note on the (Non)Relationship Between* Romer v. Evans *and* Hunter v. Erickson:

> **"The Court faulted Colorado for first enumerating a list of protected classes in public accommodations and then removing sexual orientation from the list. The Court surely did not mean that Colorado would violate the Equal Protection Clause if it did not include age or marital status on its list of protected classes, just as Colorado would not violate the Fourteenth**

> Amendment if it included age, but not marital status, on the list. . . . . Furthermore, all kinds of categories are not included on Colorado's list -- the illiterate, persons with communicable diseases, licensed cosmeticians, the tall, the short, persons with male pattern baldness, and so forth. Surely Colorado's laws are not infirm because persons with these characteristics are not expressly protected." (p. 224)

Second, as an attorney (in a career, non-supervisory position) at the Department of Justice in 1988, I was assigned to write a brief on behalf of the Department of Defense in a case challenging DoD's procedures for issuing security clearances to DoD contractors. The suit argued that DoD's procedures violated the rights of homosexuals whose background checks might take longer to complete than similarly situated heterosexuals. DoD's position was that its security clearance procedures were justified because "there is *some* evidence that *some* homosexuals experience confusion over their sexual identity, manifesting itself as mental or emotional instability, and this instability may impair the judgment and reliability of those individuals." (Brief at 17; see also id. at 46 (emphasis added)).

As a government attorney, I had an obligation to zealously represent my clients and to make arguments for which there was a basis in law and fact for doing so. Litigating positions I took on behalf of my clients should not be deemed to represent my personal opinions.

Questions for Jay S. Bybee, Nominee for the Ninth Circuit
Submitted by Senator Patrick Leahy

1. During your time at the Justice Department in the 1980s, you helped shape the federal government's response to a class-action lawsuit filed by survivors of the internment camps where Japanese-Americans and foreign nationals were warehoused during World War II. This horrific deprivation of civil rights was at the time implemented by the executive branch out of what they called a "military necessity."

As you may recall, in October 2001, when you appeared before this Committee for confirmation to your current position as Assistant Attorney General for the Office of Legal Counsel (OLC), you testified about the Internment of Japanese-Americans and you recognized that "the United States made a terrible mistake during very difficult conditions." You indicated that this mistake should never be repeated. You even went so far as to promise to "bring additional sensitivity to the rights of all Americans'" and to "not trample civil rights in the pursuit of terrorism" in your role in advising the current Administration in our *current* difficult conditions. I am interested in the legal work you have been involved in since your confirmation in 2001. As you are no doubt aware, this Administration has been accused of encroaching on the civil rights of Americans in the pursuit of terrorism.

It has been reported that OLC advised the Administration on its decision that it did not need to declare the al Qaeda and Taliban detainees prisoners of war under the Geneva Convention. Your recommendation appears to conflict with Secretary Powell, who argued that the detainees at Guantanamo Bay should be declared prisoners of war and afforded protections under the Geneva Convention. Congressional Research Services analysis supports that view: "Because the United States has argued that the intimate connection between the Taliban and Al Qaeda in part justifies the use of armed force in Afghanistan, some observers argue that Al Qaeda ... members may be entitled to treatment as prisoners of war."

Without speaking for Secretary Powell, I suspect the State Department is concerned about the harm that this decision could have on U.S. foreign policy and national security goals -- especially combating terrorism. This decision has angered key allies, including members of the European Parliament and Organization of American States, whose help we will need to disrupt terrorist cells and interdict weapons of mass destruction. Some argue that not declaring these individuals POWs also could affect the treatment of our own soldiers if they are captured in hostile countries.

(a) In your personal opinion, is the State Department is wrong about the need for POW status of persons detained at Guantanamo Bay?

Answer: I understand your keen interest in this important issue. The President has declared the Administration's position with respect to POW status for the detainees

at Guantanamo Bay. As a member of the Administration, it is my responsibility to support the President's decision. To the extent that I have a different personal view on this matter (or any other matter of Administration policy), it would be inappropriate for me to express publicly a personal view at variance with the President's position.

(b) What do you see as the strongest part of the State Department's position?

Answer: I respect the Department of State and value its perspective on U.S. foreign policy and national security. As a member of the Administration, it is my responsibility to support the President's decision. To the extent that I have a different personal view on this matter, it would be inappropriate for me to express publicly a personal view at variance with the President's position.

(c) Are you concerned about the repercussions this could have on the treatment of American soldiers that are captured?

Answer: Like other Americans, I am always concerned for the welfare of American soldiers and, particularly, those who are captured.

(d) What did OLC advise with regard to POW status for detainees?

Answer: As an attorney at the Department of Justice, I am obligated to keep confidential the legal advice that I provide to others in the executive branch. I cannot comment on whether or not I have provided any such advice and, if so, the substance of that advice.

2. On a related note, the Administration has taken the position that any individual whom the President declares to be an "unlawful combatant" may be detained indefinitely, without access to counsel, without having any charges brought against him, and without regard to the individual's nationality or to where he was arrested. Since we are considering you for a lifetime appointment to the bench, I am most interested in your view on the access to counsel issue.

There are few safeguards to liberty that are more fundamental than the Sixth Amendment, which guarantees the right to a lawyer throughout the criminal process, from initial detention to final appeal. Yet today, an untold number of individuals – at least some of whom are American citizens – are being held incommunicado, without access to counsel. In one case that we do know about, the Padilla case in the Southern District of New York, the defendant – a U.S. citizen – was arrested in Chicago on a material witness warrant, then transferred to a military brig after the President labeled him an "unlawful combatant." For nine months he has been denied the right to consult with a lawyer – even after a court ruled that he had a right to do so. As the head of OLC, you have no doubt played a key role in developing the Administration's policy with respect to denying

legal representation for "unlawful combatants."

(a) Please explain your involvement in this issue and the legal theories that support the Justice Department's treatment of this person.

Answer: With respect to any involvement I may have had on this matter, please see my response to 1(d). The Administration has explained the legal basis for the treatment of American citizens who have been detained as enemy combatants in briefs filed by the Department of Justice in federal courts. Such cases fall under the supervision of the Solicitor General's office. The Fourth Circuit Court of Appeals recently dismissed a challenge to the confinement of one such citizen. *Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir. 2003).

(b) Please explain your personal belief of the importance of the Sixth Amendment rights of criminal defendants.

Answer: Sixth Amendment rights are foundational to the promise of due process for persons accused of crimes. Like other constitutional rights, Sixth Amendment rights should be protected and enforced to their fullest extent.

(c) You have recently expressed your beliefs on the subject in speeches entitled "War and The Constitution" and "War and Crime in a Time of Terror" given to the Federalist Society and other groups. During these speeches you have stated that Presidents have "the option" of treating the same person either under criminal rules or under rules reserved for war because in your words these realms "are not mutually exclusive." Have you advised the Administration on the propriety of trying terrorist suspects in *military tribunals*, rather than in district court? Do you concede that this is a new view of executive power?

Answer: As an attorney at the Department of Justice, I am obligated to keep confidential the legal advice that I provide to others in the executive branch. I cannot comment on whether or not I have provided any such advice and, if so, the substance of that advice. Similarly, I cannot comment on whether any such advice would be "new."

3. In conducting research on the recent activities of the office that you head at the Justice Department, a substantial roadblock was encountered when it was discovered that you had only published three OLC opinions since your confirmation in 2001. A recent search revealed that 1,187 OLC opinions were publicly available on-line since 1996. Clearly, these opinions were routinely published *prior* to your appointment to Assistant Attorney General.

(a) Please explain to the Committee why *under your leadership* there has been a virtual termination in the routine publication of opinions and why you have only saw fit to

release three opinions?

Answer: The Office of Legal Counsel does not make its opinions public as a matter of course. The office has a well-established procedure for reviewing opinions for publication. That process gives consideration to the interests of our clients, the interests of other executive agencies that might benefit from the advice we have given, and the interests of the public. In no case will OLC make its opinions public without client consent. During my tenure, the process for the review of OLC opinions has been consistent with the longstanding traditions of the office.

(b) I am concerned that there is a disturbing pattern in your record of an expansive view of Executive Privilege – that you do not believe the people have a right to know what the Administration is doing, what legal rules informed their policy choices and who was consulted. What can you say to assure us that you are for public access to government and are not part of an attempt to stonewall the public to ward off scrutiny about difficult policy decisions implemented by the Administration?

Answer: Congress has enacted various laws that open the processes of government. Those important laws include the Freedom of Information Act, the Government in the Sunshine Act, and the Federal Advisory Committee Act. I support the faithful adherence to such laws, consistent with the Constitution and, if I am fortunate enough to be confirmed to the Ninth Circuit, I would enforce such laws fully.

4. In reviewing your record, I note that you appear to have spent much of your professional career in government working against Congress' administrative oversight efforts.

(a) For the first time in the 81-year history of the GAO, the Comptroller General of the United States went to Federal court to ask a judge to order a member of the executive branch to turn over records to Congress. Have you advised the Administration on the propriety of asserting executive privilege and refusing to produce documents to the GAO who sought to investigate how public money is spent? Please explain your reasoning.

Answer: The Administration did not assert executive privilege with respect to documents requested by the GAO that were the subject of the suit in *Walker v. Cheney*, but instead challenged the authority of GAO to review the activities of a group of presidential advisers preparing recommendations to the President in connection with the discharge of his constitutional responsibilities. The position of the Administration was explained in the extensive briefs filed in the *Walker* case by the Solicitor General's office. For reasons explained in response to Question 1(d), I cannot comment on whether or not I provided any such advice in connection with this case and, if so, the substance of that advice.

(b) Can you give us an example of a federal court case where you thought Executive Privilege should *not* apply? How about an example of a case that upheld the denial of a

FOIA request that you disagreed with?

Answer: In *Nixon v. United States*, the Supreme Court recognized the principle of executive privilege but held that, on the facts of the case before it, the needs of the pending criminal trial outweighed the interests protected by the executive privilege claim and therefore the claim would not be sustained. My experience with FOIA has been largely limited to teaching the subject in my course in Administrative Law. My course coverage did not permit extended discussion of the FOIA exemption decisions, and therefore I do not have a basis for citing a particular exemption case as wrongly decided.

(c) In *Advising the President: Separation of Powers and the Federal Advisory Committee Act*, Yale Law Journal (1994), you analyze Congress' ability to enact laws that requires committees 'utilized' by the President to open their records and to open their meetings to the public. In fact, you contends that the Federal Advisory Committee Act (FACA), is an *unconstitutional encroachment by Congress on the power of the executive*. I am concerned that you have a firm ideological bias against public access to any executive decision making. What do you have to say on this subject?

Answer: There are numerous laws that provide for the public's access to government information. In my response to Question 3, I cited three acts, FOIA, the Government in the Sunshine Act, and FACA as examples of important laws opening government processes. Congress has determined that there are significant public policy reasons for providing public access to such information held by the executive branch. I have previously written about the relationship between Congress and the executive on the subject of access to information. In the very article to which the question refers, *Advising the President: Separation of Powers and the Federal Advisory Committee Act*, I discussed the circumstances under which Congress may regulate executive branch consultations with advisory committees. In that article I wrote:

> **"In the exercise of his Take Care responsibilities, the President's consultations are regulated by Congress in two circumstances. First, when Congress prescribes consultations as a part of the President's Take Care responsibilities, the requirement does not infringe upon his judgment and, indeed, becomes part of the President's duty to faithfully execute the law. It is when the advice is made binding on the President that he has been relieved of his Take Care responsibilities in violation of the separation of powers. Second, when the President appoints his own advisory committees in support of his Take Care responsibilities, and Congress funds the committees, then Congress may place some restrictions on the committees. In this context, the Take Care Clause is the occasion for the exercise of the implied power, but it exists concurrently with Congress' spending power. . . ." (p. 123; footnote omitted)**

My article did not conclude that FACA was unconstitutional in all of its

applications. Rather, my article carefully concluded that the FACA was unconstitutional in narrow circumstances – namely, "to the extent that it regulates the President's use of outside advisory committees funded at their own expense." (p. 128). As a judge, I would be firmly committed to faithfully applying the public access laws.

5. Last year, you were called to Capitol Hill to testify before the House Government Operations Committee to explain why the Administration refused to produce documents prepared by federal prosecutors involving corrupt FBI practices in a 30-year old investigation of organized crime in New England. At this very heated hearing, you were severely criticized by Members from both sides of the aisle for the Administration's lack of disclosing virtually anything to a congressional committee who was engaged in oversight proceedings. I believe your reason for not producing the many documents requested by the Committee was that there was an on-going investigation into the mistakes made by the FBI. If that is the standard for asserting executive privilege – that there is an on-going investigation– then how will anything be discoverable regarding the mistakes made prior to September 11th?

(a) Wouldn't that standard also encourage the Administration to just keep investigating things in order to block off important disclosures directly relevant to oversight proceedings?

Answer: It is my understanding that the Department of Justice has cooperated fully with the Joint Inquiry of the Senate and House Intelligence Committees regarding September 11th, concurrent with the executive branch's own ongoing investigation. With respect to the documents sought by the House Government Reform Committee, the concern was not that there was an ongoing investigation, but that the Committee sought documents setting forth the deliberations of prosecutors as to whether to seek indictments of individuals. The rationale for the executive privilege claim was set forth in a letter from White House Counsel Alberto Gonzales to Chairman Burton, dated January 10, 2002:

> **"Absent unusual circumstances, the Executive Branch has traditionally protected those highly sensitive deliberative documents against public or congressional disclosure. This traditional Executive Branch practice is based on the compelling need to protect both the candor of the deliberative processes by which the Department of Justice decides whether to prosecute individuals and the privacy interests and reputations of uncharged individuals named in such memoranda.**
>
> **"Moreover, with respect, congressional access to these kinds of sensitive prosecutorial decisionmaking documents would threaten to politicize the criminal justice process and thereby threaten individual liberty. The Executive Branch is appropriately concerned that the prospect of congressional review of prosecution or declination memoranda might lead prosecutors to err on the side of investigation or prosecution solely to avoid**

political criticism."

(b) Do you believe that Congress has a valid power of oversight and should be allowed to obtain documents from the Justice Department?

Answer: This Administration adheres to the longstanding executive branch policy of seeking to satisfy Congress's oversight needs to the fullest extent consistent with the executive branch's constitutional responsibilities. This commitment extends to oversight of the Department of Justice. As Judge Gonzales stated in the same letter,

> **"As a general matter, the Executive Branch will treat requests for Department of Justice deliberative documents from closed matters in the same way it treats requests for Executive Branch deliberative documents more generally: through a process of appropriate accommodation and negotiation to preserve the respective constitutional roles of the two Branches. No bright-line rule historically has governed, or now governs, responses to congressional requests for the general category of Executive Branch 'deliberative documents.'"**

(c) In addition to disagreeing with the Supreme Court's decision in *Public Citizen v. United States*, can you please name three other recent decisions that you disagree with?

Answer: As a nominee, I think it is improper to criticize publicly a Court whose decisions I might be called upon to uphold and enforce. I have, however, criticized in my academic capacity the Supreme Court's reasoning in several cases, including *General Electric v. Gilbert, Employment Division v. Smith* and *Morrison v. Olson.*

6. There has been an overwhelming wave of concern expressed about the Department of Defense's Total Information Awareness system being developed under Admiral Poindexter. I understand that some form of data mining is currently used at the Justice Department.

(a) Have you advised the Attorney General or the President on the propriety of such data mining and whether it comports with the Privacy Act? Please explain your analysis.

Answer: As an attorney at the Department of Justice, I am obligated to keep confidential the legal advice that I provide to others in the executive branch. I cannot comment on whether or not I have provided any such advice and, if so, the substance of that advice.

(b) According to a recent article in *The Nation*, law enforcement officials sought to use databases which maintain information regarding the purchase of guns to monitor the purchasing activities of suspected terrorists. The article quotes an OLC memo, which stated: "We see nothing in the NICS regulations that prohibits the FBI from deriving additional benefits from checking audit log records." Attorney General Ashcroft

reportedly refused to allow these officials such access, saying: "It's my belief that the United States Congress specifically outlaws and bans the use of the NICS database - and that's the use of approved purchase records - for weapons checks on possible terrorists or on anyone else." Have you advised the Administration on the propriety of using gun purchase databases to track terrorist suspects, as reported in *The Nation*?

Answer: As an attorney at the Department of Justice, I am obligated to keep confidential the legal advice that I provide to others in the executive branch. I cannot comment on whether or not I have provided any such advice and, if so, the substance of that advice.

7. I noticed that prior to your appointment to the Justice Department you commented on the constitutionality of states' requiring fingerprints to receive a drivers license. In a Las Vegas newspaper you were quoted as saying that "The Constitution gives us a lot of leeway to decide on these issues."

(a) Have you contributed to OLC opinions or advised the Administration on the constitutionality of using biometric traits in governmental databases?

Answer: As an attorney at the Department of Justice, I am obligated to keep confidential the legal advice that I provide to others in the executive branch. I cannot comment on whether or not I have provided any such advice and, if so, the substance of that advice.

(b) Do you believe there is a constitutional right to privacy? If so, please describe what you believe to be the key elements of that right. If not, please explain.

Answer: The Constitution protects privacy rights in a number of ways. The First Amendment protects, among other things, the sanctity of our thoughts and communications. The Third and Fourth Amendments help secure our persons, papers, effects and houses against certain kinds of government intrusions. In addition, in a number of cases -- beginning most prominently with *Griswold v. Connecticut* -- the Supreme Court has recognized a constitutional right to privacy in certain family and reproductive decisions. If confirmed, I will follow these cases, which are binding precedent.

(c) Do you support the holding of *Roe v. Wade* and a constitutionally recognized and protected right to choose?

Answer: If I am confirmed, I will faithfully apply the Supreme Court's precedent on *Roe v. Wade*.

(d) A number of lawyers designated by the Federalist Society as experts on the constitutionality of abortion are openly hostile to a woman's right to choose and believe

that *Roe v. Wade* should be overruled. As a member of the Federalist Society, do you share the views of their experts in this area?

Answer: I am not aware that the Federalist Society has designated any lawyers as experts on the constitutionality of abortion. Consequently, I do not know what their views may be.

8. You have argued that the Seventeenth Amendment providing for the popular election of U.S. Senator was a significant "mistake" because it removed the state legislature's power. I am concerned that your article reflects a serious disdain for democracy. If you are appointed to the Ninth Circuit you will frequently be required to judge cases on voter initiatives and referenda, which are very popular in the western region of this country. What can you tell us to ensure us that you do not have a bias against instruments of direct-democracy like voter initiatives?

Answer: As a judge, I would approach any law – whether it was a law enacted by Congress or by a state legislature or through voter initiative – in the same way, with the presumption of constitutionality to which all laws are entitled. My article on the Seventeenth Amendment was an effort to analyze how that Amendment affected the bicameral scheme designed by the framers of the Constitution, and was not meant to disparage in any way the principles of republican government or democracy.

9. You have argued that the Tenth Amendment should be reinterpreted to protect states' rights from encroachments by Congress and have been critical of the Supreme Court's opinions which allowed Congress to expand its powers under the Interstate Commerce Clause. In your article "The Tenth Amendment Among the Shadows," you argue that the Court should further curtail Congress' ability to enact national standards to give states *complete control* in "family law, ordinary criminal law enforcement, and education." In your academic writing on protecting states' rights, you indicate a clear support the Supreme Court's curtailment of Congress' power to act but you do not indicate any support for restrictions on the President's power to act.

(a) Certainly, the President's implementation of regulations and executive orders also affects states' rights. Can you provide examples of executive actions that have violated states' rights?

Answer: I have pointed out, as the Supreme Court stated in *Lopez*, that family law, criminal law enforcement and education are areas "where States historically have been sovereign." (514 U.S. at 564). Even Justice Breyer, writing on behalf of himself and three other members of the Court, argued that his view would not compel the conclusion "that the Commerce Clause permits the Federal Government to regulate any activity that it found was related to the economic productivity of individuals citizens, to regulate marriage, divorce, and child custody, or to regulate any and all aspects of education." (514 U.S. at 624 (Breyer, J., dissenting)(quotation

marks and citation omitted)).

It would be unusual that we would distinguish between congressional actions that violated the rights of the states and executive actions that violated the rights of the states. In the so-called "commandeering" cases, it would generally be irrelevant whether Congress ordered the states to take a particular action or whether the executive, acting pursuant to congressional authority, directed the same action. For example, in the Low-Level Radioactive Waste Policy Amendment Act, part of which was held unconstitutional in *New York v. United States*, portions of the act were self-executing, while other sections were to be enforced by the Secretary of Energy and the Nuclear Regulatory Commission.

Generally speaking, the President's implementation of regulations is performed pursuant to his constitutional responsibility to "take Care that the Laws be faithfully executed." I discussed in my article *Advising the President: Separation of Powers and the Federal Advisory Committee Act*, the relationship between Congress and the President's "take Care" responsibility:

> **"The exercise of the Take Care Clause, unlike the exercise of other enumerated powers, is without meaning in the absence of congressional legislation. The duty of the President to see that the laws be executed is a duty that does not go beyond the laws or require him to achieve more than Congress sees fit to leave within his power. Congress determines what it is the President must faithfully execute, and it accomplishes the task in varying degrees of specificity. The power to enact substantive legislation is Congress' principal check on the President. The greater the specificity, the greater the control Congress has asserted over the President's faithful execution of the law." (pp. 100-01;quotation marks and footnote omitted).**

(b) Do you agree with the President, who in his first State of the Union said that education is a top federal priority because education is the first, essential part of job creation, or do you agree with the Supreme Court majority in *United States v. Lopez*, which said that education is a "non-economic" activity and is therefore outside the federal regulatory power?

Answer: There is no conflict between the President's statement and what the Court said in *Lopez*. The Court did not hold that education is a non-economic activity and outside the federal regulatory power. What the Court said in *Lopez* is "[t]he possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce." (514 U.S. at 567). Elsewhere in the opinion the Court stated that "We do not doubt that Congress has authority under the Commerce Clause to regulate numerous commercial activities that substantially affect interstate commerce and also affect the educational process. That authority, though broad, does not include the authority to regulate each and every aspect of local schools." (514 U.S. at 565-66). Many federal activities in the area of education rest upon Congress's power under the Spending Clause rather than its power under the Commerce Clause.

10. In response to the September 11th terrorist attacks, our government has launched a criminal investigation of unprecedented scope. The federal government has responded to the attack in not only in its military, intelligence, and national security capacity, but also in its domestic law enforcement capacity. I have been worked very closely with the Administration to pass comprehensive anti-terrorism legislation to make sure that such a tragedy never happens again. As part of this effort, I proposed creating a new federal crime to punish attacks on mass transit systems, and the Administration has suggested created new federal criminal prohibitions against the possession of biological agents or toxins by unauthorized persons and against harboring terrorists.

(a) A few years ago you gave a speech to the Nevada Inn of Court where you said: "Had the Court not struck down VAWA, then, I am afraid, there was (for those concerned about federalism) a *parade of horribles* to follow." In light of this concern, what is your position on proposals to expand federal criminal law to respond to terrorists?

Answer: Congress has broad authority -- including, but not limited to, the Commerce Clause – to enact criminal laws, including laws that would protect the United States against terrorism.

(b) You recently gave a speech saying that "Federalism must step aside" to executive power when we are at war. In your view, does this exception also apply to the power of Congress? Please reconcile your answer with the speech you gave to the Federalism Society entitled "War & the Constitution: We are all Hamiltonians Now."

Answer: The waging of war involves authority vested by the Constitution in both the executive and legislative branches. In my speech "War & the Constitution: 'We Are All Hamiltonians Now,'" I stated that "War, even war within the internal boundaries of the U.S., can be waged on a number of constitutional grounds (invasion clause, DVC, perhaps even the piracy clause or Republican Guaranty Clause). The President (together with Congress) should be given broad leeway to wage war successfully."

(c) Can you provide examples, other than the fight against terrorism where we would be constitutionally justified in establishing national standards? What about, for example, protecting citizens against discrimination? In your view, would that be a justifiable subject for Congress to legislate?

Answer: Congress has power under various provisions of the Constitution to protect persons against discrimination. I have testified before this Committee concerning Congress's power under Section 5 of the Fourteenth Amendment to protect persons against religious discrimination. In connection with the Religious Liberty Protection Act (which was a predecessor bill to what ultimately became the Religious Land Use and Institutionalized Persons Act), I testified *in favor* of Congress's exercise of Section 5 authority in RLPA. In fact, I advised the

Committee that Section 5 "means that Congress does not need to wait on the judiciary and that, using its unique powers of inquiry, Congress may be proactive. Congress may determine that the states are violating provisions of the Constitution and provide a remedy or a prophylactic measure to address the violations."

11. In 1997, you wrote that Congress has very limited power to pass criminal statutes. You supported this view with a cite to the Domestic Violence Clause of the Constitution, a little known clause in Article Four, that in your view provides "general criminal law enforcement to the states." You also argued that even when we act under our enumerated constitutional powers, the clause created "a presumption against federal preemption, co-option and even duplication of state efforts to control [crime]." I understand from your public statements that since September 11th, a lot has changed in terms of the power of the Executive to fight the war on terrorism and I wonder if your view of the power of Congress to enact criminal statutes has also changed.

Answer: My article on the Domestic Violence Clause offered a historical perspective on how federal jurisdiction over crime was viewed during formative periods in our constitutional history, including the framing of the Constitution and the adoption of the Fourteenth Amendment. As I pointed out in my response to Questions 10(a) and (b), Congress has broad authority to protect the United States against terrorism.

12. In your law review article, *The Equal Process Clause: A note on the (Non)Relationship Between Romer v. Evans* and *Hunter v. Erickson*, you wrote that, "If Amendment 2 violates the Equal Protection Clause, it does so because . . . homosexuals are entitled to strict or heightened scrutiny. Whether, however, homosexuals are entitled to strict or heightened scrutiny is the one thing the Court could not bear to answer."

(a) In your opinion, do you believe members of the gay and lesbian community constitute a suspect class and, as such, are entitled to heightened scrutiny? If not, why not?

Answer: The question whether sexual orientation constitutes a class entitled to strict or heightened scrutiny under the Equal Protection Clause was not addressed by the Court in *Bowers v. Hardwick*. The question may be, however, before the Court this Term in *Lawrence v. Texas*. It would be inappropriate for me to opine on a case currently before the Court, both because I am a nominee and because the Solicitor General speaks for the Administration on matters before the Supreme Court. If confirmed, I would follow the decision of the Supreme Court and welcome clarification of the law.

(b) In *Romer v. Evans*, 517 U.S. 620 (1996), the Supreme Court invalidated "Amendment Two" because the law could not withstand even the most deferential level of review, rationality review. The majority opinion explains that the Amendment, "lacks a rational relationship to legitimate state interests," because it, "seems inexplicable by anything but animus toward the class it affects." *Romer*, 517 U.S. at 632. Yet, you seem

to be implying that the Amendment can be found unconstitutional only if gays and lesbians constitute a suspect class, which you suggest they do not. How do you reconcile that argument with the *Romer* majority's position quoted above?

Answer: The Court in *Romer* held that Colorado's Proposition 2 did not satisfy rational basis scrutiny. The Court thus declined to decide whether sexual orientation defines a class entitled to strict or heightened scrutiny. I argued in my article *The Equal Process Clause: A Note on the (Non)Relationship Between* Romer v. Evans *and* Hunter v. Erickson that the Court should have reached that question. I did not address the question whether sexual orientation should or should not constitute a class entitled to strict or heightened scrutiny.

(c) How would you analyze a situation in which a lesbian applied for housing and was denied purely on the basis of her status as a lesbian? Would you say that she should have no recourse under the law? What about a gay man who called 911 and the police refused to respond because of his sexual orientation, as Amendment 2 seemed to allow?

Answer: Questions of discrimination in housing generally require construction of applicable federal, state, and local fair housing laws. Any questions that require construction of the Equal Protection Clause may be answered by the Supreme Court in *Lawrence v. Texas*, which is before the Court this Term. With respect to the police refusing to respond to a 911 call from a gay man, the first duty of government is to protect equally all persons within its jurisdiction. It would be inexcusable for police to decline to answer a plea for help for reasons unrelated to public safety, such as the characteristics of the victim.

(d) I am impressed by your acknowledgment that as a result of the states' failure to act, Congress amended the Constitution to pass the 14th Amendment. This "Amendment granted expanded authority to Congress and the federal courts to deal with the gross inequities in state laws." Many people argue that discrimination on the basis of sexual orientation is the same as discrimination on the basis of race or gender. In your view, does Congress have the power to enact legislation to protect gays and lesbians from discrimination on the basis of their orientation?

Answer: In *Boerne*, the Court stated that "It is for Congress in the first instance to determine whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment, and its conclusions are entitled to much deference. Congress' discretion is not unlimited, however, and the courts retain the power, as they have since *Marbury v. Madison*, to determine if Congress has exceeded its authority under the Constitution." (521 U.S. at 536; quotation marks and citation omitted). Congress's power under Section 5 to enact legislation to protect persons on the basis of their sexual orientation may be further defined after the Court's decision in *Lawrence v. Texas*. Congress may have other constitutional sources of authority on which it could enact such legislation.

(e) In that same law review article, you criticized the Supreme Court's decision in *Hunter v. Erickson* which invalidated a law that restructured the political process in such a way as to make it harder for minority groups to pass anti-discrimination legislation. If the Supreme Court's analysis in that case is flawed, as you suggest, how should the courts, if at all, protect the rights of minority groups to participate equally in the political process?

Answer: Federal courts have a constitutional duty to protect the political rights of certain groups. In the first place, federal courts have authority under the Constitution (under, for example, the Fourteenth, Fifteenth, Nineteenth, Twenty-Fourth and Twenty-Sixth Amendments) to protect the rights of certain groups who have been denied the franchise, and thus the opportunity to participate in the political process. The courts' authority under these provisions is self-executing; it does not require congressional action to create authority in the courts to fashion a remedy for violations of those provisions. Moreover, Congress has authority under the Constitution (under, for example, those same amendments) to enforce such provisions through legislation -- the Voting Rights Act being a good example -- and the courts may be called upon to uphold the enforcement of such statutes.

(f) You have also suggested that courts should not treat legislative referenda any differently than laws enacted by legislative officials. Do you believe that referenda raise any special concerns when it comes to protecting the rights of minorities?

Answer: All laws, whether they are adopted by the legislature or by public referendum, must be judged by the standards of the Constitution. To the extent that any law, irrespective of the process by which it was adopted, violates constitutional rights, the courts should deal with the law appropriately.

13. In your article on *Romer v. Evans*, you state that

> In the recent past, when the Court has confronted such controversial questions of general interest, it has attempted to draw on our legal traditions to demonstrate the inevitability of its decision. This idea of judicial precedent possesses a certain Calvinistic fatalism: By ascribing to traditions or prior decision a power beyond the present [Supreme] Court's ability to control, precedent absolves the present Court of responsibility for the decision the Court must make.

Please explain your understanding of judicial precedent and what role it serves in both the judicial and executive branches for guiding and justifying decisions. If the role you believe it serves is different from the role you think it should serve, please explain.

Answer: The principle of *stare decisis* is firmly established in American jurisprudence. The principle helps to assure us that the courts apply the same law to all persons; that one set of rules does not apply to one person at one time or place and a different set of rules to another person at another time or place. From time to

time, the courts have overruled prior decisions where the court was of the firm opinion that the prior decision was in error and other factors -- such as any reliance interest -- did not require adherence to precedent. When courts have to overrule prior decisions, they should do so plainly, so that other branches of government and the people may know what the law is.

14. In your article "Government Aid to Education: Paying the Fiddler," you criticize the IRS policy ultimately found constitutional by the Supreme Court in *Bob Jones University v. United States*, which denies tax exempt status to universities that employ racially discriminatory practices.

(a) Your concern is that governmental power can be used "against almost any institution in the name of any alleged 'public policy.'" As a judge, how will you differentiate among what you believe are "good" public policies versus "bad" public policies? Can you provide an example of a public policy that, in your view, would allow the government to use its power to protect marginalized groups?

Answer: In my article "Government Aid to Education: Paying the Fiddler," I did not criticize the IRS's tax exemption policy which the Supreme Court upheld in *Bob Jones*. Rather, I criticized the caprice in the government's litigation position in the Supreme Court – where the United States initially supported the IRS before the lower court and then changed its mind before the Supreme Court. If the government can change its policy in the middle of litigation over one policy that we should all agree is fundamental – that race discrimination is wrong – then, I asked, when colleges and universities accept government aid, how can they possibly know in advance what the conditions of the aid will be?

With respect to the specific question, the judge's role is not to judge what are "good" policies and what are "bad" policies. Those judgments must be made by the legislature. Rather, the judge's role is to decide whether a policy is within the Constitution and laws of the United States. There are many examples where government has employed its power to protect marginalized groups, such as the poor, the aged, or the infirm. Examples of legislation might include aid to families with dependent children, legal services, and medicare.

(b) In criticizing the government's so-called capricious leverage, you comment on the multitude of lawsuits that have resulted. You specifically include "sexual preference" as one type of suit courts have "entertained." Does this mean that you would not support government protection against sexual-orientation discrimination?

Answer: As I noted in response to 12(d), Congress may have power under more than one provision of the Constitution to enact legislation to protect gays and lesbians against discrimination on the basis of their sexual orientation. Consistent with the Constitution and laws of the United States, I would faithfully interpret and uphold the enforcement of the discrimination laws.

15. I notice that you have filed at least two Supreme Court briefs on behalf of the Clarendon Foundation – one in the case challenging the Violence Against Women Act and the other challenging the Religious Freedom Restoration Act.

(a) Were you approached by the Foundation to file these Amicus Briefs or did you seek them out?

Answer: I have had a long friendship with one of the attorneys who worked with the Clarendon Foundation. We talked frequently about the interests of the Foundation and my own scholarly efforts and discussed whether it would be appropriate to work together on amicus briefs for Clarendon.

(b) Please describe the Clarendon Foundation and tell us if you share a common legal philosophy with the Foundation on issues of federalism?

Answer: The Clarendon Foundation was a non-partisan, non-profit organization created to promote study of the Constitution and the importance of civics in public school curricula. The Foundation engaged in two activities. It sought to acquire FCC licenses for educational use, and it sought to participate as *amicus curiae* in cases before the Supreme Court where it could provide a historical perspective on the Constitution. I worked with the Clarendon Foundation on two *amicus* briefs. I cannot speak to the Clarendon Foundation's philosophy on matters other than the briefs in which I participated.

(c) Since your confirmation to the Justice Department, what contact, if any, have you had with the Clarendon Foundation?

Answer: I have had no contact with the Clarendon Foundation.

16. In the amicus brief you filed on behalf of the Clarendon Foundation on the case *United States v. Morrison*, you take issue with the constitutionality of the Violence Against Women Act. In particular, you argue that, under the Domestic Violence Clause of the Constitution, art. IV, § 4, "Congress did not assume primary responsibility – whether exclusive or concurrent – for quelling domestic violence. Rather, its responsibility was secondary: The United States was to 'insure domestic tranquility' when the states, in their own judgment, proved incapable." 1999 WL 1186265. You go on to argue that Congress has interpreted the Commerce Clause too broadly, and that, "Congress's response to the problem of gender-based violence was simply to coopt the field nationally" and that "[t]he framers conditioned the exercise of federal power over domestic violence on the states requesting federal assistance" and that "[t]he Domestic Violence Clause thus shields the states from unwanted federal intervention." Id.

(a) Please explain how you think the Domestic Violence Clause limits the Commerce Clause, and therefore the Congress, from enacting criminal statutes.

Answer: I explained in my article *Insuring Domestic Tranquility:* Lopez, *Federalization of Crime, and the Forgotten Role of the Domestic Violence Clause*, based on extensive historical research, that the framers of the Constitution and the authors of the Fourteenth Amendment (among others) regarded the Domestic Violence Clause as evidence that the states would retain primary responsibility for the definition and punishment of local crime. Under that historical view, Congress has the power to define and punish a range of crimes related to its enumerated powers, including the Commerce Clause. The Domestic Violence Clause confirmed what Chief Justice Marshall observed in *Cohens v. Virginia*, that Congress does not have the power to "punish felonies generally." Notwithstanding any of my academic writings, I would fully and faithfully apply Supreme Court precedent regarding the scope of the federal government's authority to enact criminal laws.

(b) What other criminal statutes do you feel run afoul of the Commerce Clause and why?

Answer: My article dealt with the Domestic Violence Clause from a historical perspective and at a very conceptual level and did not undertake to deal with any particular criminal statute.

17. What can you say to assure this Committee and prospective parties that you will be a fair judge, an impartial adjudicator, who will not use the federal bench to achieve the philosophical agenda that you have been advancing as an advocate and officer of the Federalist Society?

Answer: I have been fortunate in my career to have seen the law from several different perspectives, but I have never viewed my role as advocating any supposed position of the Federalist Society. I have been an attorney representing private persons, an attorney representing the government, and a law professor. Those are very different roles. As an advocate for private persons, I represented my clients vigorously, pursuing every argument that could reasonably be made. When I served as a litigator for the government, I assumed a different role: I had a duty to the Constitution and the laws of the United States, and sometimes I had to tell agencies that I represented that an argument they wished to make in court was not in the broader interests of the United States. As a law professor, it was my responsibility to probe, push and prod my students to think critically about the Constitution, the laws, and the decisions that they were studying. In my scholarship, I imposed the same standard on myself and my colleagues in the academy: to probe and prod and think critically about the law. The role of a judge is different from any of these roles. It is not to be an advocate or to push and prod the law. The role of the judge is to say what the law is. I pledge that, if I am confirmed, I will say what the law is to the best of my ability.

18. President Bush previously appointed a judge to an appellate court (John Rogers) who asserted that a lower court, when faced with case law it thinks a higher court would

overturn were it to consider the case, should take that responsibility upon itself and go ahead and reverse the precedent of the higher court on its own. The idea is that the Supreme Court, for instance, has rules it follows about when and whether to overturn precedent, and lower courts should follow this body of law in the same way they follow other laws of the higher court, and, therefore, a judge should reverse higher court precedent on his own when he thinks that the higher court would. Do you subscribe to this theory that lower courts should intuit when a higher court would decide to overturn its own precedent? Or do you believe that lower courts may never overturn precedents of higher courts?

Answer: A lower court may not overturn the decision of a higher court.

SUBMISSIONS FOR THE RECORD

UNLV
UNIVERSITY OF NEVADA LAS VEGAS

January 31, 2003

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

I am writing to express my strong support for Jay S. Bybee whom President George W. Bush renominated to be a judge of the U.S. Court,of Appeals for the Ninth Circuit on January 7. I have known Jay since 1990 or so when we hired him to the faculty at Louisiana State University Law Center. In addition, Bybee was the person above all others who convinced me to come to teach at the Boyd School of Law, University of Nevada at Las Vegas. Bybee and the small cadre of first rate professors and scholars, along with Dean Dick Morgan, were able in a very short time to build a law school here in Las Vegas that is quite astounding in its quality and depth. On the basis of my very close professional and personal association with Bybee in these two different enterprises, I strongly commend Bybee to you. I should note that my personal politics are quite different from Bybee's, but Jays tremendous intelligence, work ethic and, above all, his integrity and desire to complete each and every task not only to the best of his ability, but also to do the right thing with it, convinces me that I would rather have him be a federal judge than many or most who share more closely my own politics. There is absolutely no doubt that very quickly he will be one of the better federal judges on the bench.

Jay Bybee is currently the Assistant Attorney General for the Office of Legal Counsel (OLC) in the United States Department of Justice, a position to which President Bush appointed him in October 2001. Bybee is exceptionally well qualified to serve as a Ninth Circuit judge. His professional achievements have equipped Bybee for this position. In 1980, Bybee graduated cum laude from the J. Reuben Clark Law School of Brigham Young University where he was the business manager for the BYU Law Review. Bybee first served as a judicial law clerk for the late Judge Donald Russell of the United States Court of Appeals for the Fourth Circuit. He then engaged in the private practice of regulatory and appellate law with the Washington, D.C. office of Sidley & Austin, a highly-regarded Chicago firm. Thereafter, Bybee worked for five years in the Department of Justice, initially at the Office of Legal Policy and subsequently on the Appellate Staff of the Civil Division. Bybee has filed briefs in the Supreme Court and in 10 of the 13 federal appeals courts, while he has argued

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cases before most of those appellate courts. Bybee next served for several years as Associate White House Counsel to President George Bush, the father of the current Chief Executive.

During 1991, Bybee joined the faculty of the Louisiana State University Law Center. He quickly developed a reputation for publishing innovative scholarship on the Constitution,

of being a first rate and caring, yet demanding teacher, and soon earned a chaired professorship. In 1999, Bybee became a faculty member at the William S. Boyd School of Law, University of Nevada, Las Vegas. He continued to produce cutting-edge work and is considered one of the leading constitutional law experts.

As a scholar, Bybee has scrutinized carefully, and written extensively about, the Constitution, the presidency, administrative law, Congress and the federal courts. He has specifically studied, and authored articles on, separation of powers among the federal government's executive, legislative and judicial branches, the relationship between the national government and the states as well as the First and Fourteenth Amendments. These areas are crucial to his work at OLC, which must issue legal opinions on, and attempt to resolve, complicated, sensitive questions involving the authority of the federal government's three coordinate branches and the national government's power vis-à-vis the states. Issues also arise in these areas which federal appellate judges must resolve. Bybee's rigorous, balanced scholarship simultaneously demonstrates a sophisticated appreciation of constitutional history and of competing interpretative theories.

Jay Bybee has rendered outstanding service as Assistant Attorney General. The Office of Legal Counsel is technically the lawyer for the United States Attorney General, the federal government's highest ranking legal officer. However, the Assistant Attorney General in charge of OLC also advises the President about numerous, significant matters, such as the constitutionality of substantive legislation passed by Congress and awaiting his signature. Perhaps most important, the Assistant Attorney General must be able to inform the Chief Executive that actions he contemplates instituting may violate the United States Constitution.

Bybee clearly possesses broad, deep substantive expertise for federal judicial service. Throughout his distinguished legal career, Bybee has worked with the very issues that appellate judges must confront daily. His knowledge is not purely abstract or theoretical, however. The law firm, Justice Department and White House experiences enabled Bybee to practice in fields implicating these questions and to view them from real world perspectives. Therefore, his appreciation for the modern administrative state will help resolve disputes that involve, for example, agency statutory interpretations. Bybee concomitantly understands many important aspects of contemporary government, including topics as diverse as federal administrative procedure, religious liberty, and freedom of information.

Bybee also possesses valuable personal qualities. He is highly intelligent and extremely industrious while exercising measured temperament. He is kind while strong. Moreover, Bybee respects, and works effectively with, individuals who have diverse perspectives. I had many opportunities to witness these characteristics in the thirteen, plus, years that I have known him and during which we have worked together. Bybee invariably exercised consummate good judgment, exhibited a strong work ethic, and displayed great collegiality and equanimity in discharging a broad spectrum of complex, delicate tasks. Bybee has deep concern for those in need and a compassion that allows him to work with and to benefit people who find themselves in difficult circumstances.

In sum, I believe that Jay Bybee is eminently qualified to fulfill the challenging duties of an active judge on the Ninth Circuit. If you have questions about this letter or Bybee, please contact me. Thank you.

Yours truly,

Christopher L. Blakesley
Professor of Law

cc: The Honorable Patrick J. Leahy

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Seventy-first Session

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January 22, 2003

VIA TELECOPIER
VIA U.S. MAIL

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

I write in strong support of Jay Bybee's nomination to the Ninth Circuit Court of Appeals.

I met Jay Bybee roughly three years ago when I retained him as an expert witness in a civil matter involving litigation with tort and First Amendment implications. (I am an attorney in private practice as well as a state legislator.) He had come highly recommended by the administration of the UNLV Boyd School of Law, which had recently opened, and where Jay had been recruited as a faculty member. I thereafter met and spoke with Jay on several occasions related to his expert report, and it was clear to me from the beginning that he is blessed with a brilliant and disciplined legal mind, and—not always the case with academicians—is immensely enjoyable to work with.

Subsequently, I interviewed several of the law school's students for summer clerkships, and those who were Jay's students were consistent in their praise and admiration. In fact, it was largely with Jay in mind that, as a state legislator, I lobbied for increased funding for the law school.

I've no doubt that Jay Bybee will make for a superb and respected appellate jurist.

Respectfully,

Terry John Care
State Senator

TJC/lj
cc: The Honorable Patrick J. Leahy
(via telecopier)

Statement of Senator Kent Conrad
Introduction of Ralph Erickson,
Nominee for Federal District Judge,
District of North Dakota
February 5, 2003

Mr. Chairman, I am pleased to support the nomination of Ralph Erickson to the eastern division federal district court judgeship in North Dakota. Judge Erickson is a highly-respected state trial judge with a reputation for intelligence, fairness, and a wonderful judicial temperament, and I fully expect him to carry on his fine work at the federal level.

Judge Erickson has a solid background and record. He graduated with distinction from the University of North Dakota Law School, where he served on the law review, and was a magna cum laude graduate of Jamestown College. Since law school, he has had a breadth of legal experiences, both in front of judges as well as wearing the robe himself. He first had a distinguished career in private practice, including having worked on both civil and criminal matters.

Since 1995, he has served with great distinction as a state district judge in North Dakota's East Central Judicial District. During his tenure, Judge Erickson has heard countless cases on every topic imaginable and has written around 500 opinions. He has also served the North Dakota bar in a variety of capacities, including as a past Secretary and has been involved on numerous important committees. Judge Erickson has also played a special role in helping kids with substance abuse problems through the Juvenile Drug Court.

I have often thought that one of the truest measures of a person's success in a chosen profession is how your colleagues feel about you. In Judge Erickson's case, the verdict is in. In a Fargo *Forum* survey last year, 300 of his colleagues selected him the "Best Judge in Cass and Clay Counties." Among other comments, colleagues noted that he was "highly intelligent and fair," "bright and practical." A recent newspaper editorial put it this way, Judge Erickson "has distinguished himself as a jurist of integrity, fairness, and intelligence." The editorial summarizes by calling him an "excellent" choice for the current judgeship.

I am proud to introduce Judge Erickson to this Committee, and I ask for the Committee's speedy consideration of this very qualified nominee.



BOSTON COLLEGE

LAW SCHOOL
OFFICE OF THE DEAN

January 22, 2003

The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Senator Leahy:

I am delighted that Jay Bybee has been nominated for the 9th Circuit. I have known Mr. Bybee for almost two decades. We both served in Washington in the 1980s, overlapping at the Justice Department in 1984. I have had frequent contact with Mr. Bybee since then, because we both have taught constitutional law, and written articles in many of the same areas. Mr. Bybee is, among legal academics, one of the best known and best respected writers on the subjects of federalism and separation of powers. I have been impressed with his calm and approachable demeanor, his ability to explain difficult legal concepts in understandable terms, and his fairness and open-mindedness in dealing with those who have intellectual disagreements with him.

Mr. Bybee has also had a wealth of significant legal experience since his graduation from law school twenty-three years ago. As a private lawyer he has acquired expertise in issues concerning transportation and communication. In the Civil Division of the Justice Department for five years he acquired a wealth of knowledge about the standard business of the agencies of government. He has handled with considerable skill more than three dozen appellate cases for the United States. He served on the White House staff for two years as associate counsel to the first President Bush. And I think he has done a terrific job of running the Office of Legal Counsel for the past few months. I think that he will be a splendid addition to the 9th Circuit.

Sincerely,

John H. Garvey
Dean

cc: Office of Legal Policy

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January 29, 2003

The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Via FAX No. (202) 224-9516

RE: Nomination of Jay Scott Bybee to the United States Court of Appeals

Dear Senator Leahy:

I teach constitutional law at Brigham Young University Law School. I am writing to endorse in the strongest terms President Bush's nomination of Jay Bybee to a judgeship on the United States Court of Appeals for the Ninth Circuit.

I have known Jay for nearly 30 years. We became good friends at Brigham Young University during the 1970s, where we both participated in the Honors Program and graduated together in economics. We have talked regularly about personal and professional matters over the years, and he remains one of my closest and most valued personal friends.

Since Jay and I both ended up as law professors teaching constitutional law, he and I have had numerous discussions about constitutional issues. I am a lifelong Democrat whose personal views generally coincide with those of the national party, so it is fair to say that Jay and I often disagree on constitutional issues. In all our discussions, Jay has always been interested in and open to opposing arguments. He is intellectually honest in expressing his own views and in acknowledging their weaknesses. Although he has conservative instincts, he is not dogmatic in his politics. Perhaps most important, there has not been a single instance in all our many exchanges in which he mischaracterized the law or misread a case.

To say that Jay has an open mind is not to say that he has an empty one; he has his views, as we all do. Indeed, I think it would be a little troubling to put people on the federal bench who had not reached at least some tentative personal conclusions about the nature and content of constitutional law. Nevertheless, because of my long personal association with Jay, I can say with full confidence that no litigant need ever fear that Jay will have prejudged any issue in any case. Jay will approach the task of adjudicating the law with an open mind that will carefully and honestly consider the arguments on both sides.

Jay will be a good and a fair judge. I would urge all of the members of the Judiciary Committee to support his confirmation.

Very truly yours,

Frederick Mark Gedicks
Professor of Law

cc: Department of Justice,
Office of Legal Policy
Via FAX No. (202) 514-5715

Prof. Stuart Green
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UNIVERSITY *of* GLASGOW

January 13, 2003

By Fax: +01 (202) 228-1698
The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510
USA

Dear Chairman Hatch:

I am delighted to have the opportunity to recommend to you my former colleague, Jay Bybee, who has been nominated to a seat on the U.S. Ninth Circuit Court of Appeals. I got to know Jay Bybee during the approximately four years we served together on the Louisiana State University law faculty, where I am a professor of law. (During the 2002-03 academic year, I am on sabbatical, serving as Fulbright Distinguished Scholar to the United Kingdom, in residence at the University of Glasgow.)

Jay is a person of high intelligence, genuine decency, and a strong work ethic. He was an always reliable and generous colleague, a popular and effective teacher, and a creative and insightful scholar. He must surely be regarded as one of the leading constitutional law thinkers in the United States, particularly with respect to questions of separation of powers and the religion clauses of the First Amendment. I have no doubt that he will quickly establish himself as a leading member of the Ninth Circuit Court of Appeals.

Jay and I differ on many issues of politics and law (unlike Jay, I am a liberal Democrat and active member of the ACLU). Yet I have always found him to be an extremely fair-minded and thoughtful person. Indeed, Jay truly has what can best be described as a "judicious" temperament, and I would fully expect him to be a force for reasonableness and conciliation on a court that has been known for its fractiousness.

In short, I am pleased to recommend Jay Bybee enthusiastically and without any reservation to be a judge of the U.S. Ninth Circuit of Appeals.

Sincerely,

Stuart P. Green

Cc: The Honorable Patrick J. Leahy (fax: +01 (202) 224-9516)
Office of Legal Policy, U.S. Department of Justice (fax: +01 (202) 514-5715)

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News Release

JUDICIARY COMMITTEE

United States Senate • Senator Orrin Hatch, Chairman

February 5, 2003 Contact: Margarita Tapia, 202/224-5225

Statement of Chairman Orrin G. Hatch
Before the United States Senate Committee on the Judiciary

On the Nominations of:

Jay S. Bybee for the Court of Appeals for the Ninth Circuit
Judge Ralph R. Erickson for the District of North Dakota
Judge William D. Quarles, Jr. for the District of Maryland
Judge Gregory L. Frost for the Southern District of Ohio

I am pleased to welcome to the Committee this morning four excellent nominees for the federal bench. All of you are to be commended for your impressive qualifications and accomplishments. Our first panel today will feature an outstanding circuit court nominee, Jay S. Bybee, who has been nominated to the Ninth Circuit Court of Appeals. Mr. Bybee is no stranger to Committee hearings, having appeared most recently before the Committee in October 2001. We will also hear from three District Court nominees: Judge Ralph R. Erickson for the District of North Dakota, Judge William D. Quarles, Jr. for the District of Maryland, and Judge Gregory L. Frost for the Southern District of Ohio. And of course, I would also like to express appreciation for the Members who have taken time to come and present their views on the qualifications of our witnesses today. We will hear from them in a moment.

I am especially honored to have Mr. Jay Bybee here today, who has been nominated by President Bush to serve on the Court of Appeals for the Ninth Circuit. Professor Bybee comes to us with a sterling resume and a record of distinguished public service.

Professor Bybee is currently on leave from UNLV's William S. Boyd School of Law, where he has served as a professor since the law school's founding in 1999. He has served as Assistant Attorney General for the Department of Justice's Office of Legal Counsel (OLC) since October 2001. Notably, this is a post formerly held by two current Supreme Court justices. As head of the Office

of Legal Counsel, Mr. Bybee assists the Attorney General in his function as legal advisor to the President and all executive branch agencies. The Office also is responsible for providing legal advice to the executive branch on all constitutional questions and reviewing pending legislation for constitutionality. I'm sure Professor Bybee can attest that his work has been more than challenging, especially since he joined OLC soon after the events of September 11th, but the nation is lucky to have him.

Professor Bybee is a Californian by birth, but he made the wise choice of attending Utah's own Brigham Young University, where he earned a bachelor's degree in Economics, *magna cum laude*, and a law degree, *cum laude*. While in law school, he was as a member of the BYU Law Review.

Following graduation, Mr. Bybee served as a law clerk to Judge Donald Russell of the Fourth Circuit Court of Appeals before joining the firm of Sidley & Austin. In 1984 he accepted a position with the Department of Justice, first joining the Office of Legal Policy, and then working with the Appellate Staff of the Civil Division. In that capacity, Mr. Bybee prepared briefs and presented oral arguments in the U.S. Courts of Appeals. From 1989 to 1991, Mr. Bybee served as Associate Counsel to President George H.W. Bush.

Professor Bybee is a leading scholar in the areas of constitutional and administrative law. Before he joined the law faculty at UNLV, he established his scholarly credentials at the Paul M. Hebert Law Center at Louisiana State University, where he taught from 1991 to 1998. His colleagues have described Professor Bybee as a first-rate teacher, a careful and balanced scholar, and a hardworking and open-minded individual with the type of broad legal experience the federal bench needs.

The recommendations of two individuals, in particular, deserve special note. Bill Marshall, a professor of law at the University of North Carolina and a former Associate White House Counsel under President Clinton who also participated in the judicial selection process for Clinton Administration appointments while at OLP, said of Mr. Bybee:

> "The combination of his analytic skills along with his personal commitment to fairness and dispassion lead me to conclude that he will serve in the best traditions of the federal judiciary. He understands the rule of law and he will follow it completely."

Stuart Green, a law professor at Louisiana State University, who describes himself as a "liberal Democrat and active member of the ACLU" has written the Committee:

> "I have always found [Jay Bybee] to be an extremely fair-minded and thoughtful person. Indeed, Jay truly has what can best be described as a 'judicious' temperament, and I would fully expect him to be a force for reasonableness and conciliation on a court that has been known for its fractiousness."

We hear a great deal from some Committee Members about the need for "balance" on the federal courts. Here we have a self-described liberal Democrat who testifies that Professor Bybee would bring some balance to the Ninth Circuit. I would welcome some balance on a court in which 14 of the 24 active judges—including 14 of the last 15 confirmed—were appointed by President Clinton. A court which is seldom out of the news and often seems to court controversy with its decisions needs some leavening once in a while.

We are all familiar with the Ninth Circuit's Pledge of Alliance ruling this past summer, and the Ninth Circuit's high reversal rate by the Supreme Court is well documented, but less well known is the Ninth Circuit's propensity for reversing death sentences, some judges voting to do so almost as a matter of course. No doubt the Ninth Circuit has some of the nation's most intelligent judges, but some cannot seem to follow the law. Just this term, the U.S. Supreme Court has summarily reversed the Ninth Circuit three times in one day and vacated an opinion 9-0.

With two judicial emergencies in the Ninth Circuit, we need judges who are committed to applying and upholding the law. I firmly believe Professor Bybee represents this type of judge. I am very much looking forward to hearing from Professor Bybee today, and to working with this Committee to obtain the Committee's positive recommendation to the full Senate and to the full Senate's confirmation. He will be a terrific judge.

In addition to the nomination of Professor Jay S. Bybee to the U.S. Court of Appeals for the Ninth Circuit, we have the privilege of considering three district court nominees.

Our nominee to the U.S. District Court for the District of North Dakota, Judge Ralph Erickson, has carved out a stellar legal career on both sides of the

bench. Judge Erickson served as a private practice litigator for more than a decade before being elevated to the state court bench in North Dakota eight years ago. According to a secret poll conducted by *The Forum*, Fargo's daily newspaper, in 2002, Judge Erickson was selected as "Best Judge in Cass and Clay Counties" by survey of over 300 lawyers in those counties. He also has experience as a city prosecutor and attorney in private practice.

Judge William Quarles, our nominee to the U.S. District Court for the District of Maryland, has an impressive record in both the private and public sectors. Upon graduating from Catholic University Law School, Judge Quarles clerked for the Honorable Joseph C. Howard of the U.S. District Court for the District of Maryland. In addition to private practice experience in complex commercial, corporate, antitrust and products liability litigation, Judge Quarles has served as an Assistant U.S. Attorney, primarily focusing on organized crime prosecutions. Judge Quarles is currently an associate circuit judge for the Circuit Court of Baltimore City, where he has handled more that 4,000 criminal cases and tried more than 150 jury trials.

Judge Gregory Frost, our nominee for the Southern District of Ohio, has an impressive background in the private and public sectors. Upon graduation from Ohio Northern University Law School in 1974, Judge Frost served as an assistant Licking County prosecuting attorney. In this capacity, he handled a variety of cases, including juvenile and felony prosecutions. From 1974 to 1983, Judge Frost was a partner at Schaller, Frost, Hostetter, & Campbell, where his practice consisted of civil litigation, including domestic relations law, oil and gas law, estate planning, and personal injury law. From 1983 to 1990, he served as a judge for the Licking County Municipal Court, and since 1990 he has served as a judge for the Licking County Common Pleas Court.

I am confident that all three of these fine nominees have the intellect, experience, and temperament necessary to serve with distinction on the federal courts. I look forward to hearing from them today and to working with my colleagues to bring their nominations to a vote very soon. Again, I welcome all of you.

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UNIVERSITY OF NEVADA LAS VEGAS

STEVE JOHNSON, E.L. WIEGAND PROFESSOR OF LAW

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January 30, 2003

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

I write to state my strong support for Jay S. Bybee, who was renominated on January 7 by President George W. Bush to be a judge of the United States Court of Appeals for the Ninth Circuit. I have known Bybee since 2001 when we both were members of the faculty of the William S. Boyd School of Law of the University of Nevada, Las Vegas.

I had the privilege of working directly and substantially with Bybee on Law School committees, in faculty meetings, and in a variety of informal contexts. I also have read much of his published work and have discussed him and his work with numerous other law professors, at the Boyd School of Law and other law schools, and with numerous of his students.

Based on these contacts and associations, I strongly commend Bybee to you. For three reasons, I am confident he would be an outstanding federal appellate judge. First, Bybee clearly has deep and extensive knowledge of the law. He is widely and properly regarded as a leading constitutional law expert, and his expertise extends to many other areas of law as well. By virtue of his private practice, government practice, and academic experience, he is well rounded and superbly knowledgeable in the law.

Second, Bybee's ability to communicate and teach are extraordinary. As a teacher, he is held in near legendary status here. His skill as a teacher established a standard that few other law professors can meet. The importance of federal appellate decisions lies not only in correct outcomes but also in the clarity and explanatory force of the opinions that justify the outcomes reached. Bybee's skill as a communicator and teacher will serve the nation well.

Third, Bybee exemplary personal qualities will enhance his value as a judge. Bybee is highly intelligent, industrious, diligent, and responsible. He has outstanding judgment and is a rock of stability when seas become stormy. Perhaps above all, he respects and works effectively with persons of diverse perspectives, temperaments, and ideology. He is uniformly respected

here by faculty, students, and administrators whose views span the political spectrum.

In sum, I have every confidence that Bybee will be an outstanding federal judge. He will contribute positively to the sound application and development of the law and to the wise administration of it. He is exceptionally able and well qualified. I hope that your Committee will act rapidly and positively on his nomination. Please contact me if you have any questions. Thank you.

Sincerely,

Steve Johnson

Steve Johnson,
E.L. Wiegand Professor of Law

cc. The Honorable Patrick J. Leahy
Office of Legal Policy, United States Department of Justice

U.S. SENATOR PATRICK LEAHY

CONTACT: David Carle, 202-224-3693 VERMONT

Statement of Senator Patrick Leahy,
Ranking Member, Senate Judiciary Committee,
Judicial Nominations Hearing
February 5, 2003

Today the Judiciary Committee meets to consider four nominees for lifetime appointments to the federal bench – one to the Ninth Circuit Court of Appeals and three to district courts in North Dakota, Maryland and Ohio. This arrangement, in keeping with years of precedent, is far more reasonable and sensible than what we faced last week when we were asked to consider a virtually unprecedented three circuit court nominees at one time. By having only one circuit court nominee per hearing, we are able to give each of the people who has traveled here with their families and friends the attention they, and the position to which they are nominated, deserve.

Last week's assembly line hearing proved to be a disaster. It was simply more work than can be done in a day by people of good will with difficult schedules. And that has always been the reason such numbers of controversial nominees are not scheduled together.

I do not urge a return to the days when the Committee did not hold a single hearing on a judicial nominee until mid-June, as in 1999. I think if we worked together on a fair schedule, more like the steady pace we had set in the previous 17 months, there would be better hearings and better results from those hearings.

Today the circuit court nominee before us is Jay Bybee, currently serving in the Justice Department as Assistant Attorney General for the Office of Legal Counsel, or OLC. The head of OLC serves as the Attorney General's lawyer, advising him on legal issues underlying Administration and Department policies. In the wake of September 11, Mr. Bybee's responsibilities included rendering opinions on many controversial policies that have emerged from the Justice Department. These include its ability to try terrorist suspects in military tribunals; its ability to use state and local police to make arrests for civil violations of immigration laws; its use of gun purchase databases to track terrorist suspects; its decision that, contrary to Secretary of State Colin Powell's opinion, they did not need to declare the al Qaeda and Taliban detainees prisoners of war under the Geneva Convention, and who knows how many other controversial policies.

I am interested in Mr. Bybee's views on these questions of law, and I am also concerned with any role he has played in perpetuating the culture of secrecy that has enveloped the Justice Department over the last two years. The office which he heads has long been a leader in sharing its work with the American public, and in recent years that office even began publishing its legal opinions on a yearly basis. Many of these opinions are available in legal databases and provide a valuable insight into the legal underpinnings of our government's policies. But of the 1,187

OLC opinions that have been published on the Lexis legal database since 1996, only 3 are from the period during which Mr. Bybee has headed the office. Up until now, there has also been a history of OLC releasing numbers of opinions on the DOJ website, as well as being made public in litigation and in response to requests by the Judiciary Committee. This practice, too, has ended under Mr. Bybee's leadership at OLC. This non-disclosure fits a consistent pattern of an expansive view of executive privilege that has marked his time in government, and I look forward to hearing from him on that issue.

The district court nominations on today's hearing agenda come from North Dakota, Ohio and Maryland, and appear to be more moderate and bipartisan than the President's circuit court nominations. Today we will hear from Judge Erickson, currently a Judge on the East Central District Court of North Dakota, who is supported by his two Democratic home-state Senators and is well-respected in his community as being a hard-working, thoughtful, fair, and even-tempered judge. Among other accomplishments, Judge Erickson has been involved in developing a new Fargo initiative to assist juveniles involved in drug crimes. I recall that when I was Chair of the Committee, we confirmed President Bush's other nominee to the District Court for the District of North Dakota, Judge Hovland.

Today, we will also hear from Judge Quarles, nominated to the U.S. District Court for the District of Maryland. Judge Quarles served as an attorney in private practice and an assistant U.S. Attorney in Baltimore before becoming a circuit judge on the Circuit Court for the City of Baltimore in 1996. He is another consensus nominee who is supported by both of his home-state Senators.

Finally, Judge Frost, nominated to the U.S. District Court for the Southern District of Ohio, has been on the bench for the past 12 years. In addition to serving as a judge, he is a current or former member of numerous charitable and civic organizations, and, I would like to note, Judge Frost has been principled in ensuring that the organizations of which he is a member do not discriminate.

I welcome the nominees and their families to this hearing.

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School of Law

January 27, 2003

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
131 Russell Senate Office Building
Washington, D.C. 20510

Re: Jay Bybee

Dear Chairman Hatch:

I am writing this on behalf of the nomination of Jay Bybee to the Ninth Circuit Court of Appeals.

First let me introduce myself. I am currently the Kenan Professor of Law at the University of North Carolina School of Law and have taught law for almost 20 years. I also worked in the Clinton Administration as the Deputy Counsel to the President under Beth Nolan and previously as an Associate Counsel to the President under Charles Ruff. In addition, I served under Assistant Attorney General Eldie Acheson in the Justice Department during the spring and summer of 1993 during which my task was to begin the processes of judicial selection for Clinton Administration appointments. I am therefore well familiar with the judicial selection process.

I have come to know Jay Bybee in my work as a law professor both through his writings and through the interactions we have had at numerous legal conferences and academic events. He is an extremely impressive person. To begin with, he is a remarkable scholar. His ideas are creative, insightful, and stimulating and his analysis is careful and precise. I believe him to be one of the most learned and respected constitutional law experts in the country.

He is also an individual with exceptional personal qualities. I have always been struck by the balance that he brings to his legal analysis and the sense of respect and deference that he applies to everybody he encounters – including those who may disagree with him. He is someone who truly hears and considers opposing positions. Most importantly he is a person who adheres to the highest of ethical standards. I respect his integrity and trust his judgement.

Needless to say, I believe that Jay Bybee's professional and personal skills make him an outstanding candidate for a federal judgeship. The combination of his analytic skills along with his personal commitment to fairness and dispassion lead me to conclude that he will serve in the best traditions of the federal judiciary. He understands the rule of law and he will follow it completely. He is an exceptional candidate for the Ninth Circuit and I support his nomination without reservation.

I hope these comments are helpful to you. Please feel free to contact me if you have any further questions.

Sincerely,

William P. Marshall
Kenan Professor of Law
University of North Carolina
(919) 843-7747

cc: Senator Patrick Leahy

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THOMAS MCAFFEE, PROFESSOR OF LAW

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January 30, 2003

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 200510

Dear Mr. Chairman:

I write to offer my strongest recommendation that the Senate confirm the nomination of Jay Bybee to be a judge on the Ninth Circuit Court of Appeals. I clerked for a Ninth Circuit Court of Appeals judge in 1979-1980, so I have a pretty strong idea of what is involved in holding this position. I have also known Mr. Bybee since 1987 and have tremendous confidence that he is a person of great legal knowledge and sound judgment. Without question he has the ability and motivation to give cases the careful attention and thought they deserve. I carefully reviewed Jay's legal scholarship when he taught law at Louisiana State University and recommended his promotion and tenure there. His scholarship is very strong and analytical, and it is clear that he brings a careful and thoughtful mind to bear in addressing legal problems.

Jay is also a person of great integrity, and we can be confident that he will represent the nation well in his professional and personal endeavors. In the years I have known Jay, I have felt great confidence that his word was his bond. This is among the reasons why, when in 1999 I reported to join the faculty here at Boyd School of Law at the University of Nevada, Las Vegas, I invited Jay to co-author with me a book on the Ninth and Tenth Amendments–a work we are still working to complete. Jay's interests in legal scholarship reflect the range of interests he has, and he would bring to this position an awareness of the importance of structural issues relating to government powers as well as the fundamental importance of individual rights. Whether I was a member of the executive branch or the legislative branch of government, I would feel greatly reassured in knowing the important issues relating the scope of governmental powers would be addressed by one with Jay's background, expertise, and judgment.

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If I could be of any further assistance to the committee or the Senate in deciding whether to confirm the nomination of Mr. Bybee, I would be happy to do so. I have total confidence that he would be a thoughtful, perhaps even brilliant, judge.

Sincerely,

Thomas B. McAffee

Thomas B. McAffee
Professor of Law

UNLV

January 29, 2003

Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Hatch:

I enthusiastically support the nomination of Jay S. Bybee to the United States Court of Appeals for the Ninth Circuit, and I hope that you and your colleagues will confirm his nomination. Professor Bybee is an outstanding teacher, scholar, lawyer, public servant and human being. He will become a splendid judge, exactly the sort who ought to sit on the appellate courts of our country.

I have known Jay Bybee for about five years, since I began to recruit him for a position on the founding faculty of our new law school here at UNLV. We were very fortunate to recruit a faculty member of Jay's quality–he is a superb teacher, a very well-published scholar and a very productive and collegial faculty member–and he, in turn, helped us to hire other members of what has become an excellent faculty. Moreover, in his years on our faculty, Professor Bybee helped us to build an excellent law school, teaching important courses, chairing key committees, producing excellent scholarship, speaking widely in our community, and serving as an example of an excellent public lawyer and scholar. We had hoped that he would return to our faculty at the conclusion of his service as Assistant Attorney General for the Office of Legal Counsel, but those hopes have now been superceded by the needs of our country, which has called him to the United States Court of Appeals.

Professor Bybee will answer that call excellently. He is very smart, very thorough and very knowledgeable about the demanding legal issues that confront our country and our courts. He is a creative thinker, but one whose creativity is appropriately tempered by rigorous legal analysis. More importantly, he is a compassionate and decent person who will approach his work in humane and very reasonable ways.

William S. Boyd School of Law
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While those of us on the Boyd Law School faculty come from many backgrounds and hold a variety of views on important societal issues, I think that we all agree on at least three things: that Jay Bybee is a wonderful colleague who has earned our high esteem; that his departure from our faculty weakens our law school; and that his elevation to the federal judiciary will improve our courts and our country. President Bush has chosen well, and I hope that you will confirm his choice.

Please let me know if you would like further information or comment from me. Thank you for your service to our country.

Best regards.

Very truly yours,

Richard J. Morgan, Dean

The University of Memphis
Memphis, Tennessee 38152-3140

Herbert Herff Chair of Excellence in Law
Cecil C. Humphreys School of Law
207 Humphreys Law School

901/678-2425
FAX 901/678-5210

January 30, 2003

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Re: Nomination of Jay S. Bybee, U.S.C.A., 9th Circuit

Dear Chairman Hatch:

I am honored to write this letter in support of the nomination of Jay S. Bybee to serve on the United States Court of Appeals for the Ninth Circuit. I have known Jay Bybee, on a personal and professional level, since he entered the academy. I am aware of his scholarship and commitment to the rule of law. As one who has written letters to the Committee on the Judiciary in support of nominees of both parties in the past, I offer my strongest support for Jay S. Bybee.

As one who often disagrees with arguments raised in Professor Bybee's scholarship, I remain convinced that he thoughtfully weighs all sides of an argument. Jay is a true scholar, who examines various arguments in an effort to contribute to the scholarly dialogue. One should not mistake the strength of the positions Jay has occasionally taken with rigidity. When I have disagreed with Jay, he has always given my position thoughtful and fair consideration. This trait and spirit of moderation will serve him well as an appellate judge.

Jay is more than an excellent scholar, however. He has a strong judicial temperament. I believe that Jay is committed to the rule of law and respects precedent. In an era, when some judges of all political persuasions have been willing to disregard precedent in the furtherance of their own ideological or political preferences, Jay's presence on the bench will be most welcome. He is not an ideologue and certainly will not use the position as a means of furthering his own political agenda. Rather, he will be a considerate judge, who recognizes the value of the rule of law, and will follow the law even when he might disagree with aspects of it.

Jay is a decent and caring person, which will complement his scholarly and judicial temperament and will make him a judge who is respected by all advocates who appear before him. In that regard, he will be a strong representative of the judiciary before the public it serves.

Respectfully yours,

Rodney K. Smith
Herff Chair of Excellence in Law

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January 30, 2003

The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Mr. Leahy:

I am writing to express my strong support for Jay S. Bybee whom President George W. Bush renominated to be a judge of the U.S. Court of Appeals for the Ninth Circuit on January 7. I have known Bybee since 1998 when we both became founding faculty members at the William S. Boyd School of Law of the University of Nevada, Las Vegas. On the basis of my close professional and personal association with Bybee in building the first public law school in Nevada's history, I strongly commend Bybee to you.

Jay Bybee is currently the Assistant Attorney General for the Office of Legal Counsel (OLC) in the United States Department of Justice, a position to which President Bush appointed him in October 2001. Bybee is exceptionally well qualified to serve as a Ninth Circuit judge. His professional achievements have equipped Bybee for this position. In 1980, Bybee graduated cum laude from the J. Reuben Clark Law School of Brigham Young University where he was the business manager for the BYU Law Review. Bybee first served as a judicial law clerk for the late Judge Donald Russell of the United States Court of Appeals for the Fourth Circuit. He then engaged in the private practice of regulatory and appellate law with the Washington, D.C. office of Sidley & Austin, a highly-regarded Chicago firm. Thereafter, Bybee worked for five years in the Department of Justice, initially at the Office of Legal Policy and subsequently on the Appellate Staff of the Civil Division. Bybee has filed briefs in the Supreme Court and in 10 of the 13 federal appeals courts, while he has argued cases before most of those appellate courts. Bybee next served for several years as Associate White House Counsel to President George Bush, the father of the current Chief Executive.

During 1991, Bybee joined the faculty of the Louisiana State University School of Law. He quickly developed a reputation for publishing innovative scholarship on the Constitution and soon earned a chaired professorship. In 1999, Bybee became a faculty member at the William S. Boyd School of Law, University of Nevada, Las Vegas. He continued to produce valuable work and is considered one of the leading constitutional law experts.

As a scholar, Bybee has scrutinized carefully, and written extensively about, the Constitution, the presidency, administrative law, Congress and the federal courts. He has specifically studied, and authored articles on, separation of powers among the federal government's executive, legislative and judicial branches, the relationship between the national government and the states as well as the First and Fourteenth Amendments. These

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areas are crucial to his work at OLC, which must issue legal opinions on, and attempt to resolve, complicated, sensitive questions involving the authority of the federal government's three coordinate branches and the national government's power vis-à-vis the states. Issues also arise in these areas which federal appellate judges must resolve. Bybee's rigorous scholarship simultaneously demonstrates a sophisticated appreciation of constitutional history and of competing interpretative theories.

Jay Bybee has rendered outstanding service as Assistant Attorney General. The Office of Legal Counsel is technically the lawyer for the United States Attorney General, the federal government's highest ranking legal officer. However, the Assistant Attorney General in charge of OLC also advises the President about numerous, significant matters, such as the constitutionality of substantive legislation passed by Congress and awaiting his signature. Perhaps most important, the Assistant Attorney General must be able to inform the Chief Executive that actions he contemplates instituting may violate the United States Constitution.

Bybee clearly possesses broad, deep substantive expertise for federal judicial service. Throughout his distinguished legal career, Bybee has worked with the very issues that appellate judges must confront daily. His knowledge is not purely abstract or theoretical, however. The law firm, Justice Department and White House experiences enabled Bybee to practice in fields implicating these questions and to view them from real world perspectives. Therefore, his appreciation for the modern administrative state will help resolve disputes that involve, for example, agency statutory interpretations. Bybee has also thought deeply about many important aspects of contemporary government, including topics as diverse as federal administrative procedure, religious liberty, and freedom of information.

Bybee also possesses valuable personal qualities. He is highly intelligent and extremely industrious while exercising measured temperament. Moreover, Bybee respects, and works effectively with, individuals who have diverse perspectives. I had many opportunities to witness these characteristics in the three years that we worked together. Bybee invariably exercised consummate good judgment, exhibited a strong work ethic, and displayed great collegiality and equanimity in discharging a broad spectrum of complex, delicate tasks.

In sum, I believe that Jay Bybee is eminently qualified to fulfill the challenging duties of an active judge on the Ninth Circuit. If you have questions about this letter or Bybee, please contact me. Thank you.

Sincerely,



Carl Tobias
Beckley Singleton Professor of Law

cc: The Honorable Orrin G. Hatch

Senator George V. Voinovich
Senate Committee on the Judiciary
Statement on the Nomination of Gregory Frost
February 5, 2003

Mr. Chairman, today I am very pleased today to introduce a native of Newark, Ohio and a very qualified candidate for the United States District Court for the Southern District of Ohio -- Judge Gregory Frost.

Judge Frost received his bachelor of arts in political science from Wittenberg University and his *juris doctor* from Ohio Northern University. Having served for almost two decades as a jurist, Judge Frost is eminently qualified to take the next step to the federal bench. He is currently serving as a judge with the Court of Common Pleas in Licking County, Ohio, a position he has held since 1990. Prior to his tenure on this court, Judge Frost served from 1983 to 1990 as a judge in the Licking County Municipal Court. Furthermore, before he first arrived on the bench, Judge Frost gained invaluable experience working for three years as the Clerk for the City of Heath, Ohio's Civil Service Commission; nine years as a member and partner with the law firm of Schaller, Frost, Hostetter, and Campbell in Newark, Ohio; and four years as an assistant prosecuting attorney for Licking County. I am sure you will all agree that Judge Frost's breadth of legal experience uniquely qualifies him for this position on the Southern District.

Not only has Judge Frost demonstrated his capabilities as a lawyer, but also his commitment to his family and community. He is married to Kris, who worked for me when I was governor, and they have raised three children. He served on Board of Directors for Maryhaven Alcohol & Drug Addiction Treatment Center, as well as the Licking Alcoholism Prevention Program. He is also a member of several bar associations including, the Licking County Bar Association, the Ohio State Bar Association, and the South Carolina Bar Association.

In addition, throughout his career, Judge Frost has received numerous awards in recognition for his work. Some examples include the Ohio Supreme Court Judicial Conduct Award, the Who's Who in American Law award, and the Ohio Department of Natural Resources Wildlife Award.

Chairman Hatch, Ranking Member Leahy, and Members of the Committee, I sincerely hope that this Committee acts favorably on Judge Frost's nomination and sends this qualified nominee to the Senate floor. Thank you, Mr. Chairman.



THE GEORGE WASHINGTON UNIVERSITY LAW SCHOOL
WASHINGTON DC

MICHAEL K. YOUNG
DEAN AND LOBINGIER PROFESSOR
OF COMPARATIVE LAW AND JURISPRUDENCE

January 30, 2003

VIA FAX: (202) 228-1698

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Re: Nomination of The Honorable Jay S. Bybee to the U.S. Court of Appeals for the 9th Circuit

Dear Chairman Hatch:

I write in support of the nomination of the Honorable Jay S. Bybee to the United States Court of Appeals for the 9th Circuit. I have known Jay in both his professorial and governmental capacities and I have little doubt he will be a superb judge.

In the first place, Jay is, simply put, very smart, a highly useful attribute for a judge, in my opinion. He graduated with honors from both college and law school. But even more to the point, that legal work with which I am familiar is outstanding. He has a remarkable ability to digest an extraordinary amount of material and then, sorting the wheat from the chaff, produce a succinct, cogent analysis of the problem at hand. His law review articles are of the highest quality, thoroughly researched, impressively documented, carefully analyzed and gracefully written. His briefs exhibit a complete – and honest – explication of the relevant authorities and a thoughtful marshaling of the evidence in support of his position. They are all models of legal craftsmanship. He will undoubtedly apply these highly honed analytical skills to the inescapably difficult problems federal judges face.

Jay also seems to understand well the amount of energy and effort necessary to solve complex legal problems. He is a tireless worker producing impressive amounts of work at a very high level of quality. He will bear up well under the extraordinary workload our federal judges face.

I am also impressed with the breadth of Jay's legal experience. He has worked for a year on a court. He has practiced in the private sector. He has worked at both a staff and political level in the government. And he has spent time as an academic, reflecting on the broader purposes of the law. He has been exposed to the operation of the law in almost every imaginable setting. All of this experience will undoubtedly inform his judicial deliberations in highly useful ways.

2000 H STREET, NW • WASHINGTON, DC 20052 • (202) 994-6288 • FAX (202) 994-5157 • myoung@law.gwu.edu

I have also always found Jay enormously balanced, and fair in both his professional judgments and his personal dealings. He has political views, to be sure, but he is no ideologue. I have even seen him change his mind, something incredibly rare in the academy. I think any petitioner will justifiably have great confidence that his pleas will receive a fair, just and sympathetic hearing.

I also think Jay has a happily well-developed sense of the majesty and dignity of the law. He is well attuned to the importance of the law in protecting our rights, redressing our grievances, and protecting us from the pressure of both our neighbors and, on occasions, the government. At the same time, I think he understands – and understands well – the limits of legal redress. The courts are not legislators and I do not think Jay would ever confuse the two. In short, I think he has a sophisticated and appropriate appreciation of the role of the judge and the courts in our political and legal system. Jay will prove a very good judge, someone we will all be proud to claim, whatever our personal view of the appropriate line between courts and legislators.

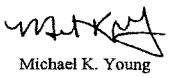
Finally, I would be remiss if I did not stress just how extraordinarily decent Jay is. Even on first meeting, it is clear he is a thoughtful, considerate, indeed, kind person. But much more importantly, my every contact has also convinced me he is a person of unshakeable integrity. He is clear and entirely transparent about his core values. And they are absolutely the right ones. They revolve around family, community and country. They bespeak a fidelity to law as both a device to ensure that all have the opportunity to reach their fullest capacity, as well as a shield against man's least worthy impulses. He is honest, forthright and entirely respectful of the dignity of everyone he meets.

I have gone on at perhaps too much length, but I strongly support this nomination. Jay has all the professional and, more importantly, in my judgment, personal attributes of a great judge. I sincerely hope he will become one.

Thank you for allowing me to submit this letter in support of Jay.

With best regards.

Sincerely yours,



Michael K. Young

MKY/kb

NOMINATIONS OF TIMOTHY M. TYMKOVICH, NOMINEE TO BE CIRCUIT JUDGE FOR THE TENTH CIRCUIT; J. DANIEL BREEN, NOMINEE TO BE DISTRICT JUDGE FOR THE WESTERN DISTRICT OF TENNESSEE; WILLIAM H. STEELE, NOMINEE TO BE DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF ALABAMA; THOMAS A. VARLAN, NOMINEE TO BE DISTRICT JUDGE FOR THE EASTERN DISTRICT OF TENNESSEE; TIMOTHY C. STANCEU, NOMINEE TO BE JUDGE OF THE UNITED STATES COURT OF INTERNATIONAL TRADE; AND MARIAN BLANK HORN, NOMINEE TO BE JUDGE OF THE UNITED STATES COURT OF FEDERAL CLAIMS

WEDNESDAY, FEBRUARY 12, 2003

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

The Committee met, pursuant to notice, at 9:43 a.m., in Room SD–226, Dirksen Senate Office Building, Hon. Jeff Sessions, presiding.

Present: Senators Sessions, Hatch, Specter, Craig, Chambliss, Leahy, Kennedy, Feingold, and Schumer.

OPENING STATEMENT OF HON. JEFF SESSIONS, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator SESSIONS. The Committee will come to order. Senator Hatch is on the floor. I think there continues to be debate on one of the judicial nominees, Miguel Estrada, an extraordinarily capable lawyer, and that debate is going on, and I think that is where he is, and I have been asked to commence the hearing.

I am pleased to welcome to the Committee this morning six fine nominees to the Federal bench. We will be considering the nominations of individuals to the U.S. Court of Appeals for the Tenth Circuit, U.S. District Courts in Tennessee and Alabama, the Court of Federal Claims, and the Court of International Trade. So we don't lack for a variety today.

Our first panel will feature an excellent candidate for the appellate court, Timothy Tymkovich, who has been nominated to fill a seat on the Tenth Circuit Court of Appeals. Mr. Tymkovich's hearing has been a long time in coming. He was first nominated on May 25, 2001, almost 2 years ago. So I am pleased to see him this morning.

We will then turn to our second panel: Judge Daniel Breen for the Western District of Tennessee; Thomas Varlan for the Eastern District of Tennessee; Judge William Steele for the Southern District of Alabama; Judge Marian Blank Horn for the U.S. Court of Federal Claims; and Timothy C. Stanceu for the Court of International Trade.

And, of course, I would like to express appreciation for the members who have taken time from their busy schedules to come and present their views on the qualifications of our witnesses and nominees today. We will hear from them in a moment. Let me now say a few words about each of our nominees.

Timothy Tymkovich, a graduate of the University of Colorado School of Law, has worked as a partner in private practice since 1996 representing clients in matters involving State licensing and regulatory issues. He has also acquired expertise in State and Federal election issues and has represented a variety of political parties and candidates. Mr. Tymkovich has been a great public servant for the State of Colorado, serving from 1991 to 1996 as the State Solicitor General where he acted as chief appellate lawyer for the citizens of Colorado. In that capacity, he ably represented the State in State and Federal courts, including the Colorado Supreme Court, the Tenth Circuit Court of Appeals, and the United States Supreme Court.

When he left the Office of Solicitor General, the Denver Post editorialized, "In an age in which lawyers and government workers are often held in low esteem, Tymkovich, a member of both groups, has stood in stark contrast to both stereotypes." The Post added, "Tymkovich has set a high standard of service." And that is high praise.

Mr. Tymkovich's nomination has drawn powerful support from all corners. He enjoys the unqualified endorsements of Colorado's Senators Campbell and Allard, both of whom I am glad to see here today; a number of former Colorado Supreme Court Justices, the Colorado Governor, the current Attorney General, and Colorado's major newspapers—the Denver Post and the Rocky Mountain News. I firmly believe Mr. Tymkovich will make a great member of the Tenth Circuit.

As I said, we will also consider the nominations of five other individuals to the bench. Our nominee for the Western District of Tennessee, Judge J. Daniel Breen has served with distinction on both sides of the docket. An experienced civil litigator, he served as a United States Magistrate Judge since 1991.

Thomas Varlan, our nominee for the Eastern District of Tennessee, currently practices law in the areas of government relations, labor law, and employment law. For 10 years, he was the law director for the city of Knoxville.

Judge William Steele, nominated for the Southern District of Alabama, has served as an Assistant United States Attorney—

helping a poor U.S. Attorney at that time who needed all the help he could get—and as a private practitioner, and since 1990 Judge Steele has served as a magistrate judge for the United States District Court for the Southern District of Alabama. Magistrate judges are chosen on a very competitive basis by the courts, and they use them a lot.

Judge Marian Horn, nominated to the Court of Federal Claims, has served in the Departments of Energy and Interior and is currently an adjunct professor of law at George Washington University School of Law. Since 1986, she served as a judge for the United States Court of Federal Claims.

Last, but not least, Timothy Stanceu, our nominee to the United States Court of International Trade, has worked for the Environmental Protection Agency, as a Deputy Director of the Treasury Department's Office for Trade and Tariff Affairs. In 1990, he joined the law firm of Hogan and Hartson where he concentrates in the field of international trade and customs.

I look forward to hearing from all our nominees today and to working with my colleagues to bring their nominations to a vote very soon. Again, I welcome you all.

As is our tradition or policy in the committee, the Circuit Court nominees, the Senators and Members of Congress for them would be offered the opportunity to speak first, and then Senators in order of their seniority would be allowed to speak on the District Court nominees.

Senator Campbell, would you like to lead off?

PRESENTATION OF TIMOTHY M. TYMKOVICH, NOMINEE TO BE CIRCUIT JUDGE FOR THE TENTH CIRCUIT BY HON. BEN NIGHTHORSE CAMPBELL, A U.S. SENATOR FROM THE STATE OF COLORADO

Senator CAMPBELL. Thank you, Mr. Chairman. I am going to make my statement somewhat brief, partly because I have to chair a hearing myself at 10 o'clock and partly because you have already mentioned some of the outstanding qualities of Tim Tymkovich, the gentleman I am going to introduce, to serve on the Tenth Circuit Court of Appeals.

It is a pleasure to be here with my friend and colleague and relative, Senator Allard, to introduce a very good man who is well qualified as a jurist, and I hope you will agree. It is my understanding that you met Mr. Tymkovich in your past life as Attorney General of your State and had worked with him on several things.

I am also pleased that his wife, Suzanne Lyon, and their two sons, Michael and Jay, are here with us today to witness this important nomination of their Dad.

Mr. Chairman, Tim Tymkovich is well qualified to serve on the Tenth Circuit. He is a native of Colorado, an excellent jurist, and an outstanding person who will be a terrific addition to the Tenth Circuit Court. Since he earned his doctor's degree, his juris doctor, as you mentioned, as the University of Colorado in 1982, he has had an outstanding career which I consider to be well balanced as a combination of both public service and private practice, too. Tim's public service experiences included serving as a clerk for the former Colorado Court Chief Justice William Erickson from 1982 to

1983. From 1991 to 1996, as I think you mentioned, he served as Colorado's Solicitor General. And in between those years of public service, he earned an excellent reputation in private practice with several of our leading firms.

For the past 2 years, he had served as counsel to Colorado Governor Owens' Columbine Review Commission, which reviewed the public agency and law enforcement response to the tragic Columbine High School shootings of 1999. At the same time, he cochaired the Governor's Task Force on Civil Justice Reform, which has led to improvements of Colorado's civil justice and practice. He currently serves as a partner in the Denver-based law firm of Hale, Hackstaff and Tymkovich.

You mentioned two of Colorado's leading newspapers have positively endorsed him. You mentioned some of the things they did say. They also said that he has gained a local reputation as a thoughtful, insightful attorney who knows the law and works hard to uphold it. That was in the Denver Post. I know that they have given Tim Tymkovich a very serious look, and I agree with them when they say that he is someone who combines intellectual heft and a steady temperament.

So I just wanted to add my voice to that, Mr. Chairman, and tell you that I think it has been long overdue. You mentioned that it has been almost 2 years since he was first nominated, and I would hope that he would get the speedy approval of this Committee and the U.S. Senate.

Thank you.

Senator SESSIONS. Thank you, Senator Campbell.

I am going to ask Senator Larry Craig to preside for a few moments. I have to leave for the necessity of a quorum just briefly in the HELP Committee, and I would recognize Senator Wayne Allard, my colleague, for your comments.

PRESENTATION OF TIMOTHY M. TYMKOVICH, NOMINEE TO BE CIRCUIT JUDGE FOR THE TENTH CIRCUIT BY HON. WAYNE ALLARD, A U.S. SENATOR FROM THE STATE OF COLORADO

Senator ALLARD. Thank you, Mr. Chairman. It is a great honor to be able to introduce, along with my colleague from Colorado, Senator Ben Nighthorse Campbell, Tim Tymkovich to the Judiciary Committee. He is the President's nominee to the Tenth Circuit Court of the United States Courts of Appeal. And Mr. Tymkovich has tremendous respect in the State of Colorado. You went over many of those accolades in your introduction, Mr. Chairman. My senior colleague from Colorado went over many of those. I will try not to repeat what has already been said. But the fact is he has been able to work in a bipartisan way, and he is well recognized in Colorado for his ability in his legal profession and is somebody that is respected, no matter who you are, because he is such a dedicated professional.

This hearing has been a long time in the making, several letters and several floor statements and indeed several years after the date of the nomination. So I thank you again, Mr. Chairman, and the Committee for providing this hearing.

I also want to thank Senator Campbell, the senior Senator from Colorado, and congratulate him for his fine remarks.

First, I would like to welcome Mr. Tymkovich's wife to the hearing, Suzanne Lyon, as well as their two sons, Michael and Jay, and their family and the guests. I am sure that he will introduce them. I don't know what exactly is your format here in the committee, but frequently we have them introduce their family. I want to make sure that is covered.

The nomination process is indeed a grueling process, and I hope it is no more difficult, though, than being elected to the Senate.

I am sure it has been your family's continued support and encouragement that has provided the strength and energy Tim has needed in order to stand steadfast in pursuit of this most worthy endeavor. In a moment, I will share with you some truly stirring comments Mr. Tymkovich made to me during a recent conversation, but first, I had some comments I was going to direct to Senator Grassley on the committee. Unfortunately, he is not here right now, and many of us are tied up with a lot of other things that are going on. But just it is kind of interesting, and the fact is that Tim Tymkovich reminded him that Suzanne has actually spent time—that is Tim Tymkovich's wife—on Grassley's staff and is a native of Des Moines, Iowa. In fact, I am told Suzanne's mother, Janet Lyon, actually managed one of Senator Grassley's first campaigns for public office. I wish he had been here in the committee. We could have made a nice tie-in there with Senator Grassley.

Mr. Chairman, when considering the nomination, please know that Tim Tymkovich has my unequivocal support. The confirmation of his nomination by the Senate will prove to be a great service to the people of the United States.

As you know, his nomination has enjoyed broad and bipartisan support, support from judges, colleagues, both Democrat and Republican Governors. He is well respected for his approach to the law and to problem solving. He manages cases and clients with civility and understanding, setting a high example for the legal community. Tim Tymkovich understands the West, its community and its past. In fact, he informed me that he knows where all the outlaws are in the Tenth Circuit and where they hang out, valuable insight, I think, for a Federal judge.

Now, how does he know might be a question this Committee would ask. Well, he spent many years traveling with his wife as a Western historian and novelist. Together they have traveled extensively, uncovering the old stomping grounds of legendary Western figures, like Butch Cassidy and others. Undoubtedly, this deep knowledge of the West will aid in his duties.

Tim Tymkovich's commitment to public service is unparalleled. Through our conversations, I have developed a strong understanding of Tim's deep personal commitment to public service and his long respect for the rule of law and protecting people and the interests of the State.

Mr. Tymkovich's legal credentials reveal him a man who values independence and fairness in the judicial process and understands the implications of a lifetime appointment to our Nation's courts.

Mr. Chairman, Tim Tymkovich is a man who truly believes that there is no higher calling than to serve the American people through the impartial administration of the law. He will serve our Nation with the utmost of respect to our country and our Constitu-

tion, and for this reason, I urge you to forward his nomination to the Senate with a favorable recommendation.

Thank you, Mr. Chairman, and our thanks to the committee.

Senator CRAIG. [Presiding.] Before I turn to Senator Shelby, I thank you for those comments, Senator Allard. I wanted to put in the record a statement by Senator Grassley, who couldn't be here this morning, who did not want the presence of Mr. Tymkovich and his wife, Sue Lyon, to be unnoted in relation to the native Iowan and former intern in the Senator's office that Mrs. Tymkovich was. So I will put that statement in the record on behalf of Senator Grassley.

Senator CRAIG. With that, thank you very much.

Senator ALLARD. Thank you, Mr. Chairman.

Senator CRAIG. I will turn to Senator Richard Shelby of Alabama to visit with us about William H. Steele. Thank you very much.

PRESENTATION OF WILLIAM H. STEELE, NOMINEE TO BE DISTRICT JUDGE FOR THE SOURTHERN DISTRICT OF ALABAMA BY HON. RICHARD C. SHELBY, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator SHELBY. Thank you, Senator Craig, Senator Chambliss. I regret that my colleague and friend, Jeff Sessions, had to leave for a minute, but I can tell you he is in big support of William H. Steele, who worked with him, as Jeff just said, in the U.S. Attorney's Office.

Mr. Chairman, it is a privilege for me to be here on behalf of William H. Steele's nomination for the United States District Court for the Southern District of Alabama. Judge Steele has a long record of public service and accomplishment, a distinguished record. Prior to entering the legal profession, he served in the United States Marine Corps as an aircraft commander and operations officer. He later served in the Alabama National Guard for 18 years as the commanding officer of an assault helicopter company. Judge Steele is also a founding member of the Child Advocacy Center and currently serves on the board. As a result of his work in the area of child abuse intervention, Judge Steele was awarded the City of Mobile's United Citizen Service Award, a great honor.

After graduating law school from the University of Alabama, Judge Steele served as an Assistant District Attorney for Mobile County, where he subsequently attained the position of Chief Assistant District Attorney. He then went on to serve as an Assistant United States Attorney, as I said, under Jeff Sessions with the Department of Justice. He later worked in the private law firm of Thetford and Steele, during which time he also served as a municipal judge there. Currently, he is a magistrate, a distinguished magistrate, at the United States District Court for the Southern District of Alabama. And as a magistrate, he is trying cases all the time.

He is well respected at the bar, both sides of the political aisle, Democrats and Republicans. His legal experience makes him an ideal candidate for the position of Federal District Court judge. As a Federal magistrate, he has already handled many full civil trials involving issues such as trade secrets, contract disputes, employment discrimination, and torts. You name it.

Mr. Chairman, I support Judge Steele's nomination without reservation. His extensive judicial experience as a prosecutor and a Federal magistrate make him well prepared to assume the responsibilities of a United States District Court judge. I am confident that he will serve with honor and distinction in the new role, and I urge the Committee to send his nomination to the full Senate as soon as possible.

Mr. Chairman, I ask that my full remarks be made part of the record.

Senator SESSIONS. [Presiding.] Thank you, Senator Shelby, and I appreciate your insight into that. I know as a former lawyer, like I was, that you take these matters very seriously.

Senator SHELBY. It is a serious appointment.

Senator SESSIONS. It is.

Senator SHELBY. And a very highly qualified appointee for this job.

Senator SESSIONS. Thank you, and I know you talked to a lot of mainstream practicing lawyers before you—

Senator SHELBY. And I mentioned, I don't know if you heard, but I have had a lot of calls from Democrats and Republicans in the Mobile area that practice in the bench in the last few days and they said please support Bill Steele because he is fair, he is prepared, he will make an outstanding judge. And I think you can't have a better recommendation.

Senator SESSIONS. Thank you. I agree with that. That is the exact reputation that I continue to hear from the lawyers in Mobile where I practiced my career. They are very, very high on him.

Thank you. You can stay with us, or you are free to—

Senator SHELBY. I am going to leave it up to you, and I know he is going to sail through. You are going to help him, and I am going to help you.

[Laughter.]

Senator SESSIONS. All right. Thank you.

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

Senator SESSIONS. Senator Alexander?

PRESENTATION OF J. DANIEL BREEN, NOMINEE TO BE DISTRICT JUDGE FOR THE WESTERN DISTRICT OF TENNESSEE AND THOMAS A. VARLAN, NOMINEE TO BE DISTRICT JUDGE FOR THE EASTERN DISTRICT OF TENNESSEE BY HON. LAMAR ALEXANDER, A U.S. SENATOR FROM THE STATE OF TENNESSEE

Senator ALEXANDER. Mr. Chairman, it is my privilege today to recommend on behalf of Senator Frist and myself two outstanding Tennesseeans. As the other Senator suggested, I have a lot of respect for this proceeding for two reasons. One, while I was Governor, I appointed about 50 judges, and I found that they outlasted me in terms of influence, and so I do this process very carefully. And, second, I had the privilege, as you and your families have today, of being confirmed by the United States Senate and seeing what a remarkable process it is. So I welcome you here and respect you for being here.

Senator Frist, our Majority Leader, joins me in that welcome. He is at least as enthusiastic as I am about it. He had a lot to do with your being here. He has a lot of duties as the Majority Leader today, so he sent his warmest wishes and a message which I am going to leave with the committee, which will reflect his enthusiasm for your presentation.

Just very briefly, Dan Breen and Tom Varlan have been nominated to be United States District judges for the two ends of our State, the Western District and the Eastern District of Tennessee, which are very different parts of the world. But while they represent different parts of our State, they come with many of the same kinds of credentials. They both have exceptional academic records. They both have lots of practical experience in the practice of law and in judging. They both are extremely active in their respective communities. And they both have wide respect among members of the bar and in those communities.

Judge Breen is the United States Magistrate Judge for the Western District of Tennessee now. He graduated first in his class in college. He has the highest rating from the American Bar Association. He has been an author and he is well known for his thoughtful judicial temperament, and it is a great privilege to be here to recommend him.

Tom Varlan in the same way graduated with the highest honors at the University of Tennessee and Vanderbilt University. He has been in the private practice of law. He has been law director of the City of Knoxville. He comes to the bench, as does Dan, with real practical experience and respect for the law.

I used to say when I appointed judges that among the things that I hope they would remember is that once they ascend the bench for a long term, in this case a life term, that they would remember to be courteous to all those who came before them. And I think that is important as any other qualification. But on behalf of the people of our State and Senator Frist and myself, it is a great honor to recommend two such exceptional men as Tom Varlan and Dan Breen, and I am delighted they are here with their families.

Senator SESSIONS. Thank you, Senator.

Senator Specter, I would recognize you for your comments at this time and would note that Senator Specter, of course, is a senior member of this committee, himself an outstanding practicing attorney and prosecutor, and just a very knowledgeable person in the law. Senator Specter?

STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator SPECTER. Thank you very much, Mr. Chairman. Just a comment or two.

I welcome all of the nominees and their families and others who are here today. Do not be surprised at the number of Senators who are here because this is a very, very busy day. As you doubtless know, we have the nomination of Miguel Estrada on the floor. We are finishing up the omnibus appropriations bill. And there are many, many competing hearings. But we will follow what is going on very, very closely on the nominating process.

Senator Alexander articulated a chord which is worth just a minute. When I was here in this room back in 1982 on the nomination of two Pennsylvania judges, Judge Caldwell and Judge Mansman, Senator Thurmond, who was the Chairman of the committee, said, in his inimitable Southern drawl, "If confirmed, do you promise to be courteous?" And I translated that to be, "If confirmed, do you promise to be courteous?"

[Laughter.]

Senator SPECTER. And I said, What an unusual question. What does Senator Thurmond expect the nominees to say but yes? And then he added to it, "Because the more power a person has, the more courteous the person should be."

Senator Sessions understands that.

Senator SESSIONS. That is pretty close.

[Laughter.]

Senator SPECTER. He is from the South where they understand this dialect, frequently articulate it themselves. The more power a person has, the more courteous the person should be. Whenever Senator Thurmond is not here—and he has, of course, left the Senate, an extraordinary record—I take a moment to say that, because when you become a judge and you have litigants and lawyers who appear before you, it is not unusual to be a little distressed with some of the things that go on. And that is a great admonition. And on the selections which Senator Santorum and I make on our judicial nominating panel for Pennsylvania, we are very, very concerned about that item.

Senator Allen just walked in, and I always make it a point when Senator Allen walks in just to finish the sentence.

Senator ALLEN. Go ahead.

Senator SPECTER. I just did. Thank you, Mr. Chairman.

Senator SESSIONS. Thank you, Senator Specter. Wise comments.

Senator CHAMBLISS. Mr. Chairman?

Senator SESSIONS. Senator Chambliss?

Senator CHAMBLISS. Before you leave Judge Breen and Mr. Varlan, as a graduate of the University of Tennessee myself, I notice they are both graduates of that fine institution, so I am very confident that their educational background will make them excellent judges. So I am pleased to look forward to their confirmation.

Senator SESSIONS. I have no doubt of it.

Senator Allen?

PRESENTATION OF TIMOTHY C. STANCEU, NOMINEE TO BE JUDGE OF THE UNITED STATES COURT OF INTERNATIONAL TRADE BY HON. GEORGE F. ALLEN, A U.S. SENATOR FROM THE STATE OF VIRGINIA

Senator ALLEN. Thank you, Mr. Chairman.

Senator SESSIONS. You didn't get caught in traffic also, did you?

Senator ALLEN. No. This is my fourth meeting of the morning.

Senator SESSIONS. I am hearing that. I had a note here that several of our members are having trouble in some traffic snarl. We probably need a new bridge to Virginia, I am sure.

[Laughter.]

Senator ALLEN. Or at least widen the 14th Street Bridge. It is important for national security and homeland defense.

Senator SESSIONS. I have no doubt.

Senator ALLEN. This is about the fourth or fifth event of the morning for me. I am delayed because I am on the Commerce Committee, and we are having a hearing with Mr. O'Keefe on the NASA disaster of the Columbia. So thank you for fitting me in here, Mr. Chairman and members of the committee.

I am here for the privilege of introducing an outstanding gentleman from Arlington, Virginia, for your consideration as the President's nominee to be a judge of the United States Court of International Trade. That gentleman is Timothy, or Tim, Stanceu. He is an extraordinarily well-qualified individual for the appointment to this important Court of International Trade. He is recognized as an expert in many of the issues that are under the jurisdiction of the CIT through his extensive experience both in Government and in public service as well as in the private sector.

Mr. Stanceu served in the public sector from 1974 to 1989 in the U.S. Department of Treasury as the Deputy Director of Trade and Tariff Affairs and as the Special Assistant to the Assistant Secretary for Enforcement and Operations. His responsibilities in these positions included regulatory and policy issues involving the U.S. Customs Service.

For the past 13 years, Mr. Stanceu has been with the Washington law firm of Hogan and Hartson. Most of his practice has involved customs laws, antidumping, and countervailing duty proceedings.

Mr. Stanceu has also represented clients before the Customs Service, the Office of the U.S. Trade Representative, the Commerce Department, the International Trade Commission, the foreign trade zones issues as well, and the Court of International Trade, the very court to which he is nominated to serve.

Mr. Stanceu is also a frequent lecturer and instructor on customs and other international trade law topics at the University of Maryland Law School.

If you all look at his very distinguished career in public and private service in those positions, I cannot imagine the President finding a more qualified person on the face of the earth to be serving in this important Court for International Trade. And I understand Mr. Stanceu's family is also with him today: his wife, Mary, who is an Assistant U.S. Attorney; Mitzi Mewhinney, his mother; and Dick Mewhinney, his stepfather; and Patrician Hallissy, his sister.

Unfortunately, Mr. Chairman and members of the committee, this new job will require Mr. Stanceu to move from Virginia to New York City, where the court is located, meaning he will no longer be a resident, I suspect, of our wonderful Commonwealth of Virginia. But I am sure the Senator from New York will make him feel very welcome in New York City.

Senator SCHUMER. I will welcome him to New York State.

Senator ALLEN. Okay, that is a nice way of saying it. If that will help move him through expeditiously, Mr. Chairman, again, it is my pleasure to present to this Committee an outstanding, truly exceptional individual with the background, the knowledge, and capabilities to serve us on the Court of International Trade. And I think that you will recognize that as you interview him, look through his

record, and I hope you will be able to, as promptly as practicable, move his nomination for confirmation.

Thank you, Mr. Chairman and members of the committee.

Senator SESSIONS. Thank you, Senator Allen. I know you do have to get back to the hearing on science.

Senator ALLEN. Thank you.

Senators Chambliss or Schumer, do you have any opening comments you would like to make?

Senator SCHUMER. No.

Senator CHAMBLISS. No.

PRESENTATION OF WILLIAM H. STEELE, NOMINEE TO BE DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF ALABAMA BY HON. JEFF SESSIONS, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator SESSIONS. I would make my remarks today in reference to Judge William Steele.

Judge Steele served in the Marine Corps, was a helicopter pilot, completed his tour of duty, came to the University of Alabama School of Law and got his degree there, did well. He came to Mobile and worked for the District Attorney, Chris Galanos, who was a Democratic administration, rapidly rose to his chief assistant. During that time I was United States Attorney, and my staff and Chris Galanos' staff worked together on quite a number of cases, some big cases, one of them being the terrible murder of Michael Donnell and hanging of his body in Mobile by a Klan group, and we worked together through those intense days. And Bill Steele, according to all the people in my office and my personal observation, was just a rock of integrity and judgment in those times. So when we had the opportunity, I was able to hire him as an Assistant United States Attorney. He worked in my office for a couple of years and then went into private practice.

A vacancy became available for the position of United States Magistrate Judge, which in the Southern District of Alabama is a very important position. It is important in most districts, but I don't think there is a district in America that demands more of the magistrate judges, calls on them to do more complex work than in the Southern District of Alabama. A very competitive position, probably 40 or 50 or 60 people applied. The judges in that district, knowing they are going to rely on the magistrates for important matters, take that selection process very seriously, and he was selected on merit for that position, and since then has served with extraordinary skill and capability, winning support throughout the area for his judgment and integrity.

I just thought I would mention a few things that you hear from the local community about his abilities. Virtually all the—the present president of the Mobile Bar Association and the other members, former presidents of the bar have endorsed him. The Vernon Z. Crawford Bay Area African-American Bar Association in Mobile gave Bill Steele their unanimous endorsement, saying, "The Association strongly recommends Magistrate Bill Steele for the position because he recognizes and is sensitive to the issue facing African-American lawyers and the African-American community. We give Magistrate Steele our highest recommendation."

Major General Gary Cooper, retired from the U.S. Marine Corps, the first African-American Marine general, President Clinton's Ambassador to Jamaica, grew up in Mobile, said, "As an African-American citizen of Mobile and as a retired Marine, I appreciate what William Steele has done for his community as a county and Federal prosecutor, as a Federal magistrate, and what he has done for his country as a Marine helicopter pilot. His record indicates he will make a fine judge."

Carlos Williams, Chairman of the Southern District of Alabama Federal Defender Organization, an African American, noted that, "During the years I have practice in Judge Steele's court, I have come to know a jurist of integrity, professionalism, and compassion and have grown to respect his judgment. I note that every lawyer in my office—Christin Gartman Rogers, Kay Lynn, Hillman Campbell, Christopher Knight—in unsolicited comments have expressed their support for his nomination. It is, therefore, without hesitation that I send this letter of support of Magistrate William Steele's nomination to the United States Court of Appeals."

That group is the one that defends the criminal cases in Federal court. They have an opportunity to know whether a magistrate judge is fair or not. And I think that was a strong comment.

But I will just mention this, one more before I—a couple more comments I think I will make. I just have so many.

Merceria Ludgood, assistant county attorney now for Mobile County, and former program director for the Legal Services Corporation in Washington, D.C., and a former executive director of the Legal Services Corporation for the entire State of Alabama, an African American, made this comment, and it captures him so well: "Magistrate Judge Steele is one of the finest men I have ever known. Never once have I believed his actions to be motivated by politics or ambition. He simply wants to do the right thing for the right reasons." And that is the Bill Steele that everybody knows in the Southern District of Alabama who practiced before him.

I would note that he has support from a host of other people, including the bar. Greg Breedlove, on behalf of the law firm of Cunningham, Bounds, Yance, Crowder and Brown, a prominent Democratic plaintiff firm in Mobile, one of the best plaintiff firms in the country, if you want to know the truth, send their unanimous support for Judge Steele, and I have had several members of the firm tell me that they are just exceedingly impressed with his integrity and ability and strongly support his nomination.

So I say that to say that his support goes across racial and political bounds. It represents the considered judgment, I believe, of the bar and practitioners in the Southern District of Alabama.

All right. Opening statements are done, and I will offer a formal statement for the record.

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

Senator SESSIONS. At this time I would call on Mr. Tymkovich, the Court of Appeals nominee, as our first witness.

Mr. Tymkovich, would you stand and be sworn, please? Do you swear that the testimony you are about to give before the Committee will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. TYMKOVICH. I do.

Senator SESSIONS. Thank you. Please be seated.

Congressman Cannon, I am glad you finally go through that traffic jam. I appreciate your coming, and I won't ask Mr. Tymkovich to move. Maybe you can sit right there.

Mr. CANNON. I hope this won't affect anything that ever happens before him in his court.

Senator SESSIONS. That is the center seat you have. Thank you for coming. I know you have some comments about one of our nominees.

PRESENTATION OF MARIAN BLANK HORN, NOMINEE TO BE JUDGE OF THE UNITED STATES COURT OF FEDERAL CLAIMS BY HON. CHRIS CANNON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF UTAH

Representative CANNON. Thank you, Mr. Sessions, Mr. Schumer. It is a pleasure to be here today to introduce my dear friend, Marian Horn, whom I think you are going to be considering today for an appointment back to the bench for the Court of Claims.

It is a great honor for me. I have known Marian since 1983 when I took her job. She was elevated to become an Associate Solicitor at the Department of the Interior for General Law, and I became the Deputy Associate Solicitor for Surface Coal Mining. I shortly thereafter became an Associate Solicitor, so we were peers, although never equals in our experience with the law or coal mining.

In that capacity, I got to know Marian and her family well, her three daughters, her husband. Our families became close. I was trying to think on the way over here. We worked on literally dozens of relatively small issues and several major issues together. During that period of time, I found that her judgment was exceptional, thoughtful, considered, and I can't recall a time that she was wrong. And we also dealt with many, many minor issues, and she was right on those as well.

In thinking about what I could say about Marian, it occurred to me that over the course of her judgeship I have run into four or five or six people who have clerked for her in the past. And while they all said very nice things about her and had different experiences, the one thing that came through that everyone talked about was the fact that it was a great learning experience and they learned a lot from her. She has taught in a couple of different capacities in law school. I think she understands the law well. I think she has done a great job as a judge. And I would recommend her. It is my honor to introduce her, and I apologize, Mr. Chambliss. I didn't look over in this direction. But you are on the wrong side, aren't you?

[Laughter.]

Representative CANNON. Thank you for your time and attention.

Senator SESSIONS. Thank you, Congressman. We appreciate those comments.

Our ranking member, Senator Leahy, do you have any comments before we call our first witness?

Senator LEAHY. No. I was tied up over on the floor. You folks have a matter over there, and so I was doing that. But I am delighted to see the Congressman and others who are here.

I do have one short statement concerning six nominees for appointments to the Federal bench, and I am glad that we are going back to Senator Hatch's precedent he established when he was Chairman before of having one Court of Appeals nominee plus whatever other nominees are on. I think that is helpful. It allows us to have better attention to it. There is a lot of staff work and Senators' work to go into each one of these hearings preceding them and going through the backgrounds. When you toss out, for example, three Courts of Appeals nominees in 1 day, it is impossible to do that. And it can be done quickly if you do it right. For example, during the less than a year and a half that Democrats chaired this committee, we greatly accelerated the pace of nominees from before. During the Clinton era with Republicans in charge, nominees were slowed up, I thought unnecessarily. We confirmed 100 of President Bush's nominees in 17 months, but we did it step by step so that both sides of the aisle would know what we are doing so we don't end up like a conveyor belt, which really makes the American public wonder just what we are doing.

We are moving with Tim Tymkovich for a seat on the Tenth Circuit. He is from Colorado. And I am glad to see that he is having a hearing. I think he should have.

I would note that when President Clinton nominated two different people to fill that seat, Jim Lyons and Christine Arguello, they were not allowed to have a hearing. And I thought that was unfortunate. Mr. Lyons was among the many Clinton nominees who had the highest rating, something that, Mr. Chairman, you and members of your party have been talking about, people with the highest ratings, on the floor. And I think one of you said they should at the very least all get a hearing. Well, Mr. Lyons had that "well qualified," the highest rating by the American Bar Association. He was never granted a hearing. Ms. Arguello, who is a talented Hispanic attorney whose nomination had significant support from her community, including the two Republican Senators from her State, she was denied a hearing also, and the seat remained open. They had these very highly qualified ratings, but they were not allowed to have a hearing by the Republican leadership of the committee.

Mr. Tymkovich has a good record in private practice and Government, seems impressive, and I am interested to know more about him. I would note that the American Bar Association gave this nominee a partial "not qualified" rating. I am so glad he is having this hearing, but I would note that there is a little bit of a double standard here when you have two Democratic nominees with the highest ratings and they were not even allowed to have a hearing.

I have more things to say. I will put them in the record so as not to hold this up and will look forward to hearing the answers from the nominee.

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

Senator SESSIONS. Thank you, Senator Leahy. I know that some nominees did not clear last year. Forty-one were left pending when President Clinton left office. Fifty-four had not cleared and were left pending when President Bush left office. And only one nominee

was voted down on the floor of the Senate, and none were blocked in Committee during the time the Republicans chaired this. But—

Senator LEAHY. Mr. Chairman, that is not—

Senator SESSIONS. —I know you feel that there are different ones that had different problems that you didn't feel were fair, but I think overall the Congress moved pretty well with the Clinton nominees.

Senator LEAHY. Well, Mr. Chairman, that is not totally accurate. For one thing, you say they were not voted down. They were never voted. They were never brought up for a hearing. These two with the highest qualification ratings from Colorado, one Hispanic woman supported by two Republican Senators, was still never allowed a hearing. That is my point. It is easy to talk about who gets voted up, who gets voted down, if they are allowed a vote. They were not allowed a vote in the committee. They weren't even given hearings. That is the concern. Were there several on the end of the first President Bush's term? Yes, there were. You may recall the reason. I don't know if you were here at the time, but they were nominated after the application of the Thurmond rule, named after Senator Strom Thurmond, whom you will recall served here for so many years. And under that rule, nominees, except in extraordinary circumstances, if nominated in the last 6 months of a President's term, were not given hearings. This was a Republican-instituted rule that was followed in that case, although I must say the Democratic Chairman of the Committee at that time asked and got consent for a number of President Bush's nominees that would have fallen under the rule. He still put them through and arranged for them to go through.

There was also the assumption that President Bush was—and I think the reason the Republicans were glad to use the Thurmond rule was they assumed that President Bush was going to be reelected. He wasn't.

But I also know in that case one of those nominees, a Republican from my State, the Second Circuit, a conservative Republican, when President Clinton became President, I went down and urged President Clinton to appoint this conservative Republican to the Second Circuit, and he did.

But I just pass that for history.

Senator SESSIONS. Well, I will admit there were 41 that were not confirmed. With regard to Mr. Lyons, he was nominated, and then his nomination was withdrawn because there was no home State support. And I know you expect your Democratic Senators to be consulted. And Christine Arguello was nominated in late July and just did not clear before the election.

But, anyway, I would say this—and I hope we can get a vote for Miguel Estrada. Maybe you can support us on that.

Senator LEAHY. Well, in fact, we could have a vote very, very quickly on Mr. Estrada if Mr. Estrada were to—we have a number of others, very controversial nominees of President Bush, very conservative ones, all of whom answered the questions they were asked, all of whom got votes when the Democrats were in charge. I think of Professor McConnell and others who fall in that category, some from your own neck of the woods. As Senator Daschle and I told President Bush yesterday, we would urge that we have a vote

on Miguel Estrada as soon as he answers the questions. in fact, he stated under oath that he had no objection to answering these questions, but the White House told him not to. If they would change their view, let Mr. Estrada do what he said under oath that he is perfectly willing to do, we could probably have a vote on him very quickly.

Senator SESSIONS. Maybe that will happen.

I have a letter from Senator Frist, our Majority Leader, with regard to nominees Judge Daniel Breen and Tom Varlan. He concludes saying, "I am convinced Dan Breen and Tom Varlan are ideal candidates, and they have my highest recommendation and unqualified support."

I will place that in the record.

Mr. Tymkovich, sorry to interrupt you. We are glad you are here.

STATEMENT OF TIMOTHY M. TYMKOVICH, NOMINEE TO BE CIRCUIT JUDGE FOR THE TENTH CIRCUIT

Mr. TYMKOVICH. Thank you, Mr. Chairman.

Senator SESSIONS. Mr. Tymkovich, the Founding Fathers believed that the separation of—did you have an opening statement? We would be glad to hear that. I didn't give you that opportunity.

Mr. TYMKOVICH. Mr. Chairman, I do not. I had a few introductions, if I may.

Senator SESSIONS. Please, that would be wonderful.

Mr. TYMKOVICH. Thank you, Senator. With me today is my wife, Sue Lyon, the noted Western novelist, I might add, who writes about Utah and Wyoming and Colorado and other parts of the Tenth Circuit history.

Senator SESSIONS. If it is not perfectly favorable, that might make Senator Hatch nervous because he sees nothing but good in Utah.

[Laughter.]

Mr. TYMKOVICH. Well, it is about a few bandits, but they had a good heart to them, also.

My sons, Michael and Jay Tymkovich, who are students at Peak to Peak High School in Lafayette Colorado. In the back of the room are my father and mother, Carla and Michael Tymkovich. Would you stand, please? And with them are my two sisters, Jenni Tymkovich and Terri Tymkovich. Traveling from Columbia, Missouri, today is Sally Lyon, my sister-in-law, who is a middle school principal in the public schools in Columbia, and her son, Jack, who is a high school student in Missouri, also. Also, my friends, Mike Ibarra and Ray Gifford have joined me here today.

Thank you, Senator.

Senator SESSIONS. Well, thank you, and we are glad to have each of you here. And it is a special day, I know, to be chosen and be nominated by the President for this important position.

Mr. Tymkovich, the Founding Fathers believed that the separation of powers in a government was critical to protecting the liberty of the people. Thus, they separated the legislative, executive, and judicial powers into three different branches of government—the legislative power being the power to balance moral, economic, and political considerations and make law; the judicial power being the power to interpret laws made by Congress and the people.

In your view, is it the proper role of a Federal judge when interpreting a statute or the Constitution to accept the balance struck by Congress or the people or to rebalance the competing moral, economic, and political considerations?

Mr. TYMKOVICH. Mr. Chairman, thank you for that question. You've raised an issue that's a bedrock to our constitutional structure, the separation of powers doctrine. And as the Senator well knows, we have three co-equal branches of government: the legislative, executive, and judicial branches.

I have had the good fortune in my career to serve or represent all three branches of government at the State level and have a keen and abiding sense of the proper role of those institutions within that structure of government.

The job of the judiciary is to interpret the laws that have been passed by Congress and apply them against our constitutional framework. To do that, we have been given precedent from the United States Supreme Court in interpreting the Constitution as well as the guidance of Congress in enacting legislation within its sphere of power.

Senator SESSIONS. Making law is a very serious matter. To make constitutional or statutory law, the text of a proposed amendment or statute must obtain a set number of formal approval by the people's elected representatives. This formal process embodies the expressed will of the people through their elected representatives and, thus, raises the particular words of a statute or constitutional provision to the status of binding law.

Would you agree that the further a judicial opinion varies from the text and the original intent of the statute or constitutional provision, the less legal legitimacy it has? And is it the proper role of a Federal judge to uphold the legitimate will of the people as expressed in law or to impose his or her view of what is wise or just?

Mr. TYMKOVICH. Mr. Chairman, a Federal judge has a solemn obligation to leave his personal views behind when interpreting an act of Congress or the provisions of the United States Constitution. The job of a lower court, inferior court, as the Tenth Circuit Court of Appeals in our constitutional structure, is to apply precedents that have been given to it by the United States Supreme Court and try not to vary from the Congressional dictates as set forth in the statutes that have been enacted by this body of Congress.

I've had an experience representing the State of Colorado in various capacities and defending and interpreting State law and have a keen understanding of the advocacy and the give-and-take that goes into the legislative process and the importance that judges apply the law that's been passed by the legislative branches faithfully and according to the language and intent of the legislative process.

Senator SESSIONS. In general, Supreme Court precedents are binding on all lower Federal courts and Circuit Court precedents are binding on the District Courts within that particular circuit. Are you committed to following the precedents of the Supreme Court and giving them full force and effect even if you personally were to disagree with those precedents?

Mr. TYMKOVICH. I am, Mr. Chairman. It's a critical part of our system of government and the furtherance of the rule of law that

lower court judges, such as the Tenth Circuit Court of Appeals, follow the binding precedent of the United States Supreme Court. And I'm dedicated to applying that important principle if I am fortunate enough to be confirmed as a Tenth Circuit judge.

Senator SESSIONS. And, just again, would you apply that decision as the Supreme Court held even if you personally thought it was a seriously erroneous opinion?

Mr. TYMKOVICH. Even if I believed the Court was wrong, I would apply that as binding precedent on the Tenth Circuit, yes, sir.

Senator SESSIONS. Well, I think that is an important principle. We are government of laws and not of men or women or personal opinion. And I think that is important.

Also, I would just note that judges, by being given the extraordinary power of a lifetime appointment, we remove them from politics and the will of the people. Therefore, they must show restraint and must allow the policy issues to be set by the legislative branches. And if we do that right, we will continue to have this tremendously wonderful rule of law that we have.

Senator Schumer, do you have any comments or questions?

Senator SCHUMER. Yes, I do. Thank you, Mr. Chairman.

First, I want to welcome Mr. Tymkovich and his family. On this Committee it is well known we have lots of different views and different opinions, but I think one of the things that binds us together, it just warms everyone's heart to see a family come from all over, and friends, and we welcome you and are glad that you are so joyful at your relative's or friend's nomination here.

I have a few questions about some of the issues here today. Mr. Tymkovich, when you were the State Solicitor General, you litigated the *Romer* v. *Evans*, the Supreme Court case that held that a Colorado State statute violated the U.S. Constitution's equal protection guarantees. And you have been extraordinarily critical of the Supreme Court's opinion in *Romer* v. *Evans*. You have called the decision "an important case study of the Supreme Court's willingness to block a disfavored political result, even to the point of ignoring or disfiguring established precedent."

You have written that the case is "another example of ad hoc activist jurisprudence without constitutional mooring."

Will you please explain why you see *Romer*, a case that held that the 14th Amendment's equal protection guarantee protects the rights of gays and lesbians and bisexuals as a case of judicial activism and unmoored jurisprudence?

Mr. TYMKOVICH. Senator, thank you for giving me the opportunity to clarify my role in the *Romer* v. *Evans* case.

As the Senator knows, as a State Solicitor General it is the job of the Office of the Attorney General, of which I'm a member, to defend State laws which have been enacted by our State legislature or, in this case, by a popular initiative. And I might add that this particular provision, like many in our State, are generated through a citizens' petition process, put on the ballot, and then put forward to a statewide vote.

The officials of the State of Colorado and the office in which I served had nothing to do with the development or the passage of that law. However, once it's enacted, that provision, like many others that were on the same ballot, fall to the Attorney General's Of-

fice to defend. And as part of my role as State Solicitor General, that was a provision that we were obligated to defend, our constitutional duty on behalf of the State of Colorado.

I might note Governor *Romer*, our Democratic Senator, happened to be the defendant in that case and understands what it's like to have an institutional obligation in those matters.

The issue in *Romer* v. *Evans* had to do with whether or not the statewide provision could repeal or pre-empt certain gay rights laws that had been enacted at the local level. Under the constitutional jurisprudence at the time, we put forth what we thought were the best arguments to sustain its constitutionality under a rational basis analysis, under the Federal Equal Protection Clause, and various State law provisions.

On appeal to the Colorado Supreme Court, the Supreme Court came up with a different analysis of what it believed to be the constitutional problems with Amendment 2, namely, that it had an effect on the voting participation rights of an identifiable group, in this case people's characteristics based on their sexual orientation.

That issue was appealed to the United States Supreme Court in really a bipartisan decision in our State. I don't think there was any question in the State of Colorado that it was an appropriate case to be appealed to the U.S. Supreme Court, and I think that it was a very controversial and divisive issue at the time, as I think the Senator knows from reviewing my background. And the State firmly believed that a United States Supreme Court decision would bring legal closure to that provision.

During the course of that appeal, Senator, I want to say that I've always firmly believed in the doctrine of judicial supremacy of—the supremacy of the Federal Constitution even to a State provision like Amendment 2. The rule of law applied in that circumstance certainly was a vote of—a statewide vote of the people that it was entitled to be tested against the Federal Constitution, which was what the case was all about.

At the Supreme Court level, as the Senator knows, the Supreme Court did find that it violated the Equal Protection Clause, and it was declared unconstitutional.

I had the opportunity to participate in a symposium about a year after the Supreme Court decision with a number of respected scholars from around the country, many from the left, from the right, from the middle, to critique the Supreme Court's decision. And as a part of my participation in that symposium, I prepared a Law Review article that described the legal arguments for and against the provision and what I thought the applicable legal standards should be and how the Court employed the decisionmaking process in that case.

Notwithstanding my observations about the way the Court's decisionmaking process was employed, *Romer* v. *Evans* is binding precedent of the United States Supreme Court, and I wouldn't have any problem with applying it faithfully if I am fortunate enough to be confirmed as a member of the Tenth Circuit.

Senator SCHUMER. But it is true that the Law Review article you wrote, you were doing not in your official capacity—I don't even know if you were still in the Colorado Solicitor—were you in the

Office of the Solicitor General at the time you wrote the article and participated in the symposium?

Mr. TYMKOVICH. Senator, it was just as I was transitioning off. I think the symposium occurred while I was in the late stages of my tenure as Solicitor General.

Senator SCHUMER. Okay. But you wrote it—this was not—no one was telling you to write this. This was not part of your duties as a State official. Is that correct?

Mr. TYMKOVICH. No, the University of Colorado, my alma mater, had the Byron White Constitutional Law Symposium, and this was the issue, and they had asked me to present—

Senator SCHUMER. So these were your own opinions in this article?

Mr. TYMKOVICH. Well, it was certainly my reflections on my experience in the case, and my co-counsel in the case, Jean Dubofsky, also provided her experiences.

Senator SCHUMER. But this doesn't seem to be a reflection of what happened. I mean, you tell me if I am misinterpreting these words. You said that you thought the Supreme Court ignored or disfigured established precedents, and of most interest to me, at least, and I think some others on the committee, you called it "another example of ad hoc activist jurisprudence without constitutional mooring."

Now, you believe that, right?

Mr. TYMKOVICH. Well, Senator, I think in the article I was describing what critics have described the decisionmaking process of *Romer* v. *Evans*, and I wanted to come back to the symposium because I think the unanimous views of the members of the symposium, constitutional professors like Janet Haley and Larry Alexander, had similar criticisms of the decisionmaking process.

So I certainly was not alone and in good company, left, right, and center, in that symposium.

Senator SCHUMER. I am not arguing with you about the outcome of the case, although we would probably—I agree with the outcome, but I mean, I am not—at the moment I don't want to get into a discussion; I may a little later. But these were your views. I mean, let's just call a spade a spade. You were writing a Law Review article, and you wrote very strong language. You weren't saying "others said." You were the author, and you said, "is another example of ad hoc activist jurisprudence without constitutional mooring." I am not asking if others agreed or disagreed. I am just asking, Was that your opinion?

Mr. TYMKOVICH. Well, I think I was describing the overview of many critics, and certainly I think, Senator, one of the prerogatives of a lawyer who's had an opportunity to litigate a case of some prominence—and this is a case that I lost, but the purpose of the article was to present the arguments that were made in the lower and appellate courts and why I thought the law should be applied in a certain way. Certainly that position was not accepted by the Supreme Court, but the purpose of the article was to present those arguments as we presented them—

Senator SCHUMER. Okay. But was your personal opinion about the case what you wrote at the time you wrote it?

Mr. TYMKOVICH. My personal opinion was that we thought we had a strong argument on the Equal Protection Clause which, Senator, was not accepted by the Supreme Court.

Senator SCHUMER. As you probably know, because I am sure you have been briefed about this, my basic view here is that we ought to know the basic judicial philosophy of the people who are before us. And there has been too much of a—this is what the whole argument with Mr. Estrada is that my good friend Jeff Sessions brought up, that he sort of refused to say how he felt, and he hadn't written any articles or whatever else. And I think that is—you know, I truly believe it is your obligation to tell us your general views, not about a specific case that might be decided in the future, and it is our responsibility as part of the advise and consent process that the Founding Fathers so wisely wrote into the Constitution to get some of those views.

And so, you know, there is nothing wrong with your writing and thinking, and there is nothing wrong, in fact, everything right with your telling us what you think. And I do think that at least some of us on this Committee think there is an effort now that nominees shouldn't tell us what they think. And my guess is they are asked about what they think by a lot of other people as they move up the process, and somehow when it comes to this committee, you are not supposed to say anything.

So let me just ask you once again. You wrote—I don't have the context here. I don't know if we have the article. But as I am told, you didn't say this is what other people say, this is what—you said this is—you were arguing your own point of view about this case after it had been completed. And it is a pretty strong view to say that the Supreme Court exhibited "another example of ad hoc activist jurisprudence without constitutional mooring."

Just, you know, tell us candidly: Is that what you think? I am not saying you won't follow the law if you get to be a member of this very important Court of Appeals. But that is what I would like to know.

Mr. TYMKOVICH. I think I answered the question, and I do believe that the statement in context applied to a range of critics of the decision. But certainly I think the article speaks for itself that I was critical of the decisionmaking process of the Supreme Court. As the Senator knows, it is one case under the Equal Protection Clause which generally applies a fairly deferential standard to State legislative pronouncements. So in that respect, Senator, that's the basis of the criticism that I made of that case.

But as I've testified—

Senator SCHUMER. Okay. I appreciate your candor.

Mr. TYMKOVICH. —I accept it as precedent and it's binding not only on the Tenth Circuit, but—

Senator SCHUMER. I appreciate your candor, and I think that helps in terms of, I think, not only me but some of my colleagues here. Let me go on. Do I have a little time? Can I—

Senator SESSIONS. Your time is out, but if—

Senator SCHUMER. I won't go to a second round.

Senator SESSIONS. Senator Chambliss has been here so faithfully.

Senator SCHUMER. Okay.

Senator SESSIONS. But if—

Senator CHAMBLISS. How much longer do you want to go, Chuck?

Senator SCHUMER. Well, I have a few more questions.

Senator SESSIONS. Whatever you two agree would be all right with me. If he says okay, if you don't go too long—if you are going to go a while, I think you ought to let him. But if you have got a few more, just finish up.

Senator SCHUMER. Go ahead.

Senator CHAMBLISS. I am not going to be very long.

Senator SCHUMER. Go ahead, Saxby.

Senator CHAMBLISS. Mr. Tymkovich, just continuing along that line, having practiced law for 26 years myself and tried hundreds of cases, some of which I, like you, lost, it ain't much fun to lose. And I have found that practicing law is a lot like athletics. If your heart is in it, you want to win. You emotionally get involved in your cases. You believe your argument is right. You craft an argument irrespective of which side of the case you are on. And you make that argument forcefully, as you obviously did in this case. And I assume that you believed that your argument was a correct argument and should prevail. Otherwise, you wouldn't have been doing your client justice, and I think it is only appropriate that you were able to express yourself not just as an advocate for your client but criticizing the decision. There is nothing wrong with that. And my reading of what happened following this case—and I want to ask you this. Is it a safe statement to say that the legal reasoning that took place in the *Romer* case was very much criticized by both liberals and conservatives? Is that correct?

Mr. TYMKOVICH. Senator, that is correct. There's been, I think, a range of academic assessment of that particular decision, that particular ruling. And you also make a good point. Certainly in private practice you have more luxury in picking the cases that you might represent as a plaintiff or a prosecutor as a defender. In State government, we don't get to pick and choose our cases. We represent them all whether we have a personal agreement or disagreement with them. It's our solemn duty to really play that role in our State structure, and just like the U.S. Attorney's Office represents acts of Congress, that's our role as government lawyers at the State level.

Senator CHAMBLISS. You have already been asked this once, but I just want to let you reiterate the point. This case has been decided. You were not successful in the case. Precedent has been set by the Supreme Court. As a Circuit Court judge, if this issue comes before you under whatever circumstance, are you prepared to follow the mandate that was handed down by the Supreme Court?

Mr. TYMKOVICH. I don't have any reservations at all, Senator. Thank you.

Senator CHAMBLISS. Okay. The one thing, I guess, that bothered me from time to time—and I ask this question of all of our Circuit Court nominees—is that sometimes we see judges who tend to legislate from the bench as opposed to interpret the Constitution. As a member of the Circuit Court, will you make a commitment to interpret the Constitution as you see the Constitution and based upon the precedents set by the Supreme Court versus legislating your opinions into decisions that you render?

Mr. TYMKOVICH. Senator, I'll be sworn to follow the United States Supreme Court as interpreted by the Supreme Court. That's my solemn duty as a Circuit Court judge if I am fortunate enough to be confirmed and have no reservations whatsoever in applying—in playing that role within our constitutional structure.

Senator CHAMBLISS. I think that was all, Mr. Chairman. Let me make one...yes, I think that is it, Mr. Chairman. Thank you.

Senator SESSIONS. Thank you, Senator.

Senator CHAMBLISS. Thanks, Chuck.

Senator SESSIONS. Thank you for being with us.

Senator Schumer?

Senator SCHUMER. Yes, thank you, and I appreciate your courtesy, as you always are, Mr. Chairman.

Senator SESSIONS. As you were when the shoe was on the other foot.

Senator SCHUMER. Yes, indeed.

Senator CHAMBLISS. Mr. Chairman, I was on a TV show with him last night, and I thought I had him convinced to switch parties. But obviously I didn't.

[Laughter.]

Senator SCHUMER. That is a long, hard road, Senator Chambliss. Actually, we were on—what show? Chris Matthews, whatever it is called. "Crossfire"? No.

Senator CHAMBLISS. "Hardball."

Senator SCHUMER. "Hardball." And we were working on something we agree with, which is to try and develop some system so if, God forbid, a terrorist uses one of these hand-held stinger missiles that our commercial airlines have a way of avoiding that, the way our military planes do. It is really important. Thanks, Saxby. Good to see you.

Okay. Let me ask you, Mr. Tymkovich—and I have asked this question of all nominees, and all but one have basically given me answers one way or another. Again, I don't expect us to agree on most of them. But given that you were pretty strong in your criticism of *Romer*, records show that it was decided 6–3 with Justices Scalia, Rehnquist, and Thomas dissenting; Kennedy, O'Connor, and the other—in other words, the moderates on the Court tended to vote—voted for the decision, the three conservatives against, the four generally regarded as a little more liberal for it.

Anyway, so your criticism, which you should do—I think it is good that you wrote these articles and push your point of view even though I disagree with them. But you were pretty free with the criticism of *Romer*. So could you please identify and discuss three Supreme Court decisions that you are critical of or disagree with? And I would like to hear about cases that have not been reversed by the Supreme Court and on which you haven't yet taken a public position.

Mr. TYMKOVICH. Senator, thank you for the question. It raises sort of—

Senator SCHUMER. I am sure it comes as no surprise to you that I was going to ask that one.

Mr. TYMKOVICH. No, but it does raise a difficult circumstance for a nominee in my position that may have the opportunity to apply or have cases based on these types of precedent before it as a judge

on the Tenth Circuit, if confirmed. So I'm a little reluctant to opine on recent case law that may develop in my circuit or be an issue before me.

Having said that, I think, you know, it would be fair for me to say that when I was State Solicitor General, we had the opportunity to follow cases around the country closely that might affect the State of Colorado. I can remember one in particular where the State filed an amicus brief in support of a hate crimes law in Minnesota, the case called *RAV* v. *St. Paul*, and we urged the Supreme Court in that case to uphold the constitutionality of a State provision in that regard. And part of the reason we did that was because about at the same time we were defending in Colorado an ethnic intimidation law—

Senator SCHUMER. And you personally agreed with that?

Mr. TYMKOVICH. And I believe that the arguments that we presented to the Supreme Court through the amicus were, you know, the better arguments and were reflective of the interests of our State.

You know, having said that, I certainly don't believe that it's my role to insert my personal views as a judge in this process. I need to set aside the advocacy that we've taken in cases both in the private practice and as government lawyers, and I'm firmly convinced that I can set aside my personal advocacy in cases and be a fair, impartial, and open-minded judge, if confirmed.

Senator SCHUMER. Right. But I would like still to repeat my question here. You have answered one. You have named one. Name two other—and I will say that you agree or disagree with. This does not violate the canons in any way. These are already decided cases. Law professors who are on the Supreme Court, prior Justices who have had their records, everyone talks about these. And until the last few weeks, so have just about all nominees that we have asked. I ask this of judges I interview, you know, when we are making decisions in terms of the judges in New York. Just last week, I asked a nominee by the President for some cases that she agreed with and disagreed with. She gave good answers. I am not sure I agreed with her answers, but they helped me understand the way she thinks, and that was very positive.

So why don't you try to think of a couple of others that—this has nothing to do with deciding future cases. This has to do with your thoughts on jurisprudence, and as you know, nominees of Democratic Presidents on the courts vote somewhat differently than nominees of Republican Presidents—not all the time. So it is not simply that we have a machine, a legal machine that applies the precedents in the same way. We know that. Everyone knows that. Otherwise, we wouldn't even need a Supreme Court or appellate courts or whatever. We could just feed this into some kind of computer.

So I just want to repeat my question of you. Can you name two other cases or two cases you agree with or disagree with, cases that have already been decided.

Mr. TYMKOVICH. Well, Senator, I think I've—

Senator SCHUMER. Have you ever discussed cases with other people now that you are in private practice? Have you ever?

Mr. TYMKOVICH. Certainly I have, and in answering your question, I think I've mentioned, you know, two cases that I've been familiar with: the equal protection case that we discussed earlier, the *Romer* case, and the hate crimes case. And, again, from a practitioner's standpoint, I advocate positions on behalf of clients. I did have the opportunity in the last couple of years to try to apply a case called *Buckhannon* v. *West Virginia* that has to do with a prevailing party attorney's fees claims in a 1983 context and had the opportunity on behalf of a client to present arguments somewhat different from the U.S. Supreme Court on that as a part of our—as part of our presentation of that case.

Senator SCHUMER. Right. What do you think of the *Buckley* v. *Valeo* decision? Do you think that one was correctly decided?

Mr. TYMKOVICH. *Buckley* v. *Valeo* is certainly binding precedent.

Senator SCHUMER. I understand. I am assuming that you will follow precedent on the Tenth Circuit. You don't have to add that. What do you think of it? I personally think it is a rotten decision.

[Laughter.]

Mr. TYMKOVICH. Senator, it was certainly recently—

Senator SCHUMER. I am not trying to lead the witness, Mr. Chairman. I am just showing him that we all have opinions on these things, and he is too smart to be led, anyway.

Mr. TYMKOVICH. And, Senator, you know, certainly that was reaffirmed last year in the *Nixon* v *Shrink PAC*.

Senator SCHUMER. I know you will follow it if you become a judge. What do you think of it?

Mr. TYMKOVICH. Well, I had the opportunity as a practitioner to try to apply it in an actual case in the Colorado Federal courts and District Court and found it very difficult and challenging to apply as a practitioner. It's, I think, the longest decision in the annals of the United States Reports. So it's certainly a challenge for a practitioner, and maybe an admonition for all of us to keep opinions to a readable and understandable length. But—

Senator SCHUMER. Do you believe that the First Amendment protects someone's right, you know, a multi-millionaire's right to say put a commercial on the air 417 times, as opposed to just getting out their view? Because that was the basic—as you know, that was the basic premise of *Buckley*, that the First Amendment said that you could—if you had a whole lot of money, no limits were permissible, that, A, the First Amendment protected that right, and, B, it prevailed over the countervailing right—the countervailing notion—it is not a right—of trying to see that money didn't sort of dominate our political system. That is why I disagreed with it. I think there is a protection by the First Amendment, but no Amendment is absolute. We all agree that you can't falsely scream "Fire" in a crowded theater. I think that was Justice Holmes who said that. And that is a limitation on your—no? Well, one of our—it is precedent.

Senator SESSIONS. I thought so.

Senator SCHUMER. You think it is Holmes? Well, Jeff and I agree. See that? Let the recorder underline that, please, that Jeff and I agree.

[Laughter.]

Senator SESSIONS. I will have to resign here.

Senator SCHUMER. But, in any case, it is not an absolute right, and that is why I thought the Court wrongly decided. Just give me some thoughts on it, aside from the length of the opinion.

Mr. TYMKOVICH. Well, Senator, I think I was trying to do so. Certainly that case involved some very thorny issues of public policy and the application of the United States Constitution to those issues and has been binding precedent for some time.

As a practitioner and trying to apply that precedent, you know, one thing I found is that the circumstances that underlie a case are critical. And having briefed and presented trial evidence under the *Buckley* case, I can appreciate as a trial lawyer at that level trying to marshall facts and law to present the best case to the—

Senator SCHUMER. You have some skepticism about it.

Mr. TYMKOVICH. —trial court. And certainly I understand the difficulty in doing so, and I think the lesson I take from that as a nominee to an appellate bench is that you really have to get into the record, look at the briefs and arguments that will be presented by the advocates in a case, and really approach an issue like that with an open mind and a fair mind, realizing, of course, that it's our job to apply faithfully the precedent of the United States Supreme Court in those circumstances.

Senator SCHUMER. But would it be unfair to say you show some skepticism towards that decision? Admittedly, you will follow it to the letter of the law and the best of your ability once you are a judge, but personally you are a little bit skeptical.

Mr. TYMKOVICH. I don't think my personal views come into play because I have to tell you—

Senator SCHUMER. That is where we disagree.

Mr. TYMKOVICH. —that as a practitioner I've had the opportunity to apply precedent in that area and others. And sometimes it's easier said than done, Senator, as you know as a lawyer yourself.

Senator SCHUMER. Let me ask you about another case since—do you have any others that you want to offer that you would agree with or disagree with? We have talked about now three. You named *St. Paul*.

Mr. TYMKOVICH. Nothing additional, Senator.

Senator SCHUMER. Okay. Let me ask you then about *Morrison*, a case you are familiar with, I presume, *Morrison* v. *United States*, the VAWA case.

Mr. TYMKOVICH. Yes.

Senator SCHUMER. Okay. In *Morrison* v. *United States*, a 5–4 Supreme Court held that, despite years' worth of hearings and well-substantiated findings proving that violent crime against women costs the country between $5 and $10 billion each year in health care, criminal justice, and other social costs, Congress didn't adequately establish the effect of violence against women on interstate commerce to justify the use of the Commerce Clause. The four Justices in the minority disagreed, arguing the Court should show deference to Congress' ample findings and uphold the Violent Against Women Act as a rational response to the national threat posed by gender-motivated violence.

The majority's decision was criticized by many as a real overstepping, judicial activism, something you criticized *Romer* for. And Justice Breyer, who was one of the four Justices who dissented, he

wrote that, "Since judges cannot change the world, it means that within the bounds of the rational, Congress, not the courts, must remain primarily responsible for striking the appropriate State–Federal balance."

Do you see *Morrison* as an incident of judicial activism? Again, I know you will follow it.

Mr. TYMKOVICH. And, Senator, I will follow that and the other binding precedent of the United States Supreme Court in this area. Certainly the Court has applied the doctrine of federalism, which has to do with the respective powers between the State and Federal Government. In recent years, through its case law—Mr. Chairman had mentioned the separation of powers doctrine as an adjunct to that.

As an attorney representing a legislative body, I certainly understand some of the difficulties in the legislative process and certainly, while I haven't worked for the Congress of the United States, I understand the important fact-finding role of this body in providing a basis and support for legislation.

Senator I think that it goes without saying from my experience in the State of Colorado that a legislative pronouncement such as VAWA has a presumption of constitutionality and is entitled to great deference from the judicial branches in its applying of the law to that—

Senator SCHUMER. Do you think the majority showed great deference to the Congress' finding in that case?

Mr. TYMKOVICH. I have not read that decision recently, Senator, so I don't have a good feel for exactly what arguments were made.

Senator SCHUMER. I will ask—

Mr. TYMKOVICH. So I can't comment on that.

Senator SCHUMER. I would ask you to read it, and I will ask a question in writing, just that specific question, if you don't mind.

Mr. TYMKOVICH. Thank you.

Senator SCHUMER. Okay. I have one more, Mr. Chairman.

You know, one other thing which is sort of interesting, obviously—

Senator SESSIONS. I am enjoying this. It is a good exchange between two good lawyers, and I am glad you are having—I would like for you to have full time to ask your questions.

Senator SCHUMER. Thank you. I appreciate it.

Senator SESSIONS. Very interesting discussion.

Senator SCHUMER. Thank you, Mr. Chairman.

Just tell me a little—and I realize there are different constitutional bases here. But the *Romer* case, basically the question was: Should the State be allowed to overrule local law? It was a State referendum that did so. So you are dealing with States to localities, and I am not familiar with Colorado law. In New York, the localities are creations of the State, and the State does have a lot of benefit of the doubt against the localities.

Of course, *Morrison* was a case—or the whole federalism issue is: What can the Federal Government do in terms of State law?

Do you think there are some differences between those two? The analogy, you know, if we were doing an analogy in one of these tests, they would say Federal is to State law as State is to local law in terms of how much deference should be shown. Just give me

some thoughts on that. This is not a case, just an interesting question.

Mr. TYMKOVICH. It sounds like an SAT question, Senator Schumer.

Senator SCHUMER. Yes, it does. My first job was working for a—I went to Madison High School in Brooklyn, New York, and I had to get a job when I was 14. That is when you could get working papers. And I knocked on the door of a little office, and it was a Madison High School teacher who was starting a new business. And the business was training students to take the SATs. So for 3 years I ran the mimeo machine that laid out the preparatory materials, and I got very good at them. Actually, his name—I think you probably even heard about him in Colorado. His name was Stanley Kaplan.

[Laughter.]

Mr. TYMKOVICH. Sure, absolutely.

Senator SCHUMER. This was a little business with five people, and I was sort of the go-fer. And he sold it to the Washington Post for $50 million 20 years later. God bless America.

[Laughter.]

Senator SCHUMER. In any case—it is. I was thinking of the SATs. But just give me your thoughts on that.

Mr. TYMKOVICH. Senator, it is an important question because it has to do with sort of the relative sphere of decisionmaking, and I think each State has a really different take on that so it is tough to come up with a perfect analogy. Certainly in the State of Colorado, we have a structure where the State Constitution, like the Federal Constitution, is supreme, although we have a lot more interaction between the local and State governments than you would find a perfect analogy on the Federal model. And so we don't have the same type of federalism structure in our State Constitution that you see in the Federal one, but I think having said that, there are some common themes, including the supremacy of statewide law to a local government, just like the supremacy of the Constitution, both the Congress and the States as well as the supremacy of Congressional laws on State government.

I think that is an important part of the dialogue between State and the national legislature on the types of laws to pass and how to accommodate local concerns. And I think that certainly my experience in State government is it's important for this body to reach out to the State governments to understand the effect of legislative pronouncements on State and local governments and be sensitive to that testimony as a part of their fact-finding basis.

Senator SCHUMER. And, again, because the *Romer* case was so different because it was, as you say, a statewide referendum, but would you say the same thing ought to apply with the States and the localities, before a State does something they ought to go reach—

Mr. TYMKOVICH. Without question.

Senator SCHUMER. Okay. One final question, Mr. Chairman. I thank you. It is related. It is the same stream of thought here.

A few years back, you testified in support of the Tenth Amendment Enforcement Act of 1996, which would have instructed the courts to presume that all Federal laws were unconstitutional

when they allegedly infringed on States' rights. You endorsed reversing the normal rule that the Supreme Court presumes Federal laws are valid under the Constitution and required Federal agencies to severely limit their regulations when they pre-empted State law.

In your testimony in support of this bill, you objected to Federal environmental regulations, Medicaid requirements, and the motor voter law as too burdensome on the States. You also argued that the bill should go further—this bill would be regarded by many as pretty extreme, but you argued that the bill should go further and require that all existing Federal regulations be terminated if they did not comport with States' rights principles.

Your testimony suggests to me, your testimony back then, that you have a rather constricted view—"rather" would be understating it, at least from what I have stated here—of the Commerce Clause, of the Spending Clause, and of the 14th Amendment.

Can you tell us about that testimony? And what can you tell us to allay our concerns that your personal views in terms of this federalism issue, which is a very important issue, are not—I am not saying right or wrong, but if you had to line people up on this issue, you would be sort of way over there on the State—at the far end of the State side.

Mr. TYMKOVICH. Senator, thank you for the question regarding the testimony. First, I might add that I was presenting the testimony of the Office of the Attorney General, and the Attorney General was unable to testify personally on behalf of the—

Senator SCHUMER. Did you help write it? Did you help prepare it? Or did you just read it because—

Mr. TYMKOVICH. Senator, I did not help prepare that testimony. It was prepared by other staff within the Office of the Attorney General, and I was presenting it on her behalf to this body.

I might add that I followed Senator Bob Dole, who was the primary sponsor of the bill at the time, and I want to add a few things about it.

First of all, I think I respectfully disagree with some of the application of the statute. As I understand it, it's quite similar to President Clinton's federalism order that he issued while he was in office, which asked Congress and the Federal agencies to look, listen, and be sensitive about funding issues that would affect State and local governments.

Senator SCHUMER. That is different than a presumption that a law ought to be scrapped.

Mr. TYMKOVICH. Well, it certainly as applied would have a similar effect, and I think the historical context at the time, I think the Senator probably appreciates that there were many concerns about whether Federal mandates would be funded on State government at the time, and I think that the testimony reflects some frustration that some of the States had, and the Attorneys General that appeared on the panel with me had similar examples from their State.

I might add that one of the experiences that the commentary provided was, you know, this notion that States can be very innovative in certain areas, including the environment regulation. And in Colorado at the time, for example, we had two, what I think are

very innovative environmental policies, and we were having trouble with the Environmental Protection Agency from accepting those as sort of alternative forms of regulation.

So one of the points that we wanted to make in the testimony was that you ought not to stifle appropriate innovation below as a part of the process.

Senator SCHUMER. Did you basically agree with the testimony you gave? You seem to from your comments here.

Mr. TYMKOVICH. Senator, I was presenting the testimony of the office.

Senator SCHUMER. I understand, but I am asking you personally. Did you at the time personally agree?

Mr. TYMKOVICH. I think there were parts of that I did and parts of it that I did not endorse. But I was the presenter for the Office of the Attorney General. It was my job to present the testimony to this body.

Senator SCHUMER. Okay. Thank you, Mr. Chairman. I appreciate your giving me the extra time, and I want to thank you, Mr. Tymkovich, for your answers and for your being here.

Mr. TYMKOVICH. Thank you.

Senator SESSIONS. Thank you, Senator Schumer.

Mr. Tymkovich, the Law Review article on the *Romer* case you were asked about, let me ask you a few additional questions. It was co-authored by you and two other people from the Attorney General's office. Is that correct?

Mr. TYMKOVICH. Yes, sir.

Senator SESSIONS. And were there other attorneys involved in the litigation of the case also?

Mr. TYMKOVICH. They were involved in the litigation of the appellate proceedings before the Colorado Supreme Court and the United States Supreme Court, yes.

Senator SESSIONS. And so you were explaining the position of the State of Colorado?

Mr. TYMKOVICH. That's correct.

Senator SESSIONS. And other States that joined in that brief.

Mr. TYMKOVICH. That's correct.

Senator SESSIONS. You know, I was an Attorney General also, and I just have to say with absolute clarity that an Attorney General has an absolute duty to defend the laws of the State which he works for. There is no one else that can defend the State. There was a referendum process established in Colorado, and Colorado people voted in this matter, and you have an absolute duty to defend that. And, frankly, I joined in one brief. There were seven other States. I know California and Virginia joined in on that brief. There was another brief in support of your position that had about ten States joining it. So that was not an extreme position, in my view.

With regard to the power of the State over the cities, as Senator Schumer says, I assume it is true in Colorado that cities are creatures of the State. Is that right?

Mr. TYMKOVICH. That's correct.

Senator SESSIONS. So it always struck me, when I heard about the case, that the State of Colorado has the legal authority to state

a State law that would pre-empt local municipal laws and ordinances. Is that a factor in this case?

Mr. TYMKOVICH. That's correct. If there is an issue of statewide concern, it would pre-empt local provisions that would be contrary to it.

Senator SESSIONS. And in one sense—I know there are a lot of implications of the act, but in one significant sense, it seemed to me, and I am sure to the other States who joined with you, that this diminished State power vis-a-vis the cities, which they create, is that a fair statement?

Mr. TYMKOVICH. I think that is. I think that's very accurate, Mr. Chairman.

Senator SESSIONS. So, you know, the Supreme Court ruling, in fact, diminished the authority a State has over its creatures, the cities. It was a tough case, and there has been a lot of criticism of it.

You and your colleagues did not just volunteer to write this article. You were asked to delivery a paper on the State's arguments and the Court's decision at the Byron White Conference on American Constitutional Study. Is that correct?

Mr. TYMKOVICH. Yes, Mr. Chairman.

Senator SESSIONS. And there were a number of other speakers and presenters at that conference?

Mr. TYMKOVICH. That's correct.

Senator SESSIONS. So you didn't just go out and call a press conference to complain. You were asked to make a presentation in a prestigious forum on this subject.

Mr. TYMKOVICH. That's correct, Senator. We joined scholars from around the country, as I said, also joined by the opposing counsel in Colorado that handled the other side of that case.

Senator SESSIONS. But even in that article where you made some criticism of *Romer*, you noted this, for those who are concerned about the results of it. A lot of people wanted a different result, but I think you were justified in defending the result that the people of Colorado voted by referendum. But, at any rate, you said in the article, did you not, "The Amendment 2 litigation is remarkable not for its results but for the tangled jurisprudence"? Does that indicate that you were more concerned about the complexity of the Court rulings than you were of the outcome of the case?

Mr. TYMKOVICH. It certainly was, Senator. We tried to present the best arguments to support the amendment as representatives of the State, and certainly I think the quote there reflects some of my legal experiences as a part of that case.

Senator SESSIONS. And others at the symposium supported the result of the Court's opinion, but also, those who supported the result, some of them questioned the legal reasoning of that opinion, did they not?

Mr. TYMKOVICH. Yes, they did, in no uncertain terms, Senator.

Senator SESSIONS. I have one example here. Professor Larry Alexander notes that at two important junctures in the majority's reasoning "the dog did not bark." That is, important steps "in the ordinary equal protection analysis were omitted."

Professor Lynn Baker writes that, "The majority reached the right results, but for the reasons that it articulated only partially or not at all."

Akhil Amar, a respected liberal law professor at Yale, wrote the following in a Law Review article supporting the *Romer* decision. He said this—he supported the result. "Since *Romer* came down, I have had many conversations about it with law professors and students across the country. The initial consensus seems to be that while Justice Kennedy's language soared, Justice Scalia's logic held. Justice Kennedy won their hearts, Justice Scalia their heads."

The New Jersey Law Journal editorialized, "We applaud the result in *Romer*. We regret the manner in which it was reached. The dissent's philosophy is clear, though wrong. The majority opinion would have been far stronger and more convincing if it had been forthright in explaining why Amendment 2 lacked a rational basis."

Stewart Taylor, writing in the "Texas Lawyer," found the decision "immensely inspiring and intensely troubling." On the one hand, he praised the result in the case, liked the result. On the other hand, he faulted Justice Kennedy's majority opinion for its "crude, superficial, and evasive" reasoning. He went even further in characterizing Justice Scalia's dissent as "elegantly vitriolic"—that is nice language. I am sure Justice Scalia was proud of that comment—"pervasive with distortions"—but not that part—"and a resort to bumper sticker jurisprudence." He expressed concern that the decision could "damage the Court's moral authority and even in the long run set back the cause of gay rights." And he pleaded with the Court to "try harder to ground its rulings in constitutional language, theory, and precedent." And was not that exactly what you criticized the Court for, not grounding the opinion in the Constitution?

Mr. TYMKOVICH. Yes, Senator, I think those excerpts reflect the range of commentary on the result and the reasoning there, and certainly our presentation was certainly in line with a lot of the analysis of the case.

Senator SESSIONS. Well, it was a very, very interesting case and had a lot of ramifications, and there has been a lot of criticism of it. I don't think you should be held up because of that.

I would mention this also. Even those who disagreed with Amendment 2 understood the role of the State Attorney General in defending the measure. The editorial page of the Denver Post, which has been extremely critical of the amendment from the beginning—in other words, they editorialized against its passage. Is that correct?

Mr. TYMKOVICH. That's correct, Senator.

Senator SESSIONS. Recognized that the State was required to defend the measure. The Post also singled out you in praising the State's handling of the case. They said, "The Post was consistently critical of Amendment 2, but we don't fault Attorney General Norton"—now Secretary of Interior Norton, who was your Attorney General at that time. Is that correct?

Mr. TYMKOVICH. Yes, sir.

Senator SESSIONS. "...for defending it vigorously. Once it became part of the State Constitution, it was her sworn duty to defend it." And I agree with that.

"For his part, Tymkovich fought doggedly and skillfully, losing simply because no amount of advocacy could offset the legal weaknesses of the sloppily drafted and, at times, virtually inchoate initiative itself."

Now, let me ask you: Did you write the initiative or have anything to do with writing it?

Mr. TYMKOVICH. No, Senator. Nothing whatsoever.

Senator SESSIONS. And your office didn't have anything to do with it?

Mr. TYMKOVICH. None.

Senator SESSIONS. This was a group of people in Colorado that put it together and got it out on the ballot for a vote.

Mr. TYMKOVICH. It's part of our process of direct democracy, and it can be very difficult to apply sometimes, as those comments reflect.

Senator SESSIONS. The Denver Post goes on to say, "In law, as in poker, you have to play the cards you're dealt. We'd say Norton and Tymkovich played out their hands pretty well, considering they held a pair of deuces."

Well, that is what you have to do at times to defend the case, but I thought it was a little better case than that, frankly. And so did about 20 other States who supported Colorado in it. And I'm not real—I think one reason the Court's reasoning has been criticized is if it were real easy to strike down that legally passed act by the people of Colorado, maybe it would have been clearer. I think it was a little bit difficult for them to justify their position, and that is why their logic is not very clear.

Well, you know, I think Senator Chambliss was exactly correct. You know, when you pour your heart in the case and you advocate it and you believe in the State, later when you are in private practice and making a comment on it, if you have got a little enthusiasm there for your case, there is nothing wrong with expressing it.

Now, Mr. Tymkovich, the attorney on the winning side of the *Romer* case was Jean Dubofsky. Is that correct?

Mr. TYMKOVICH. Yes, Senator.

Senator SESSIONS. And she supports your nomination for the tenth Circuit. Is that correct?

Mr. TYMKOVICH. That's correct, Mr. Chairman. She submitted a letter, along with several other former Colorado Supreme Court Justices, including the author of the majority opinion at the State Supreme Court level, Chief Justice Rovera, and—

Senator SESSIONS. Now, did the Supreme Court rule for or against the referendum?

Mr. TYMKOVICH. The Colorado Supreme Court ruled against the measure.

Senator SESSIONS. But even that Justice who wrote the opinion against your view supports you. Is that correct?

Mr. TYMKOVICH. That's correct, along with a number of other Justices that were on the court at the time.

Senator SESSIONS. Now, Dubofsky was a former Colorado Supreme Court Justice, and certainly no right-winger. The Denver Post described her as one of "a dwindling breed of unabashed liberals." There are few left. Some of them on my left right now.

[Laughter.]

Senator SESSIONS. I don't know how dwindling they are, but they—

[Laughter.]

Senator SESSIONS. They are unabashed, I will tell you that, and believe in and fight for what they care about daily.

Justice Dubofsky, along with a number of other former Colorado Supreme Court Justices, has written a letter in support of your nomination: "Based on our professional experience, we are of the unanimous judgment that he is well qualified and most able to serve as an appellate judge of the United States Court of Appeals." So we will put that letter in the record.

Justice Dubofsky also recognized—well, I will just finish. My time is up. She has recognized that you were simply doing your job as Solicitor general. She commended your performance. She says the Colorado Attorney General's Office "dealt with the case as well as it could have." She goes on: "In fact, Justice Scalia got upset with him in oral argument because Tymkovich would not answer the way he wanted you to answer the case."

Well, those things happen in court, and that is what litigation is all about.

Senator Feingold, I would recognize you.

Senator FEINGOLD. Thank you, Mr. Chairman, and especially thanks to Senator Kennedy. I have almost 10 years' seniority on this committee, but I think he has got 4 times more than that. So the fact that I get to go before him is greatly courteous of you, Senator Kennedy.

I would like to return to the same subject. First, congratulations on your nomination.

Mr. TYMKOVICH. Thank you, Senator.

Senator FEINGOLD. I will go back to the issue of gay rights and your involvement as Solicitor General of Colorado in the case that led to the U.S. Supreme Court's *Romer* v. *Evans* decision. As has been discussed by Senator Schumer and Senator Sessions, you defended the ballot initiative on behalf of the State of Colorado. It was, I agree, your job to do that and I accept that. But I do want to ask you a bit about what perhaps goes beyond the zealous advocacy for your client, and this is the article that we are discussing, the 1997 University of Colorado Law Review, that forcefully presents your view that laws against discrimination based on sexual orientation in activities like employment, housing, and education in places like Denver, Aspen, and Boulder somehow conferred special rights or protections on gays and lesbians.

Let me ask you this: Do you believe that Title VII of the Civil Rights Act of 1964, the landmark legislation prohibiting employment discrimination based on race, confers special rights on African Americans?

Mr. TYMKOVICH. Senator, the anti-discrimination laws in Colorado and at the Federal level are important protections to minorities and others that have faced discrimination. So to the extent that the baseline was no, you know, Federal or State protections based on ethnicity or race, the addition of those laws to the legislative pronouncement provides a protection, an additional protection that would not be available under the common law. So in that

sense, certainly under Colorado law, additional protections are provided through the discrimination laws, and I might add that's an important part of the legislative process to identify and protect injustices out there.

Senator FEINGOLD. But what about my question? Does Title VII of the Civil Rights Act of 1964 confer special rights on African Americans?

Mr. TYMKOVICH. I'm not sure exactly what you mean by "special rights," Senator, but I would say—

Senator FEINGOLD. Well, I am referring to the fact that your article seemed to say that the Colorado law conferred special rights or protections on gays and lesbians. I am asking you whether or not Title VII of the Civil Rights Act of 1964 in that same spirit in your view confers special rights on African Americans?

Mr. TYMKOVICH. No, Senator. I think it provides a civil remedy, some laws provide a criminal remedy, on behalf of discrimination, and certainly that's the intent and purpose of those laws.

Senator FEINGOLD. In that same spirit, do you think that Title VII wrongly protects Americans from employment discrimination based on race, ethnicity, national origin, religion, age, disability, or gender? Do you believe that an American who brings a claim of job discrimination based on any one or more of these categories is somehow enjoying special rights or protections?

Mr. TYMKOVICH. No, Senator. They're simply enjoying the protections that this body has provided to those particular groups.

Senator FEINGOLD. As you discussed in your article, you believe that the Supreme Court was wrong to be hostile to the political decision of a majority of Colorado voters who supported adoption of the Colorado amendment. You state that Colorado voters made "a seemingly good-faith policy choice."

If I understand you correctly, you agree with Justice Scalia's dissent in *Romer* and believe that the Court improperly injected itself into a political debate. Is that your view?

Mr. TYMKOVICH. Senator, that's an excellent question, and I appreciate the opportunity to clarify and reflect on the issue below.

As you know from your participation in this body, there are important issues of public policy debate that cross party lines or are bipartisan and very difficult issues. In Colorado, the question of whether or not to add sexual orientation to State and local antidiscrimination laws has been a very important and ongoing political debate in our State. And certainly Amendment 2 was in part within that context and dialogue. And certainly many people respectfully disagreed with the legislative pronouncement there, and I think the point I was trying to make in those remarks and certainly in the case is that the courts were not a good forum for airing sort of political or legislative policy-type arguments, and that the courts are best able to address a constitutional principle when they have the concrete facts and law before them and not sort of rhetorical or legislative-type pronouncements.

The Amendment 2 case had a strong mix of sort of a policy debate in that sense, and I think my comment was that the policy debate and certainly the arguments we made to the courts is that that would be better left to the political process.

Senator FEINGOLD. I am taking that as a yes, that you agree with Justice Scalia that the Court improperly injected itself into a political debate. Do you believe that the Court should have—is that fair?

Mr. TYMKOVICH. Senator, I think Justice Scalia accepted some of the presentation of the State, but they rejected others. So I don't wholly agree or disagree with the dissent in the case, but it does—

Senator FEINGOLD. Do you agree with that point?

Mr. TYMKOVICH. —reflect some of the arguments that were made.

Senator FEINGOLD. Do you agree with that point?

Mr. TYMKOVICH. I agree—the presentation that the State made to the Supreme Court was that it was a policy debate and not subject to the Supremacy Clause of the equal protections. But, again, as I testified earlier, that argument, that presentation was not accepted by the Court, and regardless of my personal views, I am perfectly capable and willing to impartially apply that precedent.

Senator FEINGOLD. That isn't what I am asking. I have asked your personal view, and I take it that your personal view is that the Court did the wrong thing here and improperly injected itself into the political debate. I understand that you would follow the law based on the Court's decision.

Mr. TYMKOVICH. I would follow the law.

Senator FEINGOLD. Do you believe that the Court should have given more consideration to the privacy, associational, and religious rights of persons who do not condone homosexual behavior?

Mr. TYMKOVICH. Senator, the lower courts in Colorado had identified that there were religious and associational factors that would be implicated by the laws that were pre-empted by Amendment 2. I think, again, that that, as I've tried to explain in my previous testimony, is part of the political give-and-take, the public policy give-and-take in crafting a gay rights law that would accommodate certain interests, and certainly that's part of the policy debate that we've seen in our State. Certainly the Amendment 2 provision would have required that debate to go at the statewide level, and as I recall, even during the judicial proceedings on Amendment 2, there was a move to enact a statewide initiative that would—

Senator FEINGOLD. Okay. I accept that, but I am asking you your personal view. You are an expert on this. Do you think the Court should have given more consideration—you, do you think the Court should have given more consideration to the privacy, associational, and religious rights of persons who do not condone homosexual behavior?

Mr. TYMKOVICH. Senator, I think that in that case, as others, as an advocate, as a representative of my client, we were presenting what we thought were the best arguments based on the applicable case law—

Senator FEINGOLD. I am asking your view right now.

Mr. TYMKOVICH. —to the Supreme Court.

Senator FEINGOLD. I am not asking in your role as an advocate. I am asking in your view should the Court have taken that more into account?

Mr. TYMKOVICH. I think, as I've testified earlier, indicated in my article, that I believe that we had strong arguments based on the

existing precedent at the time and asked that the Court accept that.

Senator FEINGOLD. Well, you seem to be refusing to give your own view on this, and I don't know why. This isn't a pending case. This is a case that was resolved by the Supreme Court. You have strong opinions indicated I here, and I don't understand why you can't give me your personal view.

Mr. TYMKOVICH. I think I've reflected the views that we presented to the Court, and as I've testified—

Senator FEINGOLD. You did do that and that is all you have done, and you are not answering my question.

Throughout our Nation's history, proponents of racial discrimination have used the argument that they should be free to discriminate based on their privacy, associational, or religious rights. In *Brown* v. *Board of Education* of Topeka, Kansas, the Supreme Court injected itself into a contentious political debate where in some parts of the country separate but equal schools were defended to the point of literally spilling blood over the issue.

Do you believe that *Brown* v. *Board of Education* was wrongly decided and that the Supreme Court should not have injected itself into the policy question of maintaining school segregation?

Mr. TYMKOVICH. Senator, it's an important question because certainly the history of discrimination in this country has had a very mixed and very sorry record at times, and the *Brown* decision is certainly a reflection of part of that history.

One of the reasons I went to law school was the influence of a book I read about the *Brown* case called "Simple Justice" that traced the history of the legal development from *Plessy* v. *Ferguson* to the *Brown* decision, and a very powerful historical book about the legal and social and ideological aspects of discrimination in this country.

So certainly *Brown* is one of the cornerstones of American jurisprudence, and certainly its foundation is a very important part—

Senator FEINGOLD. So you obviously don't disagree with that decision, and that is why I want to ask you: What is the difference in your mind between African-Americans and gay people in terms of whether laws protecting them from discrimination are permissible?

Mr. TYMKOVICH. Senator, I think that it's a very important part of the public policy debate to analyze the rationale and the reasons for a particular legislative judgment. I don't sit here today as having a legislative agenda. I do not. My goal as a Tenth Circuit judge, if confirmed, would be to impartially and fairly and open-mindedly apply the law. You're asking me for a legislative judgment, and I certainly—

Senator FEINGOLD. No. I am asking you your personal opinion, having studied this in law school, having the question of discrimination having been one of the inspirations for your going to law school, and doing extremely well, I might add, and being a very distinguished lawyer. I am asking you what your thought process is here. What is the difference between discrimination against African-Americans and gay people?

Mr. TYMKOVICH. Senator, I think that, you know, again, to answer your question from a public policy standpoint, I believe that

this body, Congress, which has debated whether or not to add sexual orientation to Title VII or to Federal law, and certainly the debate at the State level would be to take the testimony and the experiences of gay and lesbian Americans and apply that to the particular circumstances at work.

In Colorado, that's an important dialogue that is ongoing about to what extent the laws ought to be modified and changed to prevent discrimination and violence and harassment against gay and lesbian people. I support that legislative debate in our State. I don't think it's appropriate for me to take a personal view to the Federal bench, and I can commit to this body that I'd be able to apply the discrimination laws faithfully and carefully as a Tenth Circuit judge—

Senator FEINGOLD. Well, Mr. Chairman, my time is up, but let me just say that I certainly respect Mr. Tymkovich and wish him well. But this process where we can't even get at sort of the thought process of a nominee on something as simple and important as how you relate discrimination against African-Americans to the issue of discrimination against gay people, to me, Mr. Chairman, this is the problem we are having, that we are really not being given a chance to examine how these individuals will simply go through their thought process as judges, not whether there is a right answer or a wrong answer, but how will they go through the judicial process and how will they go through that thought process.

I think that is legitimate, and, again, I respect you and certainly you have tried to respond to me. But it makes it very, very difficult to analyze, especially in light of the fact that this nominee wrote an article, an extensive article about this very important subject, and all I am trying to do is to get his thought process as it compared to another body of law that he obviously thinks is valid.

So, with that, Mr. Chairman, I conclude and thank you and thank Senator Kennedy.

Senator SESSIONS. Thank you. I know that what we really expect out of a judge is not so much how they feel about the issue but how they analyze the applicability or lack of applicability of the law. So to that extent, their personal views on political or social issues are a little less valid.

Senator FEINGOLD. I would just add on that point, I wasn't asking for his personal views. I was asking for his personal view of the logical relationship as a matter of law between discrimination against African-Americans and gays. It was not literally his own personal views about those subjects.

Senator SESSIONS. Well, you certainly have a right to ask that.

Senator Kennedy?

STATEMENT OF HON. EDWARD M. KENNEDY, A U.S. SENATOR FROM THE STATE OF MASSACHUSETTS

Senator KENNEDY. Thank you very much, Mr. Chairman, and I share the concerns that have been expressed by Senator Feingold. I was here when we passed those civil rights laws in 1964, and I can still hear the echoes of many of my colleagues who said that—Norris Cotton, who was from the State of New Hampshire, people have a right—if there is any freedom left in this country, such em-

ployees will be congenial, promote good feelings with business. And even former Senator Tower talked about employers, employees, any freedom to speak or to act on the basis of their religious convictions in terms of the issues on discrimination on the basis of race. And there are other Senators. I am not meaning to embarrass these other Senators, but on March 20th, another of our colleagues had similar kinds of statements. Another very distinguished Senator, this time from Florida, surely no outsider should be able to tell an owner or manager who he must hire or who he must promote. Then even our colleague Senator Ervin, the bill undertakes to control the thoughts of American people in respect to racial matters.

So many of us who have been here over a long period of time have heard similar kinds of concerns expressed, as you have, in terms of the extension of the protections for gays and lesbians. And as the principal author of ENDA, it brings a lot of concern about where you are going to come out. We have come very close to passing that law as an amendment to ensure that there wouldn't be discrimination on the basis of sexual orientation.

On that issue, it is about 60 percent, 65 percent of the American people are basically for that, think ought to be evaluated on who they are, not on the questions of their sexual orientation. So that is why there is a lot of difficulty in trying to understand the fear or unwillingness to say, well, if the Congress is going to make this as a judgment and decision, I don't have any problem or trouble in terms of enforcing that if that is going to be the judgment that is made.

We have gone all through in the legislative considerations about special rights, developed that debate and responded to it. But I hear a lingering kind of unwillingness on your position to entertain it. I heard the Chairman say that you were one of the co-authors of the—I obviously respect your position as a State employee, but we went on after that to talk about your position in the Law Review article, which was one of three people. But I don't see you disassociating yourself from anything that was in it, even though it was written with others. So we obviously interpret that to be your position as well.

I wanted to ask you—and I want to just give you an additional opportunity if there is anything you want to respond to those kinds of concerns that we, or at least I have in terms of considering, you know, the nominee and whether those that would be able to come before you would feel that they are going to get equal justice.

Mr. TYMKOVICH. Senator, thank you for that question. I think it's an important question, and I believe that those who know me the best in Colorado and with whom I've practiced who endorse my nomination to the Tenth Circuit firmly believe on a bipartisan basis that I can be an effective and fair judge on the Tenth Circuit, if confirmed.

I might add a couple of things about my experience that I think might bear on your question, really two cases I wanted to mention. One is a case called *Hill* v. *Colorado* that was an outgrowth of a legislative concern that we had in Colorado regarding protests near health care facilities. And I think, Senator Kennedy, you are aware of the Federal Access to Clinics Act and either were the prime sponsor or major sponsor.

In Colorado, Congressman Degette, who was in the State legislature at the time, helped pass that bill on a bipartisan basis through a very evenly split Colorado Legislature, and that provision was immediately challenged as unconstitutional. At the time I was Solicitor General, like with Amendment 2, it was an act of our legislature, act of our legislative branches, and the office defended that provision. And we fortunately were able to prevail in the State court and the Colorado Supreme Court level.

That case was a very important Federal case. It was appealed to the United States Supreme Court after I had left the State government, so my successor as Solicitor General ended up arguing that casein the United States Supreme Court. And the United States Supreme Court, I think on a 7–2 vote, ultimately upheld that case, upheld that law in a case called *Hill* v. *Colorado*, which very importantly clarified the ability to enact protective legislation in this area.

And so I want to point out, Senator, that, you know, part of my obligation as Solicitor General was to not pick and choose my cases but to defend as well as we could cases, whether they came from the legislature or from the people, and we thought we did an effective job on that.

The other issue I wanted to mention—

Senator KENNEDY. What was your role in that case?

Mr. TYMKOVICH. I did not argue the case directly but was involved in the briefing on the policy development of that case. Again, in my role, I have substantial involvement—limited involvement in a range of cases, but that certainly was an important case at the time and had created some controversy at the time because it was one of the few State laws that made this legislative determination at the time.

The other issue I wanted to make that bear on this question of impartiality and open justice is the work that the office did while I was Solicitor General in taking on a very difficult issue involving the Martin Luther King holiday in our State. At the time I became Solicitor General, we had had racial protests on the steps of our Capitol in Denver, where I know you have been before, Senator, and it was creating a very divisive situation because representatives of white supremacists and Ku Klux Klan members were obtaining a parade permit to protest on Martin Luther King Day and preventing the Martin Luther King celebrants from having the opportunity to celebrate that holiday on really the most visible forum in our State.

To help defuse racial tensions in our community, the Attorney General helped Governor *Romer* and the State develop regulations that allowed for a very careful process on when and how you could use that open forum, and as a result of those regulations, the racial conflict that we had dissipated, and in the last 10 years we have not had any problems in that regard.

So when I have had the opportunity to work on issues and cases—

Senator KENNEDY. What was your role in that as well?

Mr. TYMKOVICH. It was also to assist the office in developing those regulations and representing the State agencies in that re-

gard. It certainly was part of a larger effort of other lawyers in the office that undertook that representation.

Senator KENNEDY. One of the things that we look at in the confirmation process is judicial temperament, and an important part of that assessment is whether you respect people's views that differ from yours. It is okay to disagree with someone, but we look at whether you respect others' legal views and whether you label anyone who disagrees with you as having an improper motive or being political. And it is especially important to evaluate your respect for the Supreme Court cases with which you disagree because we are assessing whether we can take you at your word when you promise to follow both the letter and the spirit of the decisions of the Court.

With that in mind, I have some questions about the statements that you made in the Law Review article that indicate a seeming lack of respect for the Supreme Court and Justice Kennedy in particular.

You called the six-Justice majority opinion in *Romer* "an important case study of the Supreme Court's willingness to block a disfavored political result, even to the point of ignoring or disfiguring established precedent." You state the opinion is "cause for great uneasiness about the health of self-government."

That opinion was written by Justice Kennedy, hardly one of the Court's more ideological members, whom you criticize by name in your article. Can you explain what you meant in calling Justice Kennedy's opinion political?

Mr. TYMKOVICH. Thank you, Senator, for the question. As I've testified earlier, the purpose of the article was to reflect the arguments that the State made in the appellate courts and under applicable precedent, we believed that the arguments that we had presented would have sustained a finding of constitutionality. Obviously the Court disagreed and ruled against us. And, again, we believe that the Court had to address in a rather novel way the application of the precedent that was argued below. And as I think I've testified in answers to Mr. Chairman, certainly a number of academic criticisms of the opinion and analyses of the opinion have reached a similar conclusion. I think there's really a bipartisan and non-ideological view about that.

And so my purpose in the article was to show the arguments that we thought were presented under the existing case law that the Court rejected—

Senator KENNEDY. Well, I hear that and you have expressed that opinion while I have been here, and I apologize for missing the earlier hearing. Both the Chairman and I are on the Armed Services Committee, and we have Mr. Tenet over there, the head of the CIA. So I was unable to be here earlier. But I have heard your comments just generally about obviously the holding. But I am getting to the nature and the choice of words that are being used, and there is one thing about differing with a Supreme Court opinion, but it does seem to me that using the words "important case study of the Supreme Court's willingness to block a disfavored political result, even to the point of ignoring or disfiguring established precedent," and the opinion is "cause for great uneasiness about the health of self-government."

When you are using those kinds of words and stating it to be political, it is more than just a general kind of difference with the substance of the argument. I think that those particular words are highly volatile, I would think, in terms of the criticism both of Justice Kennedy and of the Court itself.

Mr. TYMKOVICH. Senator Kennedy, I think I really pride myself in my career of having the ability to, I think, demonstrate the ability to work across party lines as a lawyer. As you probably know, I represented a Democratic administration. While I was Solicitor General, Governor *Romer* was the chief executive of our State the entire time I was in public service, and he has supported my candidacy. And I think as a result of that experience I had an opportunity to work with a lot of people across party lines to really do the best possible job we could on behalf of the State of Colorado.

So I really believe that the bipartisan support of the people that have worked with me in Colorado really speak volumes about their view that I will have the ability to be a good judge, to be open-minded and fair, and provide the applicable civility and temperament to the position if I am fortunate enough to be confirmed.

Senator KENNEDY. Okay. Thank you, Mr. Chairman.

Senator SESSIONS. Thank you.

Mr. TYMKOVICH. Thank you, Senator.

Senator SESSIONS. On the question of the—

Senator KENNEDY. I would say to the nominee, I just want to congratulate you on the nomination. A number of people I have known out there have also communicated with me their support for your nomination.

Mr. TYMKOVICH. Thank you, Senator Kennedy.

Senator SESSIONS. Thank you, Senator Kennedy.

I notice that with regard to that brief, it looks like as many as 15 States actively participated in support of the position of Colorado, including Massachusetts was on one of the briefs.

You wrote the "uneasiness about self-government." Well, I think that is a very nice lawyerly way to say it. I mean, that is not a hot-head comment, that it creates "uneasiness about self-government." And I will tell you what I felt about it. The people of Colorado passed an amendment, and the Supreme Court struck it down. And they are unelected, and they denied the people the right to have that statute that they passed become law.

Now, let me ask you this—I won't go into that. We have got another panel that is waiting.

Thank you very much, Mr. Tymkovich, for your testimony.

Mr. TYMKOVICH. Thank you, Mr. Chairman.

Senator SESSIONS. You have done an outstanding job, I believe. You have an extraordinarily good record, and I would ask this: As Solicitor General of Colorado—that was the position you held?

Mr. TYMKOVICH. Yes, sir.

Senator SESSIONS. That is a position chosen by the Attorney General to be in charge of appellate litigation for the State of Colorado. Is that correct?

Mr. TYMKOVICH. That's correct, Senator.

Senator SESSIONS. State Supreme Court or U.S. Courts of Appeals and the U.S. Supreme Court.

Mr. TYMKOVICH. Yes, sir.

Senator SESSIONS. And I would just say as a former Attorney General, that reflects a sincere belief by Attorney General Gale Norton, now Secretary of Interior, that you possess extraordinary legal skills and an ability to articulate in the appellate courts. And, of course, that is what you are seeking, the position that you are seeking in the Court of Appeals. And this background and experience as Solicitor General for the State gave you an extraordinary ability and opportunity to be active in a lot of appellate court cases. Most lawyers in America would never have had that opportunity. So you come here extremely well qualified, and I believe you should be confirmed, and we thank you for your good testimony.

Mr. TYMKOVICH. Thank you, Mr. Chairman.

[The biographical information of Mr. Tymkovich follows.]

SENATE QUESTIONNAIRE FOR JUDICIAL NOMINEES

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. **Full Name (Include any former names used.)**

Timothy Michael Tymkovich

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

Residence
Broomfield, CO

Business
Hale Hackstaff Tymkovich, LLP
1430 Wynkoop, Suite 300
Denver, CO 80202

3. **Date and place of birth.**

November 2, 1956, Denver, CO

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

Suzanne Lyon
Occupation: Writer
Suzanne Lyon Enterprises
1182 Clubhouse Drive
Broomfield, CO 80020

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

The Colorado College -- 1975-1979; Bachelor of Arts, Political Science (May, 1979)
The University of Colorado School of Law -- 1979-1982; Juris Doctor (May, 1982)

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.**

1979 – 1982: Farmers Union Mutual Insurance Co., adjuster;

1980: Continental Airlines, ramp agent;
1981: White & Steele; law clerk;
1982 – 1983: The Colorado Supreme Court (Aug.1982 -- Dec.1983), law clerk;
1983 – 1986: Villa Espana Partners, partner in real estate venture;
1983 – 1989: Davis Graham & Stubbs, associate;
1983 – 1986: Villa Espana Partners (partner in real estate);
1990 – 1991: Bradley Campbell Carney & Madsen, of counsel;
1991 – 1996: Office of the Colorado Attorney General (Jan. 1991 -- Nov. 1996), Solicitor General;
1995 – 1996: Highwire, Inc. (partner in small company);
1996 – 1998: Hale Pratt Midgley Hackstaff Green & Laitos (aka Hale Pratt Hackstaff Green Laitos & Tymkovich), partner;
1997 – 2000: T2 Parters, real estate partnership, partner;
1998 – 1999: Hale Hackstaff Tymkovich ErkenBrack & Shih, partner;
1999 – 2001: Hale Hackstaff Tymkovich & ErkenBrack, partner;
2000: Suzanne Lyon Enterprises, secretary in spouse's business;
2001: Tymkovich-Ibarra Joint Venture, partner in real estate partnership.
2002: HHT, LLC, real estate partnership, member;
2002: Hale Hackstaff Tymkovich, LLP, partner.

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

None

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

American Law Institute, Fellow (2000)
International Society of Barristers, Fellow (2000)
American Bar Foundation, Member (2000)
Colorado Bar Foundation, Member (2000)
Scribes Award for Outstanding Student Note (1982)
Governor's Task Force on Civil Justice Reform, Chair (1998 -- 2000)

Columbine Review Commission, Counsel (1999 – 2001)
Managing Editor of the University of Colorado Law Review (1981 -- 1982)
Martindale-Hubbell Rating: AV

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
American Bar Foundation
Colorado Bar Association
Colorado Bar Foundation
Denver Bar Association
District of Columbia Bar Association
Boulder County Bar Association
Jefferson County Bar Association
Faculty of Federal Advocates
Governor's Task Force on Civil Justice Reform

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
American Bar Association
Colorado Bar Association

Other Memberships
American Bar Foundation
American Law Institute
Colorado Bar Foundation
Denver Bar Association
Lutheran Church of Hope
The Federalist Society
Colorado State Board of Ethics, Chair

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.**

Colorado Supreme Court:	1982
U.S. Supreme Court:	1986

Tenth Circuit:	1983
U.S. District Court, Colorado:	1983
U.S. District Court, E.D. Virginia:	1986 -- 1990 (lapsed, moved from jurisdiction)
U.S. District Court, D.C.	1986 -- 1991 (lapsed, moved from jurisdiction)
Fourth Circuit:	1986

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.**

Comment, Referendum and Rezoning, 53 U. Colo. L. Rev. (1982);

T. Tymkovich, William H. Erickson, Colorado Supreme Court, Judicial Profile, 63 Den. L. Rev. (1985);

T. Tymkovich, J.D. Dailey, P. Farley, A Tale of Three Theories: Reason and Prejudice in the Battle Over Amendment 2, 68 U. Colo. L. Rev. (1997);

Report of the Governor's Task Force on Civil Justice Reform (Co-Chair);

Colorado Testimony Concerning Tenth Amendment Enforcement Act of 1996 (March, 1996).

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

Good. My last health exam was in October 2002.

14. **Judicial Office: State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.**

None.

15. **Citations: If you are or have been a judge, provide: (1) citations for the ten most significant opinions you have written; (2) a short summary of and citations for appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) citations for significant opinions on federal or state constitutional issues,**

together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions.

Not Applicable.

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

Solicitor General, State of Colorado (Appointed, 1991-1996)

17. **Legal Career:**

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

1. **whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;**

1982 -- 1983: Law Clerk to Chief Justice William H. Erickson, Colorado Supreme Court

2. **whether you practiced alone, and if so, the addresses and dates;**

I have never practiced as a sole practitioner.

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

1983 – 1991; 1996 – present:

Davis Graham & Stubbs, 370 17th Street, Suite 4700, Denver, CO, 80202, and, 1200 19th Street, Suite 500, Washington, D.C., 20003 (1983 -- 1990), associate attorney;

Bradley Campbell Carney & Madsen, 1717 Washington Ave., Golden, CO 80209 (1990 -- 1991), of counsel;

Hale Pratt Hackstaff Midgley Green & Laitos, 1675 Broadway, Suite 2000, Denver, CO 80202 (1996 -- 1997), Partner;

Hale Pratt Hackstaff Green Laitos & Tymkovich, 1675 Broadway, Suite 2000, Denver, CO 80202 (1997 -- 1998), Partner;

Hale Hackstaff Tymkovich ErkenBrack & Shih, 1675 Broadway, Suite 2000, Denver, CO 80202 (1998 -- 1999), Partner;

Hale Hackstaff Tymkovich & ErkenBrack, 1675 Broadway, Suite 2000, Denver, CO 80202 (1999 -- 2001), Partner;

Hale Hackstaff Tymkovich, LLP, 1430 Wynkoop, Suite 300, Denver, CO 80202 (2002 – Present), Partner;

1991 -- 1996

Solicitor General, State of Colorado, 1525 Sherman St., Denver, CO 80202

b. 1. What has been the general character of your law practice, dividing it into periods with the 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.

The general character of my law practice has had several phases. I first served as a law clerk to the Chief Justice of the Colorado Supreme Court, where I developed expertise in appellate practice and oral advocacy. My first job out of my clerkship was with a large Denver law firm (over 200 lawyers). I practiced in the firm's commercial litigation and appeals groups, representing a variety of business and corporate clients on matters of trade regulation, antitrust, securities regulation, federal matters and appeals. Typical clients included US WEST, United Airlines, and Colorado National Bank.

In 1986, the firm asked me to rotate to its Washington D.C. branch office. In Washington, my practice centered on antitrust and related trade regulation matters involving private litigation and interaction with the Department of Justice antitrust division and the Department of Agriculture. My practice with a smaller firm in Golden, Colorado centered on commercial counseling (in the areas of trade regulation and compliance, environmental compliance and insurance, and administrative matters). I also represented individuals in matters involving employment and contracts.

From 1991 to 1996, I represented the State of Colorado as its Solicitor General. In that capacity, I assisted the Colorado attorney general in representing state agencies in the state and

federal courts, providing legislative assistance to the Colorado General Assembly, and as a liaison to Colorado's federal congressional delegation. I also represented the state in its interactions with other states and its national trade association. My practice required supervision of principally civil litigation and appeals involving the state. I personally argued a number of appeals on behalf of the state in the Colorado Supreme Court, the Tenth Circuit, and two cases before the United States Supreme Court.

Since 1996, I have been a partner in a Denver law firm (16-18 lawyers). My practice centers on a wide variety of administrative and governmental matters in which I represent individuals and companies in matters involving state licensing and regulatory issues. My practice also has evolved to include a significant expertise in state and federal election matters, and I have represented candidates and committees ranging from the Governor to state representative officials to state-wide political parties. My election practice is before both administrative agencies and in the federal courts. In addition, I continue a general civil commercial and appellate practice. Clients have ranged from Great Outdoors Colorado to Qwest Corportation to Governor Owens' campaign committee.

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

I have appeared frequently in courts and administrative tribunals as a part of my law practice. Early in my career, I assisted more senior attorneys in a range of litigated matters, appearing in civil jury trials, trials to the court, and appeals. As Solicitor General from 1991 to 1996, I appeared on behalf of the state in civil trials to the court, and in both civil and criminal matters in the state and federal appellate courts. I now frequently appear in court or administrative tribunals as lead or co-counsel on matters.

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

The following is a rough assessment of my trial practice:

a. federal courts -- about 30 percent
b. state courts -- about 35 percent
c. administrative courts -- about 35 percent

3. **What percentage of your litigation was:**
   (a) civil – 95%
   (b) criminal – 5% (during attorney general years)

My private practice has been wholly civil, with the exception of my time in the Colorado Attorney General's office where I participated in counseling state consumer protection and law enforcement agencies on criminal or penal issues. I also argued criminal appellate matters in the Colorado Supreme Court, although I have not tried a criminal case at the trial court level. As a law clerk, I worked on a number of criminal appellate matters. In private practice, civil litigation has been most of my practice.

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.**

The following are cases tried to verdict or judgment:

I have tried 26 matters to verdict or judgment, including adversary proceedings before administrative tribunals. Of these cases I was sole counsel in 4, chief counsel in 16, and associate counsel in 6. I have also argued as sole counsel in over a dozen appellate matters, including cases in the United States Supreme Court (2), the Tenth Circuit (6), the Colorado Supreme Court (9), and the Colorado Court of Appeals (4). Many cases (up to 100) settled prior to trial.

5. **What percentage of your litigation was:**
   (a) civil
   (b) criminal

My litigation practice has been over 95 percent civil and less than 5 percent criminal.

18. <u>Litigation</u>: 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 the principal counsel of the other parties.

1. Durham et al. v. Davidson, 60 F. Supp. 2d 1066 (D. Colo. 1999)(Sparr, J.)(1996-2001). This case involved a six week trial to the court regarding the constitutionality of portions of Colorado's campaign regulation statute. I represented a set of plaintiffs in a consolidated case. My clients included an elected member of the Colorado House of Representatives, the Colorado Republican Party, the Colorado Libertarian Party, and a political consultant. The plaintiffs substantially prevailed on a number of claims, and the statute was subsequently amended to address the constitutional problems by the Colorado General Assembly.

Co-Counsel: Ed Ramey, Mark Grueskin, Issacson Rosenbaum Woods & Levy, 633 17th St., Suite 2200, Denver, CO, 80202, 303-292-5656;
Co-Counsel: James Bopp, One South, 6th St., Terre Haute, ID 47807-3510; 812-232-2434;
State's Counsel: Maury Knaizer, Elizabeth Weishaupl, Colorado Attorney General, 1525 Sherman St., Denver, CO 80202, 303-866-3052;
Counsel to amicus: Robert F. Hill, 1441 18th St., Suite 100, Denver, CO 80202; 303-296-8100.

2. Davidson v. Durham et al., 236 F.3d 1174 (10th Cir. 2000)(Kelly, Henry, Shadur, JJ.)(1999-2000). This appeal challenged the ruling in the Durham case cited above. The Tenth Circuit upheld the district court's ruling on issues on which the plaintiffs had prevailed and reversed several rulings adverse to the plaintiffs. I was one of the counsel who argued the case to the court. The parties represented and the counsel are the same as above.

3. Nebraska v. Colorado, 515 US 1, 115 S.Ct. 1933 (1995)(United States Supreme Court)(1994-1195). This case is an original proceeding in the United States Supreme Court (assigned to a special master) to determine compliance by Nebraska, Wyoming and Colorado with the interstate compact among those states regulating water rights on the Platte River system. I argued on behalf of Colorado before the United States Supreme Court on interim issues relating to compact interpretation. The Court remanded the case back to the special master and it is still pending.

Co-Counsel: Dennis C. Cook, Special Assistant Attorney General, Wyoming, 503 S 3, Laramie, WY 82070; 307-745-7320;
Counsel to Nebraska: Richard Simms, P.O. Box 5250, Sante Fe, NM 87502; 505-983-3880.

4. Romer v. Evans, 517 U.S. 620 (1996)(United States Supreme Court)(1992-1996). This case involved a challenge to the constitutionality of a citizen initiated provision to the Colorado Constitution enacted by the voters in the 1992 election. The provision restricted the ability of state and local governments to enact legislation on the basis of sexual orientation. The Colorado Attorney General is responsible for defending challenges to state constitutional provisions, and I argued the case (along with the Attorney General) in the trial and appellate courts. This case resulted in a two week trial to the court in 1993, two appeals to the Colorado

Supreme Court, and a final appeal to the U.S. Supreme Court. The courts found the provision to be unconstitutional because it created a barrier to beneficial legislation on the basis of sexual orientation.

Co-Counsel: Hon. Gale A. Norton, 1849 C St. NW, Washington DC, 20240; 202-208-7351.
Counsel to plaintiffs: Hon. Jean Dubofsky, 1000 Rosehill Dr., Boulder, CO 80302; 303-447-3510.

5. In the Matter of U S WEST Communications, Inc, Docket No. 99C-371T (Colorado Public Utilities Commission)(Gifford, Hix, Maijkowski, JJ.)(1999-2000). This matter involved an adversary proceeding before the Colorado Public Utilities Commission. I represented US WEST, now Qwest Corporation, in a case involving compliance unfilled order regulations, out of service repair intervals and other service quality benchmarks. I was co-counsel in a week long trial to the Commission. The Commission imposed reparations on US WEST and the matter was not appealed.

Co-Counsel: Kris Ciccolo, 1801 California, Denver, CO 80202, 303-672-2884
Opposing Counsel: Ann Botterud, Office of the Attorney General, 1525 Sherman St., Denver, CO 80202, 303-866-3052.
Michelle Norcross, Office of the Attorney General, 1525 Sherman St., Denver, CO 80202, 303-866-3052.

6. Claassen v. City and County of Denver, 2000 Colo. App. LEXIS 1875 (Adams County, 1997-2001)(Judge Ensor)(Colorado Court of Appeals, Nieto, Hume, Ruland, JJ.). This case involved a group of homeowners who live north of the new Denver International Airport. The homeowners argued that the airport impaired the liveability of their homes because of noise and other pollution from airport operations. After a one week trial, the court ruled that Colorado law precluded a remedy even though it found evidence of noise impacts caused by aircraft. I represented the homeowners. The Colorado Court of Appeals affirmed the decision in 2000. The case is currently pending before the Colorado Supreme Court on the correct legal standard for airport noise cases.

Co-Counsel: Allan L. Hale, 1675 Broadway, Denver, CO 80202; 303-592-8700;
Counsel to Denver: Nick Pijoan, 8500 Pena Boulevard, Denver, CO 80209, 303-342-2200;
Patricia Tisdale, 1700 Lincoln St., Denver, CO 80203; 303-866-0200.

7. AT&T v. US WEST Communications, Inc., Docket No. 99F-404T (Kirkpatrick, J.)(1999-2000).This case involved a challenge to my client, US WEST, and its provisioning of wholesale telecommunications services under state and federal law. After a three day trial, an administrative law judge held that AT&T failed to show any violation of Colorado law for the

provisioning of wholesale telecommunications services, and that any complaints under the federal telecommunications laws should be brought in the Federal Communications Commission. AT&T chose not to appeal the court's ruling.

Co-Counsel: John Munn, 1801 California, Denver, CO 80202, 303-672-2884; Counsel to AT&T: Letty Friesen, 1875 Lawrence St., 15th Floor, Denver CO 80202, 303-298-6166.

8. People v. Ickler, 877 P.2d 863 (Colo. 1994)(Colorado Supreme Court). In this appeal, Dalvin Ickler, a convicted sex offender, sought probation without attending court ordered therapy. The trial court had revoked probation, but the Colorado Court of Appeals agreed with Ickler, and the court ordered him to be set free without appropriate counseling. I represented the people and argued the case in the Colorado Supreme Court, which held that the trial court could properly condition probation on the successful completion of sex offender counseling.

Counsel to defendant: Harry Holmes, 323 3rd St., Longmont, CO 80501; 303-776-7113.

9. United States v. Colorado, 87 F.3d 1161 (10th Cir. 1997)(Tacha, Holloway, Briscoe, JJ.)(1996). This appeal in the Tenth Circuit involved a procedural challenge by the United States Department of Justice to Colorado's requirement that federal prosecutors abide by Colorado ethical guidelines in prosecutions in this state. The federal government alleged that they should be held to a lesser standard than state law required. I argued the case on appeal. The Court held that the United States was entitled to a hearing on the merits.

Counsel for the United States: Thomas M. Bondy, US Department of Justice, 950 Pennsylvania Ave. NW, Washington DC 20530; 202-514-0287.

10. Falls City Brewing Co. v. Vanco, No. 81-1271 (Federal District Court for the Southern District of Indiana)(Holder, J.)(1986-89). This matter involved a major challenge to business practices under the federal Robinson-Patman Act, which prohibits price discrimination that harms competition. I represented Falls City, a long time brewer in the Midwest, located in Louisville, Kentucky. The case had been tried and appealed previously to the United States Supreme Court. We represented Falls City at a trial on remand to determine whether any discrimination occurred. The case settled on the fourth day of trial.

Lead Counsel for Falls City: Howard Adler, 815 Connecticut Ave., NW, Washington, DC 20006; 202-452-7000.
Counsel for Vanco: John T. Cusack, Quaker Tower, Suite 3400, 321 North Clark St., Chicago, ILL. 60610; 312-644-3000.

19. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question,

please omit any information protected by the attorney-client privilege (unless the privilege was waived).

1. Solicitor General, State of Colorado:

From 1991 to 1996, I had the privilege of representing the State of Colorado in a wide variety of civil and criminal matters. As Solicitor General, I had the opportunity to promote reform to state criminal, consumer protection and antitrust laws, and to help represent the state and its citizens in cases involving state government. As government lawyers, the office helped assert a belief that lawyers can and must be civil in their dealings with opposing counsel and the courts, and that government lawyers owe a special respect for the rule of law and the fair administration of justice. The office advocated that the state can take a lead in legal reform and the proper administration of the legal justice system.

2. Co Chair, Governor's Task Force on Civil Justice Reform:

In 1999, Governor Owens of Colorado asked me to co-chair a task force whose mission was to examine and recommend improvements to Colorado's system of legal justice. The task force met over an 18 month period. As a result of its deliberations, the task force came up with a series of recommendations to improve the efficiency of the administrative law process, including the role of persons not represented by counsel, establish experimental business courts, and increase the number of trial judges in the state. In the 2001 legislative session, a number of these recommendations have been introduced, and I believe will be enacted into law.

3. Counsel to the Columbine Review Commission:

The Columbine Review Commission was established by Governor Owens to review the tragic shootings at Columbine High School in 1999. The Commission's mission is to review the response of law enforcement, emergency personnel, and hospitals to situations involving mass trauma and to recommend changes to then existing protocols. The Commission also reviewed school safety issues, school culture, and juvenile justice matters.

4. Assistant to Chief Justice and Governor in judicial selection process:

As Solicitor General, I acted as the Attorney General's delegate to the judicial selection process. I assisted the Chief Justice of the Colorado Supreme Court and the Governor's delegate in identifying and selecting members of the numerous judicial nominating commissions whose job it is to interview and recommend potential nominees to the Governor for appointment to Colorado's state courts. Colorado has a nationally recognized nonpartisan judicial selection process that has been emulated in a number of states. The three top judicial and executive officers select members who then select potential nominees for the governor's ultimate selection.

We selected high quality members whose judgment will be critical for identifying the best qualified people for the state court bench.

5. United States v. Denver (as law clerk):

I had the opportunity to work as a law clerk with Justice Erickson on a significant water rights case that is still a leading authority on western water rights. The case resolved a number of complicated issues of first impression concerning the accommodation of federal lands, state water appropriation rights and private property. The case is still an important precedent on federal reserved water rights. The United States chose not to appeal the case to the United States Supreme Court, and there has been no superseding precedent on the many issues addressed in the lengthy opinion.

6. Legislative reform to Colorado's antitrust and consumer protection laws:

I had the opportunity to take a lead in working with the Colorado legislature in reforming the state's antitrust laws in 1992. The antitrust reform led to the first major amendments to the antitrust laws in over 20 years, and brought Colorado law in line with modern antitrust jurisprudence. I also assisted the legislature in analyzing proposed amendments to the state's consumer protection laws to aid credit reporting and hearing aid consumers.

7. Legislative Practice:

Since 1996 I have developed a widely recognized expertise in legislative and election matters. I have assisted numerous candidates and political parties in election law compliance. In addition, I have represented clients before courts and administrative tribunals on election matters. My practice has included a constitutional challenge to overly broad provisions to Colorado's campaign regulations, and subsequent (unpublished) testimony before the state legislature on amendments to the state law. I have worked with others in providing election law compliance seminars.

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.

I have a right to a portion of any income derived from accounts receivable generated while I was a partner at my current firm (Hale Hackstaff Tymkovich, LLP) pursuant to the partnership distribution agreement. Generally, that agreement gives me a right to one-third of any receivables after expenses. I believe the accounts receivable are approximately $600,000, as of December 31, 2002, with expenses of approximately $100,000. I have a one-fourth claim on the value of the accounts receivables as of the date of my departure. That value has not yet been determined. Any payments would be distributed within five years. I have a profit sharing plan (less than $20,000) that would be rolled over to an IRA.

2. Explain how you will resolve any potential conflicts 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.

If confirmed, I will resolve any potential conflicts of interest by strictly adhering to the rules and opinions interpreting the Colorado Code of Professional Conduct and the Federal Rules of Judicial Conduct. I will first consult any applicable rule in analyzing a potential conflict, and, as necessary, consult with ethics officers available to members of the federal judiciary. I anticipate that the categories of potential conflicts arise primarily from cases or matters I am currently handling, or that my firm is handling but in which I am not directly involved. There may be certain matters involving the State of Colorado (matters arising from the Columbine shootings) and the United States Department of the Interior (matters arising from transition services) that could create a conflict or the appearance of impropriety. With respect to any financial interests I may have, I will consult the Federal Rules of Judicial Conduct to determine the proper course in analyzing potential conflicts.

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

I have no plans, commitments or agreements to pursue outside employment while a member of the court.

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

   See attached copy of the forms required by the Ethics in Government Act of 1978.

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

   See Attached net worth statement and schedules.

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 been a campaign treasurer (1990 to Attorney General candidate), and counsel to various state office campaigns (Governor Bill Owens (1998), Rep. Rob Fairbank (2000), Rep. Joe Nunez (1998), Congressman Tom Tancredo, (1998)). In addition, I was general counsel to the Colorado Republican Party from 1998 to 2001. I resigned from that position in January, 2001.

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 would describe my activities on pro bono matters as covering several phases in my career. First, early in my career my volunteer activity centered on representing disadvantaged individuals with specific legal problems. In 1984 I represented a young woman (age 29) who desperately needed assistance in a domestic court regarding custody of her granddaughter. Her daughter, the mother of the child, was only 15 years old and was not yet capable of rearing the baby. The case was resolved through a mediated settlement in Denver County Court, and took 50 to 100 hours of my time between 1983 and 1986. I handled other pro bono matters through the Denver Bar Association's Thursday Night Bar program, a program that supplied lawyers on a regular basis to answer common questions regarding landlord/tenant, domestic relations, and debt collection issues. I cannot recall the exact number of hours worked on these matters over the years.

I also represented a minor state political party (the Prohibition Party) in the early 1980s that had a civil rights complaint against the State of Colorado regarding access to the ballot. After we filed a federal court complaint, the State realized its vulnerability to our claims and legislatively corrected the statute that we believe injured our clients. This matter took several hundred hours in the early to mid 1980s.

Also, in the mid 1980s, I volunteered substantial time to a Colorado Bar Association program that celebrated the bicentennial of the Constitution. I led a committee that drafted a number of summaries of constitutional law or legal history that were made available for publication in smaller newspapers around Colorado. During the early 1990s I was in public service as Colorado's Solicitor General.

In recent years, I have devoted a large amount of time (several hundred hours in 1999 and 2000) to several matters. The first is the Governor's Task Force on Civil Justice Reform. The governor appointed me as co-chair to the Task Force in 1998. We then selected a group of over 60 prominent lawyers, government officials, business leaders, citizens, and judges to blue-ribbon panels to look at improving the administrative law system, access to the courts by the poor or self-represented, specialty courts, and judicial delay. The Task Force issued its report in 2000 and the report has been the basis for substantial legislative attention (with several bills pending to implement the recommendations) and executive action through executive order.

I have also volunteered substantial time as chair of the State Board of Ethics and the Columbine Review Commission. I was counsel to the Columbine Review Commission, which

reviewed the Columbine High School shootings and made recommendations regarding the public response to the tragedy and possible steps to address school violence and juvenile crime. These two projects have taken hundreds of hours over the past two years.

2. **The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates -- through either formal membership requirements or the practical implementation of membership policies? If so, list, with the dates of membership. What you have done to try to change these policies?**

I do not belong and have never belonged to an organization that, to my knowledge, discriminates on the basis of race, sex or religion.

3. **Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).**

Colorado's two senators have established a selection commission to review applicants for federal district court vacancies. The Commission has not reviewed applicants for the Tenth Circuit. I have interviewed with the Office of the White House Counsel and representatives of the Department of Justice, and have responded to the FBI questionaire and interviewed with the FBI. I have long been interested in serving on the Federal Bench, and expressed my interest to the White House counsel in early January 2000.

4. **Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as asking how you would rule on such case, issue or questions? If so, please explain fully.**

None.

5. **Please discuss your views on criticism involving judicial activism:**

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the

judicial branch has usurped many of the prerogatives of other branches and levels of government.

Some of the characteristics of this "judicial activism" have been said to include;

a. A tendency by the judiciary toward problem-solution rather than grievance-resolution;

b. A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;

c. A tendency by the judiciary to impose broad affirmative duties upon governments and society;

d. A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and

e. A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

The nature and role of the federal courts have been debated since the founding of the United States. James Madison wrote first in The Federalist about the judiciary as the "least dangerous" branch of the new federal system -- institutionally it would have to rely on reason and judgment rather than force or fiscal constraint to accomplish its mission.

The federal courts play a vital role in interpreting the laws of Congress and the Constitution. When some critics comment on judicial activism they are really addressing the uniquely judicial task of interpretation, and the resulting remedies that flow from a finding of a statutory or constitutional violation. The federal courts have relied on a number of key tools in aiding them in resolving disputes in discrete cases before them -- ripeness, standing, *stare decisis*, abstention, and comity. All of these tools require the courts to understand and apply their authority in a way that recognizes the scope and power of co-equal branches at the federal level, and of the states vis-a-vis the federal government. The norms of judicial interpretation do much to ensure that the courts occupy their appropriate place in a well-functioning national government.

These "rules of the road" for federal courts help the courts maintain their proper role within the federal system. The courts are at their strongest when they resolve concrete problems for parties with specific allegations of injury. Then the courts can interpret laws as enacted by Congress or authority as exercised by the President or executive branch, and apply faithfully the Constitution and the Supreme Court precedent that construes it.

A healthy respect for separation of powers and federalism ensures that the courts act on matters that truly implicate federal law (or diversity jurisdiction where appropriate), and not matters left to other branches of government. The canons of interpretation aid the courts and reassure the critics that courts are objectively applying the law as it has been enacted by the legislature, and not basing decisions on subjective or personal preferences.

In sum, the current debate over the scope and role of the federal courts contains the echoes of the debate that started over 200 years ago when the founders established the federal system. The courts -- like Congress and the President -- function best when they understand not only their power, but their limitations. The historic independence of the judiciary in our system brings with it a special responsibility of deference to the political branches and the lawmaking process. The courts are most respected when they apply the law and precedent to concrete parties before them and respect the institutional role of the legislative and executive branches, and the state governments.

AFFIDAVIT

I, Timothy M. Tymkovich, do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

11/6/02
(Date)

Timothy M. Tymkovich
(Name)



Alice M. Hanna
(Notary)

My Commission Expires: 8-31-03

Senator SESSIONS. We will take a 3-minute recess and get ready for our next panel, and you can move on up and take your seats.

[Recess 12:02 p.m. to 12:07 p.m.]

Senator SESSIONS. Ladies and gentlemen, if you would stand, we will do the oath. Do we have everybody or are we missing—no, we have everybody. If you would raise your right hand and take this oath. Do you swear that the testimony you are about to give before the Committee will be the truth, the whole truth, and nothing but the truth, so help you God?

Judge BREEN. I do.

Judge STEELE. I do.

Mr. VARLAN. I do.

Mr. STANCEU. I do.

Judge HORN. I do.

Senator SESSIONS. Please take your seats.

I congratulate you again on being nominated for one of the most significant offices an American can have, to receive the support of the President and your State Senators, and now you are seeking the support of the United States Senate in the confirmation process to be a Federal judge. That is a great, great honor, and I know that from what we have learned from your background that you are worthy of it. You have been reviewed by the American Bar Association. First, of course, the administration has reviewed and the Department of Justice has reviewed your qualifications. The FBI has done a full-field investigation and background check on your background, your integrity and competence and ability and see if there are any problems there. The American Bar Association has rated you qualified for the position after doing the extensive work that they do.

For those of you who may not know, the Bar Association requires nominees to submit a large number, I think as many as ten cases that you have litigated that are important, and the nominee has to list all the attorneys that were involved in that case, and the ABA goes and interviews them as well as the judges who may have presided over the case. And so they do intensive work. And then we at the Senate, through the staff here, review the nominees. We receive letters of support, and you have mostly gotten support for you for sure, and any questions that arise, and then we have this public hearing and you go forward.

The Senate is very busy now. We are at the last minutes of an appropriation process. We also have Armed Services going forward. We have the review of the Space Shuttle disaster going on and debate on the floor continuing on the Estrada nomination, and a number of members here are there. So that would explain some of the absences that we might otherwise not see today.

Let me start off with general principles. First let me ask each of you if you would like to make an opening statement, and I would be pleased if you would identify any family members or friends that you have here.

Judge Breen, would you like to start?

STATEMENT OF J. DANIEL BREEN, NOMINEE TO BE DISTRICT JUDGE FOR THE WESTERN DISTRICT OF TENNESSEE

Judge BREEN. Thank you, Mr. Chairman. Let me first of all thank you and the other Committee members for considering my nomination on today's hearing. I would like to also, if I could, publicly thank Senator Frist and Senator Alexander for their support and kind words on my behalf.

If I might, I would like to introduce a lady that I know quite well and who has traveled with me here. We are celebrating our 30th anniversary this year. My wife, Linda, who is seated here behind me, and she is certainly here in my support.

I would also, if I might, although they weren't able to be here, my two sons. One is Daniel in Memphis, working in Memphis, Tennessee, and the other, Phillip, is in Orlando, Florida. He is in school there, and certainly they are very supportive of me as well.

With that, sir, I do not wish to make, other than that, an opening statement at this time, sir. Thank you.

Senator SESSIONS. Thank you.

Judge Steele? I am glad to see your wonderful wife, Linda, here and your family. Please introduce who you have.

STATEMENT OF WILLIAM H. STEELE, NOMINEE TO BE DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF ALABAMA

Judge STEELE. Thank you, Mr. Chairman. I am extremely grateful and honored for this opportunity to participate in this important constitutional process. I also would like to publicly express my gratitude to you and to Senator Shelby, who made the kind remarks on my behalf earlier, and also to President Bush for nominating me to this position and having confidence in my ability to serve as a district judge for the Southern District of Alabama.

I am honored today to have many members of my family and some friends here that I would like to introduce. First of all, my wife, who is also my dance partner, my hiking partner, and my golfing partner, and my best friend for the last 32 years, Linda. Thank you.

My mother, Martha, who is a member of Tom Brokaw's greatest generation of Americans, and I will tell you that she is a person who loves this country almost as much as she loves her family, which is considerable.

Senator SESSIONS. I enjoy seeing your mother at the Whistle Stop Restaurant every now and then after church on Sunday.

Judge STEELE. My son, Chris, who is here today. If you would stand, Chris? He is the owner and operator of two of the best, if not the best restaurants on the Gulf Coast and a very hard-working restaurateur. We are very proud of him. Thank you, Chris.

His wife, Rosemary, and his daughter, Madison, who is my only granddaughter, are unable to attend. Rosemary is anticipating delivering our second granddaughter in just a matter of days, so Chris will be leaving here quite quickly after the hearing today to attend to those responsibilities. Thank you, Chris.

My son, Blake, former Eagle Scout, all-around good guy, also involved in the restaurant business on the Gulf Coast. His wife, Ranee, is here, and she is a very good student at one of our local universities in Mobile, and we're very proud of Ranee.

My daughter, Keri, who is a software application engineer for a large corporation in New Orleans, and she has done quite well with that particular profession. Thank you, Keri.

My brother, Bob, Major, United States Marine Corps, retired. He's a former helicopter pilot for Presidents Reagan and Bush. He's also the recipient of a Distinguished Flying Cross for acts of bravery in Vietnam, and we're certainly proud of my brother, Bob. Thank you.

His wife, Valerie. Valerie is engaged in the noble profession of school teaching. She teaches first grade just south of here in the Stafford, Virginia, area. Thank you, Valerie.

Their son, Jimmy, who's a Lieutenant JG with the U.S. Coast Guard. He's also a law student at American University here in this area and doing quite well in law school.

His wife, Melissa, is also involved in the noble profession of school teaching in the Falls Church area, around the D.C. area.

I'm also honored today to have one of my former law clerks, Joy Williams. I'm proud to have her today. She was a wonderful law clerk for me and one of the nicest people you'll ever meet anytime, anywhere. She informs me that she has just accepted a position with the Office of General Counsel for the FBI here in Washington, so we're really proud of Joy.

Also in attendance from Mobile is Dr. Floyd Windal, one of our best friends, and we're certainly gratified to have him with us here today.

And in attendance is Bill Wynne, chief of the United States Probation Office, a good friend, and we're proud to have him here today.

Senator SESSIONS. One of the great probation officers in the history of the world.

Judge STEELE. He is the best, let me tell you. And unable to attend is my sister, Sandy Steele, who is a city clerk in Fort Pierce, Florida, and my brother, Jerry Steele, who is a Colonel, United States Marine Corps Reserve, also director of the Boys and Girls Clubs in Mobile.

So we're proud of everyone, and I'm grateful today to be able to introduce them to the committee. Thank you.

Senator SESSIONS. Thank you, Judge Steele. Very good.

Mr. Varlan?

STATEMENT OF THOMAS A. VARLAN, NOMINEE TO BE JUDGE FOR THE EASTERN DISTRICT OF TENNESSEE

Mr. VARLAN. Thank you, Mr. Chairman. I, too, want to thank the Chair and the members of the Senate Judiciary Committee for consideration of my nomination. I also want to thank Majority Leader Senator Frist and Senator Alexander for their kind and gracious comments concerning my nomination. As well, obviously, I would like to thank the President for his submission of my nomination to this body.

I have with me my wife and two of my four children I would like to introduce. My wife, Danni, who's been so supportive of my professional efforts, in particular this particular quest. My oldest daughter, Georgia, who is a sophomore in high school in Knoxvlile.

My daughter, Susanna, who's in eighth grade, a middle school student.

And also with us today is one of our very good friends, Amy Hartman. I'd ask her to stand. We both lived—our families both lived in Atlanta, Georgia, in Senator Chambliss' home State, for a time in the 1980's, and they moved to the Washington area about the same time we moved back to Tennessee, and we're glad she's here today.

In absentia, I would also like to mention my two sons—my 12-year-old son, Alex, and my 9-year-old son, Paul—as well as my father, Alexander Varlan, who are back in Knoxville wishing us well.

So, again, thank you, Mr. Chairman, for the opportunity to be here today.

Senator SESSIONS. Thank you.

Mr. Stanceu?

STATEMENT OF TIMOTHY C. STANCEU, NOMINEE TO BE JUDGE OF THE UNITED STATES COURT OF INTERNATIONAL TRADE

Mr. STANCEU. Thank you very much, Mr. Chairman. The President's nomination of me to the U.S. Court of International Trade has been the greatest honor of my career, and I am very grateful for the opportunity to be here today before the committee. I am also, of course, very grateful to President Bush for my nomination.

I'm also very proud to be joined here today by members of my family. First of all, let me introduce my wife, Mary Incontro. Mary is in public service. She is an official with the Department of Justice and now working with the Federal Bureau of Investigation.

My mother, Mitzi Mewhinney, is here, and her husband and my stepfather, Richard Mewhinney. They have come all the way from Florida to be with us here today, and I'm very pleased to say that, and also very, very pleased that my sister, Patricia Hallissy, has also traveled from Florida to be with us here today.

And I sincerely thank you, Mr. Chairman.

Senator SESSIONS. Thank you.

Judge Horn?

STATEMENT OF MARIAN BLANK HORN, NOMINEE TO BE JUDGE OF THE UNITED STATES COURT OF FEDERAL CLAIMS

Judge HORN. Thank you, Mr. Chairman, and I want to thank you and Chairman Hatch for allowing me the opportunity to appear here this afternoon, and I want to thank the President for placing his trust in me and re-nominating me to another term on the Court of Federal Claims. I've been there for 16-plus years and enjoyed every day of that opportunity, and I hope to do another 15 years plus with the same kind of dedication that I think I've given to the job in the past.

I do want to take the opportunity to introduce my husband who is here with me today, Robert Horn, a partner at Patton Boggs firm here in Washington, who is known to many of the members of this committee, and also my daughter, Carrie Horn, who is an associate at the law firm of Hunton and Williams here in D.C. Her two sisters, her twin sister, Rebecca, could not be with us here today. She's a fourth-year medical student, and they don't let her out of

the hospital. And my other daughter is a holder of an MBA degree and works as a consultant in New York, in Senator Schumer's State, in which I was born and raised. And I want to thank you all and hope that I could answer any questions, and I appreciate the opportunity.

Senator SESSIONS. Very good. Well, you know, the Court of Claims and the International Court of Trade, and these three are for Federal district judgeships, I guess with regard to all of them, I know with the Federal judges, that management is a key requirement, that this is not a retirement job, that the modern challenges of a Federal judge are enormous. The caseloads are heavy. Lawyers have a right to expect that when they have submitted briefs properly and that sort of thing that the court will rule promptly. Delays cost parties extra money. They deny justice and that sort of thing.

I remember when Judge Steele was Chief Assistant United States Attorney, I was District Attorney there for Chris Galanos in Mobile. He was a good administrator, and I remember we had some actually not very well thought out procedures in Federal court dealing with the processing of cases. Actually, I had thought for some time it was something that should be changed, and several years later, when Judge Steele was appointed magistrate judge, the court asked him to study the case processing in the court and to develop a plan to improve that.

Judge Steele, it was a stunning improvement. Everybody that practiced regularly in the Federal court in Mobile appreciated the changes, and you orchestrated that.

I will ask you, based on your experience as a magistrate judge and as an observer of Federal judges, do you feel a burden to move cases in a fair and prompt way? And is management something that we need to look for in our nominees?

Judge STEELE. Thank you, Mr. Chairman, for the opportunity to answer that question. Yes, sir, I do think it's something—management is a skill that is absolutely required of any nominee to the Federal district bench. Not only do you have to manage your own caseload, but you have to be conscious of the other judges' caseloads as well and offer to help when needed to move the cases fairly and efficiently through the court. And I think we're pretty successful at doing that in the Southern District of Alabama. We've had occasions where the caseload was just so excessive that it was difficult to do so. But I come from a court that has just a history of having judges who have great relationships with each other, who work with a sense of purpose and a goal to do the good—do justice for the good of the people. And they stay focused, and I think that's the important part to a case management plan, is to have a plan that allows the judges to focus on the purpose of the court, and that is to do justice effectively and efficiently.

Senator SESSIONS. So the plan shouldn't drive the system. The plan should help you achieve justice.

Judge STEELE. Yes, sir.

Senator SESSIONS. I think that is a good observation.

Judge Breen, do you agree with that? Do you have any thoughts?

Judge BREEN. Yes, Mr. Chairman. Thank you again for the opportunity to answer the question. Rule 1 of the Federal Rules of Civil Procedure in civil cases obviously calls for us to have a fast,

certainly efficient disposition of our cases, and I think that certainly applies equally in the criminal area. Obviously we have the Speedy Trial Act, so those cases are moved—certainly in your experience, I'm sure, as U.S. Attorney, to move those cases.

In the Memphis area, which is one of the locations I sit now presently, we have a rotation docket that allows and assists us in moving the criminal cases because all the judges are participatory in that process of able to move those.

In the civil area, I think it certainly is a collaborative effort in the sense that it takes the judge's staff or the attorneys, the litigants, to set up deadlines and set up certain trial dates so that the lawyers will know, the litigants will know when their day in court is going to occur.

In our area, we are trying to move those cases somewhere between 12 and 14 months from the date of filing. One of the aspects that certainly I've been involved in, and I'm sure other magistrate judges have, is in the area of ADR. And one of the things that is usually set in one of the scheduling orders is the use of ADR. And I think—

Senator SESSIONS. That is alternative dispute resolution.

Judge BREEN. Yes, sir, alternative dispute resolution, mediation, settlement conferences, things of that nature. And I think along with Judge Steele, I'm sure he's been involved in a number of them. But many of our cases are resolved in that area. I don't think it's—

Senator SESSIONS. Is that a factor, the use of that, in the decline in the number of cases actually going to trial in Federal court?

Judge BREEN. I think it is. I think, again, I don't think it's a forced resolution. It's a matter that, at least in my experience, is one that the lawyers and I think the litigants are becoming more accustomed to and are willing to involve themselves in, because they realize that, first of all, it's less expensive. I always tell them it's less traumatic than having to go through a full-blown trial, and certainly it's less time-consuming because obviously the matter can be resolved at an earlier point in the life of a case.

And so all of those factors that I've just described, along with what Judge Steele has said, I think is the role of our court, the role of the magistrate judges, the district judges, to collaborate with the litigants and with the lawyers to have a speedy and efficient disposition of cases.

Senator SESSIONS. Well said.

Mr. Varlan, do you have any comments? Have you given any thought to that?

Mr. VARLAN. I have, Mr. Chairman, and thank you for the opportunity to respond. Certainly, going back to your original question or premise, certainly management of the caseload is a key consideration for district court judges as well as magistrate judges. I have not had the perspective of being a magistrate judge as Judge Steele and Judge Breen have been. But from the standpoint of a practicing attorney, it is a key consideration.

In discussions with various attorneys, as my nomination was being considered, over and over again I hear from attorneys, you know, what do they want out of district court judges? They want to be treated fairly, they want to be treated even-handedly, and

they want their cases to move in a fair and efficient manner, which somewhat almost similarly echoes the words of the Chair at the beginning of your question.

And from my perspective, it takes hard work. It takes managing your docket. It takes adhering to deadlines, rendering prompt decisions. Certainly alternative dispute resolution, ADR, is a very useful tool, as Judge Breen mentioned. In the Eastern District we have a voluntary ADR program where many attorneys sign up to serve on a list of approved mediators. As a practicing attorney, I've had several cases in Federal court that we have utilized that mediation program, and although I don't have statistics for the Chair, we tend to find that many of those cases that are mediated are settled. They may have been settled without mediation, but certainly mediation and ADR has been a useful, an extremely useful tool with respect to cases pending in Federal court, as well as State court for that matter.

Senator SESSIONS. With regard to precedent—and I will ask all of you this—do you recognize that even though you have been given, for three of you lifetime appointments, long appointments for the others, that you have a solemn personal duty to restrain your personal impulses and to be a neutral arbiter of the law and the facts as fairly have been found by you as you make your opinions and that you will be faithful to the binding authorities in defining the laws and statutes? Judge Breen, just briefly, would you comment on that?

Judge BREEN. Yes, thank you, Mr. Chairman. Certainly the issue of precedent, of stare decisis, is an extremely important concept in our jurisprudence. I think it's the backbone of our system. Certainly lawyers and litigants both look for some predictability, something that they know that—stability in the sense that they can go into court and have some basis or some idea of what precedent has been involved here. And I think we as judges have a duty, we are duty-bound certainly by oath, to look at that precedent, certainly from the Supreme Court standpoint and then from our own circuit, in my case, obviously, the Sixth Circuit. But certainly that is, again, a bedrock, I think, of what we as judges must look to and utilize whenever we are ruling on matters in our courts.

Senator SESSIONS. Judge Steele?

Judge STEELE. Yes, sir. Certainly it's not the role of a Federal district judge or a Federal judge of any level to legislate. And a judge is obligated by the rule of law to follow the precedent that's available to him in the circuit that he's in, or if there is Supreme Court precedent, to follow that.

I'm reminded of the language in the—I think it's a recent case, the United States Supreme Court in *Hatter*, in which the Court admonished the lower court that you will follow our law whether you agree with it or not, and you will follow it until we tell you that it's different.

Well, that admonishment, I think, is well taken and—

Senator SESSIONS. Well, that is important because one party has had to appeal because the court is not ruling correctly, they had to go to all that expense and all that delay through a system that really wasn't necessary if they had followed the law to begin with.

There are a lot of reasons why lower courts should follow the superior courts.

Judge STEELE. I agree with that. I think I've selected somewhere in the neighborhood of 200 juries in my capacity as a magistrate judge, maybe 250 juries, and each time I charge them that you must follow the law whether you agree with it or not. And I think that same charge applies to me. I have to follow the law whether I agree with it or not.

Senator SESSIONS. And that is the standard charge given to all the juries.

Judge STEELE. Right.

Senator SESSIONS. Mr. Varlan?

Mr. VARLAN. Thank you, Mr. Chairman. I, too, agree that the principle of stare decisis and adherence to precedent is extremely important to our judicial system and our rule of law. As the Chair stated, our role as judges is to act as a neutral arbiter of the facts and the law, and that principle, that bedrock principle, provides the predictability to the lower court in terms of following the Sixth Circuit, in my case, as in Judge Breen's, and the U.S. Supreme Court, as well as some measure of predictability to the litigants and the attorneys and parties that come before us.

Senator SESSIONS. Mr. Stanceu?

Mr. STANCEU. Thank you, Mr. Chairman. I would agree with the views that have been expressed here, and I would add that I would view a judge's most solemn duties are to uphold the rule of law and to do impartially and fairly. Judicial activism—and those are two words that I don't believe go together. Judicial activism is not being impartial. Activism is for the parties and their attorneys who must zealously represent them within the bounds of the law. I would see the judge's duty as to uphold the rule of law and achieve fairness.

Senator SESSIONS. The light is fading on us.

[Laughter.]

Mr. STANCEU. And with the specific respect to the U.S. Court of International Trade, that would mean loyalty and fidelity to the decisions of the Supreme Court and, of course, to the U.S. Court of Appeals for the Federal Circuit, in which circuit the U.S. Court of International Trade is located.

Senator SESSIONS. What special challenges do you think you will face as a Court of Trade judge?

Mr. STANCEU. I would say that in fulfilling the responsibilities of a judge of the Court of International Trade, if I am fortunate to be confirmed, one thing we must always guard against is to make sure that all parties have a full and fair opportunity to be heard. I want to make a couple of points on that.

First, you mentioned—the excellent remarks that you had mentioned, Mr. Chairman, about managing the docket. Wholeheartedly I agree, and I believe that that responsibility will require continued diligence and dedication.

I can commit to this Committee and to the bar of the Court of International Trade that I will do my utmost to move the docket along, but never at the expense of fairness or giving every party the opportunity to be heard. For example, I do not believe it is proper for judges to pressure parties into settlements as a means

of managing the docket. The Congress has created the Court of International Trade under its Article III powers under the Constitution to give importers, domestic parties, and other interested parties the right to be heard in front of this court. And if it is their desire to go to trial, then that right must be upheld.

Thank you.

Senator SESSIONS. Judge Horn, tell me about your experience and what do you look forward to next.

Judge HORN. Well, I can honestly say I've had 16 marvelous years on the court.

Senator SESSIONS. Is that the term?

Judge HORN. The term is 15. I'm now in senior status until hopefully the Committee sees fit to have the re-nomination confirmed. The term is 15 years in and of itself.

I think that the beauty of the caseload on our court is the complexity of many of the cases, which is why I enjoy the challenge. We, of course, have an entirely civil docket, and we get cases in a variety of areas, many of which are multi-count, large-dollar volume, and pretty complex, which is why it is challenging.

I believe just in answer to the questions that have been asked that case management is obviously an important part of any judge's responsibility, and in a sense time is money, particularly since we have a civil docket and our responsibility is to make sure to get to the just, fair, and proper answer in as expeditious manner as possible.

With respect to following case precedent, I think it's the sworn duty of any judge to follow case precedent. I try to do that and have tried to do that in all of the cases that I've decided, including some in which—the few that the Court of Appeals for the Federal Circuit has seen fit to overturn, which has been on an average of about one a year in about 16 years. So, so far, we've done okay.

Senator SESSIONS. Let me ask you, do you think judges sometimes can become too timid in honestly evaluating the law and facts and worry about reversals? Is that something you should—how should you evaluate calling it and worrying about reversals?

Judge HORN. Well, Mr. Chairman, I welcome that question because I preached for a long time—

Senator SESSIONS. Well, you have taught. I know you taught at George Washington and American University Schools of Law, so I am sure you have thought about it.

Judge HORN. I have thought about it, and I honestly believe that that is something a judge should never think about. You are there to do the best you possibly can with the case precedent, with the facts that come before you in a particular case, and I think it would be inappropriate for a judge, frankly, to worry about whether or not he or she will be reversed.

It happens on occasion. Reasonable men and women disagree. But that should never be the driving force.

Senator SESSIONS. Well, you three Federal district judge nominees, I will ask you this. I hope Judge Steele hasn't forgotten his brief tenure as an Assistant United States Attorneys, 2 years or so. But my question is: Will you give the prosecutors the same fidelity to fair rulings that you do to the defendant? As Judge Horn suggested, you really need—I think the law requires you to call the

shots fairly. It is a fact, however, that a lot of people in America do not know that if you rule against a prosecutor, they can't appeal. If you rule against a defendant, they might. So I have observed—and there have been criticisms of judges tending to rule for the defendant just so they might—there will be no chance of being reversed on appeal. Will you be faithful and give the prosecutor a fair chance, the three of you? Yes or no, or any brief comment you might have.

Judge BREEN. Mr. Chairman, again, I have been on the bench now about 12 years, and I think that there have been opportunities and occasions when I have ruled against the government. There are many opportunities that I have ruled in their favor. Certainly I pride myself on being impartial and fair and willing to listen to all parties, whether they're the government, whether they're private individuals, corporations, or whatever persons, you know, certainly who are not even represented, are representing themselves. So I feel that I can unqualifiedly give the government and any other litigant who comes into my court a fair hearing and certainly the decision I make is not based upon who it is or what their status in life is.

Senator SESSIONS. Judge Steele?

Judge STEELE. Yes, sir, I have a similar experience with 13 years as United States magistrate judge. I have had many opportunities to rule for and against the government and for and against the defendants in cases, and each time my rulings were based on the facts and the law as they were presented to me in my best judgment of what the result ought to be.

Senator SESSIONS. Mr. Varlan?

Mr. VARLAN. Thank you, Mr. Chairman, and I have—in my legal career, approximately half has been public from a civil standpoint in terms of being city attorney and the other half in private practice. And I believe and I know that I can be fair and impartial to those who appear before me, and that would obviously include the government and prosecutors as well as defendants and other litigants.

Senator SESSIONS. Well, I will just say to all of you congratulations, you have cleared one more hurdle, I suppose you can call it, in this weird process. I am not sure there is any real justice in it, but it is a process that we go through and historically has resulted in good judges going on the bench. And I don't think it makes any difference if you are Senator Leahy's campaign Chairman or a former Assistant United States Attorney that you know. What we want is the best judges that we can get who, when they put that robe on, will try to rule right and fair, following the law and following the facts.

We will keep the record open for one week to allow follow-up questions. The questions are due by 5:00 p.m. next Wednesday.

[The biographical information of Judge Breen, Judge Steele, Mr. Varlan, Mr. Stanceu, and Judge Horn follow.]

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

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

   John Daniel Breen

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

   United States District Judge for the Western District of Tennessee

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

   345 U.S. Courthouse
   111 South Highland
   Jackson, TN 38301
   (731) 421-9250

4. **Birthplace**: State date and place of birth.

   July 10, 1950, Jackson Tennessee

5. **Marital Status**: (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es). Please also indicate the number of dependent children.

   Married
   Linda Gail Turnbo Breen, not employed outside the home
   One dependent child

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

   University of Tennessee, Knoxville, TN
   attended 9/72 - 6/75; Degree: Doctor of Jurisprudence, 6/75

   Spring Hill College, Mobile, AL
   attended 8/68 - 5/72; Degree: B.A. History, 5/72, summa cum laude

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

United States Courts
111 South Highland Avenue
Jackson, TN 38301
7/91 - Present
United States Magistrate Judge

Waldrop and Hall, P.A.
106 South Liberty
Jackson, TN 38301
8/75 -7/91
Partner

Waldrop and Hall, P.A.
106 South Liberty
Jackson, TN 38301
6/74 - 9/74
Law Clerk

J.C. Penney Co.
2021 North Highland Avenue
Jackson, TN 38305
5/73 - 8/73 - Clerk
5/72 - 8/72 - Clerk
5/71 - 8/71 - Clerk
5/70 - 8/70 - Clerk
5/69 - 8/69 - Clerk

Board Member - Ashbury Communities of Tennessee (2000 - present)
Board Member - West Tennessee Cerebral Palsy Center (1980-1988)
Madison County, Tennessee Sheriff's Department Civil Service Commission (1983-1991); appointed by the Sheriff of Madison County

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

None

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

College: Valedictorian; graduated Summa Cum Laude; member of Alpha Sigma Nu and Phi Eta Sigma Honor Societies; Matt Rice Cup for outstanding graduating senior; Who's Who Among Students in American Colleges and Universities (1971-1972); President, Student Government Association

Law School: Research Editor, Tennessee Law Review; Phi Alpha Delta Legal Fraternity

Jackson Sun Community Service Award (Lawyer) (1987)

Master, Leo Bearman Chapter, American Inn of Court

10. Bar Associations: List all bar associations or legal or judicial-related committees, selection panels 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.

TENNESSEE BAR ASSOCIATION
President (1996-97)
President-Elect (1995-96)
Vice President (1994-95)
Board of Governors (1986-1994)
House of Delegates - 12th Judicial Circuit (1983-1987)
General Practice Section - Chair (1984-1985)

TENNESSEE BAR FOUNDATION
Chair (2002 - to present)
Board of Directors (1997 - present)
Grant Selection and Review Committee (1993-1995); Chair (1999)

AMERICAN BAR ASSOCIATION
Member - Ad Hoc Committee on State Justice Initiatives (1997-2001)
Chair- Roadmap Publication Subcommittee (1998-2001)
Member - Judicial Division (1992 - present)
Member of the General Practice Section and Chair of Commercial Law Committee (1985-1986)

JACKSON-MADISON COUNTY BAR ASSOCIATION
President (1983-84)
Vice President (1982-1983)
Secretary/Treasurer (1981-1982)
Board of Directors (1978-1981)

Fellow, American Bar Foundation (1995 - present)
Master, Leo Bearman, Jr., American Inn of Court (2000 - present)
National Conference of Bar Presidents (1996-1999)
Federal Magistrate Judges Association; Sixth Circuit Director (2000 - present)
Tennessee Court of the Judiciary (1987-1991)
Tennessee Defense Lawyers Association (1978-1991)
International Association of Defense Counsel (1984-1991)
West Tennessee Legal Services, Steering Committee for Pro Bono Project (1986)

11. Bar and Court Admission: List each state and court in which you have been admitted to practice, including dates of admission and any lapses in membership. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

Tennessee Supreme Court - 10/18/75
United States District Court, Western District of Tennessee - 11/17/75
U. S. Court of Appeals, Sixth Circuit - 7/17/77
United States Supreme Court - 2/21/79

12. Memberships: List all memberships and offices currently and formerly held in professional, business, fraternal, scholarly, civic, charitable, or other organizations since graduation from college, other than those listed in response to Questions 10 or 11. Please indicate whether any of these organizations formerly discriminated or currently discriminates on the basis of race, sex, or religion - either through formal membership requirements or the practical implementation of membership policies. If so, describe any action you have taken to change these policies and practices.

Executive Committee - West Tennessee Council Boy Scouts of America (1989-present)
Director - Jackson Madison County Health Care Foundation (1989-1993)
Director - Jackson Arts Council (1984-1986)
Madison County Sheriff's Dept. Civil Service Commission (1983-1991)
Member, Tennessee Commission on Children and Youth, Southwest Tennessee Region (1983-1985)
Jackson Tennis Center (1995-present)
Kiwanis Club(1977-1980)
Madison County Republican Party; Treasurer (1990-1991)
St. Mary's Church Parish Council; President (1982-1984)

To my knowledge, none of these organizations formerly discriminated or currently discriminates on the basis of race, sex, or religion.

13. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other material you have written or edited, including material published on the Internet. Please supply four (4) copies of all published material to the Committee, unless the

Committee has advised you that a copy has been obtained from another source. Also, please supply four (4) copies of all speeches delivered by you, in written or videotaped form over the past ten years, including the date and place where they were delivered, and readily available press reports about the speech.

Article, *Mediation and the Magistrate Judge*, 26 U. MEM. L. REV. 1014 (Spring 1996)

SPEECHES

7/02	**West Tennessee Legal Service's CLE Program - Recurring Issues in Discovery**
3/01	**West Tennessee Legal Service's CLE Program - 2000 Amendments to Federal Rules of Civil Procedure**
10/99	**West Tennessee Legal Service's Seminar - Trust and Confidence in the Judicial System**
11/98	**Federal Practice Seminar - Preparing for and Representing your Client for Mediation**
11/97	**Federal Bar Association Seminar - Civil Discovery and ADR**
11/97	**Obion County Federal Practice Seminar - Role of the Magistrate Judge in ADR**
11/95	**Federal Practice Seminar - Role of Magistrate Judge in Pretrial Proceedings**
11/94	**Federal Bar Association - Proposed Changes to the Federal Rules of Civil Procedure**
7/93	**Jackson-Madison County Bar Association - Bail Reform Act**

14. **Congressional Testimony**: List any occasion when you have testified before a committee or subcommittee of the Congress, including the name of the committee or subcommittee, the date of the testimony and a brief description of the substance of the testimony. In addition, please supply four (4) copies of any written statement submitted as testimony and the transcript of the testimony, if in your possession.

None

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

Good overall health; last physical examination 8/8/02.

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

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

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

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

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

(a): **Bailey v. Turbine Design, Inc.**
86 F.Supp.2d 790 (W.D. Tenn. 2000)

The plaintiff, a Tennessee businessman, sued a competitor located in Florida for defamation, interference with contract, and conspiracy. The defendant developed an internet website which contained derogatory references to the plaintiff and his product. The court granted the defendant's motion to dismiss for lack of personal jurisdiction, finding that defendant's wholly passive website, on which the alleged defamatory statements were posted for anyone anywhere with internet access to see, did not amount to a purposeful availment to the benefits of Tennessee upon which jurisdiction could be based. There was no evidence that the defendant had any contact with Tennessee, that any effort was made to reach out to Tennessee residents more than those of other states or that any Tennessee resident, except the plaintiff, ever visited the website.

Nelson v. Tennessee Gas Pipeline
No. 95-1112, 1998 WL 1297690 (W.D. Tenn. Aug. 31, 1998)
Affirmed 243 F.3d 244 (6th Cir. 2001)
Cert. Denied 122 S.Ct. 56, 151 L.Ed.2d 25 (2001)

Plaintiffs, residents of Lobelville, Tennessee near the defendant's natural gas pipeline compressor station, brought this action alleging that defendant over a period of years had released toxic substances into the soil, groundwater and atmosphere surrounding the station. Plaintiffs retained certain experts who were to testify at trial as to the physical and mental condition of the plaintiffs and offer opinions on whether plaintiffs' illnesses and injuries were caused by the defendant's chemical releases. The court granted the motion of the defendant to exclude the proffered testimony, finding that it did not meet the standards articulated in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

Bower v. Siegel-Robert, Inc.
No. 96-2315 (W.D. Tenn. Mar. 19, 1997 and Aug. 6, 1998)
Orders Granting In Part And Denying In Part Defendant's Motion To Dismiss and on Reconsideration Of Order Granting Defendant's Motion To Dismiss Same-Sex Sexual Harassment Claim

In its initial order, the court dismissed the plaintiff's claim of same-sex harassment for failure to state a claim upon which relief could be granted. Upon review of the legislative history of Title VII, Equal Employment Opportunity Guidelines and the divergent case law at the time concerning whether same-sex harassment was actionable, the court determined that under the current law of the Sixth Circuit "the conduct complained of in a same-sex sexual harassment action under Title VII must be 'because of' the victim's sex, that is, because of the perpetrator's sexual attraction to the victim." As the case before the court involved heterosexual-on-heterosexual behavior and there was no evidence that the harasser was sexually attracted to the plaintiff, his claim would not lie.

In 1998, the United States Supreme Court decided, in Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998), that same-sex harassment was actionable under Title VII, finding that "harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex." The court directed the parties to submit additional briefs addressing the application of the Supreme Court's ruling to this case. In an order on reconsideration entered August 6, 1998, the court concluded that, while heterosexual-on-heterosexual behavior was actionable based on Oncale, the plaintiff's harassment claim must still be dismissed, as the conduct complained of did not, according to the guidelines for analyzing such behavior set forth by the Supreme Court, rise to the level of a Title VII violation.

Ashley v. United States
37 F.Supp.2d 1027 (W.D. Tenn. 1997)

Plaintiff, a federal prison inmate, sued under the Federal Tort Claims Act seeking damages for loss of personal property in the aftermath of a riot at FCI-Memphis. While regulations and procedures were in place governing the handling of contraband and the routine movement of inmate personal property during arrival, transfer between facilities, and discharge into the community, no policy existed directing the administration of such property in a riot situation. Accordingly, the court concluded that the conduct complained of--the manner in which the warden managed the security of inmate property during a disturbance--was a discretionary act which fell within an exception to the Act, resulting in a lack of subject matter jurisdiction.

United States v. Rye
No. 96-20111 (W.D. Tenn. Sept. 30, 1997)
Report And Recommendation

The defendant in this criminal case moved for dismissal of the indictment alleging violation of the Interstate Agreement on Detainers Act. The court concluded that, because the requirements of the Act must be strictly followed by a defendant requesting final disposition of charges against him, the defendant's failure to seek a speedy disposition at the time a federal detainer was lodged constituted waiver of his right to be brought to trial within 180 days under Article III of the Act.

Snow v. Aetna Insurance Co.
No. 93-2330 (W.D. Tenn. Jan. 30, 1998)
Report And Recommendation (adopted by District Judge Jon P. McCalla by order entered Mar. 31, 1998; see 998 F.Supp. 852 (W.D. Tenn. 1998))

In a medical insurance coverage case, the court, in a Report and Recommendation on whether an insurer was required to pay moneys owed to a hospital and to Medicare, concluded that an award of prejudgment interest was warranted because the insurer had been unjustly enriched by its failure to make payment; interest accrued against the insurer as of the date it decided to deny benefits; interest to be paid to hospital should be calculated at the federal statutory rate set forth in 28 U.S.C. § 1961; and interest owing to Medicare was to be calculated as stated in reimbursement notices sent from Medicare intermediaries to the insurer demanding payment, in accordance with federal regulations.

Grinnell v. Dana Corporation
No. 00-1313 (W.D. Tenn. Apr. 18, 2002)
Order Granting Defendant's Motion For Summary Judgment

In a claim brought under the Americans with Disabilities Act, the court ruled that the plaintiff, who suffered from sleep apnea, was not terminated "because of" his disability when fired for sleeping on the job, which was, according to the employee handbook, a violation of company policy and grounds for discharge. In making its decision, the court recognized the distinction between termination because of a disability and discharge for unacceptable conduct where the misconduct was related to an alleged disability.

Teague v. Jackson
No. 97-1214 (W.D. Tenn. Mar. 11, 1999)
Order Granting Defendants' Motion For Summary Judgment And Dismissing With Prejudice Plaintiff's Title VI Claims

In a claim brought pursuant to the Age Discrimination in Employment Act, the court found summary judgment in favor of defendants appropriate where the plaintiff failed to establish that other employees who were similarly situated but not over 40 years of age were treated more favorably than she. Plaintiff contended she had spoken with other employees who stated they were not checked up on as she was but could not name any particular individual. Moreover, while plaintiff identified a co-worker who had signed a timesheet when she was out of town, she offered no information concerning whether the employee was similarly situated or a member of a non-protected class.

Rodriguez v. Luttrell
97-2319 (W.D. Tenn. Feb. 17, 1998)
Report And Recommendation

The court recommended that the habeas corpus petition of an alien who plead guilty to rape five years after arriving in the United States during the Mariel boatlift be denied, as, to the extent the court possessed subject matter jurisdiction, it determined that the Attorney General maintained the authority to detain excludable aliens who posed a security threat and that his continued detention did not violate the Constitution or international law.

United States v. Trotter
No. 98-20200 (W.D. Tenn. Feb. 2, 1999)
Report And Recommendation

It was recommended in this case, in which the defendant was charged with converting moneys, as an agent of an organization receiving federal funding, to the use of unauthorized persons in violation of 18 U.S.C. § 666, that the motion to dismiss the indictment be denied. The court found that the indictment clearly set forth the facts of the offense charged. Furthermore, based upon the court's review of its language and legislative history, the statute under which the defendant was indicted reached the activities alleged and was not unconstitutionally vague.

(b): Herron v. Harrison
No. 96-3051 (W.D. Tenn. Apr. 16, 1998)
Order Granting Plaintiff's Motion To Supplement Complaint, Denying Defendants' Motion To Dismiss First Supplemental Complaint, Granting Defendants' Motion To Dismiss And Denying All Remaining Pending Motions As Moot

Affirmed in part, reversed in part and remanded 203 F.3d 410 (6th Cir. 2000)
Order Granting Defendants' Motion to Dismiss on remand (W.D. Tenn. Aug. 31, 2000)

In this case filed by a pro se state prisoner, the Sixth Circuit Court of Appeals reversed the court's dismissal of the plaintiff's retaliation claim based on the Circuit court's en banc decision, issued almost a year after the lower court's original order and eight months after the filing of the appeal, in Thaddeus-X v. Blatter, 175 F.3d 378 (6th Cir. 1999), in which the circuit court clarified the burden of a prisoner alleging a retaliation claim. Under the Thaddeus-X standard, the plaintiff must show that he engaged in protected conduct, suffered an adverse action that would deter a person of ordinary firmness from continuing to engage in such conduct, and that the adverse action was motivated by the protected conduct. The Sixth Circuit, finding that plaintiff might have been able to produce evidence to establish all the elements listed in Thaddeus-X, reversed and remanded the case to the district court to permit the plaintiff to amend his complaint if he chose to do so. On remand, the district court again dismissed the retaliation claim based on its finding that the plaintiff's complaint, as amended, could not survive a motion to dismiss under Thaddeus-X.

Gregory v. Shelby County, Tennessee
No. 95-3040 (W.D. Tenn. June 30, 1998)
Order Denying Motions Of Defendants Jerry Ellis And Rhett Shearin For New Trial And Granting Motions For Remittitur
Affirmed in part and reversed in part 220 F.3d 433 (6th Cir. 2000)

Following a jury trial, the court granted the defendants' motion for remittitur, finding the $778,000 in compensatory damages, and $2.2 million in punitive damages against a jail employee, to be excessive and not supported by the facts. On appeal, the Sixth Circuit reversed, concluding that the awards, albeit large, did not, under the circumstances of this case, shock the conscience of the court or lie beyond the range of supportable proof.

United States v. Green
No. 97-20131 (W.D. Tenn. Nov. 4, 1998)
Report And Recommendation
Order On Objections Of The United States To Magistrate Judge's Report And Recommendation (W.D. Tenn. May 6, 1999), by District Judge Jerome Turner
Order On Defendants' Motion To Reconsider (W.D. Tenn. June 10, 1999), by District Judge Jerome Turner

The district judge disagreed with the magistrate judge's conclusion that the defendants in this criminal case had shown by a preponderance of the evidence that a statement in the affidavit submitted in support of an application to search a business for the presence of video gambling machines contained a false

statement made intentionally or with reckless disregard for the truth by the agent seeking the warrant. The district further found that information omitted from the search warrant application, while perhaps critical to a probable cause determination, was not omitted with reckless or intentional disregard for the truth. Rather, it was the opinion of the district judge that the agent's actions were negligent. On motion for reconsideration, the district judge, who had in his order taken statements by the officers involved at face value, conceded that perhaps the magistrate judge did not find the agent credible and remanded the matter for findings on that issue. Indeed, the basis for the magistrate judge's ruling had been a conclusion that the agent's testimony was not credible. No further orders were entered on this matter, however, as the indictment was dismissed.

United States v. Banks
No. 00-20135 (W.D. Tenn. May 8, 2001)
Report And Recommendation
Order On Motions To Suppress (W.D. Tenn. Sept. 28, 2001), by District Judge Julia Smith Gibbons

In this criminal matter, the district judge adopted the report and recommendation entered by the magistrate judge in its entirety but, upon hearing additional proof, disagreed with the magistrate judge's factual finding concerning the credibility of a witness who testified for the government.

(c): Moore v. Arlington Developmental Center
No. 99-2008 (W.D. Tenn. Mar. 2 and July 11, 2000)
Orders Granting In Part And Denying In Part State Defendants' Motion to Dismiss and Denying The Motion Of State Defendants To Dismiss Plaintiff's Claims Under Section 504 Of The Rehabilitation Act Of 1973 And Granting Motion To Dismiss § 1983 Claims

Plaintiff, who had been diagnosed with mental retardation and placed in a state institution, initiated this § 1983 lawsuit based on abuse suffered at the facility, alleging violations of the Individuals with Disabilities Education Act, the Social Security Act, the Rehabilitation Act, and the Due Process Clause. The court held that plaintiff's claims for retrospective relief against the state defendants under the Social Security Act were barred by the Eleventh Amendment. With respect to the state defendants' assertion of immunity from suit under the Eleventh Amendment as to the plaintiff's Rehabilitation Act claim, the court reviewed the law concerning the exceptions to state immunity, focusing particularly on the state's ability to waive immunity and thereby consent to suit in federal court. Following the majority of circuits, the court concluded that the 1986 amendments to the Rehabilitation Act manifested a clear and valid intention to condition state

participation in programs listed in the Act on consent to waive Eleventh Amendment immunity and that acceptance of federal funds constituted a waiver of state immunity.

Prince v. Faulkner
No. 99-2041 (W.D. Tenn. Oct. 19, 2000)
Memorandum Opinion And Order

Pursuant to a state court restraining order authorizing them to take necessary actions to ensure the peaceful transfer of the plaintiff's children to his ex-wife, county sheriff's officers arrived at plaintiff's house; drew weapons on him as he stood in the front yard taking out his garbage; commanded him to drop to the ground; and handcuffed, frisked, and placed him in the back of a patrol car, where he was questioned as to the whereabouts of the children. After directing the officers to the home of a babysitter, from whom the children were taken by other officers, the deputies drove him back to his home, handcuffed, and denied his requests to be let off at his workplace near the babysitter's home. The plaintiff filed a civil rights action against the deputies, alleging violation of his Fourth and Fourteenth Amendment rights. After a non-jury trial, the court determined that the defendants were not entitled to qualified immunity. What began as an investigatory stop ripened into a de facto arrest when the officers denied the plaintiff's request to be taken to his business address after the children had been removed from the babysitter's home, as there was no reason to detain him further or any indication he had committed a crime or was about to do so. As the deputies had violated plaintiff's Fourth Amendment rights by continuing to detain him absent probable cause and it was clear from the defendants' own testimony at trial that the unlawfulness of their actions was reasonably apparent to them, qualified immunity did not protect the defendants from liability.

Warren v. Shelby County
191 F.Supp.2d 9 80 (W.D. Tenn. 2001)

Plaintiff, a former detainee at the Shelby County, Tennessee jail, filed this civil rights action against, among others, Shelby County and its sheriff, claiming violations of his rights under the Eighth and Fourteenth Amendments. Warren alleged that a doctor at the facility refused to respond to his requests for additional treatment. In support of his claim of municipal liability, the plaintiff offered a report issued by the Department of Justice following a tour of the jail facility a year after Warren's detention, in which the DOJ cited constitutional deficiencies in various areas of jail operations, including the medical department. The court found that the existence of a policy at the jail for handling requests for medical treatment, the timeliness for which was later criticized in the DOJ report, was not sufficient to support a finding of municipal liability.

United States v. Carrick
No. 98-20094 (W.D. Tenn. Dec. 2, 1998 & May 26, 1999)
Report And Recommendation
Order On Objections To Magistrate Judge's Report And Recommendation, overruling objections to Magistrate Judge's Report (W.D. Tenn. Nov. 29, 1999), by District Judge Jerome Turner

In its initial Report and Recommendation, the court concluded that a protective sweep of the residence for other persons, which included inspection of the spaces between mattresses and box springs, did not violate the Fourth Amendment. In a second Report and Recommendation, the court, analyzing an issue not before the court in the previous ruling, decided that a 26-year-old warrant for failure to comply with a juvenile court order to pay child support, issued for a person different from the defendant who it had been previously determined no longer lived that the address searched, did not support entry into the home, as officers lacked a reasonable belief the person named in the warrant was inside.

United States v. Smith
No. 99-20211 (W.D. Tenn. Dec. 23, 1999)
Report And Recommendation

In a criminal case involving allegations of utilizing a computer and telephone to induce a minor to travel for the purpose of engaging in sexual activity and of transmitting and receiving through interstate commerce sexually explicit visual depictions of minors, the court found no legitimate expectation of privacy for Fourth Amendment purposes in the records of internet service providers.

Boyd v. Forbes
No. 00-1055 (W.D. Tenn. May 15, 2001)
Order Dismissing Without Prejudice Plaintiffs' Complaint

In a case alleging unconstitutional taking and denial of procedural due process concerning the demolition of a house by a municipality, the court found that (1) plaintiffs' Fifth Amendment claim of taking without just compensation was not ripe for review, as there had been no final determination by the relevant state decisionmaker and the owners had not availed themselves of the state's inverse condemnation procedures; and (2) where a Fourteenth Amendment procedural due process claim, arising from an alleged injury based on the infirmity of the process itself, is ancillary to a takings claim, which involves a diminution of property value, the court cannot address the due process claim until a determination has been made on the state inverse condemnation claim. Therefore, dismissal was appropriate.

United States v. Beasley
No. 00-20151 (W.D. Tenn. Dec. 19, 2000)
Report And Recommendation
Order Denying Motion To Suppress, adopting Magistrate Judge's Report (W.D. Tenn. Apr. 2, 2001), by District Judge Jon P. McCalla

Even if actions of a state law enforcement officer in applying for and obtaining a search warrant telephonically violated state procedural rules, the search warrant may be upheld under the good faith exception to the Fourth Amendment exclusionary rule set forth in United States v. Leon, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984).

Pickett v. Sundquist
No. 98-2311 (W.D. Tenn. Nov. 25, 1998)
Order Granting Motion Of Defendants Sundquist And Greene For Summary Judgment

The court found, in a case involving the seizure of a vehicle contemporaneously with the driver's arrest for driving under the influence of alcohol and driving on a revoked driver's license, that the state statute under which the vehicle was seized did not violate the Constitution's due process clause.

United States v. Wilson
No. 00-20031 (W.D. Tenn. May 17, 2000)
Report And Recommendation

Federal agents received information from the defendant's former employer that child pornography had been found on his computer workstation. The agent seeking a search warrant for the defendant's home stated in the affidavit submitted in support of the warrant application that child pornographers and collectors of pornography usually kept collections in their homes, but never alleged that the defendant fell into the categories of "pornographers" or "collectors." Nor were other facts contained in the affidavit establishing a nexus between the discovery at the defendant's workplace and his home. Although the warrant was therefore found to be invalid, the court recommended that the evidence uncovered in the defendant's residence not be suppressed, as the seizure of the evidence was based upon a reasonable, good-faith reliance on the validity of the warrant.

17. **Public Office, Political Activities and Affiliations**:

(a) List chronologically any public offices you have held, federal, state or local, other than judicial offices, including the terms of service and whether such positions were elected or appointed. If appointed, please include the name of the individual who appointed you. Also, state chronologically any unsuccessful candidacies you

have had for elective office or nominations for appointed office for which were not confirmed by a state or federal legislative body.

Tennessee Court of the Judiciary, 1987-1991, appointed by the Board of Governors of the Tennessee Bar Association

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

Madison County, Tennessee, Co-chair, Howard Baker for Senate (1978)

Lamar Alexander for Governor, Madison County, Tennessee (1982) - worked in re-election campaign

Madison County, Tennessee finance chair, Winfield Dunn for Governor (1986)

Madison County, Tennessee finance chair, George Bush for President (1988)

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

(a) Describe chronologically your law practice and legal experience after graduation from law school including:

(1) whether you served as clerk to a judge, and if so, the name for the judge, the court and 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 affiliated, and the nature of your affiliation with each.

Waldrop and Hall, P.A.
106 South Liberty, Jackson, TN 38301
Partner: January, 1980 - July, 1991
Associate: August 1975 - January, 1980

U. S. Courts, 111 South Highland, Jackson, TN 38301
United States Magistrate Judge
July 1991 - present

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

General civil practice with emphasis on litigation; represented insurance companies and self-insured businesses but also handled claims for individuals who had been injured; I represented individual clients in real estate, commercial, corporate and estate planning matters; in the early years of my practice, I accepted appointments for indigent criminal defendants in state and federal courts; in the last two years of my practice, I primarily represented liability insurance clients.

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

Primarily, liability insurance companies; tort law and worker's compensation claims (defense)

(c) (1) Describe whether you appeared in court frequently, occasionally, or not at all. If the frequency of your appearances in court varied, describe each such variance, providing dates.

Frequently

(2) Indicate the percentage of these appearances in

(A) federal courts; **20%**
(B) state courts of record; **80%**
(C) other courts.

(3) Indicate the percentage of these appearances in:

(A) civil proceedings; **99%**
(B) criminal proceedings; **1%. In the first 5-7 years of practice, I handled appointed criminal cases in state and federal court.**

(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.

100-125; about 60% of those, I was sole counsel, with the other being evenly divided between acting as chief counsel and associate counsel.

(5) Indicate the percentage of these trials that were decided by a jury.

50% were by a jury

(d) Describe your practice, if any, before the United States Supreme Court. Please supply four (4) copies of any briefs, amicus or otherwise, and, if applicable, any oral argument transcripts before the U.S. Supreme Court in connection with your practice.

None

(e) Describe legal services that you have provided to disadvantaged persons or on a *pro bono* basis, and list specific examples of such service and the amount of time devoted to each.

In the first 5-7 years of my practice, I routinely accepted criminal appointments for indigent defendants in state and federal courts. I also handled cases on a pro bono basis from the "Pro Bono" project established by the West Tennessee Legal Services. In 1976, I was appointed by the federal court to handle, pro bono, an inmate's civil rights action against the Sheriff of Gibson County, Tennessee and the Warden of the Tennessee State Penitentiary for which I expended a significant number of hours in preparation and for trial which lasted approximately a week.

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

(1) **McIntyre v. Ballentine, 1987-1991, Circuit Court of Hardin County, Tennessee; Judge Creed McGinley; plaintiff's attorney: T. Robert Hill, 1269 North Highland, Jackson, TN 38303, (731) 423-3300. Counsel for defendant East West Motor Freight Company: John Daniel Breen, 345 U.S. Courthouse, 111 South Highland, Jackson, TN 38301, (731) 421-9250; Counsel for defendant Clifford Ballentine: Robert V. Redding, 464 N. Parkway, Ste. A, Jackson, TN 38305, (731-660-2332).**

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

833 S.W.2d 52 (Tenn. 1992)

(b) a detailed summary of the substance of each case outlining briefly the factual and legal issues involved;

This was a claim for damages as a result of the negligence of the defendant Ballentine, as imputed to his employer, East West Motor Freight Company; the plaintiff claims to have been substantially injured when a vehicle in which he was driving was hit from the rear by the tractor trailer driven by

Ballentine; although the jury rendered a verdict for the defendants, the initial trial verdict was appealed by the plaintiff and as a result of the determination by the Tennessee Supreme Court, the doctrine of comparative negligence was adopted in Tennessee.

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

East West Motor Freight Company

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

I was co-counsel in representing the trucking company and participated as co-defense counsel in the initial trial of the case; the lawsuit was won by the defendants at trial but as indicated, it was ultimately appealed and sent back for a second trial. I was not involved in the second trial.

(2) **Porch, et al. v. Simpson, et al., (1988-1990) Circuit Court of Haywood County, Tennessee; trial judge: Dick Jerman, Jr. (deceased); attorneys for the plaintiffs: Robert Green, 65 Union Avenue 9th Floor, Memphis, TN 38173, (901) 523-2500; and Judge Lynn Cobb, General Sessions Court, Division I, 140 Adams Street, Memphis, TN 38119, (901) 545-4050; attorneys for defendants: John Daniel Breen, 345 U.S. Courthouse, 111 South Highland, Jackson, TN 38301, (731) 421-9250 and Jim Pentecost, 106 S. Liberty Street, Jackson, TN 38301 (731) 424-6211**

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

No. 2766, Circuit Court of Haywood County, Tennessee

(b) a detailed summary of the substance of each case outlining briefly the factual and legal issues involved;

This case was a wrongful death claim in which a young girl was killed in an accident on a public highway when she ran from behind a parked vehicle and my client hit her. Although there was no evidence of speeding on my client's part, a very emotional case was presented and the jury returned a verdict in favor of the plaintiff's parents. Following the trial, negotiations ensued between the parties and the lawsuit was ultimately settled.

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

Ms. Simpson (who is now deceased)

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

I was lead counsel along with an associate, Jim Pentecost, in representing Ms. Simpson. After a jury verdict in favor of the plaintiffs, the case was ultimately settled.

(3) **Paul Randolph v. William Smith and Cherokee Construction Co., 1983-1986, Circuit Court of Madison County, Tennessee; trial judge: Judge Andrew T. Taylor (deceased); attorneys for the Plaintiff - John Daniel Breen, 345 U.S. Courthouse, 111 South Highland, Jackson, TN 38301, (731) 421-9250 and Rick Kendall, 106 South Liberty Street, Jackson, TN 38301, (731) 424-6211; attorneys for the defendant Smith: Clint Butler, P.O. Box 1147, Jackson, TN 38301, (731)-423-2414; attorney for Cherokee Construction Co.: Carthel Smith, 85 E. Church Street, Lexington, TN 38351, (731) 968-2561**

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

No. 83-246, Circuit Court of Madison County, Tennessee, 1983

(b) a detailed summary of the substance of each case outlining briefly the factual and legal issues involved;

This case involved a claim for damages for personal injuries sustained by my client, Paul Randolph, who was riding a motorcycle when the defendant, William Smith, pulled out of a construction company site into the path of Randolph, causing the collision. Randolph sustained serious injuries, including a broken leg in which a steel rod was inserted. In addition to the issue of negligence was the question as to whether the defendant driver was acting at the time in the course and scope of his employment with Cherokee Construction Co. The accident happened in the early evening and the construction company, as well as the individual defendant driver, denied that he was acting on behalf of his employer at the time.

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

Paul Randolph

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

I was lead counsel in representing the plaintiff, Paul Randolph, and was assisted by my associate, Rick Kendall. A verdict was rendered in favor of my client, which, at the time, was the highest personal injury verdict that had been rendered in Madison County, Tennessee. Although the defendant, Cherokee Construction Co., appealed the decision, it was ultimately settled before the appeal was argued.

(4) Hinson v. Walker Grain Co., et al., Dyer County, Tennessee, Law and Equity Court; trial judge: Judge David Lanier; plaintiff's counsel: Ralph Lawson, 306 Church Avenue, Dyersburg, TN 38025, (731)285-4112; attorney for defendant Patsy Joyce (as legal representative of the estate of her deceased husband): Bob Millar, 208 N. Mill Street, Dyersburg, TN 38025 (731) 286-5828; attorney for defendant Covington Mobile Homes: James Causey, 100 N. Main Street, Ste. 2400, Memphis, TN 38103 ; (901) 526-0206; attorney for Ragan Trucking Company: Russell Reviere, 209 E. Main, Jackson, TN 38301, (731) 423-2414; attorney for Walker Grain Co.: John Daniel Breen, 345 U.S. Courthouse, 111 South Highland, Jackson, TN 38301, (731) 421-9250 and Rick Kendall, 106 South Liberty Street, Jackson, TN 38301, (731) 424-6211.

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

No. 31489, 1986

(b) a detailed summary of the substance of each case outlining briefly the factual and legal issues involved;

This was a negligence case involving an accident on a bridge near Dyer County, Tennessee, in which a tractor trailer truck owned by my client, Walker Grain Company, loaded with beans, attempted to stop while approaching a bridge on which a mobile home and other vehicles were proceeding in the opposite direction. The bean truck collided with the mobile home and ultimately hit a vehicle in which the plaintiff, Hinson, was riding, resulting in both physical and psychological injuries to the plaintiff. A counter-claim was made by the family of the estate of the decedent, Mr. Joyce, for wrongful death against the mobile home and negligence was alleged as against all defendants for the injuries to the plaintiff.

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

Walker Grain Co.

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

I was lead counsel for Walker Grain Company and assisting me was attorney Rick Kendall. After a two week trial, interrupted with a ninety day delay between the first and second week of trial, the jury returned a verdict for the plaintiff, but only as against the mobile home company. The jury also awarded damages for the wrongful death claim of the driver Joyce against the mobile home company. Walker Grain Company and Ragan Trucking Company were not found to be liable. After the trial judge granted a new trial based upon an error in his jury instructions, the parties settled all claims.

(5) Spragins v. Bridgewater and Wilkerson Wrecker Service, **Circuit Court of Madison County, Tennessee, trial judge: Andrew T. Taylor (deceased); for the plaintiff was Sid Spragins, 206 Liberty Claybrook, Beach Bluff, Jackson, TN 38313 , (731) 421-9972; for the defendants Bridgewater and Wilkerson: John Daniel Breen, 345 U.S. Courthouse, 111 South Highland, Jackson, TN 38301, (731) 421-9250 .**

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

No. C-83-159, May 24, 1983

(b) a detailed summary of the substance of each case outlining briefly the factual and legal issues involved;

Spragins brought a claim for damages as a result of the negligence of the defendants, Bridgewater and his employer, Wilkerson Wrecker Service. The plaintiff sustained a broken hip and other physical injuries when his vehicle, which was being towed by my client to the auto repair shop and in which the plaintiff was seated, knocked the plaintiff to the pavement. Unbeknownst to defendant Bridgewater, Spragins attempted to exit the vehicle and was knocked down while Bridgewater was moving the towed car to the area where it was to be repaired. The defendants alleged that the plaintiff was contributorily negligent due to his exiting the vehicle prior to it being stopped and lowered from its towed position.

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

Dan Bridgewater and Wilkerson Wrecker Service

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

I was counsel for the defendants, Bridgewater and Wilkerson Wrecker Service; after a three day trial, the jury returned a verdict for my clients.

(6) Smith v. Wal-Mart, **(1985-1988) Circuit Court of Gibson County, at Humboldt, Tennessee; trial judge: Dick Jerman, Jr. (deceased); for the plaintiff: John Daniel Breen, 345 U.S. Courthouse, 111 South Highland, Jackson, TN 38301, (731) 421-9250; for the subrogation claim: John Burleson, 105 South Highland Avenue, Jackson, TN 38301, (731) 423-2414; for the defendant: Charles Barnett, 312 E. Lafayette, Jackson, TN 38301, (731) 424-0461.**

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

No. 2010, March 1985

(b) a detailed summary of the substance of each case outlining briefly the factual and legal issues involved;

The plaintiff, Smith, sought damages from Wal-Mart as a result of its employee allowing a steel security door to drop onto the head of my client, who was a truck driver, while making a delivery at the Wal-Mart store in Humboldt, Tennessee. The defendant alleged that Smith was contributorily negligent and, further, that the damages he suffered were neither credible nor related to the injury he sustained. A significant amount of damages were alleged to have flowed from the injuries to plaintiff's mouth and jaw. The defendant claimed that the plaintiff had not been significantly injured due to the plaintiff's short absence from his employment as a truck driver.

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

Travis Smith

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

I was lead counsel and assisted by John Burleson, who represented the worker's compensation subrogation carrier. After a two day trial, the jury returned a verdict in favor of my client and awarded the full amount of the damages sought in the complaint. The defendant paid the judgment and no appeal was taken.

(7) **Great American Ins. Co. v. Byrd & Watkins Construction Co., Inc., 77-1087, United States District Court for the Western District of Tennessee; trial judge: Judge Bailey Brown; attorney for plaintiff: John Daniel Breen, 345 U.S. Courthouse, 111 South Highland, Jackson, TN 38301, (731) 421-9250; attorney for defendants: Ed Wallis, 325 N. Parkway, Jackson, TN 38305, (731) 668-5500.**

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

630 F.2d 460 (6th Cir. 1980)

(b) a detailed summary of the substance of each case outlining briefly the factual and legal issues involved;

This claim brought by Great American Insurance Company, sought recovery from a construction company on performance bonds issued by the predecessor of Great American after it had made payments on these bonds based on defendant's default in performance. The corporate defendant, Byrd & Watkins Construction Co., Inc., had dissolved four years prior to the institution of the lawsuit, however, one of the shareholders, George Bennett, had executed an indemnity agreement in which he agreed to assume "all

liabilities known or unknown to the corporation" as well as "any outstanding debts or corporate liabilities." The trial court granted summary judgment on behalf of the defendants and Bennett, holding that Tennessee Code § 48-1014, barred claims that were made two years after dissolution against anyone who had assumed the obligations of the dissolved corporation. The Sixth Circuit reversed the grant of summary judgment, holding that the agreement placed Bennett outside of the restrictions of the Tennessee statute and, thus, the bonding company could pursue claims against Bennett and the other former stockholders.

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

Great American Insurance Company

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

I was lead counsel in the case for Great American Insurance Company. Following the Sixth Circuit's opinion, the parties engaged in discovery and ultimately settled all outstanding claims.

(8) **<u>The City of Jackson v. The Jackson Sun, Inc.</u>, Chancery Court of Madison County, Tennessee, No. 39461; trial judge: Judge Robert S. Thomas (deceased); attorney for the plaintiff: Russell Rice, Sr. (deceased); attorney for defendant: John Daniel Breen, 345 U.S. Courthouse, 111 South Highland, Jackson, TN 38301, (731) 421-9250.**

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

1998 W.L. 11515 (Tenn. Ct. App. Feb. 16, 1988)

(b) a detailed summary of the substance of each case outlining briefly the factual and legal issues involved;

This lawsuit was brought by the City of Jackson, Tennessee against the local newspaper, The Jackson Sun, Inc., seeking to have certain statements which were made by a witness in a police report excised. The newspaper had sought to inspect and copy the entire investigative file of the police department concerning an apparent suicide. In a show cause hearing, the Chancellor determined that certain language in the police report was unrelated to the incident in question, was "scandalous" and "hearsay" and should be removed from the report which was then to be turned over to the newspaper. In addition, after allowing an amendment to the complaint to include reliance upon Rule 26.03, Tennessee Rules of Civil Procedure, relating to protective orders, the court determined that it could enter a protective order deleting the extraneous information while providing the rest of the report to the newspaper. This case concerned an interpretation of

Tennessee Code Annotated § 10-7-503, otherwise known as the "Open Records Act," which generally allows the inspection of state, county and municipal records by the public. Although the trial court had sealed the removed information, on appeal, the Tennessee Court of Appeals, Western Section, reversed the Chancellor and found that based on prior Tennessee Supreme Court decisions regarding the application of the Open Records Act, as well as the fact that this was not a discovery proceeding, the newspaper was entitled to receive an unexpunged record.

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

The Jackson Sun, Inc.

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

I was lead counsel and participated in both the lower court hearing and in the appeal of the Chancellor's finding. Following the Court of Appeals decision, the City of Jackson sought permission to appeal from the Tennessee Supreme Court, which was denied. After time had passed for the judgment of the Supreme Court to become final, the City delivered to the newspaper an unredacted copy of the investigative file concerning this suicide. The newspaper chose not to publish the information which the City fought to have excised.

(9) **Saylors, et al. v. The City of Jackson, 1977-1978, Chancery Court of Madison County, Tennessee; trial judge: Judge Dewey C. Whitenton; plaintiffs' attorney: John Daniel Breen, 345 U.S. Courthouse, 111 South Highland, Jackson, TN 38301, (731) 421-9250, assisted by Lewis L. Cobb, Jr., 312 E. Lafayette, Jackson, TN 38301, (731) 424-0461; attorney for the defendant: Russell Rice, Sr. (deceased)**

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

575 S.W.2d 264 (Tenn. 1978)

(b) a detailed summary of the substance of each case outlining briefly the factual and legal issues involved;

I represented approximately 2,500 citizens who challenged the validity of an ordinance of the City of Jackson, Tennessee, which annexed the area in which these citizens lived. The suit was in the nature of a quo warranto proceeding attacking the validity of the annexation ordinance. The annexation procedure at the time, as interpreted by the Supreme Court of Tennessee, was to be judged on a "fairly debatable standard." Following a trial before the Chancellor, he determined that the reasonableness of the annexation was a debatable question and, therefore, upheld the validity of

the annexation ordinance. Subsequent to the decision, the Tennessee Supreme Court ruled in another annexation case that the fairly debatable standard had been superceded by a legislative enactment and that the burden of proof in an annexation contest was placed upon the municipality. Nonetheless, the Chancellor amended his previous judgment and following the new standard set by the Supreme Court, found that the City had still met its burden of proof. The Supreme Court also dismissed an argument that the City, in passing the annexation ordinance under the Roberts Rules of Order, had violated its own rules of procedure, and thus, making its action invalid. The Court determined that by reason of the unanimity of the City Commission's vote in adopting the ordinance, any violation of Roberts Rules was overcome. Finally, the Supreme Court determined that in considering all of the evidence before it, the City of Jackson had provided persuasive evidence that it could provide the benefits to the newly annexed area within a reasonable time after the annexation occurred.

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

H.I. Saylors and others who were a representative group of the citizens in the Northside area annexed by the City of Jackson.

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

I was co-counsel in representing the citizens and participated as lead counsel in the trial of the case. Following the Chancellor's ruling, the plaintiffs appealed to the Supreme Court of Tennessee, which affirmed the decision of the Chancellor and granted the ordinance of annexation.

(10) **State v. Thomas; Circuit Court of Madison County, Tennessee 1980; trial judge: Gene Walker; attorneys for the State: George Hymers (deceased), R.C. Stegall, 114 Gracelyn Drive, Jackson, TN 38305, (731) 661-9125; attorney for defendant (by appointment): John Daniel Breen, 345 U.S. Courthouse, 111 South Highland, Jackson, TN 38301, (731) 421-9250**

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

619 S.W.2d 513 (Tenn. 1981)

(b) a detailed summary of the substance of each case outlining briefly the factual and legal issues involved;

In this criminal case, I was appointed to represent Charles Billy Thomas, who had been charged with first degree sexual conduct and the use of a gun in the performance of first degree sexual conduct. Thomas was convicted of those charges. The two issues on appeal concerned whether or not the defendant could be convicted of criminal sexual conduct when the acts were

not performed by the defendant, but by other innocent participants. The Court looked at the common law as well as the statute at issue and determined that the defendant could be criminally liable under the common law regarding the use of innocent agents as the instrumentality of a crime. Thus, a defendant who forces an innocent party to commit other criminal offenses is guilty as the only principal even though the defendant did not actually commit the offense himself. The second issue dealt with whether or not the defendant could be given an enhanced penalty for the use of a gun in the course of his criminal conduct when the statute under which he was convicted already contained such an enhancement. Finding that the defendant's punishment could not be twice enhanced because he used a deadly weapon, the Court reversed the sentence with regard to the enhancement.

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

Charles Billy Thomas

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

I was counsel in representing the defendant through trial and on appeal to the Court of Criminal Appeals and to the Supreme Court, which affirmed in part and reversed in part the defendant's conviction as set forth in 10(b) above.

20. **Criminal History**: State whether you have ever been convicted of a crime, within ten years of your nomination, other than a minor traffic violation, that is reflected in a record available to the public, and if so, provide the relevant dates of arrest, charge and disposition and describe the particulars of the offense.

No

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

Yes; a Complaint of Judicial Misconduct (No. 99-6-372-54) was filed by David Lanier against Judge Jerome Turner and myself in September of 1999 with the Judicial Council of the Sixth Circuit. Following his conviction in the United States District Court for the Western District of Tennessee, Lanier, a former state trial judge, claimed that I had been biased against him in the course of the criminal proceedings because of his treatment of me in a prior civil case in his court. In his criminal case, I was assigned to conduct two bond revocation hearings and in the

second one, I revoked Lanier's bond for failure to comply with his conditions of release. Following a submission of my response and after a review of the allegations by Chief Judge Boyce F. Martin, Jr., an order dismissing the complaint was entered on December 7, 1999.

William C. Beaudreau v. Julia S. Gibbons, et al., No. 3:99CV2356(DJS) United States District Court, District of Connecticut; pro se plaintiff sued forty-nine defendants, including all judges in the Western District of Tennessee, because he was dissatisfied with proceedings that occurred in the United States Bankruptcy Court for the Western District of Tennessee. There were no specific allegations in the complaint against me, although I was named as a party in the body of the complaint. On December 21, 1999, District Judge Dominic J. Squatrito entered an order of dismissal, terminating the lawsuit.

David Lanier v. Ed Bryant, et al., No. 94-2611, U.S. District Court, Western District of Tennessee; prisoner civil rights claim under 42 U.S.C. Section 1983; the allegations presented by Lanier were similar to the ones he made in the Complaint of Judicial Misconduct set forth above. The claim against me was dismissed in October 1997.

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

The only potential conflicts of interest would be with litigation involving those companies in which I presently have stock ownership. I will provide to the clerk of court a list of those entities and will maintain a list in my possession to avoid being assigned any such case. Since I have been a magistrate judge for eleven years, there are no current categories of litigation or financial arrangements which would present potential conflicts of interest. I will continue to follow the Code of Judicial Conduct.

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

No

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

See Attached Financial Disclosure Statement

25. **Statement of Net Worth**: Complete and attach the financial net worth statement in detail. Add schedules as called for.

See Attached Net Worth Statement

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

No

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

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

I submitted my name and resume to Senators Fred Thompson and Bill Frist in 2001. In March of 2002, I, along with other prospective candidates, were asked to come to Nashville, Tennessee to meet with the Chiefs of Staff for Senators Thompson and Frist. Following the submission of my name to the White House, I was invited to Washington to meet with Tim Flanigan and an associate of the Office of White House Legal Counsel and an attorney with the Justice Department.

(c) Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as asking or seeking a commitment as to how you would rule on such case, issue, or question? If so, please explain fully.

No

I. BIOGRAPHICAL INFORMATION (PUBLIC)

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

2. Address: List current place of residence and office address(es).
   Residence: Mobile, Alabama.
   Office: United States Courthouse, 113 Saint Joseph Street, Mobile, Alabama 36602.

3. Date and place of birth:
   June 8, 1951; Tuscumbia, Alabama.

4. Marital Status: (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).
   Married.
   Linda Kay McMath; Comptroller, City of Mobile, Alabama.
   Government Plaza, 205 Government Street, Mobile, Alabama, 36602.

5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.
   University of Alabama School of Law (8/78 - 12/80); J.D. (awarded 12/80).
   University of Southern Mississippi (8/70 - 8/72); B.A. (awarded 8/72).
   University of Georgia (1/70 - 6/70).
   University of Southern Mississippi (8/69 - 12/69).

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.
   United States Magistrate Judge, Southern District of Alabama (1990 - present).
   Thetford & Steele Attorneys (partner) (1989 - 1990).
   Assistant United States Attorney, Southern District of Alabama (1987 - 1989).
   Assistant and Chief Assistant District Attorney, Mobile County District Attorney's Office (1981 - 1987).
   Law Clerk, District Court (State), Tuscaloosa, Alabama (1981).
   Librarian/Researcher, University of Alabama School of Law (1978 - 1980).
   Officer/Pilot, United States Marine Corps (1972 - 1978).

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.
   United States Marine Corps (1972 - 1978); Captain; 422667935; Honorable.
   Alabama Army National Guard (1979 - 1997); Captain/CW3; 422667935; Retired.

8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.
   Phi Kappa Phi (Academic/Honorary)
   Phi Beta Sigma (Academic/Honorary)
   Omicron Delta Kappa
   Honors Program, University of Southern Mississippi
   Music Scholarship, University of Southern Mississippi
   National Defense Service Medal (USMC)
   Chief of Naval Training Command Commendation (USMC)
   Mobile United Citizens Service Award (for child abuse prevention and intervention)
   M.O. Beale Scroll of Merit (for child abuse prevention and intervention)

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.
   Alabama Bar Association
   Mobile Bar Association: Bench and Bar Committee; Criminal Practice Committee; Civil Practice Committee; Juvenile Justice Practice Committee; Law Day Committee (Chairman 1996, 2000); Alternative Dispute Resolution Committee.

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.
    Federal Magistrate Judge's Association (this Association retains an individual who lobbies before Congress).
    Moorer Branch of the YMCA, Mobile, Alabama
    Skyline Country Club, Mobile, Alabama (By-laws attached)
    Consumers Union
    Mobile Symphonic Pops Band

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.
    U. S. Court of Appeals for the Eleventh Circuit (1987)
    U. S. District Court for the Southern District of Alabama (1987)
    Alabama Supreme Court and Alabama Courts (1981)

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.
    None.

13. Health: What is the present state of your health? List the date of your last physical examination.
Excellent (1990)

14. Judicial Office: State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.
United States Magistrate Judge, Southern District of Alabama (1990 - present) (jurisdiction defined by 28 U.S.C. § 636).
Municipal Judge, City of Creola, Alabama (1989) (misdemeanor and traffic court).

15. Citations: If you are or have been a judge, provide: (1) citations for the ten most significant opinions you have written; (2) a short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions.
(a) Citations for the ten most significant opinions:
(1) Perry v. United States, 936 F.Supp. 867 (S.D.Ala. 1996);
(2) Dees v. PrimeHealth, 894 F.Supp. 1549 (S.D.Ala. 1995);
(3) Bagsby v. Redwing Carriers, 91-0867-BH-S (S.D.Ala. 1992);
(4) Morrison v. Metropolitan Life Insurance Company, Civil Action 97-1110-P-S (S.D.Ala. 1998);
(5) Geringer v. Metropolitan Life Insurance Company, Civil Action 99-0661-MJ-S (S.D.Ala. 2000);
(6) Brewer v. City of Daphne, 111 F.Supp. 2d 1299 (S.D.Ala. 1999);
(7) Professional Insurance Group, Inc. v. Pierce, Civil Action 00-0186-S (S.D.Ala. 2001);
(8) Salva v. Blue Cross and Blue Shield of Alabama, Civil Action 01-0329-S (S.D. Ala. 2001);
(9) Hyundai Heavy Industries Co., Ltd. v. M/V Saibos FDS, Civil Action 01-0403-S (S.D.Ala. 2001);
(10) Hartford Fire Ins. Co. v. First National Bank of Atmore, Civil Action 00-0127-S (S.D.Ala. 2001).

(b) Reversals:
(1) Ross v. Johnson, Civil Action 95-0745-BH-S (S.D.Ala. 1998). This was a habeas corpus action brought pursuant to 28 U.S.C. § 2254 in which the District Court adopted my recommendation that the writ be denied. The Eleventh Circuit affirmed in part and vacated and remanded in part with instructions that this Court consider the prejudice prong of the ineffective assistance of counsel test of Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) with regard to Petitioner's claim of ineffective assistance of counsel where Petitioner alleged counsel was ineffective for failing to allow him to testify at trial. On remand, the

instructions of the Eleventh Circuit were followed, and I entered a subsequent recommendation (2000 WL 284204) again recommending that the writ of habeas corpus be denied.

(2) Blackmon v. Holt, Civil Action 91-0296-RV-S (S.D.Ala. 1994). This was a habeas corpus action brought pursuant to 28 U.S.C. § 2254 in which the District Court adopted my recommendation that the writ be denied. The Eleventh Circuit reversed and remanded with directions to the District Court that the Court analyze the petitioner's equal protection claim on the merits pursuant to Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), after finding that, even though Petitioner's trial occurred some two years before Batson was decided, this Court's decision to analyze Petitioner's claim under Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed. 759 (1965), was in error. The Eleventh Circuit found that, even though Petitioner's rehearing application had been denied eight days before Batson was decided, Petitioner still had six more days left to file a petition for the writ of certiorari in the Alabama Supreme Court; thus, notwithstanding the fact that Petitioner never filed a petition for the writ of certiorari, he still had a direct appeal route to the Supreme Court available and therefore, the principles of Batson were applicable. On remand, I determined that the record was insufficient to analyze Petitioner's claim pursuant to Batson, and therefore, I had no alternative but to recommend that the writ be granted and the case returned to the state court for retrial.

(3) Lewis v. Callahan, 125 F.3d 1436 (11th Cir. 1997). This was a social security action in which the District Court adopted my recommendation that the decision of the Commissioner to deny disability benefits be affirmed. This recommendation was based on a finding that the claimant possessed the residual functional capacity for sedentary work and was therefore not disabled. The Eleventh Circuit disagreed and found that the Administrative Law Judge's finding that claimant possessed the residual functional capacity for stress-free sedentary work was not supported by substantial evidence. The action was reversed and remanded with instructions that the case be returned to the Commissioner for the award of benefits.

(4) Wheeles v. Human Resource Systems, Inc., 179 F.R.D. 635 (S.D.Ala. 1998). During a telephone conference conducted as a result of a dispute between attorneys at a deposition, I granted a motion to compel the deponent to answer a question which, after discussion with the attorneys had been narrowly tailored and would be subject to a protective order which would prevent untoward disclosure of the answer. I instructed the attorneys that notwithstanding my ruling, the deponent could still refuse to answer the question and my ruling could be appealed to the District Judge. This appeal was taken and the District Judge reversed my decision finding that, after balancing the Plaintiff's claim of bias against the privacy interest of the non-party witness, Defendants were entitled to a protective order precluding Plaintiff from inquiring into any sexual conduct between the witnesses, but that Plaintiff could inquire whether the witnesses presently had such a relationship such as might cause a reasonable person to doubt the veracity of the testimony of the co-worker concerning the supervisor.

(5) Lowery v. Sullivan, 979 F.2d 835 (11th Cir. 1992). This was a social security action in which the District Court adopted my recommendation that the decision of the

Commissioner of Social Security denying disability benefits to the claimant be affirmed. The Eleventh Circuit, finding that substantial evidence did not support the Administrative Law Judge's finding that claimant's mental retardation did not manifest itself before age 22, reversed and remanded.

(6) McNab v. J & J Marine, Inc., 2001 WL 101800 (11th Cir 2001). Following a jury trial in which I presided as the trial judge, and in which the jury found for the Plaintiff, Defendant appealed on various grounds. The Eleventh Circuit Court of Appeals dismissed the appeal on the grounds that a procedure followed in the Southern District of Alabama that purported to allow parties to consent to a Magistrate Judge's exercise of jurisdiction by failing to object within 30 days of receiving notice that the case had been assigned to a Magistrate Judge, was invalid and insufficient to establish "on the record" consent statutorily required to empower a Magistrate Judge to exercise jurisdiction. It should be noted that no party contested the jurisdiction of the Magistrate Judge nor was this an issue on appeal. This "opt-out consent" procedure is no longer utilized in the Southern District of Alabama.

(7) Jones v. Apfel, 1999 WL 1565204 (S.D.Ala. 1999). While this action appears in Westlaw as a reversal (red flag), it should be noted that my recommendation was adopted by the District Judge. However, after observing that he had inadvertently overlooked the Plaintiff's objections to my recommendation, the District Court vacated its order and judgment and addressed Plaintiff's objections. Jones v. Apfel, 2000 WL 360241 (S.D.Ala. 2000). After doing so, the District Judge again adopted my report and recommendation as the opinion of the Court and dismissed the action.

(c) Significant opinions on federal or state constitutional issues:
None.

16. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.
None.

17. Legal Career:

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

1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;

After graduating from law school in 1980, and while studying for the bar exam and awaiting results, I worked as a law clerk for Judge Gay Lake, a District Judge in the District Court for Tuscaloosa County, Alabama. My term of service started

sometime around March 1981 and concluded in August 1981.

2. whether you practiced alone, and if so, the addresses and dates;

Not applicable.

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;

1981-1985: Assistant District Attorney. District Attorney's Office, Mobile, Alabama. Prosecutor.

1985-1987: Chief Assistant District Attorney. District Attorney's Office, Mobile, Alabama. Prosecutor.

1987-1989: Assistant United States Attorney. U. S. Attorney's Office, Southern District of Alabama, Mobile, Alabama. Prosecutor.

1989-1990: Law firm of Thetford & Steele. Suite 1702, 107 Saint Francis Street, Mobile, Alabama, 36602. Partner.

1990- present: United States Magistrate Judge for the Southern District of Alabama. U. S. Courthouse, 113 Saint Joseph Street, Mobile, Alabama, 36602.

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

From 1981 to 1989, I worked as a prosecutor in state and federal court. From 1989 to 1990, I was in private practice where I handled a variety of matters including domestic relations disputes, criminal defense and criminal appeals, estate planning matters, plaintiff's actions, and representation of a government agency (the Department of Human Resources). From 1990 until the present, I have been employed as a United States Magistrate Judge for the District Court in the Southern District of Alabama.

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

For most of my legal career before becoming a United States Magistrate Judge, I was employed as a trial attorney prosecuting criminal cases for the District Attorney's Office and the United States Attorney's Office in Mobile, Alabama. As such, I represented the people of the State of Alabama and the people of the United States who were my clients. During the course of my work as a

prosecutor, I specialized in child abuse cases and public corruption cases.

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

As a prosecutor from 1981 to 1989, I appeared in court almost daily. While in private practice from 1989 to 1990, the frequency of my court appearances was reduced; however, I would estimate that I was in court on a weekly basis.

2. What percentage of these appearances was in:
(a) federal courts;

From 1987-1989, 100%.

(b) state courts of record;

From 1981 to 1989, 100%.

(c) other courts.

Not applicable.

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

From 1981 to 1989, 100% of my litigation was criminal. From 1989 to 1990, while in private practice, my litigation experience was probably 50% criminal and 50% civil.

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.

Approximately 85 as sole counsel, and 15 as associate counsel.

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

100% of these trials were before a jury.

After graduating from law school in 1980 and while studying for the bar exam and awaiting results, I worked as a law clerk for Judge Gay Lake, a District Judge in the District Court for

Tuscaloosa County, Alabama.

In September 1981, I was employed as an Assistant District Attorney in the District Attorney's Office for Mobile County, Alabama. In 1985, I was promoted to the position of Chief Assistant District Attorney and continued to work for the District Attorney until 1987. From 1981 to 1987, I prosecuted literally hundreds of felony preliminary hearings and misdemeanor cases before the District Courts of Mobile County, I tried in excess of 75 felony cases before juries in the Circuit Courts of Mobile County as sole counsel, and, as Chief Assistant District Attorney, I assisted other prosecutors in the trials of dozens of felony cases, presented in excess of 1,000 felony cases to the Mobile County Grand Jury, and tried one felony case in U.S. District Court as a Special Assistant United States Attorney. I also litigated civil forfeiture matters in state court, participated in criminal investigations including significant public corruption investigations in Mobile, Alabama, supervised the District Attorney's legal and support staff, supervised the Mobile County Grand Jury, directed the creation of the District Attorney's Check Enforcement Unit, and substantially assisted in the creation of the Child Advocacy Center for physically and sexually abused children.

From 1987 to 1989, I was employed as an Assistant United States Attorney where I tried seven felony cases before the District Court for the Southern District of Alabama, including cases of mail fraud, public corruption, drug violations, firearm violations, and tax code violations. I also wrote legal briefs on cases prosecuted and argued these briefs before the Eleventh Circuit Court of Appeals. I assisted law enforcement agents during investigations of public corruption, drug violations and white collar crimes, which included rendering legal advice, and assisting with search warrants, pen registers and wiretaps.

In 1989, I left the U. S. Attorney's Office and entered the private practice of law with Joseph D. Thetford and the law firm of Thetford & Steele. The law firm was located in Suite 1702, 107 Francis Street, Mobile, Alabama. As a private practitioner, I handled civil litigation in state and federal court, criminal defense in state and federal court, litigation of domestic relations matters, representation of indigent appellants before the Alabama Court of Criminal Appeals, representation of claimants in social security matters, and representation of the Alabama Department of Human Resources in child custody matters.

In January 1990, while still in private practice, I was appointed as a part-time Magistrate (half-time) for the U. S. District Court for the Southern District of Alabama. After that, to avoid any conflicts of interest, my private practice of law was focused primarily in state court.

In December 1990, I was appointed as a full-time Magistrate Judge for the District Court for the Southern District of Alabama where I remain today. Because of the nature of our court, and the exigent circumstances experienced due to a heavy workload and the attrition of our district judges, I have been utilized in my position as Magistrate Judge to the fullest extent allowed by federal laws and rules. In addition to handling the usual assortment of preliminary criminal matters, prisoner cases, and social security appeals, I find that I devote more than half of my time to civil matters which usually involve reviewing and resolving motions, holding hearings on

disputed issues, and conferencing with attorneys to resolve problems or to manage the schedule of a particular case. As a result of recent developments in our Court, our Magistrate Judges are now in rotation to receive, with the consent of the parties, 25 percent of the civil docket. The product of this policy is that, for the past several years, I have managed my own civil docket and have presided over a growing number of civil jury trials. According to statistical data reported to the Administrative Office of United States Courts, during my tenure as a Magistrate Judge in this Court, I have conducted 3,959 hearings; I have held 1,783 pretrial conferences (745 of these were civil and 51 were mediation conferences); I have entered a total of 1,385 reports and recommendations addressing civil motions such as summary judgment motions and motions to dismiss or motions to remand, addressing social security appeals, and recommending action in prisoner habeas petitions and claims under §1983; I have entered written orders resolving 10,765 motions (5,539 of which involve civil matters); I have selected 226 trial juries; I have terminated (by order or settlement) 115 civil consent cases; and I have presided over the trial of 15 civil jury cases.

In addition to managing my docket, I have been responsible for creating several plans which have significantly impacted the day-to-day operation of this Court. For instance, shortly after coming on board, I drafted the Criminal Case Management Plan for this District which is still in effect and has resulted in the efficient management of our criminal cases. I also drafted the Criminal Justice Act Plan for this District, set up the CJA Panel of Attorneys for appointment to represent indigent defendants, created a Training Panel to assist in the training of new attorneys, and I serve as Chairman of our CJA Selection Committee. I was significantly involved in the drafting of this Court's Alternative Dispute Resolution Plan and have served as liaison to the Mobile Bar Association's Mediation Committee. I have also been instrumental in consolidating our automation efforts in this District, and with the technical assistance of our Automation Chief, I drafted an Automation Plan and set up an Automation Committee for this Court. Finally, in an effort to stay alert to the needs of the public and the attorneys who represent our citizens, I have served on several Mobile Bar Association committees over the years. These include the Civil Practice Committee, the Criminal Practice Committee, the Alternative Dispute Resolution Committee, the Bench and Bar Committee, the Social Security Practice Committee, the Juvenile Practice Committee, and the Law Day Committee.

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

    (a) the date of representation;
    (b) the name of the court and the name of the judge or judges before whom the case was litigated; and
    (c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

All of the cases I have litigated, both jury and non-jury, were criminal cases, and were tried between 1981 and 1989. The following cases were tried before the Circuit Court of Mobile County, Alabama:

State of Alabama v. Tankersley. This was a DUI murder case which is believed to be the first conviction in the United States for murder where the Defendant was driving under the influence of alcohol and killed an individual. The appeal is reported at Tankersley v. State, 420 So.2d 818 (Ala.Crim.App. 1982). Opposing counsel: T. Jefferson Deen, III; 207 Church Street, Mobile, Alabama 36602; (334) 433-5860. Trial judge: Judge Braxton L. Kittrell, Jr.

State of Alabama v. Williams. Drug case (illegal possession of phenmetrazine – defendant convicted). Appeal reported at Williams v. State, 429 So.2d 625 (Ala.Crim.App. 1982). Opposing counsel: Robert F. Clark; 207 Church Street, Mobile, Alabama 36602; (334) 433-5860. Trial judge: Judge Robert L. Byrd, Jr.

State of Alabama v. Hastings. Drug case (illegal possession of hydromorphone hydrochloride -- defendant convicted). Appeal reported at Hastings v. State, 439 So.2d 204 (Ala.Crim.App. 1983). Opposing counsel: Charles N. McKnight; Mobile Government Plaza, 205 Government Street, Mobile, Alabama 36602; (334) 574-8439. Trial judge: Judge Telfair Mashburn.

State of Alabama v. Carson. Manslaughter case (defendant convicted). Appeal reported at Carson v. State, 439 So.2d 1350 (Ala.Crim.App. 1983). Opposing counsel: Donald C. Brutkiewicz, 2312 AmSouth Bank Bldg., Mobile, Alabama 36602; (334) 433-1866. Trial judge: Judge James Avery.

State of Alabama v. Koger. Child abuse/murder case (defendant convicted). Appeal reported at Koger v. State, 443 So.2d 1343 (Ala.Crim.App. 1983). Opposing counsel: Edward R. Tibbetts; 1 Office Park, Mobile, Alabama 36616; (334) 343-3330. Trial judge: Judge Robert L. Byrd, Jr.

State of Alabama v. Carl Perry. Murder case (defendant convicted). Appeal reported at Perry v. State, 453 So.2d 762 (Ala.Crim.App. 1984). Opposing counsel: Paul D. Brown; 920 Dauphin Street, Mobile, Alabama 36604; (334) 438-4691. Trial judge: Judge Edward B. McDermott.

State of Alabama v. Paulson. Forgery case (defendant convicted). Appeal reported at Paulson v. State, 455 So.2d 85 (Ala.Crim.App. 1984). Opposing counsel: T. Jefferson Deen, III; 207 Church Street, Mobile, Alabama 36602; (334) 433-5860. Trial judge: Judge Ferrill D. McRae.

State of Alabama v. Fields. Vehicular homicide (defendant convicted). Appeal reported at Fields v. State, 494 So.2d 477 (Ala.Crim.App. 1986). Opposing counsel: W. A. Kimbrough, Jr.; 1359 Dauphin Street, Mobile, Alabama 36604; (334) 432-2855. Trial judge: Judge

Braxton L. Kittrell, Jr.

The following cases were tried in federal court:

United States v. Wicks. Public corruption case. Trial resulted in the conviction of an incumbent county commissioner. (No reported opinion.) Opposing counsel: W. A. Kimbrough, Jr.; 1359 Dauphin Street, Mobile, Alabama 36604; (334) 432-2855. Trial judge: Judge W. Brevard Hand.

United States v. Runderson. Drug/Firearm case (defendant convicted). (No reported opinion.) Opposing counsel: Larry C. Moorer; 107 North Jackson Street, Mobile, Alabama 36602; (334) 432-0002. Trial judge: Judge W. Brevard Hand.

United States v. Williams. Tax case (attempting to evade federal income tax and willfully failing to pay tax -- defendant convicted). Appeal reported at U.S. v. Williams, 875 F.2d 846 (11th Cir. 1989). Opposing counsel: W. A. Kimbrough, Jr.; 1359 Dauphin Street, Mobile, Alabama 36604; (334) 432-2855. Trial judge: Judge W. Brevard Hand.

Attorneys with whom I have had recent or frequent contact:

Joseph M. Brown, Jr.; 1601 Dauphin Street, Mobile, Alabama 36604; (334) 471-6191.
Richard E. Shields; 63 South Royal Street; Mobile, Alabama 36602; (334) 432-1656.
T. Jefferson Deen, III; 207 Church Street, Mobile, Alabama 36602; (334) 433-5860.
Michael E. Mark; 5 Dauphin Street, Mobile, Alabama 36602; (334) 432-0702.
Richard W. Fuquay; 1111 Dauphin Street, Mobile, Alabama 36604; (334) 433-7177.
William C. Tidwell, III; 107 Saint Francis Street, Suite 26, Mobile, Alabama 36602; (334) 694-6310.
Caine O'Rear, III; 107 St. Francis Street, Suite 3000, Mobile, Alabama 36602; (334) 694-6308.
Vincent F. Kilborn, III; 1810 Old Government Street, Mobile, Alabama 36606; (334) 479-9010.
Jerry A. McDowell; 63 South Royal Street, Suite 900, Mobile, Alabama 36606; (334) 431-8800.
Richard W. Moore; 63 South Royal Street, Suite 438; Mobile, Alabama 36602; (334) 441-5845.

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

I am a member of the Alabama State Bar Association and the Mobile Bar Association. I have served on various committees with these associations including the Bench and Bar Committee with the State Bar (the purpose of this Committee is to allow interaction between state and

federal judicial officers and members of the Bar with the goal of improving the lines of communication and exploring ways of improving the justice system and better serving the public), and the following committees of the Mobile Bar Association: the Civil Practice Committee (the purpose of this Committee is to develop recommendations to the federal court for improving the administration of civil justice through rule changes, and the implementation of case management plans and procedures); the Criminal Practice Committee (the purpose of this Committee is to discuss, formulate, and make recommendations to the state and federal judicial officers with the goal of improving the administration of criminal justice in the state and federal court); the Juvenile Practice Committee (the purpose of this Committee is to provide a forum where its members can discuss, formulate, and make recommendations to improve the administration of juvenile justice in state court); the Social Security Practice Committee (the purpose of this Committee is to provide a forum for its members to discuss ideas for the effective management of social security cases among social security practitioners and to make recommendations to federal court for the purpose of improving the administration of justice in the area of social security appeals); the Alternative Dispute Resolution Committee (the purpose of this Committee was to create an Alternative Dispute Resolution plan for implementation in federal court which would create a panel of neutrals and provide procedures for the effective and efficient management of cases through the ADR phase); and the Law Day Committee. I have chaired the Law Day Committee on at least two occasions and have participated in the extensive activities of this Committee which has as its goal, the improvement of the relationship between the Bar Association and the general public. I was also one of the founding members of the Child Advocacy Center which was created to assist child victims of physical and sexual abuse using a multi-disciplinary approach, with special emphasis on cases that would be prosecuted before juries in state court.

THOMAS A. VARLAN
QUESTIONNAIRE FOR NOMINEES BEFORE THE COMMITTEE ON THE JUDICIARY,
UNITED STATES SENATE

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

   Thomas Alexander Varlan

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

   U.S. District Judge, Eastern District of Tennessee

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

   Bass, Berry & Sims PLC
   900 S Gay Street, Suite 1700
   Knoxville, TN 37902
   865.521.0369

4. **Birthplace**: State date and place of birth.

   July 8, 1956 Oak Ridge, TN

5. **Marital Status**: (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es). Please also indicate the number of dependent children.

   Spouse: Danni B. Varlan (maiden name-Danni Bowers)
   Employment: Partner, The Envision Group
   Post Office Box 11288
   Knoxville, TN 37939
   Dependent Children: 4

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

   8/78 to 5/81 Vanderbilt University School of Law
   J.D. 1981
   Order of the Coif

   8/74 to 6/78 University of Tennessee
   B.A. 1978
   Highest Honors

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

8/98 to present	Partner Bass, Berry & Sims PLC 900 S. Gay Street, Suite 1700 Knoxville, TN 37902
1/88 to 7/98	Law Director City of Knoxville 400 Main Street Knoxville, TN 37902
6/81 to 12/87	Associate Sutherland, Asbill & Brennan 999 Peachtree Street, NE Atlanta, GA 30309
7/80 to 8/80	Summer Associate Sutherland, Asbill & Brennan 999 Peachtree Street, NE Atlanta, GA 30309
6/80 to 7/80	Summer Associate Vinson & Elkins LLP 2300 First City Tower, 1001 Fannin Houston, TX 77002
6/79 to 8/79	Summer Associate Lewis, King, Krieg, Waldrop, P.C. One Centre Square, Fifth Floor 620 Market Street Knoxville, TN 37902
2002 to present	Bearden High School Foundation, Inc. Board of Directors
1995 - 1998	International Municipal Lawyer Association Chair, Litigation and Risk Management Section (1995-1996) Regional Vice President (1997-1998)
1996 - 1997	Tennessee Bar Association Chair, Litigation Section

1994 - 1995	President Tennessee Municipal Attorneys Association
1996 - present	Commissioner Tennessee Advisory Commission for Intergovernmental Relations 226 Capitol Boulevard Building, Suite 508 Nashville, TN 37243
1999 - 2002	Board of Directors Knoxville Area Chamber Partnership 601 W. Summit Hill Drive Knoxville, TN 37902
1995 - 1996	Board of Trustees Knoxville Museum of Art 1050 World's Fair Park Drive Knoxville, TN 37902
1996 - 2000	Board of Directors Dogwood Arts Festival 601 W. Summit Hill Drive Knoxville, TN 37902
1998 - present	University of Tennessee College of Arts and Sciences Board of Visitors
1999 - present	Vice President and President AHEPA (American Hellenic Educational Progressive Association) Knoxville Chapter No. 346 (Secretary, Atlanta Chapter, 1987)
1996	Parish Council President St. George Greek Orthodox Church 4070 Kingston Pike Knoxville, TN 37919
1995 - present	Executive Committee Member West Hills Community Association
1992 - 1995	University of Tennessee Chancellor's Associates

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

Not applicable.

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

* Order of the Coif, Vanderbilt Law School
* Managing Editor, Vanderbilt Law Review
* Appellate Argument I -- Vanderbilt Law School recognition awards for brief writing and oral argument presentations
* Phi Beta Kappa, University of Tennessee
* Phi Kappa Phi Graduate Scholarship (granted senior year at University of Tennessee for first year of law school)
* Highest Honors, B.A. 1978, University of Tennessee with dual major in Political Science and Economics
* Tennessee Advisory Commission for Intergovernmental Relations (private citizen appointment by Governor for consecutive three-year terms beginning in 1996)
* Leadership Knoxville 1993 (selection in "government" category through community-wide nomination and selection process)
* Knoxville-Knox County Charter Unification Commission, 1995-1996 (one of eight city representatives to 17-member committee appointed by Mayor and confirmed by Knoxville City Council)
* Eagle Scout award, 1974
* University of Tennessee Chancellor's Associates, 1992-1995
* University of Tennessee College of Arts and Sciences Board of Visitors, 1998-present

10. **Bar Associations**: List all bar associations or legal or judicial-related committees, selection panels 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.

* State Bar of Georgia, 1981-present (voluntary inactive status since 1988)
* Atlanta Bar Association, 1981-1987
* Knoxville Bar Association, 1988-present
* Tennessee Bar Association, 1988-present
  - Secretary-Treasurer, Section of Litigation, 1994-1995
  - Vice-Chair, Section of Litigation, 1995-1996
  - Chair, Section of Litigation, 1996-1997
* American Bar Association, 1988-1998
* International Municipal Lawyers' Association (IMLA), 1988-present
  - Member, 1988-1998; Associate Member, 1998-present
  - Vice-Chair, Section of Litigation and Risk Management, 1994-1995
  - Chair, Section of Litigation and Risk Management, 1995-1996
  - Strategic Planning Committee, 1995-1998
  - Regional Vice President, 1997-1998
* Tennessee Municipal Attorneys' Association (TMAA), 1988-1998
  - Secretary-Treasurer, 1992-1993
  - Vice President, 1993-1994
  - President, 1994-1995

* Hamilton Burnett American Inns of Court, 1996-present

11. **Bar and Court Admission**: List each state and court in which you have been admitted to practice, including dates of admission and any lapses in membership. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

States:

Tennessee, 1988
Georgia, 1981 (voluntary inactive status since relocation to Tennessee in 1988)

Courts:

U.S. Supreme Court, May 24, 1993
U.S. District Court for the Northern District of Georgia, April 12, 1982
U.S. Court of Appeals for the Eleventh Circuit, July 14, 1982
U.S. Court of Appeals for the Federal Circuit, May 27, 1987
U.S. Court of Appeals for the Sixth Circuit, March 21, 1988
U.S. District Court for the Eastern District of Tennessee, May 29, 1989
Georgia State Courts, 1981
Georgia Court of Appeals, September 10, 1985
Georgia Supreme Court, September 17, 1985
Tennessee State Courts, 1988

12. **Memberships**: List all memberships and offices currently and formerly held in professional, business, fraternal, scholarly, civic, charitable, or other organizations since graduation from college, other than those listed in response to Questions 10 or 11. Please indicate whether any of these organizations formerly discriminated or currently discriminates on the basis of race, sex, or religion - either through formal membership requirements or the practical implementation of membership policies. If so, describe any action you have taken to change these policies and practices.

Current

Bearden High School Foundation, Inc., Board of Directors - 2002-present
Tennessee Advisory Commission for Intergovernmental Relations,
Commissioner - 1996-present
American Hellenic Educational Progressive Association
Knoxville Chapter No. 346, Vice President and President - 1998-present
(Secretary, Atlanta Chapter, 1987)
West Hills Community Association, Executive Committee member - 1995-present
Leadership Knoxville, Inc. - 1993 (class member) to present (alumni)
West Hills Elementary School PTA -1992-present
Bearden High School PTA - 2001-present
Episcopal School of Knoxville PTA - 2002-present
Bearden High School Band Boosters - 2001-present
Knox Heritage, Inc. - 2001-present
Knox Youth Sports, Inc., Volunteer Basketball Coach - 1998-2002

Former

Knoxville Area Chamber Partnership, Board of Directors - 1999-2002
Knoxville Museum of Art, Board of Trustees - 1995-1996
Dogwood Arts Festival, Board of Directors - 1996-2000
St. George Greek Orthodox Church, Parish Council President - 1996
Deane Hill Country Club (1988-1993--no longer in existence)
West Hills 46th Precint Republican Committee, 1988-2002
Knoxville-Knox County Charter Unification Commission - 1995-1996
Junior League of Knoxville Community Advisory Board - 1996-1998
Bearden Middle School PTA - 1998-2001

To my knowledge, none of these organizations formerly or currently discriminates on the basis of race, sex, or religion. I would note that the American Hellenic Educational Progressive Association (AHEPA) is a fraternal organization founded in Atlanta, Georgia in 1922, focused at that time on protecting Greek immigrants from subversive Klan anti-Greek activities and to help integrate Greek immigrants into American culture and which has now expanded into an international organization which promotes Hellenism, education, philanthropy, civic responsibility, family and individual excellence. Affiliate auxiliary organizations have been created under the AHEPA family umbrella to include female adult and male and female young adult members (through the Daughters of Penelope, Maids of Athena, and Sons of Pericles).

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

A. Materials Available and Supplied

TAB NO.

1. "Defining the Government's Duty Under the Federal Tort Claims Act," Vand. L. Rev. (1980).

2. October 19, 1990 Tennessee Municipal Attorneys Association ("TMAA") Fall Seminar: "Municipal Contracts."

3. June 16, 1992 TMAA Annual Seminar: "Tax Equalization and the Bell Telephone Appeals."

4. August 24, 1993: "Tennessee Municipal League Report on Annexation" presented to the Tennessee Advisory Commission for Intergovernmental Relations.

5. Fall 1994 International Municipal Lawyers Association ("IMLA") Annual Conference: "The New Rules of Federal Civil Procedure and Their Impact on Municipal Legal Practice."

6. "Sixth Circuit Holds City and County Not Liable in Incinerator Lawsuit," Municipal Attorney, Nov./Dec. 1992, Vol. 3, No. 6, pp. 150-51.

7. March 3, 1995 TMAA Seminar: "Changes in the Federal Rules of Civil Procedure."

8. June 20, 1995 TMAA Annual Seminar: 6-hour CLE seminar that, as president of TMAA, I organized with staff assistance and served as moderator at the seminar. Topics included employment law, municipal liability and immunity issues, and other topics.

9. October 15-18, 1995 IMLA 60th Annual Conference: "Litigation & Risk Management Section Annual Report."

10. October 17, 1995 IMLA Annual Conference: Moderator, Work Session: "Fire and Law Enforcement Issues for Local Government Attorneys."

11. June 18, 1996 TMAA Annual Seminar: "Open Records, Open Meetings, and Communicating with the Media: the City Attorney's Role."

12. November 17, 1997 IMLA Annual Conference: Moderator, Work Session, "Local Government Liability: New Forms and New Defenses."

13. December 16, 1997: Presentation by the City of Knoxville to the Annexation and Incorporation Study Committee of the Tennessee General Assembly.

14. Spring 1998: Tennessee Municipal Law Letter: "Legislature Overhauls Annexation Laws."

15. April 4, 1998 University of Tennessee College of Law Speaker Series -- Interdisciplinary Symposium: "Revitalizing Cities and Building Communities."

16. October 20, 1998 Bass, Berry & Sims Labor and Employment Law Group Seminar: "1998 Federal Law Update."

17. February 5, 1999 TMAA: "Legislative Preview--Tort Liability and Other Local Government Issues."

18. June 3, 1999 Bass, Berry & Sims Labor and Employment Law Group Seminar: "Employment Law Update."

19. June 15, 1999 TMAA Annual Seminar: "Legislative Update."

20. September 27, 1999: Presentation to the Civil Practice and Local Government Subcommittees of the Tennessee House of Representatives: "Proposed Tort Liability Legislation" presented by Tennessee Municipal League.

21. June 8, 2000 KBA Annual Seminar: "Legislative Update."

22. June 13, 2000 TMAA Summer Seminar: "Legislative Update."

23. May 24, 2001 Lorman Education Services Seminar: "Local Government Issues in Tennessee."

24. June 12, 2001 TMAA Summer Seminar: "Legislative Update."

25. June 9, 2002 TMAA Annual Seminar: "Legislative Update."

B. Materials Not Available and/or Extemporaneous Remarks

Spring 1995: Made presentation to Leadership Knoxville on local government issues.

1995 to 1996: Made numerous presentations to civic groups and organizations (including neighborhood associations, business forums, rotary clubs, and others) relating to tropic of unified government in role as member of Knoxville/Knox County Unified Government Charter Commission.

1996: Spoke (in Greek and English) to over 15,000 people at Olympic Torch Celebration community-wide event sponsored by City of Knoxville and Atlanta Committee for the Olympic Games relating to importance of Olympics and their Hellenic origins.

1996 and 1997: Made presentations to St. George Greek Orthodox Church General Assemblies in role as Parish Council president and chair of various committees. Topics included budget, by-laws, and strategic planning.

May 9, 1997 TBA Litigation Section, "Federal Practice Seminar." As chair of the TBA Litigation Section, I organized this 6-hour CLE seminar, worked with federal judges, magistrates, and attorneys on the selection of topics and presentations, and served as moderator at the seminar. Topics included pretrial practice and discovery in the federal courts, the use of scientific evidence and testimony, and federal mediation.

August 12, 1997: Knoxville Police Department In-Service Training: "Open Records and Public Documents."

1988 to 1998: Made numerous presentations as City Law Director to homeowners' associations, school groups, and civic groups related to various community and city matters.

August 19, 1998: Speech to Northside Kiwanis regarding Tennessee Municipal League activities.

June 9, 1999 Tennessee County Services Association Post-Legislative Conference: "Tort Liability Update."

January 22, 2002: Speech to West Knox Sertoma Club regarding Tennessee Municipal League activities.

14. **Congressional Testimony**: List any occasion when you have testified before a committee or subcommittee of the Congress, including the name of the committee or subcommittee, the date of the testimony and a brief description of the substance of the testimony. In addition, please supply four (4) copies of any written statement submitted as testimony and the transcript of the testimony, if in your possession.

I have not testified before Congress.

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

I am in good physical condition and health. The date of my last physical examination was August 13, 2002.

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

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

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

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

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

Not applicable.

17. Public Office, Political Activities and Affiliations:

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

From January 1, 1988 to July 31, 1998, I served as Law Director for the City of Knoxville, Tennessee. I was appointed to this position by the Mayor, Victor Ashe.

(2) 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.

During my tenure as Law Director, Mayor Ashe successfully underwent two re-election campaigns, in 1991 and 1995. I participated in those campaigns on my own time in a limited advisory capacity. Municipal elections in Tennessee are nonpartisan.

18. Legal Career: Please answer each part separately.

(1) Describe chronologically your law practice and legal experience after graduation from law school including:

(1) whether you served as clerk to a judge, and if so, the name for the judge, the court and 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 affiliated, and the nature of your affiliation with each.

Attorney	Sutherland, Asbill & Brennan 999 Peachtree Street, NE Atlanta, GA 30309	1981-1987

Law Director	City of Knoxville 400 Main Street Knoxville, TN 37902	1988-1998
Partner	Bass, Berry & Sims PLC 900 S. Gay Street, Suite 1700 Knoxville, TN 37902	1998-present

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

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

During my practice in Atlanta, Georgia with Sutherland, Asbill & Brennan, I served in the firm's litigation department with special focus in the areas of employment law and school law. I had responsibility for all phases of complex commercial lawsuits, including patent and trade secrets, antitrust, contract, and products liability, at both the trial and appellate levels in the state and federal courts. Typical clients included boards of education, state agencies, railroad companies, hospitals, manufacturing companies, movie producers, and other private companies and individuals.

As Law Director for the City of Knoxville, I headed a department of 23 full-time and 2 part-time employees -- which included seven staff attorney positions and eight additional professional positions. The Law Department represented the city in all litigation in which the City of Knoxville is a party. Either directly or in a supervisory role, I participated in the defense and prosecution of this litigation. The types of cases that we handled included tort, civil rights, annexation, tax matters, zoning, condemnation, employment liability, workers' compensation, and cases dealing with a wide range of constitutional and statutory issues.

The Law Department also provided legal advice and consultation to city officials, boards, and agencies on an ongoing basis. In addition to the Mayor and City Council, the departments for which we rendered advice and provided representation on a variety of issues included the departments of police, fire, finance, recreation, engineering, civil service, public service, and development. In addition to the above listed case categories, areas of the law in which we provided legal research and advice included telecommunications, mass transit, real property issues, and federal regulations including fair labor standards, drug and alcohol testing requirements, ADA, and FMLA.

Also, in a typical year, we prepared approximately 30 council agendas and over 900 ordinances and resolutions for consideration by City Council. The Law Department also prepared approximately 300 city contracts on an annual basis. All of those contracts, by statutory requirement, obtained my review and signature as to their legal form and content.

Through the Law Department's Risk Management Division, we administered a self-funded and substantially self-administered program for workers' compensation and liability claims. We also had responsibility for all health and welfare benefits for city employees including regulatory compliance with applicable federal statutes. In addition, we administered the City's safety and loss control programs including compliance with state and federal OSHA requirements.

My current practice areas with Bass, Berry & Sims PLC include governmental relations, civil litigation, labor and employment law, and representation of quasi-governmental corporations. Representative clients include the local housing authority, the airport authority, the statewide municipal league, representation of various private and public entities on employment matters and employment litigation, and representation of a metropolitan area school system in teacher salary equity litigation brought by an association of state small school systems.

(3) (1) Describe whether you appeared in court frequently, occasionally, or not at all. If the frequency of your appearances in court varied, describe each such variance, providing dates.

Occasionally.

(2) Indicate the percentage of these appearances in

(1) federal courts;

40% (approximate)

(2) state courts of record;

50% (approximate)

(3) other courts.

10% (approximate)

(3) Indicate the percentage of these appearances in:

(1) civil proceedings;

100%

(2) criminal proceedings.

0%

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

10 (total includes deadlocked jury cases; excludes cases where verdict obtained by a grant of motion to dismiss and/or summary judgment).

(4) Indicate the percentage of these trials that were decided by a jury.

60%

(4) Describe your practice, if any, before the United States Supreme Court. Please supply four (4) copies of any briefs, amicus or otherwise, and, if applicable, any oral argument transcripts before the U.S. Supreme Court in connection with your practice.

I have not practiced before the U. S. Supreme Court.

(5) Describe legal services that you have provided to disadvantaged persons or on a *pro bono* basis, and list specific examples of such service and the amount of time devoted to each.

Served as lead (sole) counsel in appeal in Herron v. Beck, 693 F.2d 125 (11th Cir. 1982), in which the U.S. Court of Appeals for the Eleventh Circuit reversed and remanded decision of federal district court in prisoner *pro se* action for alleged illegal removal of legal and educational materials from jail cell.

Performed various pro bono services in Atlanta through organizations such as Volunteer Legal Arts Services.

Participant in Knoxville Bar Association's "Mentor for the Moment" Program, in which attorneys who have questions or problems in a particular area of legal expertise may seek the guidance of a more experienced Mentor attorney.

As City Law Director, developed and implemented a "walk-in/call-in" program whereby citizens could speak directly to a city attorney either in person or by telephone at any time during office hours about legal questions or problems pertaining to city matters. Through this program, the Law Department served more than 1,000 citizens per year.

In addition, the Mayor of Knoxville held monthly meetings either at his office or at a community facility where citizens were able to personally discuss matters with him and the various city department representatives. During these "Mayor's Night In/Night Out" meetings, either myself or a staff city attorney was available to assist citizens with legal matters relating to city issues.

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

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

(2) a detailed summary of the substance of each case outlining briefly the factual and legal issues involved;

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

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

1. Civil Service Merit Bd. of City of Knoxville, et al. v. Charles W. Burson, Victor Ashe, and City of Knoxville, 816 S.W.2d 725 (Tenn. 1991).

This declaratory judgment action presented the principal question of whether state legislation passed in 1989 affecting municipal civil service boards in counties with population greater than 300,000 violates the home rule provisions of Article XI, Section 9 of the Tennessee Constitution.

The action was initiated by the members of the Knoxville civil service board, who were appointed pursuant to a 1980 city charter amendment, against the City of Knoxville, its Mayor, and the State Attorney General. The plaintiffs alleged that their tenure was threatened by the 1989 enactment of T.C.A. § 66-54-114, which established uniform qualifications and procedures for nomination of civil service board members for municipalities located in counties with population greater than 300,000 and operating under a mayor-aldermanic form of government. The trial court found the statute to be constitutional, and an appeal was taken. The Tennessee Supreme Court held that (1) the statute was not "local legislation" invalid under the home rule amendment to the Tennessee Constitution; (2) the statute did not implicate the provision of the Tennessee Constitution prohibiting suspension of any general law for benefit of any individual or corporation; (3) the statute did not violate Article I, Section 8 of the Tennessee Constitution guaranteeing reasonable classifications; and (4) the statutory one-year residency requirement for appointment to the board did not violate the equal protection clause of the Fourteenth Amendment.

This decision was significant in that it struck an appropriate balance between the state's interest in adopting uniform legislation relating to civil service board composition in larger counties and a municipality's interest in upholding the principles of home rule protection. The defense of this case also involved a collaborative effort between the City of Knoxville and the State Attorney General's office.

Nature of Involvement: Chief counsel; sole author of City's brief before Tennessee Supreme Court and presented successful oral argument before Tennessee Supreme Court.

Trial Court Judge: Chancellor Frederick McDonald

Counsel for Attorney General Charles W. Burson: Andy D. Bennett, 114 John Sevier Bldg., 500 Charlotte Avenue, Nashville, Tennessee 615.741.3492

Counsel for Civil Service Merit Board: Wayne R. Kramer, Suite 2500, First Tennessee Plaza, Knoxville, Tennessee 865.525.5134

Counsel for Wayne Day/City Employees League: Timothy A. Priest, Suite 600, Two Centre Square, 625 S. Gay Street, Knoxville, Tennessee 865.522.4191

* * *

2. Foster Wheeler Energy Corp., et al. v. The Metropolitan Knox Solid Waste Authority, et al., 970 F.2d 199 (6th Cir. 1992).

This lawsuit arose out of the proposed construction of a solid waste incinerator (the "Facility") in Knox County, Tennessee. In August 1986, pursuant to a local cooperation agreement between the City of Knoxville and Knox County, The Metropolitan Knox Solid Waste Authority, Inc. was incorporated as a Tennessee nonprofit corporation to construct and operate the incinerator. At about the same time, the Waste Authority issued $174,995,000 in revenue bonds to finance the Facility. Ultimately, the revenues from the incinerator were to be used to pay the bonds. Almost three years after the initial issuance of the Waste Authority's bonds, the Waste Authority entered into two contracts with two separately formed Foster Wheeler Corporation companies to construct and then operate the Facility. Neither Foster Wheeler company had a contract with the City of Knoxville or Knox County.

The Facility was not constructed because permanent financing for it was never obtained. The Foster Wheeler companies alleged that an announcement by the City's Mayor that the City was withdrawing its support for the Facility led to a withdrawal of insurance for the Waste Authority's bonds. The bonds were then redeemed. Foster Wheeler then sued the Waste Authority, the City, and the County for over $10,000,000. Since there would never be a completed Facility that it could operate, the second Foster Wheeler company sued for another $5,000,000. In their lawsuit, the Foster Wheeler plaintiffs claimed that the Waste Authority breached the DCT and O&M Agreements. Foster Wheeler then alleged that the City and County were also liable even though they were not parties to the agreements because they "dominated and controlled" the Waste Authority causing it to breach its contracts. Foster Wheeler also alleged that the Waste Authority constituted

nothing more than the alter ego of the City and County, and thus the court should "pierce the corporate veil" of the corporation to reach the City and County.

The City and County filed motions to dismiss which were denied by the federal district court on June 20, 1991. The City and County thereafter sought, and were granted, an order to certify the case for interlocutory appeal. The Sixth Circuit granted the petition and thereafter, on July 23, 1992, reversed the district court's denial of the City and County's motions to dismiss.

The Sixth Circuit decision in this case was of major significance not only to the City of Knoxville and Knox County but also to all local government entities. First, the decision resulted in the dismissal of claims against the City and County totaling $15 million. Second, the Sixth Circuit, in overturning the district court decision -- which had held that the City and County could be liable for the contractual obligations of the Solid Waste Authority -- rejected both Foster Wheeler's alter ego theory of liability and the district court's agency theory of liability. Finally, the Sixth Circuit decision provided important guidance to local governments and their officials as they continue to address their communities' solid waste collection and disposal needs through local cooperation agreements and other methods.

Nature of Involvement: Co-counsel; co-authored City's brief in federal district court and Sixth Circuit Court of Appeals.

District Court Judge: Judge Leon Jordan

Co-Counsel for City: John A. Lucas, 900 S. Gay Street, Suite 2000, Knoxville, Tennessee 865.549.7700

Counsel for Plaintiffs: Charles J. Gearhiser, 320 McCallie Avenue, Chattanooga, Tennessee 423.756.5171

Counsel for Metropolitan Knox Solid Waste Authority: Robert H. Watson, Jr., 800 S. Gay Street, Knoxville, Tennessee 854.637.1700

Counsel for Knox County, Tennessee: Richard T. Beeler, 530 S. Gay Street, Suite 802, Knoxville, Tennessee 865.522.2717

* * *

3. State ex rel. Kessel v. Ashe, et al., 888 S.W.2d 430 (Tenn. 1994).

The Tennessee Supreme Court held that a county's interest in dedicated roadways was insufficient to qualify the county as an "aggrieved owner of property" as required by T.C.A. § 6-51-103(a)(2)(A), and thus, the county lacked standing to maintain a quo warranto action challenging an annexation ordinance.

Knox County brought a quo warranto action challenging an annexation ordinance passed by the Knoxville City Council. The subject area included two roadways that had been dedicated to the County. The City filed a motion to dismiss, or in the alternative for summary judgment, asserting that the County did not have proper standing to challenge the ordinance because its interest in the roadways was insufficient to qualify it as an "aggrieved owner of property" under T.C.A. § 6-51-103(a)(2)(A). The trial court denied the motion, but granted the City's request for an interlocutory appeal. The Court of Appeals reversed the trial court's judgment, and the Supreme Court affirmed.

This decision represented the first definitive Tennessee appellate decision on the issue of whether roadways qualified as ownership of property for purposes of standing in annexation lawsuits. This issue had been hotly debated in trial courts in many Tennessee counties. This ruling provided essential guidance and clarity in this area of the law.

Nature of Involvement: Chief Counsel; co-author of City's successful appellate brief.

Trial Court Judge: Chancellor Sharon Bell

Counsel for Plaintiff: Michael W. Moyers, Knox County Law Director, 400 Main Street, Knoxville, Tennessee 865.215.2327

* * *

4. State ex rel. McNamee, et al. v. City of Knoxville, 824 S.W.2d 550 (Tenn. Ct. App. 1991).

A quo warranto action contesting an annexation ordinance does not survive pendente lite transfer of property by the original plaintiffs.

Three plaintiffs initiated a quo warranto action contesting an annexation ordinance passed by the City of Knoxville. All three plaintiffs owned property in the proposed annexation area at the time of the filing of the lawsuit. Prior to the trial, however, two of the plaintiffs, Larry McName and Dwight Cope, sold their property. The remaining plaintiff, Elbert Griffith, sold his property after a mistrial due to a deadlocked jury and before the next trial date. The City filed a motion for dismissal or alternatively for summary judgment on the basis that none of the plaintiffs was any longer an "aggrieved owner of property" under T.C.A. § 6-51-103. The motion was granted by the trial court. On appeal, the judgment was sustained upon the finding of the Court of Appeals that a quo warranto action does not survive the pendente lite transfer of property by the original plaintiff.

This decision's significance was two-fold. First, it further defined the law of annexation as it relates to standing to maintain lawsuits. Second, on a local level, the dismissal resulted in the largest single growth by the City of Knoxville – 1.2 square miles (768 acres) and over 2,000 residents – in almost 30 years and enabled the City to implement plans of service that had been in abeyance since 1987.

Nature of Involvement: Chief Counsel, co-authored City's appellate brief and presented successful oral argument in Court of Appeals.

Trial Court Judge: Chancellor Frederick McDonald

Co-Counsel: K. Dickson Grissom, Administrative Law Judge, Post Office Box 1149, Knoxville, Tennessee 865.584.5747 and John T. Batson, Jr., 800 S. Gay Street, Suite 1700, Knoxville, Tennessee 865.637.1700

Counsel for Plaintiff McNamee: David Buuck, Post Office Box 9305, Knoxville, Tennessee 865.637.3310

Counsel for Plaintiff Knox County: Richard T. Beeler, 530 S. Gay Street, Suite 802, Knoxville, Tennessee 865.522.2717

* * *

5. State ex rel. Schaltenbrand, et al. v. City of Knoxville, 748 S.W.2d 812 (Tenn. Ct. App. 1989).

The Tennessee Court of Appeals held that a city has the power to repeal annexation ordinances which are the subject of pending quo warranto proceedings, and that such action renders the proceedings moot.

The Knoxville City Council passed six ordinances annexing different areas contiguous to the city limits. The plaintiffs brought quo warranto suits challenging the reasonableness of three of the ordinances. Those three ordinances were subsequently repealed by the City Council, and the trial court dismissed each action as moot. The Court of Appeals affirmed the decision of the trial court holding that a city does have the right to repeal an annexation ordinance which is the subject of a pending quo warranto action and that such repeal renders the proceeding moot.

This decision was of great significance to cities across the state in planning and implementing growth strategies. Also, the decision was significant in that the court further held that upon repeal of the ordinance, the plaintiffs were not entitled to an order prohibiting annexation of any portion of the subject territory for 24 months pursuant to T.C.A. § 6-51-103(c) because such an order is only proper when the ordinance has been judicially determined to be unreasonable.

Nature of Involvement: Chief counsel; co-authored City's successful appellate brief.

Trial Court Judge: Chancellor Frederick McDonald

Co-Counsel: John T. Batson, Jr., 800 S. Gay Street, Suite 1700, Knoxville, Tennessee 865.637.1700

Counsel for Plaintiff Schaltenbrand: David Buuck, Post Office Box 9305, Knoxville, Tennessee 865.637.3310

Counsel for Plaintiff First Utility District: John A. Lucas, 900 S. Gay Street, Suite 2000, Knoxville, Tennessee 865.549.7700

* * *

6. National Independent Theatre Exhibitors, Inc., et al v. Charter Financial Group, Inc., et al., 747 F.2d 1396 (11th Cir. 1984).

The clients in this case were the producers and owners of the movie, "The Buddy Holly Story" ("the Film"). Prior to the Film's introduction, the clients, through the company Charter Financial Group (or "Charter") began seeking investors for the Film. During this same general time period, the National Independent Theatre Exhibitors, Inc. ("NITE") was purportedly establishing a film financing and distribution program in order to provide films for its theater members. Charter initially discussed the possible distribution of the Film with NITE's president, but those discussions eventually ended.

Subsequently, financing was obtained for the Film, and the Film's producers entered into an agreement with Columbia Pictures whereby Columbia agreed to distribute and promote the Film. Following announcement of that agreement in the trade press, Plaintiff through its president reemerged and claimed that NITE had a prior contract to distribute the Film.

In two related lawsuits, Plaintiffs filed multi-million dollar breach of contract claims against the Film's producers/owners and antitrust restraint of trade claims against the producers/owners and the actual distributors of the Film.

After extensive discovery, the first case was tried before a jury over an approximate six-week period. At the conclusion of Plaintiffs' case, the district court directed a verdict in favor of Columbia with respect to Plaintiffs' antitrust claims against Columbia. At the conclusion of client Charter's case, the Court directed a verdict in favor of Charter with respect to Plaintiffs' antitrust count, and at the conclusion of the trial the jury returned a verdict for Charter on Plaintiff's breach of contract claim.

These verdicts were subsequently upheld on appeal by the Eleventh Circuit. Subsequently, we moved for summary judgment in the related second case on the grounds of res judicata and collateral estoppel. The district court granted the motion, and the Eleventh Circuit subsequently also affirmed the dismissal as to all claims against the producers/owners of the Film.

This case was significant in that it involved extensive discovery and a variety of claims against multiple defendants in actually two separately filed cases. The initial successful trial verdict was followed by extensive research and briefing at the appellate level to uphold the court and jury verdicts in the first case. Subsequent research and briefing at the district court and appellate court level upheld the dismissal of all remaining actions and brought a successful conclusion to the litigation.

Nature of Involvement: Associate counsel at trial; co-author of clients' briefs in the federal district court and before the Eleventh Circuit Court of Appeals in both cases.

District Court Judge: Judge Marvin H. Shoob

Co-Counsel: Alfred A. Lindseth, 999 Peachtree Street, NE, Atlanta, Georgia 404.853.8000

Counsel for Plaintiffs: Stanley F. Sacks, Suite 501, Tower Point Center, 150 Boush Street, Norfolk, Virginia 757.6223.2753; William C. Lanham, 100 Peachtree NW, Atlanta, Georgia 404.524.5626

Counsel for Co-Defendant Columbia Pictures: Jeffrey R. Nickerson, 127 Peachtree Street, NE, Atlanta, Georgia 404.523.5614

* * *

7. W. Dwight Kessel v. Victor Ashe, Knox County Chancery No. 1086270-1. (Final Order June 24, 1991).

This case involved a complaint by Knox County against the City of Knoxville relating to calculation of teachers' pension obligations arising from abolition of former city school system in 1987. Plaintiff Knox County contended that the benefits being paid to retired teachers by the City of Knoxville through its Pension Board did not constitute the City's full obligation to fund the full accrued pension benefit as of the date of abolition (i.e., July 1, 1987).

The City filed a motion for summary judgment contending that Knox County's complaint was barred by the doctrines of res judicata and/or collateral estoppel in that Knox County's claims and issues had already been the subject of a final judgment in prior litigation. Knox County vigorously contested the City's motion and filed its own motion for summary judgment in its favor as to its claim.

I acted as chief counsel for the City and argued the motion before the Chancery Court. After submission of briefs and arguments, the Court granted the City's motion for summary judgment and denied Knox County's own motion. Knox County filed a notice of appeal in the case, but subsequently entered an order of voluntary dismissal in the Court of Appeals.

At issue in this case was the allocation of pension benefits with a present value of $30 million. The decision in the City's favor meant that City of Knoxville taxpayers were not obligated for this amount as claimed by Knox County. The decision also finally brought a conclusion to years of litigation involving the City, Knox County, teachers' groups, and individual teachers resulting from the abolition of the former city school system.

Nature of Involvement: Chief counsel; co-author of City's trial briefs and presented successful oral argument in trial court.

Trial Court Judge: Chancellor Frederick McDonald

Co-Counsel: Debra C. Poplin, City Law Department, 400 Main Street, Knoxville, Tennessee 865.215.2050

Counsel for Plaintiff: Richard T. Beeler, 530 S. Gay Street, Suite 802, Knoxville, Tennessee 865.522.2717

* * *

8. State of Tennessee, ex rel. Thomas A. Varlan, Law Director for the City of Knoxville, v. Robert Morris Ferguson, individually and d/b/a Big Bobs Pub, Knox County Chancery No. 121737-1 (Final Order June 7, 1994).

This case was a petition for abatement of a nuisance occurring at Big Bobs Pub brought upon relation of the city attorney pursuant to T.C.A. §§ 29-3-102 and 29-3-103. The City sought and injunction enjoining and restraining Respondent from maintaining and permitting sexual activity in the establishment in violation of § 16-467 of the Knoxville City Code and operating an adult cabaret within 1,000 feet of a residentially zoned area in violation of § 16-468.

Following a hearing, the Knox County Chancery Court entered an Order Granting Temporary Restraining Order on May 12, 1994. Subsequently, but prior to the scheduled hearing for a permanent injunction, Respondent agreed to surrender his City of Knoxville Beer Permit and further agreed not to apply for another permit from the City for a period of ten years.

This case demonstrates the importance of local ordinances and provides an example of how the state nuisance laws can be utilized for the enforcement of such ordinances when municipal court fines do not provide an adequate remedy.

Nature of Involvement: Chief Counsel

Trial Court Judge: Chancellor Sharon Bell

Co-Counsel: Debra C. Poplin, City Law Department, 400 Main Street, Knoxville, Tennessee 865.215.2050

Counsel for Plaintiff: Jimmy Kyle Davis, 406 Union Avenue, Suite 520, Knoxville, Tennessee 865.544.2020

* * *

9. Grant v. City of Knoxville, Glock, Inc., et al., United States District Court for the Eastern District of Tennessee, Civil Action No. 3-92-0059 (Stipulation of Dismissal August 1993).

This civil action arose out of the alleged wrongful death of decedent following an altercation with City of Knoxville and University of Tennessee police departments on July 9, 1991.

Plaintiffs alleged excessive force and gross negligent conduct as to defendant officer and reckless or gross negligence on the part of the City in the hiring and retaining of the individual officer. Plaintiff as personal representative of decedent sough compensatory damages in the amount of $1,225,000 and punitive damages in the amount of $2,500,000. Plaintiff husband sought damages against municipal defendants of similar amounts. Plaintiffs also sought compensatory and punitive damages against defendant manufacturer Glock, Inc. for alleged defects in the manufacture and design of the pistol used by the individual officer at the time of the incident.

Following an extensive discovery period, and prior to the scheduled trial of this action, the municipal defendants and plaintiffs agreed to a settlement whereby plaintiffs would dismiss their federal civil rights claims against defendants and accept a monetary settlement of negligence claims within the limits of the Governmental Tort Liability Act.

Nature of Involvement: Co-Counsel

District Court Judge: Judge Leon Jordan

Co-Counsel: K. Dickson Grisson, Administrative Law Judge, Post Office Box 1149, Knoxville, Tennessee 865.584.5747

Counsel for Plaintiff: Robert W. Ritchie, 606 W. Main Street, Suite 300, Knoxville, Tennessee 865.637.0661

Counsel for Defendant Glock, Inc.: Ronald Grimm and Philip P. Durand, Ambrose, Wilson, Grimm & Durand, 607 Market Street, 9th floor, Knoxville, Tennessee 865.544.3000

Counsel for Defendant Wagner: Robert H. Watson, Jr., 800 S. Gay Street, Suite 1700, Knoxville, Tennessee 865.637.1700

* * *

10. Vulcan Materials Co., Inc. v. Driltech, Inc., 306 S.E.2d 253 (Ga. 1983).

This case involved a products liability action against our client, Driltech, Inc., the manufacturer of a rotary blast hole drilling machine in use by plaintiff at its rock quarry near Kenesaw, Georgia. In 1978, a cast iron bushing in the machine's compressor system fractured and the resulting loss of fluid resulted in a fire. The drill operator was surrounded by flames but managed to escape injury. The drill was damaged beyond repair, but there was no damage or personal injury to property other than the drill.

Plaintiff sought suit in federal court for loss of use of the drill under theories of negligence and breach of warranty. The district court ruled that the warranty claims were barred by the statute of limitations and that the negligence claim was barred by the fact that there was no personal injury or damage to property other than the drill.

On appeal, the Eleventh Circuit certified two questions to the Georgia Supreme Court relating to whether there is an "accident" exception to the general rule that an action in negligence does not lie absent personal injury or damage to property other than to the allegedly defective product itself. The Georgia Supreme Court held that there is such an exception and further defined the circumstances under which such an exception would apply.

While the latter decision was adverse to our position, the decision clarified an area of the state products liability law in Georgia and allowed the case to proceed to a negotiated settlement. The case involved factual and expert witness depositions and testimony and extensive briefing of the key issues as well as appearances in both the federal and state courts.

Nature of Involvement: Associate counsel; co-author of briefs in federal and state courts

District Court Judge: Judge Marvin Shoob

Co-Counsel: Charles T. Lester, Jr. and Thomas A. Cox, 999 Peachtree Street, NE, Atlanta, Georgia 404.853.8000

Counsel for Plaintiff: R. Dennis Withers, 950 East Paces Ferry Road, NE, Atlanta, Georgia 404.233.1114

20. **Criminal History**: State whether you have ever been convicted of a crime, within ten years of your nomination, other than a minor traffic violation, that is reflected in a record available to the public, and if so, provide the relevant dates of arrest, charge and disposition and describe the particulars of the offense.

No.

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

State of Tennessee, ex rel. Thomas A. Varlan, Law Director v. Robert Morris Ferguson, individually and d/b/a Big Bob's Pub, Knox County Chancery Court No. 121737-1: Petition for abatement and injunction against owner and operator of pub for violation of state nuisance statutes filed by City of Knoxville under T.C.A. § 29-3-101. Filed May 2, 1994. Injunction granted by Chancery Court.

Mary Longworth v. Victor Ashe, et al., Knox County Chancery Court No. 127679-2: Complaint filed by former city employee against Mayor Victor Ashe, Thomas A. Varlan, and City of Knoxville alleging improper termination under the Tennessee Human Rights Act. Filed September 25, 1995. Agreed order of dismissal of individual defendants entered upon settlement with City of Knoxville.

Danni B. Varlan v. Renfro Construction Co., Knox County Circuit Court No. 2-419-95. Lawsuit arising out of automobile accident between spouse and defendant construction company on May 2, 1995. Defendant joined Thomas A. Varlan as a party Plaintiff because of joint ownership of family automobile. Lawsuit concluded.

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

I would plan to follow the Model Code of Judicial Conduct as adopted in Tennessee in Rule 10 of the Rules of the Supreme Court of Tennessee applicable to judges in Tennessee and apply those rules, and other such applicable rules and law, to issues of actual or potential conflicts of interest.

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

No.

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

See attached Financial Disclosure Report.

25. **Statement of Net Worth**: Complete and attach the financial net worth statement in detail. Add schedules as called for.

See attached Financial Net Worth Statement.

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

No.

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

Not applicable.

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

On February 11, 2002, I was interviewed in Nashville, Tennessee by Howard Liebengood, Chief of Staff to Senator Fred Thompson; Emily Reynolds, Chief of Staff to Senator Bill Frist; and Rick Hartley of Senator Frist's staff.

On July 22, 2002, I was interviewed in Washington, D.C. by Tim Flannigan, Deputy Assistant and Deputy Counsel to President, and an Associate Counsel to the President.

On August 13, 2002, I submitted various forms and documents to the Department of Justice related to my prospective nomination. On October 4, 2002, I was interviewed via telephone by Brian Benczkowski with the Department of Justice.

(3) Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as asking or seeking a commitment as to how you would rule on such case, issue, or question? If so, please explain fully.

No.

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

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

   Timothy Charles Stanceu. I have not used any former names.

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

   Judge, United States Court of International Trade

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

   Hogan & Hartson L.L.P.
   555 13th Street, N.W.
   Washington, D.C. 20004
   (202) 637-5844

   I am a resident of Virginia.

4. **Birthplace**: State date and place of birth.

   July 31, 1951 in Canton, Ohio

5. **Marital Status**: (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es). Please also indicate the number of dependent children.

   Married to Mary A. Incontro (same maiden name), who serves as an Assistant United States Attorney, District of Columbia, and currently is on detail as Associate Deputy Attorney General, U.S. Department of Justice, Tenth Street and Constitution Avenue, N.W., Washington, D.C. 20530. I have no dependent children.

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

   Kennedy School of Government, Senior Managers in Government Program, non-degree program, attended July-August 1989

J.D., Georgetown University, 1979 (attended 1975-79)

A.B., Colgate University, 1973 (attended 1969-73)

Purdue University, National Science Foundation non-degree program (attended June-August 1968)

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

1994 to present:	*Partner, Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004*
1992 to present:	*Director and Honorary Director, National Association of Foreign-Trade Zones, Suite 1001, 1000 Connecticut Avenue, N.W., Washington, D.C. 20036 (unpaid volunteer position)*
1990 to 1994:	*Associate, Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004*
1986 to 1989:	*Deputy Director, Office of Trade and Tariff Affairs, U.S. Department of the Treasury, 1500 Pennsylvania Avenue, N.W., Washington, D.C. 20220*
1982 to 1985:	*Special Assistant to the Assistant Secretary, Office of Enforcement and Operations, U.S. Department of the Treasury, 1500 Pennsylvania Avenue, N.W., Washington, D.C. 20220*
1974 to 1982:	*Program Analyst and Environmental Protection Specialist, U.S. Environmental Protection Agency, 401 M Street, S.W., Washington, D.C. 20460*
Mid-to-late 1973:	*Sales representative, Nevada Chrysler-Plymouth, Inc., of Reno, Nevada (no longer in existence)*

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

I have not had military service.

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

Honorary director award for outstanding volunteer service, National Association of Foreign-Trade Zones, 1996.

U.S. Department of the Treasury, award for outstanding service to the Department, 1989.

Recognitions for outstanding performance, 1983 to 1989, U.S. Department of the Treasury.

10. **Bar Associations**: List all bar associations or legal or judicial-related committees, selection panels 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.

Based on a review of my records, I believe that I have not been a member or officer of any associations, committees, or conferences of the types described.

11. **Bar and Court Admission**: List each state and court in which you have been admitted to practice, including dates of admission and any lapses in membership. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

United States Court of International Trade, admitted March 5, 1991.

United States Court of Appeals for the Federal Circuit, admitted February 15, 1991.

District of Columbia Court of Appeals, June 16, 1980.

There have been no lapses in membership.

12. **Memberships**: List all memberships and offices currently and formerly held in professional, business, fraternal, scholarly, civic, charitable, or other organizations since graduation from college, other than those listed in response to Questions 10 or 11. Please indicate whether any of these organizations formerly discriminated or currently discriminates on the basis of race, sex, or religion - either through formal membership requirements or the practical implementation of membership policies. If so, describe any action you have taken to change these policies and practices.

To my knowledge, no organizations of which I am or have ever been an officer or member formerly discriminated or currently discriminates on the basis of race, sex, or religion, either through formal membership requirements or the practical implementation of membership policies. I list below the organizations of which I am or was a member or officer.

Member of the partnership of the law firm Hogan & Hartson L.L.P., Washington, D.C.

Member and Director, National Association of Foreign-Trade Zones, Washington, D.C.

Member, Willard Club at the Willard Hotel, Washington, D.C.

Former member of the Harvard Club at the National Press Club, Washington, D.C.

Former member, "Pactra" (no longer in existence; was a Washington D.C.-area auto collector's club)

Theta Chi fraternity, Iota Chapter, Colgate University, Hamilton, N.Y.

Phi Beta Kappa fraternity

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

I have submitted to the Committee four articles that I authored for Frozen Food Report, which was the trade publication of the American Frozen Food Institute, published until 1998. The articles are: "Country of Origin Marking of Your Frozen Food Products—What You Need to Know Now" (Spring 1997 issue); "The Uruguay Round and World Trade Organization: Where Are We Now?" (March-April 1995 issue); "The Hidden Costs of Over-Regulation" (March-April 1994 issue); and "NAFTA—Prospects in the Current Political Environment" (November-December 1992 issue).

I also submitted an article entitled "NAFTA: Will it Prevail?" This article is similar to, but shorter than, the NAFTA-related article cited above. It appeared in the December 1992 edition of Snack World, the trade publication of the Snack Food Association, publication of which ceased in 1999.

I have given a number of speeches and presentations at seminars and conferences on various topics in customs and international trade law. Except where indicated, each was accompanied by a paper that I authored or co-authored. The papers were not published in any book or periodical for general circulation but were included in the seminar or conference materials for limited distribution to attendees only. The abbreviation "NAFTZ" refers to the National Association of Foreign-Trade Zones, an organization of which I currently serve as an honorary director.

"Classification and Valuation," October 24, 2001, NAFTZ Seminar and Conference (Reno, Nevada).

"What If Customs Imposes Fines, Penalties, and Forfeitures?" October 23, 2001, NAFTZ Seminar and Conference (Reno, Nevada).

"The New Administration and the Outlook for International Trade," March 16, 2001, Conference of International Wood Products Association ("IWPA") (San Juan, Puerto Rico) (Paper was not included in conference materials and was available in unpublished form from the IWPA).

"Classification and Valuation," October 16, 2000, NAFTZ Seminar and Conference (Las Croabas, Puerto Rico).

"The Benefits of the Foreign-Trade Zone Program: Other Program Comparisons (Bonded Warehouses, TIBs, Duty Drawback)," May 8, 2000, NAFTZ Marketing and Operations Seminar (Los Angeles, California).

"Regulation of FTZ Merchandise: Jurisdiction of Agencies Other Than U.S. Customs," October 7, 1999, NAFTZ Annual Seminar and Conference (Hershey, Pennsylvania).

"Informed Compliance and Enforced Compliance: Customs Fines, Penalties, and Forfeitures," May 24, 1999, NAFTZ Marketing and Operations Seminar (Cleveland, Ohio).

"Classification and Valuation of Merchandise," October 21, 1998, NAFTZ Annual Seminar and Conference (Monterey, California).

"Country of Origin Marking," October 22, 1997, NAFTZ Annual Seminar and Conference (Tampa, Florida).

"Rules of Origin," October 22, 1997, NAFTZ Annual Seminar and Conference (Tampa, Florida).

"Classification of Merchandise," September 19, 1996, NAFTZ Conference (Phoenix, Arizona).

"Maximizing Marketability: Coordinating the FTZ Program with Other Federal Trade and Development Programs," September 16, 1996, NAFTZ Conference (Phoenix, Arizona).

"Litigation and the Foreign-Trade Zones Program: How FTZ Court Decisions Affect Your Zone--Arbor Foods, Inc. v. United States; Goodman Manufacturing L.P. v. United States; Miami Free Trade Zone Corp. v. U.S. Foreign-Trade Zones Board; Conoco, Inc. v. U.S. Foreign-Trade Zones Board; Philbo Energy, Inc. v. Brown, October 12, 1995, NAFTZ Annual Seminar and Conference (Kamuela, Hawaii)

"The NAFTA Agreement and FTZs," Legislative Seminar of the National Association of Foreign-Trade Zones, March 1, 1994 (no written text of this presentation was distributed).

"Origin Determinations under the North American Free Trade Agreement: The Harmonized System, Valuation of Materials, and Country of Origin Marking Requirements," January 14, 1994, "Working with NAFTA" Programme of the Canadian Bar Association (Toronto, Ontario).

"The Labyrinth of Trade Agencies: Survival of American Business,"(co-authored with Richard F. Ehmann, Jr.), October 26, 1993, NAFTZ Annual Seminar and Conference, Seattle, Washington

"The Successful NAFTZ Application: What Are the Essentials?" (co-authored with John J. Da Ponte, Jr., Executive Secretary, Foreign-Trade Zones Board), February 23, 1993, Annual NAFTZ Legislative Seminar

"Subtitle A of the Customs Modernization and Informed Compliance Act: An Analysis of New Procedures and Penalty Provisions," October 28, 1992, Eighth Annual Judicial Conference of the U.S. Court of International Trade (New York Hilton Hotel, New York, New York).

"Country of Origin Rules," October 10, 1991, NAFTZ Annual Seminar and Conference, Coronado, California (no text is available).

Congressional Testimony: List any occasion when you have testified before a committee or subcommittee of the Congress, including the name of the committee or subcommittee, the date of the testimony and a brief description of the substance of the testimony. In addition, please supply four (4) copies of any written statement submitted as testimony and the transcript of the testimony, if in your possession.

On July 11, 1995, at the request of, and on behalf of, the American Frozen Food Institute, I testified orally and in writing before the Subcommittee on Trade, Committee on Ways and Means, U.S. House of Representatives. The subject of the hearing, and of my testimony, was the development of internationally-harmonized rules of origin for goods in international commerce. I have provided four copies of my outline and written testimony, as submitted to the Trade Subcommittee, and of the pertinent portions of the hearing transcript.

14. **Health**: Describe the present state of your health and provide the date of your last physical examination.

My health is very good. On November 1 and 2, 2001, I underwent a physical examination. No health problem was discovered that would interfere with my fulfilling my prospective duties as a judge.

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

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

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

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

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

I have not served as a judge.

16. Public Office, Political Activities and Affiliations:

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

I have not served in an elected or appointed public office other than the positions with the U.S. Treasury Department and Environmental Protection Agency described in the response to question 7. I have had no unsuccessful candidacies for elective office and no nominations that were denied confirmation.

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

I have not held a position or played a role in a political campaign.

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

(a) Describe chronologically your law practice and legal experience after graduation from law school including:

(1) whether you served as clerk to a judge, and if so, the name for the judge, the court and dates of the period you were a clerk;

I have not served as clerk to a judge.

(2) whether you practiced alone, and if so, the addresses and dates;

I have not practiced as a solo practitioner.

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

1990 to present: ***Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004; Partner of the firm, 1994 to the present; Associate of the firm, 1990 to 1994.***

1982 to 1989: ***U.S. Department of the Treasury, 1500 Pennsylvania Avenue, N.W., Washington, D.C. 20220; Deputy Director, Office of Trade and Tariff Affairs, 1986-1989; Special Assistant to the Assistant Secretary, Office of Enforcement and Operations, 1982-1985.***

1979 to 1982: ***Environmental Protection Specialist, U.S. Environmental Protection Agency, 401 M Street, S.W., Washington, D.C. 20460.***

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

My private law practice began on January 2, 1990 as an associate with the Washington, D.C.-based firm Hogan & Hartson L.L.P. I was elected to the partnership of Hogan & Hartson in November 1993, with an effective date of January 1, 1994. This practice is concentrated in the field of international trade and customs law. Its general character has not changed during the past 13 years. Specifically, it has involved the following subspecialties of international trade law:

<u>Customs practice.</u> In my customs law practice, I have served as lead counsel in numerous administrative proceedings before the U.S. Customs Service that have resulted in successful outcomes at the administrative stages, avoiding the need for litigation in the Court of International Trade and the district courts. As examples, I have successfully represented clients, as lead counsel, in administrative protest proceedings before the U.S. Customs Service on disputed issues of tariff classification involving various classes of merchandise. I also have served as lead counsel in obtaining favorable results for clients in administrative penalty, forfeiture, and liquidated damages proceedings brought by the Customs Service. Another aspect of my customs representation involves obtaining favorable Customs Service rulings and other administrative determinations addressing issues of tariff classification, the valuation of merchandise for tariff purposes, country of origin determinations, country of origin marking issues, tariff preference programs, and other tariff-related matters.

<u>Foreign-Trade Zones practice.</u> My practice involving foreign-trade zone proceedings has resulted in the issuance of manufacturing grants of authority and favorable scope determinations by the Foreign-Trade Zones Board.

Antidumping and countervailing duty practice. *As co-counsel with my partner Lewis E. Leibowitz and other attorneys of Hogan & Hartson, I have represented clients in antidumping and countervailing duty proceedings.*

In serving as Deputy Director of the Treasury Department's Office of Trade and Tariff Affairs (1986-1989), my responsibilities also pertained to international trade and customs law. They included the review, on legal and policy grounds, of Customs Service regulations, classification decisions, and penalty actions and the legal and policy review of applications for foreign-trade zones.

In my service as Special Assistant to the Assistant Secretary (Enforcement), Department of the Treasury (1982-1985), my responsibilities included the review of regulatory actions of the Treasury Department's enforcement bureaus (including the U.S. Customs Service) and also included certain legislative matters.

My responsibilities at the Environmental Protection Agency (1979-1982) included the development and review of environmental regulations.

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

My typical former clients are U.S. corporations that engage in import and export transactions to support their U.S. manufacturing, processing, and distribution activities. I have specialized in customs matters and foreign-trade zone matters but also have represented clients in proceedings involving the antidumping and countervailing duty laws, the North American Free Trade Agreement, and the Generalized System of Preferences.

(c) (1) Describe whether you appeared in court frequently, occasionally, or not at all. If the frequency of your appearances in court varied, describe each such variance, providing dates.

I have appeared in court occasionally. The greater part of my practice is before Federal administrative agencies, including the U.S. Department of the Treasury and its bureau the U.S. Customs Service, the U.S. Department of Commerce, the U.S. International Trade Commission, the Foreign-Trade Zones Board, the U.S. Department of Agriculture, and the Office of the U.S. Trade Representative.

(2) Indicate the percentage of these appearances in

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

All of my representations in court cases have been before federal courts.

(3) Indicate the percentage of these appearances in:

(A) civil proceedings;
(B) criminal proceedings.

My law practice is almost entirely confined to the representation of clients in civil matters. During the 13-year period of my private practice, I have represented only two clients in which the proceedings were of a criminal nature; in neither of those two representations did the matter proceed to trial. In both cases, I worked with co-counsel who specialized in criminal law matters. In both cases, the proceedings also involved civil matters.

(c) (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.

One of the cases before the U.S. Court of International Trade in which I was one of four co-counsel proceeded to a judgment. The judgment was in favor of our client and was upheld on appeal. This case, Miami Free Zone Corp. v. Foreign-Trade Zones Board, et al., is described in my response to question 19, below.

(5) Indicate the percentage of these trials that were decided by a jury.

I have not tried any cases decided by a jury.

(d) Describe your practice, if any, before the United States Supreme Court. Please supply four (4) copies of any briefs, amicus or otherwise, and, if applicable, any oral argument transcripts before the U.S. Supreme Court in connection with your practice.

I have not appeared before the United States Supreme Court.

(e) Describe legal services that you have provided to disadvantaged persons or on a *pro bono* basis, and list specific examples of such service and the amount of time devoted to each.

I have participated in a recurring volunteer program at my law firm, Hogan & Hartson L.L.P., to teach legal advocacy skills, without compensation, to disadvantaged prospective law students. This course has required approximately three days of preparation and classroom time for each year in which I have participated. I have participated during many of the twelve years I have been with the firm.

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

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

(b) a detailed summary of the substance of each case outlining briefly the factual and legal issues involved;

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

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

I have set forth below descriptions of ten proceedings before courts and administrative bodies in which I served either as lead counsel or as co-counsel. All are Federal civil proceedings.

Rossborough Manufacturing Co. L.P. v. United States, Court No. 99-08-00537 (Ct. Int'l Trade 1999)

(a) date: ***Dec. 22, 1999 (date of filing of settlement agreement and consent motion)***

court: ***U.S. Court of International Trade***

judge: ***The Honorable Donald C. Pogue***

counsel: *Lewis E. Leibowitz, (202) 637-5638, Timothy C. Stanceu, and Lynn G. Kamarck, (202) 637-6545, Hogan & Hartson L.L.P., 555 13th Street, N.W. Washington, D.C. 20004, for plaintiff Rossborough Manufacturing Co. L.P.; David W. Ogden, Assistant Attorney General, David M. Cohen, Director, Commercial Litigation Branch and Reginald T. Blades Jr., (202) 514-7300, U.S. Department of Justice, Civil Division, 1100 L Street, N.W., Washington, D.C. 20530 for Defendant United States; Joe Dorn, King & Spalding, 1730 Pennsylvania Ave. N.W., Washington, D.C. 20006, (202) 737-0500, for Defendant-Intervenor Magnesium Corporation of America*

(b) *In this litigation, plaintiff Rossborough Manufacturing Co. L.P., a domestic producer of granular magnesium-based products, challenged an administrative determination by the International Trade Administration, U.S. Department of Commerce, that a particular magnesium alloy known as "AZ-10A" was within the scope of the Commerce Department's antidumping order on pure magnesium from China. Rossborough challenged in particular the retroactive application of the scope determination to eight of Rossborough's entries of AZ-10A, which Rossborough contended had liquidated by operation of law pursuant to 19 U.S.C. § 1504(d) and therefore could not be subjected lawfully to antidumping duties.*

(c) *I represented the plaintiff Rossborough Manufacturing Co. L.P.*

(d) *Together with co-counsel Lewis Leibowitz and Lynn Kamarck of Hogan & Hartson L.L.P., I drafted the pleadings and conducted settlement negotiations with the Departments of Justice and Commerce. The case was resolved through a settlement agreement and consent motion to dismiss, under which Rossborough agreed to leave judicially unchallenged the Commerce Department's final scope determination and the United States agreed that the aforementioned eight entries had liquidated by operation of law and, therefore, would not be subjected retroactively to antidumping duties.*

United States v. Rotek, Inc., Court No. 97-08-01311. (Slip Op. 98-75)

(a) *date:* *June 9, 1998 (decision on motion to dismiss); February 19, 1999 (date of execution of settlement agreement)*

court: *U.S. Court of International Trade*

judge: *The Honorable Jane A. Restani*

counsel: *Frank W. Hunger, former Assistant Attorney General, David M. Cohen, Director, Commercial Litigation Branch, A. David Lafer, (202) 305-7562, and Lucius C. Lau, (202) 307-6288, U.S. Department of*

Justice, Civil Division, and Lars-Erik A. Hjelm, Assistant Chief Counsel, Customs Service (currently, Senior Counsel, Akin, Gump, Strauss, Hauer & Feld, 1333 New Hampshire Avenue, N.W., Washington, D.C. 20036, (202) 887-4175) , for Plaintiff United States; Lewis E. Leibowitz, (202) 637-5638, Timothy C. Stanceu, and Scott M. Deutchman (currently, minority counsel to Committee on the Judiciary, B351C Rayburn House Office Building, Washington, D.C., (202) 225-6906), Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, for Defendant Rotek Incorporated.

(b) Plaintiff United States brought this action against Rotek Incorporated, a domestic (Aurora, Ohio) manufacturer and importer of "slewing rings," which are mechanical components of conveyors, cranes, and other heavy industrial equipment, to collect duties and penalty under section 592 of the Tariff Act of 1930. The principal claims of Plaintiff were that certain invoice descriptions for slewing rings on import entries filed on behalf of Rotek had failed, as a result of alleged negligence, to include a detailed description of the merchandise and had caused a loss of duties to the United States. The United States withstood a motion to dismiss that had been based on Rotek's assertion that the plaintiff, by disregarding its own regulations, had failed to exhaust administrative remedies; the court found that the failure of the Customs Service to follow its own regulations was "harmless error." Court No. 97-08-01311, Slip. Op. 98-75, June 9, 1998.

(c) Together with co-counsel Lewis Leibowitz and Scott Deutchman, I represented defendant Rotek Incorporated.

(d) Together with co-counsel, I conducted research, drafted pleadings, prepared arguments, and conducted settlement negotiations. I second-chaired the oral argument before Judge Restani on the motion to dismiss, which was presented by Lewis Leibowitz. The litigation was concluded through a settlement agreement and consent motion to dismiss.

Miami Free Zone Corp. v. Foreign Trade Zones Board et al., 20 C.I.T. 1297, 945 F. Supp. 273 (Ct. Int'l Trade 1996); affirmed, 136 F.3d 1310 (Fed. Cir. 1998).

Miami Free Zone Corp. v. Foreign Trade Zones Board et al., 20 C.I.T. 146, 914 F. Supp. 620 (Ct. Int'l Trade 1996)

(a) date: 1996

court: U.S. Court of International Trade

judge: *The Honorable Gregory W. Carman, Chief Judge*

counsel: *Gilbert Lee Sandler and Edward M. Joffe, (305) 267-9200, and Arthur K. Purcell, (212) 883-1300, Sandler, Travis & Rosenberg P.A., 5200 Blue Lagoon Drive, Suite 600, Miami, Florida 33126 for plaintiff Miami Free Zone Corp.; Frank R. Hunger, former Assistant Attorney General, Joseph I Liebman, former Attorney-in-Charge (International Trade Field Office) (now retired), Bruce N. Stratvert, (212) 264-9241, and Carla Garcia-Benites, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, 26 Federal Plaza, New York, New York 10278 and Robert J. Heilferty, Department of Commerce, Room 3622, Herbert Clark Hoover Building, 14th Street and Constitution Avenue, N.W., Washington, D.C. 20230, (202) 482-0082, for Defendant United States; Lewis E. Leibowitz, (202) 637-5638, David G. Leitch (currently, Deputy Counsel to the President, 1600 Pennsylvania Ave., N.W., Washington, D.C. 20500, (202) 456-6611), Timothy C. Stanceu, and Joanne L. Leisure, (610) 578-9134, Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, for Defendant-Intervenors Wynwood Community Economic Development Corporation, Inc. and Dade Foreign Trade Zone, Incorporated*

(b) *Plaintiff Miami Free Zone Corp. challenged Foreign-Trade Zones Board action approving application of Wynwood Community Economic Development Corporation to establish a new general purpose foreign-trade zone in the Miami, Florida Port of Entry, where plaintiff served as grantee of an existing foreign-trade zone. Miami Free Zone challenged the action on numerous grounds, principally alleging that the Board abused its discretion in approving a grant for an additional zone in the Port of Entry and in applying the Foreign-Trade Zones Act "convenience of commerce" test to a new general purpose zone where a zone already served the Port.*

(c) *Along with the three co-counsel listed above, I represented defendant-intervenors Wynwood Community Economic Development Corporation, Inc. and Dade Foreign Trade Zone, Incorporated.*

(d) *Along with co-counsel, I developed arguments and drafted pleadings for this litigation. The Court of International Trade entered judgment upholding the administrative actions of the Foreign-Trade Zones Board and approving the Board's grant of authority to Wynwood Community Economic Development Corporation, and the Federal Circuit affirmed.*

<u>*Pure Magnesium in Granular Form from the Peoples Republic of China,*</u> **Inv. No. A-570-864, 66 Fed. Reg. 49345 (Sep. 27, 2001)**

Pure Magnesium in Granular Form from the Russian Federation, Inv. No. A-821-813, 66 Fed. Reg. 49347 (Sep. 27, 2001)

Pure Magnesium in Granular Form from Israel, Inv. No. C-508-810; 66 Fed. Reg. 49351 (Sep. 27, 2001)

(a)	*dates:*	*August 2, 2001 (hearing); September 27, 2001 (date of final determination)*
	forum:	*International Trade Administration, U.S. Department of Commerce*
	deciding official:	*Richard Moreland, Deputy Assistant Secretary of Commerce for Antidumping & Countervailing Duty, Room 3099, 14th Street & Constitution Ave., N.W., Washington, D.C. 20230, (202) 482-5497*
	counsel:	*Joe Dorn, King & Spalding, 1730 Pennsylvania Ave. N.W., Washington, D.C. 20006, (202) 737-0500, for Petitioner Magnesium Corporation of America; Timothy C. Stanceu, Lewis E. Leibowitz, (202) 637-5638, and Lynn G. Kamarck, (202) 637-6545, Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, for Respondent Rossborough-Remacor L.L.C.*

(b) *In these two administrative antidumping proceedings and in the one countervailing duty proceeding, respondent Rossborough-Remacor L.L.C. challenged the preliminary determinations by the International Trade Administration of the scope of the three investigations, in order to obtain a clear delineation of the scope and to ensure that the scope of the investigations excluded all common forms of magnesium-based "desulfurization reagent," a product that Rossborough-Remacor supplies to the domestic steel industry to desulfurize iron in steel production. Rossborough-Remacor also sought an "actual use" provision for the magnesium that it imported for use in the United States in manufacturing its line of desulfurization reagents.*

(c) *I represented respondent Rossborough-Remacor L.L.C.*

(d) *I served as lead counsel, assisted by co-counsel Lewis E. Leibowitz and Lynn Kamarck, and assumed the lead role in the drafting of briefs and other filings. In its final scope determination, the International Trade Administration adopted the scope exclusion sought by Rossborough-Remacor, with the exception of the above-described actual use provision.*

Pure Magnesium from China and Israel, USITC Inv. Nos. 701-TA-403 and 731-TA-895-896 (Final) (Nov. 2001)

(a)	*date:*	*October 1, 2001 (hearing); November 2001 final determination*
	forum:	*U.S. International Trade Commission*
	deciding officials:	*Chairman Koplan, Vice Chairman Okun, and Commissioners Bragg, Devaney, Hillman and Miller*
	counsel:	*Joe Dorn, King & Spalding, 1730 Pennsylvania Ave. N.W., Washington, D.C. 20006, (202) 737-0500, for Petitioner Magnesium Corporation of America; Timothy C. Stanceu and Lynn G. Kamarck, (202) 637-6545, Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, for Rossborough-Remacor L.L.C.*

(b) *In this proceeding, Petitioner Magnesium Corporation of America sought a determination from the U.S. International Trade Commission that imports of granular magnesium from China and Israel were causing or threatening to cause injury to the domestic magnesium-producing industry. Rossborough-Remacor L.L.C., a domestic producer of magnesium-based desulfurization reagent, sought a determination that the U.S. magnesium ingot industry, consisting of petitioner Magnesium Corporation of America, should be determined to be a separate domestic producer from the granular magnesium reagent industry, of which Rossborough-Remacor is a member, and, accordingly, that granular magnesium and magnesium ingot should be regarded as separate "like products" for purposes of the Commission's injury investigation.*

(c) *I represented Rossborough-Remacor L.L.C.*

(d) *I served as lead counsel, assisted by co-counsel Lynn G. Kamarck, (202) 637-6545. Three members of the Commission found that granular magnesium and magnesium ingot constituted a single like product. Two members of the Commission found that granular magnesium and magnesium ingot constituted two separate like products. One member of the Commission found that grinders/reagent producers do not engage in sufficient production-related activity to qualify as domestic producers. All six members of the Commission found that imports of magnesium from Israel were not causing or threatening to cause injury to the domestic magnesium industry or industries.*

Grant of Authority for Subzone Status, Toyota Motor Manufacturing, Indiana, Inc. (Motor Vehicles), Princeton, Indiana, **Order No. 1201, 66 Fed. Reg. 59234 (Nov. 27, 2001)**

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(a)	*date:*	*Nov. 16, 2001 (date of issuance of Order)*
	forum:	*Foreign-Trade Zones Board*
	deciding officials:	*Faryar Shirzad, Assistant Secretary of Commerce for Import Administration and Alternate Chairman, Foreign-Trade Zones Board; Dennis Puccinelli, Executive Secretary, Foreign-Trade Zones Board, (202) 482-2862*
	counsel:	*Lewis E. Leibowitz, (202) 637-5638, and Timothy C. Stanceu, Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, for applicant Toyota Motor Manufacturing, Indiana, Inc.; Robert J. Heilferty, Department of Commerce, Room 3622, Herbert Clark Hoover Building, 14th Street and Constitution Avenue, N.W., Washington, D.C. 20230, (202) 482-0082, for Foreign-Trade Zones Board.*

(b) *In this proceeding before the Foreign-Trade Zones Board (consisting of the Secretaries of Commerce and Treasury, or their alternates), applicant Toyota Motor Manufacturing, Indiana, Inc. sought designation of its motor vehicle manufacturing facility in Princeton, Indiana as a foreign-trade subzone pursuant to the Foreign-Trade Zones Act, 19 U.S.C. § 81a-81u.*

(c) *I represented applicant Toyota Motor Manufacturing, Indiana, Inc.*

(d) *I served as principal counsel in the drafting of the necessary filings and in communications with the Foreign-Trade Zones Board. The Board issued an order granting all authority requested by Toyota Motor Manufacturing, Indiana, Inc.*

Country of Origin Marking Requirements for Frozen Imported Produce

(a)	*dates:*	*1991 to 1996* 1/
	fora:	***U.S. Court of Appeals for the Federal Circuit; U.S. Customs Service***
	deciding officials:	***Chief Judge Nies and Circuit Judges Newman and Mayer, U.S. Court of Appeals for the Federal Circuit, and the Commissioner of Customs***
	counsel:	***Robert Ted Parker, Titchell, Maltzman, Mark, Bass, Ohleyer & Michel, Four Embarcadero Center, Suite 1400, San Francisco, California 94111, now with Berg & Parker L.L.P. (same address), (415) 397-6000, for Norcal/Crosetti Foods, Inc.; David W. Cohen, Director, Commercial Litigation Branch, U.S. Department of Justice, 12124 L Street, N.W., Washington, D.C. 20530, (202) 514-7300, for the United States; Gary Jay Kushner, (202) 637-5856, Timothy C. Stanceu, and David W. Phillips, Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, for amicus Grocery Manufacturers of America, Inc.*** 2/

1/ *Country of Origin Marking Requirements for Frozen Imported Produce*, 62 Fed. Reg. 43958 (Aug. 18, 1997); 61 Fed. Reg. 38119 (Jul. 23, 1996); *Advance Notice of Proposed Customs Regulations Amendments Concerning the Country of Origin Marking Requirements for Frozen Produce Packages*, 60 Fed. Reg. 6464 (Feb. 2, 1995); *Country of Origin Marking for Frozen Produce; Implementation of T.D. 94-5; Solicitation of Comments on New Effective Date and Size and Style of Marking*, 59 Fed. Reg. 14579 (Mar. 29, 1994); *Country of Origin Marking for Packaged Frozen Produce; Suspension of Date for Compliance*, 59 Fed. Reg. 14548 (Mar. 29, 1994); *Decision Following Petition by Domestic Interested Party--Location of Country of Origin Marking for Frozen Produce Packages*, 58 Fed. Reg. 68743 (Dec. 29, 1993); *Receipt of Domestic Interested Party Petition Concerning Country of Origin Marking for Frozen Produce*, 58 Fed. Reg. 47413 (Sep. 9, 1993); *Country-of-Origin Marking Requirement on Frozen Produce Packages; Revocation of Ruling and Request for Comments Regarding Effective Date for Change in Practice*, 56 Fed. Reg. 24115 (May 28, 1991).

2/ Other parties also were involved in these proceedings.

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QUESTIONNAIRE FOR JUDICIAL NOMINEES
UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY
AUGUST 2001

I. BIOGRAPHICAL INFORMATION (PUBLIC)

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

Marian Blank Horn, born Marian Rose Blank, formerly Marian Blank Belenky.

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

(Residence)	(Office)
Chevy Chase, Maryland 20815	United States Court of Federal Claims 717 Madison Place, N.W. Washington, D.C. 20005

3. Date and place of birth.

June 24, 1943, New York, 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).

Married to Robert Jack Horn, Partner, Patton Boggs L.L.P., Attorneys at Law, 2550 M St. N.W., Washington, D.C. 20037.

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

Barnard College, Columbia University
September 1961 - June 1965
A.B., June 1965

Cornell University
Summer 1962
No degree, attended only to take an extra economics course I could not fit into my regular, college schedule.

Teachers College, Columbia University
June 1965 - August 1965
No degree, purpose was to achieve enough teaching credits for accreditation to teach in the State of New York. Certification to teach social studies in secondary schools

awarded.

New York University, Graduate School of Arts and Sciences
September 1965 - June 1966
No degree, 30 credits in American and Diplomatic History, left to attend law school.

Fordham University Law School, Fordham University
September 1966 - June 1969
J.D., June 1969

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

Judge, United States Court of Federal Claims, April 1986 to present.

Adjunct Professor of Law, The George Washington University School of Law, 1992 to present.

Woodrow Wilson Visiting Fellows Program, 1994 to present (maximum once a year).

Member, Prettyman-Leventhal American Inn of Court, 1997 to present, President, 1999 to 2000, Member at Large, Executive Committee, June 2001 to present.

Member, Charter 100 (National Women's Professional Organization), 1997 to present.

Attorney, United States Department of Interior (DOI), June 1981 to April 1986.

Principal Deputy Solicitor, United States Department of Interior (DOI), June 1985 to April 1986 and Acting as Solicitor, June 1985 to December 1985.

Associate Solicitor, Division of General Law, DOI, September 1983 to June 1985.

Deputy Associate Solicitor, Division of Surface Mining, DOI, June 1981 to September 1983.

Member, The Administrative Conference of the United States, 1985 to 1995.

Attorney, Office of General Counsel, United States Department of Energy (DOE)/Federal Energy Administration (FEA), January 1975 to June 1981.

Deputy Assistant General Counsel for Financial Incentives, Office of General Counsel, FEA, August 1979 to June 1981.

Senior Attorney, Office of General Counsel for the Strategic Petroleum Reserve (SPR), DOE, September 1976 to August 1979.

Senior Regulatory Specialist, Strategic Petroleum Reserve, DOE, September 1976 to May 1977.

Attorney, Office of General Counsel, Litigation Section, FEA, January 1975 to September 1976.

Project Manager, U.S. Department of Justice, Law Assistance Enforcement Administration, financed "Study of Alternatives to Conventional Criminal Adjudication," performed at the American University, Washington College of Law and American University, Washington College of Law, Institute for Studies in Justice and Social Behavior, October 1973 to January 1975.

Adjunct Professor of Law, American University, Washington College of Law, September 1973 to June 1976.

Associate Litigation Attorney, Arent, Fox, Kintner, Plotkin & Kahn, August 1972 to October 1973.

Assistant District Attorney, District Attorney's Office, Bronx County, New York, Deputy Chief of Appeals Bureau, August 1969 to July 1972.

Internship, United States Attorney's Office, Southern District of New York, June 1968 to May 1969.

Fordham Law School Student Internship, National Association for the Advancement of Colored People, Summer 1967.

Quite a number of years ago, I also served as an officer of the Maret School Board of Trustees, the Maret Parents Association, the National Child Research Center (a nursery school), the D.C. Partnership for Education, and the Rollingwood Citizens Association.

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.

Four-year New York State Competitive Regents Scholarship for college education; Constitutional Law Book award for Constitutional Law seminar, highest class grade for paper on "The Effect of the Extension of the Fifth Amendment Privilege Against Self-Incrimination Upon Government Reporting and Registration Requirements"; Internship, summer 1968 and fall-spring 1968-1969, United States Attorney's Office for the Southern District of New York; Dean's Medal of Recognition, Fordham University Law School, 1995; Woodrow Wilson Visiting Fellow.

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.

I have participated in the activities of the New York Bar Association, the American Bar Association (ABA), and the Federal Bar Association (FBA). I served as a member and vice chairman of the ABA Committee on Women in Criminal Justice, as a member and vice chairman for Public Relations of the FBA's Career Service Committee and as deputy chairman for Chapter Liaison, Council on the Federal Lawyers. In the spring of 1984, I was appointed by the Secretary of the Interior to be the Department's member of the Administrative Conference of the United States and served as a member of the conference until it ceased to exist in 1995. I am on the Advisory Council of the United States Court of Federal Claims. I am currently a member of the Prettyman-Leventhal American Inn of Court and served as its president in 1999-2000.

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 do not belong to any organizations which lobby before public bodies. Also, see answer to question 9, above.

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.

New York State, 1969
United States District Court for the Southern and Eastern Districts of New York, 1970
United States Court of Appeals, Second Circuit, 1970
District of Columbia, 1973
United States District Court for the District of Columbia, 1973
United States Court of Appeals, District of Columbia Circuit, 1973
United States Supreme Court, 1973

United States Court of Appeals for the Federal Circuit, 1991

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

I teach Trial Advocacy and Alternative Dispute Resolution - Negotiation, Mediation and Arbitration as an Adjunct Professor of Law at the George Washington University School of Law. I also guest lecture on government contract law and other areas of jurisdiction assigned to this court. I participate as a Woodrow Wilson Fellow, speaking to college students all over the country on a wide variety of topics from energy and environmental law to opportunities for women with children in the workplace. A lecture I gave at the Fordham University School of Law was transcribed and published with footnotes added. Horn, Marian Blank, A Trial Judge's Perspective - Promoting Justice and Fairness While Protecting Privilege, 26 Fordham Urb. L.J. 1429 (1999). I was the editor and project manager of, as well as a contributor to, a Department of Justice funded study on Alternatives to Conventional Criminal Adjudication, finalized in 1973. I also have participated in numerous seminars and given speeches at Bar Association meetings and educational institutions, including: Lectures on Government Contract Law, Constitutional Law and Ethics at the United States Air Force Academy (September 27-28, 1999); Court of Federal Claims Protest Update, speech to Naval Air Systems Command Conference (May 1999); The Utility of ADR at the Court of Federal Claims, panel discussion sponsored by the Court of Federal Claims Bar Association (April 11, 2001); Lectures on The Contract Disputes Act – Today, panel discussion at the American Bar Association Section of Public Contract Law program on The CDA at Twenty: How's it Going? Where to Now? (November 6, 1998); Government Contract Professionals, A View from the Bench (June 1998); Reflections on the Bid Protest Jurisdiction of the Court of Federal Claims, panel discussion sponsored by the Government Contracts Section of the Federal Bar Association (May 29, 1997); Judges Roundtable, Federal Bar Association Tax Law Conference (March 1997); Work and Family in Balance, New Directions in the 1990's, Fordham University Law School (May 15, 1993); and Implementation of the Infant Vaccine Jurisdiction of the Court – An Update, remarks at the Seventh Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit (May 24, 1989). On June 11, 1985, while at the Department of the Interior, I testified in Congress before the Subcommittee on Fisheries and Wildlife Conservation and the Environment, Committee on Merchant Marine and Fisheries, House of Representatives, concerning Native American involvement with endangered and threatened species. In addition, I gave speeches on legal and energy-related topics while at the United States Department of Energy and the United States Department of the Interior. Generally, I speak from notes, not from formalized speeches. I use the notes from previous speeches to prepare for future speeches, so these notes are in a constant stage of evolution. If transcripts have

been made, I do not have copies in my files. A copy of the Fordham Urban Law Journal article is attached.

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

Excellent; last complete physical examination: May 23, 2001.

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

Judge, United States Court of Federal Claims, nominated by the President and confirmed by the United States Senate. The United States Court of Federal Claims is a trial court with national jurisdiction over claims against the United States arising from government contracts, constitutional claims for government takings of property without compensation, tax refunds, patent and copyright infringement against the United States, Native American claims, civilian and military pay cases, vaccine compensation cases, and congressional reference cases.

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

(1) The ten cases selected are significant in different ways because, for example, they address an issue for the first time, involve a significant legal issue, site or government contract, or represent an important aspect of the court's jurisdiction: YRT Services Corp. v. United States, 28 Fed. Cl. 366 (1993); Supermex, Inc. v. United States, 35 Fed. Cl. 29 (1996); Bubble Room, Inc. v. United States, 36 Fed. Cl. 659 (1996), vacated, 159 F.3d 553 (Fed. Cir. 1998); CC Distributors, Inc. v. United States, 38 Fed. Cl. 771 (1997); PCL Construction Services, Inc. v. United States, 41 Fed. Cl. 242 (1998), 47 Fed. Cl. 745 (2000); Standard Manufacturing Co. v. United States, 25 Cl. Ct. 1 (1991), 42 Fed. Cl. 748 (1999); Song v. United States, 43 Fed. Cl. 621 (1999), appeal dismissed, 217 F.3d 857 (Fed. Cir. 1999) (table); Pettro v. United States, 47 Fed. Cl. 136 (2000); Berkley v. United States, 45 Fed. Cl. 224 (1999); 48 Fed. Cl. 361 (2001); Brickwood Contractors, Inc. v. United States, 49 Fed. Cl. 148, on reh'g, --- Fed. Cl. ---, 2001 WL 793228 (2001).

(2) From the time the court's computer database began systematically tracking closed cases in 1994, I have disposed of 509 cases through dispositive motion, dismissal following preliminary proceedings, settlement and trial. Prior to when the court began

tracking closed cases, I disposed of cases at approximately the same average, annual rate as following 1994. Since I began my tenure as a judge on the United States Court of Federal Claims, I have issued 243 published opinions. On rare occasions, I have issued bench rulings and unpublished opinions. The following are a list of appellate decisions which were critical of or reversed my trial court opinion.

Arens v. United States, 24 Cl. Ct. 407 (1991), vacated, 969 F.2d 1034 (Fed. Cir.), reh'g denied (1992).

A Coast Guard officer was involuntarily retired after twice being passed over for promotion. The plaintiff challenged his nonselection at the Board for Correction of Military Records, and also by filing an action in the trial court. The action in the trial court was stayed so that the Correction Board could conduct an evidentiary hearing to examine the plaintiff's claims. After the hearing, but before the Correction Board issued a decision, the plaintiff sought to withdraw his application for relief before the Correction Board. The Correction Board declined to permit the withdrawal, citing the resources already expended in gathering the witnesses, conducting the hearing, and in the post-hearing briefing.

The trial court concurred with the Correction Board's decision. The United States Court of Appeals for the Federal Circuit vacated the trial court's decision and remanded the case to the trial court with instructions that it vacate the Correction Board's decision, and order the Board to permit the plaintiff to withdraw his application for relief before the Correction Board. The Federal Circuit interpreted the Correction Board's regulations, at the time of this case, as mandating withdrawal if desired by the applicant, with no discretion for good cause to permit a case to proceed before the Correction Board.

Burnett Constr. Co. v. United States, 26 Cl. Ct. 296 (1992), rejected in Foley Co. v. United States, 11 F.3d 1032 (Fed. Cir. 1993).

In Burnett Construction Company v. United States, a government contractor brought suit against the government challenging a contracting officer's denial of its claim for equitable adjustment under the "Variation in Estimated Quantity" clause (Variations clause) incorporated into its contract with the Federal Highway Administration. The parties agreed that the contractor was entitled to compensation for 8,641,000 gallons of adjustable, overrun quantities of water used. They disagreed, however, as to whether the court should use the contract unit price ($5.00) or the contractor's actual experienced cost ($37.87) in calculating the contractor's equitable adjustment. The court found that when the Variations clause is activated, normal principles of pricing equitable adjustments should apply, which dictate that the contractor should receive its actual experienced cost. The case was not appealed. In an unrelated case, Foley Co. v. United States, 26 Cl. Ct. 936 (1992), a different judge of the United States Claims Court rejected the decision in Burnett Construction Co. v. United States, and found that the grant of an equitable

adjustment under the Variations clause requires proof of an actual increase or decrease in costs due solely to the variation. The United States Court of Appeals for the Federal Circuit affirmed the decision in Foley Co. v. United States, 11 F.3d 1032 (Fed. Cir. 1993).

Greeley v. United States, 30 Fed. Cl. 721 (1994), rev'd, 50 F.3d 1009 (Fed. Cir. 1995).

The widow of a fireman filed a claim for a survivor benefit pursuant to the Public Safety Officers' Benefits Act. The Act provides for a $100,000.00 benefit for a fireman who dies as the result of personal injury in the line of duty. Decedent had just fought a fire when he complained of chest pains and died. The fireman was agreed to have died in the line of duty, but the widow's claim was denied by the government based on a finding that the decedent died of heart disease. Benefits are not paid for death caused by pre-existing disease. The trial court agreed with plaintiff's medical experts that death was caused by a traumatic injury such as smoke inhalation or carbon monoxide intoxication, and that the benefit should be paid. The United States Court of Appeals for the Federal Circuit, however, noted that the plaintiff has the burden of showing a traumatic injury, and determined that the evidence was insufficient to support the claimed types of traumatic injury as the cause of death.

Willingham v. United States, 35 Fed. Cl. 633, aff'd, 104 F.3d 374 (Fed. Cir. 1996).

In Willingham v. United States, plaintiff challenged his involuntary separation from the Marine Corps Reserves. Plaintiff did not argue the merits of the decision to discharge him, but only argued that the military did not follow the proper procedures. Although the court found that it had jurisdiction over the claim and that it was justiciable, it decided that the government had proven that its decision to discharge plaintiff was proper, in accordance with the relevant statutes, regulations and guidelines, and was not arbitrary or capricious. The United States Court of Appeals for the Federal Circuit affirmed the trial court's decision. The Federal Circuit criticized the court, however, for failing to address plaintiff's claim that his discharge breached an implied-in-fact contract between himself and the government. Finding that the issue was purely legal and that a remand for fact finding would serve no purpose, the Federal Circuit decided to address the issue itself. Subsequently, the court rejected plaintiff's argument because it ignored the well-established principle that a military officer's status has no contractual basis.

Cincinnati v. United States, 39 Fed. Cl. 271 (1997), aff'd, 153 F.3d 1375 (Fed. Cir. 1998).

In Cincinnati v. United States, the City of Cincinnati claimed that the National Institute of Occupational Safety and Health (NIOSH) owed more than $60,000.00 in storm drainage service charges imposed by a city ordinance. NIOSH refused to pay, contending that the assessment was an unconstitutional tax on a federal entity. Plaintiff countered by claiming that its complaint was based on an implied-in-fact contract and was not a tax.

The court dismissed the complaint for failure to state a claim because the assessment was imposed on all property owners and was not the product of a voluntary purchase decision by the federal government and, thus, constituted an unconstitutional tax on a federal entity. The United States Court of Appeals for the Federal Circuit affirmed the trial court's "thorough" opinion, yet disagreed with the trial court's reasoning in one respect. While the trial court regarded the question of whether there was an implied-in-fact contract between the city and the United States as identical to whether the storm drainage service charge was a permissible fee for services or an impermissible tax, the Federal Circuit separated the two queries. The Federal Circuit found that because the assessment was involuntary there was no implied-in-fact contract, but that the involuntary nature of the assessment was not dispositive of the tax issue. As the court rejected plaintiff's claim that it had an implied-in-fact contract with the government, it did not reach the issue of whether the storm drainage service charge was a tax.

Bubble Room, Inc. v. United States, 36 Fed. Cl. 659 (1996), vacated, 159 F.3d 553 (Fed. Cir. 1998), reh'g denied (1999).

The plaintiff, a restaurant owner, brought an action against the Internal Revenue Service for a refund of Federal Insurance Contribution Act (FICA) taxes which were based on an aggregate estimate of unreported tips received by restaurant employees. Employees pay a FICA tax based on wages earned during the tax year. Employers collect the employee FICA tax from their employees by deducting the tax from wages. With some exceptions, wages include tips and employees are required to report their cash tips. The IRS used a formula to estimate unreported tip income at the plaintiff's restaurants. The trial court found for the plaintiff, concluding that the tax code did not permit the IRS to assess liability for FICA taxes on employers only, without assessing employees, and also that the formula used by the IRS was flawed.

The United States Court of Appeals for the Federal Circuit concluded that the IRS is not obligated to assess FICA taxes against each employee before it can assess FICA tax against the employer, and that using an indirect formula is appropriate when wages are understated and difficult to determine. The Federal Circuit acknowledged that the particular formula employed may have been inaccurate, and remanded for the trial court to determine whether the asserted flaws in the formula were sufficient to overcome the presumption of correctness of the findings of the Commissioner of Internal Revenue. One Federal Circuit Judge wrote a comprehensive dissent in Bubble Room, and would have affirmed the trial court. After the remand, the case settled and was dismissed. There is a split among the trial courts and also in the Circuit Courts of Appeal on this issue. See Morrison Rest., Inc. v. United States, 918 F. Supp. 1506 (S.D. Ala. 1996) (ruling for the taxpayer); Fior D'Italia, Inc. v. United States, 21 F. Supp. 2d 1097 (N.D. Calif. 1998) (ruling for the taxpayer); 330 West Hubbard Rest. Corp. v. United States, 37 F. Supp. 2d 1050 (N.D. Ill. 1998) (ruling for the IRS); Quietwater Entm't, Inc. v. United States, 80 F. Supp. 2d 1323 (N.D. Fla. 1999) (ruling for the taxpayer); LIR Mgmt. Corp.

v. United States, 86 F. Supp. 2d 340 (S.D.N.Y. 2000) (ruling for the IRS) (not appealed); Morrison Rest., Inc. v. United States, 118 F.3d 1526 (11th Cir.) (ruling for the IRS), reh'g denied, 132 F.3d 48 (11th Cir. 1997) (table); 330 West Hubbard Rest. Corp. v. United States, 203 F.3d 990 (7th Cir. 2000) (ruling for the IRS); Quietwater Entm't, Inc. v. United States, 220 F.3d 592 (11th Cir. 2000) (table) (ruling for the IRS); Fior D'Italia, Inc. v. United States, 242 F.3d 844, 851 n.12 (9th Cir. 2001) (ruling for the taxpayer and citing the trial court in Bubble Room with approval).

Massie v. United States, 40 Fed. Cl. 151 (1997), rev'd, 166 F.3d 1184 (Fed. Cir. 1999), on remand, 45 Fed. Cl. 213 (1999), rev'd, 226 F.3d 1318 (Fed. Cir. 2000).

The plaintiff suffered injuries at a Naval hospital, and filed a claim based on medical malpractice. The government entered into an agreement to purchase an annuity for the plaintiff from an insurance company rated A+ by A.M. Best. The government paid $1,300,000.00 for the annuity. Subsequently, however, the insurance company was placed in receivership and the plaintiff agreed to accept a reduced annuity, but then sued the government for breach of their agreement.

The trial court denied the government's motion to dismiss based on a lack of jurisdiction over an agreement of this type, and the United States Court of Appeals for the Federal Circuit subsequently agreed with this ruling. The trial court agreed with the government, however, that the language of the agreement did not cause the government to become a guarantor of the annuity payments after the original purchase of the annuity. On appeal, the government argued that the language in the agreement requiring purchase of the annuity from a highly rated insurance company would be rendered meaningless if the payments were nevertheless required to be guaranteed. The Federal Circuit, however, found language in the agreement which required the government to guarantee the annuity payments. The Circuit Court assumed that the government's interpretation of the provision and of the contract was on the whole reasonable, therefore, revealing a latent ambiguity because Massie's interpretation was also reasonable. Because latent ambiguities are construed against the drafter of the agreement, in this case the government, the Federal Circuit determined that the government had agreed to guarantee the annuity payments.

On remand, the plaintiff sought a lump sum payment, rather than restoration of the future annuity payments, and also an award of attorney's fees. The trial court awarded a lump sum making up the difference between the original and reduced annuity payments, but provided that the government could purchase another annuity to make up the difference in future annuity payments, which the government would guarantee, reflecting the intent of the parties in their original agreement. The Federal Circuit, however, stated that the trial court did not have the authority to enforce the original agreement, which had been breached, and directed the government to pay a lump sum in damages, rather than future annuity payments. The appellate court also stated that the plaintiff had met the test for

receipt of attorney's fees. On remand, the parties filed a stipulation for entry of judgment, and judgment was entered against the government pursuant to the stipulation.

Pomeroy v. United States, 39 Fed. Cl. 205 (1997), aff'd in part, vacated in part, 173 F.3d 432 (Fed. Cir. 1998) (table).

Plaintiff sought an award as an informer for the United States Customs Service and the United States Drug Enforcement Administration, alleging that in 1976 he furnished information to these agencies about a conspiracy to smuggle drugs into the United States which led to arrests and a large drug seizure. The complaint was filed twenty years after the drug seizure. The trial court determined that the cause of action was barred by the six year statute of limitation, 28 U.S.C. § 2501, and dismissed the case. The trial court also cited as an additional ground for dismissal of the complaint the plaintiff's failure to prosecute the case. The United States Court of Appeals for the Federal Circuit affirmed the trial court's ruling on the statute of limitations, but also reasoned that, when the trial court ruled the claim was barred by limitations, the court lacked jurisdiction of the case, and, therefore, had no authority to consider the plaintiff's failure to prosecute. That part of the trial court's judgment was vacated.

Beta Construction Co. v. United States, 39 Fed. Cl. 722 (1997), rev'd, 185 F.3d 884 (1999) (table).

Plaintiff entered into a contract with the government to replace the roof on a federal building. The contract called for the removal of asbestos-containing materials using asbestos abatement procedures. The contracting officer directed the plaintiff to use the asbestos abatement procedures in the removal of insulation adjacent to the roof membrane, because the insulation had become contaminated with asbestos during the removal of the roof membrane, which contained asbestos. Plaintiff sought the additional costs incurred for removal of the insulation. The trial court, however, held that the contract required the plaintiff to use the asbestos abatement procedures in the removal of the insulation. The United States Court of Appeals for the Federal Circuit determined that the contract did not require the plaintiff to use the asbestos abatement procedures on the insulation, and remanded the case for a determination of damages.

Green v. United States, 42 Fed. Cl. 18 (1998), rev'd, 191 F.3d 1341 (1999).

The receiver for an insolvent insurance company filed a claim for a tax refund. The trial court held that the claim had not been timely filed under the applicable statute of limitations, 26 U.S.C. § 6511(a) (1994). The United States Court of Appeals for the Federal Circuit stated that the proper tax return from which the statute began running was not the original return, but a subsequent amended return, and that the latter return was within the three-year statute of limitations. The case was remanded to the trial court to resolve the tax refund claim.

Palm Beach Isles Associates v. United States, 42 Fed. Cl. 340 (1998), vacated, 208 F.3d 1374 (Fed. Cir. 2000), aff'd on reh'g, 231 F.3d 1354 (Fed. Cir. 2000), reh'g en banc denied, 231 F.3d 1365 (Fed. Cir. 2000).

Investors bought 311.7 acres of land in Florida in 1956 for $380,190.00, of which 261 acres were sold for approximately $1 million. The remaining 50.7 acres consisted of 1.4 acres of shoreline wetlands and 49.3 acres of submerged land adjacent to the wetlands. This submerged portion of the property lies in the bed of a navigable water of the United States. Before performing work that impacts a navigable water of the United States, such as dredging and filling, a permit from the Army Corps of Engineers is required. The plaintiffs requested a permit from the Corps, which was denied. Plaintiffs filed suit, claiming that the permit denial was a regulatory taking.

The trial court found that the 49.3 acres were subject to the federal navigational servitude, so that there was no taking. The trial court also found that the 1.4 acres were part of the initial 311.7 acre parcel, for which adequate compensation was received when the 261 acres were sold for $1 million. The United States Court of Appeals for the Federal Circuit, however, defined the proper parcel for analysis as 50.7 acres, rather than 311.7 acres, and that the permit denial rendered the entire 50.7 acres, including the 1.4 acres, as having no or minimal value.

The Federal Circuit also stated that the navigational servitude provided the government with a defense to a takings claim on the submerged 49.3 acres, but viewed as a disputed issue of material fact whether the government had bona fide navigational grounds for the permit denial, and remanded the case to resolve this issue.

On petition for rehearing, the Federal Circuit stated that the 1.4 acres of shoreline wetlands were not subject to a navigational servitude defense, that the plaintiffs may have had reasonable investment-backed expectations for the 1.4 acres, and that whether the 1.4 acres were usable after a permit denial was a disputed question of fact. The case was remanded on this second issue for the trial court to determine whether or not there was a categorical taking, or a partial taking of the 1.4 acres. The case is in trial on the remand issues.

Dureiko v. United States, 42 Fed. Cl. 568 (1998), aff'd in part, rev'd in part, 209 F.3d 1345 (Fed. Cir. 2000).

A hurricane damaged the plaintiff's mobile home park. The Federal Emergency Management Agency (FEMA) assisted in the hurricane clean up, and agreed with the plaintiff to lease sites at the park in return for FEMA cleaning up the park. The government hired a contractor for this purpose, but the plaintiff claimed that the contractor damaged the park and filed a claim in the United States District Court for the Southern District of Florida. The federal district court dismissed the claims as barred by

the Stafford Disaster Relief and Emergency Assistance Act, which immunizes the government against claims arising from discretionary acts undertaken during disaster relief. See Dureiko v. Phillips & Jordan, Inc., No. 95-1441, 1996 WL 825402, at *1 (S.D. Fla. Apr. 19, 1996).

The plaintiff then sued the government in the United States Court of Federal Claims for breach of contract, a Fifth Amendment taking, and fraudulently inducing the plaintiff to enter into the lease agreements. The trial court granted the government's motion to dismiss under the Stafford Act; found that the doctrine of collateral estoppel was dispositive, given the earlier federal district court decision on the applicability of the Stafford Act; that the plaintiff had executed a release of all claims; that there was no taking; and that the trial court lacked jurisdiction over the plaintiff's fraud in the inducement claim, a tort claim. The United States Court of Appeals for the Federal Circuit held that the trial court was correct that there was no taking, and noted that the plaintiff had not appealed the trial court's adverse holding on its fraud in the inducement claim. However, the Federal Circuit reversed and remanded on the Stafford Act discretionary function issue, stating that the contract was like a statute or regulation which removed the government's discretion. The Federal Circuit also declined to give collateral estoppel effect to the federal district court's decision, since the district court found that the Stafford Act precluded only the plaintiff's tort claim, and not the contract claim before the Court of Federal Claims. Finally, the Federal Circuit stated that the plaintiff's release of "all claims of whatever nature arising from such demolition and removal" was unclear, and that, on remand, the trial court must determine whether extrinsic evidence supports the plaintiff's or the government's interpretation of the reach of the release. Dureiko v. United States, 209 F.3d at 1357.

Ecology and Environment, Inc. v. United States, 43 Fed. Cl. 490 (1999), vacated, 232 F.3d 914 (Fed. Cir. 2000) (table).

The Environmental Protection Agency awarded a contract to the plaintiff for construction of a groundwater treatment system. The plaintiff awarded a subcontract to perform the actual construction of the groundwater treatment system. When the subcontractor requested certain payments from the plaintiff, the plaintiff denied the payments, declining to include the subcontractor payment requests in vouchers submitted to the government. All vouchers which were submitted by the plaintiff to the government were paid. The trial court agreed with the government's argument that the dispute was one between the plaintiff and its subcontractor, pursuant to the subcontract between the plaintiff and the subcontractor, and that the subcontractor did not have privity of contract with the government. The trial court granted summary judgment for the government. In a very brief unpublished decision, the United States Court of Appeals for the Federal Circuit vacated the trial court's judgment, and remanded the case for reconsideration of two specific Federal Circuit decisions which were decided subsequent to the trial court's opinion: E.R. Mitchell Constr. Co. v. Danzig, 175 F.3d 1369 (Fed. Cir. 1999) and W.G.

Yates & Sons Constr. Co. v. Caldera, 192 F.3d 987 (Fed. Cir. 1999).

(3) The United States Court of Federal Claims is a trial court of limited jurisdiction. Moreover, our government contract and tax jurisdiction, which form a large segment of our practice, does not generally raise issues of a constitutional nature. Our takings jurisdiction is constitutionally based, but not each takings case is significant in legal terms, although each is very significant to the individual litigants. Citations to selected opinions raising federal constitutional issues include: Marks v. United States, 34 Fed. Cl. 387 (1995), aff'd, 116 F.3d 1496 (Fed. Cir.) (table), reh'g denied (1997), cert. denied, 522 U.S. 1075 (1998); Song v. United States, 43 Fed. Cl. 621 (1999), appeal dismissed, 217 F.3d 857 (Fed. Cir. 1999) (table); Pettro v. United States, 47 Fed. Cl. 136 (2000); Berkley v. United States, 45 Fed. Cl. 224 (1999), 48 Fed. Cl. 361 (2000).

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

Assistant District Attorney, Bronx County, New York, appointed, August 1969 to July 1972.

Staff Attorney, Federal Energy Administration and Department of Energy, appointed, January 1975 to August 1979.

Deputy Assistant General Counsel for Financial Incentives, Department of Energy, appointed, August 1979 to June 1981.

Deputy Associate Solicitor, Division of Surface Mining, Department of the Interior, appointed, June 1981 to September 1983.

Associate Solicitor, Division of General Law, Department of the Interior, appointed, September 1983 to June 1985.

Principal Deputy Solicitor, Department of the Interior, appointed, June 1985 to April 1986 and acting as Solicitor, Department of the Interior, June 1985 to December 1985.

17. Legal Career:

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

1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk.

I did not serve in a clerkship to a judge.

2. whether you practiced alone, and if so, the addresses and the dates.

I did not engage in solo practice.

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.

Judge, United States Court of Federal Claims, April 1986 to present.

George Washington University School of Law, 2000 H Street, N.W., Washington, D.C. 20052, Adjunct Professor of Law, 1992 to present. I have taught Trial Advocacy to law students in the J.D. program since I began teaching at the school. More recently, I also began teaching a course in Alternative Dispute Resolution - Negotiation, Arbitration and Mediation to L.L.M. candidates.

United States Department of the Interior (DOI), 18th & C Streets, N.W., Washington, D.C. 20240, June 1981 to April 1986.

Principal Deputy Solicitor, June 1985 to April 1986, and from June 1, 1985 to December 1985, acting as Solicitor. As Principal Deputy Solicitor and acting as Solicitor, I supervised all the Regional and Field Offices of the Solicitor's Office in the Department and acted as the chief lawyer to the Secretary and Under Secretary of DOI. The office had 6 Divisions in Washington: Division of General Law, Division of Conservation and Wildlife, Division of Surface Mining, Division of Indian Affairs, Division of Energy and Resources, Division of Audit and Investigation; 8 Regional Offices: Anchorage, AK; Portland, OR; Sacramento, CA; Salt Lake City, UT; Denver, CO; Tulsa, OK; Atlanta, GA; and Boston, MA; and 12 Field Offices in: Knoxville, TN; Charleston, WV; Pittsburgh, PA; Pawhuska, OK; Amarillo, TX; Santa Fe, NM; Phoenix, AZ; Window Rock, AZ; San Francisco, CA; Billings, MT; Twin Cities, MN; and Boise, ID. The Solicitor's Office throughout the country gives legal support to all program areas within the Department's responsibility.

Associate Solicitor, Division of General Law, September 1983 to June 1985. As the Associate Solicitor, I reported directly to the Deputy Solicitor and Solicitor and provided legal advice to the Secretary, the Under Secretary, the Assistant Secretaries, and other senior officials at

DOI. I supervised 21 attorneys, 2 paralegals, and 8 support staff in Washington, and coordinated legal work pertaining to this Division's areas of responsibility in the 8 Regional Solicitor's Offices and 12 Field Offices throughout the country. In addition to acting as the general legal practitioner for issues not covered by the other divisions in the Solicitor's Office, I was the coordinator for special projects, and chief attorney for the office of Territorial and International Affairs. The Division had 3 branches: Administrative Law and General Legal Services; Procurement, Patents & Torts; and Equal Opportunity Compliance. The Administrative Law and General Legal Services Branch provided legal advice regarding: (1) rulemaking; (2) federal personnel law; (3) labor law; (4) the Freedom of Information Act; (5) the Federal Advisory Committee Act; (6) budget and appropriations law; (7) conflicts of interest; (8) personal capacity suits against federal employees; (9) debt collection; and (10) organizations and management of the Department. The Procurement, Patents and Torts Branch handled all matters related to: (1) procurement contracts; (2) financial and federal assistance; (3) inter- and intra-agency agreements; (4) disposal of government property; (5) the interpretation, application and administration of statutes concerning patents, copyrights and trademarks; and (6) all claims submitted by members of the public under the Federal Tort Claims Act for personal injury and/or property damage. The Equal Opportunity Compliance Branch performed legal work for its principal client, the Office for Equal Opportunity, in order to help assure nondiscrimination and to defend the Department in legal challenges which alleged discrimination. The support provided to the Assistant Secretary for Territorial and International Affairs was a varied, general practice designed to meet the trust responsibilities of the United States in the Virgin Islands, American Samoa, Guam, the Commonwealth of the Northern Mariana Islands and the Trust Territories of the Pacific Islands. Sample tasks included administration of the Trust Territory Courts, assisting the office of Micronesian Status Negotiations, conducting a study of the applicability of U.S. Laws to the Territories, developing a procurement code for the Virgin Islands, working on the Medical Care program in the Marshall Islands, and resolving issues related to fishing for highly migratory fish in the open sea.

Deputy Associate Solicitor, Division of Surface Mining, Department of the Interior, June 1981 to September 1983. In this job, I assisted the Associate Solicitor and supervised 15 attorneys, 2 paralegals, and 7 support staff in Washington, as well as 17 attorneys in field offices throughout the country. The office was charged with all legal work for DOI's Office of Surface Mining, which had the responsibility of administering the Surface Mining Control and Reclamation Act of 1977.

The office was divided into three branches: (1) Litigation and Enforcement; (2) Regulation Drafting and Interpretation; and (3) State Programs (which acted as a liaison with state governments to develop the ability of the states to assume the primary enforcement role for the Surface Mining Act). I supervised all three branches, personally litigated cases when necessary, and provided ongoing legal advice to the Director and Deputy Director of the Office of Surface Mining, the Assistant Secretary for Energy and Minerals, and the Secretary and Under Secretary of DOI, while representing the Solicitor of DOI. The work involved legal analysis of situations and cases involving highly technical, and scientific information and the interpretation of complex statutory and regulatory language in areas such as mining procedures, revegetation, air and water emissions and underground and overland water supply patterns. I served as acting Associate Solicitor in the Associate Solicitor's absence on a regular basis.

United States Department of Energy (DOE)/Federal Energy Administration (FEA), 1000 Independence Avenue, S.W., Washington, D.C. 20585, January 1975 to June 1981.

Deputy Assistant General Counsel for Financial Incentives, Office of General Counsel, August 1979 to June 1981. I supervised all legal work related to financial incentives at DOE, including loan guarantees, price supports and purchase commitments for the development of synthetic and alternate fuels from resources such as coal, shale, biomass, and urban waste. In addition, I served as legal advisor to the Assistant Secretaries for Fossil Energy and Resource Applications, as well as to the Office of Energy Research. I also served as a legal advisor to the Synthetic Fuels Transition Office, chaired by the DOE Under Secretary, which supervised the creation of the $5.5-billion synthetic fuels programs, ultimately transferred to the Synthetic Fuels Corporation. The work required the application of complex legal principles, including the impact of environmental laws to complicated scientific, engineering, and financial factual patterns. For this effort, I supervised 16 attorneys and 4 secretaries in Washington and used multiple attorneys from DOE's field organization. In this job, I conducted numerous public hearings and participated in professional panels on synthetic fuels development.

Senior Attorney, Office of General Counsel for the Strategic Petroleum Reserve (SPR), 1726 M Street, N.W., Washington, D.C. 20036, September 1976 to August 1979. The mission of SPR was to expeditiously create a domestic petroleum reserve of up to one billion barrels. Work included primary responsibility to negotiate and draft

contracts for the procurement of oil terminal pipeline and barging contracts for storage sites and oil pipelines. I also served as principal legal advisor to the SPR Office of Site Operations, which had the function of operating the oil storage sites following construction and of overseeing transportation and proper handling of government oil from the point of landing on domestic shores to the storage sites. Prior to leaving the program, I was the second ranking appointee in an organization that included 8 attorneys and 3 support staff in Washington and the field. Although I was utilizing my expertise as an attorney during part of my time working on the Strategic Petroleum Reserve, I held an appointment in a non-legal program slot from September 1976 to May 1977.

Attorney, Office of General Counsel, Litigation Section, FEA, 12th St. & Pennsylvania Avenue, N.W., Washington, D.C. 20004, January 1975 to September 1976.

Functions included handling lawsuits, brought in jurisdictions throughout the country, by large oil companies, small producers, refiners, marketers, and individuals to challenge the FEA statutory and regulatory authority.

Project Manager, U.S. Department of Justice, Law Assistance Enforcement Administration financed Study of Alternatives to Conventional Criminal Adjudication, American University, Washington College of Law, 4801 Massachusetts Avenue, N.W., Washington, D.C. 20016 and American University, Washington College of Law, Institute for Studies in Justice and Social Behavior, 2139 Wisconsin Avenue, N.W., Washington, D.C. 20007, October 1973 to January 1975.

The study was sponsored and published by the American University, Washington College of Law. Duties included supervisory and coordination functions, as well as substantive research, writing, and editing. The staff was comprised of 5 full-time professionals, supplemented by the extensive use of consultants, law students, and other part-time and secretarial personnel.

Adjunct Professor of Law, American University, Washington College of Law, 4801 Massachusetts Avenue, N.W., Washington, D.C. 20016, September 1973 to June 1976.

I was an Adjunct Professor at the Law School, teaching the Introductory Legal Methods Course, which covered legal research, brief and legal memo writing, and oral advocacy.

Arent, Fox, Kintner, Plotkin and Kahn, 1815 H Street, N.W., Washington, D.C. 20006, August 1972 to October 1973. Associate Attorney, Litigation Division. Responsibilities included courtroom trial work, legal research, legal drafting and brief writing, as well as intense negotiations with clients, attorneys, and adversary parties.

District Attorney's Office, Bronx County, New York 10451, August 1969 to July 1972. Assistant District Attorney, Deputy Chief, Appeals Bureau. Responsibilities included researching, writing, and arguing cases in all the federal and state, trial and appellate courts in the State of New York, as well as preparing cases for argument in the United States Supreme Court. As Deputy Chief, supervisory responsibilities included assigning the workload and editing the briefs and memos written by the other attorneys. The job also included legislative drafting of revisions to the New York State Penal Law and the New York Code of Criminal Procedure.

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

Criminal litigation: From August 1969 to July 1972, I held an appointment as an Assistant District Attorney in Bronx County, New York. During that time, the nature of my practice was primarily criminal litigation as a prosecutor in criminal cases, although I did defend the office in a few civil proceedings in which the office was a defendant.

Civil litigation: From August 1972 to October 1973, while at the law firm of Arent, Fox, Kintner, Plotkin & Kahn, I continued as a litigator. The cases I handled were civil in nature, both as plaintiff's and defendant's attorney.

Teaching law school: I began teaching as an adjunct professor of law at American University Law School in September 1973 while at Arent, Fox, Kintner, Plotkin & Kahn. I continued to teach at the law school after leaving the law firm, while I was project manager on a major, legal study of Alternatives to Conventional Criminal Adjudication and also during part of my tenure at the Federal Energy Administration, until June 1976. I began teaching again in 1992 at the George Washington University School of Law, and continue as an adjunct at the school at the present time.

Legal research and writing: From October 1973 to January 1975, I was project manager of a major legal study financed by the United States Department of Justice on Alternatives to Conventional Criminal Adjudication. In this job, I functioned as legal researcher, writer, editor,

and manager of the project staff. We studied topics such as court administration, sentencing patterns and post-adjudication facilities, and treatment.

Civil litigation and enforcement: From January 1975 to September 1976, I handled civil, defensive litigation at the Federal Energy Administration regarding the Administration's pricing and allocation regulations.

Procurement law, general legal advice on major government programs, including administrative and appropriations law: From September 1976 to June 1981, while serving as an attorney and in staff and management positions on the Strategic Petroleum Reserve, Synthetic Fuels, Fossil Energy, and other oil and gas programs at the Department of Energy, I structured major procurement strategies for multi-million dollar programs and drafted regulations to support these programs. I also negotiated numerous contracts and financial incentive awards for feasibility studies, cooperative agreements, loan guarantees, price guarantees, and construction and support services contracts.

Litigation, enforcement, regulation drafting, procurement, patents, equal opportunity, general administrative and appropriations law, practice and supervision: June 1981 to April 1986. While at the Department of the Interior, my practice was broad, spanning legal issues and types of practice raised throughout all parts of the Department, including the areas listed above.

Trial Court Judge: From April 1986 to the present, I have served as a judge on the United States Court of Federal Claims. The cases are all civil claims against the United States.

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

As a Prosecutor in the Bronx County District Attorney's Office, my client was the State of New York, including all of its citizens. Likewise as a federal civil servant at the Federal Energy Administration, the Department of Energy and the Department of the Interior, my client was the United States, including all of its citizens. In private practice, the majority of the clients I represented were engaged in either the real estate or construction trades. Prior to joining the United States Court of Federal Claims, my particular areas of legal specialty were energy law, administrative law, procurement law, and criminal law. On the court, my areas of practice are government contracts, takings, tax, patent and copyright, Native American

claims, civilian and military pay, and vaccine compensation in claims against the United States.

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

During my experience as an Assistant District Attorney, I was involved in litigation on a daily basis. I practiced primarily in New York State courts, and occasionally in federal courts. All but a very small number of the cases were criminal, non-jury, appellate litigation. I did, however, handle arraignments on a regular basis and occasionally trials in the Criminal Court of the City of New York or the New York State Supreme Court.

During my experience at Arent, Fox, Kintner, Plotkin & Kahn, I was an associate in the litigation section of the firm. My practice was primarily non-jury, civil, with an occasional criminal pro bono case, and was in local, state and federal courts.

During my federal service at the Federal Energy Administration, the Department of Energy and the Department of the Interior, I was assigned to the Litigation Division. My practice was almost entirely in federal court, civil and non-jury. In all subsequent federal jobs, as Deputy Associate Solicitor for Surface Mining, as Associate Solicitor for General Law, as Principal Deputy Solicitor, and while acting as Solicitor, supervising active litigation sections and occasionally litigating sensitive or difficult cases, or parts of cases, was only part of my responsibility.

2. What percentage of these appearances was in:

(a) Federal courts: While in federal service - 100%, while in private practice - about 40%, while in the Prosecutor's Office - less than 5%.

(b) State courts of record: While in Federal service - none, while in private practice - about 60%, while in the Prosecutor's Office - more than 95%.

(c) Other courts: none.

3. What percentage of your litigation was:

(a) civil: While in Federal service - all, while in private practice - about 95%, while in the Prosecutor's Office - less than 5%.

(b) criminal: While in Federal service - none, while in private practice - about 5% pro bono, while in the Prosecutor's Office - more than 95%.

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.

Although I cannot remember the exact number of cases I handled in any one year during my tenure in the District Attorney's Office, I appeared as counsel of record or co-counsel in at least 60 cases per year and covered arraignments one weekend every eight weeks. While in private practice, I was generally the associate working on the case with a partner. During my tenure at the Federal Energy Administration, I handled, together with attorneys in the Department of Justice, approximately 35 to 40 cases a year. Subsequently, during my years at the Department of Energy, working on the Strategic Petroleum Reserve and Financial Incentives Programs, I handled primarily procurement and regulatory matters and was involved in litigation only sporadically, on condemnation, freedom-of-information and procurement matters. While at the Department of the Interior, I reviewed and rewrote sections of pleadings to be filed in litigation each day.

5. What percentage of these trials was

(a) Jury: less than 1%

(b) Non-Jury: more than 99%

18. Litigation: Describe ten of the 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, address and telephone numbers of co-counsel and of principal counsel for each of the other parties.

Although I have participated as litigation counsel in many matters and supervised many others, the cases cited below are cases which I prepared personally, although for some of

the cases oral argument may have been handled in whole or in part by co-counsel.*

(1) In the Matter of the Petition of Anthony Panarese, Robert Cortino and Peter Iacobaccio against Hon. Frances J. Blounstein, J., 310 N.Y.S.2d 326 (1970), order affirmed. This case presented a difficult double jeopardy question and was also my first appeal in the Court of Appeals of the State of New York, the highest appellate court in that state. I represented the People of the State of New York by writing the brief for presentation to the Court. The final order affirmed the decision of the Court below, dismissing the order of the Intermediate Appellate Court, which had dismissed, without opinion, the petition to prohibit the trial on April 13, 1970. A panel of seven judges heard the case. My co-counsel on the case was my supervisor, Daniel J. Sullivan, then Chief of the Appeals Bureau in the District Attorney's Office. Opposing counsel was Norman J. Mordkofsky, Bronx, New York. I researched and wrote the briefs and assisted in preparing for oral argument.

(2) The People of the State of New York against Joseph Capra. Briefs in this case were presented to the United States Court of Appeals for the Second Circuit in September 1970. It was an appeal from an order of the United States District Court for the Southern District of New York, remanding a state criminal case for trial to the Supreme Court of the State of New York, County of Bronx. The case was significant because, normally, State criminal cases did not reach the federal court. I represented the People of the State of New York by preparing the written briefs and motions and by presenting the oral argument. My co-counsel were my supervisor, the Chief of the Appeals Bureau, Daniel J. Sullivan and the District Attorney of Bronx County, Burton B. Roberts. No decision was reported, but the case was remanded for trial to the State Court.

(3) Julio Vasquez against the People of the State of New York, 402 U.S. 968 (1971), appeal dismissed. This case, which was submitted to the Court during the October 1970 term of the Supreme Court of the United States, was an appeal by a defendant of a conviction for loitering for the purposes of using narcotic drugs and possession of a hypodermic needle. After a hearing to determine whether defendant was an addict, he was committed to the care and custody of the Narcotics Addiction Control Commission for a period not to exceed 36 months. The case was significant because it involved constitutional challenges to Article 9 of the New York State Mental Hygiene Law. The issues were specifically whether Section 208(2) thereof violated the Due Process Clause of the Fourteenth Amendment in that a finding of addiction could be made upon a finding

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* Although I have kept copies of pleadings in some cases I prepared, I did not keep copies of opponents' papers and cannot recall the names of counsel for the other parties. Moreover, the records are not easily obtainable or have been placed in archives by the state and federal offices in which I worked. Some of the cases also continued long after I transferred out of the office handling the matters so I was not involved in the ultimate disposition of the case.

of a preponderance of the evidence; whether Section 207(5) violated the Fifth, Sixth and Fourteenth Amendments, in that post-arrest statements made by the defendant about his status as an addict were admissible at the addiction hearing; and whether Sections 208(4a) & (5) violated the Eighth Amendment of the Constitution, in that certification to a narcotic facility was deemed a judgment of conviction by these provisions. I represented the People of the State of New York by writing major portions of the appellate briefs and helping to prepare for oral argument, along with co-counsel, Daniel J. Sullivan, then Chief of the Appeals Bureau. Burton B. Roberts, the District Attorney in the Bronx County District Attorney's Office, argued the case before the Supreme Court.

(4) The People of the State of New York against Calvin Frazier and The People of the State of New York against James A. Thomas, Warden, 316 N.Y.S.2d 434 (1970), judgments and order affirmed. This case was presented to the seven justices of New York's highest appeals court, the Court of Appeals, in the fall of 1970. Both cases were unanimously affirmed, without opinion, as reported on November 13, 1970. I prepared the briefs and argued the cases. The cases involved appeals of convictions of two counts of murder. I argued the cases, reviewed the difficult factual record and prepared the briefs. The issues presented were whether guilt was established beyond a reasonable doubt and whether defendant's allegation that his clothes were illegally seized and illegally introduced into evidence violated his rights.

(5) The People of the State of New York against Charles McClain. This unreported case was presented to five judges of the New York Supreme Court, Appellate Division, First Department in 1971. I reviewed the record, prepared the briefs and argued the case before the court. In this case, defendant had been convicted of first degree murder and rape. It was a brutal case and significant because defendant represented a serious threat to society. In addition, legal and factual issues of concern, including alleged prosecutorial misconduct, ineffective counsel, and bias on the part of the trial judge, were raised.

(6) The People of the State of New York against James Wilkins, 321 N.Y.S.2d 87 (1971), affirmed in part and dismissed in part. This case was submitted to the seven justices of the New York State Court of Appeals, the highest appeals court in New York, in 1971. Defendant was appealing his conviction for manslaughter in the first degree. I reviewed the record, prepared the appendix and briefs, and argued the appeal. Co-counsel for the purpose of review was my supervisor, Daniel J. Sullivan. Defendant's counsel were Jack Himmelstein, Jack Greenberg, Conrad Harper, and Elizabeth B. DuBois, then of 10 Columbus Circle, New York, NY 10013.

(7) The People of the State of New York against Frank Campanale, 322 N.Y.S.2d 633 (1971), unanimously affirmed, no opinion. This murder case was prepared and submitted to the New York Supreme Court, Appellate Division, First Department in April 1971. I represented the People of the State of New York. The issues included, among others, the severance of the several defendants, alleged improper impeachment of a defendant during

trial, alleged improper admission into evidence of bullets and suitcases, alleged impropriety of a station house identification and the use of the husband-wife privilege. Opposing counsel was J. K. Koplovitz.

(8) The People of the State of New York against Larry Johnson, a/k/a Larry White, and Boyce Thompson, 327 N.Y.S.2d 546 (1971), unanimously affirmed, no opinion. This case was submitted to the five judges of the New York Supreme Court, Appellate Division, First Department, in November 1971. Defendants had appealed their convictions of murder. The issues on appeal were whether, given the complex factual record, the defendants' guilt had been proven beyond a reasonable doubt, whether the Court's alteration of the indictment just prior to introduction of evidence had been proper, and whether the judge's charge to the jury had been free from error. I represented the People of the State of New York by reviewing the record, preparing the briefs, and arguing the case. Opposing counsel was L. P. Zamzok.

(9) The People of the State of New York against Rudolph Prisco, 334 N.Y.S.2d 905 (1972), order affirmed, all concur. In this case, the defendant had been convicted of the crimes of promoting gambling in the first degree and possession of gambling records in the first degree and sentenced to one year in prison. The case was significant because at the time, defendant was an individual of some notoriety and the disposition of this case represented a successful prosecution where other federal and state prosecutors had failed to accomplish the same result. I represented the People of the State of New York on the appellate cases and wrote and argued the cases in the New York courts, including in the highest appeals court in New York, the Court of Appeals of the State of New York. The conviction was affirmed and the defendant was ordered to serve time in prison. Opposing counsel was Irving Anolik.

(10) Autotronic Systems, Inc. against Frank G. Zarb. In this unreported case, in which I represented the defendant, Frank Zarb, then Administrator of the Federal Energy Administration, plaintiff challenged the Federal Energy Administration's "Guidelines for Supplier and Base Period Use of New Gasoline Retail Sales Outlets." The allegations included charges that there had been violations of the Administrative Procedure Act during the pertinent rulemaking, that the Guidelines were inconsistent with Federal Energy Administration regulations and relevant governing statutes, that the Guidelines' definition of "aggrieved parties" contravened the federal antitrust laws, and that a particular assignment granted to a Texas station was arbitrary and capricious and unsubstantiated by the evidence. This hotly contested suit was significant at the time because the outcome of the suit could have affected the ability of small gas stations to enter the market. The case was filed in the United States District Court for the District of Columbia and litigated during 1975 and 1976. I prepared the pleadings and briefs. Co-counsel from the Civil Division at the Department of Justice were Bruce G. Forrest and his supervisor, Stanley D. Rose.

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

Although I have spent large portions of my career as a litigator and supervisor of litigation, (including all of the time prior to joining the Federal Government and significant portions as a government attorney) my practice also demonstrates a significant involvement with procurement activities, regulatory development and responsibility for personnel and tort cases, many of which settled prior to litigation.

At the Federal Energy Administration and the Department of Energy (DOE), while an attorney in the Office of General Counsel, in addition to litigation responsibilities, I assisted in drafting regulations and advising program managers. Also at DOE, while assigned to represent the Strategic Petroleum Reserve (SPR), I was responsible for negotiating and drafting contracts to procure oil, oil pipeline and storage capacity and served as the principal legal advisor to the SPR Site Operators Office, which managed the oil storage sites and the movement of purchased oil to those sites. Procurement activities were conducted in accordance with a combination of both civilian and military procurement regulations. Also, as the Deputy Assistant General Counsel for Financial Incentives, at DOE, I handled a wide range of procurement activities involving grants, cooperative agreements, price supports, loan guaranties and contracts, as well as any associated patent and licensing issues.

At the Department of the Interior (DOI), as the Deputy Associate Solicitor for Surface Mining, in addition to litigation activities, I supervised and performed regulation drafting and interpretation tasks and worked closely with state governments regarding surface mining programs. I also served as the advisor to the senior program managers. When I became the Associate Solicitor for General Law, I assumed responsibility for all legal procurement and patent activities at DOI, this time for agencies such as the Bureau of Mines, the Bureau of Reclamation, the U.S. Geological Survey, the Bureau of Land Management, the Minerals Management Service, as well as the other Bureaus at the Department. The Division of General Law also handled all personnel cases, discrimination cases, tort cases, and administrative procedure issues. Moreover, the Division advised on any international and domestic legal issues generated as a result of United States' responsibilities for the Territories of the United States, including the Virgin Islands, American Samoa and the Trust Territories of the Pacific.

In June 1985, when the Solicitor retired, I became Principal Deputy Solicitor of DOI until April 1986, and acted as the Solicitor of the Department until December 1985. As Principal Deputy Solicitor and Acting Solicitor, I was responsible for all legal activities at DOI.

Senator SESSIONS. If there are no other matters, we will stand adjourned.

[Whereupon, at 12:38 p.m., the Committee was adjourned.]

[Additional material is being retained in the Committee files.]

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

QUESTIONS AND ANSWERS

RESPONSES OF TIMOTHY M. TYMKOVICH TO WRITTEN QUESTIONS OF SENATOR RICHARD J. DURBIN
(March 5, 2003)

1. **You are a member of the Federalist Society and reportedly helped organize the Federalist Society Chapter in Colorado.**

   A. **Please describe your involvement with the Federalist Society.**

Answer: As noted in my responses to the Senate Questionnaire, I am currently a member of the Federalist Society. I have been on the Board of Advisors to the Lawyers Chapter of Colorado in the past, but do not currently serve in any capacity other than as member.

   B. **The Federalist Society has provided a forum for discussions about a number of matters you have been involved with, including the Republican Party of Colorado's campaign litigation, the litigation in *Romer v. Evans*, and Gale Norton's environmental policies. Have you been involved in preparing for, assisting with, or participating in Federalist Society events such as these or others? If so, please describe your role and please provide copies of any materials you prepared or provided, as well as any speeches or remarks you have given at Federalist Society or related events. If you do not have copies of such materials or remarks, please describe the substance of the materials or remarks, the approximate date such materials or remarks were provided, and the title of the event.**

Answer: I was asked to serve on a panel discussion in 2001 concerning attorneys who have served in the public and private sectors, but it is my recollection that I had to cancel my attendance because of a travel commitment. I also was asked to serve on a panel in 1999 regarding judicial term limits. I spoke against term limits for members of the state and federal judiciary. I do not recall any Federalist Society forums on the matters listed above at which I made a presentation or participated.

2. **According to the Federalist Society's statement of purpose: "Law schools and the legal profession are currently strongly dominated by a form of orthodox liberal ideology which advocates a centralized and uniform society. While some members of the academic community have dissented from these views, by and large they are taught simultaneously with (and indeed as if they were) the law. The Federalist Society for Law and Public Policy Studies is a group of conservatives and libertarians interested in the current state of the legal order." Do you agree with this statement? Please explain why or why not.**

Answer: I agree with parts of the statement and disagree with others. The Federalist Society in my experience has provided a forum for the discussion of issues, inviting speakers from across the political or ideological spectrum, including from such organizations as the ACLU and the National Organization of Women. These forums have provided a discussion of ideas about legal topics that many agree are interesting and informative. I am not aware of the date the statement was drafted; I think, however, the legal profession and many law schools are currently more diverse than the statement implies. Other organizations interested in the current state of the legal order to which I belong include the American Bar Association, the American Law Institute, the ABA's American Bar Foundation, the International Society of Barristers, the Colorado Bar Foundation, and the Colorado Bar Association.

3. **One of the goals of the Federalist Society is "reordering priorities within the legal system to place a premium on individual liberty, traditional values, and the rule of law." Which priorities do you believe need to be reordered? What is the role of federal judges and the courts in reordering such priorities? On which traditional values should there be a premium, and why? The Federalist Society also states that its objective "requires restoring the recognition of the importance of these norms among lawyers, judges, and law professors." If you are confirmed, how will you as a judge restore, recognize, or advance these norms?**

Answer: I am not aware of the context of the quotations in the question, but all seem to address the role of a policy commentator as contrasted with the role of a federal judge. If confirmed as a judge to the Tenth Circuit, I would set aside any personal views and apply the precedent of the Supreme Court and the Tenth Circuit.

4. **In recent remarks at a Federalist Society event, former D.C. Circuit Judge and Independent Prosecutor Kenneth Starr criticized the doctrine of *stare decisis*, stating that "deference can be quite dangerous to our constitutional order because, at the end of the day, it promotes Congressional supremacy." Do you agree with Mr. Starr's assessment of the dangers of respecting precedents that defer to Congress? Please explain why or why not?**

Answer: I am not familiar with the remarks of Judge Starr that are mentioned above and have not seen or heard his comments. In my view, the role of a circuit judge requires him or her to apply the precedent of the Supreme Court, or, if confirmed as a judge to the Tenth Circuit, the precedent of the Tenth Circuit.

5. **Mr. Starr also noted that James Madison would have agreed that "It is, in short, emphatically the province of the judicial department to say 'no,' and to say 'no' with some regularity, and particularly to Congress." Do you agree or disagree?**

Answer: I have had substantial experience in state government defending the enactments of legislative branches. There is a strong presumption of constitutionality of legislative enactments and acts of the federal Congress. Courts must grant substantial deference to

such enactments, and apply the precedent of the Supreme Court or the circuit to cases before them.

6. **Mr. Starr also told the Federalist Society that "we are not going to allow law by bureaucracy without a perfectly aggressive muscular judicial check."**

A. Do you agree with this sentiment? Why or why not?

Answer: As with legislative enactments, courts under the *Chevron* doctrine apply substantial deference to regulatory agencies. My experience in state government involved defending regulatory enactments of state agencies under similar standards of review. If confirmed as an appellate judge, I will apply the precedent of the Supreme Court or the Tenth Circuit to cases involving regulatory matters.

B. How much deference is owed, for example, to the EPA's exercise of discretion in challenges to environmental regulations?

Answer: As I stated in response to question 6(a), the EPA is entitled to substantial deference under the *Chevron* doctrine. The Court in *Chevron* held when reviewing an agency's interpretation of a statute, the court must first determine "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." The Court went on to hold that if Congress has not addressed the specific issue, or if the statute is ambiguous with respect to the issue, "the question for the court is whether the agency's answer is based on a permissible construction of the statute." The Court in Chevron also stated "if Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." The Supreme Court has accordingly established the standard of review in such cases, and I would, if confirmed, apply that precedent to cases involving regulatory agencies.

C. How has the non-delegation doctrine affected agency rule-making and discretion?

Answer: I have not practiced in cases involving federal agency rule making and the non-delegation doctrine. My experience at the state level is that the courts will defer to federal administrative officers where federal and state agencies conflict or overlap and the authority of the federal agency will prevail over that of the state agency. If confirmed as an appellate judge and presented with a case involving agency rule making, I would apply the precedent of the Supreme Court and the Tenth Circuit.

7. **Mr. Starr also stated that the Supreme Court's decision in *Board of Trustees of the University of Alabama v. Garrett*, 121 S. Ct. 955 (2001) has "the ultimate meaning that non-consenting states may not be sued, even by private individuals in federal**

court, each individual having a very poignant and moving and sympathetic story." Do you agree? Please explain why or why not.

Answer: I am not aware of the comments presented by Judge Starr and have not had an opportunity to review the entire scope of his remarks. Generally speaking, *Garrett* held that "Congress is the final authority as to desirable public policy, but in order to authorize private individuals to recover money damages against the States, there must be a pattern of discrimination by the States which violates the Fourteenth Amendment, and the remedy imposed by Congress must be congruent and proportional to the targeted violation." However, in explaining its holding the Court went on to explain that disabled citizens have a number of alternative methods of redressing unlawful state discrimination, including (1) a suit for money damages in state court; (2) a suit for injunctive relief in federal court; (3) a suit for back pay in federal court; and (4) the federal government can file suit on their behalf in federal court for money damages or injunctive relief.

8. **Mr. Starr also stated, "Is the Court willing to be the policeman? It did so in *Bush v. Gore*, and asserted its supremacy over a runaway state supreme court that was simply ignoring the structure of federal law, as well as a specific mandate in round one." Do you agree with this assessment? Please explain why or why not.**

Answer: I have not had the opportunity to review the context of Judge Starr's comments, nor have I been presented with a case in my practice involving *Bush v. Gore*. Unlike the Supreme Court, however, the federal courts of appeal have limited ability to review decisions of state supreme courts. More frequently on matters involving state law, the federal courts may certify questions to state appellate courts.

9. **During a recent Federalist Society presentation on "Environmental Law in the 21st Century," Becky Norton Dunlop, a Senior Vice President at the Heritage Foundation, stated: "[F]ederal environmental laws generally, and EPA in particular, often prevent states from adopting innovative enforcement regimes that would provide the same or significantly more environmental protection at a lower social and economic cost." Do you agree with this assessment? Please explain why or why not.**

Answer: I am not aware of when or in what context Ms. Dunlop made her remarks. Generally, federal law will displace state law on matters where the regulations conflict. If confirmed as a federal judge, I will apply the precedent of the Supreme Court and the Tenth Circuit to such cases. The experience of state regulators in Colorado in working with federal agencies such as the EPA was overall positive while I was in state government. My experience in state government is that federal and state regulators and enforcement agencies have common objectives and should work together to achieve complementary environmental goals.

RESPONSES OF TIMOTHY M. TYMKOVICH TO QUESTIONS OF SENATOR FEINSTEIN
(February 26, 2003)

1. ***Romer v. Evans*: Protecting Gays from Discrimination**

Mr. Tymkovich, in *Romer v. Evans*, you defended a state constitutional amendment—commonly known as "Amendment 2"—before the Supreme Court. Amendment 2 barred state and local governments' laws or ordinances from protecting gays against discrimination. The Supreme Court struck down the amendment ruling that "singling out a certain class of citizens for disfavored legal status" served no legitimate state interest, but rather in Colorado's case, it made homosexuals unequal to everyone else.

If Amendment 2 had been upheld, not only would public institutions and accommodations be free to discriminate against gays and lesbians, they would also have no legal recourse, "no matter how public or widespread the injury." The majority in the *Romer* case held that such state action was impermissible under the Fourteenth Amendment.

QUESTIONS:

a. **Mr. Tymkovich, how is your view of the U.S. Supreme Court's ruling in *Romer v. Evans* different today than it was nearly six years ago, when you strongly criticized the Majority's reasoning, as well as the outcome of the case?**

Answer: *Romer v. Evans* is binding precedent of the Supreme Court. If confirmed as an appellate judge, I will apply the decision. My comments on the *Romer* decision were made at the invitation of the University of Colorado Law Review. I took on the role of an academic when writing the article, in conjunction with my co-authors. The purpose of the article was not only to explain the state's argument, but also to encourage debate about the Court's decision.

b. **Could you please explain how the Court should have applied a Fourteen Amendment—Equal Protection analysis?**

Answer: In the State's brief before the Supreme Court, it argued that the Court should apply rational basis review to the Amendment rather than strict scrutiny, which had been applied by the Colorado Supreme Court. The U.S. Supreme Court did apply the rational basis test.

2. ***Romer v. Evans***

After the passage of Amendment 2, a national boycott of Colorado was undertaken, which, coupled with a decline in tourism, may have cost the State $120 million in lost revenue. Yet, Amendment 2 had other, more substantial costs. **Hate crimes increased by as much as 800% following its passage, which is consistent with the effect of anti-gay rights campaigning in other states.**

QUESTIONS:

a. Could you please explain how you came to the decision to defend the referendum?

Answer: The Colorado Governor and Attorney General have a constitutional duty to defend state laws, including voter initiatives. Amendment 2 was one of several voter initiatives the state had a duty to defend.

b. Now that this case is over, can you assess whether you agree with the arguments that you were making at the time?

Answer: The State made the best legal arguments it could under applicable judicial precedent at the time consistent with applicable rules. The job of the Attorney General is to make arguments supported by the law. The personal views of the lawyers that represented the State were not relevant to their obligation to defend state laws. If confirmed as an appellate judge, I would similarly set aside personal views and apply the precedent of the Supreme Court and the Tenth Circuit.

c. Had Colorado adopted a referendum that protected gays against discrimination, would you have defended that measure as vigorously as you had defended Amendment 2?

Answer: Yes, without question. The job of the Office of the Attorney General is to defend state laws enacted by the legislature and the voters.

3. ***Romer v. Evans – Federalism***

Mr. Tymkovich, Colorado's Amendment 2 was enacted for the purpose of repealing or preventing existing statutes, regulations, ordinances, and policies of state and local entities that barred discrimination based on sexual orientation. At the time of the amendment's enactment, the Cities of Aspen and Boulder, and the County and City of Denver, had erected such anti-discrimination measures.

During the oral arguments in *Romer v. Evans*, you argued that the purpose of the State's constitutional amendment was to "preempt State and local laws that extended special protections." And that "[i]t was a response to political activism by a political group that wanted to seek special affirmative protections under the law."

You claimed that the purpose of Amendment 2 was to deny "preferred legal status" to gay people, "which could conflict with civil rights protections of other citizens." You mentioned freedom of religion and freedom of association as examples.

QUESTIONS:

a. Specifically, how would an anti-discrimination ordinance interfere with the civil rights of another protected class?

Answer: The oral argument before the Supreme Court was based on the record developed below in the case. Amendment 2 was the result of a citizen initiative in which the proponents argued that the political debate involved claims of equal rights, on the one hand, and "special rights," on the other hand. The Amendment's text said it was designed to prevent laws that extended "minority status," "quota preferences," "claims of discrimination," or "protected status" on the basis of sexual orientation. During the political campaign prior to the adoption of the measure, the proponents argued against extending state and local discrimination laws to new groups and noted the fiscal constraints already faced by state enforcement agencies. The State's argument was therefore that the voters might have rationally concluded that existing civil rights enforcement might have been adversely affected by the extension of state and local anti-discrimination laws. The trial court found that associational rights were a "compelling" basis for the measure but found that it was too poorly drafted to survive.

b. Under the constitutional scheme you defended, would a hospital have been permitted to turn away a gravely ill patient on account of his or her sexual orientation. If YES, is that an acceptable result of Amendment 2? If NO, please explain why?

Answer: The State defended Amendment 2 in a facial challenge to its constitutionality. Since the Supreme Court found it to be unconstitutional, the Amendment was never applied to a particular factual circumstance. The State argued that Amendment 2 would not have displaced the protections of the Fourteenth Amendment's equal protection clause available to gays, lesbians, and bisexuals.

c. Could you explain where you draw the line between deference to the will of the majority and the protection of rights of the minority?

Answer: The protections of the Constitution are supreme, and any voter enactments such as Amendment 2 must be measured against the Constitution, including provisions such as the Equal Protection Clause that function to protect minorities. If confirmed as an appellate judge, I would apply the precedent of the Supreme Court and the Tenth Circuit in answering such questions.

4. **Judicial Temperament**

Mr. Tymkovich, after the Supreme Court struck down the Colorado constitutional provision, you wrote an article in the University of Colorado Law Review sharply criticizing the Court's decision in *Romer v. Evans*. In the article you wrote:

"With the wave of the judicial pen, Justice Anthony Kennedy and five of his colleagues on the Supreme Court dismissed as illegitimate the desire of Colorado voters to prohibit special legal protections for homosexuals. *[Romer v.] Evans* is more than simply an unsatisfactory decision interpreting rationality review under the Equal Protection Clause. **Rather, it is an important case study of the Supreme Court's willingness to block a disfavored political result—even to**

the point of ignoring or disfiguring established precedent." *(See* Univ. of Colorado Law Review Article at 287-88.)

***QUESTION:* Do you believe this writing reflects the appropriate temperament of a candidate for the Federal Court of Appeals?**

Answer: I wrote the law review article at the invitation of the University of Colorado Law Review, along with several other practitioners and legal scholars who participated in a symposium on the *Romer* decision. The purpose of the article was not only to explain the state's argument, but also to encourage debate about the Court's decision. I joined many scholars, even those who agreed with the Court's result, who have written that the majority opinion did not clearly apply rational basis analysis under then existing authority. I strongly respect the role of the Supreme Court in deciding difficult cases, and, if confirmed as an appellate judge, I will have no problems in applying *Romer*. As an aside, my nomination has been supported by the opposing counsel in *Romer v. Evans*, Governor Romer, who was the defendant in the case and is currently the Superintendent of the Los Angeles public school system, as well as a number of justices of the Colorado Supreme Court who served at the time the case was in the state judicial system.

5. **Judicial Temperament/Judicial Activism**

Mr. Tymkovich, in the same law review article, you also criticized the Justices' questions, stating:

"While the purpose of this article is not to critique the Supreme Court's oral argument process, it is safe to say that oral argument seems to have become less and less relevant to the ultimate 'judging' of a case and that the Court's format leads more to **judicial histrionics** than to Socratic dialogue. . . .

You continued by adding,

"That leaves the critics of *Romer* with the inevitable conclusion that the case is merely **another example of *ad hoc*, activist jurisprudence without constitutional mooring."**

QUESTIONS:

a. **Please explain what you meant by that statement and, more specifically, where you found the Supreme Court to be without "constitutional mooring," as you put it.**

Answer: As I noted above in my response to question 4, I have, as a number of scholars have done, commented on the legal reasoning of the Court under the existing

precedent. However, I believe an appellate judge has to set aside his or her personal views and faithfully apply applicable Supreme Court precedent.

b. Do you believe this writing reflects the appropriate temperament of a candidate for the Federal Court of Appeals?

Answer: As I noted above in responses to questions 4 and 5(a), many scholars have written about the *Romer* decision. At the symposium at which the article you referenced was submitted, many of the law professors who supported the outcome of the decision criticized the legal reasoning used by the Court. One of the purposes of the article was to encourage debate about the Court's decision. However, I recognize that the role of a judge and the role of a scholar or advocate are quite different. I strongly respect the role of the Supreme Court in deciding difficult cases, and, if confirmed as an appellate judge, I will have no problems in applying *Romer*.

6. **Reproductive Rights**

Mr. Tymkovich, on March 1, 1996, you testified before the Senate Governmental Affairs Committee in support of "restoring the balance of power to the States" and "the continuing effort to return to the States matters which properly belong within their control."

You cited as an example of Federal intrusion into matters of State concern the Federal court ruling regarding State responsibilities under the Medicaid program. As Solicitor General, you had unsuccessfully defended in Federal court a Colorado provision that prohibited State Medicaid funding to women who sought to terminate pregnancies that were the result of rape or incest.

The Federal District Court struck down the State law in *Hern v. Beye*, ruling that it directly conflicted with Federal law. The 10th Circuit Court of Appeals, to which you are seeking to be appointed, unanimously affirmed it.

Before the Senate Committee you observed, "[t]his problem could have been avoided if Federal officials clearly understood their own responsibility to protect State prerogatives." However, Congress clearly understood the States' prerogatives when it permitted States to choose whether or not to participate in the Medicaid program. If Colorado had chosen not to participate in Medicaid, it would not have been required to fund abortions whatsoever.

***QUESTION:* Could you please explain how broad a State's prerogative should be when the State uses federal funds to operate a program like Medicaid?**

Answer: The courts have held that states that access federal Medicaid funds must comply with the federal rules applicable to the program. The issue in the *Hern* case was the scope of Congress's Hyde Amendment and the extent to which it preempted state restrictions on the public funding of abortions. A number of states, including Colorado, had such restrictions at the time, and states had an obligation to defend provisions of their state laws. The testimony that I presented was that of the Colorado Attorney General, not my own. I presented the referenced testimony in 1996 on a panel with several other state attorneys general. The testimony was that of the Attorney General, not my own. I did not personally prepare the text; however, the testimony generally described the opportunities for innovation with state programs that could be a model for other states or Congress.

8. **Medicaid Funding of Abortion Services in Colorado**

The freedom to choose is a fundamental freedom, but restrictions on funding make it an unattainable choice for many women. Since 1977, the so-called "Hyde Amendment" has prohibited federal Medicaid funds from paying for most abortions for low-income women. In its current form, the Hyde Amendment bans federal funding for abortions except in cases of rape, incest, or life endangerment.

Some States have tried to go even further and deny Medicaid funding to some of our most vulnerable citizens even in cases of rape and incest. Colorado is one of those States, in that Colorado passed by referendum a constitutional amendment prohibiting the public funding of abortion except to save the life of the woman.

In 1995, in the case of ***Hern v. Beye,*** the Tenth Circuit Court of Appeals, the court you would join should you be confirmed, affirmed the district court and held that Colorado must fund abortion services in cases of rape and incest in its Medicaid program. You were part of the team that petitioned the U.S. Supreme Court for review of the Tenth Circuit decision, at which point the name of the case was Weil v. Hern.

QUESTIONS

a. How did you become involved with this case?

Answer: I did not work directly on the case in the district court or Tenth Circuit. My involvement was as a result of my position as Solicitor General where I reported to the Attorney General on cases brought against state agencies, including *Hern v. Beye*. The state had a duty to defend the constitutional provision that was at issue in that case.

b. Here the Colorado Department of Health Care Policy had to reconcile conflicting requirements of the State constitution and the federal Medicaid law. Did you consider defending this policy to be mandatory or discretionary for the Attorney General of Colorado?

Answer: The client in the case was the Department of Health Care Policy and Financing, which believed it had a duty to defend the state law at issue in the case. At the time of the case, I

recall that there were a number of cases pending in other parts of the country raising many of the same issues under similar provisions of other states' laws.

c. Were you involved in the decision-making process which led to that case being appealed to the Supreme Court?

Answer: The client agency, Governor Romer and the Attorney General made the decision to appeal the case to the Supreme Court. I was not the lead attorney on the case and my role would have been to review the decision of the Tenth Circuit and the other judicial decisions on similar issues.

d. Did you consider petitioning the U.S. Supreme Court for certiorari to be mandatory or discretionary for the Colorado Attorney General?

Answer: The attorney general would have a duty to appeal a decision if asked to do so by the client agency unless to do so would be groundless and frivolous.

e. What was your role in the preparation of the Petition for Certiorari in that case?

Answer: I did not personally prepare the petition for certiorari, but may have reviewed a draft of the petition. While I do not recall my specific involvement in the case, as I was not the lead attorney, my role as Solicitor General would have been to review the decision of the Tenth Circuit and other judicial decisions on similar issues.

f. Did you agree with the arguments presented in that petition? Specifically, did you agree with the assertion that Colorado should not have to adhere to the requirements of the "Hyde Amendment" which requires States participating in Medicaid to cover abortions in cases of rape and incest?

Answer: The arguments in the petition were based on the State's view of the applicable Supreme Court and Tenth Circuit precedent. The State's job was to present the best arguments it could to the Supreme Court, and to set aside any personal views of the lawyers of the Office of the Attorney General about the legislative pronouncement.

g. Did you agree with the Supreme Court's decision to deny certiorari in that case? Please explain your answer.

Answer: The State asked the Supreme Court to review the holding of the Tenth Circuit. While the Supreme Court did not explain its reasons for denying certiorari, I accept that determination. If confirmed as an appellate judge, I would apply the precedent of the Supreme Court and Tenth Circuit on these issues.

9. **Medicaid Funding of Abortion Services in Colorado**

In ***Hern v. Beye,*** the trial court held as follows:

"The testimony here concerning the injury which will occur to pregnant women who are pregnant as a result of rape or incest . . . is compelling to the effect that it endangers their health, in some cases, it endangers their life, and I do not weigh that very lightly in the balance, even the balance [as stated by defendant's counsel that the state of Colorado will have to withdraw from the Medicaid program].

As you know, findings of fact by the trial court will be disturbed on appeal only under the most extraordinary circumstances. Yet, in your petition, you argued that "there are no medical reasons" to finance abortion in cases of rape and incest.

QUESTIONS:

a. What was your basis for contradicting the clear factual finding of the District Court?

Answer: As I noted in my response to question 8 above, I did not prepare the petition for certiorari and was not counsel in the trial court or in the Tenth Circuit.

10. **Medicaid Funding of Abortion Services in Colorado**

In testimony before the Senate Government Affairs Committee in support of the Tenth Amendment Enforcement Act of 1996 you again argued against the federal requirement that states receiving federal Medicaid funds must pay for abortion services for low-income women in cases of rape and incest.

QUESTIONS:

a. Do you believe it is appropriate and constitutional for the Federal Government to set requirements for the Medicaid program?

Answer: As I stated in response to question 7 above, the courts have held that states that access federal Medicaid funds must comply with the federal rules applicable to the program. Under the Supremacy Clause and federal rules of preemption states cannot disregard federal requirements for such programs.

b. Alternatively, do you believe health care for the poor should be entirely up to the states?

Answer: The question raises an important public policy question and it is well settled that there is an appropriate role for both the state and federal governments on such issues.

11. **Federalism and Guns**

In *U.S. v. Lopez*, the Fifth Circuit, and later the U.S. Supreme Court, struck down a law regulating guns near schools based on the argument that Congress had overstepped its bounds. This case is one of several cases in recent years that have challenged the traditional role of Congress in addressing issues of national concern with national regulations.

QUESTION: **To what extent do you believe that Congress can regulate in the area of dangerous firearms, particularly when those weapons travel in interstate commerce, affect commerce and tourism, and have such a devastating impact on the children of this country?**

Answer: Congress has the authority to regulate interstate commerce under the Constitution. I have not studied the law or briefs at issue in the *Lopez* case. As a general matter, if confirmed as an appellate judge, I would look at the briefs and arguments of the parties challenging or defending a particular enactment, and apply the precedent of the Supreme Court or the Tenth Circuit. Legislative enactments have a strong presumption of constitutionality. My experience in defending state government makes me especially sensitive to the give-and-take of the legislative process and the care that courts must take in reviewing such enactments.

RESPONSES OF TIMOTHY M. TYMKOVICH TO FOLLOW-UP QUESTIONS OF SENATOR LEAHY
2/26/2003

Q. Not only did you defend Colorado's anti-gay ballot initiative in court, but you later wrote a law review article expressing your strong view that you were right and that the Colorado trial court, the Colorado Supreme Court, and the United States Supreme Court were wrong on the factual and constitutional questions about Amendment. Because you have publicly expressed your personal and strongly held views on this matter, I want to ask you some questions to further clarify your views:

a. At the time it was passed, you were actively involved in Colorado politics. Did you support the passage of Amendment 2?

Answer: The Amendment 2 initiative was the result of a citizen petition drive and government employees were not involved in its drafting or the resulting political campaign. The Office of the Attorney General, and I as Solicitor General, had nothing to do with the initiative's passage. I did not take a position on the initiative and defended its legality only as a part of the responsibilities of the Attorney General to defend voter enactments. I might also note that the Office of the Attorney General had an anti-discrimination policy that barred discrimination on the basis of sexual orientation, which I supported.

b. In your Colorado Law Review article you compare the Colorado measure, which singles out people based on their status as gays or bisexuals, with "certain activities [that] are considered ... 'contra bonos mores,' i.e. immoral. ... [I]nclud[ing], for example, sadomasochism, cockfighting, bestiality, suicide, drug use, prostitution, and sodomy. ..." Do you not see any constitutional difference between a law that outlaws conduct like drug dealing and a law that excludes a group of people from protection against discrimination because of their status as gays or lesbians?

Answer: The Colorado Law Review article quotes the concurring opinion in *Barnes v. Glen Theatre*, which you excerpt in your question, only for the proposition that there is Supreme Court precedent for a moral component as a rational motivation for an electorate in adopting a statewide initiative. There are significant differences between laws that prohibit criminal conduct such as drug dealing and laws involving sexual orientation. In fact, Colorado had repealed laws criminalizing homosexual conduct many years prior to the passage of Amendment 2. The question before the Supreme Court was whether the Amendment inhibited participation in the political process by identifiable groups. The State argued to the Supreme Court, as described in the Colorado Law Review article, that the issue of whether sexual orientation should be added to statewide

anti-discrimination laws was a political question for the legislature or the electorate. The Court disagreed with that position in striking down the enactment. Colorado also took the position before the courts that Amendment 2 did not preempt Fourteenth Amendment protections available to gays, lesbians, and bisexuals. Finally, I note that Colorado has added a law to its civil code that provides employment protections against discrimination on the basis of one's sexual orientation.

c. You write in your Colorado Law Review article that you view protections for gays and lesbians as providing "special treatment" for them. What is the difference between a law that protects gays and lesbians from discrimination and a similar law for African Americans, Hispanics, or people with disabilities? Do those laws also provide "special treatment?"

Answer: The political debate described in the article by the opponents and proponents of Amendment 2 involved claims of equal rights, on the one hand, and "special rights," on the other hand. The Amendment's text said it was designed to prevent laws that extended "minority status," "quota preferences," "claims of discrimination," or "protected status" on the basis of sexual orientation. The anti-discrimination laws have been extended to persons who have been subject to discrimination, but I do not believe that such laws provide "special treatment" under those provisions. At the time of the article, most states and Congress had not yet decided to include sexual orientation within general anti-discrimination provisions.

d. What is the difference between a law that protects gays and lesbians from discrimination and one that protects people who chose a certain religion from discrimination? Are such laws also "special rights" laws?

Answer: As with Title VII at the federal level, such laws are a result of policy decisions by legislative bodies. Anti-discrimination laws provide civil and criminal protections to those persons included within their ambit; there are numerous types of laws that prevent public and private discrimination on the basis of legislatively enacted status or characteristics. The scope and coverage of such laws are public policy questions for the legislative branches.

e. In your article, you describe the Supreme Court decision in Romer v. Evans as "one more example of ad hoc activist jurisprudence without constitutional mooring." If you believe Romer is "just one more example" please elaborate on others. Please cite specific examples of cases in which you believe the Supreme Court has engaged in "ad hoc activist jurisprudence."

Answer: The article refers to "critics of *Romer*," which included scholars who participated in the Constitutional Law Symposium at which the article was presented and who supported or opposed the Supreme Court's ruling. Many scholars have leveled similar critiques of the Supreme Court's cases striking down actions of Congress on disabilities, violence against women, and religious freedom. However, if confirmed as an

appellate judge, I would follow the pronouncements of the Supreme Court in cases before me.

f. In your law review article on the Romer case, you suggest that it is proper that landlords and employers be allowed to discriminate in rental and hiring decisions based on an individual's sexual orientation. You wrote, "Eliminating the liberty of landlords and employers to take account of homosexuality sends the unmistakable message that homosexual behavior, like race, is a characteristic which only an irrational bigot would consider." Can you explain the value you place on the freedom of a landlord to evict a tenant from a building simply based upon his or her sexual orientation? Or of an employer to fire a highly-performing employee merely because that person is gay?

Answer: The quotation you cite in your question comes from an amicus brief submitted on behalf of the citizens of Cincinnati. The brief argued that Amendment 2 did have a rational basis in that it protected "religious liberty and associational privacy." The article itself describes the public policy arguments that were presented to the voters during the initiative's political campaign, not my own opinion. The Denver District Court did find that the voters' concerns about religious and associational protections were "compelling" but that the Amendment was too poorly drafted to survive.

Q. In your law review article on Romer v. Evans, you called the six Justice majority opinion "an important case study of the Supreme Court's willingness to block a disfavored political result – even to the point of ignoring or disfiguring established precedent." You state that the opinion is cause "for great uneasiness about the health of self-government." The Romer opinion was written by Justice Kennedy, whom you criticize by name in your article.

a. Can you explain what you meant in calling Justice Kennedy's opinion "political"?

Answer: I appreciate the opportunity to clarify the description of the Supreme Court process in the law review article. While I did comment on the Court's legal reasoning, I was referring to the passage of Amendment 2 as a "disfavored political result" and a "political decision" of the electorate. I did not refer to the Court's decision as "political."

b. You write that this is only one "case study" of "political" decisions by the Supreme Court. Please list other opinions that you believe were "political." Was Bush v. Gore, another equal protection case, a "political" decision, in your view?

Answer: As I indicated in my response to (a) above, I did not refer to the Court's decision as "political." However, as many scholars have done, I did criticize the legal reasoning of the Court. I believe an appellate judge has to set aside his or her personal views and faithfully apply applicable Supreme Court precedent. *Bush v Gore* is binding law on the Tenth Circuit, and, if confirmed, I would be obligated to apply it.

c. If confirmed as a judge, please explain how you would treat a Supreme Court decision that you decide to be a "political" decision as compared to one that you believe was motivated by non-political motives?

Answer: I would be bound if confirmed as an appellate judge to apply the precedent of the Supreme Court regardless of my personal views about the case. I would have no personal, moral or ethical problems in applying Supreme Court law to the cases before me.

Q. You harshly criticize the Supreme Court's oral argument process in your Colorado Law Review article. You wrote:

> "[The Colorado Supreme Court] is composed of intelligent and experienced judges who are not shy about questioning counsel. Those arguments had been aggressive and comprehensive. On the other hand, the U.S. Supreme Court – for better or for worse – has taken the traditional give and take of appellate argument to extremes. .... it is safe to say that oral argument seems to have become less and less relevant to the ultimate 'judging' of a case and that the Court's format leads more to judicial histrionics than to Socratic dialogue."

a. Could you explain what you meant by the term "judicial histrionics" in referring to the Justices of the U.S. Supreme Court?

Answer: I was referring to the frequent questions of the justices, allowing limited opportunity for follow-up or extended questioning or answering. In the *Romer* case the arguing counsel entertained a question and answered on average every thirty seconds. The opportunity for dialogue was limited, and in some instances, in my view, did not allow for the full consideration of complex questions.

b. How should the Committee consider your characterization of the Supreme Court in assessing your judicial temperament and whether or not you will respect the decisions of the same Supreme Court that you seem to hold in such low regard?

Answer: My nomination has had strong support from Colorado judges before whom I have appeared. My experience before the U.S. Supreme Court in the other case I argued, *Nebraska v. Wyoming*, did not have the same level of intensity as *Romer*, and was also a basis for my comments in the article. I, of course, have the highest respect for the Supreme Court; oral argument is an important part of the legal process. As an appellate

judge, if confirmed, I hope to use the experience to better implement the give and take of oral argument.

Q. **In your 1996 testimony in favor of the Tenth Amendment Enforcement Act you talk about a "continuing effort to return to the States matters which properly belong within their control." When you stated this, what matters did you think should be returned to state control? Please identify the U.S. Supreme Court decisions since your 1996 testimony that illustrate an effort to "return to the States matters which properly belong within their control."**

Answer: I presented the testimony of the Office of the Colorado Attorney General in 1996 on a panel with several other state attorneys general. The testimony was not my own, and I did not personally prepare the text. However, the testimony generally described the opportunities for innovation with state programs that could be a model for other states or Congress. Another concern expressed by the State was the problem with unfunded mandates in congressional legislation that left it to the states to implement and pay for certain programs.

Q. In your testimony before the Senate Governmental Affairs Committee in 1996, you cite a Colorado "self-audit" program that granted enforcement immunity to polluters that voluntarily came forward and agreed to address the problem in the future. This amnesty from penalties or remediation applied to *all* polluters, no matter how egregious or longstanding their violations. The Colorado legislation was strenuously opposed by the U.S. Environmental Protection Agency because it violated Colorado's obligations under the Clean Air Act, Clean Water Act and other federal statutes and because it interfered with criminal and civil law enforcement for environmental violations. You cite EPA's refusal to refrain from prosecuting polluters under federal law as an example of an "intrusive" federal action that infringes on state prerogatives.

   a. **Do you believe that federal pollution control laws, including the Clean Water Act, Clean Air Act, CERCLA, RCRA, and other programs are intrusions into fields that should be the *exclusive* province of the state?**

Answer: The testimony of the Office of the Colorado Attorney General presupposes a strong federal role in environmental protection. However, the State believed that there also was an opportunity for innovation and invention at the state level that should be supported by federal regulators. For example, Colorado's environmental audit law, the result of a bipartisan consensus in our State, has been subsequently implemented by many states and has lead to the identification and remediation of a number of environmental sites in Colorado. Colorado complemented its environmental audit law with one of the Country's first environmental crimes unit located in an office of an attorney general. My experience in State government is that both the federal and state officials have a complementary role and should strive to work together for common environmental goals.

   b. **How exactly does EPA's decision to enforce these laws—notwithstanding a state self-audit provision—intrude into state prerogatives?**

Answer: The experience of state regulators in Colorado in working with the EPA has been very positive. Governor Romer of Colorado and his administration worked with EPA in identifying areas where the state could take the lead and other areas where the federal regulators could take the lead. I am not aware of any significant problems created by the audit law in actually cleaning up sites voluntarily identified. As I recall, many of the concerns about the law prior to its enactment were not found to exist during implementation.

Q: **You have argued in testimony against federal intrusion into state affairs; you have argued against EPA enforcement and national standards in environmental laws; and you have argued against the Motor Voter law and against Medicaid funding of abortions in the case of rape or incest—all on the basis of state rights.**

In addition, you supported a bill that would have redefined Supreme Court precedent on preemption. The Tenth Amendment Enforcement Act essentially called on Congress to eliminate implied preemption—a well-recognized form of preemption that has been consistently recognized by the Supreme Court.

Your writings indicate a desire to redefine constitutional law to promote states' rights, even if it means overturning settled law. As a circuit court judge, how would you reinterpret rulings to favor the states?

Answer: The Colorado Attorney General submitted testimony in support of legislation proposed by a number of senators in 1996. I merely presented that testimony. Many aspects of the proposed legislation are similar to Executive Order 13123, signed by President Clinton in 1999. The Executive Order directed federal agencies to be mindful of the impact of federal regulations on state governments. For example, the Order stated that federal agencies should (a) "grant the States the maximum administrative discretion possible"; (b) "consult with appropriate State and local officials to determine whether Federal objectives can be attained by other means;" and (c) "in determining whether to establish uniform national standards, consult with appropriate State and local officials as to the need for national standards and any alternatives that would limit the scope of national standards or otherwise preserve State prerogatives and authority." The role of a circuit judge in an inferior court, and important principles such as stare decisis, preclude a judge from ignoring or overturning settled law. If confirmed, my view of the judicial process and the importance of the rule of law will lead me faithfully to apply the precedent of the Supreme Court and the Tenth Circuit. It is the job of a circuit judge to apply settled law and not to ignore it.

Q. The law commonly referred to as the McDade Amendment has created problems for federal prosecutors. Federal prosecutors can now face conflicting ethical rules governing their conduct. The Guidelines that Attorney General Ashcroft gives them may say one thing, while a state code of ethics may say another. In Colorado, there was precisely such a problem when you were the State's Solicitor General. Before the Tenth

Circuit, you took the position that in order to get clarification so that he or she could do the job better, a federal prosecutor would first have to intentionally break the Colorado ethics rules and be subject to discipline, including potential disbarment. Fortunately, the Tenth Circuit disagreed with that view.

a. I am concerned that this view betrays a states' rights agenda that extends to an actual hostility towards federal law enforcement. In your view, was there anything that Colorado's federal prosecutors could have done to obtain clarification short of risking disbarment?

Answer: The question refers to *United States v. Colorado Supreme Court*, which I did not handle for the Colorado Supreme Court at the administrative level. Therefore, I do not know about any discussions addressing the concerns of prosecutors at that level. The issue on appeal was a narrow procedural issue of standing based on the posture of the case at the time it was filed. While the client decided to challenge standing in that case, there may have been a number of other opportunities to establish a "case or controversy" that would not have been objectionable to the Colorado Supreme Court and would have satisfied federal prosecutors. While I was in state government the Office of the Attorney General had an excellent working relationship with federal prosecutors and cooperated on a number of important cases.

b. As a former prosecutor, your stance troubles me. It seems that the federal prosecutors in this case were doing precisely the right thing in trying to fully understand the ethical rules before they acted. In fact, they even wrote to the Supreme Court to try to and get clarification before going to court. Why did you take the position that a federal prosecutor would have to intentionally violate ethical rules, and potentially injure an innocent third party, before getting a court to provide clarification?

Answer: As I indicated in my response to (a) above, I was not involved at the initial stages of the litigation when such decisions were made.

Q. On your Senate Questionnaire you listed as both the first and second most significant cases of your legal career the campaign finance reform case where you represented the Colorado State Republican Party, the Libertarian Party, and several state legislators in their challenge to Colorado's Fair Campaign Practices Act (FCPA). According to the Tenth Circuit decision, you attempted to argue a claim before the Court of Appeals after the claim was dismissed by the District Court. The claim involved a constitutional challenge to section 106(1) of the FCPA, which limited how a candidate could use money left over from a prior campaign. In fact, although you attempted to argue that the claim had been dismissed by the trial judge "without explanation" the Court of Appeals reviewed the transcript and found that you had actually agreed to the dismissal.

a. Did the Tenth Circuit rule that you had consented to the dismissal of one of your client's constitutional claims in open court? Did you intend to pursue the claim, but accidentally agreed to its dismissal?

Answer: I respectfully disagree with the conclusions of the Tenth Circuit on this issue. My review of the status of the issue during and after the appeal was that the district court had dismissed it without a written opinion on the lack of standing. My recent review of the summary judgment transcript shows that during the argument on standing, the district court concluded, contrary to my argument, that the party, Mr. Pankey, did not have standing to pursue one of his claims because he was a term limited elected official. Accordingly, the court stated: "I am paring it [the complaint] down on the carryover because that's the only issue that I see Mr. Pankey can raise at this point in time," apparently because of the asserted lack of standing. When asked later in the hearings on these issues (and after the portion of the hearing cited in the Tenth Circuit's opinion), the district court stated that Mr. Pankey still had a pending claim under section 106(1) that was the subject of the State's summary judgment motion on standing and the merits, which the court ultimately granted without explanation. The district court's discussion dispels any notion that the claim had been consensually dismissed. On appeal, we argued that Mr. Pankey had standing to assert the claims. There was no briefing on the issue of whether the dismissal was voluntary before the Tenth Circuit because the State did not assert that argument. As stated above, my review of the transcript confirms that the dismissal was not voluntary and that the district court granted the State's summary judgment motion. The district court did not grant summary judgment on another portion of the same provision (section 106(2)), which went to trial on its merits. On appeal, the issue raised by section 106(1) took one-half page of an 85 page brief. While the appeal was pending, the Colorado legislature modified the law pertaining to that claim, and a decision was made not to challenge the Tenth Circuit's determination through a petition for rehearing.

b. Is it correct that your client, Mr. Panckey, was the only plaintiff with standing to pursue this particular claim, so that its dismissal meant that there was no way that the Circuit Court could consider this important constitutional claim?

Answer: The Court was not asked to decide if another party had standing to challenge this provision of the statute. There were several other parties who I believe could have asserted injury in fact to challenge the provision. In any event, the statute was amended by the Colorado legislature, and was a very minor part of the overall legal challenge to the election statute.

c. Instead of confronting this potential problem head on, did you assert that the trial judge had simply dismissed the claim "without explanation?" Did you review the transcript before making this serious accusation against the trial court?

Answer: As noted above, the question of standing of other parties on this issue was not briefed before the Tenth Circuit. The district court before entering final judgment in the case, found that "subsequent legislative amendments to [the provision] renders moot Panckey's [sic] challenge." See also my response to (a) above regarding the district court's position on standing for term limited public officials.

d. In your Senate Questionnaire describing the appeal – which you list as the most important one you have ever handled -- you describe the ruling as follows: "The Tenth Circuit upheld the district court's ruling on issues which the plaintiff had prevailed and reversed several rulings adverse the plaintiffs." Why did you fail to inform the Committee that the Tenth Circuit had also upheld the district court's ruling dismissing one of your client's claims, especially when the reason for the dismissal bore so directly upon your skill as an attorney?

Answer: See my response to (a) above. As I have indicated, the Tenth Circuit upheld several other rulings of the district court adverse to plaintiffs out of the multiple issues litigated, and a number of issues were rendered moot by legislative changes before and during the appeal. The Senate Questionnaire was a capsule summary of a complex case with over a dozen parties and claims in three consolidated cases. The district court eventually awarded attorneys' fees as costs to the plaintiffs as partially prevailing parties in the case.

e. A lawyer has an ethical duty of candor to the court in matters such as this. Please explain whether you fulfilled that duty before the Tenth Circuit in this case, specifically addressing your claim in the appellate brief that the court dismissed the claim "without explanation"?

Answer: In response to (a) above I have discussed the procedural background of this issue. My review of the transcript of the proceedings makes it clear that there was no voluntary dismissal of the claim, that the district court did not provide a written opinion for the basis for the dismissal, and, accordingly, that the argument made on appeal was fair and accurate. As I indicated above, I respectfully disagree with the Tenth Circuit's opinion of this issue. However, there was a decision not to pursue the issue after the Tenth Circuit's decision for the reasons set forth above.

f. If you claim that you did not agree to dismissal of your client's claim under section 106(1) before the district court – whether by accident or not – why did you not cite the court's dismissal order either in your notice of appeal or docketing statement laying out the issues? If you did not agree to dismissal of the claim below, did you mistakenly forget to properly preserve the appeal on this claim?

Answer: The claims under this provision were cited in the notice of appeal, which included appeals of claims dismissed by the district court by summary judgment prior to the merits trial.

g. Please explain all steps you took to preserve this claim on appeal, and explain any difference you have with the Tenth Circuit's reasoning in that regard.

Answer: The claims under this provision were included in the notice of appeal. Since the provision was modified by the legislature, and was a minor part of the case, no further attempt has been made to determine whether a petition for rehearing on this part of the Tenth Circuit's ruling was warranted.

Q. **How many cases did you argue before the Colorado Supreme Court in your tenure as Solicitor General? Is that number more or less than is typical for a five-year tenure in that position?**

Answer: My records show at least seven oral arguments in the Colorado Supreme Court while I was Solicitor General. This is typical for a state Solicitor General, who has many other office responsibilities.

Q. When you defended Colorado's anti-gay ballot initiative both in the courts and in your Colorado Law Review Article, you argued that the potentially broad language of the statute should be read narrowly to preserve its constitutionality. However, when you attacked the decision made by the popularly elected Colorado legislature to reform their campaign finance system, you opposed your successor's arguments that the statute would be read and enforced narrowly so that issue advocacy groups would not be prosecuted. Can you explain why you took one position when it came to the protecting the rights of a vulnerable minority and the opposite stance when attacking efforts to reform campaign finance?

Answer: Colorado has enacted over ten citizens' initiatives over the last ten years, of which seven have been challenged in the courts. Five of these seven have been struck down by the courts. Each case stands on its own language and applicable case law. The courts will exercise their proper function to determine the ultimate constitutionality of such enactments. In the cases in which I have been involved that addressed initiatives, the State made the best arguments it could under the facts and law on behalf of the enactments. I respect the judicial decisions in these cases and, if confirmed as an appellate judge, would follow any Supreme Court or Tenth Circuit precedent in these areas.

RESPONSES OF TIMOTHY M. TYMKOVICH TO SECOND SET OF FOLLOW-UP QUESTIONS OF SENATOR LEAHY
(March 5, 2003)

1. You have stated in your Senate Questionnaire that Qwest Communications has been one of the major clients that you have represented in private practice. As you know, Qwest has been the subject of an extended investigation by the Department of Justice and SEC based upon its financial affairs. Please answer the following additional questions:

    a. **Please describe in as much detail as possible the nature of your representation of Qwest or any affiliated person or entity.**

Answer: Consistent with my obligations under the attorney-client privilege, I can state that I have represented Qwest in regulatory and appellate matters in Colorado. Most of my work for Qwest has been before the Colorado Public Utilities Commission, involving such matters as rulemaking, litigation dockets, and appeals. For the most part, the cases I have handled have involved either cases brought by the PUC or competitors regarding the scope and application of rules or regulations of the PUC. I am currently representing Qwest as co-counsel in a matter involving disputed invoices in federal court in Wyoming, and in arbitration in Colorado. The court in Wyoming recently dismissed that case. Other cases I have handled have included an appeal over rules regulating speed dialing codes, a docket regarding out of service regulations and service quality benchmarks, and a docket involving provisioning of wholesale services.

    b. To your knowledge, did you work for Qwest on any subject or matter that is now or has been within the last 18 months the subject of any subsequent investigation or inquiry by any federal or state law enforcement or regulatory agency?

Answer: Consistent with my obligations under the attorney-client privilege, I can state that I have not been involved in any matter that to my knowledge is the subject of a federal investigation or inquiry. I have described in my response to question 1 my work before the Colorado Public Utilities Commission, where some cases are brought by the Commission or its staff. There have been no state law enforcement inquiries or investigations on any matter that I have worked on to my knowledge.

    c. Have you been contacted, directly or indirectly, by any person in relation to any such investigation? If so, what was the nature of that contact?

Answer I have not been contacted by any person in relation to an investigation involving Qwest.

d. Have you retained an attorney in relation to your representation of Qwest or any affiliated person or entity? If so, please provide that person's name and contact information.

Answer: I have not retained an attorney in relation to my representation of Qwest.

Responses of William H. Steele to Senator Kennedy's Follow-Up Questions

1. In Shields v. Fort James Corporation, 167 F.Supp.2d 1322 (S.D. Ala. 2001), you rejected the racial harassment claims of black Mill employees who were repeatedly subject to denigrating comments and racial epithets.

These were some of the facts in the record:

- John Edwards a 45 year old black man had been employed at the Mill for 21 years. He was subjected to racial slurs since shortly after he was hired, about three to four days a week, four to five times a day. He heard the use of the n-word as a way of referring to blacks by his supervisor, and by his co-workers. He was exposed to discussions about "how great the Klan was." His chair was lit on fire by a white co-worker. He was assigned clean-up work, while white employees only occasionally did this work. He was also disciplined in situations where white employees were not.

- Another employee, Ronald Shields, had worked at the Mill for twenty years. He was assigned the dirtiest and most dangerous jobs that were rarely assigned white co-employees. He heard racial slurs at least four to five times a day, almost every day. Nothing was done about these racial slurs. Racial jokes were made about blacks. A supervisor threatened to fire him because of his race.

- Another long-time employee Donald Shields was also subjected to repeated racial slurs by co-workers and supervisors. He complained about these comments, but nothing stopped. He was patted down, and told this was because blacks steal. A white co-worker told him that "all blacks should be sent to Africa." He was denied overtime work given to white employees.

These are just a few of the many examples. Yet you found that the conduct was not "sufficiently severe or pervasive" enough to even create a prima facie case of a hostile working environment. You concluded that all these discriminatory incidents were not so "objectively offensive" as to alter workplace conditions, and granted summary judgment to the Defendants.

A. What specific facts would you require a plaintiff to show to defeat a defendant's motion for summary judgment on a racial harassment claim or racially hostile work environment claim?

Response:

A hostile work environment claim under Title VII is established upon

proof that "the work place is permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." Harris v. Forklift Sys, Inc., 510 U.S. 17, 21, 114 S.Ct. 367, 370, 126 L.E.2d 295 (1993). The Court of Appeals for the Eleventh Circuit has instructed that a plaintiff attempting to establish a hostile work environment claim must show: (1) that he belongs to a protected group; (2) that he has been subjected to unwelcome harassment; (3) that the harassment must have been based on a protected characteristic of the employee; (4) that the harassment was sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatorily abusive working environment; and (5) that the employer is responsible for such environment under either a theory of vicarious or of direct liability. See, e.g., Mendoza v. Borden, 195 F.3d 1238, 1245 (11th Cir. 1999).

Hostile work environment claims often turn on the quality and quantum of evidence submitted by the plaintiff to establish the fourth element; that the harassment was sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatorily abusive working environment. This requirement, as defined by the Supreme Court, contains both an objective and subjective component. Harris, 510 U.S. at 21-22, 114 S.Ct. 367 at 370-71. Thus, to be actionable, the alleged behavior must result in both an environment "that a reasonable person would find hostile or abusive" and an environment that the victim "subjectively perceive[s] ... to be abusive." Id. In evaluating the objective severity of the harassment, the Eleventh Circuit has delineated a number of factors which should be considered: (1) the frequency of the conduct; (2) the severity of the conduct; (3) whether the conduct is physically threatening or humiliating, or a mere offensive utterance; and (4) whether the conduct unreasonably interferes with the employee's job performance. See Allen v. Tyson Foods, 121 F.3d 642, 647 (11th Cir. 1997) (citing Harris, 510 U.S. at 23, 114 S.Ct. at 371).

A trial Court's inquiry as to the merits of a hostile work environment claim is made on a case-by-case basis assisted by the guidance of the Supreme Court and the Eleventh Circuit as set forth above. Trial judges are required to base their analysis on the evidence presented by the parties in their briefs and evidentiary submissions. Upon receipt of this information, the Court is required to examine the conduct in context, not as isolated acts, and then determine under the totality of the circumstances whether the alleged harassing conduct is sufficiently severe or pervasive to alter the terms or conditions of the plaintiff's employment and create a hostile or abusive working environment.

B. One plaintiff, Donald Shields, testified that he had "internal scars" because of the racial harassment and that he had been tense, aggravated, upset and angry to the point of wanting to leave his job, but you concluded that this was insufficient even

to create a jury question that the "conduct objectively or unreasonably interfered" with his job performance. Why did you not think this evidence was sufficient to create a question for the jury? What specific evidence would you require plaintiffs to show to prove that racial harassment "unreasonably interfered with or impaired their job performance"?

Response:

Shields v. Fort James Corp. is presently pending before the District Court for the Southern District of Alabama. Following public comment made by an individual associated with this case, I determined that I should recuse myself and the case was reassigned to another judge in this district. The case is still pending. Accordingly, I am prohibited by Canon 3A(6) of the Code of Conduct for United States Judges from commenting in anyway about this action, given its present status.

In anticipation of confirmation hearing proceedings, I sought and received an opinion letter (attached) from the Committee on Codes of Conduct of the Judicial Conference of the United States in an attempt to clarify my ethical requirements with regard to responses to questions about the Shields case. According to the Committee,

> If during the course of your Senate confirmation proceedings the case is still pending on appeal or upon remand, the proscription of Canon 3A(6) would apply and you would not be able to comment on the case, including its facts, the law as applied to the facts, or your reasons for granting summary judgment.

Therefore, I must respectfully decline to respond to questions regarding the Shields case.

Regarding your final question in part B, as set forth above, to establish a hostile work environment claim under Title VII, an employee must show: (1) that he belongs to a protected group; (2) that he has been subjected to unwelcome harassment; (3) that the harassment was based on a protected characteristic of the employee; (4) that the harassment was sufficiently severe or pervasive to alter the terms and conditions of employment and created discriminatorily abusive working environment; and (5) that the employer is responsible for such environment under either a theory of vicarious or of direct liability. Absent explicit discrimination, such as wrongful termination, retaliation, failure to promote, failure to hire, unequal pay, etc., an employer must make some showing in order to connect allegations of harassment to a violation of Title VII. Thus, in cases traditionally described as hostile work environment cases, the employee must show that the

employer's harassing actions toward him constitute conduct which is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment. Establishing that the harassing conduct was sufficiently severe or pervasive to alter an employee's terms or conditions of employment includes a subjective and an objective component. The employee must subjectively perceive the harassment as sufficiently severe and pervasive to alter the terms and conditions of employment, and this subjective perception must be objectively reasonable. In other words, the environment must be one that a reasonable person would find hostile or abusive and that the victim subjectively perceives to be abusive. Furthermore, the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering all of the circumstances.

The objective component of this analysis is fact-intensive. To aid the Court in this analysis, the Supreme Court and the Eleventh Circuit have identified several factors that should be considered in determining whether the harassment objectively altered an employee's terms or conditions of employment: (1) the frequency of the conduct; (2) the severity of the conduct; (3) whether the conduct is physically threatening or humiliating, or a mere offensive utterance; and (4) whether the conduct unreasonably interferes with the employee's job performance. Again, the Court is required to examine the conduct in context, not as isolated acts, and then determine under the totality of circumstances whether the harassing conduct is sufficiently severe or pervasive to alter the terms and conditions of the plaintiff's employment and create a hostile or abusive working environment. See Mendoza v. Borden, 195 F.3d 1238 (11th Cir. 1999).

C. You were reversed by the Eleventh Circuit for limiting consideration of claims to the two years preceding the filing of the plaintiffs' claims. You concluded that the actions within the two-year period were insufficient to sustain their claim. What additional facts would you have required plaintiffs to show within the two year period in order to find the harassment "sufficiently pervasive" to be actionable?

Response:

As stated above, Canon 3A(6) of the Code of Conduct for United States Judges and the opinion letter from the Committee on Codes of Conduct of the Judicial Conference of the United States prohibit me from commenting on the Shields case. Therefore, I must respectfully decline to respond to this question and must rely on my Order entered on April 9, 2001.

Also, I respectfully submit that my decision in the Shields case was not reversed by the Eleventh Circuit but was remanded to this district court for reconsideration and further analysis pursuant to intervening case law established by

the United States Supreme Court in National Railroad Passenger Corp. v. Morgan, 536 U.S. 101, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002), which eschewed the use of the continuing violation doctrine in hostile work environment cases. The Supreme Court held that a hostile work environment claim should be reviewed in its entirety, so long as one of the alleged events comprising it fell within the statute of limitations. 122 S.Ct. at 2074. Thus, according to the Eleventh Circuit, "the [Supreme] Court essentially rejected the 'continuing violation doctrine' and simplified the law by allowing courts to view allegations of hostile work environment as "a single unlawful employment practice." Shields v. Fort James Corp., 305 F.3d 1280, 1282 (11th Cir. 2002)(quoting Nat'l R.R. Passenger Corp., 122 S.Ct. at 2075). The Eleventh Circuit remanded this action to the Southern District of Alabama for reconsideration in light of intervening case law enunciated in National Railroad, which was decided after the Order entered on April 9, 2001.

2. In Davis v. Baroco 2000 U.S. Dist. Lexis 19659 (2000), an electrician's helper alleged sexual harassment under Title VII of the 1964 Civil Rights Act. Plaintiff Davis detailed a range of graphic sexual and physical gestures (including some unwanted touching) made by his supervisor, White. The obscene remarks and gestures, which began on Davis's first day of work, and continued for the 10 days of his employment, are documented in detail in your opinion. See id. at 6-7.

In stating the standard to prevail in a hostile environment sexual harassment case, you cited the Eleventh Circuit's requirement that the plaintiff must show that the "conduct is physically threatening or humiliating." Id. at 5 (emphasis added). You then concluded that Davis's claim could not survive a motion for summary judgment, saying that Davis "has presented no evidence that he was physically threatened by, or afraid of, White," and that "there is absolutely no evidence before the Court that White's conduct unreasonably interfered with or impaired Plaintiff's job performance" by either a subjective or objective analysis.

A. Would it have been sufficient, in your reading of the legal requirement, for the conduct to be "humiliating" in order to sustain the claim, or must it also be "physically threatening" ? Please explain your conclusion that the conduct was not sufficiently "humiliating" to sustain Davis's claim.

Response:

To establish a hostile environment sexual harassment claim under Title VII based on harassment by a supervisor, an employee must show: (1) that he or she belongs to a protected group; (2) that the employee has been subjected to unwelcome sexual harassment; (3) that the harassment was based on the sex of the employee; (4) that the harassment was sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatorily abusive working

environment; and (5) a basis for holding the employer liable. Mendoza v. Borden, Inc., 195 F.3d 1238, 1245 (11th Cir. 1999). Absent explicit discrimination, such as wrongful termination, failure to promote, retaliation, failure to hire, unequal pay, etc., an employee must make some showing in order to connect allegations of sexual harassment to a violation of Title VII. Id. In hostile environment cases, an employer's harassing actions toward an employee do not constitute employment discrimination under Title VII unless the conduct is "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" Id., at 1245-46 (citing Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986)).

Establishing that harassing conduct was sufficiently severe or pervasive to alter an employee's terms or conditions of employment requires proof of a subjective and an objective component. The employee must produce evidence to demonstrate that he subjectively perceived the harassment as sufficiently severe and pervasive to alter the terms and conditions of his employment, and this subjective perception must be objectively reasonable. Id. at 1246. Furthermore, "the objective severity of harassment should be judged from the perspective of a reasonable person in a plaintiff's position, considering "all the circumstances." Id. (citing Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 118 S.Ct. 998, 1003, 140 L.Ed.2d 201 (1998)).

Because the objective component of this analysis is somewhat fact-intensive, the Supreme Court and the Eleventh Circuit Court of Appeals have identified several factors that should be considered in determining whether the alleged harassment objectively altered the employee's terms or conditions of employment: (1) the frequency of the conduct; (2) the severity of the conduct; (3) whether the conduct is physically threatening or humiliating, or a mere offensive utterance; and (4) whether the conduct unreasonably interferes with the employee's job performance. Id. (citations omitted). The Court is required to examine the conduct in context, not as isolated acts, and determine under the totality of circumstances whether the harassing conduct is sufficiently severe or pervasive to alter the terms and conditions of the plaintiff's employment and create a hostile or abusive working environment. Id.

As set forth in footnote 3 of my opinion in Davis v. Baroco Constr. Co., 2000 W.L. 33156436, *4 (S.D. Ala. 2000), the Plaintiff improperly combined his claims in the various counts of the complaint. For instance, the hostile work environment claim was combined with a claim for retaliatory discharge. It was unclear from Plaintiff's complaint whether Count 1, alleging a claim for sexual harassment, was for *quid pro quo* harassment or for hostile work environment. Because the Plaintiff made no allegation or presented any argument or evidence which would establish that his action involved *quid pro quo* or explicit sexual

harassment, I determined that he was attempting to plead a claim for hostile work environment. As set forth in footnote 3, I determined that I would consider the claim for sexual harassment (Count 1) and the claim for hostile work environment (Count 2) to be one claim for hostile environment sexual harassment, and that I would discuss the two counts as though they were one claim. The remaining claims were discussed separately.

As set forth in my opinion, the Defendant moved for summary judgment on Plaintiff's hostile environment sexual harassment claim, invasion of privacy, retaliatory discharge claim, and intentional infliction of emotional distress claim. After reviewing the briefs and evidentiary submissions of the parties pursuant to Fed.R.Civ.P. 56, I determined that Defendant's motion for summary judgment was due to be granted as to the hostile environment, sexual harassment claim, and invasion of privacy claim, but denied as to the retaliatory discharge claim and the intentional infliction of emotional distress claim. Those remaining claims were tried by jury in a trial over which I presided and which resulted in a verdict for the Plaintiff.

With respect to the dismissal of Plaintiff's hostile work environment claim, I found that Plaintiff's failure to adequately plead his claim was compounded by his failure to present the quality and quantum of proof necessary to satisfy his burden under Fed.R.Civ.P. 56 and the case law attendant thereto as cited in my opinion. In fact, it appeared that Plaintiff failed to appreciate his burden of presenting evidence which would establish a material issue of fact as to the elements of a hostile work environment claim as established by the Supreme Court in Harris v. Forklift Sys., Inc., 510 U.S. 17, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993). Even after the Plaintiff's failure of proof was noted by the Defendant in Defendant's motion for summary judgment, Plaintiff failed to cure the noted deficiencies by demonstrating and producing evidence that Defendant's conduct in any way affected his ability to perform his assigned tasks or alter the conditions of his employment. Thus, summary judgment was granted for the Defendant as to this claim.

B. What specific facts would you require a plaintiff to show to survive summary judgment on a hostile work environment or sexual harassment claim?

Response:

As discussed above, and as set forth in Harris v. Forklift Sys, Inc., 510 U.S. 17, 114 S.Ct. 367, 126 L.Ed. 295 (1993), and Mendoza v. Borden, Inc., 195 F.3d 1238 (11th Cir. 1999), a plaintiff attempting to establish a hostile environment sexual harassment claim under Title VII must produce evidence demonstrating: (1) that the employee belongs to a protected group; (2) that the employee has been

subjected to unwelcome sexual harassment; (3) that the harassment was based on the sex of the employee; (4) that the harassment was sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatorily abusive working environment; and (5) that there is a basis for holding the employer liable.

As discussed above, the fourth element requiring proof that the harassment was sufficiently severe or pervasive to alter the terms and conditions of employment includes both a subjective and objective component. The objective component of the analysis is fact intensive, and as such, the U.S. Supreme Court and Eleventh Circuit have identified various factors that should be considered in determining whether the alleged harassment objectively altered an employee's terms or conditions of employment: (1) the frequency of the conduct; (2) the severity of the conduct; (3) whether the conduct was physically threatening or humiliating, or a mere offensive utterance; and (4) whether the conduct unreasonably interferes with the employee's job performance. Trial courts are required to examine the conduct in context, not as isolated acts, and determine under the totality of circumstances whether the harassing conduct is sufficiently severe or pervasive to alter the terms or conditions of plaintiff's employment and create a hostile or abusive working environment. This analysis is applied on a case-by-case basis, and the application of this analysis must focus on the briefs and evidentiary submissions of the parties. Because each case must be judged on its own merits, and even some factually similar cases may require different outcomes, it would be inappropriate for me to speculate about a specific set of facts.

COMMITTEE ON CODES OF CONDUCT
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
UNITED STATES DISTRICT COURT
P.O. BOX 3485
GREENSBORO, N.C. 27402

JUDGE WILLIAM H. BARBOUR, JR.
JUDGE PETER W. BOWIE
JUDGE MARY BECK BRISCOE
JUDGE WILLIAM C. BRYSON
JUDGE JOSEPH A. DICLERICO
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JUDGE JUDITH W. ROGERS

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CHAIRMAN

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(202) 502-1100

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November 6, 2001

The Honorable William H. Steele
United States District Court
Southern District of Alabama
United States Courthouse
113 St. Joseph Street
Mobile, Alabama 36602

Re: Docket No. 1594

Dear Judge Steele:

You have recently been nominated to fill a vacancy on the Court of Appeals for the Eleventh Circuit. Last April you granted summary judgment in an employment discrimination action and dismissed the case. Prior to appealing your order, plaintiffs' counsel criticized your decision publicly and wrote letters to the White House, the Senate, and others opposing your nomination on the grounds that you are "racially insensitive." You consider the allegation completely groundless and note that nothing in your opinion or in anything you may have said or done with respect to the attorney and his clients in this case or in previous cases would give anyone any reason to believe that you are "racially insensitive." You recused yourself from the case after receiving the notice of appeal.

You are concerned that during your Senate confirmation proceedings you may be asked questions about the nature of this action and your reasons for granting summary judgment. You

inquire as to whether you may discuss any and all aspects of the case, including your understanding of the facts presented by the parties in their briefs, your understanding of the law in your circuit applicable to the facts of the case, and your reasons for granting the defendant's motion for summary judgment.

Your inquiry is primarily governed by Canon 3A(6) which provides, with various exceptions not relevant here, that "[a] judge should avoid comment on the merits of a pending or impending action." The Commentary to Canon 3A(6) states, in part:

> The admonition against public comment about the merits of a pending or impending action continues until completion of the appellate process. If the public comment involves a case from the judge's own court, particular care should be taken that the comment does not denigrate public confidence in the integrity and impartiality of the judiciary in violation of Canon 2A.

Canon 3A(6)'s proscription applies to cases even after they have been decided by the district judge and while they remain pending, either on appeal or on remand following an appeal. The Committee has previously advised a district judge to abstain from making public comments about a case decided by that judge which was then pending on appeal, even though the judge indicated he would recuse if the case were remanded back to the district court. See Compendium § 4.3(a)(2001).

If during the course of your Senate confirmation proceedings the case is still pending on appeal or upon remand, the proscription of Canon 3A(6) would apply and you would not be able to comment on the case, including its facts, the law as applied to the facts, or your reasons for granting summary judgment. However, you would not be proscribed from addressing allegations of racial insensitivity provided you did so in a manner that avoided reference to the case in issue.

On the other hand, if during the course of your Senate confirmation proceedings the case has been finally disposed of, Canon 3A(6) would not on its face bar you from answering questions about the case, subject to several caveats that should be taken into account. Public comments should be limited and

discreet. We have advised that a judge's comment on his own thought process in deciding a previous case could create difficulties under Canon 1 (requiring judges to act in a manner that helps maintain the integrity and independence of the judiciary). See Compendium § 2.13(a) and § 3.9-1(d) (2001). Thus, in formulating a public response to questions about the case, you would have to exercise care not to provide insight into your deliberative process in deciding the case. Care should also be taken to avoid making comments that might place your impartiality in question in future cases involving similar issues. See Canon 3C(1). As noted in Advisory Opinion No. 55, in any form of public commentary, a judge always must "avoid sensationalism and comments which may result in confusion or misunderstanding of the judicial function or detract from the dignity of his office."

Congratulations on your nomination. We thank you for your inquiry and we hope our advice will be helpful to you.

Sincerely,

William L. Osteen
Chairman

SUBMISSIONS FOR THE RECORD

Statement by Senator Bill Frist
Senate Judiciary Committee
February 12, 2003

Mr. Chairman, I am fortunate to have the opportunity today to support two outstanding candidates for District Judgeships – Judge Daniel Breen, who is nominated to be a United States District Judge for the Western District of Tennessee, and Tom Varlan, who is nominated to be a United States District Judge for the Eastern District of Tennessee.

For more than a decade Judge Breen has admirably served the state of Tennessee's Western District as a United States Magistrate Judge. Before assuming this position in the Jackson and Memphis area, he practiced law in most of the surrounding West Tennessee counties for sixteen years.

Judge Breen graduated first in his class from Spring Hill College and later graduated from the University of Tennessee College of Law. His list of bar-related and civic activities is long and distinguished: President of the Tennessee Bar Association, Subcommittee Chair in the American Bar Association, Executive Committee member of the West Tennessee Council Boy Scouts of America, and a Lifetime Board Member of the West Tennessee Cerebral Palsy Center. As you can tell, his roots are deep with the people he serves.

In addition to an active civil trial docket, Judge Breen is also recognized as an effective mediator, and an instructor and author on alternative dispute resolution. He has made a broad range of contributions to the Bar, as well as the state and federal courts. This work has earned him the respect of the local legal community. I have heard from many in the Tennessee Bar praising Judge Breen's thoughtfulness and judicial temperament. Judge Breen is a dedicated, hard working and even-handed jurist.

Judge Breen's record has prepared him to be ready for this job beginning on day one. I am honored to support his nomination, and I know he will serve the Western District of Tennessee as a U.S. District Judge with distinction.

Mr. Chairman, it is also an honor for me to join you today in support of Tom Varlan's nomination as United States District Judge for the Eastern District of Tennessee.

Tom grew up in Knoxville, Tennessee as a second-generation Greek-American. His parents, Alexander and Constance Varlan, instilled in their son the time-honored ideals of commitment to hard work, involvement in the community, and love for country.

He put those ideals to work in his studies of Political Science and Economics at the University of Tennessee in Knoxville, and at Vanderbilt University's School of Law, where he was the managing editor of the Vanderbilt Law Review. From there, Tom practiced law in Atlanta from 1981 to 1987. In 1988, Tom began ten years of service as Law Director for the City of Knoxville where he was responsible for a wide range of legal issues. In this role, Tom demonstrated his keen legal mind and temperament suited to judicial office. Tom's current position as a partner at Bass, Berry and Sims has enhanced his solid background in the law.

It has been a long time since a member of the Knoxville Bar served on the federal bench in Knoxville. And, more significantly, it is my understanding that Tom would be the first Greek-American appointed to the federal bench in Tennessee.

Tom has worn many hats in his professional life, but he has never wavered from the ideals he grew up with. In fact, his presence before this Committee fulfills not only the dreams of his first-generation American parents, I believe it epitomizes the American dream as well.

Mr. Chairman, I thank you and the Committee for your expeditious handling of these highly qualified nominees from my home State. I am convinced that Dan Breen and Tom Varlan are ideal candidates, and they have my highest recommendation and unqualified support.

U.S. SENATOR PATRICK LEAHY

CONTACT: David Carle, 202-224-3693 VERMONT

Statement of Senator Patrick Leahy,
Ranking Member, Senate Judiciary Committee,
Judicial Nominations Hearing
February 12, 2003

Today the Judiciary Committee meets to consider six nominees for appointments to the federal bench. This is the third hearing for judicial nominees that has been held in the past two weeks. After today we will have considered 16 judicial nominees in that short period of time.

While I am glad to see that, for this hearing, the Chairman has returned to the precedent he followed during his previous chairmanship and scheduled only one nominee to a Court of Appeals, I am disappointed that we are having this hearing at this time. This slapdash pace of hearings and business meetings, one on top of another, cannot help but depreciate the attention the Committee is obligated to pay to individual nominees, and that is a disservice to the American people and federal bench. The Democratic Senate greatly improved the earlier pace in the handling of President Clinton's nominations. We confirmed 100 of President Bush's nominees in only 17 months. But we pursued a steady, methodical pace that allowed due consideration of the nominations before us. That is not the case at this moment.

Filling vacancies for lifetime appointments to the independent federal judiciary should be a retail operation, not a wholesale one. The rushed processing of nominees in these past few weeks has led to editorial cartoons showing conveyor belts and assembly lines with Senators just rubber-stamping these important, lifetime appointments without sufficient inquiry or understanding. What we are ending up with is a pile-up of nominees at the end of this rapidly-moving conveyer belt. There is no way that we can meaningfully keep up with our constitutional duty to determine the fitness of these nominees. The quality of our work must suffer, and slippage in the quality of justice will necessarily follow.

Again, I ask the Chairman to work together with the Democratic members of the Committee to set a fair schedule and a fair pace of hearings and business meetings, in order to allow the time he knows is necessary to do the jobs we are constitutionally expected to do. The result would be better hearings and more thorough consideration of President Bush's judges.

Of course, I do not wish to return to the days during President Clinton's Administration when hearings were so few and far between. Today, on February 12th, we are having our third hearing of the year to consider our 16th nominee and our fifth nominee to a Circuit Court. In recent years, things have not moved so quickly. In 1997, the third hearing did not occur until June 25th. In 1999 it was nearly the August recess, July 29th, until a third judicial nominations hearing was held. The record is much the same on the sheer numbers of nominees: It was not until May or July that the 16th nominee was heard in five out of the six years of the last period of Republican control. And although we have before us today the fifth nominee to a Circuit Court to come

before the Committee this year, it wasn't until July 29th of 1999, and September 30th of 1997, that the fifth Circuit Court nominee appeared at a hearing. In 1996, that day never came. Only four Circuit Court nominees were allowed hearings during that entire year, although not one was confirmed all that year. Not one. But apparently, this year is going to be different.

Included among the nominees today is Timothy Tymkovich, nominated to a seat on the 10th Circuit from Colorado. President Clinton nominated two different people to fill that seat – Jim Lyons and Christine Arguello, although neither was ever granted a hearing. Mr. Lyons was among the many Clinton nominees voted unanimously "Well Qualified" by the American Bar Association who was never granted a hearing, and Ms. Arguello is a talented Hispanic attorney whose nomination had significant support from her community, including from the two Republican Senators from her state. But they were denied hearings, and this seat has remained vacant.

I am glad to have the opportunity to learn more about Mr. Tymkovich today. His record in private practice and in government seems impressive, and I am interested to know about some of the cases he has handled over the years. But I must confess that I am also interested in knowing why the American Bar Association, about whose ratings we have been hearing so much this week, has given this nominee a partial "Not Qualified" rating. Last week, Chairman Hatch praised the ABA's efforts to evaluate judicial nominees. He said, "I think they have been doing an excellent job . . . We are gaining by the work they are doing . . . I want to praise the American Bar Association for it." I was pleased to hear the Chairman make these statements because I have great respect for the ABA and for its review process of judicial nominees. So, I think we can agree that we have some questions to ask in that regard.

I also look forward to learning more about some of Mr. Tymkovich's views that some have criticized as being ideologically extreme. For instance, not only did Mr. Tymkovich defend Colorado's anti-gay ballot initiative in court, but after he lost the case at every level, he wrote a harshly-worded law review article claiming that he was right and that each and every court that had ruled on the case was wrong. I have as many questions about the substance of that article as I do about its tone, which seems hostile not only toward citizens who have been historically discriminated against, but toward Justice Kennedy and other members of the U.S. Supreme Court, whom he labels as "political" and accuses of engaging in "judicial histrionics." I hope that Mr. Tymkovich will have an opportunity to explain such remarks. And I hope that in this difficult setting, and these difficult times, we will have time to fully consider his answers.

Today, the Committee also hears from Judge Marian Blank Horn, who has been nominated for another term on the Court of Federal Claims. Judge Horn has spent several years on this important court which handles complex financial claims against the United States government, such as claims against important environmental regulations brought under the Takings Clause of the Constitution.

As I mentioned last year, when the Senate Judiciary Committee considered the nomination of one of Senator Hatch's staffers, Larry Block, I am very concerned that this President is trying to put judges on this Court who have a very dim view of regulations that protect our water and our air and a very expansive view of what constitutes a taking of property. Some, like Judge Block,

had previously asserted that even temporary restrictions in any use of property constitutes a taking that must be compensated. Judge Block assured the Committee that he would not take his advocacy to the bench. I understand that he has spent a great deal of time working on legislative matters from the bench in the past few months, which causes me some concern as well, given our Constitution's separation of powers and the need for confidence that judges are not engaging in the political process or continuing past political activities.

I am also concerned about this court because of the President's actions in removing Chief Judge Lawrence Baskir, a Clinton appointee, from this leadership position on the Court and replacing him with another former staffer of Chairman Hatch, Judge Ed Damich. As I mentioned last November, Chief Judge Baskir made a lot of reforms to that court in his brief tenure as chief to ensure that ordinary citizens got fair treatment when they sued the federal government. Knowing of the large number of pro se plaintiffs -- or people representing themselves -- going up against the Justice Department, including parents with heartbreaking cases involving young children, he revised the system of handling these cases, and in the process referred more than 700 pro se plaintiffs to attorneys participating in the Court's vaccine program. Believing in the duty of members of the legal profession to contribute a portion of their time without charge for the good of the public, he also helped launch a pro bono program within the Court for both judges and legal clerks, and among the attorneys who are members of the Court's bar. I hope these important efforts have not been abandoned.

I must add that I am very concerned that this White House is trying to pack this court with ideologues, especially with its most recent nomination of Mr. Victor Wolski, in spite of the practice of other Presidents of bipartisan cooperation in the selections of judges for this Court. Judge Horn, however, has experience adjudicating the types of cases handled by this court and setting aside her personal views in her decision making. I look forward to hearing from this nominee. I wish that the White House had made more of an effort to cooperate with Democratic members of this Committee in other appointments to this court.

Another instance in which this Administration has chosen to be uncooperative is Mr. Stanceau's nomination. While his name was originally sent to the Senate in December of 2001, I regret that I was not able to schedule a hearing for him during my tenure as Chairman because his ABA rating was not completed until relatively recently. As I understand it, the Department of Justice and the White House, in yet another instance of keeping unnecessary secrets, were unwilling to have him sign the waivers needed for the ABA to finish its work. Fortunately, however, more than a year later, after the election this fall, the ABA and the Justice Department were able to work out an agreement that allowed the nomination to go forward.

I join in welcoming our colleagues who are presenters, and our nominees.

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Statement of Senator Jeff Sessions on the Nomination of William H. Steele for the Southern District of Alabama

Mr. Chairman, Bill Steele is one of Alabama's most outstanding magistrate judges, and I am confident that he will be an even better district court judge. I have followed Judge Steele's career since the time I worked with him at the U.S. Attorneys Office in the Southern District of Alabama, so I know from first hand experience what kind of individual Judge Steele is. This statement will not do him justice. He is a nominee of the highest order, and it is an understatement when I say that I am pleased that President Bush has chosen to nominate Magistrate Judge William H. Steele for elevation to the Southern District of Alabama. As a magistrate judge, Judge Steele has been training for this position for the last twelve years, and because the Southern District of Alabama utilizes magistrate judges to a greater extent than most other districts, he will be able to hit the ground running in his new position. I have had conversations with the other judges in the Southern District and I know that they are as excited about Judge Steele as I am, so I appreciate you scheduling this hearing today, Mr. Chairman, so that we can move forward with this nomination.

Mr. Chairman, some people talk about public service. Judge Steele has done more than just talk. Judge Steele has dedicated the better part of his life to public service and has served both this country and the great state of Alabama well. After graduating summa cum laude, from the University of Southern Mississippi in 1972, Judge Steele served in the United States Marine Corps as an officer, pilot, and instructor pilot. During his service in the Marine Corps, Judge Steele participated in the operation to evacuate American citizens from Lebanon in 1976. Judge Steele also served in the Alabama National Guard as a pilot and as the commanding officer of an assault helicopter company.

After serving his country in the Marine Corps, Judge Steele attended the University of Alabama School of Law, graduating in 1980. After law school, Judge Steele was employed as an Assistant District Attorney in Mobile, Alabama, and worked six years for a Democrat District Attorney. At the District Attorney's Office, Judge Steele distinguished himself as an outstanding advocate, litigating close to, if not more, than 100 jury trials. In recognition of his legal skills and leadership qualities in the District Attorney's Office, Judge Steele was appointed as Chief Assistant District Attorney in 1985. As the Chief Assistant, Judge Steele was instrumental in establishing the Child Advocacy Center, an agency devoted to identifying and providing assistance to child victims of physical and sexual violence.

In 1987, Mr. Chairman, given his reputation in the community for excellent legal abilities and personal skills, I was proud to hire Judge Steele as an Assistant U.S. Attorney in the Southern District of Alabama. I can say without reservation, that during his service, while I was the U.S. Attorney in that office, Judge Steele did not disappoint. I found him to be a first-rate lawyer who set the standard for integrity by treating all parties with respect.

In 1990, Judge Steele was appointed to the position, which he currently holds, as a United States Magistrate Judge. He has served in this position with distinguishment, handling a full array of criminal and civil matters in federal court. The Southern District of Alabama has a heavy caseload, and the judges there depend on magistrate judges to go beyond preliminary criminal matters and social security cases. The magistrate judges in the Southern District are in rotation to receive 25% of the civil docket, where the parties consent. So Judge Steele has been doing the job of a district judge, including presiding over civil jury trials in many instances. It is my understanding, from talking to lawyers who practice in the Southern District, that Judge Steele has managed his docket well and the numbers show it. This is simply an outstanding nominee, Mr. Chairman.

Judge Steele has not only been a leader in the workforce, but has been a leader and an active participant in his community as well, serving on the board of the Child Advocacy Center that he helped established. And for the record Mr. Chairman, like you, Judge Steele does not shy away from the arts. Judge Steele often volunteers his time to support First Night Mobile, a family-oriented, New Year's Eve, alcohol-free celebration of the arts, and he regularly performs with the Mobile Symphonic Pops as a saxophone player.

I acknowledge, Mr. Chairman, that all of these accolades would futile, if Judge Steele had not demonstrated commitment to the rule of law and to the Constitution, during his service as a magistrate judge. In my view, this is the first and foremost requirement for a federal judge. This is what our democracy hinges upon, and I know that Judge Steele is committed to that requirement. Judge Steele has a reputation for being eminently fair and impartial throughout the bar association. And having worked with him personally, I know that he is an individual with unquestioned integrity and the utmost character.

That said, Mr. Chairman, there have been some allegations raised against Judge Steele which need to be addressed, particularly the charge of racial insensitivity. Let me say from the outset that there is not one iota of truth in these allegations. These allegations arose, not over a period of time, but from one ruling, Shields v. Fort James. In this employment discrimination case, Judge Steele granted summary judgment to the employer because the claim was time barred.

To be brief Mr. Chairman, Judge Steele issued the Shields v. Fort James ruling on April 9, 2001. On June 10, 2002, before the 11th Circuit had examined Judge Steele's opinion, the Supreme Court announced a new rule for determining whether hostile environment claims in employment discrimination cases were time barred. Based on this new rule, not on the merits of the case, the 11th Circuit vacated Judge Steele's opinion. At the time of his ruling, Judge Steele

did his duty by following 11th Circuit precedent, any other ruling would have been improper.

Placed in context, Judge Steele has made more than eleven thousand rulings during his 13 years of service as a magistrate judge and has had only this single complaint against him. That is a pretty good record, I think, especially when the one complaint came from the lawyer who lost the case.

It will be said by some that the 11th Circuit did vacate Judge Steele's ruling, but they will not tell you that his ruling gave no hint of racial insensitivity. When the 11th Circuit vacated Judge Steel's ruling, they did not reach the merits of the case, but vacated the case on procedural grounds – because the Supreme Court had changed the law since Steele's initial ruling. In fact, anyone who actually reads the case will see where Judge Steele referred to the racial slurs directed at the plaintiffs as offensive, severe and humiliating to the plaintiffs. I believe that Judge Steele made the proper ruling in Shields v. Fort James, and I would offer the following items for the record: the opinion issued by Judge Steele; the 11th Circuit opinion; a chart containing a complete analysis of the law at the time Judge Steele made the ruling; and the intervening opinion issued by the Supreme Court of the United States, the opinion that changed the law in hostile environment cases.

I will just say this Mr. Chairman, when it comes to matters of Civil Rights and racial insensitivity, and I have to choose between the opinion of a lawyer who has lost a case in front of Judge Steele and Fred Gray, former counsel the late Reverend Dr. Martin Luther King, Jr., I'll take the word of Fred Gray. This is what Mr. Gray, after reading Judge Steele's opinion in Shields v. Fort James, had to say about Judge Steele in a letter to this Committee supporting his confirmation:

> I have practiced law in the State of Alabama and before all the federal district courts ... I realize that it is important that all the judges who serve on the courts ... are one[s] who possess the necessary personal characteristics, experience, practical knowledge, legal skills and professional background, so they will

> administer justice in a fair and impartial manner.
> I have discussed [Judge Steele's] qualifications generally and specifically with reference to intelligence, honesty, morality, integrity, maturity, stability, demeanor and temperament with members of the bar who know him and have practiced before him and other judges who sit on some of the courts in Mobile. Based upon their representations to me, Judge Steele possesses all the necessary qualities for a [federal judgeship].
>
> I have had the opportunity to meet with Judge Steele personally ... I believe he will be fair to all litigants who appear before him ... regardless of color or national origin or the type of litigation. I believe he will administer justice tempered with mercy.

I do not believe that you could receive a better endorsement than this one, Mr. Chairman.

I will say this Mr. Chairman, I hope we do not get into a situation where we are tarnishing a good man's character, based on one complaint from a losing attorney. I have mentioned the support of Fred Gray, but let me just mention in closing, some other support from lawyers and individuals who know Judge Steele best, because they have worked with him and practiced in front of him. Since his nomination has been pending, he has been endorsed by a number of individuals including the current President and 16 former presidents of the Mobile Bar Association, several former presidents of the Birmingham Bar, and several former presidents of the Alabama Bar Association. The Vernon Z. Crawford Bay Area–African American–Bar Association of Mobile has given Judge Steele their "highest recommendation." These are people who know better than anyone his commitment to fair and impartial justice. This support, in my view, confirms that President Bush made the right decision in nominating Judge Steele.

Mr. Chairman, Judge Steele has the professional qualifications, integrity, professional competence and judicial temperament to serve on the federal bench in the Southern District of Alabama. The ABA has acknowledged such, rating him unanimously qualified. As a magistrate

judge in the Southern District of Alabama, he is practically already doing the job. Judge Steele will make an excellent addition to the federal bench and deserves to be confirmed by this Senate. I look forward to supporting Judge Steele and to casting my vote in favor of his confirmation.

Richard Shelby

Testimony regarding the nomination of William H. Steele to be United States District Court Judge for the Southern District of Alabama

February 12, 2003

Mr. Chairman, thank you for the opportunity to address the Senate Judiciary Committee. I am glad to be here today as the Committee considers the nomination of Magistrate Judge William H. Steele to the United States District Court for the Southern District of Alabama. It is a privilege to have the opportunity to introduce such an outstanding judge.

Judge Steele has a long record of public service and accomplishment. Prior to entering the legal profession, he served in the United States Marine Corps as an aircraft commander and operations officer. He later served in the Alabama National Guard for eighteen years as the commanding officer of an assault helicopter company. Judge Steele is also a founding member of the Child Advocacy Center and currently serves on its board. As result of his work in the area of child abuse intervention, Judge Steele was awarded the City of Mobile's United Citizen Service Award.

After graduating law school from my alma mater, the University of Alabama, Judge Steele served as an Assistant District Attorney for Mobile County, where he subsequently attained the position of Chief Assistant District Attorney. He then went on to serve as an Assistant United States Attorney with the Department of Justice. He later worked in the private law firm of Thetford and Steele, during which time he also served as a municipal court judge. Currently, he is a Magistrate at the United States District Court for the Southern District of Alabama.

Judge Steele's extensive legal experience makes him an ideal candidate for the position of federal district court judge. As a federal magistrate, he has already handled many full civil trials involving issues such as trade secrets, contract disputes, employment discrimination and torts.

Mr. Chairman, I support Judge Steele's nomination without reservation. His extensive judicial experience as a prosecutor and a federal magistrate make him well prepared to assume the responsibilities of a United States district court judge. I am confident that he will serve

with honor and distinction in this new role and I urge the Committee to send his nomination to the full Senate. Thank you again Mr. Chairman for giving me the opportunity to appear before the Committee today.

NOMINATIONS OF CORMAC J. CARNEY, NOMINEE TO BE DISTRICT JUDGE FOR THE CENTRAL DISTRICT OF CALIFORNIA; JAMES V. SELNA, NOMINEE TO BE DISTRICT JUDGE FOR THE CENTRAL DISTRICT OF CALIFORNIA; VICTOR J. WOLSKI, NOMINEE TO BE JUDGE FOR THE UNITED STATES COURT OF FEDERAL CLAIMS; THERESA LAZAR SPRINGMANN, NOMINEE TO BE DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF INDIANA; PHILIP P. SIMON, NOMINEE TO BE DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF INDIANA; MARY ELLEN COSTER WILLIAMS, NOMINEE TO BE JUDGE FOR THE UNITED STATES COURT OF FEDERAL CLAIMS; RICARDO H. HINOJOSA, NOMINEE TO BE SENTENCING COMMISSIONER; AND MICHAEL E. HOROWITZ, NOMINEE TO BE SENTENCING COMMISSIONER

WEDNESDAY, MARCH 12, 2003

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

The Committee met, pursuant to notice, at 2:05 p.m., in Room SD–226, Dirksen Senate Office Building, Hon. Saxby Chambliss, presiding.

Present: Senators Chambliss, Feinstein, Cornyn, Feingold, and Schumer.

OPENING STATEMENT OF HON. SAXBY CHAMBLISS, A U.S. SENATOR FROM THE STATE OF GEORGIA

Senator CHAMBLISS. The Committee will come to order. It is my pleasure to welcome to the Committee this afternoon eight outstanding nominees. This is the first time I have had the privilege of chairing a hearing before the Senate Judiciary Committee and I, for one, am pleased that this is a confirmation hearing.

One of the most important responsibilities that we have as Senators is to exercise our constitutional duty of advice and consent. As yesterday's floor debate illustrates, there is substantial disagreement among us about what precisely the Constitution demands in the fulfillment of that duty, but I have no doubt that each and every member of the United States Senate takes that responsibility just as seriously as I do. This is why it is a particular honor for me to be here today chairing this hearing.

Whether by design or by default, it seems that this hearing is structured in pairs. We have before us two nominees for the Central District of California, two for the Northern District of Indiana, two for the U.S. Court of Federal Claims, and two for the U.S. Sentencing Commission.

I know that for our first panel of witnesses, we will have many things to say about the superb qualification of the nominees, so I will keep my remarks brief.

Let me first say a word or two about our first four District Court nominees, three of whom are sitting judges. Our nominees for the Central District of California are Cormac Carney and James Selna, who are both Orange County Superior Court judges. Judge Carney and Judge Selna have another experience in common. They were both partners in the prestigious law firm of O'Melveny and Myers before entering judicial service. While their confirmation will bring a wealth of experience to the Federal bench, it will undoubtedly inflict a loss upon the State bench.

The nominees for the Northern District of Indiana are Philip Simon and Theresa Springmann. Mr. Simon has already spent the bulk of his career in public service as a Federal prosecutor. Given the high volume of criminal cases our Federal courts handle, this experience will no doubt serve him well.

Judge Springmann began her legal career as a law clerk for a judge on the very court she now seeks to join. She has extensive experience on both sides of the bench, first as a lawyer in private practice, and then as a Federal magistrate judge.

In addition to our four district nominees, we will consider two more judicial nominees, these for the Court of Claims. This court hears most of the high-dollar lawsuits against the Federal Government. Our first Court of Claims nominee is Mary Ellen Coster Williams, who has been an Administrative Judge on the General Services Administration Board of Contract Appeals since 1989. Prior to that, she worked for 8 years in private practice and for more than 3 years as an Assistant United States Attorney, where she gained valuable experience handling matters involving government contracts, employment law, torts, and commercial litigation.

Like Judge Williams, Victor Wolski comes to us with excellent qualifications. He has worked as a law clerk for a Federal district judge and as an attorney in both private practice and public service. His career includes a stint as a Capitol Hill staffer, and I am told that many of his fellow staffers are here today in support of his nomination. I am confident that he will make a fine addition to the Court of Claims.

Our final panel of the day will consist of two nominees for the Sentencing Commission, which sets sentencing practices and policies for the Federal courts. Judge Ricardo Hinojosa has served as

Federal District Court Judge for 20 years and has presided over hundreds of sentencing proceedings. This is an important perspective to bring to the Commission.

Michael Horowitz served in the Criminal Division of the Department of Justice in both the Clinton and President Bush administrations, and prior to that as a Federal prosecutor in Manhattan. He already has familiarity with the operation of the Sentencing Commission since he presently serves as a member of its advisory group.

This is obviously an incredibly talented group of nominees before us today. I commend President Bush for nominating them and I look forward to hearing their testimony.

Our first panel is a very distinguished group of Senators, and you know since they are all colleagues of mine, I would love to put them all under oath and ask them a few questions about some issues that I would like to know about—

[Laughter.]

Senator CHAMBLISS. —but we always exempt this panel from being put under oath.

Senator Feinstein, I know, has another commitment and we have agreed that she will go first, so Senator Feinstein, we look forward to hearing from you.

PRESENTATION OF JAMES V. SELNA AND CORMAC J. CARNEY, NOMINEES TO BE DISTRICT JUDGES FOR THE CENTRAL DISTRICT OF CALIFORNIA BY HON. DIANNE FEINSTEIN, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator FEINSTEIN. Thank you very much, Mr. Chairman. In particular, I am here to make a few comments about two California judges, both of them to be District Court Judges for the Central District of California, and in no particular order, the first one I will introduce is Judge Selna.

Judge Selna passed through the screening committee, as did the second judge, Judge Carney, with a unanimous six-zero vote. The Committee gave him a rating of "exceptionally well qualified." As you know, Mr. Chairman, the Committee is composed of three Republicans and three Democrats, so they have to agree, and all six did agree on this.

Judge Selna is joined today by his wife Harriet and daughter Christine. He has impressive academic and legal credentials. He graduated Phi Beta Kappa from my alma mater, Stanford, in 1967, where he was Editor-in–Chief of the Stanford Daily. Now, this is the only thing that makes me question his credentials—

[Laughter.]

Senator FEINSTEIN. —because when I went to Stanford, the Daily was a very controversial Daily, and now I assume under his Editor-in–Chief, it is much more mild than it was in my days.

Three years later, he obtained his law degree at Stanford, earning the Order of the Coif. He also received the Urban Sontheimer Prize for graduating second in his class. After a brief stint in the military, Judge Selna joined the Los Angeles law firm of O'Melveny and Myers, where he has practiced law for 25 years. He specialized in litigating complex commercial disputes, typically involving high-

tech issues and companies. He also developed an expertise in antitrust and trade regulation, as well as trade secret law.

After a highly successful career in private practice, he was appointed to the Superior Court in 1998 and he has served with distinction on that bench and enjoys great respect from the trial bar.

I would put the rest of my statement, if I may, not to take more time on this distinguished individual, in the record, and will go quickly to Judge Carney.

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

Senator FEINSTEIN. Judge Carney is joined here today by his wife, Mary Beth, his son, Thomas, age 13, his son, John, a fifth grader, and his daughter, Claire, age nine. His father and his mother and his sister are here today, as well. Perhaps you could all stand and we will welcome you, since you are such a nice large family. We are delighted to have you here today.

[Applause.]

Senator FEINSTEIN. Now, this judge also comes before this Committee with impressive credentials. He received his undergraduate degree from UCLA Cum Laude in 1984. While at UCLA, he played varsity football and earned all–American recognition. After playing 1 year of professional football in the United States Football League, Judge Carney attended Harvard Law School and obtained his law degree in 1987. An all–American from Harvard—that is wonderful.

Judge Carney spent his entire legal career in the private sector until he was appointed to the Superior Court in 2001. From 1987 to 1991, Judge Carney worked as an associate at the firm of Latham and Watkins, where he practiced business litigation on behalf of Fortune 500 companies. He subsequently moved into another prestigious Los Angeles firm, O'Melveny and Myers, and became a partner in the firm. He remained there until his appointment to the Superior Court.

Again, I have a list of very qualified people, appellate justices recommending him very strongly, and I will put those in the record, Mr. Chairman.

I thank you and I thank my colleagues for the courtesy. I serve on five committees and 12 subcommittees and I have found that it is a full deck of cards, so thank you very much.

Senator CHAMBLISS. Thank you, and on all five of those committees, she is a good one, too.

Senator FEINSTEIN. Thank you.

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

Senator CHAMBLISS. Senator Lugar?

PRESENTATION OF PHILIP P. SIMON AND THERESA LAZAR SPRINGMANN, NOMINEES TO BE DISTRICT JUDGES FOR THE NORTHERN DISTRICT OF INDIANA BY HON. RICHARD G. LUGAR, A U.S. SENATOR FROM THE STATE OF INDIANA

Senator LUGAR. Thank you very much.

Senator CHAMBLISS. We are pleased to have you here.

Senator LUGAR. I appreciate, Mr. Chairman, your chairing this meeting and it is a real pleasure to present to the Senate Judiciary Committee two outstanding District Court nominees from the

Northern District of Indiana. I would like to thank especially Chairman Orrin Hatch and Ranking Member Pat Leahy for holding this hearing and moving so quickly on these nominations.

Early last year, Judge William Lee and Judge James Moody informed me of their decisions to assume senior status after distinguished careers of public service. Both of these individuals are remarkable leaders on the Federal bench and I applaud their leadership for Indiana and to the legal profession.

Immediately upon hearing of these decisions, I notified the White House and was asked by the President to help find the most qualified candidates to fill these two important positions in Hammond and Fort Wayne, Indiana. I took this role very seriously and selected the candidates who would best serve the Northern District of Indiana, and after sharing these selections with my friend and colleague, Senator Evan Bayh, I submitted the names and applications of three outstanding candidates to the White House for their consideration. The President recently selected Assistant United States Attorney Philip Simon and United States Magistrate Theresa Springmann.

Philip Simon is joined here today by his wife, Jane; his children, Claire, Matthew, and Sarah; his parents, Robert and Bonnie Simon; and his mother-in-law, Sally Mayes. I am very pleased they were able to come to today's hearing and I would like to recognize them if they would stand. Thank you.

[Applause.]

Senator LUGAR. Philip Simon has a remarkable record as an Assistant United States Attorney. As Chief of the Criminal Division, he is responsible for overseeing all criminal prosecutions in the Northern District of Indiana. He has supervised and participated in prosecutions involving large-scale drug distribution rings, illegal firearms trafficking, white collar fraud cases, environmental crime, and mob-related racketeering cases. In addition, he is in charge of a public corruption task force in Lake County, Indiana.

Philip has been the recipient of a number of awards and commendations. In 1995, the Mutual Insurance Companies of Indiana presented the Sherlock Award to Philip for his work to combat insurance fraud. In 1999, Philip was given the Director's Award by Janet Reno, the highest award given to an Assistant United States Attorney by the Justice Department.

Aside from his outstanding public service, he is a dedicated community leader with an interest in assisting children and families with autism.

Judge Theresa Springmann is joined here today by her husband, David; her two sons, Gus and Tony; and by her mother, Mary Lazar. I would like to recognize their appearance here today and ask them to stand for your recognition.

[Applause.]

Senator LUGAR. Theresa was the first woman to be made partner at Spangler, Jennings, and Dougherty, the largest law firm in Northwest Indiana. She followed up this distinction by becoming the first woman judicial officer in the Northern District of Indiana. Judge Springmann has served as United States Magistrate Judge since March of 1995, where she has presided over 30 civil jury

trials, ten civil and criminal bench trials, and conducted over 300 settlement conferences for the District Court.

She has received a number of high performance ratings throughout her tenure as a magistrate judge, including the "AV" rating from Martindale–Hubbell and the highest judicial rating from the Lake County Bar Association. Like Philip Simon, she is involved in a number of community activities and civic organizations.

I want to thank again you, Mr. Chairman, for conducting the hearing, the Chairman and Ranking Member for these opportunities to present these two outstanding nominees to the committee. I believe they will demonstrate remarkable leadership in Northern Indiana and will appropriately hold and defend our laws under the Constitution. I thank the chair.

Senator CHAMBLISS. Thank you, Mr. Chairman.

We are also pleased to have your colleague, Senator Evan Bayh, here with us. Senator Bayh, we look forward to hearing from you.

PRESENTATION OF PHILIP P. SIMON AND THERESE LAZAR SPRINGMANN, NOMINEES TO BE DISTRICT JUDGES FOR THE NORTHERN DISTRICT OF INDIANA BY HON. EVAN BAYH, A U.S. SENATOR FROM THE STATE OF INDIANA

Senator BAYH. Thank you very much, Mr. Chairman. I, too, would like to thank you and your colleagues on the Committee for moving sos expeditiously with regard to these nominees and I hope you will share our gratitude with Chairman Hatch and Ranking Member Leahy for your quick work in this regard. We are very grateful.

I would also like to thank my friend and colleague, Senator Lugar. He has been, as always, the embodiment of comity and reason during this process. As he described, he established a procedure early on for narrowing the number of applicants down to a final number. He called me into his office, personally reviewed the qualifications with me before forwarding all of the names to the White House, and so I would just like to say, Mr. Chairman, while the recommendations to the President were his, I felt fully consulted throughout this process, and for that, I am most grateful to Senator Lugar.

I am pleased, Mr. Chairman, to lend my wholehearted and unqualified support to these nominees. Theresa Springmann and Philip Simon will be outstanding jurists in the finest tradition of our Federal judiciary. Both have outstanding academic credentials, having graduated from fine Indiana legal institutions. Both have extensive legal and public service backgrounds, one first as a clerk in the Federal courts and now as a U.S. Magistrate, the other as a longtime Federal prosecutor with an exemplary record. Both have been rated highly qualified by the American Bar Association.

So, Mr. Chairman, it is without reservation and with a full heart that I support these nominees. I thank the Committee for your indulgence, and again my colleague, Senator Lugar, for his courtesy.

Senator CHAMBLISS. We thank you very much for being here and we look forward to hearing from these nominees.

Our dear friend and my Committee Chairman on the Armed Services Committee, Senator Warner. We are pleased to have you with us today and look forward to hearing from you.

PRESENTATION OF VICTOR J. WOLSKI, NOMINEE TO BE JUDGE FOR THE UNITED STATES COURT OF FEDERAL CLAIMS BY HON. JOHN W. WARNER, A U.S. SENATOR FROM THE STATE OF VIRGINIA

Senator WARNER. Thank you very much, Mr. Chairman. It is a pleasure to see you in the chair there, presiding. I have got to keep an eye on you in my committee. You are so enthusiastic, you might try and bump me out one of these days.

[Laughter.]

Senator WARNER. Mr. Chairman and members of the committee, as I listened to my colleagues here and the summary by the distinguished Chairman of the nominees today, I thought how fortunate we are as citizens of this great nation to have a President who has very, very carefully gone into the selection process and made these splendid selections.

My dear friend and co-equal partner here in the Senate, Senator Allen, and I have the privilege today of introducing Victor Wolski for nomination as a judge on the United States Court of Federal Claims. I would ask, Mr. Chairman, that my entire statement be placed in the record and Senator Allen and I are going to share on the distinguished background of this individual in our introduction.

Senator CHAMBLISS. Certainly, we will do that.

Senator WARNER. As you may know, the Federal Court of Claims is an Article I court that is authorized to hear primarily money claims founded upon the Constitution, Federal statutes, executive regulations, or contracts with the United States. Twenty-five percent of the cases before this court involve complex tax issues. The judges on this court serve for a term of 15 years. In my view, Mr. Wolski's background makes him well qualified to be a member of this specialized court. He has had extensive training in a broad range of areas and most particularly the emphasis on taxation.

He graduated from the University of Virginia, where my distinguished colleague and I were privileged to graduate, and then went on to serve as a Federal law clerk for a U.S. District judge sitting in California. Subsequent to his clerkship, Mr. Wolski worked for 5 years as a litigator for the nonprofit Pacific Legal Foundation.

He then came to Capitol Hill, where he served for 3 years as tax counsel for Senator Connie Mack. I was privileged to serve throughout the tenure of Senator Mack here in the Senate and few attained the recognition and the respect on both sides of the aisle as did our dear friend Senator Mack, who is still very active. I saw him just the other day. But his heart is still here in the Senate, and for this fine man to have been selected by that outstanding member of the United States Senate says a lot about Mr. Wolski's credentials.

After leaving Senator Mack's office, Mr. Wolski joined the Washington, D.C. law firm of Cooper and Kirk and he currently works at that firm, practicing law in a number of diverse areas including consitutional law, land use regulations, and tax law.

Clearly, Mr. Chairman and members of the committee, he is eminently qualified and I heartily give my unqualified endorsement to this distinguished nominee.

Senator CHAMBLISS. Thank you very much.

Senator CHAMBLISS. We are very pleased that you brought along your sidekick and my good friend, Senator George Allen.

Senator WARNER. Oh, yes.

Senator CHAMBLISS. Senator Allen, we are glad you are here and look forward to hearing from you.

Senator WARNER. When it got to that all–American qualification in one of the nominees—

Senator CHAMBLISS. He got excited, didn't he?

Senator WARNER. —he jumped six inches out of his seat over here.

[Laughter.]

Senator CHAMBLISS. He may sign him up as a Redskin here before he leaves.

Senator WARNER. His heart is still to become a football player. I mean, he has tried several times in college, but you will make it one of these days.

[Laughter.]

PRESENTATION OF VICTOR J. WOLSKI, NOMINEE TO BE JUDGE FOR THE UNITED STATES COURT OF FEDERAL CLAIMS BY HON. GEORGE F. ALLEN, A U.S. SENATOR FROM THE STATE OF VIRGINIA

Senator ALLEN. Well, I am glad I am here, Mr. Chairman, and thank you all. It is wonderful to be with Senator Feingold, Senator Cornyn, and it is my pleasure to be introducing and support my colleague, Senator Warner, in support of Victor Wolski of Virginia to be judge for the U.S. Court of Federal Claims.

I do think Judge Carney would be great. He was in the USFL. My father coached in the USFL. He played with Reggie White and Pepper Rogers coached him, and you know Rogers was at Georgia Tech, so that should give you a few added points for Judge-to-be Carney.

Senator CHAMBLISS. And the Falcons need some help. He looks like he is still in pretty good shape, George.

[Laughter.]

Senator WARNER. Well, let's kill the nomination and send him back, then.

[Laughter.]

Senator ALLEN. I have to look out for the Rangers these days. At any rate, back to the matter at hand, Victor Wolski.

Victor Wolski is someone who I knew when I was in the House of Delegates in the Charlottesville area. He was a law student at the University of Virginia School of Law and that is when I first got to know him. That was probably before his life was made much better by his bride, Lisa, who is here with him, as well as his mother, Jean, of course, who brought him into this world. And so if Lisa and Jean are here, I would ask that they would arise and be recognized by the committee.

[Applause.]

Senator ALLEN. Mr. Chairman, I am happy to report in the years since he left the University of Virginia, Mr. Wolski has distinguished himself as a leader in the legal profession and also as an accomplished legislative aide and, obviously, a very well qualified nominee. He served as general counsel to the Joint Economic Com-

mittee in the 106th Congress and later as tax counsel, as Senator Warner said, to Senator Mack.

During his time on Capitol Hill, Mr. Wolski worked closely with staff on both sides of the aisle to advance Senator Mack's bipartisan tax agenda, which was a wide variety of bills covering many areas of the tax code, including low-income housing tax credit, the District of Columbia's first-time home buyer tax credit, defense industry taxation, capital gains taxes, and the research and development tax credit.

He established himself not just as a man of good ideas, but also one who could work on the tax code in a variety of issues with people on both sides of the aisle. As Senator Warner talked about his experience in the private sector with a law firm, what you have here before you, Mr. Chairman and members of the committee, is an outstanding individual with legislative experience, litigation experience, with a proper balanced perspective for the issues that come before this court and I am confident he will make an outstanding judge and he has my highest recommendation and I request that you move as quickly as possible for his confirmation.

Thank you all for your indulgence and your care.

Senator CHAMBLISS. I thank both of you very much, and we look forward to hearing from your nominee.

Senator Hutchison, we are glad to have you with us and we look forward to hearing from you.

PRESENTATION OF RICARDO H. HINOJOSA, NOMINEE TO BE UNITED STATES SENTENCING COMMISSIONER BY HON. KAY BAILEY HUTCHISON, A U.S. SENATOR FROM THE STATE OF TEXAS

Senator HUTCHISON. Mr. Chairman, I am here to introduce Judge Ricardo Hinojosa. He has been my friend for a long time. He has served as a U.S. District Judge for the Southern District of Texas in McAllen for nearly 20 years and he is nominated today for the U.S. Sentencing Commission.

Judge Hinojosa sentences an astounding 400 people per year. The average is only 70 people per year. He earned his law degree from Harvard in 1975 and served a year as a briefing attorney for the Texas Supreme Court, and then returned to the Rio Grande Valley to practice law for 7 years.

Over the years, Judge Hinojosa has received numerous honors and awards for his leadership and community service, including being named one of the 100 Most Influential Hispanics in the country by Hispanic Business Magazine in 1984 and 1985. He received the 2001 Distinguished Alum Award from the University of Texas Students' Association, and he is a former President of that association. He also teaches at the University of Texas Law School as an adjunct professor, teaching sentencing.

His outstanding term of service on the Federal Court system certainly qualify him to serve on this Sentencing Commission and I do hope that you will be able to put his nomination through in an expedited way. He is a wonderful person, a friend that I have known personally for a long time working with him in the UTX Students' Association, excusing me, Senator Cornyn, who is a

Baylor graduate—no, Trinity graduate, excuse me. But anyway, he is a longtime friend and would be great in this position.

Senator CHAMBLISS. And he couldn't have a better recommendation than coming from you. Thank you very much, Senator Hutchison.

Senator HUTCHISON. Thank you.

Senator CHAMBLISS. Senator Cornyn, we are pleased to have you as a member of the panel to give your recommendation on Judge Hinojosa.

PRESENTATION OF RICARDO H. HINOJOSA, NOMINEE TO BE UNITED STATES SENTENCING COMMISSIONER BY HON. JOHN CORNYN, A U.S. SENATOR FROM THE STATE OF TEXAS

Senator CORNYN. Thank you, Mr. Chairman, and I would like to add my voice to that of my colleague, the Senior Senator from Texas.

I have learned in the short time that I have been in the United States Senate the truism that while everything has been said, not everybody has said it yet, so really, I don't want to repeat what Senator Hutchison has said because she has done a good job of talking about Judge Hinojosa's qualifications for this important job. But, of course, if I wasn't here, then I would have to explain to my friend, Judge Hinojosa, why I wasn't here adding my voice in support of his nomination and people might get the wrong idea, so I am delighted to be here with Senator Hutchison to recommend to the Judiciary Committee and hope that we will act promptly to vote this nomination out to the full floor and have Judge Hinojosa confirmed as one of the newest members of the United States Sentencing Commission.

Judge Hinojosa, as Senator Hutchison has observed, knows about sentencing because he does it daily. While guilt is rarely in doubt in many of the cases that come before a Federal District Judge, sentencing is one of those things that weighs most heavily on the minds and the hearts of judges because they know the consequences of their judgment.

And so the Sentencing Commission was created, of course, to give some uniformity, some standard guidelines that would allow judges to assess proper punishment in those cases where guilt is already established. It is, I think, important to have judges like Judge Hinojosa, who are experienced, who know how it works in real-life application, because, of course, they are writing the rules that have to be applied by judges all across this country and it is important to have those who are there where the rubber meets the road and who understand the practical implications of these important guidelines.

So in closing, let me just say how delighted I am the President has chosen such an outstanding individual for this great honor and how much I look forward to Judge Hinojosa's excellent service on the United States Sentencing Commission. Thank you.

Senator CHAMBLISS. Thank you, Senator Cornyn, and again, we look forward to the presentation of these nominees.

At this time, we are going to ask the first panel of nominees, Mr. Carney, Mr. Selna, Mr. Simon, Ms. Springmann, Ms. Williams, and Mr. Wolski, to please come forward. Before you sit down, we are

going to ask all of you to be sworn, and would you remain standing to be sworn, please. Would each of you raise your right hand, please.

Do you swear the testimony you are about to give before this Committee will be the truth, the whole truth, and nothing but the truth, so help you, God?

Judge CARNEY. I do.

Judge SELNA. I do.

Mr. SIMON. I do.

Judge SPRINGMANN. I do.

Judge WILLIAMS. I do.

Mr. WOLSKI. I do.

Senator CHAMBLISS. Thank you. You may be seated and we will put a name tag in front of you.

We will start with you, Judge Carney, and I will ask each of you if you have any opening statement you wish to make, we will be glad to hear your opening statement. Or if you have your family here, even though they may have been recognized, we would love for you to recognize them again. So, Judge Carney, we will start with you.

STATEMENT OF CORMAC J. CARNEY, NOMINEE TO BE DISTRICT JUDGE FOR THE CENTRAL DISTRICT OF CALIFORNIA

Judge CARNEY. Thank you, Mr. Chairman. I do not have an opening statement, but I would like to take you up on your offer to introduce my family again.

First, if I could introduce my wife, Mary Beth. Do you want to stand up? And my daughter, Claire, my son, John, my son, Thomas, my mother-in-law, Mary Fagerson, my father, Padraig Carney, and my sister, Sheila Thalimer.

Senator CHAMBLISS. We are glad to have all of you here.

Judge CARNEY. Thank you.

Senator CHAMBLISS. Judge Selna?

STATEMENT OF JAMES V. SELNA, NOMINEE TO BE DISTRICT JUDGE FOR THE CENTRAL DISTRICT OF CALIFORNIA

Judge SELNA. Thank you, Mr. Chairman. My wife, Harriet, is here and I would like to acknowledge her, if she would stand, please. And our daughter, Christine, is here with us, as well. She is pursuing a degree in psychology while working at Disneyland, as well.

With the chairman's permission, I would also like to acknowledge several folks who couldn't be here today, my brother, Terry Selna, and my sister-in-law, who live in Danville, California, and my courtroom staff who sent me here with their best wishes and wishes for good luck.

The courtroom is a difficult place, and to run smoothly it requires a diligent and loyal staff and I certainly have that. I would like to acknowledge my court clerk, Sarah Ochoa, who is on pregnancy leave with her third child, my relief clerk, Larry Brown, my court reporter, Heidi Stewart, my courtroom assistant, Becky Chumpitazi, and my bailiff, Derrick Webb, and my research attorney, Cathy Fair. Thank you, Mr. Chairman.

Senator CHAMBLISS. You are a smart man, Judge. None of us could do without great staff.

Mr. Wolski?

STATEMENT OF VICTOR J. WOLSKI, NOMINEE TO BE JUDGE FOR THE UNITED STATES COURT OF FEDERAL CLAIMS

Mr. WOLSKI. Thank you, Mr. Chairman. Having served as a staffer for a member of the Senate for three-and-a-half years, it is always a great privilege and great pleasure to be back here at the United States Senate and it is a tremendous privilege to be sitting here rather than sitting back there, which is where I am used to.

I would like to again recognize my family who is here, my mother, Jean, who came down from Philadelphia, and my wife, Lisa, who lives with me in Virginia.

[Laughter.]

Mr. WOLSKI. My brother, Charles, unfortunately wasn't able to make it here. He made it about a quarter of the way. He went from Brooklyn to Philadelphia, but then he was not feeling well, so I would like to acknowledge that he would have liked to have been here.

Also having worked on the Hill for so many years, I have got a number of friends here. I don't know if I could possibly go through and mention them all, a lot of people who worked on the Joint Economic Committee staff with me for Senator Mack, people who worked in Senator Mack's personal office, people who worked for members of the Senate Finance Committee, because I did Senator Mack's tax work for the Finance Committee and knew quite a number of those.

I would also like to acknowledge my friend, Richard Beneke [ph.] from college, from the University of Pennsylvania. Dick, do you want to stand up? Here is your chance.

[Laughter.]

Mr. WOLSKI. Also, several of my colleagues from Cooper and Kirk are here, and I also would like to acknowledge my friend and co-counsel, John Cuneo, who is also back there somewhere. I do appreciate the support.

Senator CHAMBLISS. Thank you.

Judge Springmann?

STATEMENT OF THERESA LAZAR SPRINGMANN, NOMINEE TO BE DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF INDIANA

Judge SPRINGMANN. I have no opening statement, Mr. Chairman. However, I would like to introduce the family that is with me today.

Senator CHAMBLISS. Certainly.

Judge SPRINGMANN. First, I would like to introduce my husband, David. We have been married for 23 years this year and I met him when I was a sophomore in college, so that goes back to age 19. He has been my number one supporter all during that time and in the different positions that I have held as an attorney and a wife and a mother.

I would also like to introduce my mother, Betty Lazar, who is here. Mom? She didn't want me to say anything, but she is going to be celebrating her 80th birthday next month.

Senator CHAMBLISS. All right.

[Applause.]

Judge SPRINGMANN. And she was bound and determined, with a sore back and other things, to make it here today to be a part of this experience.

I also want to introduce my two sons, my son, Tony, who is 10 years old, and my son, Gus, who is 12 years old.

Senator CHAMBLISS. Guys, it is not that rough in here. You are all going to be okay.

[Laughter.]

Senator CHAMBLISS. That was an effort for Tony to get up there, I could tell. We are glad to have you all.

Judge SPRINGMANN. This has been the quietest they have been for this period of time in years.

Senator CHAMBLISS. Mr. Simon?

STATEMENT OF PHILIP P. SIMON, NOMINEE TO BE DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF INDIANA

Mr. SIMON. Thanks, Mr. Chairman. I also have no opening statement. I have quite a few people in the room I would like to acknowledge, as well.

First and foremost is my wife, Jane Simon. She is a law clerk to a Federal judge in Chicago. My daughter, Claire, is sitting next to her, and my other daughter, Sarah, is also here. My son, Matthew, couldn't be here today. I am also fortunate to have my Mom and Dad here, Bob and Bonnie Simon, and my sister, Jeanine Swick, and her two daughters, Mary and Margaret, my Aunt Mary Beth Hyland, and her daughter, my cousin, Christina, and last but not least, the world's greatest mother-in-law, Sally Mays. Thank you.

Senator CHAMBLISS. Great.

Judge Williams?

STATEMENT OF MARY ELLEN COSTER WILLIAMS, NOMINEE TO BE JUDGE FOR THE UNITED STATES COURT OF FEDERAL CLAIMS

Judge WILLIAMS. Thank you, Mr. Chairman. I have no opening statement, but I would like to thank the Committee for convening this hearing.

With me today, I am very proud to introduce my family, my husband of 20-plus years, Mark Calhoun Williams, who has encouraged me in all that I have been able to do; my son, Justin Williams, who is 15 years old and luckily happens to be on spring break from the Woodbury Forest School, so he is able to be with us; my daughter, Jackie Ann Williams, who is a sixth grader at Pyle Middle School in Montgomery County, and she is here with us despite the fact that it is an unexcused absence.

[Laughter.]

Judge WILLIAMS. Also, I am very proud to introduce my mother, Rosemary Coster, who has traveled here from New York to be with us today, as well as my brother, Joseph Gerard Coster, who is here

from New York. Missing from our huge family are several other brothers and a sister. My brother John and James and my sister Pat are all up in New York working hard. My brother, Gerard, lives in Jacksonville, Florida. And my 13 nieces and nephews are busy in school.

But I do have several friends who are here, as well, my dear friends Scott and Peggy Ann Technay, and Kent Morrison and did Stefan Lapaskiewicz make it? Well, he may join us later. Thank you, Mr. Chairman.

Senator CHAMBLISS. Great. We are glad to have all of your family and friends here supporting you today.

Senator CHAMBLISS. I want to start with you, Judge Carney, and we will just go down the row, if each of you will take these questions. We may give you a break, Judge, and let somebody else go first on this end.

First of all, each of you are nominated to be a trial judge, even though it may be different courts and different levels of court in the Federal Court system. But each of you are nominated as trial judges. Under what circumstances do you believe it appropriate for a Federal Court to declare a statute enacted by Congress unconstitutional? Judge Carney?

Judge CARNEY. Thank you, Mr. Chairman. Obviously, with any statute drafted and enacted by Congress, there is a presumption of constitutionality. It would seem to me that I would be very reluctant to declare anything unconstitutional. Obviously, the court who should be making law or evaluating that is a court that is superior to me, the Ninth Circuit or the Supreme Court.

Senator CHAMBLISS. Judge Selna?

Judge SELNA. Clearly, the legislation which Congress passes begins with a presumption that it is constitutional. I think it is the extraordinary circumstance where a District Court would hold that a law passed by Congress is unconstitutional. I think it would require a clear deviation of the precedents—from the precedents of the United States Supreme Court and I think that is a rare circumstance.

Senator CHAMBLISS. Mr. Wolski?

Mr. WOLSKI. Well, for the Court of Federal Claims, actually, the jurisdiction, I don't believe, would allow a judge to declare an act of Congress unconstitutional. The Claims Court would be able to give money damages to people. I guess the constitutionality of a provision could come up in some of the tax areas. But I agree that the acts of Congress that we review do have a presumption of constitutionality. There is a very heavy burden that somebody must—who is challenging that constitutionality must reach in order to carry the day and I would, of course, follow very carefully the binding precedents of both the United States Supreme Court and the Federal Circuit in making these determinations.

Senator CHAMBLISS. Judge Springmann?

Judge SPRINGMANN. Mr. Chairman, I would concur in the comments of my colleagues, that when posed with that issue, you would first look to the statute, and particularly an act of Congress, and begin with the presumption that it is constitutional. It is very rare, indeed, that a judge, a trial judge would be faced with a cir-

cumstance of determining that a statute is unconstitutional and rule on it in a vacuum.

A trial court must look to the precedents that have been set out by the United States Supreme Court as well as the circuit in which that trial judge sits, and in our situation, that would be the Seventh Circuit situated in Chicago. We would look to those courts for guidance in how to interpret similar statutes and take that guidance and apply it to that situation. It would, indeed, be a very rare occurrence to ever declare such an act of Congress unconstitutional.

Senator CHAMBLISS. Mr. Simon?

Mr. SIMON. Mr. Chairman, I totally agree with that. I think that any District Court judge has to start from the premise that Congress is acting in a constitutional way when it is passing or enacting statutes. So I would certainly start from that bent.

I really believe that it would be my obligation to look to my circuit and the Supreme Court and follow those precedents, but I really feel as if that acts of Congress deserve considerable deference in the laws that they pass and it would be a very, very rare circumstance indeed where I could envision finding something unconstitutional.

Senator CHAMBLISS. Judge Williams?

Judge WILLIAMS. Thank you, Mr. Chairman. I would echo the sentiments of all my colleagues up here today, especially those of Mr. Wolski, noting that the United States Court of Claims is a court of very limited jurisdiction. It would be highly unusual for us to be asked to judge a statute unconstitutional, but were we to be, I would certainly apply that strong presumption in favor of the constitutionality.

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

Judge CARNEY. Yes, Mr. Chairman.

Senator CHAMBLISS. If I can get a positive response from each of you.

Judge SELNA. I can give you that assurance without qualification, Mr. Chairman.

Mr. WOLSKI. Absolutely, Mr. Chairman.

Judge SPRINGMANN. Absolutely, Mr. Chairman.

Mr. SIMON. I concur.

Judge WILLIAMS. Absolutely.

Senator CHAMBLISS. Ms. Williams, we will start with your end this time. There may be times when you will be faced with cases of first impression. What principles will guide you, or what methods will you employ in deciding cases of first impression?

Judge WILLIAMS. Well, Mr. Chairman, in fact, I have had that happen to me already in my life as a judge for the last 14 years on the Board of Contract Appeals. Back when this board was deciding bid protests, we had a very unusual statute and no one else had ever interpreted it before. Largely, the questions entailed questions of jurisdiction that the board had, and the way I approached it then and the way I think I would continue to approach it was

to look at the clear language of the statute first and to attempt to understand the law that way and apply it and decide the case as best I could that way.

Senator CHAMBLISS. Mr. Simon?

Mr. SIMON. I agree. I think what a District Court judge has to do is to read a statute and determine, based on the plain meaning of the statute, using ordinary usage, or applying ordinary usage to the words that are in the statute, and apply it to the facts and circumstances of the case before you. I think it is fair for judges in cases of first impression to look to analogous situations to try to determine how or to see how the Supreme Court or the Seventh Circuit has addressed perhaps a similar situation and to try to follow that lead. But the guiding principle should be, what does the statute say and what does it mean and to apply it to your facts and circumstances.

Senator CHAMBLISS. Judge Springmann?

Judge SPRINGMANN. With regard to a case of first impression, and during my tenure as a Magistrate Judge, I have had that situation happen in one or two cases, the standard principles apply in viewing such a case, and that is that you apply standard legal principles. You look first to see whether or not it is, in fact, a case of first impression by looking to, again, United States Supreme Court decisions, decisions within the circuit in which you are situated, as well as any other case decisions within that circuit or within our district.

Likewise, if there are any analogous cases to which you can—which you can review and analogize the facts and legal principles to apply to a case of first impression, that is what would be appropriate for a trial court judge to do and that is what I would promise to do.

Senator CHAMBLISS. Mr. Wolski?

Mr. WOLSKI. Thank you, Mr. Chairman. Certainly, I concur with the comments of my colleagues on this panel. When you are presented by a case of first impression as a judge, if the question deals with a statutory interpretation, you start first with the text of the statute, look at the language that was employed by Congress, use the ordinary meaning of that language. If it is ambiguous at all, then repair to aids such as legislative history, conference reports. If instead this is a matter that involves a contract, that would be the document that you would first be construing, that you would do the same, starting with the text.

And then, of course, you would look carefully to see if there are analogous situations, try to determine what the legal principle that was followed by the Supreme Court and the Federal Circuit Court in the most analogous situations was and try to adapt that to the facts that are presented to you in the case.

I believe that also you should read very carefully the briefs that are filed by both parties and look very carefully at the cases that they cited. That might be a very good place to start to try to determine analogous cases, and also, it is the respectful thing to do in treating very courteously the submissions of the parties.

Senator CHAMBLISS. Judge Selna?

Judge SELNA. Mr. Chairman, I agree with the hierarchy of analysis suggested by my colleagues. I think that it is the rare day

when you have a truly question of first impression and that the farther one digs, the more likely one is to find an answer, going back in the case of legislation to the floor debates, to the reports, to try and divine, to the extent it is unclear from the face of the statute, what Congress had in mind. I think diligence will limit the number of first impression cases as true questions of first impression.

Senator CHAMBLISS. Judge Carney?

Judge CARNEY. Mr. Chairman, to avoid sounding like a parrot, can I adopt all the answers of my colleagues here?

[Laughter.]

Senator CHAMBLISS. Whatever.

[Laughter.]

Senator CHAMBLISS. It certainly speeds up the process, Judge.

Judge CARNEY. I think I will, because what they said makes sense to me and I agree with it.

Senator CHAMBLISS. Senator Feingold?

STATEMENT OF HON. RUSSELL D. FEINGOLD, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Senator FEINGOLD. I would like to welcome all the witnesses and all your lovely families. One of the oddest parts about this job is that you come to a setting like this with the nice families and you still have a job to do, so I have to rain just a bit on the parade here and make a few comments about this hearing and the situation we are in in the Committee on nominations.

I am concerned that we are proceeding with another nominations hearing when we have not resolved the serious breach of the Committee rules that took place a few weeks ago when we voted on Justice Deborah Cook and John Roberts. The entire episode came about because this Committee refused to schedule another hearing for those two nominees who many on the Committee felt were not adequately examined at the unprecedented hearing held on January 29 with three Circuit Court nominees. And yet, despite our concerns with that, there is a hearing scheduled just a day after this hearing on eight lower court nominees with Justice Priscilla Owen, who had an extensive hearing last year.

I think we need to restructure our priorities on this committee, Mr. Chairman. We are shortchanging the Senate's constitutional responsibility to advise and consent on judicial nominees with this extraordinary case.

Two of the nominees on the agenda today are for the bipartisan U.S. Sentencing Commission. It is my understanding that there has been no consultation at all with the Democratic Congressional leadership on the choice for a Democratic seat for this Commission. Now, this continues a disturbing pattern that can only lead to more delay and controversy on the floor for these two nominees.

And we have two nominees to an Article I court, the Court of Federal Claims. This court has also traditionally been treated in a bipartisan manner, but again, the administration has chosen to break with tradition and is moving forward to fill all the vacancies without consulting with the Democratic leadership or with this committee. That, too, could cause delays on the floor, as well, if not in this committee.

I note also that one of the nominees on the agenda today is the most recent of the nominations to that court. The other nominees might wonder why he has been moved to the front of the line, and frankly, Mr. Chairman, so do I.

I would like to ask Mr. Wolski a few questions. Congratulations on your nomination.

Mr. WOLSKI. Thank you, Senator.

Senator FEINGOLD. I am told that in 1999, you told the National Journal that, quote, "Every single job I have taken since college has been ideologically oriented, trying to further my principles. I am essentially a Libertarian. I believe in limited government, individual liberty, and property rights," end of quote.

I would be shocked if you told us you view this next job that you have been nominated to as ideologically oriented based on the answers that you just gave. In fact, I am sure you are going to assure us, and I think you really have already, that you would put your personal views aside and simply apply the law, and that is what, of course, all nominees say when they come before this committee, so let me ask you a few specific questions in light of your earlier writing.

Do you understand why it would concern at least some members of this Committee that a self-professed idealogue has been appointed to be a judge?

Mr. WOLSKI. Well, Senator, I do appreciate the question and I appreciate the opportunity to, if I may, qualify the remarks from the National Journal article.

Senator FEINGOLD. Go right ahead.

Mr. WOLSKI. As I remember the question, and those particular remarks actually came from a profile of the Joint Economic Committee in the, I guess it's called the "Hill people" issue that comes out every 2 years, or I assume it comes out every 2 years, and I can say I am not certain what exactly language I used in discussing with the reporter, but I do recall the question that I was asked, which was why I was willing to relocate from California to come to Washington, D.C., to work for a Senator from Florida, which is a reasonable thing to inquire.

And the sentiment I tried to express, and perhaps I didn't use the best words, was that unlike my colleagues at the University of Pennsylvania, where I was an undergraduate in the Wharton School, or a lot of my colleagues at the University of Virginia School of Law, particularly people who had District Court clerkships, to me, trying to get the highest-paid job possible was never a concern of mine. Money was never the be all and end all for me.

I was very—I had a tremendous opportunity to be able to go to college, and the first in my family. My mother and my father didn't have that opportunity, and I have always felt very strongly that somebody should give something back to the community and that somebody should, when they are given such an opportunity and such a privilege of higher education, to do something good for the community. And that is why the jobs I have taken were jobs in the public sector, which I believe very strongly in, jobs in the nonprofit world, jobs that related to matters like tax policy, which interested me.

And the point that I was trying to make was just that this—my decision to come here and work for Senator Connie Mack, a tremendous opportunity, very respected member of the Senate, to do the tax work for his Finance Committee responsibilities, was a tremendous opportunity that was consistent with my commitment to the public sector and was consistent with my commitment to nonprofit interests, and that is really the only point I wanted to make in that—

Senator FEINGOLD. Well, let me first say that I respect those comments in terms of your observations and your commitment to public service. I remember having a similar reaction at law school to what choices others were making. But if I could get a direct answer to the question, given that explanation—

Mr. WOLSKI. I am sorry, Senator.

Senator FEINGOLD. I think that is fair, the explanation you gave. Let me just ask you, do you understand why it would concern at least some members of this Committee that a self-professed idealogue has been appointed to be a judge?

Mr. WOLSKI. Yes, I certainly can understand that and I guess the reason I went into the extended explanation was just that I don't consider myself an idealogue. I'm not somebody who rigidly sticks to one position. I'm not somebody who's inflexible. I think the people that know me and have worked with me on Capitol Hill could attest to that. I have worked closely with people in staff of Senate offices on both sides of the aisle on a number of bipartisan initiatives, things like the low-income housing tax credit or the D.C. Economic Recovery Act—

Senator FEINGOLD. Let me ask you another question. Do you understand the concern that some have about someone who proclaimed with some pride that he is a Libertarian who believes in limited government and property rights being appointed to be a judge on this particular court? Do you understand why it would lead to some concern?

Mr. WOLSKI. Oh, certainly, Senator. I could understand why the first part of that might concern somebody. Again, by Libertarian, all that I meant was in the context of the economic policies that we were pursuing at the Joint Economic Committee to try to maintain prosperity, I had a free market orientation. I didn't—certainly did not mean that I was a Libertarian in the sense that I believe that government is bad and we should get rid of government. In fact, I wouldn't have spent so many years working in government if I believed that.

But on the second part of that, I actually must say that it shouldn't concern—I think it shouldn't concern anybody that a nominee to the Court of Federal Claims supports the notion of property rights and supports the notion that there are limits to government, because if you think about it, there couldn't be a Court of Federal Claims, there couldn't be a place for citizens to go to get money damages against the government unless there was a recognition that there are property rights, unless there was a recognition that there were some limits to government—

Senator FEINGOLD. Well, I think there is some truth to that, so let me—

Mr. WOLSKI. —whether that is through the Constitution or by the government entering into a contract.

Senator FEINGOLD. I think there is some truth to that. Let me ask it another way, then, in fairness to you. Do you agree that if you testified here today that you view this appointment to the bench as yet another opportunity to further your principles of limited government and property rights, that in that context, Senators would be justified in voting against your confirmation on that basis?

Mr. WOLSKI. Thank you for that question, Senator. I certainly can assure you that I don't view the Court of Federal Claims as a place for somebody to be furthering any political or policy views that they have. It is very important in our society under the rule of law that judges not ever consider their personal views, not ever consider their personal beliefs or the positions that they have argued earlier as a counsel when they become a judge. It is a very—that is exactly the wrong thing to do and—

Senator FEINGOLD. Fair enough. Let me ask you about a specific case. In a brief for the Pacific Legal Foundation, *Cargill*, Inc. v. *United States*, you argued that it was far beyond Congress's power under the Commerce Clause to protect ponds that served as a habitat for migratory birds. In the brief, you described wetlands as, quote, "puddles," unquote, and you raised concerns regarding the longstanding national interest in protecting migratory birds.

In fact, this brief states, quote, "Jurisdictions over puddles was justified by the Ninth Circuit on the basis that birds might frolic in these puddles," unquote. You also stated, quote, "Will one fewer puddle for the birds to bathe in have some impact on the market for these birds," unquote. You also praised the Supreme Court for its five-to-four decision in *United States* v. *Lopez* for beginning to reign in the abuses of the Commerce power justification for acts of Congress.

As you know, the Supreme Court decision in *Penn Central* requires courts to assess the importance of the governmental interest involved in determining if regulations affect a taking. If you were asked to decide a takings case that involved the protection of wetlands or the protection of migratory birds, do you believe that you could rule impartially and not enjoin legislation giving the government the ability to protect the environment? Do you continue to believe, as you asserted in your brief, that Federal environmental laws passed under authority of the Commerce Clause, such as the Clean Water Act, are unconstitutional?

Mr. WOLSKI. Thank you for that question, Senator. At the outset, I would like to point out that the brief you are mentioning was an advocacy brief on behalf of a client. I was taking the position on their behalf and I obviously was living up to my duties to make a zealous representation of their interests. It is certainly no reflection of what I would do as a judge and it is no reflection of my personal views.

I would point out also that in that particular case, when the United States Supreme Court ultimately did consider the issue of the Clean Water Act and what Congress intended the Clean Water Act to do, the Supreme Court said that whether migratory birds could be protected did raise significant constitutional issues. So it

certainly wasn't a frivolous argument. It certainly wasn't an unreasonable argument to make and raise on behalf of a party.

I can assure you, though, if I am fortunate enough to be confirmed to be a judge of the Court of Federal Claims that I will consider very seriously the important purposes of government behind every single regulation that anyone has based a takings claim upon. As you may know, the Court of Federal Claims actually couldn't invalidate any laws. You take as given that the law is legitimate. You take as given that it has got a good purpose. And instead, what you are doing is looking to see the impact on the property owner.

As you mentioned, you are correct. Under *Penn Central*, I would certainly look at the economic impact on the property owner. I would certainly look at whether the government action interfered with reasonable investment-based expectations. And also, I would consider the nature and character of the government action. In one of the more recent Supreme Court cases, I believe it was the *Taos Sierra* case, the decision by Justice Stevens explains quite clearly that under the character and nature prong of the *Penn Central* test, you have got to consider the important interests of the government.

Senator FEINGOLD. But you do not go into this job believing that the Clean Water Act passed under the authority of the Commerce Clause is unconstitutional, do you?

Mr. WOLSKI. No, I do not. That is—that is not the case. The Clean Water Act has been upheld and I certainly believe that that is a constitutional act.

Senator FEINGOLD. Thank you, Mr. Chairman, and I thank the witness. I know my time is up. I would just like to ask unanimous consent that two letters expressing concern about the nomination of Mr. Wolski be included in the record.

Senator CHAMBLISS. Without objection.

Senator FEINGOLD. Thank you, Mr. Chairman.

Senator CHAMBLISS. My friend from New York has joined us and we are glad to have you here, Chuck. Senator Schumer?

Senator SCHUMER. Glad to be here. I have been watching it on TV from my office and I have enjoyed your comments.

I also want to welcome all of the nominees here today, and particularly—as I understand it, Judge Williams is no longer from New York but hails from New York, although they didn't tell me where. Whereabouts, Judge?

Judge WILLIAMS. Flushing, New York.

Senator SCHUMER. Flushing? That is known as part of Queens to most of you—

[Laughter.]

Senator SCHUMER. —and it is where the New York Mets play baseball. Isn't that nice.

Judge WILLIAMS. I must tell you that I worked at Shea as a young person.

Senator SCHUMER. Did you?

Judge WILLIAMS. Yes, indeed.

Senator SCHUMER. I have been a Yankee fan—

Judge WILLIAMS. Oh well.

[Laughter.]

Senator SCHUMER. —but that won't interfere with my—

Judge WILLIAMS. Please, you can strike that comment.

Senator SCHUMER. —impartiality as we look at your nomination.

[Laughter.]

Senator SCHUMER. I have questions of Victor Wolski. The other folks, you can relax.

[Laughter.]

Senator SCHUMER. Maybe you can relax, too, Mr. Wolski.

I think my position on judges is well known. I have three standards in the selection of judges, excellence, in other words, legal excellence. You have to be really good. These are important jobs. Moderation, I don't like judges too far right or too far left because I think judges who are at the extreme feel so passionately about what they do that they tend to make law rather than interpret law, which is what the Founding Fathers wanted us to do. And third, diversity. I don't think the bench should all be white males.

The excellence qualification, I don't have any problems with any of the nominees in that regard. It is the moderation that I am worried about with you, Mr. Wolski, because you are known not as somebody who is moderate, particularly on taking issues, but someone who has a decided point of view.

And to me, for a nominee to just simply say, I will follow the law, is not sufficient, because if everyone followed the law in the same way, we could have a computer do our judging. If everyone followed the law in the same way, it wouldn't matter which President nominated you or what your political views were. You would rule cases the same. But study after study has shown nominees from Democratic Presidents rule different than nominees from Republican Presidents, and while there are exceptions to every rule, people's personal views always enter into the way they follow the law.

So I have some concerns about your nomination, Mr. Wolski, given that you have been quite far over, at least in my judgment, on many of the issues that the Court of Claims would have to judge, and here is a quote from you. You have said, "Every single job I have taken since college has been ideologically oriented, trying to further my principles. I am essentially a Libertarian. I believe in limited government, individual liberty, and property rights."

Now, I think I believe in—I know we all believe in those things, too, but read in the context of what you have said and put up against the kind of cases you have reached out to take in order to advance this ideological agenda, I am pretty confident that your beliefs are not sort of in the shades of gray which most of the world really exists in.

So first, I would like to ask you, you have said, well, I was representing clients and that is why I took this and this position when my friend from Wisconsin questioned, but on the other hand, you have said, "every job I have taken has been ideologically oriented." Just tell me how you can reconcile those two views.

Mr. WOLSKI. Thank you for the question.

Senator SCHUMER. First, you did say that, right?

Mr. WOLSKI. I can't be sure that those are my exact words, but I do remember the question and I do remember the sentiments I was trying to express, and as I explained earlier to Senator Fein-

gold, the—maybe I didn't use the best words. First, let me state flat out, I don't consider myself an ideologue. I am not somebody who takes a rigid position on things and can't be flexible. People who have worked with me on Capitol Hill, I think know that. I have worked with people on both sides of the aisle, staff members for the Democrat as well as Republican members of the Finance Committee, on Senator Mack's bipartisan agenda and things like low-income housing and tax credit, the D.C. Economic Recovery Act, and a number of bipartisan bills.

That particular comment, what I was trying to get—trying to convey was just that I have never chased the highest-paying job. I have never been somebody who wanted to go work on Wall Street, work for the big firms. I have been interested in public sector work. I have been interested in nonprofit work. I think it is very important that people do give something back to the community and that is how I did that. I was merely explaining that coming to work for Senator Mack is consistent with my background of having done public sector work and having done nonprofit work—

Senator SCHUMER. And that is—

Mr. WOLSKI. —and that I do believe that those things are important. The use of that word, it was probably a poor choice of words. Certainly, I recognize that now. But that is not—that is not what I meant to convey.

Senator SCHUMER. Are you saying you didn't say that?

Mr. WOLSKI. I am not certain. I could have. It is possible I could have misspoken. That is not what I meant, though. By "ideological," I did not mean I am somebody who is an ideologue. I mean I am somebody who has taken public sector jobs and nonprofit jobs, jobs that involve public issues, idea-oriented public issues jobs.

And anyone who is familiar, I think, with my record over the last few years and who knows the sort of cases I have taken, I think would agree that I am not a rigid, closed-minded person. I am an attorney representing a class of Medicare beneficiaries who are suing the tobacco industry to try to recover reimbursement to the Medicare system.

Senator SCHUMER. Let me ask you, have you taken any cases in the environmental law area where you have been on the other side, where you have been on the so-called non-taking side or the environmental side?

Mr. WOLSKI. Well, yes, Senator. As a matter of fact, I have been involved in two over the last few years. In fact, the only land use matter that I have been involved with in the last 6 years has been on the side of local governments who were trying to prevent commercial development from taking place near them. The county had approved the development and they thought that there were going to be traffic and safety problems and they wanted to stop it. We looked at that for them. That was something I worked on—

Senator SCHUMER. What case was that? Was that a case that was litigated?

Mr. WOLSKI. We ended up not filing any Federal action on it, but we looked at it and did the legal work for the—actually, for some towns in New York.

Senator SCHUMER. Which towns were those? Not Flushing, I presume.

[Laughter.]

Senator SCHUMER. No, they don't have a legal—

Mr. WOLSKI. No, towns in Westchester County.

Senator SCHUMER. Okay. If you can get us some information on that, I would like to know some details about that so I can figure that out.

Mr. WOLSKI. Certainly. Certainly. But in any event, that was a case in which, obviously, the side we were on was seeking to prevent commercial development.

Senator SCHUMER. Right.

Mr. WOLSKI. Another instance is my representation for the State of Nevada in its efforts to resist the placement of a nuclear repository in Yucca Mountain, and in this particular matter, I think that probably every single environmental group in the country, at least that I am aware of, is on our side, is on the side I am taking. And those are two examples.

Senator SCHUMER. Okay, thanks. I still, I think you are going to have a hard time saying, "I meant I enjoyed public service when I said every single job I have taken since college has been ideologically oriented, trying to further my principles. I am essentially a Libertarian. I believe in limited government, individual liberty, and property rights." It strikes me as if you wanted to say, "I want to serve the public and I enjoy being in public service," it wouldn't have quite come out that way, but let me ask you another one.

Mr. WOLSKI. Sure.

Senator SCHUMER. This is a letter that you wrote in 1992. It is a letter to the editor to the San Francisco Examiner, and this is signed by Victor Wolski, Victor J. Wolski. It says, "Admitted, it is"—you are talking about the electoral college. "Don't trash States' roles in the electoral college system," and then you go on to talk about the electoral college, and the final paragraph reads as follows.

"Admittedly, it is ironic in all of these years when people are thoroughly disgusted with a rogue Congress"—this was 1992—"that raises taxes, raises spending, raises its pay"—by the way, are you against pay raises for Congress members?

Mr. WOLSKI. Not any more, Senator.

[Laughter.]

Senator SCHUMER. Not any more. They are tied to judges' salaries, you might know.

[Laughter.]

Senator SCHUMER. "—and is so used to the unconstrained use of other people's money that its members don't bother to balance their own checkbooks. We might see the Presidential election decided in the House. However, there are two silver linings. Many of the current bums will be gone, and the importance of the individual States in our system of government will be underscored." Did you write that?

Mr. WOLSKI. I certainly—I do remember writing a letter to the editor. I think that was in response to, was it Chris Matthews' column, I believe?

Senator SCHUMER. Yes, it was, because you mentioned Chris Matthews being upset to have discovered any vestige of State sov-

ereignty. So it was. What do you think of those words 11 years later?

Mr. WOLSKI. I certainly think the use of hyperbole was a bit much. I meant—certainly didn't mean to—didn't mean any disrespect to you as a member of the House at that time, Senator.

[Laughter.]

Senator SCHUMER. You mean I wasn't one of the current bums?

[Laughter.]

Mr. WOLSKI. No, no. Even though I am a Mets fan and you are a Yankees fan, no.

Senator SCHUMER. Well, the Dodgers were known as the bums, frankly.

Mr. WOLSKI. That was my father's team.

[Laughter.]

Senator SCHUMER. Well, go ahead. Why don't you elaborate a little and tell me what you think of this. Again, it strikes me as somebody who has a passion on one side of the fence. That is not a bad thing. I just am not sure it is the right place for a judge. So do you want to say anything else about that?

Mr. WOLSKI. Senator, just that I—among the principles that I do believe in is the notion of judicial restraint, and I believe very strongly that a judge should not try to make law, that a judge should not try to make policy. I particularly appreciate that having served here in Congress. If I had served in Congress before I had written that letter, I am sure that the tone would have been different. In fact, I probably wouldn't have written it. I have come to appreciate even more than I ever did the important role that Congress plays in our society and the important role of the legislature. I very much enjoyed my time working here in the Senate and I would certainly never try to usurp the law-making or the policy-making role of the Congress or the policy-making role of the executive branch, for that matter.

Senator SCHUMER. Okay. That does seem at odds with the statement that "every job I have taken since college has been ideologically oriented." It does again. You know, I will follow the law. Given that you are taking this job now, people change. I am the first to admit that. I am worried about that.

Let me ask you this one. In light of the positions you took in briefs for the case in *Cargill* v. *United States*, would you please describe your understanding of Congressional powers under the Commerce Clause to regulate under the Clean Water Act and the understanding of the term "navigable waters." Your brief is—it is contentious, I guess. People might describe it as sarcastic. You pose such questions as, is the color of the houses the next subject, since certain colors might deter birds from an otherwise cozy resting spot.

And another example of the statement is Congress nowhere found that the viability of migratory fowl or endangered species populations is dependent upon the preservation of such isolated wetlands. However, as I understand it, in the Migratory Bird Treaty Act and the North American Wetlands Conservation Act, Congress made just those two findings.

So would you comment on your views on the Commerce Clause and the term "navigable waters."

Mr. WOLSKI. Certainly, Senator.

Senator SCHUMER. Navigable, however. I don't know how to pronounce that word, to be honest with you.

Mr. WOLSKI. I guess it is navigable.

Senator SCHUMER. Navigable.

Mr. WOLSKI. I am from the same general section of the country, so I—

Senator SCHUMER. Flushing.

Mr. WOLSKI. Well, actually, I am from New Jersey originally, Sayreville, near Perth Amboy.

Senator SCHUMER. Right.

Mr. WOLSKI. Now, I must confess at the outset that this is not—that Commerce Clause area is not really something that I have litigated in much over the years and looked at much. It is not actually something that could come before the Claims Court, either, since we take—we accept as valid the laws that are before us and don't look to see whether or not there is a—it was a permissible exercise of Congressional power.

Having not looked at the Supreme Court cases in this area very recently, as I understand it, the test that the Supreme Court employs is whether something is—for something to be regulated under the Commerce Clause power of Congress, it either has to be—has to involve an article that has been in or traveled through commerce or something that might substantially affect commerce, and in light of that, obviously, the United States Supreme Court in the *Wickerd* v. *Filburn* case had held that one way to determine whether there is some substantial effect on commerce is to consider the aggregation of all the impacts or all of the—I guess impacts is probably the best word—on commerce from any particular—in that case, it was a farmer growing wheat.

In the *Cargill* case you have mentioned, the Clean Water Act and the scope of the Clean Water Act was what was at issue. I understand that the—I believe the United States Supreme Court in the *Solid Waste Agency of Northern Cook County* case had said that there were significant constitutional issues involved in trying to determine whether Congress's power would extend under the Commerce Clause to protect migratory birds in a particular circumstance. Certainly, under the treaty power, Congress can protect migratory birds, as they have—I think *Missouri* v. *Holland* was the case that recognized that.

Senator SCHUMER. So how does that square with, in your brief, that Congress nowhere has found that the viability of migratory fowl or endangered species populations is dependent on the preservation of such isolated wetlands?

Mr. WOLSKI. Well, Senator, I don't believe that in the Clean Water Act there were any such findings. In fact, I might be mistaken on this, but I believe that, as I remember it, the Clean Water Act was dealing with pollution and was concerned with pollution to the navigable waters to the United States and there was nothing in the legislative history and certainly nothing in the language of the Clean Water Act that would make reference to the migratory birds, and this was a case concerning jurisdiction that was asserted under the Clean Water Act. The jurisdiction wasn't asserted under the Migratory Bird Treaty Act or some other act of Congress.

Senator SCHUMER. But you said Congress nowhere found. You meant nowhere in the Clean Water Act, I presume?

Mr. WOLSKI. That must be what I meant, Senator, nowhere that was relevant to that particular case, because again, the jurisdiction that was invoked was the jurisdiction under the Clean Water Act. It wasn't under some other act.

And on navigable waters of the United States, I understand those to mean, getting back—I think that was part of your original question—I understand those to be waters, not only waters that are navigable, but also waters that are adjacent to or have some connection to navigable waters. So it is a very broad jurisdiction.

Senator SCHUMER. Okay. Thank you, Mr. Chairman.

Senator CHAMBLISS. You know, having practiced law for 26 years and having been involved in any number of trials and appeals of cases, I have been a little bit frustrated being on this Committee and having folks look at briefs that nominees have written over the years. In one case, I remember we went back as long as 12 years and a phrase was taken out of a brief that one of our nominees wrote, and I am sure this happened during the years when we weren't in control or we didn't have a Republican President, so I am not picking on anybody, but it is a frustration to me, having practiced law and having taken positions as an advocate for my client that, number one, went against any number of precedents that were in case law, and I don't think it is right to hold somebody accountable to that.

It is all right to hold them accountable or let them explain what they meant by it, and my question to each of you is, you have all practiced law or you are practicing law. You have been in that position before, but the role of an advocate is distinctly different from the role of a judge. I want to make sure that we don't have nominees who necessarily have their minds made up on an issue that they advocated as a lawyer that they are going to take as a judge, and Judge Carney, I would like to start with you.

If you will, each of you just comment on that aspect of your being nominated and confirmed to the bench, with respect to how you are going to deal with a case on an issue that maybe you have advocated the other side of. Where are you going to be with respect to how you decide that case from the bench?

Judge CARNEY. Well, Mr. Chairman, I don't see my role as a legislator or as a prosecutor or as an attorney. I am a judge to make sure that there is fairness in the process and to apply the law as I understand it from a statute or from what the Ninth Circuit or the United States Supreme Court has said. I do not let my personal views get into the picture, and I agree with your earlier comments as a lawyer, for just to make a point or make it entertaining, you sometimes say things that you don't really mean, and I would hate to be held to some of the things that I have said in the past.

Senator CHAMBLISS. Judge Selna?

Judge SELNA. Mr. Chairman, I think there is clearly a different mindset from an advocate to moving to a judge. I experienced that transition over the last 4 years and I think the most significant part of that transition is to listen to lawyers and let lawyers try their cases. Listen to both sides. Whether you have dealt with that issue in the past, generally speaking, having been an advocate, you

know that there are two sides to an issue. You know what arguments the other side will put forth. I think the role of the judge is to listen and to make his or her best judgment as to what the correct view of the law is.

Senator CHAMBLISS. Mr. Wolski?

Mr. WOLSKI. Thank you for the question, Mr. Chairman. Certainly, I believe that a judge has an obligation and a duty to keep an open mind, to not let any positions they have taken in the past, any arguments, any position they have taken in argument on behalf of a client in the past, not to allow that to affect in any way their understanding and their analysis in a particular case, and that I certainly agree with the sentiments of my colleagues that that does not play a role in the judicial function whatsoever. A judge's duty is to follow the law. A judge's duty is to follow the binding precedents of higher courts and to put aside any past work they have done, put aside any past advocacy they have done in fulfilling that obligation.

Senator CHAMBLISS. Judge Springmann?

Judge SPRINGMANN. Mr. Chairman, you are correct that as an advocate representing your client, that that client expects you to be passionate in representing their side in a case. But when you become a judge, you have to set aside passions and, in fact, become dispassionate when you are interpreting the law. You have to remain impartial, open minded, and fair for all the people that come before you in a court so that they can have confidence in the integrity of the system in which you are as a trial judge representing. That is not to say, though, that a judge should not lose all compassion for human frailty when that becomes an issue in a case.

Mr. SIMON. Mr. Chairman, I have spent the last 13 years of my life as a Federal prosecutor and the last 4 years as the Chief of the Criminal Division in the United States Attorney's Office. I have never been a judge and should I be fortunate enough to be confirmed, I can only promise you, Mr. Chairman, and this Committee that I will do my level best to be fair and impartial.

I, candidly, have some concerns of—not that I can't be fair, I know that I can, but that there may be some perception that I have spent so much time as a prosecutor, but I am very confident that over a period of time, that I will be able to demonstrate that I am a fair and reasonable person and that I will impartially decide the cases that come before me if I am fortunate enough to be confirmed.

Senator CHAMBLISS. Judge Williams?

Judge WILLIAMS. Thank you, Mr. Chairman. You are absolutely right that the role of an advocate is very different from the role of a trial judge. In particular, an advocate has a responsibility, an ethical obligation to most zealously present the position of his or her client as possible, and in the context of zealously representing your client, you should use every tool at your disposal to make arguments. You should use rhetoric. You should use the law to the extent that you can. You are required to under the canons of ethics.

But a judge's role is very, very different. You—I think I view it as a two-fold role. It is ensuring that the process of the decision making is fair as well as the decision itself. In the process side, we are affording every litigant complete due process, complete fair-

ness, giving them a full opportunity to be heard, and as one of my colleagues eloquently put it, listening. That is the biggest thing, is just listening and making sure you understand.

And I have often in my situation as a trial judge gone into a case or a trial or an argument thinking one way about a case and coming out thinking just the opposite way and ready to go and do my own homework, go back over the briefs, go back to the library, so that I can come up with my own independent decision. Thank you.

Senator CHAMBLISS. Thank you. Senator Durbin, we are glad to have you join us, my friend from Illinois, Senator Durbin.

Senator DURBIN. Thank you very much, and I apologize for coming in a little late with all the things we are trying to juggle here.

I thank you all for being here, and I would like to ask a general question. How many of you are members of the Federalist Society?

[Mr. Wolski raised his hand.]

Mr. WOLSKI. I am.

Senator DURBIN. Mr. Wolski. Is anybody else here a member? Could you explain it to me for the record, what the—the reason I ask this is when we map the DNA of Bush nominees for court positions, we always come across the Federalist Society chromosome in so many of them and I am just trying to get to the bottom of this, about what it is that makes Federalist Society membership an important consideration with some nominees, and perhaps, for the record, if you could explain to me how you view the Federalist Society and its philosophy.

Mr. WOLSKI. Certainly, Senator. On the penultimate question that you asked, I am the pickee, not the picker, so I really couldn't say why the administration chooses to nominate certain people and not others.

But on the first question, as to what the Federalist Society is, it is an organization, primarily a student organization, although there are also lawyer chapters, which has open forums and debates and sponsors speakers on a wide range of issues that relate to the Constitution, issues that relate to the legal process.

When I was at the University of Virginia School of Law, I was the President of the Student Chapter of the Federalist Society there and we had a number of very good events. They were well attended by people from all political walks of life and all thought, very well attended, debates on topics such as the constitutionality of certain activity—I actually can't remember what—well, let me see, it must have had something to do with—well, let us put that one aside. And then we had a debate on drug legalization, for instance. We had a debate on the Ninth Amendment and whether it means anything. The Society tends to look at—and sponsor debates and look at issues often in the perspective of the historical role of the Constitution and what the Framers were doing when they put it together, and that is I think as best as I can explain it.

Senator DURBIN. I know where I would put the ACLU in the political spectrum. Where would you put the Federalist Society?

Mr. WOLSKI. I would be reluctant to try to characterize it as one sort of group or another. It is not—it doesn't take positions on political issues. It doesn't take positions on legal or constitutional issues, for that matter. So since it is a group that doesn't take posi-

tions and doesn't litigate, doesn't get involved in advocating one position or another, I don't really think you could do that.

Senator DURBIN. You have been rather outspoken. I think some of my colleagues have already questioned you about your pride and your ideology, your political ideology. In fact, I think you were quoted in the National Journal as saying you have—you would like to take that quote back, wouldn't you?

[Laughter.]

Senator DURBIN. You are quoted in the National Journal as saying you are always looking for jobs that let you further your ideological—I don't want to misquote you, but could you tell me what you said to the National Journal and then if you would like to explain it.

Mr. WOLSKI. I wish I could remember with certainty what I said.

Senator DURBIN. I could probably find it in these notes.

Mr. WOLSKI. Well—

Senator DURBIN. Go ahead. Give it your best.

Mr. WOLSKI. As I explained earlier to the previous Senators who were here, the question was—

Senator DURBIN. Go ahead.

Mr. WOLSKI. The question, I believe, that was posed to me—I guess to actually put things in context, the National Journal piece in question, I think, is from the "Hill people" special issue that comes out every 2 years that does a profile of the new Congress, what committees each member is assigned to, and talks about Committee staff and does a little profile on each committee.

And in the profile on the Joint Economic Committee, they had a—I think it was one paragraph about me that primarily talked about my tax work and how the work I do for Senator Mack is tax oriented. And the person who was interviewing me asked me, why was I willing to relocate from California to come to D.C. to work for a Senator from Florida, and the answer I tried to express, again, was—I may not have used the best words. I am not sure that that was a precise and accurate quote, but it certainly has been reported, so I will stick with that quote.

All that I meant to convey was that the sort of jobs that I had taken since college have not been ones designed to try to earn the most money. Unlike my friends out of the Wharton School, I didn't try to get a job on Wall Street and make a lot of money. I was the first person in my family to go to college, and my mother is the granddaughter of Lithuanian immigrants. My dad is the son of Lithuanian immigrants and—

Senator DURBIN. Are you trying to get on my good side here?

[Laughter.]

Mr. WOLSKI. and I understand that you might have something—

Senator DURBIN. Someone has done some homework for you.

Mr. WOLSKI. It is one of the—the DNA of the Senators that we do before we come.

[Laughter.]

Mr. WOLSKI. But no, in all seriousness, Senator, I had an opportunity that my parents didn't have. I was able to go to college. I was able to go to law school. And I believe very strongly that people should give something back to their community. People should try to make society better and take advantage of the opportunity

that they have had to do that. And all that I meant to express was the type of jobs I had had were public sector job and nonprofit jobs, jobs that related to tax policy.

The use of the word "ideological," if that is what I had said, I wasn't trying to characterize myself as an ideologue because I think people who know me and know my record know that I am open minded, that I am not rigid. When I worked for Senator Mack, it was on a bipartisan basis on a number of tax issues that had support widely across the aisle, things like the low-income housing tax credit, the D.C. Economic Recovery Act.

Senator DURBIN. What about this whole takings question? If you are going to argue for ideology under law, that seems to be a ripe issue for the conservative right, this whole question of takings. And you have had quite a few cases, have you not, involving this issue?

Mr. WOLSKI. I guess six, seven, 8 years ago when I worked at the Pacific Legal Foundation, I did—I was a member of the Property Rights Section and I had a number of cases involved in that section that involved takings. Typical clients included Bernadine Suitum. I don't know if you are familiar with her Supreme Court case, but she was an elderly lady who had a plot of land in a fully developed subdivision in Incline Village, Nevada. Hers was the last plot that hadn't been built on. She wanted to build a house on it and she was told that, because of the regulations, she couldn't build anything on it.

So she tried to get into court and sue for just compensation since she couldn't make any use at all of her property. And the argument was raised that her claim wasn't ripe yet, because while she couldn't make any use of her property, under the regulations, she could transfer to somebody else the right to make more extensive use of their own property, and that, therefore, her case wasn't ripe because she could still help somebody else out. That was used to kick her out of court.

I did a petition for writ of certiorari to the United States Supreme Court and the Supreme Court granted the case, reviewed the case. I didn't do the argument before the Supreme Court, but we—Mrs. Suitum won nine-to-nothing, again, a unanimous opinion written by Justice Souter said that she could have her day in court.

One other case I did in the land use area was for Montereyans for Affordable Housing, which is a nonprofit organization that was challenging a procedural hurdle that was put in their place that would prevent rezoning—actually, it wouldn't prevent rezoning. It made it very difficult in Monterey to rezone land to allow apartments to be built. If somebody wanted to do that, they had to first get the city council approval, then they had to go put it on the ballot themselves, pay for the election, and win an election just in order to have apartments. As I said, I represented an affordable housing group and we got that law struck down. That is the sort of work that I did.

Senator DURBIN. Were you primarily representing property owners who were resisting either government regulation or government taking?

Mr. WOLSKI. No. Actually, in the takings context, a lot of the cases would be seeking just compensation. It is—resistance is futile, I guess, after a certain point and you have got to choose

whether you are going to seek compensation or not. In the Court of Federal Claims, for instance, the cases that are brought under the Takings Clause are people who accept as given the law or the regulation or the government decision that restricted the use of their land and accept that as proper and don't challenge the purpose, don't challenge the legitimacy of that action, but instead say the impact on this has been so great as to require just compensation under the Constitution. Those are the sort of cases—

Senator DURBIN. You mentioned the Pacific Legal Foundation. Is that connected at all with the Federalist Society?

Mr. WOLSKI. I am sure that there are probably members of the staff of the Pacific Legal Foundation who might also be members of the Federalist Society. When I was a staff attorney at Pacific Legal Foundation, I had also joined the Sacramento Chapter of the Federalist Society and I know that there were at least a few others who were.

Senator DURBIN. So let me ask you this question. The Court of Claims deals with takings and environmental issues and you will come now to a position where you will be sitting in judgment. You have prided yourself on your political beliefs, political philosophy, political ideology. Should I not have some concern as to whether or not you are going to be dispassionate and objective when it comes to this Court of Claims position or whether you are bringing a political agenda to this position?

Mr. WOLSKI. I appreciate that question, Senator, and I think the answer is no, actually, and the reason why I think you shouldn't be concerned is taking the broader perspective of my career, looking at everything that I have done, not just what—not just a job that I took as a young lawyer right out of my clerkship seven, eight, 9 years ago, but look what I have done over the whole breadth of my career, the bipartisan work I did for Senator Mack on things like the low-income housing tax credit, the sort of cases that I have litigated over the last few years.

I represent a class of Medicare beneficiaries who are suing the tobacco industry, trying to get reimbursement to the Medicare Trust Fund for smoking-related illnesses. I represent the State of Nevada in its efforts to resist the placement of the nuclear repository in Yucca Mountain. So I have represented governments, I have represented the Governor of Puerto Rico, I have represented the interests of government in a number of cases, as well, and I think I have demonstrated that I am a person who can see things fairly and does understand and appreciate the importance of government.

Senator DURBIN. Thank you, Mr. Wolski. I may have a few written follow-up questions, and to the other nominees who are before us, let me thank you for your patience. You come with great recommendations.

I would just say, if I might, Mr. Chairman, by way of closing, that this last weekend, I was privileged to join a group of my colleagues from the House and Senate to travel to Alabama with Congressman John Lewis. Some of you know John Lewis, from Atlanta, Georgia, is one of the real heroes of the civil rights movement. He was, as a young man, marching across Edmund Pettis Bridge in Selma when that terrible bloody Sunday occurred.

John took a group of us, a bipartisan group, down to Alabama. For me, it was the first time to visit the State, and we went to Montgomery and Selma and Birmingham. We went to the corner where Rosa Parks got on the bus and refused to give up her seat and we marched across the Edmund Pettis Bridge and we went to the 16th Street Baptist Church in Birmingham where the four little girls were killed by the bomb.

It was a moving experience for me. At my age, this was a formative part of my life and my values, the civil rights movement, and to see it firsthand and to meet the people involved in it made a difference.

At one point while we were traveling, I talked to John Lewis about how it all worked out, ultimately it worked out. There is still a lot to be done, but ultimately, it worked out. The civil rights movement was successful in passing historic legislation. And he said to me at one point, there never would have been a march from Selma to Montgomery if there wasn't a Federal District Court judge named Frank Johnson. Frank Johnson from Northern Alabama, a Republican appointee under President Eisenhower had the courage to stand up to the establishment, to the State courts, and to many of his Federal judges and to say, we are going to put an end to this discrimination once and for all.

As a result, he was threatened, his life was threatened, his mother's home was under protective surveillance for years and he was shunned by the society he lived in. When he passed away a few years ago, the tributes and praise were universal from everyone who looked back and said, this one Federal District Court judge changed history in America.

And it was a reminder to me as I sit in this Judiciary Committee and see literally scores of candidates come through here that you never know which one of you, if you are fortunate enough to come to the bench, will have that moment, that opportunity in history. And I hope, as I hope that the Senator and myself will have the courage to see that moment and to seize it, even if it is unpopular, that each of you will have that wisdom, too.

Thank you very much. Thanks, Mr. Chairman.

Senator CHAMBLISS. Thank you, Dick. I hope you held your hand over your heart as you flew over Georgia on the way to Selma.

[Laughter.]

Senator CHAMBLISS. I am not a member of the Federalist Society, but just like Senator Durbin, I have heard that an awful lot during the hearings that we have had and I have heard Senator Hatch, who is a member of the Federalist Society, delineate exactly what the Federalist Society is. And while some want to paint a different picture, the fact of the matter is that the Federalist Society is a mainstream organization with no articles of faith or litmus test. Members range from pro-choice to pro-life, from those who believe in the original meaning to those who focus more on precedent and evolving tradition.

The Federalist Society has hosted speeches by the likes of Justice Stephen Breyer, Alan Derschowitz, Kathleen Sullivan, and Nadine Strossen, among others. The Federalist Society has also received the input and praise of such noted liberal legal scholars such as

Harvard Professor Lawrence Tribe, Chicago law professor Martha Nusbaum, and Yale law professor Ian Ayers, among others.

So I do not believe the Federalist Society membership should disqualify anyone from the Federal bench anymore than an ABA membership should. I always appreciate all of our questions, but that one does seem to come up an awful lot.

I am sorry my friend Senator Schumer is not here, but he made the comment about Republican judges seeming to decide cases differently from Democratic judges. But as I look at this group, we have got some Republicans here. Mr. Wolski, your statement that you have been asked about a number of different times, you state in there that you are a Libertarian. I had a Libertarian opponent in my last election, and Judge Williams, I understand you are a Democrat and that you actually were considered for this position by the Clinton administration. Am I correct in that?

Judge WILLIAMS. Yes, Mr. Chairman, I was. I didn't get quite this far there, but I am told I did get pretty far along in the process.

Senator CHAMBLISS. Well, we have got a good bipartisan group of nominees is my point, and I will tell you that as a former lawyer, I would certainly look forward to practicing before each and every one of you.

We are going to conclude this panel. The process will continue. We are going to move to the next panel and we appreciate each of you being here today to provide us with your testimony. Thank you very much.

Judge CARNEY. Thank you, Mr. Chairman.

Judge SELNA. Thank you, Mr. Chairman.

Mr. SIMON. Thank you, Mr. Chairman.

Judge SPRINGMANN. Thank you, Mr. Chairman.

Judge WILLIAMS. Thank you, Mr. Chairman.

Mr. WOLSKI. Thank you, Mr. Chairman.

[The biographical information of Judge Carney, Judge Selna, Mr. Wolski, Judge Springmann, Mr. Simon and Judge Williams follow:]

QUESTIONNAIRE FOR NOMINEES BEFORE THE COMMITTEE ON THE JUDICIARY,

UNITED STATES SENATE

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

Cormac Joseph Carney

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

United States District Judge for Central District of California

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

North Justice Center, 1275 North Berkeley Avenue, Fullerton, CA 92838-0500, (714)626-7325 (until 1/10/03)
Central Justice Center, 700 Civic Center Drive West, Santa Ana, CA 92701, (714)834-2208 (commencing 1/13/03)

4. **Birthplace:** State date and place of birth.

May 6, 1959; Detroit, Michigan

5. **Marital Status:** (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es). Please, also indicate the number of dependent children.

Wife: *Mary Beth Carney (Maiden name: Fagerson)*
General Counsel of Morpho Technologies
19772 MacArthur Blvd., Suite 100
Irvine, CA 92612

Three Dependent Children

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

College/Law School	*Attendance*	*Degree*
Harvard Law School	*1984 to 1987*	*J.D., 1987*
University of California, Los Angeles	*1979 to 1983*	*B.A., 1983*
USAF Academy	*1977 to 1979*	*no degree*

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

Employer	*Position*	*Employment Period*	*Payment Received*
State of California *North Justice Center* *1275 N. Berkeley Avenue* *Fullerton, CA 92838*	*Superior Court Judge*	*2001 to Present*	*yes*

O'Melveny & Myers *610 Newport Center Dr.* *Newport Beach, CA 92660*	*Partner* *Associate*	*1995 to 2001* *1991 to 1995*	*yes* *yes*
Latham & Watkins *650 Town Center Dr.* *Costa Mesa, CA 92626*	*Associate*	*1987 to 1991 and Summer 86*	*yes*
Sheppard, Mullen, *Richter & Hampton* *650 Town Center Dr.* *Costa Mesa, CA 92626*	*Summer Associate*	*Summer 1985*	*yes*
Memphis Showboats *3767 New Getwell Road* *Memphis, TN 38118*	*Player*	*1983 to 1984*	*yes*
New York Giants *Giants Stadium* *E. Rutherford, NJ 07073*	*Player*	*1983*	*yes*

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

Branch	*Rank*	*Period of Service*	*Discharge*
USAF Academy	*Officer Candidate*	*7/77 to 3/79*	*Honorable*
Air Force	*Airman Reserve*	*3/79 to 7/83*	*Honorable*

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

First Team Academic All-American Football, 81 and 82

Second Team All-American Football, 82

First Team All Pacific Ten Conference Football, 81 and 82

UCLA Outstanding Senior Award, 83

Long Beach Athlete of the Year, 83

NCAA Post Graduate Scholarship, 83

Pacific-10 Conference Medal for Leadership, 83

Pi Gamma Mu National Honor Society

Psi Chi National Honor Society

10. **Bar Associations:** List all bar associations or legal or judicial-related committees, selection panels 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.

Orange County Bar Association

Association of Business Trial Lawyers, Orange County Section

Celtic Bar Association

Board Member of the Governing Board of Victim Assistance Programs since February 2002

11. **Bar and Court Admission:** List each state and court in which you have been admitted to practice, including dates of admission and any lapses in membership. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

Courts	*Admission Date*
All California State Courts	*1987*
United States District Court, Central District of California	*1987*
All Illinois State Courts	*1991*

12. **Memberships:** List all memberships and offices currently and formerly held in professional, business, fraternal, scholarly, civic, charitable, or other organizations since graduation from college, other than those listed in response to Questions 10 or 11. Please indicate whether any of these organizations formerly discriminated or currently discriminates on the basis of race, sex, or religion -either through formal membership requirements or the practical implementation of membership policies. If so, describe any action you have taken to change these policies and practices.

UCLA Alumni Association (This organization does not discriminate on the basis of race, sex or religion, either through formal membership requirements or the practical implementation of membership policies).

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

None.

14. **Congressional Testimony:** List any occasion when you have testified before a committee or subcommittee of the Congress, including the name of the committee or subcommittee, the date of the testimony and a brief description of the substance of the testimony. In addition, please supply four (4) copies of any written statement submitted as testimony and the transcript of the testimony, if in your possession.

None.

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

I am in excellent physical condition. My last physical was on August 7, 2002.

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

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

I have been a judge for over a year. My assignment up until mid-January of this year was to preside over criminal misdemeanor and limited civil jury trials. My rulings were generally made orally from the bench. I presided over numerous trials involving domestic violence, assault and battery, driving under the influence, theft, breach of contract and personal injury. The following are 10 jury trials over which I presided:

Name:	*People v. Lopez*
Case Number:	*BR01NM16129*
Description:	*This case was a criminal matter. The defendant was charged with violating a protective order that was previously issued against him for domestic violence. The victim had made a 911 telephone call to the police claiming that the defendant was breaking into her residence. The defendant claimed that he went to the victim's residence to retrieve some personal belongings and that he never spoke to the victim nor actually entered her residence. The defendant left the residence before the police arrived at the scene. The jury returned a guilty verdict. One of the more significant rulings that I made during the trial was my ruling not to hold the victim in contempt for refusing to testify because she was afraid the defendant would retaliate against her after he was released from prison.*
District Attorney:	*Kristine Johnston (714)773-4480*
Public Defender:	*Rasheed Alexander (714)626-3700*
Disposition:	*Guilty Verdict*

Name:	*People v. Castaneda*
Case Number:	*FU02NM05132*
Description:	*This case was a criminal matter. The defendant was charged with entering his former girlfriend's residence late at night and sleeping in her bed without her permission. The defendant's relationship with the woman had ended about six months before the evening in question. When returning from an evening engagement, the former girlfriend discovered a man sleeping in her bed. She immediately made a 911 telephone call to the police. When the police arrived on the scene, they discovered that the man in the bed was the defendant. The defendant claimed that the former girlfriend had given him an open invitation to sleep at her house whenever he had too much to drink. The jury returned a guilty verdict. One of the more significant rulings that I made during the trial was my ruling allowing testimony concerning the defendant's character for untruthfulness, more specifically, his numerous lies to the victim concerning his affairs with other women. I allowed this testimony to attack the defendant's credibility as a witness.*
District Attorney:	*Pamela Leitao (714)773-4480*
Public Defender:	*Raymond Ky (714)626-3700*
Disposition:	*Guilty Verdict*

Name:	*People v. Richey*
Case Number:	*CH02NM06691*
Description:	*This case was a criminal matter. The defendant was charged with assaulting and battering a man who had accidentally collided with the defendant's horse trailer on the freeway. The victim had a torn shirt, but no cuts or bruises on him. The victim claimed the defendant was abusive, both physically and verbally, after the collision. The defendant denied the victim's recount of the incident and claimed he accidentally tore the victim's shirt when he grabbed it to look at the victim's nametag. The jury was unable to reach a verdict and I had to declare a mistrial. One of the more significant rulings that I made during the trial was my ruling excluding testimony concerning the defendant's previous conviction for assault and battery on a police officer. I excluded that testimony because it was inadmissible character evidence.*
District Attorney:	*Israel Claustro (714)773-4480*
Public Defender:	*Richard Cheung (714)626-3700*
Disposition:	*Jury Deadlock – Mistrial*

Name: *People v. Cuadra*
Case Number: *FU01NF1462*
Description: *This case was a criminal matter. The defendant was charged, along with two other people, with stealing tape cartridges from a store. The defendant claimed she never meant to steal anything and had no knowledge that the other people charged were stealing the tape cartridges. The jury returned a guilty verdict. One of the more significant rulings that I made during the trial was my ruling allowing testimony regarding the defendant's prior convictions for theft. I allowed that testimony because those convictions involved moral turpitude.*
District Attorney: *Gary Logalbo (714)834-3600*
Public Defender: *Carl Sohn (714)626-3700*
Disposition: *Guilty Verdict*

Name: *People v. Edwards*
Case Number: *FU02NM05736*
Description: *This case was a criminal matter. The defendant was charged with assaulting and battering a man who was visiting the defendant's roommate. The victim had bruises on his neck and face. The defendant claimed that the victim caused the incident by being loud and obnoxious in the middle of the night while the defendant was trying to sleep. The jury returned a guilty verdict.*
District Attorney: *Clarissa Stone (714)773-4480*
Defense Counsel: *Mark Sutherland (714)543-8885*
Disposition: *Guilty Verdict*

Name: *People v. Segundo*
Case Number: *BP02NM08961*
Description: *This case was a criminal matter. The defendant was charged with assaulting and battering his spouse. A police officer working undercover at the time of the incident testified at the trial that he saw the defendant choke the victim and throw her to the ground. The defendant and the victim denied the police officer's account of the incident and said that they were just having a heated argument. The victim said she accidentally tripped and fell to the ground. The jury was unable to reach a verdict and I had to declare a mistrial.*
District Attorney: *William Fallon (714)834-3600*
Public Defender: *Holly Galloway (714)626-3700*
Disposition: *Jury Deadlock – Mistrial*

Name: *People v. Gideon*
Case Number: *FU02NM0264*
Description: *This case was a criminal matter. The defendant was charged with committing a battery against his girlfriend and terrorizing her during the night. The victim had bruising on her face and arms as well as blood on her shirt and pants. The defendant claimed that the victim was a drug addict going through violent withdrawals during the evening in question. The jury returned a not guilty verdict. One of the more significant rulings that I made during the trial was my ruling allowing testimony concerning the victim's drug use. I allowed that testimony because it pertained to the victim's capacity to perceive, to recollect and to communicate about the events at issue.*
District Attorney: *Christian Kim (714)773-4480*
Public Defender: *Rasheed Alexander (714)626-3700*
Disposition: *Not Guilty Verdict*

Name: *People v. Ahir*
Case Number: *BP00NM14328*
Description: *This case was a criminal matter. The defendant was charged with violating a city ordinance prohibiting a motel operator from renting out a room to any person for more than thirty consecutive days. The defendant claimed that he was operating a residential motel, which is exempt from the ordinance. The jury returned a guilty verdict. One of the more significant rulings that I made in the case was my ruling that the ordinance was constitutional and that it did not violate the equal protection and due process clauses of the Constitution.*

City Attorney: *Gregory Palmer (714)446-1400*
Defense Counsel: *Frank Weiser (213)384-6964*
Disposition: *Guilty Verdict*

Name: *Ma v. Kim*
Case Number: *00NL15925*
Description: *This case was a civil matter. The plaintiff claimed he suffered property damage and personal injuries when his vehicle was struck by the defendant's vehicle. The jury returned with a verdict in the plaintiff's favor and awarded him damages.*
Plaintiff Counsel: *Michael Gilmore (714)997-9872*
Defense Counsel: *Grady Vaughn (714)899-2734*
Disposition: *Plaintiff Verdict*

Name: *Escalante v. Garcia*
Case Number: *01NL11487*
Description: *This case was a civil matter. The plaintiff claimed she suffered property damage and personal injuries when her vehicle was struck by the defendant's vehicle. The jury returned with a verdict in the plaintiff's favor and awarded her damages.*
Plaintiff Counsel: *Vincent Russo (310)450-1359*
Defense Counsel: *Peter Simpson (714)667-5151*
Disposition: *Plaintiff Verdict*

Commencing in mid-January of 2003, I will be on the unlimited civil panel (cases in which the amount in controversy is over $25,000). I will be responsible for over 600 civil cases in this new assignment. I will hear all law and motion matters and will preside over many of the trials pertaining to these cases.

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

To date, I have not been reversed or criticized on appeal.

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

None. See response to 16(a).

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

Public Office, Political Activities and Affiliations:

List chronologically any public offices you have held. federal, state or local, other than judicial offices, including the terms of service and ther such positions were elected or appointed. If appointed, please include the name of the individual who appointed you.
o, state chronologically any unsuccessful candidacies you have had for elective office or nominations for appointed office for which were confirmed by a state or federal legislative body.

None.

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 didate, dates of the campaign), your tit l e and responsibilities.

No.

Legal Career: Please answer each part separately.

(a) Describe chronologically your law practice and legal experience after graduation from law school including:

whether you served as clerk to a judge, and if so, the name of the judge, the court and dates of the period you were a clerk;

I did not clerk for a judge.

whether you practiced alone, and if so the addresses and dates;

I did not practice alone.

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

Employer	*Position*	*From / To*
Latham & Watkins *650 Town Center,* *20th Floor* *Costa Mesa, CA 92626*	*Associate*	*1987 / 1991*
O'Melveny & Myers *610 Newport Center Drive* *Suite 1700* *Newport Beach, CA 92660*	*Associate* *Partner*	*1991/1995* *1995/2001*
State of California *North Justice Center* *1275 North Berkeley Avenue* *Fullerton, CA 92838-0500*	*Superior Court Judge*	*2001 / Present*

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

Prior to my appointment to the bench, I was a business litigator for 14 years. I gained experience in a wide variety of complex litigation areas, including real estate, partnership, lender liability, environmental, intellectual property and insurance coverage. I took hundreds of depositions over my career, briefed and argued hundreds of motions, including motions for summary judgment and provisional remedies. In addition, I litigated at least 5 cases through trial (4 jury and 1 non-jury) and two cases through arbitration.

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

Prior to my appointment to the bench, I typically represented Fortune 500 companies, both as plaintiffs and as defendants.

(c) (1) Describe whether you appeared in court frequently occasionally, or not at all. If the frequency of your appearances in court varied, describe each such variance, providing dates.

Prior to my appointment to the bench, I frequently appeared in state and federal courts located throughout California, typically three to four appearances each month.

(2) Indicate the percentage of these appearances in:

(A) federal courts; *10%*
(B) state courts of record; *85%*
(C) other courts. *5% (arbitrations)*

ndicate the percentage of these appearances in:

(A) civil proceedings; *100%, prior to my appointment to the bench*
(B) criminal proceedings. *0% prior to my appointment to the bench*

My judicial calendar for the past year consisted of 80% criminal proceedings and 20% civil proceedings. My new assignment starting in mid-January of this year is exclusively civil.

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

In my first assignment on the bench, I presided over a jury trial almost each week. I also presided over at least one felony preliminary hearing each week. Prior to my appointment to the bench, I tried seven complex business cases (five trials and two arbitrations) that went to verdict or judgment. I was chief counsel on three of those cases and associate counsel on four of them.

Indicate the percentage of these trials that were decided by a jury.

Almost every trial that I presided over for the past year was a jury trial. Prior to my appointment to the bench, four of the seven complex business cases that I tried were decided by a jury.

Describe your practice, if any, before the United States Supreme Court. Please supply four (4) copies of any briefs, amicus or otherwise, , if applicable, any oral argument transcripts before the U.S. Supreme Court m connection with your practice.

I have not practiced before the Supreme Court.

Describe legal services that you have provided to disadvantaged persons or on a *pro bono* basis, and list specific examples of such service : the amount of time devoted to each.

As an associate at O'Melveny & Myers, I devoted well over 100 hours on pro bono matters for the firm. One notable matter involved the firm's representation of Children's Institute International in its effort to enjoin NBC from airing excerpts of the Institute's videotaped interviews of the children allegedly sexually abused at the McMartin Preschool. After considering the evidence and arguments we presented, including declarations from the parents of the victims of the alleged sexual abuse, the Superior Court enjoined NBC from airing excerpts of the videotapes.

Once I became a partner at O'Melveny & Myers, I devoted numerous hours supervising junior lawyers that were working on the firm's pro bono matters. These pro bono matters encompassed housing, civil rights, education and homeless rights. Because of the firm's extensive efforts in Orange County, California, O'Melveny & Myers received the Pro Bono Services Award from the Orange County Bar Association and the Law Firm of the Year Award from the Orange County Public Law Center.

Since my appointment to the bench, I have become involved with victims' rights and am currently serving as a member of the Governing Board of Victim Assistance Programs. This Board provides support and guidance to all victim assistance programs and advises on procedure and policies relating to the operations of the victim centers located throughout Orange County, California.

More recently, I volunteered to be a judge for a high school mock trial competition sponsored by the Constitutional Rights Foundation and the California State Department of Education. This competition is designed to provide high school students with a basic understanding of our Constitution and criminal justice system. I presided over mock criminal murder trials presented by high school students in Orange County.

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

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

a detailed summary of the substance of each case outlining briefly the factual and legal issues involved;

the party or parties whom you represented; and

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

I handled the following ten matters prior to my appointment to the bench:

Name: *Miradco International Corporation v. Procom Technology, Inc.*
Number: *788412*
Description: *This case was a breach of contract and fraud action in which the plaintiff and two eyewitnesses alleged that the defendant corporation and its Chief Financial Officer orally promised the plaintiff 7% of the defendant corporation's stock in exchange for advisory services in connection with an initial public offering. I was the lead lawyer for the defendant corporation and the defendant Chief Financial Officer. The case went to trial before a jury. We argued to the jury that the defendants never entered into any binding contract for advisory services with the plaintiff and that no material misrepresentations were ever made by the Chief Financial Officer to the plaintiff. The jury came back with a defense verdict, a finding of no liability against the corporation and the Chief Financial Officer.*
Opposing Counsel: *Greg Hafif,*
Law Offices of Herbert Hafif,
269 West Bonita Avenue
Claremont, CA 91711-4783
(909)624-1671
Court: *Orange County Superior Court*
Judge: *Judge Frederick P. Horn*
Date: *Action filed December 23, 1997*
Party Represented: *Defendant Procom Technology, Inc.*
Disposition: *Defense verdict of no liability*

Name: *Newport Lido Medical Center, et al. v. Michael Lombardi, et al.*
Number: *794060*
Description: *This case was a contentious partnership dispute between Charles M. Schulz, the creator of the "Peanuts" comic strip, and Michael Lombardi, the managing general partner of the partnership. The parties' primary dispute was over the operation and control of a medical office building in Newport Beach that was owned by the partnership. Mr. Schulz had invested millions of dollars into the partnership but had never received any return on his investment. I was the lead lawyer representing Mr. Schulz. We contended that the managing general partner was mismanaging the partnership and misappropriating funds for his own personal benefit. The parties engaged in extensive discovery for over a year. After a court order was obtained preventing the managing general partner from using any partnership funds without Mr. Schulz's approval, Mr. Lombardi resigned as managing general partner and the case was settled.*
Opposing Counsel: *Scott J. Tepper,*
Garfield & Tepper
1925 Century Park East, Suite 1250
Los Angeles, CA 90067-2713
(310)277-1981
Court: *Los Angeles County Superior Court*
Judge: *Judge Aurelio Munoz*
Date: *Action filed May 8, 1998*
Party Represented: *Plaintiffs Newport Lido Medical Center and Charles Schulz*
Disposition: *Settlement after plaintiffs' motion for preliminary injunction granted*

Name: *Peggy Pearson, et al. v. Dana Point Associates, et al.*
Number: *737164*
Description: *This case was a contract and fraud action brought by several tenants against the landlord of Mariner's Village, a commercial development consisting of restaurants and shops in Dana Point Harbor, over implementation of a controlled gated parking program and other operational measures at the development. I was the lead lawyer for the landlord. We filed a motion for summary judgment to dismiss the case on the ground that the tenants' leases gave the landlord the right, as a matter of law, to implement the parking program and other operational measures. The Court granted our motion.*

Opposing Counsel:	*Frank J. Lozoya,* *Law Offices of Lozoya & Lozoya* *18672 Florida Street, Suite 102B* *Huntington Beach, CA 92649* *(714)847-5701*
Court:	*Orange County Superior Court*
Judge:	*Judge James J. Alfano*
Date:	*Motion for Summary Judgment heard December 18, 1996*
Party Represented:	*Defendants*
Disposition:	*Defendants' motion for summary judgment granted*

Name:	*Argo Construction Company, Inc. v. Shirley Bros.*
Number:	*Claim Number 1220021948*
Description:	*This case was a dissolution of a joint venture that operated Mariner's Village, a commercial development consisting of restaurants and shops in Dana Point Harbor. In connection with the dissolution, one of the partners to the joint venture alleged that the managing general partner had misappropriated venture funds for his own personal benefit. I was the lead lawyer for the managing general partner. The case was arbitrated before a retired judge. The judge ruled that the managing general partner did not misappropriate any venture funds.*
Opposing Counsel:	*Al Fadel,* *Gibbs, Gidden, Locher & Turner* *2029 Century Park East, 34th Floor* *Los Angeles, CA 90067* *(310)552-3400*
Court:	*Arbitration*
Judge:	*Judge Barnet M. Cooperman*
Date:	*Statement of Claims filed August 1999*
Party Represented:	*Argo Construction Company*
Disposition:	*Arbitrator's ruling in favor of managing general partner holding no excess salary or other benefits paid*

Name:	*Cercek, et al. v. Beckman Instruments, Inc.*
Number:	*753055*
Description:	*This case was a high profile action brought by two scientists against Beckman Instruments arising out of Beckman's decision to stop funding of a cancer research project the scientists were managing. I was one of the lead lawyers representing Beckman. The scientists alleged that Beckman failed to perform its contractual commitments to them with respect to the project and that it made numerous misrepresentations to them about funding and support for the project. Beckman denied the allegations and contended that it had the right to cancel the project, especially since, after years of support and millions of dollars of funding, the project had not produced any technology that could be commercialized. After extensive discovery and analysis of numerous patents obtained during the project, the case was settled.*
Opposing Counsel:	*Michael W. Robinson,* *Robinson & Wisbaum* *361 Forest Avenue, Suite 203* *Laguna Beach, CA 92651* *(949)497-0111*
Court:	*Orange County Superior Court*
Judge:	*Judge Richard O. Frazee*
Date:	*Action filed September 20, 1995*
Party Represented:	*Defendant Beckman*
Disposition:	*Settlement*

Name:	*Richter v. Wynn Oil Company, et al.*
Number:	*95-1255 JSL (JGX)*
Description:	*This case was an environmental action involving soil and groundwater contamination on a piece of property located in Los Angeles County. The current owner of the property brought a federal CERCLA cost recovery action against the companies that had conducted manufacturing operations at the property. I was the lead lawyer for one of the former operators of the property, Wynn Oil Company. Instead of engaging in costly and contentious litigation, Wynn and the plaintiff settled the case by entering into an agreement pursuant to the terms of which the parties shared the costs of investigating and remediating the contamination at the property.*
Opposing Counsel:	*Thomas J. Bois,* *Sedgwick, Detert, Moran & Arnold* *3 Park Plaza, 17th Floor* *Irvine, CA 92614-8540*
Court:	*United States District Court, Central District*
Judge:	*Judge J. Spencer Letts*
Date:	*Action filed June of 1995*
Party Represented:	*Defendant Wynn Oil Company*
Disposition:	*Settlement*

Name:	*All Payments Services, Inc. v. Reliance Insurance Company*
Number:	*BC 168482*
Description:	*This case was brought against Reliance by a policyholder for alleged bad faith handling and administration of its worker compensation claims. I was the lead lawyer representing Reliance. Shortly before the policyholder had filed this action, Reliance had filed a case of its own in New York against the policyholder for failure to pay the agreed upon premiums for the policies that Reliance had issued to the policyholder. After conducting some preliminary discovery, I filed a motion to stay the California action on the grounds of forum non conveniens and the prior pending action in New York. The Court granted the motion and the entire case, both the California action and the New York action, settled.*
Opposing Counsel:	*Nicholas P. Roxborough,* *Roxborough, Pomerance & Gallegos* *10866 Wilshire Blvd., Suite 1200* *Los Angeles, CA 90024-4336* *(310)470-1869*
Court:	*Los Angeles County Superior Court*
Judge:	*Judge Irving Fefter*
Date:	*Action filed March 31, 1998*
Party Represented:	*Defendant Reliance Insurance Company*
Disposition:	*Settlement after action stayed on the grounds of forum non-conveniens*

Name:	*Johnston, et al v. Transaction Financial Corporation*
Number:	*172946*
Description:	*This case was a class action brought by limited partners of a partnership against the managing general partner for alleged non-disclosure of material information in connection with the managing general partner's proposal to sell assets of the partnership at a discount. I represented the managing general partner. After a court supervised partnership vote in favor of the proposal, the Court denied the plaintiffs' motion to enjoin the sale of the partnership's assets. Soon thereafter, the plaintiffs decided to dismiss voluntarily the claims.*
Opposing Counsel:	*Lionel Z. Glancy,* *Law Offices of Lionel Glancy* *1801 Avenue of the Stars, Suite 308* *Los Angeles, CA 90067* *(310)201-9150*
Court:	*Los Angeles County Superior Court*
Judge:	*Honorable Bruce Mitchell*
Date:	*Action Filed June 16, 1997*
Party Represented:	*Defendant Transaction Financial Corporation*
Disposition:	*Action dismissed after denial of motion for preliminary injunction and appointment of receiver*

Name:	*241 Exchange Square Limited v. Citicorp Real Estate, Inc.*
Number:	*BC 093080*
Description:	*This case was a lender liability action brought by a borrower against Citicorp arising out of Citicorp's refusal to advance further loan proceeds to the borrower. I was the lead lawyer representing Citicorp. The borrower had obtained a multi-million dollar loan from Citicorp to fund the operations of its office building in downtown Los Angeles. Citicorp believed that it had the discretion to stop funding the loan if there were a material adverse change in the fair market value of the borrower's office building. After extensive discovery and law and motion, the parties settled the case.*
Opposing Counsel:	*Ronald Silverman,* *Weismann, Wolf, Bergman, Coleman & Silverman* *9665 Wilshire Blvd., Suite 900* *Beverly Hills, CA 90212-2316* *(310)858-7888*
Court:	*Los Angeles County Superior Court*
Judge:	*Judge Ronald E. Cappai*
Date:	*Action Filed December of 1993*
Party Represented:	*Defendant Citicorp Real Estate, Inc.*
Disposition:	*Settlement*

Name:	*St. John Knits, Inc. v. J.C. Penney Company, Inc.*
Number:	*SACV 96-894-LHM (EEx)*
Description:	*This case was a trademark infringement action brought by St. John Knits, a high-end designer and manufacturer of women's clothing, against J.C. Penney arising out of the latter company's use of the trademark "St. John's Bay" on women's clothing. I was one of the lead lawyers representing St. John Knits. After several months of discovery, J.C. Penney filed a motion for summary judgment on the ground that it was not infringing St. John Knits' mark because it had obtained a valid registered mark for "St. John's Bay" from the Patent and Trademark Office. The District Court denied the motion reasoning that J.C. Penney still could be liable for infringement if St. John Knits could prove prior use of its own registered mark and consumer confusion between the two marks. The case was settled.*
Opposing Counsel:	*Richard A. Wallen,* *Pretty, Schroeder & Poplawski* *444 South Flower Street, Suite 2000* *Los Angeles, CA 90071* *(213)622-7700*
Court:	*United States District Court, Central District*
Judge:	*Judge Linda H. McLaughlin*
Date:	*Action filed August 1996*
Party Represented:	*Plaintiff St. John Knits, Inc.*
Disposition:	*Settlement*

Criminal History: State whether you have ever been convicted of a crime, within ten years of your nomination, other than a minor traffic lation, that is reflected in a record available to the public, and if so, provide the relevant dates of arrest, charge and disposition and describe particulars of the offense.

Never.

Party to Civil or Administrative Proceedings: State whether you, or any business of which you are or were an officer, have ever been a ty or otherwise involved as a party in any civil or administrative proceeding, within ten years of your nomination, that is reflected in a ord available to the public. If so, please describe in detail the nature of your participation m the litigation and the final disposition of the e. Include all proceedings in which you were a party in interest. Do not list any proceedings in which you were a guardian *ad litem,* keholder, or material witness.

Never.

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

I undoubtedly will have potential conflicts of interest arising from my association with O'Melveny & Myers. The rules of ethics are clear on how to resolve those conflicts and I would strictly abide by those rules to resolve any conflicts.

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

No.

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

Please see financial disclosure report.

25. **Statement of Net Worth:** Complete and attach the financial net worth statement in detail. Add schedules as called for.

See financial net worth statement.

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

Yes.

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

Yes.

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

On or about April 29, 2002, I submitted my application for a federal appointment to the six member Advisory Committee for the Central District. On June 11, 2002, I met with the Advisory Committee for about 30 minutes to discuss my background and qualifications for a federal appointment. The questioning by the Committee was very fair and I was treated with respect and courtesy by the Committee members.

On July 16, 2002, I met with Gerald Parksy and Eric George. At that meeting, Mr. Parsky advised me that the Advisory Committee had recommended me to the White House to be considered for a federal appointment. After giving me the good news, Mr. Parsky and Mr. George asked me a few questions about my background and judicial philosophy. Both Mr. Parsky and Mr. George were very cordial and professional.

On July 22, 2002 I interviewed with individuals from the White House Counsel's Office. The interview was extremely professional and courteous.

During August and September of 2002, I had several telephone and in person interviews with agents from the FBI. The questions posed to me pertained to my background, education and employment. The interviews were professional and cordial.

During September of 2002, I had several telephone conversations with individuals from the Department of Justice regarding the forms and paperwork that I needed to complete with respect to my nomination. The conversations were cordial and professional.

(c) Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as asking or seeking a commitment as to how you would rule on such case, issue, or question? If so, please explain fully.

No. During the process, I have never been asked any question that could be reasonably interpreted as asking or seeking a commitment as to how I would rule on any legal issue or case.

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

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

   James V. Selna
   Nicknames: Jim, Jimmy

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

   United States District Judge for the Central District of California

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

   Orange County Court House
   700 Civic Center Dr. W.
   P.O. Box 1994
   Santa Ana, CA 92702-1994
   Telephone : 714-568-4817

4. **Birthplace**: State date and place of birth.

   February 22, 1945
   San Jose, CA

5. **Marital Status**: (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es). Please also indicate the number of dependent children.

   Spouse: Harriet Gomes Selna
   Maiden Name: Harriet Jane Gomes
   Not employed outside home.

   Dependent children: none

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

   Stanford Law School, J.D. 1970, attended 1967-1970.

Stanford University, A.B. 1967 (With Distinction), attended 1963-67.

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

1998– Judge of the Superior Court, County of Orange, 700 Civic Center Drive W., P.O. Box 1994, Santa Ana, CA 92702–1994

1983-98, Partner, O'Melveny & Myers LLP, 1983-1998, 610 Newport Center Drive, Suite 1700, Newport Beach, CA 92660

1978-83, Partner, O'Melveny & Myers LLP, 400 S. Hope Street, Los Angeles, CA 90071

1970-77Associate, O'Melveny & Myers LLP, 400 S. Hope Street, Los Angeles, CA 90071

Non-profit organizations:

Orange County Museum of Art, 850 San Clemente Drive, Newport Beach, CA 92660:

Trustee Emeritus, 2000–present
Vice-Chairman, 1996-2000
Board of Trustees, 1996-2000

Orange County Business Committee for the Arts, 695 Town Center Drive, Suite 1200, Costa Mesa, CA 92626:

Board of Directors, 1988-99

Los Angeles County Museum of Art, various periods approx. 1971–present

Newport Harbor Art Museum, 850 San Clemente Drive, Newport Beach, CA 92660:

Board of Trustees, 1985-93, 1994-96
President, 1994-96
Secretary and General Counsel, 1991-93
Vice-President, 1988-91

University of California, Irvine, College of Medicine, Board of Visitors, Irvine, California:

Member, 1994-96 (approx.)

Phoenix House of Orange County, 1207 East Fruit Street, Santa Ana, CA 92701:

Board of Directors, 1983-85

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

Military: United States Army
Branch: Military Intelligence
Dates of service: 1967-78
ROTC: 1967-70
Active duty: 1971
Reserve duty: 1971-74
Inactive reserve: 1974-78
Retired: 1978
Rank: Captain
Commissioned: June 13, 1970 (ROTC)
Service number: 563-68-7809
Discharge: Honorable

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

Phi Beta Kappa, Stanford University, 1967.

Urban Sontheimer Prize, 1970. Awarded to number 2 in Stanford Law School graduating class.

Order of the Coif, Stanford Law School Chapter, 1970.

Carl Franklin Prize in International Law, Stanford Law School.

10. **Bar Associations**: List all bar associations or legal or judicial-related committees, selection panels 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, 1971-98
Antitrust Section, 1971-98

Association of Business Trial Lawyers, 2003-present
Board of Directors, Orange County, CA Chapter, 2003-

Federal Bar Association, Orange County Chapter, 1991-98
Board of Directors, 1991-92

Los Angeles County Bar Association, 1971-98
Antitrust Section, 1971-98
Executive Committee, 1981-82, 1983-84

Orange County Bar Association, 1983-98

Robert Banyan Inn of Court, 2000-present

State Bar of California Appointments
Standing Committee on Federal Courts, 1982-85
Litigation Section, Executive Committee, 1986-89
Section Delegate to Conference of Delegates
Antitrust and Trade Regulation Section, Executive Committee, 1992-95; Advisor, 1995-99
Section Delegate to Conference of Delegates

11. **Bar and Court Admission**: List each state and court in which you have been admitted to practice, including dates of admission and any lapses in membership. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

State Bar of California, January 7, 1971–present

United States Supreme Court, June 18, 1979–present

United States Courts of Appeals
District of Columbia, 1983–present
Eighth Circuit, 1985–present
Ninth Circuit, 1973–present

United States District Courts
Central District of California, January 7, 1971–present
Eastern District of California, 1985–present
Northern District of California, 1978–present
Southern District of California, 1973–present

12. **Memberships**: List all memberships and offices currently and formerly held in professional, business, fraternal, scholarly, civic, charitable, or other organizations since graduation from college, other than those listed in response to Questions 10 or 11. Please indicate whether any of these organizations formerly discriminated or currently discriminates on the basis of race, sex, or religion - either through formal membership requirements or the practical implementation of membership policies. If so, describe any action you have taken to change these policies and practices.

American Air Mail Society, 1972 (aprox.)-present

Jack Knight Air Mail Society, 1978 (approx.)-present

Stanford Alumni Association, 1967-present

Universal Ship Cancellation Society, 1996-present

Social Clubs:

Balboa Bay Club, 1983–2000

Center Club, 1989–1995 (aprox.)

Los Angeles Athletic Club, 1970–1983

None of the clubs or other organizations discriminated during my affiliation.

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

Stanford Daily. From 1963 to 1967, I worked on the Daily, ultimately serving as Editor in Chief for Volume 150, 1966-67. I wrote hundreds of news stories, and as Editor in Chief wrote the editorials. I am presently unable to locate any clippings. I have contacted the

Stanford Daily. Computerized archives go back about 10 years. No microfiche or other retrieval systems exists for earlier periods. Prior issues are maintained in full-size bound volumes, which are impractical to copy.

Stanford Law Review. Note, Intermodal Shipping, 21 Stanford Law Review 1077 (1968).

Newsletter. While at O'Melveny & Myers LLP, I published an informal antitrust newsletter for clients. Circulation was between 100 and 150 depending on the period.

May 11, 1990, *Supreme Court Gives States Significant Boost In Enforcing Federal Antitrust Laws.*

May 18, 1990, *Supreme Court Denies Competitor's Right to Challenge Vertical Price-Fixing.*

June 26, 1990, *Supreme Court Clarifies Legitimate Scope of "Functional Discounts" Which Manufacturers May Grant Their Distributors.*

March 28, 1991, *When Criminal "Price-Fixing" Has Nothing to Do With Price.*

April 12, 1991, *When the Competitive Battle Leads to City Hall: Free Speech and the Antitrust Laws.*

February 5, 1993, *Supreme Court Brings Ninth Circuit Attempt to Monopolize Rules in Line with Other Circuits.*

April 5, 1996, *Federal Antitrust Regulators Stress Cooperation, International Focus at ABA Session.*

November 10, 1997, *Supreme Court Declares Maximum Vertical Price Fixing Subject to Rule of Reason Analysis.*

April 28, 1998, *Antitrust Regulators and Bar Meet in Washington, D.C.*

Letters to the Editor. I represented the Newport Harbor Art Museum in a suit against the National Endowment for the Arts. During the last quarter of 1990 and the first quarter of 1991, I wrote three letters to the *Orange County Register*. The letters advocated support for public funding of the arts.

September 18, 1990, Selna to Editor, *The Orange County Register.*

January 11, 1991, Selna to Editor, *The Orange County Register.*

Date unknown, Selna to Editor, *The Orange County Register.* Copy not available.

Following the merger of the Newport Harbor Art Museum and the Laguna Art Museum to form the Orange County Museum of Art, I wrote several letters explaining the nature of the transaction. (I was the last President of the Newport Harbor Art Museum and the first Vice-Chairman of the merged entity.)

October 29, 1998, Selna to Justine Amodeo, *Coast Orange County*.

Date unknown, Selna to *Los Angeles Times*. Copy not available.

Speeches. The following is a listing of programs: Faculty Member, Columbia Law School, Trial of an Antitrust Case (1982); Faculty Member, Practising Law Institute Program on Litigating Antitrust Case; Speaker, Federal Trade Commission Distinguished Speaker Series (1982); Speaker, CEB Competitive Business Practices Institute (1984-87, 1991); Speaker, CEB Program, "Appellate Review Before Judgment" (1985); Speaker, ALI-ABA Conference on Museum Law (1991); Chair, CEB Program, "Protecting Trade Secrets" (1992, 1995); Speaker, CEB Program, "Protecting Trade Secrets Before and During Litigation" (1997); Chair, CEB Program, "Proof in Competitive Business Practices Cases" (1997); Speaker, CEB Program, "Advanced Course of Study: Federal Practice" (1998); Speaker, CEB Program, "Advanced Course of Study: Federal Practice" (1999); Orange County Bar Association, Fee Arbitration Section, "A View from the Bench" (2000). These presentations were made from notes, and generally given extemporaneously. I do not presently have the notes which I used.

14. **Congressional Testimony**: List any occasion when you have testified before a committee or subcommittee of the Congress, including the name of the committee or subcommittee, the date of the testimony and a brief description of the substance of the testimony. In addition, please supply four (4) copies of any written statement submitted as testimony and the transcript of the testimony, if in your possession.

None

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

My health is good. My last physical exam was November 12, 2002.

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

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

Opinions of Superior Court judges in the California system are not published. Opinions typically take the form of memoranda of intended decisions or statements of decision in bench trials and lengthy minute orders in significant law and motions matters.

Ardakani v. Collino, Case No. 00CL001676. This case was tried to the Court, and involved a dispute over a turn-key contract to construct a water store. The decision is essentially fact-based, predicated upon well-settled law. There were claims for breach of contract by the plaintiff purchasers and the defendant/cross-complainant contractor. I found against the purchasers and for the contractor. The case presented an unusual equitable issue. The plaintiffs had not paid the full contract price. Although the contractor was excused from completing performance, the contractor still held equipment of substantial value yet to be delivered. After deducting the value to the retained equipment from the amount due for breach of the purchasers' payment obligation, there was a net monetary award to the losing party in order avoid unjust enrichment.

Axion Solutions, Inc. v. ACM Technologies, Inc., and related cross action, Case No. 01CC01592. This case was tried to the Court, and involved a dispute under a contract to construct and supply an e-commerce website. Assessing contract performance in the context of e-commerce presented unusual fact finding issues. Here, again, the decision is essentially fact-based, predicated upon well-settled law.

Lehman Construction, Inc. v. The City of Santa Ana, Case No. 01CC16632. This was a writ of mandate proceeding tried to the Court on the basis of declarations. The petitioner contractor had lost out on a contract to refurbish the local zoo, and challenged the City's compliance with state and local competitive bidding requirements. The petitioner also contended that a majority of the city counsel who had voted for the contract had done so in violation of local campaign contribution/conflict of interest statutes. I held that the City had complied with the bidding statutes, and held as a factual matter that none of the voting counsel members had violated the conflict of interest statutes. I declined to issue the writ.

Masket v. Miller, Case No. 817341. This case involved a dispute between and landlord and tenant over the exercise of a lease-purchase option for an upscale residence. Here, again, the decision is essentially fact-based, predicated upon well-settled law. Resolution of the case required a complex reconstruction of the tenant's payments to determine whether there had been a breach of the lease barring exercise of the option. The task was complicated by what in the first instance appeared to be tampering with the landlord's ledger supposedly documenting payments received.

The People of the State of California v. Parra, Case No. 01CF0285. I presided over the preliminary hearing in this murder case. Under California criminal procedure, the People typically proceed on the basis of an information, or complaint; presentation to the Grand Jury for the return of an indictment is the exception. Because the People had proceeded by information in this case, the defendant was entitled to a prompt preliminary hearing, at which the People must present sufficient evidence of a crime for the Court to bind the defendant over for a trial. The case presented a novel issue concerning the trial judge's unilateral authority to grant immunity to a witness. The defendant requested that the Court grant immunity to his girl friend who was at the scene of the crime, and who could allegedly provide exculpatory testimony. She had invoked her Fifth Amendment rights. At the time the district attorney had not charged her

with any crime, but was still free to do so. I held that there was no statutory authority for the Court to grant immunity, and that the exercise of such power would improperly infringe upon the role of the prosecutor.

Perez v. Weise, Case No. 01CC00731. This case was tried to the Court, and considered whether the defendant holder of a note and deed of trust had properly foreclosed upon the plaintiff maker of the note. The defendant, who had purchased the note from the original obligee, conceded that the note was usurious, but argued that the taint of usury had been purged by a subsequent modification agreement. I concluded that no such agreement had been reached, that the foreclosure was improper, and that plaintiff was entitled to treble damages for usurious interest charged under the original note. The defendant was a real estate broker, exempt from the usury laws in California. The form of modification agreement for which the defendant argued was itself usurious. This presented the novel issue, discussed as dicta, whether a lender exempt from the usury laws could purge the taint of usury in a note with a modification which itself would be usurious but for the lender's exempt status. Because I found no modification, I did not have to reach this issue as part of the holding.

Rohrig v. Carbon Canyon Church, Inc., Case No. 01CC13335. This was a writ of mandate tried to the Court. The former pastor and director of a church, who had been removed from the board and excluded from the church because of his criticism of the successor pastor's alleged financial irregularities, sought to be reinstated as a church member and director. He also sought to exercise a director's powers under the Corporations Code to review the financial records of the church The opinion discusses at length the First Amendment limitations on the powers of a civil court to adjudicate internal church affairs. On a challenge to the sufficiency of the petition on demurrer, I held that the First Amendment precluded relief. The case includes a discussion of other rights available to a disgruntled former church member.

Spyglass Hill Community Association v. Schwan, Case No. 800455. This case was tried to the Court, and involved a view dispute between members of a homeowners' association. Up-slope plaintiff homeowners claimed that downslope homeowners had failed to trim their trees, thus blocking the up-slope homeowners' ocean and city lights view. View amenities were a substantial component of the value of the respective residences. The principal legal issues related to the substantive and procedural rules with which homeowners' associations must comply in resolving homeowner disputes under the governing recorded covenants, conditions, and restrictions, and the extent of judicial deference due association decisions. I held for the complaining homeowners and the association.

Zakoyan v. Poma Distributing Company, Inc., Case No. 817726. This was a six-week wrongful death jury trial. Plaintiffs' decedent was killed when a tanker truck overturned on his car in a freeway construction zone. Post-trial motions presented a novel question concerning the allocation of non-economic damages. Under California law, defendants are jointly and severally liable for economic harm, but are liable only for their proportionate share on non-economic damages (here, loss of the decedent's companionship and affection) based on the relative fault of each defendant. The trucking company was sued on the basis of respondeat

superior for the conduct of its driver, and on the separate theory that the trucking company had negligently entrusted the truck to an unqualified drive. I concluded that the jury was entitled to consider both aspects of the trucking company's conduct in making its allocation on non-economic damages.

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

People ex rel. Department of Transportation v. The Clausner/Wells Partnership, 95 Cal. App. 4th 1066, 116 Cal. Rptr. 2d 240 (2002). The case deals with the power of the trial court to exclude expert witnesses. The Court of Appeal concluded that I had erroneously excluded a state valuation expert on the ground that his methodology did not comport with eminent domain law.

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

Rohrig v. Carbon Canyon Church, Inc., Case No. 01CC13335. See discussion of the case in answer to Question 16(a).

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

17. **Public Office, Political Activities and Affiliations**:

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

Trustee, Orange County Public Law Library, 1999–. Appointed by the presiding judge of the Orange County Superior Court.

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

No.

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

(a) Describe chronologically your law practice and legal experience after graduation from law school including:

(1) whether you served as clerk to a judge, and if so, the name for the judge, the court and 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 affiliated, and the nature of your affiliation with each.

1983-98, Partner, O'Melveny & Myers LLP, 610 Newport Center Drive, Suite 1700, Newport Beach, CA 92660.

1978-83, Partner, O'Melveny & Myers LLP, 400 S. Hope Street, Los Angeles, CA 90071

1970-77Associate, O'Melveny & Myers LLP, 400 S. Hope Street, Los Angeles, CA 90071

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

In period immediately preceding my appointment to the Superior Court, my practice consisted of preparing and litigating complex commercial disputes, typically involving high technology issues and/or companies. I advised regularly on antitrust issues, and published my own periodic antitrust newsletter for clients. In addition to major cases, I handled a wide variety of commercial cases. My practice over the years has been approximately 80% defense.

From 1989 to 1998, I was involved in the defense of various claims arising out of the grounding of the EXXON VALDEZ in Prince William Sound Alaska. The main case was tried in Anchorage, Alaska in 1994, and post-trial and appellate matters continued through 1998 when I was appointed to the Superior Court. I served as chief of staff for the trial and had brief in court appearances. Substantively, I was responsible for factual and technical issues (organic chemistry, geochemistry, bioremediation, dispersants) dealing with the clean up of the spill.

From 1983, when I moved to the O'Melveny office in Orange County, to 1990, I worked on matters principally in the Southern California area, and appeared regularly in Federal Court and Superior Courts in Orange County, San Diego, and Los Angeles. I had significant construction litigation representations.

From approximately 1980 to 1985, I represented the owners of the Trans Alaska Pipeline in a proceeding before the Federal Energy Regulatory Commission in Washington, D. C. I was responsible for Phase IIA, dealing with non-cost of construction issues.

From 1980-83, I was involved in representing the National Football League in defending antitrust claims brought by the Los Angeles Memorial Coliseum Commission and the then Los Angeles Raiders. I had in-court witness responsibilities during the two liability trials, served as chief of staff, and wrote and argued various motions.

From 1972-79, I was involved in representing International Business Machines Corporation in defending private antitrust suits in California and also participated in the United States Government's suit against IBM. I was part of the trial team for the 1977 trial in Forro Precision, Inc. v. IBM. I was part of the in-court trial team for the 1978 trial in Memorex v. IBM.

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

I developed expertise in the fields of antitrust and trade regulation, trade secret law, construction law, and the handling and management of complex litigation generally. Typical clients included: IBM, the major airlines, the National Football League, Exxon Corporation (now Exxon Mobil Corporation), the owners of the Trans Alaska Pipeline, CIGNA Corporation, and Pacific Theaters.

(c) (1) Describe whether you appeared in court frequently, occasionally, or not at all. If the frequency of your appearances in court varied, describe each such variance, providing dates.

In period immediately preceding my appointment to the Superior Court, my practice consisted of preparing and litigating complex commercial disputes, typically involving high technology issues and/or companies. I advised regularly on antitrust issues, and published my own periodic antitrust newsletter for clients. In addition to major cases, I handled a wide variety of commercial cases. My practice over the years has been approximately 80% defense.

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continued through 1998 when I was appointed to the Superior Court. I served as chief of staff for the trial and had brief in court appearances. Substantively, I was responsible for factual and technical issues (organic chemistry, geochemistry, bioremediation, dispersants) dealing with the clean up of the spill.

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(2) Indicate the percentage of these appearances in

(A) federal courts: 75%

(B) state courts of record: 25%

(C) other courts: less than 1%

(3) Indicate the percentage of these appearances in:

(A) civil proceedings: 99%

(B) criminal proceedings: less than 1%

(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.

Civil 14

Chief counsel: 5

Associate counsel: 9

Criminal 6 (Army Special Court Martials)

Chief counsel: 6

(5) Indicate the percentage of these trials that were decided by a jury.

Civil: 75%

Criminal: 0%

(d) Describe your practice, if any, before the United States Supreme Court. Please supply four (4) copies of any briefs, amicus or otherwise, and, if applicable, any oral argument transcripts before the U.S. Supreme Court in connection with your practice.

I was on the briefs in Bryant v. Yellen, Docket No. 79-421. We represented a class of land owners contesting the Department of the Interior's application of the 160 acre limitation in the 1902 Reclamation Act. We petitioned for certiorari, which was granted, and the case was resolved in favor of our clients. Bryant v. Yellen, 477 U.S. 352 (1980).

I was on the brief in Memorex Corporation v. International Business Machines Corporation, Docket No. 80-1884. On behalf of IBM, we opposed the grant of certiorari from an antitrust ruling. Certiorari was denied.

I was on the brief in Forro Precision, Inc. v. International Business Machines Corporation, Docket No. 84-1577. On behalf of IBM, we opposed the grant of certiorari from an antitrust and trade secret ruling. Certiorari was denied.

(e) Describe legal services that you have provided to disadvantaged persons or on a *pro bono* basis, and list specific examples of such service and the amount of time devoted to each.

I have served as a member of the Board of Trustees of the Newport Harbor Art Museum, and since 1996, of its successor, the Orange County Museum of Art. Over the years I served as the legal advisor to the Director, and from 1991-93 served formally as the General Counsel. I advised on contractual, labor, corporate, and art law issues, and provided free legal services on an on-going basis.

In 1990, I brought on behalf on the Newport Harbor Museum a successful constitutional challenge to federal funding restrictions in the 1989-90 appropriation for the

National Endowment for the Arts. The Honorable John G. Davies held the restrictions unconstitutional in a published opinion, Newport Harbor Art Museum v. National Endowment for the Arts, 754 F. Supp. 774 (C.D. Cal. 1991). This representation involved hundreds of hours.

From approximately 1983-85, I served on the board of Phoenix House of Orange County, a non-profit drug rehabilitation organization, and provided legal advice.

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

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

(b) a detailed summary of the substance of each case outlining briefly the factual and legal issues involved;

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

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

CASE NAME: In re Exxon Valdez, United States District Court for the District of Alaska, Case No. 89-095 CV (HRH).

TRIAL JUDGE: The Honorable Russell H. Holland

OPPOSING COUNSEL:[1] David W. Oesting, Esq., counsel for fisherman class
Davis Wright Tremaine LLP
701 W. Eighth St., Suite 800
Anchorage, AK 99501
Telephone: 907-257-5300

Matthew D. Jamin, Esq., counsel for fisherman class
Jamin, Ebell, Schmitt & Moon
323 Carolyn Street
Kodiak, AK 99615
Telephone: 907-486-6024

[1]There were several hundred plaintiffs lawyers. Listed are counsel with whom I had significant interaction.

Mee Lon Lam, Esq., counsel for United States
Torts Branch, Civil Division
United States Department of Justice
1425 New York Avenue
Room 10100
Washington, D.C. 20005
Telephone: 202-514-2000 (Locator)

Charles L. Miller, Jr., Esq., counsel for fisherman class
Dickstein, Shapiro & Morin
2101 L Street, N.W.
Suite 800
Washington, D.C. 20037
Telephone: 202-785-9700

Nancy J. Nolan, Esq., counsel for State of Alaska
Rice, Voland & Taylor
211 H Street
Anchorage, AK 99501
Telephone: 907-276-5231

Kevin M. Prongay, Esq., counsel for fisherman class
Prongay & Broderud
1212 Wilshire Blvd., Suite 400
Los Angeles, CA 90025
Telephone: 310-207-2848

Bill Rosbach, Esq., counsel for fisherman class
Rosbach & Whiston
401 N. Washington
Missoula, MT 59802
Telephone: 406-543-5156

CO-COUNSEL:

Richard M. Clinton, Esq., counsel for Exxon
Dorsey & Whitney LLP
1420 Fifth Ave., Suite 3400
Seattle, WA 98101
Telephone: 206-903-8800

John F. Daum, Esq., counsel for Exxon
O'Melveny & Myers LLP
400 South Hope Street
Los Angeles, CA 90071
Telephone: 213-430-6000

Lucy T. Eisenberg, Esq., counsel for Alyeska
342 Comstock Ave.
Los Angeles, CA 90024
Telephone: 310-470-4154

Charles P. Flynn, Esq., counsel for Alyeska
Burr, Pease & Kurtz
810 N Street
Anchorage, AK 99501
Telephone: 907-276-6100

Patrick Lynch, Esq., counsel for Exxon
O'Melveny & Myers LLP
400 South Hope Street
Los Angeles, CA 90071
Telephone: 213-430-6165

James F. Neal, Esq., counsel for Exxon
James F. Sanders, Esq., counsel for Exxon
Neal & Harwell
2000 First Union Tower
150 Fourth Ave, N.
Nashville, TN 37219
Telephone: 615-244-1713

Douglas J. Serdahely, Esq., counsel for Exxon
Patton Boggs LLP
1031 W. Fourth St., Suite 600
Anchorage, AK 99501
Telephone: 907-277-4900

William D. Temko, Esq., counsel for Alyeska
Munger, Tolles and Olsen
355 S. Grand Avenue
35th Floor
Los Angeles, CA 90071
Telephone: 213-683-9266

NATURE OF CASE: The case was a set of private class actions stemming from the grounding of the EXXON VALDEZ in Prince William Sound in March 1999. I was part of the defense team for Exxon Corporation, and served as chief of staff for the six-month jury trial conducted in 1994. I had limited court room appearances during the trial. Substantively, I was responsible for

issues relating to the clean up of the spill, including the conduct of the clean up itself and scientific assessment of environmental damage. I spent substantial time dealing with Exxon's claim that much of the environmental damage could have been avoided had Exxon been permitted by regulatory authorities to use chemical dispersants to dilute and disperse the spill oil. The case was tried to a jury in three phases, and resulted in a $5 billion punitive damage award against Exxon. The Ninth Circuit subsequently vacated the verdict, and directed the District Court to consider the appropriate amount of punitive damages in light of Constitutional limitations on such awards.

CASE NAME: Trans-Alaska Pipeline System, Federal Energy Regulatory Commission, Docket No. Or. 78-1.

TRIAL JUDGES: The Honorable Isaac Benkin and Max Kane, Administrative Law Judges.

OPPOSING COUNSEL:

Dennis H. Melvin, Esq., counsel for FERC
Office of the Administrative Litigation
888 1st St., N.E.
Federal Energy Regulatory Commission
Washington, D.C. 20426
Telephone: 202-208-0042

Edward J. Twomey, Esq., counsel for FERC
Steptoe & Johnson LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
Telephone: 202-429-3000

CO-COUNSEL:

Ralph J Shapira, Esq., counsel for Alyeska
O'Melveny & Myers LLP
400 South Hope Street
Los Angeles, CA 90071
Telephone: 213 430-6000

NATURE OF CASE: This administrative proceeding considered challenges to the initial tariffs for movement of oil over the Trans Alaska Pipeline from Prudhoe Bay to Valdez, Alaska. Although the pipeline is operated by a single entity, Alyeska Pipeline Service Company, each owner's interest is separate, and thus each had to file separate tariffs. I represented all owners of the pipeline and was lead counsel for Phase IIA which dealt with so-called "non-cost of construction" issues. These issues included determination of reasonable and prudent annual operating costs for operation of the pipeline and a host of accounting issues, such as the appropriate date for capitalization for the owners' investments. The issues themselves were substantively complex, and separate ownership issues added a further measure of complexity. Phase IIA was tried in 1983-84. Ultimately, the entire proceeding was settled before entry of any final administrative ruling.

CASE NAME: Los Angeles Memorial Coliseum Commission v. National Football League, United States District Court for the Central District of California, Case No. 78-3523-HP.

TRIAL JUDGE: The Honorable Harry Pregerson (currently United States Court of Appeal for the Ninth Circuit).

OPPOSING COUNSEL:

Maxwell M. Blecher, Esq., counsel for Coliseum Commission
Ralph C. Hofer, Esq.
Blecher & Collins
611 West Sixth St., Suite 2000
Los Angeles, CA 90017
Telephone: 213-622-4222

Joseph M. Alioto, Esq., counsel for Raiders
One Embarcadero Center
San Francisco, CA 94111
Telephone: 415-434-8900

CO-COUNSEL:

Joseph W. Cotchett, Jr., Esq., counsel for Los Angeles Rams
Cotchett, Pitre & Simon
840 Malcolm Road, Suite 200
Burlingame, CA 94010
Telephone:650-697-6000

Edwin A. Heafey, Jr., Esq. (Deceased), counsel for NFL
Crosby, Heafey, Roach & May
1999 Harrison St.
Oakland, CA 94612
Telephone: 510-763-2000

Patrick Lynch, Esq, counsel for NFL
O'Melveny & Myers LLP
400 South Hope Street
Los Angeles, CA 90071
Telephone: 213-430-6165

The Honorable Nora Manella, counsel for NFL
(Former O'Melveny & Myers associate)
United States District Court
312 North Spring Street
Los Angeles, CA 90012–4793
Telephone: 213-894-0200

Paul Tagliabue, Esq., counsel for NFL
Commissioner
National Football League
410 Park Avenue
New York, N.Y. 10022
Telephone; 212-758-1500

NATURE OF CASE: This Sherman Act antitrust action was initially brought the Los Angeles Coliseum Commission ("Commission"), owner of the venue for the Los Angles Rams, challenging the National Football League's rules on franchise movements. During initial phase of the litigation, the Oakland Raiders moved to Los Angeles (filling a void left by the Rams' move to Anaheim), and joined as a party plaintiff in the Commission's antitrust claims against the National Football League. I was associate counsel for the National Football League, and was part of the court room trial team. Among my responsibilities was presentation of the factual basis for the League's single-entity defense. Because by definition it took the combined efforts of all members of the League to create its product–a season of sports entertainment culminating in the Super Bowl–the League contended that it should be treated as a single actor incapable of violating Section 2 of the Sherman Act. My principal witness was Don Shula, head coach of the Miami Dolphins at the time, who testified about the substantial joint activity which went into professional football, from revenue sharing to competition rules. A liability trial in 1981 resulted in a mistrial (hung jury). A second liability trial in 1982 resulted in a verdict for plaintiffs. I did not participate in the damage trial held in 1983.

CASE NAME: Memorex Corporation v. International Business Machines Corporation, United States District Court for the Northern District of California, Case Nos. C-73-2238-SC, C-73-2238-SC.

TRIAL JUDGE: The Honorable Samuel Conti

OPPOSING COUNSEL: John L. Endicott, Esq., counsel for Memorex
P.O. Box 158
Mecca, CA 92254
Telephone: 760-396-5307

Ronald S. Beard, Esq., counsel for Memorex
Gibson, Dunn & Crutcher
333 South Grand Avenue
Los Angeles, CA 90071-3197
Telephone: 213-229-7000

Robert D. Raven, Esq., counsel for Memorex

Stanley A. Doten, Esq., counsel for Memorex
Morrison & Foerster LLP
425 Market Street
San Francisco, CA 94105-2482
Telephone: 415-268-7000

CO-COUNSEL:

Robert S. Draper, counsel for IBM
O'Melveny & Myers LLP
400 South Hope Street
Los Angeles, CA 90071
Telephone: 213-430-6000

Patrick Lynch, Esq, counsel for IBM
O'Melveny & Myers LLP
400 South Hope Street
Los Angeles, CA 90071
Telephone: 213-430-6165

A. Robert Pisano, Esq., counsel for IBM
526 Amalfi Dr.
Pacific Palisades, CA 90272
Telephone: 323-954-1600

NATURE OF CASE: Memorex Corporation and affiliates brought Sherman Act antitrust claims challenging IBM's pricing and technology practices. I was associate counsel, and part of the in-court trial team. Among the issues for which I was responsible was a claim that IBM had unlawfully tied computer data storage media to the electronics of disk drives. At the time, the industry was transitioning from so-called removable disk packs for data storage to fixed disks, or hard drives. The evidence showed that there was substantial technical justification for selling the media and electronics as a single product, including increases in data density and reliability. I presented IBM's case on these issues, and the District Court directed a verdict in favor of IBM on this $90 million issue. The case was tried to a jury trial from January–July 1978. I. The trial resulted in a mistrial (hung jury). The trial court granted IBM judgment on post-trial motions. The judgment, including the directed verdict on the tying issue, was affirmed by the Ninth Circuit.

CASE NAME: Redevelopment Agency of the City of Santa Ana v. Nakamura, Orange County Superior Court, Case No. 50-18-52.

TRIAL JUDGE: The Honorable James Alfano (Retired; presently with JAMS/Endispute, Orange County)

OPPOSING COUNSEL: Richard Laskin, Esq., counsel for Agency
1520 Colina Dr.
Glendale, CA 91208
Telephone: 818-246-2146

Robert F. Waldron, Esq. (Deceased), counsel for Nakamura

Robert J. Wheeler, Esq., counsel for Agency
Kinkle, Rodiger & Spriggs
827 North Ross
Santa Ana, CA 92701
Telephone: 714-835-9011

CO-COUNSEL: Karin Lane Borchard, Esq., counsel for Pacific Theaters
(Former O'Melveny & Myers associate)
50 Braeburn Lane
Newport Beach, CA 92660
Telephone: 949-644-7948

NATURE OF CASE: I was lead trial counsel for Pacific Theaters as condemnee in the condemnation of commercial property valued at $12 million. Pacific Theaters as a long-term lessee operated a Spanish language drive-in and swap meet on the condemned parcel. The case raised unique valuation issues concerning the calculation of the value of the separate real property interest of Pacific Theaters as tenant and the landlord's interest in the rent revenue and eventual return of the property at the end of the lease. Only the issue of compensation for lost good will proceeded to trial in 1993 before a jury. After a two-week trial, the jury returned a verdict for the Redevelopment Agency.

CASE NAME: Redevelopment Agency of the City of Indio v. Miller, San Bernardino County Superior Court, Case No. 27 02 49.

TRIAL JUDGE: The Honorable Bob N. Krug

OPPOSING COUNSEL: Michael J. Andelson, Esq., counsel for Agency
John Pinkney, Esq., counsel for Agency
74-760 Highway 111, Suite 200
Indian Wells, CA 92210
Telephone: 619-568-2611

CO-COUNSEL: William W. Vaughn, Esq., counsel for Miller parties
14340 Sunset Boulevard
Pacific Palisades, CA 90272
Telephone:310-454-9773

NATURE OF CASE: The Redevelopment Agency brought suit against David Miller and related entities for breach of a redevelopment contract for refurbishment and enlargement of a shopping center. Under the contract, the Redevelopment Agency was to condemn land adjacent to the existing center, and Miller, the owner of the center, was to expand and refurbish the center. I was co-lead trial counsel in the defense of the Miller entities, and in the prosecution of their claims for breach of contract on the part of the Agency. The case raised complex issues of municipal law and was factually complicated. For example, the operative facts placed in issue the Agency's prosecution of more than thirty condemnation actions against various types of entities. The case was tried to the bench from November 1995 to February 1996. Among other things, I was responsible for presenting and cross-examining all expert witnesses. The Court entered judgment for the Redevelopment Agency.

CASE NAME: Hoyer v. Insurance Company of North America, San Diego County Superior Court, Case No. 59-59-99.

TRIAL JUDGE: The Honorable James R. Milliken

OPPOSING COUNSEL: Joseph W. Cotchett, Jr., Esq., counsel for investor plaintiffs
Cotchett, Pitre & Simon
840 Malcolm Road, Suite 200
Burlingame, CA 94010
Telephone: 650-697-6000

Robert A. Meyer, Esq., counsel for investor plaintiffs
Loeb & Loeb LLP
1000 Wilshire Blvd., Suite 1800
Los Angeles, CA 90017-2475
Telephone: 213-688-3400

Mark Vranjes, Esq., counsel for investor plaintiffs
Royce, Grimm, Vranjes, McCormick & Graham LLP
550 W. C St., Suite 1100
San Diego, CA 92112-5512
Telephone: 619-231-8802

Michael J. Aguire, Esq., counsel for investor plaintiffs
Patricia Meyer, Esq.
Aguirre & Meyer
1060 Eighth Ave., Suite 200
San Diego, CA 92101
Telephone: 619-235-8636

CO-COUNSEL: Michael L. Willoughby, Esq., counsel for INA
Borchard & Willoughby
18881 Von Karman Ave, Suite 1400
Irvine, CA 92612
Telephone: 714-644-6161

NATURE OF CASE: I was lead counsel in defending Insurance Company of North America and related entities (collectively "INA") against legal malpractice insurance coverage claims and related claims arising out of the J. David & Co. fraud. In the early 1980's, J. David & Co., a San Diego brokerage firm, engaged in a classic investment Ponzi scheme which defrauded investors of more than $300 million. Actions were brought against all of J. David & Co.'s professional advisors, including a small law firm insured by INA under a professional liability policy. INA provided a defense. When a test case was lost, the law firm settled the remaining cases by confessing judgment and assigning its policy rights to plaintiffs. I was lead counsel in the defense of more that 300 separate coverage suits which ensued. I negotiated an agreement with plaintiffs in the coverage cases that a select group of plaintiffs would proceed to trial as a test case, and that all plaintiffs and INA would be bound by the result. The agreement offered INA the benefit of collateral estoppel if it prevailed, a result which would not have automatically flowed from a victory in the test case. The matter was settled several weeks before a scheduled Spring 1989 jury trial.

CASE NAME: Motion Picture Industry Pension Plan v. Barclays Mortgage Corporation, United States District Court for the Central District of California, Case No. 85-8298-TJH (Kx).

TRIAL JUDGE: The Honorable Terry J. Hatter, Chief Judge

OPPOSING COUNSEL: Peter L. Recchia, Esq., counsel for Barclays
P.O. Box 206
Lake Forest, CA 92630
Telephone: 714-541-2858

CO-COUNSEL: Karin Lane Borchard, Esq., counsel for Pacific Theaters
(Former O'Melveny & Myers associate)
50 Braeburn Lane
Newport Beach, CA 92660
Telephone: 949-644-7948

NATURE OF CASE: I was lead trial counsel for the Motion Picture Industry Pension Plan ("MPIP") in the 1989 prosecution of claims for securities fraud, RICO violations, and other claims against the Barclays entities. Barclays had issued MPIP ten separate notes totaling $5 million. The notes were secured by the pledge of underlying notes and deeds of trust supposedly meeting certain financial criteria, insurance, and the personal guarantee of the Barclays president. When Barclays defaulted, the security proved to be worth less than represented, the majority of the insurance policies were fraudulently issued without the knowledge of the insurer, and the insurer had gone into receivership. The District Court granted two summary judgments and a discovery default on the RICO claim, resulting in judgments of more than $25 million. Most of the original principal was ultimately recovered.

CASE NAME: United States of America v. GSX, United States District Court for the Central District of California, Case No. SA CR 89-6-AHS.

TRIAL JUDGE: The Honorable Alicemarie Stotler

OPPOSING COUNSEL: Barbara J. Nelson, Esq., counsel for United States
Phillip R. Malone, Esq., counsel for United States
United States Department of Justice
Antitrust Division
450 Golden Gate Avenue
San Francisco, CA 94102
Telephone: 415-436-6600

NATURE OF CASE: I was lead counsel in the defense of a criminal violation of Section 1 of the Sherman Antitrust Act for price fixing. The case was resolved by a negotiated plea covering activities of the defendant trash hauler in several states.

CASE NAME: People of the State California v. Laidlaw Waste Systems, San Diego Superior Court, Case No. 632530.

TRIAL JUDGE: The Honorable Judith McConnel

OPPOSING COUNSEL: Clifford P. Dobrin, Esq., counsel for People
Deputy District Attorney
County of San Diego
P. O. Box 121001

San Diego, CA 92102-1-11
Telephone: 619-531-4040

William D. Newsome, III, Esq., counsel for People
City of San Diego
Deputy City Attorney
1200 3d Avenue, Suite 700
San Diego, CA 92101
Telephone: 619-533-5500

Albert N. Shelden, Esq., counsel for People
Deputy Attorney General
State of California
110 West A Sireet
Suite 700
San Diego, CA 92101
Telephone: 619-645-2989

NATURE OF CASE: I was lead counsel in defense of a trash hauler against claims for violation of California's Unfair Advertising and Unfair Practices Acts. The case involved alleged misrepresentations made when form contracts were sent to customers who were receiving services on an oral month-to month basis. After lengthy negotiation, the case was resolved with an extensive consent decree which provided for the payment of fines and restitution in excess of $2 million and monitoring by an independent accounting firm.

20. **Criminal History**: State whether you have ever been convicted of a crime, within ten years of your nomination, other than a minor traffic violation, that is reflected in a record available to the public, and if so, provide the relevant dates of arrest, charge and disposition and describe the particulars of the offense.

No.

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

American Academy of Achievement v. O'Melveny & Myers, Superior Court, Los Angeles County, Case No. C677199, filed February 18, 1988. In approximately 1987, O'Melveny & Myers was retained by the American Academy of Achievement to bring suit against its retired founder, Brian B. Reynolds, to enjoin him from attending the annual meeting that year. The president of the Academy was his son, Wayne R. Reynolds, who feared that his estranged father would disrupt the proceedings. The younger Reynolds became dissatisfied when preliminary injunctive relief was denied. I was the supervising partner, and was named as a defendant in the action.

O'Melveny & Myers and the individual defendants answered, and denied all material allegations; the firm cross-claimed for unpaid fees. The matter was settled with the firm's repayment of fees which the Academy had previously paid ($23,565.75), and the entire action was dismissed with prejudice.

Montrenes Financial Services, Inc. v. O'Melveny & Myers LLP, Orange County Superior Court, Case No. 800064. A complaint was filed in late 1998, and I was not named in the original complaint. In early 1999, an amended complaint was filed naming me. I was never served int the action, and learned that I had been named from counsel retained by the firm. I did not participate in the resolution of the case, which occurred subsequent to my retirement and appointment to the Orange County Superior Court. The firm was represented by Richard H. Borow, Irell & Manella LLP, 1800 Avenue of the Stars, Suite 900, Los Angeles, CA 90067-4276, telephone: 310-277-1010.

Smart v. Selna, Case 01CC09120, Orange County Superior Court. In 2000, my daughter, Christine M. Selna, was involved in a rear-end auto accident. I was the registered owner of the car. When suit was brought, I was named because California provides for secondary liability to the owner for up to $15,000.00. I was never served; the plaintiff voluntarily dismissed me shortly after the case was filed. Christine's insurance carrier settled the case for $40,000.00.

In addition, from 1978 to 1998, I was a partner in O'Melveny & Myers LLP. From time to time, the firm was sued. I am not aware of any suit which resulted in an adverse judgment. Any matter in which I was involved is listed above.

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

I would personally screen the initial pleading in each matter assigned to me to

determine if there were a basis for recusal because of a relationship with a party or counsel, a financial interest, or any other factor which would cause a reasonable person to question the impartiality of the trial judge. (In my current assignment, I receive a copy of all initial pleadings from the Clerk's office via e-mail within a day of the filing.) I would have a standing order advising litigants of the availability from my clerk of my current federal conflict of interest filing. As a Superior Court Judge, I file an annual Form 700, a conflict of interest disclosure statement required by the California Fair Political Practices Commission. The Form 700 is available from the clerk of the court for review or copying. I manage my own retirement fund which is principally invested in common stocks. As a Superior Court Judge, I am required to manage my financial affairs in a manner which does not impair my ability to discharge my duties. I have been infrequently required to recuse myself because of a financial interest (e.g., Edison International, a utility which I hold for income). If at any time my individual holdings resulted in an inappropriate number of recusals, I would liquidate the holdings.

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

No.

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

See attached Financial Disclosure Report, AO-10.

25. **Statement of Net Worth**: Complete and attach the financial net worth statement in detail. Add schedules as called for.

See attached Statement of New Worth.

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

Yes.

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

Yes.

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

Pursuant to an agreement between the White House and California Senators Diane Feinstein and Barbara Boxer, bipartisan committees consisting of three Republicans and three Democrats selected by the Senators were established in each judicial district to screen candidates. I met with the full committee for the Central District, which was chaired by the Honorable Elwood Lui (retired), on August 30, 2001. I subsequently met with Gerald Parsky, state-wide chairman of the screening process on January 8, 2002.

On February 12, 2002, I was interviewed by Timothy Flannigan, Esq. and an associate counsel, both members of the Office of Counsel to the President.

On November 19, 2002, I was interviewed by telephone by a member of the Office of Legal Policy, United States Department of Justice. On November 26, 2002, I was interviewed by two Special Agents of the Federal Bureau of Investigation

(c) Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as asking or seeking a commitment as to how you would rule on such case, issue, or question? If so, please explain fully.

No.

FINANCIAL DISCLOSURE REPORT

Name of Person Reporting: Selna, James V.

Date of Report: January 31, 2003

IV. REIMBURSEMENTS -- transportation, lodging, food, entertainment.
(Includes those to spouse and dependent children. See pp. 25-27 of Instructions.)

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

V. GIFTS. *(Includes those to spouse and dependent children. See pp. 28-31 of Instructions.)*

	SOURCE	DESCRIPTION	VALUE
	NONE (No such reportable gifts.)		
1		EXEMPT	$
2			$
3			$
4			$

VI. LIABILITIES. *(Includes those of spouse and dependent children See pp. 32-33 of Instructions.)*

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

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

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

   Victor John Wolski

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

   Judge, United States Court of Federal Claims

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

   Cooper & Kirk, PLLC, 1500 K St., NW, Suite 200, Washington, DC 20005
   (202) 220-9600
   State of residence: Virginia

4. **Birthplace**: State date and place of birth.

   November 14, 1962, New Brunswick, New Jersey.

5. **Marital Status**: (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es). Please also indicate the number of dependent children.

   Married to Lisa Marie Wolski (maiden name Gilbertson)
   Counsel, Tax and Finance, International Mass Retail Association
   1700 N. Moore St., Suite 2250, Arlington VA 22209
   No dependent children.

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

   University of Virginia School of Law, August, 1988-May, 1991. J.D., May, 1991.
   George Washington University, Fall 1984, Summer 1986—two graduate economics courses.
   Rutgers University, June-July, 1983—one summer course.
   University of Pennsylvania, August, 1980-May, 1984. B.A., College of Arts and Sciences, May, 1984; B.S., The Wharton School, May, 1984.

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

April, 2001-present.
Cooper & Kirk, PLLC
1500 K St., NW, Suite 200
Washington, DC 20005
Associate

October, 2000-April, 2001
Cooper, Carvin & Rosenthal
1500 K St., NW, Suite 200
Washington, DC 20005
Associate

April, 1997-October, 2000
Joint Economic Committee, United States Congress
G-01 Dirksen Senate Office Building
Washington, DC 20510
General Counsel and Chief Tax Adviser, January, 1999-October, 2000
Counsel to Vice-Chairman Connie Mack, April, 1997-December, 1998

August, 1992-April, 1997
Pacific Legal Foundation
10360 Old Placerville Road, Suite 100
Sacramento, CA 95827
Attorney

September, 1995-April, 1997
Sacramento County Republican Central Committee
1329 Howe Avenue, Suite 209
Sacramento, CA 95825
General Counsel

August, 1991-July, 1992
U.S. District Ct. for the Northern District of California
450 Golden Gate Avenue, Box 36060
San Francisco, CA 94102
Law Clerk to the Hon. Vaughn R. Walker

May, 1990-August, 1990
Jones, Day, Reavis & Pogue
355 South Grand Ave., Suite 3000
Los Angeles, CA 90071
Summer Associate

May, 1989-August, 1989
United States Department of Energy, Office of the General Counsel
GC-043 Forrestal Building
Washington, DC 20585
Paralegal Specialist

April, 1988-August, 1988
United States Department of Agriculture, Office of the Secretary
Jamie Whitten Building
Washington, DC 20250
Confidential Assistant to the Secretary

January, 1988-February, 1988
Republican National Committee
310 First St., SE
Washington, DC 20003
Telephone bank worker

October, 1985-March, 1988
Institute for Political Economy
1800 K St., NW, Suite 400
Washington, DC 20006
Research Associate

October, 1984-October, 1985
Center for Strategic and International Studies
1800 K St., NW, Suite 400
Washington, DC 20006
Research Assistant

July, 1984-August, 1984
Center for Strategic and International Studies
1800 K St., NW, Suite 400
Washington, DC 20006
Intern

8. **Military Service**: Identify any service in the U.S. Military, including dates of service,

branch of service, rank or rate, serial number and type of discharge received.

None.

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

At the University of Pennsylvania, I received a President's Scholarship for academic years 1980-84. I was a finalist for the Class of 1984 Senior Honor Awards, received an Honorable Mention for the Sol Feinstone Undergraduate Awards (1984), and was President of the Junto Senior Society (1984). I was also nominated as a candidate to be a recently-graduated member of the University's Board of Trustees (1985).

10. **Bar Associations**: List all bar associations or legal or judicial-related committees, selection panels 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.

State Bar of California
Washington State Bar Association
Oregon State Bar
District of Columbia Bar
Federalist Society for Law & Public Policy Studies—University of Virginia Chapter, Member 1988-91, Vice-Chairman for Membership 1989-90, Chairman 1990-91; Lawyers' Division, Sacramento Chapter, Member 1993-97, District of Columbia Chapter, Member 2001-present; Member, Environmental Law and Property Rights Working Group, Federalism & Separation of Powers Working Group, and Government Contracts Committee.

11. **Bar and Court Admission**: List each state and court in which you have been admitted to practice, including dates of admission and any lapses in membership. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

Supreme Court of the United States – November 6, 1995
California Supreme Court – July 7, 1992
Washington Supreme Court – July 5, 1994 (inactive since 1998)
Supreme Court of the State of Oregon – October 11, 1996 (inactive since 1998)
U.S. Court of Appeals for the Ninth Circuit – March 15, 1993
U.S. Court of Appeals for the Federal Circuit – July 17, 2001
U.S. District Court for the Eastern District of California – February 3, 1993
U.S. District Court for the Northern District of California – August 8, 1995
U.S. Court of Federal Claims – August 23, 2001
District of Columbia Court of Appeals – November 2, 2001

U.S. District Court for the District of Columbia—September 9, 2002

12. **Memberships**: List all memberships and offices currently and formerly held in professional, business, fraternal, scholarly, civic, charitable, or other organizations since graduation from college, other than those listed in response to Questions 10 or 11. Please indicate whether any of these organizations formerly discriminated or currently discriminates on the basis of race, sex, or religion - either through formal membership requirements or the practical implementation of membership policies. If so, describe any action you have taken to change these policies and practices.

Member, the City Tavern Club, Washington, DC, June 2000-present (copy of by-laws provided).
Member, Regnum Christi, February, 1995.
Sustaining member, Republican National Committee, 1984-present.
Member, University of Virginia Law and Graduate Republicans, 1988-91; Treasurer, 1989-90.
General Counsel, Sacramento County (CA) Republican Central Committee, September, 1995-April, 1997.
None of these organizations discriminates on the basis of race or sex. Regnum Christi, with which I was briefly affiliated (I joined at a February, 1995 retreat but had no further involvement), is a Catholic group.

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

"Tax Reform: A Wasted Opportunity," The Intercollegiate Review, Vol. 21, No. 1, Fall 1985 (co-authored with Paul Craig Roberts), reprinted in Human Events, Vol. XLV, No. 43, October 26, 1985.

"... True Reform Was Abandoned," Human Events, Vol. XLVI, No. 4, January 25, 1986.

I also drafted and edited portions of the following publications of the Joint Economic Committee of the U.S. Congress:

"The 1999 Joint Economic Report: Report of the Joint Economic Committee, Congress of the United States, on the 1999 Economic Report of the President," S. Rep. No. 106-169 (Oct. 4, 1999).

"Economic Growth and the Future Prospects of the U.S. Economy," Growth and Prosperity Series, Vol. 1, October, 1999.

"The Budget, Taxation, and Economic Growth," Growth and Prosperity Series, Vol. 2, October, 1999.

"The 2000 Joint Economic Report: Report of the Joint Economic Committee, Congress of the United States, on the 2000 Economic Report of the President," S. Rep. No. 106-255 (April 5, 2000).

"The Great Expansion: How It Was Achieved and How It Can Be Sustained," Growth and Prosperity Series, Vol. 4, April, 2000.

"President Reagan's Economic Legacy: The Great Expansion," October, 2000.

While working at Pacific Legal Foundation (PLF), I occasionally addressed civic and political groups, which requested that PLF provide a speaker to talk about the Foundation and its work. These speeches were not based on prepared texts, and would not have been taped or transcribed in any manner. Below is a list, complete to the best of my ability, of such speeches:

January 27, 1993: Central County Republican Assembly, Concord, CA
July 14, 1993: Cameron Park (CA)—Republican Women's Club.
April 20, 1995: California Association of Business, Property and Resource Owners, Grass Valley, CA.
October 24, 1995: Apartment Owners' Association of Southern California, Los Angeles, CA.
November 11, 1995: National Tax Limitation Committee, San Diego, CA.
March 14, 1996: International Right of Way Association, Sacramento, CA.
February 22, 1997: Contra Costa Land Alliance, Clayton, CA.

While working on the staff of the Joint Economic Committee of the U.S. Congress, I occasionally addressed civic or trade associations, primarily on the topics of recently enacted tax legislation, or the prospects for Congressional enactment of tax legislation. These speeches were not based on prepared texts, and I am not aware that any had been taped or otherwise transcribed. Below is a list, complete to the best of my ability, of such speeches:

July 27, 1998: National Association of Form 1099 Filers, Arlington, VA.
November 5, 1998: National Association of Computer Consulting Businesses, Orlando, FL (on potential repeal of section 1706 of the 1986 Tax Reform Act).
May 8, 1999: National Association of Real Estate Investment Trusts, Palm Desert, CA.
August 8, 2000: Electronic Industries Alliance, 18th Annual Legislative Roundtable, Hot Springs, VA—Tax and Budget Panel.

14. **Congressional Testimony**: List any occasion when you have testified before a committee or subcommittee of the Congress, including the name of the committee or subcommittee, the date of the testimony and a brief description of the substance of the testimony. In addition, please supply four (4) copies of any written statement submitted as testimony and the transcript of the testimony, if in your possession.

September 18, 1996, United States Senate Committee on Banking, Housing, and Urban Affairs, Subcommittee on HUD Oversight and Structure, "Enforcement of the Fair Housing Act and the Fair Housing Reform and Freedom of Speech Act of 1995—S.1132." S. Hrg. No. 104-739 (1997).

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

I am generally in good health and suffer from no ailments or illnesses of any sort that I am aware. My last full physical examination was June 19, 2000, and my last physical examination was July 8, 2002.

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

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

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

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

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

Not applicable.

17. **Public Office, Political Activities and Affiliations**:

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

state or federal legislative body.

In 1984 and 1985, I was unopposed on the ballot for the position of Middlesex County (NJ) Republican Committeeman, representing District 27 of the Borough of Sayreville.

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

In 1979, I was nominally the campaign manager for J. Randall Corman's Board of Education election in Sayreville, NJ. My role was to organize volunteers. In 1979-80, I was Vice-Chairman of Sayreville's Young Republicans, and from 1980 to approximately 1984 I was Executive Director of that organization. In those capacities I served as a volunteer in a number of municipal elections.

In 1992, I served on the Bay Area (CA) Steering Committee for Bruce Herschensohn for Senate, and helped organize a letter-writing campaign to local newspapers. From September, 1995, through April, 1997, I served as General Counsel to the Sacramento County (CA) Republican Central Committee, and participated in various state campaigns by distributing literature and operating phone banks. I was a member of "Economists for Bush" during the 2000 general election campaign, and lent my name to a letter supporting the Bush campaign's economic plan.

I have been involved in the following political campaigns as a volunteer: George Bush for President, 1980 primary campaign in New Jersey; Reagan-Bush 1980 campaign and Specter for Senate in 1980 (canvassing work as a member of the University of Pennsylvania's College Republicans), in Philadelphia, Pennsylvania; the Bush-Quayle 1988 campaign in Virginia (as member of University of Virginia's Law and Graduate Republicans); Bob Dole's 1996 presidential campaign in California; and George W. Bush's 2000 presidential primary campaign (door-to-door in Delaware, Maryland, and Virginia); and the Bush-Cheney campaign (putting up signs in Arlington, Virginia). I also worked as a security volunteer at the 1996 Republican National Convention.

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

(a) Describe chronologically your law practice and legal experience after graduation from law school including:

(1) whether you served as clerk to a judge, and if so, the name for the judge, the court and dates of the period you were a clerk;

(2) whether you practiced alone, and if so, the addresses and dates;

(3) the dates, names and addresses of law firms or offices, companies or

governmental agencies with which you have been affiliated, and the nature of your affiliation with each.

From August, 1991 through July, 1992, I was law clerk to the Honorable Vaughn R. Walker, Judge of the United States District Court for the Northern District of California, San Francisco, CA.

From August, 1992 to April, 1997, I was an attorney with the non-profit public interest legal foundation Pacific Legal Foundation (PLF), of Sacramento, CA. In 1992-93, I was a fellow in PLF's College of Public Interest Law program, and from 1993-1997 I was in PLF's Property Rights section. PLF's current address is 10360 Old Placerville Road, Suite 100, Sacramento, CA 95827 (while I worked there, it was located first at 2700 Gateway Oaks Drive, Suite 200, and later at 2151 River Plaza Drive, Suite 305). In 1996, I worked about one week each month in PLF's Pacific Northwest office, located at 10800 N.E. 8th Street, Suite 325, Bellevue, WA 98009-0793.

From April, 1997 through December, 1998, I served on the staff of the Joint Economic Committee of the U.S. Congress, as Counsel to Vice-Chairman Connie Mack. From January, 1999 through October, 2000, I was General Counsel and Chief Tax Adviser to the Joint Economic Committee.

From October, 2000 to April, 2001, I was associated with Cooper, Carvin & Rosenthal. From April, 2001 to the present, I have been associated with Cooper & Kirk. Both firms have been located at 1500 K Street, NW, Suite 200, Washington, DC 20005.

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

My practice is exclusively civil litigation, primarily on the plaintiff's side. After my clerkship with a federal trial judge, I became a civil litigator with Pacific Legal Foundation (PLF), focusing on Constitutional law in general and property rights law in particular, until April, 1997. While I worked at PLF its caseload was primarily appellate and *amicus* work, but I was assigned the role of lead counsel in a large share of PLF's cases in trial courts.

From April, 1997 to October, 2000, I served as tax counsel (and pension counsel beginning in January, 1999) to a member of the United States Senate Committee on Finance. This entailed advising the Senator in all Committee mark-ups and floor action involving tax, pension, and occasionally trade matters, drafting the Senator's tax bills and amendments, drafting legislative history, and meeting with advocates of various tax policy changes. In that position I became familiar with a wide expanse of the tax code, working on several revenue reconciliation bills--including one that was enacted into law (the Taxpayer Relief Act of 1997)--and also assisted in the enactment of the IRS

Restructuring and Reform Act of 1998. During this time I was also the Senator's counsel on the Joint Economic Committee (JEC) staff, serving as General Counsel of the staff from January, 1999 through October, 2000. In those roles I served as the ethics and personnel adviser of the Senator's JEC staff.

I resumed my litigation practice in October, 2000, again focusing on Constitutional and property rights.

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

During my early years as a litigator, my typical clients were property owners, usually individuals, at times non-profit organizations, whose use of their property was restricted by State or local government, and who could not afford to hire private counsel. My cases usually involved claims under the Takings Clauses of the U. S. Constitution and State constitutions. My case load was split about evenly between cases in which I represented one of the parties and cases in which I was representing *amici curiae*, and was split roughly evenly between cases in federal and state court, although the state court cases consumed about two-thirds of my time.

Since resuming my litigation practice, my typical clients have been businesses asserting rights against the federal government or a State government under the Constitution or federal law. My cases usually involve property or contract rights, and two areas of focus have been Medicare and utility regulation. The vast majority of my cases over the last two years have been in federal court.

(c) (1) Describe whether you appeared in court frequently, occasionally, or not at all. If the frequency of your appearances in court varied, describe each such variance, providing dates.

In my career as a litigator I have appeared in court occasionally, about two or three times a year. From 1992 to 1997, my appearances averaged about two per year. Over the last two years, my appearances have averaged over five per year.

(2) Indicate the percentage of these appearances in

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

Federal courts, 50%; state courts, 40%; state administrative bodies, 10%.

(3) Indicate the percentage of these appearances in:

(A) civil proceedings;
(B) criminal proceedings.

All court appearances have been in civil proceedings.

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

I tried one case to judgment under the State of California's writ of mandate procedure, and was chief counsel in the case.

(5) Indicate the percentage of these trials that were decided by a jury.

The case was not tried to a jury, it was on writ of mandate before a judge.

(d) Describe your practice, if any, before the United States Supreme Court. Please supply four (4) copies of any briefs, amicus or otherwise, and, if applicable, any oral argument transcripts before the U.S. Supreme Court in connection with your practice.

I have been the primary author of two petitions for writ of certiorari (*Mission Oaks Mobile Home Park v. City of Hollister* and *Suitum v. Tahoe Regional Planning Agency*), one of which (*Suitum*) was granted. I wrote a substantial portion of a third petition (*Clark v. City of Hermosa Beach*). Please note that, although I was counsel of record on the reply to the opposition to the *Suitum* petition, that brief was written by co-counsel and has not been provided to the Committee. Similarly, although the briefs on the merits in that case list me as co-counsel, my contribution was limited to portions of the petition that were re-incorporated, and thus I have not provided copies of those briefs, either.

I have also written six *amicus curiae* briefs, five in support of petitions and one on the merits of a case. My Supreme Court briefs and petitions were as follows:

Northeastern Florida Chapter of the Assoc. General Contractors of America v. City of Jacksonville, No. 91-1721 (Brief Amicus Curiae in Support of Petitioner).
Mission Oaks Mobile Home Park v. City of Hollister, No. 93-756 (Petition for Writ of Certiorari and Petitioner's Reply Brief).
Hunziker v. State of Iowa, No. 94-1077 (Brief Amicus Curiae in Support of Petition for Writ of Certiorari).
Reahard v. Lee County, No. 94-1384 (Amicus Curiae Brief in Support of Petition for Writ of Certiorari)
Cargill, Inc. v. United States, No. 95-73 (Brief Amicus Curiae in Support of Petition for Writ of Certiorari).
Stubblefield Construction Co. v. City of San Bernardino, No. 95-114 (Brief Amicus Curiae in Support of Petition for Writ of Certiorari).

Rivkin v. Dover Township Rent Leveling Board, No. 95-1980 (Brief Amicus Curiae in Support of Petition for Writ of Certiorari).
Suitum v. Tahoe Regional Planning Agency, No. 96-243 (Petition for Writ of Certiorari).
Clark v. City of Hermosa Beach, No. 96-1278 (Petition for Writ of Certiorari).

(e) Describe legal services that you have provided to disadvantaged persons or on a *pro bono* basis, and list specific examples of such service and the amount of time devoted to each.

For the first four years and eight months of my legal practice, I provided legal services full-time on a *pro bono* basis. The non-profit, public interest law foundation I worked for did not charge its clients, and represented people or groups with legal claims against a government that were of public significance but who could not afford to hire private counsel. One of my clients was an unincorporated association of citizens who supported the construction of affordable housing. I would estimate that on average about 40 hours each week for those four years and eight months were spent on cases representing *pro bono* clients, and another 5 hours per week were devoted to responding to legal questions posed by members of the general public.

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

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

(b) a detailed summary of the substance of each case outlining briefly the factual and legal issues involved;

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

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

Suitum v. Tahoe Regional Planning Agency, 520 U.S. 725 (1997).

I was counsel of record at the petition stage for petitioner Bernadine Suitum. Mrs. Suitum could not build a home on her vacant lot in a residential subdivision of Incline Village, Nevada, because of land use restrictions. Mrs. Suitum attempted to challenge the restrictions under the Takings Clause, but the district court and the Ninth Circuit determined that her claim was not ripe, as the regulatory process allowed her to transfer certain development rights to other property owners in the vicinity and she had not yet attempted to transfer these rights. The

Supreme Court granted the petition and reversed, holding that transferable development rights could be valued like any other property interest, and thus property owners do not have to attempt to sell them to determine their value and ripen a Takings claim premised on the economic impact of a regulation.

Another attorney at Pacific Legal Foundation had become lead counsel once the petition was granted, and argued the case before the Court. I remained involved by assisting with the moot courts in preparation for the argument. I was not involved in the case after remand, but I understand that Mrs. Suitum subsequently entered into a cash settlement with the defendant, Tahoe Regional Planning Agency.

Co-counsel: R.S. Radford, Pacific Legal Foundation, 10360 Old Placerville Road, Suite 100, Sacramento, CA 95827. (916) 362-2833.
Opposing counsel: Richard J. Lazarus, Georgetown University Law Center, 600 New Jersey Ave., N.W., Washington, DC 20001. (202) 662-9129.

Montereyans for Affordable Housing v. City of Monterey, No. 91360, Superior Court of the State of California for the County of Monterey.

I was lead counsel representing plaintiffs Montereyans for Affordable Housing, an unincorporated association, and Mr. Luke Fry, a citizen of Monterey. The voters of Monterey passed by referendum an amendment to the city charter (Measure F) that imposed obstacles to anyone who sought to increase the use density of real property in the city. Under Measure F, all persons attempting to upzone their property would have to first get city council approval for the change in zoning, and then would have to get approval by the voters in an election paid for by the applicant. My clients challenged Measure F, under the Equal Protection clauses of the U.S. and California Constitutions, the California Constitution's free elections guarantee, and under California planning and housing law. I drafted and filed an amended complaint in the case, and briefed and argued a summary adjudication motion on the equal protection and free elections causes of action. In a minute order issued August 17, 1994, the Superior Court granted the motion, finding that the portion of Measure F requiring applicants to pay the costs of elections was invalid but leaving open the question of severability. The City then settled the case, and rescinded Measure F.

Superior Court Judge: Richard Silver.
Opposing counsel: Daniel J. Curtin, Jr., McCutchen, Doyle, Brown & Enerson, 1331 North California Boulevard, Walnut Creek, CA 94596; (925)975-5351.

Mason v. American Tobacco Co., Case No. 02-7923 (2nd Cir.); 212 F. Supp. 2d 88 (E.D. N.Y. 2002).

I am a member of the litigation team representing James Mason, Billie June Richie, and Glen Bailey, three Medicare beneficiaries who suffer from diseases due to the smoking of cigarettes. Plaintiffs on behalf of themselves and a class of all others similarly situated filed this

lawsuit seeking an award of damages from defendant tobacco companies (American Tobacco Co., R.J. Reynolds Tobacco Co., Brown & Williamson, Philip Morris Inc., Lorillard Tobacco Co., Liggett Group Inc., Liggett & Myers, Inc., and Brooke Group Ltd.) based on the defendants' manipulation and concealment of the addictive properties of their products, under intentional tort, breach of warranty and strict liability theories. This lawsuit is brought under the Medicare as Secondary Payer statute, and seeks the statutory award of double the amount paid by Medicare to treat diseases caused by use of the tobacco companies' products--with one half to go to the Medicare system to make it whole and the other half shared equitably among class members. The Medicare beneficiaries argue that the tobacco companies have maintained self-insured liability plans, or are self-insured plans as a matter of law by use of the corporate form of organization, and thus have the primary responsibility to pay for the medical expenses of Medicare beneficiaries such as plaintiffs and the putative class.

I became a member of the litigation team in this case after it was transferred from the Northern District of Texas to the Eastern District of New York, where it was joined with other class actions brought against the tobacco companies that were pending before the Honorable Jack B. Weinstein. I helped develop plaintiffs' legal theories and assisted in drafting the Fourth Amended Complaint. I then drafted portions of the briefs supporting the motion for class certification and opposing the motion to dismiss the case, and helped prepare for the hearing on class certification. The District Court dismissed the case on July 25, 2002, determining that the tobacco companies did not operate self-insured liability plans for purposes of the Medicare as Secondary Payer statute, *Mason v. American Tobacco Co.*, 212 F. Supp. 2d 88 (E.D. N.Y. 2002). The case is now on appeal before the Second Circuit.

District Court Judge: Jack B. Weinstein.
Co-counsel: Jonathan Cuneo, The Cuneo Law Group, P.C., 317 Massachusetts Ave., N.E., Suite 300, Washington, DC 20002; (202) 789-3960.
Opposing counsel: Murray R. Garnick, Arnold & Porter, 555 12th St., Washington, DC 20004; (202) 942-5000.

Coors Brewing Co. v. Calderon, Case No. 02-1483 (RJL), dismissed with prejudice on September 6, 2002, appeal pending.

I am a member of the litigation team representing the Honorable Sila M. Calderon, Governor of the Commonwealth of Puerto Rico, defending the constitutionality of the Commonwealth's progressive excise tax on beer and malt-based products. The Commonwealth raised its tax on these products, effective in June of this year, and increased the number of tax rates from two to six. Plaintiff Coors Brewing Company originally joined several other businesses in a suit challenging the tax in a Commonwealth court, but voluntarily dismissed itself from that case at a hearing on the Commonwealth's motion to dismiss (which was ultimately granted) and filed suit in the U.S. District Court in the District of Columbia against Governor Calderon in her official capacity. The lawsuit challenges the existence of tax rates lower than the top rate at which Coors' distributors are assessed, on Commerce Clause grounds, based on the assertion that no Commonwealth-based producers of malt beverages currently have a high

enough volume of production to place them in any tax bracket other than the lowest.

Coors moved for a temporary restraining order upon filing suit in the D.C. District. I assisted in the drafting of briefs opposing injunctive relief and supporting dismissal, and in the preparation for oral argument on the TRO. The Governor asserted numerous grounds for dismissal, including lack of subject matter jurisdiction (based on the Butler and Tax Injunction Acts), abstention doctrines, lack of personal jurisdiction, improper venue, sovereign immunity, and claim preclusion. The District Court dismissed the case for lack of subject matter jurisdiction on September 6, 2002, and plaintiff has filed a notice of appeal.

District Court Judge: Richard J. Leon.
Lead co-counsel: Charles J. Cooper, Cooper & Kirk, PLLC, 1500 K St., N.W., Suite 200, Washington, DC 20005; (202) 220-9600.
Opposing counsel: M. Miller Baker, McDermott, Will & Emery, 600 Thirteenth St., N.W., Washington, DC 20005; (202) 756-8000.

Union Electric Company v. Public Service Commission of the State of Missouri, Case Nos. 00CV323273 and 00CV323608 (Cole County, MO Circuit Court, Division I). Judgment issued by Circuit Judge Thomas J. Brown, III on May 17, 2002.

I am associate counsel representing Union Electric Company (UE) in an appeal of an order of the Missouri Public Service Commission (PSC). In the settlement of a prior proceeding before the PSC, UE entered into an agreement with the PSC Staff, the Office of Public Counsel, and customer intervenors establishing an experimental alternative regulation ("alt-reg") plan. Under the alt-reg plan and its successor, a six-year moratorium on rate cases involving UE was established. In lieu of cost-of-service ratemaking, under the alt-reg plan UE was to calculate its rate of return each year based on a reconciliation procedure agreed to by the parties and approved by the PSC, and would share earnings with ratepayers in the form of credits on their bills.

The Staff of the PSC disputed UE's calculation of earning credits for the third year of sharing, and filed a complaint with the PSC seeking adjustments in certain categories of expenses. UE prevailed on the majority of these adjustments, and appealed to the state trial court the decision of the PSC on the other items. UE's position is that the Staff adjustments violate the terms of the alt-reg contract, and that the PSC erroneously interpreted the contract, raising among other things questions of violations of the Contracts and Takings Clauses of the U.S. Constitution. I became involved in the matter at the initial appeal stage, researching and drafting portions of UE's briefs to the State trial court. On May 17, 2002, the trial court judge issued an order upholding the PSC Staff's position, and UE has filed an appeal.

Lead co-counsel: Robert Cynkar, Cooper & Kirk, 1500 K St., NW, Suite 200, Washington, DC 20005. (202) 220-9655.
Opposing counsel: Steven Dottheim, General Counsel, Missouri Public Service Commission, P.O. Box 360, Jefferson City, MO 65102. (573) 751-7489.

Healing v. California Coastal Commission, 22 Cal. App. 4th 1158 (1994); No. BC055465, Superior Court of the State of California for the County of Los Angeles.

Kenneth Healing owned a 2.5 acre subdivided lot in Los Angeles County. The property was a legal lot usable only for residential purposes. Under the County's land use plan, certified by the California Coastal Commission ("Commission"), the property was in a category that permitted home construction. Mr. Healing's application to the Commission for a permit to build a home was denied.

Mr. Healing filed in state court a petition for administrative mandamus, challenging the legality of the Commission's permit denial, and a complaint for inverse condemnation, alleging that the denial resulted in a taking of his property without payment of just compensation. The trial court dismissed the inverse condemnation cause of action on the ground that the takings issue should be determined in the administrative mandate proceeding. It then denied the petition for a writ of administrative mandate, determining that evidence in the record supported the denial.

I became involved in the case during the appeal of the trial court decision, drafting portions of the appellant's opening and reply briefs. Mr. Healing appealed the denial of the writ of mandate on several grounds, and the Court of Appeal for the Second District reversed the trial court and granted the writ. Mr. Healing also appealed the dismissal of his inverse condemnation complaint, arguing that property owners have a right to a trial *de novo* on the question of whether an unconstitutional taking of property resulted from an agency's actions, and cannot have such claims confined to a mere review of the administrative record. The Court of Appeal agreed, and established this right to a trial. *Healing v. California Coastal Commission*, 22 Cal. App. 4th 1158, 1177-78 (1994). Mr. Healing ultimately settled the case with the Commission.

2nd District Court of Appeal panel: Miriam A. Vogel, Spencer, Masterson.
Los Angeles County Superior Court judge: Robert H. O'Brien.
Lead counsel: Orrin Finch. (916) 483-4078.
Opposing counsel: Peter H. Kaufman, Deputy Attorney General, California Department of Justice, 110 West A St., Suite 700, San Diego, CA 92101. (619) 645-2020.

United States v. Fitzgerald, U.S. Dist. Ct.; E.D. Cal., No. CV-F-93-5750-OWW-DLB.

Five homeowners in a residential subdivision of Bakersfield, California obtained a preliminary injunction in a state court to enforce covenants, conditions and restrictions that prevent businesses from operating in the neighborhood. Because the enjoined business was an intermediate care facility for the developmentally disabled, a civil lawsuit against the homeowners was filed by the United States government in the federal district court, on behalf of the owners of the business and five of their prospective clients, alleging that the injunction violated the Fair Housing Amendments Act of 1988 ("FHAA"). Three other prospective clients of the business intervened, raising claims under state law as well as under the FHAA.

I was associate counsel representing the defendants in the federal lawsuit. I assisted in the drafting of answers to the complaints. The affirmative defenses included the assertion that the First Amendment protected our clients from liability for filing a non-frivolous lawsuit to enforce property rights, and that the Takings Clause of the Fifth Amendment would be violated by the application of the FHAA under the circumstances of the case. I assisted in the defense of depositions and also participated in settlement negotiations which resulted in both the state and federal lawsuits being voluntarily dismissed. This case and others like it prompted a Congressional investigation, and a subcommittee of the Senate Committee on Banking, Housing and Urban Affairs held a hearing on the topic, at which I testified.

District Court judge: Oliver W. Wanger
Co-counsel: David R. Lampe, LeBeau, Thelan, Lampe, McIntosh & Crear, 5201 Truxton Ave., Third floor, Bakersfield, CA 93309. (805) 325-8962
Opposing counsel: S.E. Pietrafesa, U.S. Dept. of Justice, Civil Rights Division, Housing & Civil Enforcement Section, P.O. Box 65998, Washington, DC 20035. (202) 616-2217.

Roman Catholic Archbishop of San Francisco v. City of San Mateo, No. 382717, Superior Court of the State of California for the County of San Mateo; Court of Appeal, First Appellate District, Division Four, No. A074370.

A Catholic cemetery in San Mateo notified the residents of the surrounding neighborhood that it was considering installing new garden crypts or urn walls. The neighbors asked the city council to pass restrictions on the cemetery's use of its property, and special setbacks and height limitations were imposed. I represented the cemetery, and filed a petition for a writ of mandate and a complaint for declaratory and injunctive relief, challenging the constitutionality of the restrictions. I conducted discovery, assembled the evidence for the record, and briefed and argued the motion for issuance of the writ. The Superior Court entered judgment granting the writ, ordering the restrictions to be rescinded as violating the Equal Protection, Due Process and Takings Clauses of the U.S. and California Constitutions. The City appealed, and I wrote the cemetery's opposition brief. The case was argued before the Court of Appeal after I had left PLF's employ, and that Court ultimately reversed the trial court in an unpublished opinion.

Superior Court judge: Thomas McGinn Smith.
1st District Court of Appeal panel: Poche, Anderson, Reardon.
Opposing counsel: Roy C. Abrams, San Mateo City Attorney, 330 West 20th Ave., San Mateo, CA 94403.

Satellite Broadcasting & Communications Association v. FCC, 275 F.3d 337 (4th Cir. 2001), *cert. denied*, 153 L. Ed. 2d 777 (2002); 146 F. Supp. 2d 803 (E.D. Va. 2001).

I was a member of the litigation team representing the trade association and the two largest companies in the satellite television market. We filed a federal lawsuit challenging the "carry-one, carry-all" requirements of the Satellite Home Viewer Improvement Act of 1999

("SHVIA"). The lawsuit raised claims under the First Amendment and the Takings Clause of the Fifth Amendment, among others. The trial court dismissed the suit on the basis that satellite carriers are not compelled to carry any local stations but are subject to the conditions by their own choosing. The Fourth Circuit affirmed, and the petition for writ of certiorari was denied. I have primarily been involved in discovery matters, including taking and defending depositions, and drafted portions of our summary judgment and appeal briefs as well as opposition memoranda to pre-trial motions.

District Court Judge: Gerald Bruce Lee
4th Circuit panel: M. Blane Michael, H. Emory Widener, Jr., Paul V. Niemeyer.
Lead co-counsel: Charles J. Cooper, Cooper & Kirk, PLLC, 1500 K Street, NW, Suite 200, Washington, DC 20005. (202) 220-9660.
Opposing counsel: Donald B. Verrilli, Jr., Jenner & Block, LLC, 601 Thirteenth St., NW, Washington, DC 20005. (202) 663-6000. Joseph W. Lobue, U.S. Department of Justice, 901 E Street, NW, Room 1060, Washington, DC 20530. (202) 514-4640.

Staff of the Missouri Public Service Commission v. Union Electric Company, Case No. EC-2002-1 (Mo. Pub. Serv. Comm'n).

I was a member of the litigation team representing Union Electric Company in a rate case before the Missouri Public Service Commission. The Commission's staff had filed a complaint seeking to reduce UE's revenues in excess of $250 million annually. The hearing began in July of this year, and the case settled on the second day of the hearing. I deposed Staff and intervenor witnesses, prepared rebuttal testimony, and cross-examined one of the three witnesses who testified in the hearing prior to settlement. I was responsible for several issues in the case, including pension, tax, and cash working capital items, and assisted in the drafting of the stipulation and agreement settling the case. The settlement was approved by the Commission in an order effective August 4, 2002.

Lead co-counsel: Robert Cynkar, Cooper & Kirk, 1500 K St., NW, Suite 200, Washington, DC 20005. (202) 220-9655.
Opposing counsel: Steven Dottheim, General Counsel, Missouri Public Service Commission, P.O. Box 360, Jefferson City, MO 65102. (573) 751-7489.

20. **Criminal History**: State whether you have ever been convicted of a crime, within ten years of your nomination, other than a minor traffic violation, that is reflected in a record available to the public, and if so, provide the relevant dates of arrest, charge and disposition and describe the particulars of the offense.

No—not applicable.

21. **Party to Civil or Administrative Proceedings**: State whether you, or any business of which you are or were an officer, have ever been a party or otherwise involved as a party

in any civil or administrative proceeding, within ten years of your nomination, that is reflected in a record available to the public. If so, please describe in detail the nature of your participation in the litigation and the final disposition of the case. Include all proceedings in which you were a party in interest. Do not list any proceedings in which you were a guardian *ad litem*, stakeholder, or material witness.

I was one of a number of California attorneys (36 and 20, respectively) who joined as plaintiffs challenging the State Bar of California's use of compulsory bar dues, in *Connor v. State Bar* (Sacramento County Superior Court No. 543763) and *Burling v. State Bar* (Sacramento County Superior Court No. 95AS03901). The lawsuits, filed in October, 1994 and July, 1995, sought a declaration that certain expenditures of the state bar were not germane to the regulation of the legal profession or improving the quality of legal services available to the State, in violation of the First Amendment under *Keller v. State Bar of California*, 496 U.S. 1 (1990), and also sought the refund of the improperly spent dues. The cases were voluntarily dismissed in August, 1996, after the State Bar changed its method of allocating expenses in response to a victory in the California Supreme Court by a group of attorneys challenging the use of a prior year's dues, *see Brosterhous v. State Bar*, 12 Cal. 4th 315 (1996).

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

I would not participate in any case involving a plaintiff that is a company, or subsidiary or affiliate of a company, of which I or my wife own any securities. I would not participate in any case in which I served as attorney or any case that was active at Cooper & Kirk while I was associated with the firm. For a reasonable period of time, I would not participate in any case in which a party is represented by a former colleague from Cooper & Kirk, or involving a former client. I would not participate in any case in which a company that is a member of the International Mass Retail Association ("IMRA") is a party, while my wife is employed by IMRA. I will follow the guidelines of the Code of Judicial Conduct.

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

No.

24. **Sources of Income**: List sources and amounts of all income received during the calendar year preceding the nomination, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding $500. If you prefer to do so,

copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.

See attached financial disclosure report.

25. **Statement of Net Worth**: Complete and attach the financial net worth statement in detail. Add schedules as called for.

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

No.

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

Not applicable.

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

In the Spring of 2001, I filled out an on-line application with the White House, and expressed interest in the position. I was asked for a copy of my resumé later that Fall, and was called in for an interview with Deputy White House Counsel Tim Flanigan and an Assistant White House Counsel shortly thereafter. As a former Senate staffer, I received support from members of the Senate—including members of this Committee—as well as from my former boss, Connie Mack. I also have the support of my current employer. I underwent an FBI background investigation, and was nominated by the President on September 12, 2002.

(3) Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as asking or seeking a commitment as to how you would rule on such case, issue, or question? If so, please explain fully.

No.

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

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

   Theresa Lazar Springmann
   Theresa Marie Lazar (nee)

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

   United States District Court Judge, Northern District of Indiana

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

   United States District Court, Northern District of Indiana
   5400 Federal Plaza
   Suite 3500
   Hammond, Indiana 46320
   (219) 852-6700

4. **Birthplace**: State date and place of birth.

   January 23, 1956; Gary, Lake County, Indiana

5. **Marital Status**: Please include: a) spouse's name; b) spouse's occupation, employer's name and business address(es); and c) number of dependent children.

   (a) Married David Kent Springmann on July 7, 1980

   (b) Vice President/Corporate Secretary
   Okaya Electric America, Inc.
   503 Wall Street
   Valparaiso, Indiana 46383
   (800) 852-0122

   (c) Two dependent children

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

University of Notre Dame Law School (1977-1980)
Juris Doctor (May 1980)

Indiana University–Northwest Campus in Gary, Indiana (1973-1977)
Bachelor of Arts (double major in English and Political Science) (May 1977), summa cum laude

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

Magistrate Judge (March 1995 to Present)
United States District Court, Northern District of Indiana
5400 Federal Plaza
Suite 3500
Hammond, Indiana 46320

Chancellor's Board of Advisors (1999 to Present)
Indiana University–Northwest
3400 Broadway
Gary, Indiana 46408

Partner (1993 to March 1995); Associate (January 1984 to 1992)
Spangler, Jennings, & Dougherty, P.C.
8396 Mississippi Street
Merrillville, Indiana 46410

Law Clerk to the Honorable James T. Moody (October 1980 to December 1983)
United States District Court, Northern District of Indiana
507 State Street
Hammond, Indiana 46320

Research Assistant to Professor J. Eric Smithburn (August 1979 to May 1980)
Notre Dame Law School
Notre Dame, Indiana 46556

Legal Extern (June 1979 to August 1979)
Law Office of David A. Butterfield
11 Lincolnway
Valparaiso, Indiana 46383

Managerial Assistant (June 1979 to August 1979)
LOFS Property Owners Association
1048 North Lakeshore Drive
Crown Point, Indiana 46307

Research Assistant to Professor J. Eric Smithburn (August 1978 to May 1979)
Notre Dame Law School
Notre Dame, Indiana 46556

Legal Extern (June 1978 to August 1978)
Law Office of David A. Butterfield
11 Lincolnway
Valparaiso, Indiana 46383

Managerial Assistant (June 1978 to August 1978)
LOFS Property Owners Association
1048 North Lakeshore Drive
Crown Point, Indiana 46307

Managerial Assistant (June 1973 to August 1977)
LOFS Property Owners Association
1048 North Lakeshore Drive
Crown Point, Indiana 46307

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

Not applicable.

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

Academic highlights:

Indiana University–Northwest Campus in Gary, Indiana

- Graduated summa cum laude
- Omicron Sigma Delta Honorary Society (1976-1977)
- Virginia Scovill Outstanding Student Award from the Division of Arts and Sciences
- Indiana University delegate to the Eighteenth Annual Air Force Academy American Assembly on "Women in the American Economy" (1976)
- Merit Scholarship (1973-1977)
- Dean's List all eight (8) semesters
- Recipient of the first Outstanding Academic Achievement Award from the Department of Political Science (April 1977)
- Nominated by the Division of Arts and Sciences to Who's Who Among Students in American Universities and Colleges (1976)

University of Notre Dame Law School (1977-1980)

- Glenn D. Peters Law School Fellow (1978-1979, 1979-1980)

Judicial highlights:

- Received highest overall performance rating in a judicial evaluation of federal judges in Northwest Indiana conducted by the Lake County Bar Association (October of 1998)
- Became first woman appointed as a federal judicial officer in the Northern District of Indiana (March of 1995)
- Appointed by Chief Judge Richard A. Posner to the Seventh Circuit Committee for a Model Employment Dispute Resolution Plan (September of 1998)
- Designated by the District Court Judges of the Northern District of Indiana to coordinate the establishment of the Northern District of Indiana Federal Community Defenders, Inc. (1998-2000)

Practice highlights:

- "AV" rating by Martindale-Hubbell (highest attorney rating)
- Became first woman partner and shareholder at Spangler, Jennings & Dougherty, P.C., largest "AV" rated law firm in Northwest Indiana

10. **Bar Associations**: List all bar associations or legal or judicial-related committees, selection panels 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 (1980-1984)
- Indiana State Bar Association (1980-present)
- Indiana Bar Foundation (Fellow) (1997-present)
- Lake County Bar Association (1986-present)
  - Founding Member
  - Legal Forms and Drafting Committee (1990)
  - Judicial Selection, Compensation, and Building Committee (1986-87)
  - Continuing Legal Education Committee (1987-1988)
  - Board of Directors (1986-1987)
- American Inns of Court, Calumet Chapter (1995-present)
  - Founding Master
  - President (1999-2000)
  - Program Director (1995-1996; 1996-1997)
- Federal Bar Association, Northwest Indiana Chapter (1984-1995)
  - President (1993-1994)
  - Vice-President (1990-1992)
  - Secretary (1989)
  - CLE Program Chair (1988)
  - Executive Committee (1987-1994)
- Women Lawyers Association (1999-present)
- Federal Magistrate Judges Association (1995-present)
- Federal Magistrate Judges Association Seventh Circuit Director (2000-2002)–representing all magistrate judges in the Seventh Circuit in forming policy positions and recommendations to the Administrative Office and Federal Judicial Council on issues concerning magistrate judges
- Seventh Circuit Committee for a Model Employment Dispute Resolution Plan (September of 1998)–appointed by Chief Judge Richard A. Posner
- Designated by the District Court Judges of the Northern District of Indiana to coordinate the establishment of the Northern District of Indiana Federal Community Defenders, Inc. (1998-2000)

11. **Bar and Court Admission**: List each state and court in which you have been admitted to practice, including dates of admission and any lapses in membership. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

- Supreme Court of the State of Indiana (October 10, 1980)
- United States District Court for the Northern District of Indiana (February 25, 1982)
- United States District Court for the Southern District of Indiana (July 11, 1991)
- United States Court of Appeals for the Seventh Circuit (January 28, 1983)

12. **Memberships**: List all memberships and offices currently and formerly held in professional, business, fraternal, scholarly, civic, charitable, or other organizations since graduation from college, other than those listed in response to Questions 10 or 11. Please indicate whether any of these organizations formerly discriminated or currently discriminates on the basis of race, sex, or religion - either through formal membership requirements or the practical implementation of membership policies. If so, describe any action you have taken to change these policies and practices.

Educational:

- Indiana University–Northwest, Chancellor's Board of Advisors (1999-present)
- Saint Paul Catholic School–Home and School Association (1997-present)

Religious:

- Saint Elizabeth Seton Catholic Church, Valparaiso, Indiana (1985-1994)
- Saint Paul Roman Catholic Church, Valparaiso, Indiana (1980-1985) (1994-present)
- Altar and Rosary Society (1980-present); President (1984)

Social:

- Northwest Indiana Notre Dame Club (1998-present)
- Notre Dame Alumni Association (1980-present)
- Indiana University Alumni Association (1977-present)
- Valparaiso Country Club (1998-present) (social membership only)

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

(a) Writings that have been published in any law review, law journal, or other legal periodical

(1) Effective Assistance of Counsel: In Quest of a Uniform Standard of Review, 17 Wake Forest L. Rev. 497 (1981) (with Professor J. Eric Smithburn, University of Notre Dame Law School)

(2) Perceived Perjury as a Factor in Criminal Sentencing, 23 Res Gestae 424 (1979) (with Professor J. Eric Smithburn, University of Notre Dame Law School)

(b) Writings that have been published in any other publication of general circulation

Not applicable.

(c) Published books

Not applicable.

(d) Lectures/Instruction

(1) Faculty Panelist for the Indiana Continuing Legal Education Forum (ICLEF) seminar "Secrets of Success at Trial"–November 8, 2001–Merrillville, Indiana–I did not develop any of the written material.

(2) Faculty Panelist for the ICLEF seminar on Federal Civil Practice for the Northern District of Indiana–September 24, 2001–South Bend, Indiana–I did not develop any of the written material.

(3) Guest Speaker for an undergraduate Contemporary American History class at Valparaiso University on "President Reagan and the Supreme Court"–August 8, 2001–Valparaiso, Indiana–I did not develop any of the written material.

(4) Faculty Panelist for the ICLEF seminar on Federal Civil Practice for the Northern District of Indiana–April 26, 2000–Fort Wayne, Indiana–I did not develop any of the written material.

(5) Faculty Panelist for the Indiana Trial Lawyer and Lake County Bar Association (LCBA) seminar "We, the Jury . . . The Art of Unpicking and Persuading a Jury"–presentation on "Selecting a Jury in Federal Court"–December 2, 1998–Merrillville, Indiana–I did not develop any of the written material.

(6) Judge at the Notre Dame Law School 50th Annual Showcase Moot Court Argument–February 17, 2000–Notre Dame, Indiana–I did not develop any of the written material.

Presided on a panel of three (3) judges, including the Honorable Carlos FiLucero, United States Circuit Judge, United States Court of Appeals for the Tenth Circuit, and the Honorable Charles R. Wilson, United States Circuit Judge, United States Court of Appeals for the Eleventh Circuit

(7) Faculty Panelist for the ICLEF seminar on Federal Civil Practice for the Northern District of Indiana–May 18, 1998–South Bend, Indiana–I did not develop any of the written material.

(8) Judge for the American Bar Association Law Student Division Negotiation Competition–November 9, 1996–Valparaiso University School of Law, Valparaiso, Indiana–I did not develop any of the written material.

(9) Faculty Panelist for the ICLEF seminar "Juristic Park"–October 3, 1995–Merrillville, Indiana–I did not develop any of the written material.

(10) Faculty Panelist for the LCBA Medical-Legal Conference–presentation on "Federal Discovery"–May 24, 1995–Merrillville, Indiana–I did not develop any of the written material.

(11) Faculty for the Indiana Bench/Bar Conference–presentation on "A Summit on the Profession"–May 4 and 5, 1995–Indianapolis, Indiana–I did not develop any of the written material.

(12) Faculty for the ICLEF, Indiana Judges Association, Indiana State Bar Association, and Judicial Conference of Indianapolis–"Who's Trying This Case Anyway?"–workshop on Pre-trial Procedures/Trial Conduct–May 4, 1995–Indianapolis, Indiana–I did not develop any of the written material.

(13) Faculty Panelist for the ICLEF seminar "For The Defense"–presentation on "Emotional Distress After Shuamber v. Henderson"–October 7 and 8, 1993–Indianapolis, Indiana–document attached.

(14) Faculty Panelist for the ICLEF and LCBA seminar "War in the Courts"–presentation on "Independent Medical Exams" and panel discussion–June 21, 1991–Crown Point, Indiana–document attached.

(15) Faculty Panelist for the ICLEF seminar "Evidence: Keeping It Out"–presentation on "Evidentiary Exclusions in Civil Cases"–March 4, 1988–Indianapolis, Indiana–document attached.

(16) Chairperson for the Federal Bar Association (Northwest Indiana Chapter) (FBA/NWI) seminar "Federal Practice Seminar"–November 1, 1991–Valparaiso, Indiana–I did not develop any of the written material.

(17) Chairperson for the FBA/NWI seminar "Social Security Disability"–December 2, 1988–Crown Point, Indiana–I did not develop any of the written material.

(18) Chairperson for the FBA/NWI seminar "Federal Guidelines Sentencing Seminar"–September 23, 1988–Crown Point, Indiana–I did not develop any of the written material.

Indiana Continuing Legal Education Forum (ICLEF) is located at 230 East Ohio Street, Suite 300, Indianapolis, Indiana 46204; (317) 637-9102.

I have also participated as a trial judge for student trials in the trial advocacy programs at the Notre Dame Law School (December 3, 1995) and Valparaiso University School of Law (March 23, 1996 & April 17, 1999)

(e) Naturalization Ceremonies

(1) June 20, 1997 at the United States Courthouse in Hammond, Indiana–I did not retain copy of remarks.

(2) October 24, 1997 at the United States Courthouse in Hammond, Indiana–I did not retain copy of remarks.

(3) September 4, 1998 at the United States Courthouse in Lafayette, Indiana–I did not retain copy of remarks.

(4) January 25, 2002 at the United States Courthouse in Hammond, Indiana–copy of remarks attached.

(5) April 26, 2002 at the United States Courthouse in Hammond, Indiana–copy of remarks attached.

(6) September 11, 2002 at the United States Courthouse in Hammond, Indiana–copy of remarks attached.

(f) Supreme Court of Indiana Bar Admission Ceremonies

(1) June 9, 2000 in Indianapolis, Indiana–I did not retain copy of remarks.

4. **Congressional Testimony**: List any occasion when you have testified before a committee or subcommittee of the Congress, including the name of the committee or subcommittee, the date of the testimony and a brief description of the substance of the testimony. In addition, please supply four (4) copies of any written statement submitted as testimony and the transcript of the testimony, if in your possession.

Not applicable.

5. **Health**: Describe the present state of your health and provide the date of your last physical examination.

Good; February 20, 2002.

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

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

(1) Kludt v. Majestic Star Casino, LLC., 200 F. Supp. 2d 973 (N.D. Ind. 2001)

The Plaintiff filed a Complaint alleging that the Defendant casino breached its duty under general maritime law to exercise due care and that the Defendant was liable because it failed to monitor the Plaintiff's consumption of alcohol. The Court held: (1) that fundamental principals of negligence law that had been adopted as general maritime law should apply, but that the Court would also consider the alternative theory of liability under the Indiana Dram Shop Act; (2) that the Plaintiff's negligence claim under general

maritime law would survive summary judgment, but that the Plaintiff's claim under the Indiana Dram Shop Act would not; and (3) that summary judgment was appropriate as to the Plaintiff's punitive damages claim under general maritime law and the Indiana Dram Shop Act.

(2) Lenzo v. School City of East Chicago, 2001 WL 1862949 (N.D. Ind. 2001); Lenzo v. School City of East Chicago, 2001 WL 1862948 (N.D. Ind. 2001); Lenzo v. School City of East Chicago, 140 F. Supp. 2d 947, 154 Ed. Law Rep. 487 (N.D. Ind. 2001)

The Plaintiff, an employee of the Defendant school corporation, filed a Motion for Summary Judgment in this Age Discrimination in Employment Act (ADEA) suit challenging the Defendant's early retirement plan (ERIP). The Court held: (1) that Eleventh Amendment immunity did not shelter the school corporation from suit by a private litigant under the Age Discrimination in Employment Act, and (2) that the ERIP was facially discriminatory on the basis of age. The Court also found that the Plaintiff was entitled to money damages, pre-judgment interest, and attorney fees.

(3) Schele v. Porter Memorial Hospital, 198 F. Supp. 2d 979 (N.D. Ind. 2001)

The Plaintiff brought a sex discrimination claim against her employer, a county hospital, under Title VII, the Equal Protection Clause of the Fourteenth Amendment, and the Equal Privileges Clause of the Indiana Constitution, Article I, § 23, and a claim of negligent hiring, retention, and supervision. The Court concluded that genuine issues of material fact existed as to her Title VII, Fourteenth Amendment, and negligent hiring, retention, and supervision claims, that the parties had not sufficiently argued the Equal Privileges claim, and thus that summary judgment was not appropriate.

(4) Federal Trade Commission v. Think Achievement Corp., 144 F. Supp. 2d 1029 (N.D. Ind. 2001)

The Federal Trade Commission (FTC) brought an action against several telemarketing corporations, their owner, and his wife alleging violations of the FTC Act. Judgment was entered for the FTC, and a permanent receiver was appointed. After the owner and his wife failed to comply, the receiver brought an Ex Parte Motion to Enforce Immediate Sanctions, an Ex Parte Petition for Writ of Execution, a Writ of Assistance, and a Hold Harmless Agreement. The Court, holding that the evidence clearly established that the owner and his wife knowingly violated the Court's Order and had the ability to comply and that a fine was an inadequate sanction for violation, imposed a civil commitment sanction.

(5) Federal Trade Commission v. Think Achievement Corp., 144 F. Supp. 2d 1013, 2000-2 Trade Cases P 73,089 (N.D. Ind. 2000); Federal Trade Commission v. Think Achievement Corp., 144 F. Supp. 2d 993, 2000-2 Trade Cases P 73,088 (N.D. Ind. 2000)

The FTC brought suit against several corporations engaged in career advancement and their principal under the FTC Act, which prohibits unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce. The FTC alleged that the Defendants engaged in deceptive acts and practices in their programs for persons seeking employment with the Postal Service. In granting the FTC's Motion for Summary Judgment, the Court held *inter alia*: (1) that the Defendant corporations violated the FTC Act by falsely implying connection with the Postal Service, suggesting jobs were available when they were not, and making excessive claims of high scores on the qualification examination through the use of their practice materials; (2) that the principal was liable for the conduct of the corporations; (3) that the corporations and their principal would be permanently enjoined from providing career advisory services; (4) that the corporations and their principal would be required to make full restitution to consumers of amounts paid by prospective postal employees, less any refunds; and (5) that a constructive trust would be imposed on proceeds from the scheme that were in the possession of the principal's wife.

(6) National Ben Franklin Ins. Co. of Illinois v. Calumet Testing Services, Inc., 60 F. Supp. 2d 837 (N.D. Ind. 1998)

A commercial general liability and commercial catastrophe liability insurer commenced an action seeking a declaratory judgment that it had no duty to defend or indemnify the insured, a mechanical testing company, in an underlying action arising from a pressure tank explosion. On the insurer's Motion for Summary Judgment, the Court held: (1) that the insured was an "inspection company" for purposes of the professional services exclusion, and (2) that the testing weld on a pressure tank constituted a "professional service" for purposes of exclusion. The Motion for Summary Judgment was granted.

(7) Sickinger v. Mega Systems, Inc., 951 F. Supp. 153, 83 Fair Empl. Prac. Cas. (BNA) 451 (N.D. Ind. 1996)

Former employees brought an action against a former employer and individual supervisors alleging sex discrimination and retaliation under Title VII as well as conversion, defamation, and breach of contract claims under Indiana law. The Defendants moved for dismissal or summary judgment, and

the Court held: (1) that genuine issues of material fact precluded summary judgment on whether an employee had exhausted her administrative remedies with the EEOC regarding the retaliation claim, and (2) that the Court would exercise supplemental jurisdiction over a former employee's conversion, defamation, and breach of contract claims under Indiana law against individual supervisors.

(8) Kozma v. Medtronic, Inc., 925 F. Supp. 602, Prod. Liab. Rep. (CCH) P 14,677 (N.D. Ind. 1996)

The Plaintiff brought a product liability action against a pacemaker manufacturer, asserting claims for defective design, failure to warn, breach of implied warranties, adulteration, and conversion. After the Defendant moved for summary judgment, the Court held: (1) that the Medical Device Amendments (MDA) to Food, Drug and Cosmetics Act preempted claims of defective design, failure to warn, and breach of implied warranties; (2) that the MDA did not preempt the adulteration claim; (3) that summary judgment on the adulteration claim was premature until the Plaintiff had an opportunity to inspect the allegedly defective pacemaker; and (4) that the factual question as to whether the manufacturer intended to perform acts that deprived her of her rights to the pacemaker precluded summary judgment on the conversion claim.

(9) Tucker v. Nike, Inc., 919 F. Supp. 1192 (N.D. Ind. 1995)

The Plaintiff, a basketball player, brought a product liability action against a shoe manufacturer alleging that the Nike Air Jordan VI shoe worn by the Plaintiff during a basketball game was a defective product that caused his Achilles tendon to rupture. The only evidence before the Court on the issues of defective condition and causation was the expert testimony of a doctor. The Court held that the doctor's testimony was inadmissible and granted summary judgment in favor of the Defendant.

(10) Hardin Roller Corp. v. Universal Printing Machinery, Inc., Cause No. 2:95-CV-213

A Wisconsin company, which sold printing presses and related equipment, brought suit to enforce a judgment it had obtained in a Wisconsin state court against an Indiana corporation and its majority shareholder, who had acted as the corporation's agent and also operated a proprietorship that supplied parts to the Indiana corporation. In an unpublished opinion, the Court granted summary judgment to the Wisconsin company, finding that the majority shareholder had the requisite minimum contacts with the State of Wisconsin

and was therefore subject to jurisdiction in the State of Wisconsin under the terms of Wisconsin's long-arm statute because of the shareholder's business visits to the State of Wisconsin and his economic activities relating to Wisconsin. The United States Court of Appeals for the Seventh Circuit affirmed the Court's decision in a published opinion, which is reported at 236 F.3d 839 (7th Cir. 2001).

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

(1) Federal Trade Commission v. Think Achievement, Cause No. 2:98-CV-12, 144 F. Supp. 2d 1029 (N.D. Ind. Feb. 9, 2001), 144 F. Supp. 2d 1013, 2000-2 Trade Cases P 73,089 (N.D. Ind. Oct. 18, 2000), 144 F. Supp. 2d 993, 2000-2 Trade Cases P 73,088 (N.D. Ind. Sept. 29, 2000)–Affirmed in Part and Reversed in Part by 312 F.3d 259 (7th Cir. 2002).

In its September 29, 2000 Memorandum of Decision and Order, the Court granted summary judgment in part and announced its finding that William H. Tankersley and the Corporate Defendants engaged in deceptive acts or practices in violation of section 5(a) of the Federal Trade Commission Act, 15 U.S.C. § 45(a). In its October 18, 2000 Memorandum of Decision and Order, the Court granted summary judgment as to the remaining issues, entered final judgment for the Plaintiff and against the Defendants (including William Tankersley and Relief Defendant Linda Tankersley), issued a permanent injunction against the Defendants, awarded consumer redress in the sum of $28,149,600, and appointed a Permanent Receiver. In an October 27, 2000 Memorandum of Decision and Order, the Court granted summary judgment and entered judgment in favor of Cross-claimant Steven F. Stucker in the sum of $23,065.36. In its February 9, 2001 Memorandum of Decision on Ex Parte Orders, pursuant to authority conferred by the Federal Courts Improvement Act of 2000, which was signed into law on November 13, 2000, and amended 28 U.S.C. § 636(e), the Court found William and Linda Tankersley to be in contempt of court and ordered their arrest and imprisonment until such time as they purged themselves of their contempt.

The Court of Appeals affirmed these rulings. However, the Court of Appeals reversed an unpublished Order, which the Court had entered after its rulings on the summary judgment motions and by which the Court released $25,000 of frozen assets to pay William Tankersley's criminal attorney.

(2) Cerros v. Steel Technologies, Inc., Cause No. 2:97-CV-103 (May 7, 2002) (unpublished Memorandum of Decision and Order)–Affirmed in Part and Vacated and Remanded in Part by 288 F.3d 1040 (7th Cir. May 7, 2002).

After a three-day bench trial, the Court found in favor of the Defendant and against the Plaintiff on the Plaintiff's claims of intentional race discrimination and hostile work environment claims. The Court of Appeals affirmed on the intentional discrimination claim but vacated and remanded for further proceedings and additional fact finding on the hostile work environment claim.

(3) Poteete v. Capital Engineering, Inc., Cause No. 2:96-CV-30 (July 21, 1999)–Vacated and Remanded by 185 F.3d 804 (7th Cir. July 21, 1999).

On September 18, 1997, the Court granted the Defendants' Motion for Summary Judgment, denied the Plaintiff's Motion for Summary Judgment, and awarded the Plaintiff judgment in the sum of $6,572.39, which was his vested account balance as of December 31, 1996. On February 20, 1998, the Court granted the Defendants' Motion to Tax Costs in its entirety and awarded the Defendants $26,151.62 for attorney's fees, expenses, and costs pursuant to Federal Rule of Civil Procedure 68.

The Court of Appeals vacated and remanded, finding that the Plaintiff was entitled to the $6,572.39 (as a confirmation, not a judgment), that the Plaintiff's suit was frivolous, that the Defendants were entitled not merely to the costs that a Rule 68 offeror is entitled to but to the costs to which a defendant in a frivolous suit would be entitled, and that the District Court should decide in the first instance whether the Defendants were entitled to an award of fees under statutory or common law.

(4) Williams v. Midwest Operating Engineers Welfare Fund, Cause No. 2:94-CV-20, 1996 WL 767419, 20 Employee Benefits Cas. 2152 (N.D. Ind. 1996)–Reversed and Remanded by 125 F.3d 1138 (7th Cir. Sept. 30, 1997), which was Overruled by Mers v. Marriott Int'l Group Acc. Death & Dismemberment Plan, 144 F.3d 1014 (7th Cir. May 8, 1998).

On October 16, 1996, the Court granted summary judgment for the Fund, finding that the Fund's decision not to cover the Plaintiff's injuries was legitimate. On September 30, 1997, the Court of Appeals reversed and remanded, finding that the Fund was bound by the language in the plan summary, that the insured was not required to rely on summary language for such language to apply, and that the insured's allegedly illegal act of threatening a police officer did not bar enforcement of summary plan

language. However, on May 8, 1998, the Court of Appeals overruled its precedent established in its Williams decision when it reversed and remanded the District Court's decision.

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

(1) Schele v. Porter Memorial Hospital, 198 F.Supp.2d 979 (N.D. Ind. 2001)

The Plaintiff brought a sex discrimination claim against her employer, a county hospital, under the Equal Protection Clause of the Fourteenth Amendment and the Equal Privileges Clause of the Indiana Constitution, Article I, § 23. The Court concluded that genuine issues of material fact existed as to her Fourteenth Amendment claim, that the parties had not sufficiently argued the Indiana constitutional claim, and that summary judgment was thus inappropriate.

(2) Lenzo v. School City of East Chicago, 140 F.Supp.2d 947, 154 Ed. Law Rep. 487 (N.D. Ind. 2001)

The Court considered the application of the United States Supreme Court's jurisprudence regarding Eleventh Amendment immunity and determined that Eleventh Amendment immunity did not shelter the Defendant school corporation from suit by a private litigant under the Age Discrimination in Employment Act because the school corporation was not a state agency or an arm or instrumentality of the State of Indiana.

(3) Kozma v. Medtronic, Inc., 925 F.Supp. 602, Prod.Liab.Rep. (CCH) P 14,677 (N.D. Ind. 1996)

The Court considered whether Congress intended for the language contained in the Medical Device Amendments (MDA) to the Food, Drug and Cosmetics Act to preempt state common law causes of action and determined that some of the Plaintiff's state common law claims, such as claims for defective design, failure to warn, and breach of implied warranties, were preempted by the MDA. However, the Court concluded that the Plaintiff's adulteration claim, which alleged a failure to comply with the applicable federal regulations, was not preempted.

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

17. **Public Office, Political Activities and Affiliations**:

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

Not applicable.

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

No.

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

(a) Describe chronologically your law practice and legal experience after graduation from law school including:

(1) whether you served as clerk to a judge, and if so, the name for the judge, the court and dates of the period you were a clerk;

I served as a law clerk for the Honorable James T. Moody, United States District Court for the Northern District of Indiana, Hammond Division (October 1980 to December 1983).

(2) whether you practiced alone, and if so, the addresses and dates;

Not applicable.

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

Associate (1984-1992) and Partner/Shareholder (1993-1995), Spangler, Jennings & Dougherty, P.C., 8396 Mississippi Street, Merrillville, Indiana 46410; (219) 769-2323; (219) 769-5007 (facsimile). Spangler, Jennings & Dougherty, established in 1952, is the largest law firm in Northwest Indiana and has received an "AV" rating by Martindale-Hubbell. The firm

specializes in civil trial and appellate practice and insurance defense.

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

At Spangler, Jennings & Dougherty, I practiced in the areas of insurance defense litigation with concentration in areas of automobile liability, contract disputes, civil rights violations, unfair competition and trade infringement, sexual harassment, product liability, premises liability, environmental law, and wrongful death. The remainder of my practice consisted of pro bono cases involving family law matters and court-appointed criminal defense work.

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

Private citizens, domestic corporations, a Japanese corporation, sole proprietorships, hospitals, school corporations, police departments, municipalities, and major insurance companies.

Insurance clients included: Allstate Insurance Company; American International Group; American States Insurance Company; Continental Insurance Company; CNA Insurance Companies; Farmers Insurance Company; Ohio Casualty Insurance Company; The St. Paul Insurance Companies; State Farm Insurance Companies; United States Fidelity & Guaranty Company; Zurich-American; and others.

The areas in which I have specialized include: personal injury; tort liability; product liability; professional liability; insurance coverage; bad faith insurance; insurance guaranty law; subrogation recovery; arson; environmental law; municipal and zoning law; school law; and transportation law.

(c) (1) Describe whether you appeared in court frequently, occasionally, or not at all. If the frequency of your appearances in court varied, describe each such variance, providing dates.

I appeared in court on a regular basis, approximately twelve (12) times per month.

(2) Indicate the percentage of these appearances in

(A) Federal courts

20 percent

(B) State courts of record

80 percent

(C) Other courts

0 percent

(3) Indicate the percentage of these appearances in:

(A) Civil proceedings

98 percent

(B) Criminal proceedings

2 percent

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

JURY TRIALS:

I have tried thirty-four (34) cases before juries. In eight (8) of these, I was associate counsel. In twenty-six (26), I was sole counsel.

BENCH TRIALS:

I have tried approximately twenty (20) bench trials to judgment as sole counsel. These trials were in the United States District Court for the Northern District of Indiana (Hammond Division), Lake County Small Claims Courts (Gary and Crown Point), Porter County Small Claims Court (Portage), East Chicago City Court, Gary City Court, Hammond City Court, and others in Northern Indiana. Most of these trials involved insurance defense matters or subrogation claims.

APPEALS:

United States Court of Appeals for the Seventh Circuit (1985-1989)–5 Appellee briefs; 1 Appellant brief
Supreme Court of Indiana (1990-1992)–2 Appellee briefs; 1 Appellant brief
Indiana Court of Appeals (1985-1990)–10 Appellee briefs; 5 Appellant briefs

(5) Indicate the percentage of these trials that were decided by a jury.

Sixty-three (63) percent

(d) Describe your practice, if any, before the United States Supreme Court. Please supply four (4) copies of any briefs, amicus or otherwise, and, if applicable, any oral argument transcripts before the U.S. Supreme Court in connection with your practice.

Not applicable.

(e) Describe legal services that you have provided to disadvantaged persons or on a *pro bono* basis, and list specific examples of such service and the amount of time devoted to each.

I participated in Spangler, Jennings & Dougherty's pro bono program, accepting at least three (3) cases each year (1991-1994) from Legal Services of Northwest Indiana, Inc., in Gary. The program earned Spangler, Jennings & Dougherty the 1992 and 1993 Pro Bono Publico Award from the Indiana Bar Foundation. Additionally, I represented indigent clients referred to me by my uncle/godfather, Reverend Francis Lazar, Pastor of St. James Catholic Church in Highland, Indiana, from amongst his parishioners. I also accepted one to two CJA appointments annually from the United States District Court for the Northern District of Indiana from 1984 to 1994.

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

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

(b) a detailed summary of the substance of each case outlining briefly the factual and legal issues involved;

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

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

(1) Densitron Corp. v. Okaya Electric Industries Co., Ltd., Okaya Electric America, Inc., and Luskin (Judge Byrne, United States District Court for the Central District of California, 1993-1994)

Co-counsel for the Defendants: my supervising partners, Peter G. Koransky and Richard A. Mayer, associate Mark D. Geheb. Mr. Koransky may be contacted at the following: Koransky & Bouwer, PC, 425 Joliet Street, Suite 425, Dyer, Indiana 46311; (219) 865-6700. Mr. Mayer and Mr. Geheb may be contacted at the following: Spangler, Jennings & Dougherty, PC, 8396 Mississippi Street, Merrillville, Indiana 46410; (219) 769-2323.

Counsel for the Plaintiff: Adrian M. Pruetz, Beth K. Cranston, and Steven M. Anderson of Morrison & Foerster of Los Angeles, California. Mr. Pruetz and Mr. Anderson may be contacted at the following: Quinn, Emanuel, Urquhart, Oliver & Hedges, LLP, 865 South Figueroa Street, 10th Floor, Los Angeles, California 90017; (213) 624-7707. Ms. Cranston may be contacted at the following: 1250 16th Street, Santa Monica, California.

(a) Cause No. CV 93-0752 WMB (Ex)

(b) This case was brought by Densitron Corporation, a California corporation, against Okaya Electric Industries (OEI, a Japanese corporation), Okaya Electric America (OEA, an Indiana corporation), and Keith Luskin, then General Manager of OEA and a former President of Densitron's United States entity, regarding the manufacture, distribution, and sales of LCD displays. Densitron, a competitor of OEI and OEA in the LCD market, alleged violations of trade secrets, covenants not to compete, and other intellectual property issues involving Mr. Luskin and the Co-Defendant, Delta Components, a company representative of OEA. The case included conflict of law issues as to the States of California, Indiana, and Texas (where the Co-Defendant, Delta Components was incorporated), and Japan.

(c) I represented OEI, OEA, and Mr. Luskin.

(d) I became involved in this case because my husband was the Operations Manager of OEA. When the litigation was commenced,

my husband recommended my firm to both the American and Japanese companies based on the corporate litigation experience of my partners, Richard Mayer and Peter Koransky. I was involved in the discovery process, which included taking the depositions of numerous OEA customers throughout the country and coordinating written discovery by OEA and OEI. Peter Koransky conducted discovery in California and overseas. I also participated in client conferences, witness preparation, and court conferences. The case was resolved by way of settlement prior to trial in December of 1993. This case was significant because the continued existence of my husband's company (OEA) depended upon the successful resolution of this case, particularly the careful control over defense fees and expenses, and the limitation of discovery to protect trade secrets and customer relationships.

(2) Ramirez v. School City of East Chicago (Judge Webber, Porter Superior Court, 1993)

Co-counsel for the Defendant: my partner, Harry J. Jennings. Mr. Jennings may be contacted at the following: Spangler, Jennings & Dougherty, PC, 8396 Mississippi Street, Merrillville, Indiana 46410; (219) 769-2323.

Counsel for the Plaintiff estate of the minor-decedent: Terry Smith. Mr. Smith may be contacted at the following: Smith & DeBonis, 9696 Gordon Drive, Highland, Indiana 46322; (219) 922-1000.

(a) Docket No. 64-D02-9006-CT-1601

(b) This case was a wrongful death action involving a twelve-year-old boy who was killed when a basketball backboard fell off the wall of a school gymnasium and struck him in the head. The Plaintiff alleged that the school failed to maintain the backboard properly or to notice that a support cable attaching the backboard to a cement-block wall had become loosened. This case was significant on a personal level because it tested my grit as a litigator under extreme circumstances.

(c) I represented the Defendant, School City of East Chicago.

(d) I worked on the case from the time it was referred to our law firm by the client's insurance carrier. During the investigation of the claim by the carrier, a mechanical engineer was hired to consult on the matter and provide the insurance company with a written report stating his opinion on the cause of the accident. The consulting

engineer determined that the school had failed to properly maintain the backboard at issue. Opposing counsel called the engineer to testify to this opinion in the Plaintiff's case-in-chief.

On the second day of trial, my partner collapsed at counsel table before beginning cross-examination of the engineer. My partner was taken by ambulance to the hospital where he was admitted on an emergency basis with a severe bleeding ulcer. The trial court denied a defense motion for a continuance of the trial (perhaps thinking it would bring about a settlement). The trial resumed the next day.

I finished the trial in the next three days as sole defense counsel. Having no defense expert and working only with the testimony of eyewitnesses (students, teachers, and coaches) sympathetic to the deceased boy's family, I obtained a defense verdict.

It is my recollection that no appeal was taken by opposing counsel. Mr. Smith and his law firm had been named Indiana's "Trial Lawyer of the Year" sometime shortly before the trial.

(3) Suslowicz v. Mielcarek (Judge Webber, Porter Superior Court, 1993)

Co-counsel for the Plaintiff parents as guardians of the young girl: Glenn Tabor and Roger Weitgenant. Mr. Tabor may be contacted at the following: Blachly, Tabor, Bozik & Hartman, 56 South Washington Street, Suite 401, Valparaiso, Indiana 46383; (219) 464-1041. Mr. Weitgenant may be contacted at the following: Schlyer & Associates, 200 West 80th Place, Merrillville, Indiana 46410; (219) 757-0225.

(a) Docket No. 64-D01-8706-CP-1612-D

(b) This case was a personal injury action involving a thirteen-year-old girl who was a passenger in a pick-up truck that sideswiped a reinforced rural mailbox. The girl's right arm was nearly severed (a single tendon remained intact) between the shoulder and the elbow because she had her arm leaning on the sill of the passenger-side window at the time of impact with the mailbox. The mailbox was custom-made with welded heavy gauge plate steel to discourage vandalism that had destroyed the property owner's other store-bought mailboxes. The case was significant in that it was a case of first impression in the State of Indiana, and summary judgment obtained by the defense was reversed on appeal. See Suslowicz by Suslowicz v. Mielcarek, 571 N.E.2d 1304 (Ind. Ct. App. 1991).

(c) I represented the Defendant property owner, Mrs. Mielcarek, who was an elderly widow.

(d) I worked on the case from the time it was referred to our law firm by the client's insurance carrier. After the Indiana Court of Appeals reversed the summary judgment ruling, the decision was made to take the case to trial. The injury to the girl's arm was severe. However, the arm was successfully reattached by a surgeon at the University of Chicago. The girl regained almost full function of the arm with residual scarring and disfigurement.

While awaiting trial, both the client, Mrs. Mielcarek, and her boyfriend who had made the mailbox, passed away. I was left with an empty chair defense. Despite these circumstances, I obtained a defense verdict after a three-day jury trial. I demonstrated to the jury that it was the side view mirror and extension on the passenger side of the pick-up truck that made contact with the mailbox, which then bent into the open passenger door window, cutting the girl's arm. The side view mirrors on the pick-up truck did not have the plastic safety edging/housing that is used on more recent models.

(4) Vela v. Pozywio (Judge McGraw, Jasper Superior Court, 1992)

Co-counsel for the Defendant: my senior partner, Harry J. Jennings. Mr. Jennings may be contacted at the following: Spangler, Jennings & Dougherty, PC, 8396 Mississippi Street, Merrillville, Indiana 46410; (219) 769-2323.

Counsel for the Plaintiff: Anna S. Rominger. Ms. Rominger may be contacted at the following: Sendak, Rominger, Stamper & Whitten, 209 South Main Street, Crown Point, Indiana 46307; (219) 663-0015.

(a) Docket No. 37D01-9006-CT-165

(b) In this personal injury case, the Plaintiff-driver alleged that he was injured as a result of a low-speed rear-end collision between his vehicle and a vehicle drive by the Defendant-driver, which occurred in the parking lot of a hardware store in Merrillville, Indiana. The Plaintiff claimed that the collision resulted in trauma-induced cancer of the spleen that significantly affected the Plaintiff's life expectancy. The Plaintiff, a sympathetic Plaintiff, presented medical specials in excess of $100,000.

(c) I represented the Defendant-driver.

(d) My law firm was retained by the insurance carrier to represent the Defendant, and I was responsible for the pleadings, discovery, research, and trial. Medical causation was the central issue in the case. The Plaintiff's health care providers asserted that, although the Plaintiff had a pre-existing condition for non-Hodgkin's lymphoma, it had gone into remission for a significant period of time prior to the accident. They further opined that the tumor that subsequently developed on the Plaintiff's spleen just a few weeks after the collision was likely the result of trauma. To meet these allegations, I conducted a medical literature review of non-Hodgkin's lymphoma and retained the services of a leading oncologist on the faculty of Indiana University School of Medicine (Indianapolis) to review the Plaintiff's records and to testify as an expert medical witness at trial.

The case culminated in a three-day jury trial. The doctor testified that, although the cause of non-Hodgkin's lymphoma is unknown, no research or other scientific evidence suggested that trauma could induce tumors as a result of the condition. The jury returned a verdict for the Defendant, and it is my recollection that no appeal was taken.

(5) Patrick v. Jasper County and Sheriff Terry Gilliland (Magistrate Judge Rodovich, United States District Court for the Northern District of Indiana, Hammond Division, 1988-1990)

Co-counsel for the Defendants: my senior partner, Harry J. Jennings. Mr. Jennings may be contacted at the following: Spangler, Jennings & Dougherty, PC, 8396 Mississippi Street, Merrillville, Indiana 46410; (219) 769-2323. Co-counsel on appeal: Stanley L. Pondo of Spangler, Jennings & Dougherty, PC, of Merrillville, Indiana. Rev. Pondo may be contacted at the following: c/o St. Andrew's Catholic Church, 240 South 6th Street, Richmond, Indiana 47374; (765) 962-3902.

Counsel for the Plaintiff: Shaw R. Friedman. Mr. Friedman may be contacted at the following: Friedman & Friedman, 705 Lincolnway, LaPorte, Indiana 46350; (219) 326-1264.

(a) Docket No. H84-808; Docket No. 88-2152 on appeal with the decision of the trial court affirmed in an opinion reported at 901 F.2d 561 (7th Cir. 1990)

(b) In this civil rights case, filed under 42 U.S.C. § 1983, the Plaintiff alleged that he was unlawfully detained without a valid arrest warrant, probable cause, or any other legal basis in violation of the Fourth and Fourteenth Amendments. The Plaintiff had been taken into custody after he arrived at the scene of a drug bust carrying three concealed weapons, being arrested for visiting a common nuisance and transferred to the Jasper County Jail for booking, fingerprinting, photographing, and criminal record checks. After approximately four hours at the Jasper County Jail, he was transferred to another facility where he was held for thirty-six hours and released on bail.

(c) I represented the Defendants.

(d) My law firm was retained at the time suit was filed by the insurance carrier for the Defendants. I was responsible for the research and preparation of a motion for summary judgment. The trial court granted the motion for summary judgment, finding that the Plaintiff's statement reiterating the Sheriff's comment to an officer that they could hold him for seventy-two hours without charges was inadmissible hearsay and that, in any event, the conversation was insufficient to establish policy or custom on the part of Jasper County. I was also responsible for drafting, with the assistance of an associate, Stanley L. Pondo, the Appellees' brief on appeal to the United States Court of Appeals for the Seventh Circuit. The decision of the trial court was affirmed by the Seventh Circuit in a published opinion.

(6) Plohg v. NN Investors (Judge Kanz, Lake Superior Court, Room Two, 1989)

Co-counsel for the Plaintiff: Harry J. Jennings. Mr. Jennings may be contacted at the following: Spangler, Jennings & Dougherty, PC, 8396 Mississippi Street, Merrillville, Indiana 46410; (219) 769-2323.

Counsel for NN Investors, the Petitioner/Counter-Defendant: David J. Novotny, J. Robert Geiman, and Douglas J. Varga of Peterson, Ross, Schloerb & Seidel of Chicago; and Robert F. Parker and Randy Nye of Berkman, Kelly & Smith of Hammond, Indiana. Mr. Novotny may be contacted at the following: 200 East Randolph Drive, Suite 7300, Chicago, Illinois 60601; (312) 861-1400. Mr. Varga may be contacted at the following: 1000 Lafayette Boulevard, P.O. Box 1740, Bridgeport, Connecticut 06601; (203) 333-9441. Mr. Parker may be contacted at the following: 9191 Broadway, Merrillville, Indiana 46410; (219) 769-1313. Mr. Nye may be contacted at the following: 5920 Hohman Avenue, Hammond, Indiana 46320; (219) 933-6200.

(a) Docket No. 285-1075

(b) The Plohgs were relatives of an insurance company adjuster with whom my partners Harry Jennings and David Hanson (now deceased) had worked for years. When John Plohg suffered a permanent closed head/brain injury as a result of driving his car into a parked car, a collision that occurred after he left his tavern business one evening, and the group medical insurance company for his business refused to pay his medical bills, the relative of the Plohgs sought the help of our law firm. NN Investors, a health insurer, filed a declaratory judgment action against the Plohgs after denying a claim based on a policy exclusion for a loss caused by intoxication. The Plohgs filed a counter-claim asserting fraud and sought both compensatory and exemplary damages against the company.

(c) I represented the Plaintiff.

(d) I worked on the case on assignment from my partners from day one until its conclusion several years later, doing all client and witness interviews, discovery, and expert witness preparation, and being co-counsel with Mr. Jennings at trial and co-counsel on appeal. I took the lead on the case in both responding to the declaratory judgment action and pursuing the counter-claim for bad faith by the insurance company.

At the conclusion of the Plohgs' case on the counter-claim, the court granted the insurance company's motion for directed verdict on punitive damages. However, the court allowed the Plohgs' claim for compensatory damages to go to the jury. The jury returned a verdict for the total amount of compensatory damages sought ($250,000). A post-judgment motion for set-off by NN Investors was granted on the amount of settlements made with John Plohg's medical providers just prior to trial. Less the set-off, the court entered judgment for the Plohgs in the amount of $92,270.

The Plohgs took an appeal on the punitive damage issue, and the insurance company cross-appealed on the compensatory damages recovery. The Indiana Court of Appeals affirmed the judgment of the trial court in all respects. See Plohg v. NN Investors Life Ins. Co., Inc., 583 N.E.2d 1233 (Ind. Ct. App. 1992). The Indiana Supreme Court denied transfer.

On a personal level, the case was significant because this was the first time I was involved in a direct action against an insurance company from the time the file was opened to its resolution on appeal. It was an exhaustive, time-consuming experience with only a limited award at the end. However, I gained a true respect for the work of Plaintiffs' attorneys in advancing their clients' claims against major corporations. This fresh perspective helped me later to empathize with the concerns of Plaintiffs' attorneys, while at the same time better serving my defense clients in obtaining resolutions in their best interests.

(7) Spitz v. Humphrey, Crossroads Rental, Inc., & Anderson (Judge Dillin, United States District Court for the Southern District of Indiana, Indianapolis Division, 1989)

Co-counsel for Defendant/minor-driver Humphrey: my partner, Harry J. Jennings. Mr. Jennings may be contacted at the following: Spangler, Jennings & Dougherty, PC, 8396 Mississippi Street, Merrillville, Indiana 46410; (219) 769-2323.

Counsel for the Plaintiff: John Breclaw and David Taylor. Mr. Breclaw and Mr. Taylor may be contacted at the following: Breclaw, Harris & Taylor, 200 West Glen Park Avenue, Griffith, Indiana 46319; (219) 972-6000.

Counsel for the Co-Defendants, Crossroads Rental, Inc., and its driver, Lowell Anderson: Lloyd H. Milliken, Jr. Mr. Milliken may be contacted at the following: Locke Reynolds LLP, 201 North Illinois Street, Suite 1000, P.O. Box 44961, Indianapolis, Indiana 46244; (317) 237-3800.

(a) Docket No. IP88-C-0342-D/F

(b) This personal injury case involved a student from Rose-Hulman Polytechnic Institute who suffered brain damage as a result of an automobile-van collision. The Plaintiff was a front-seat passenger in an automobile driven by a fellow student. My client, David Humphrey, was the automobile operator and designated driver. The Plaintiff and a back-seat passenger were intoxicated at the time of the accident. The automobile had the right-of-way traveling on a highway outside of Terre Haute. The rental van was turning onto the highway from a frontage road. Liability was contested as were the nature and extent of the Plaintiff's injuries.

(c) I represented the Defendant/minor-driver Humphrey.

(d) I worked on the case from the time it was referred to our law firm by the client's insurance carrier. Discovery extended across the State of Indiana because the Plaintiff, his family, and his health care providers were located in Chicago and Northwest Indiana, the accident scene and the Co-Defendant's business were in Terre Haute, and the court was in Indianapolis. The experts included toxicologists, accident reconstructionists, surgeons, economists, and others. The trial was estimated to last for two weeks. On the morning of the first day of trial, however, Judge Dillin conducted a settlement conference that was successful in resolving the case.

The case was significant because of the extensive amount of technical and medical discovery involved and the multi-million dollar exposure involving this permanently disabled young man.

(8) Yudt v. Adams (Judge Bradford, Porter Superior Court, 1988)

Co-counsel for the Defendant: my partner, Harry J. Jennings. Mr. Jennings may be contacted at the following: Spangler, Jennings & Dougherty, PC, 8396 Mississippi Street, Merrillville, Indiana 46410; (219) 769-2323.

Co-counsel for the Defendant/Counter-Plaintiff on counter-claim: Tom Macke. Mr. Macke may be contacted at the following: Blachly, Tabor, Bozik & Hartman, 56 South Washington Street, Suite 401, Valparaiso, Indiana 46383; (219) 464-1041.

Counsel for the Plaintiff: Michael Yudt, Jr., son of the Plaintiff. Mr. Michael Yudt, Jr. may be contacted at the following: Yudt & Yudt, 402 Wall Street, Valparaiso, Indiana 46383; (219) 477-4947.

Counsel for the Plaintiff/Counter-Defendant on the counter-claim: Charlie Myers (now deceased) of McHie, Myers & McHie of Hammond, Indiana.

(a) File in court archives–docket number not currently available.

(b) This personal injury case stemmed from an automobile accident. The accident occurred on the westbound Route 30/Merrillville exit from southbound I-65 in Lake County, Indiana. The Plaintiff was Attorney Michael Yudt, Sr. As Attorney Yudt was driving his vehicle on the exit ramp, he saw the vehicle in front of his spin out of control and drive off the shoulder and into the median. When Mr. Yudt slowed or stopped his vehicle in reaction, my client, Mrs. Adams, rear-ended his vehicle with her car. Mrs. Adams filed a counter-claim against

Attorney Yudt for the damages she sustained in the accident.

(c) I represented the Defendant, Mrs. Adams.

(d) I worked on the case on assignment from my partner, Mr. Jennings, from the time it was referred to our law firm by the client's insurance carrier. This was one of the first cases brought to trial under Indiana's Comparative Fault Act, Ind. Code § 34-51-2. The attorneys submitted proposed jury instructions and verdict forms from jurisdictions across the country that had similar comparative fault statutes. Considerable time was spent on argument to the court regarding the proper instructions and verdict forms to be used with regard to the then new Indiana statute. At the time, there were no comparative fault instructions in the Indiana Pattern Jury Instructions.

After three to four days of trial, the jury returned a verdict finding Attorney Yudt more than fifty percent at fault for the accident and finding in favor of Mrs. Adams on her counter-claim. I do not recall an appeal.

The case was significant because the trial judge, the Honorable Roger Bradford, was subsequently appointed to the judicial committee responsible for drafting the jury instructions and verdict forms that ultimately became the Indiana Pattern Jury Instructions for cases tried under Indiana's Comparative Fault Act. Judge Bradford has credited this case, in part, with giving him the experience and basis to direct his committee in its work.

(9) Gregory v. Ar-Vee Corp. and Burr Engineering Development Co. (Magistrate Judge Rodovich, United States District Court for the Northern District of Indiana, Hammond Division, 1988)

Co-counsel for the Defendants: my supervising partner, Robert D. Hawk. Mr. Hawk may be contacted at the following: Spangler, Jennings & Dougherty, PC, 8396 Mississippi Street, Merrillville, Indiana 46410; (219) 769-2323. Co-counsel on appeal: Stanley L. Pondo of Spangler, Jennings & Dougherty, PC, Merrillville, Indiana. Rev. Pondo may be contacted at the following: c/o St. Andrew's Catholic Church, 240 South 6th Street, Richmond, Indiana 47374; (765) 962-3902.

Counsel for the Plaintiff: Richard A. Miller. Mr. Miller may be contacted at the following: Gouveia & Miller, 433 West 84th Drive, Merrillville, Indiana 46410; (219) 736-6020.

(a) Docket No. H86-803; Cause No. 86-C-803 on appeal to the United States Court of Appeals for the Seventh Circuit, which affirmed the decision of the trial court in an unpublished order on January 2, 1990

(b) This product liability case was brought by the parents of an infant daughter who was born fourteen weeks premature with a slow heart rate and breathing problems. The infant's condition required constant monitoring. When the infant was released from the hospital, her parents were provided with an Ar-Vee Infant Monitoring System I, which was designed to alert the parents whenever the infant experienced heart or respiratory difficulties. The unit was designed and manufactured by the Defendants.

When the device was in use, a belt was fitted around the child's chest. Electrode pads were attached to the belt, and lead wires ran from the electrodes into a patient cable. The cable plugged into the monitor, which in turn was plugged into an electrical outlet. The device was designed so that an alarm would sound and awaken a sleeping child who had stopped breathing. The noise would cause the child to cry, and normal breathing would then resume.

The parents had been instructed on the use of the monitor. After using the device for over a year without incident, the parents claimed that on January 16, 1985, the device malfunctioned causing third-degree burns to the child's chest beneath the electrode pads. The parents claimed that the Defendants were responsible for the child's injury on the basis of strict liability in tort under Indiana statutory law, breach of both express and implied warranties of merchantability and fitness for a particular purpose under Indiana statutory law, and common law negligence, specifically negligent design of the device. The parents claimed damages for permanent injuries, scarring, and disfigurement.

(c) I represented the Defendants.

(d) I was responsible for preparing a motion for summary judgment on behalf of the Defendants after the discovery process was completed. The motion for summary judgment argued that the device was devoid of any design, manufacturing, or operational defect. The Plaintiff opposed the motion. After the matter was fully briefed, the trial court granted the Defendants' motion for summary judgment. The Plaintiff took an appeal, and I was responsible for writing the Appellees' brief with the assistance of an associate from the firm, Stanley L. Pondo.

In an unpublished order, the United States Court of Appeals for the Seventh Circuit affirmed the decision of the trial court.

The case was significant because it was one of the first product liability cases in Indiana brought against a sleep apnea monitor manufacturer. The case work-up with the depositions of the infant's parents, grandparents, and doctors (conducted by Mr. Hawk) and the preparation of the defense expert witness (a medical device/electrical engineer) affidavit were crucial to success on the Defendants' motion for summary judgment and on appeal.

(10) Stanton v. Blue Cross (Judge Arredondo, Lake Circuit Court Judge serving as Special Judge in Porter Superior Court, 1986)

Counsel for Plaintiff-insured: Dennis Stanton. Mr. Stanton's last know office address and telephone number is the following: 117 ½ West Joliet Street, Crown Point, Indiana 46307; (219) 663-6508.

(a) File in court archives–docket number not currently available.

(b) This case involved the medical insurance coverage issue of whether abdominal liposuction was "necessary" as opposed to "cosmetic" surgery. The case was significant for the reason that it was believed to be the first in the country dealing with the nature of liposuction. It was my second jury trial as sole defense counsel.

(c) I represented the Defendant group medical insurance carrier.

(d) I worked on the case from the time it was referred to our law firm. I researched the coverage issue extensively and performed a medical literature review on the history of liposuction from its development in France in the late 1970s to its introduction in this country in the early 1980s. I located and retained a plastic surgeon from Chicago who learned the liposuction technique from the French originating surgeon. It is my recollection that the doctor was also the first to do the surgery in the United States. His testimony was vital to overcome the testimony of the Plaintiff's own physician who testified that the abdominal surgery (liposuction) he performed on Mrs. Stanton was medically necessary to eliminate excess weight that caused chronic low back pain. It was the insurance company's position that to pay the Plaintiff's claim would set a precedent for claims across the country for payment of medical costs on what is, in most instances, elective cosmetic surgery.

Strange to say, but I was disappointed when the judge granted the Defendant's motion for directed verdict at the close of all the evidence. My impression from watching the jury throughout the trial was that they understood the difference between "medically necessary" and "cosmetic" surgery and would likely have returned a verdict for the Defendant. However, the insurance company obtained the precedent it sought for dealing with these claims. It is my recollection that no appeal was taken.

20. **Criminal History**: State whether you have ever been convicted of a crime, within ten years of your nomination, other than a minor traffic violation, that is reflected in a record available to the public, and if so, provide the relevant dates of arrest, charge and disposition and describe the particulars of the offense.

I have never been convicted of a crime.

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

I have never been a party or otherwise involved as a party in any civil or administrative proceeding.

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

At all times, I govern myself in accordance with the Code of Conduct for United States Judges. In the Northern District of Indiana, deputy clerks advise the district court and magistrate judges of cases filed, the parties and lawyers involved, and the issues that may give rise to potential conflicts of interest. A judge may then recuse himself or herself from the case before the initial pre-trial conference. At the time I was appointed as a magistrate judge, I divested myself of all investments that may have given rise to a conflict of interest.

Currently, the only cases in which I recuse myself are those involving the law firm of Johnson & Rappa, LLP, 250 East 90th Drive, Merrillville, Indiana 46410, (219) 769-0087, for the reason that the spouse of one of my law clerks is employed there as an attorney. When my law clerk's term of employment ends in the summer of 2003, I intend to resume taking cases from that law firm.

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

No.

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

See attached Financial Disclosure Report.

25. **Statement of Net Worth**: Complete and attach the financial net worth statement in detail. Add schedules as called for.

See attached Financial Statement–Net Worth.

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

No.

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

Not applicable.

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

Submission of "Response of Prospective Nominee to Questionnaire for United States District Court Judge for the Northern District of Indiana" and interview with United States Senator Richard Lugar.

After my name was submitted by Senator Lugar, I interviewed with White House Counsel's office and with counsel from the Department of Justice, and submitted information as part of the background investigation by the Department of Justice and the Federal Bureau of Investigation.

(c) Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as asking or seeking a commitment as to how you would rule on such case, issue, or question? If so, please explain fully.

No.

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

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

   Philip Peter Simon

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

   United States District Judge for the Northern District of Indiana

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

   U.S. Attorney's Office, Northern District of Indiana
   5400 Federal Plaza, Suite 1500
   Hammond, IN 46320
   (219)937-5500

4. **Birthplace**: State date and place of birth.

   July 7, 1962 in Pittsburgh, PA

5. **Marital Status**: (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es). Please also indicate the number of dependent children.

   I am married to Jane Mayes Simon. She is employed as a law clerk to the Honorable Wayne Andersen, U.S. District Judge for the Northern District of Illinois. The office address is 219 South Dearborn, Chicago, IL 60604, phone number (312) 435-3053. We have three dependent children.

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

   Indiana University School of Law, Bloomington Indiana -- August, 1984 - May, 1987
   Juris Doctor Degree received in May, 1987, cum laude

   The University of Iowa, Iowa City, Iowa -- August, 1980 - May, 1984
   Bachelor of Arts received in May, 1984

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

January, 1999 to present
U.S. Attorney's Office for the Northern District of Indiana
Chief Criminal Division, Assistant United States Attorney
U.S. Attorney's Office, 5400 Federal Plaza, Suite 1500, Hammond, IN 46320

May, 1997 to January, 1999
U.S. Attorney's Office for the District of Arizona
Assistant United States Attorney
110 South Church Ave.
Tucson, AZ 85701

September, 1990 to May, 1997
U.S. Attorney's Office for the Northern District of Indiana
Assistant United States Attorney
U.S. Attorney's Office, 5400 Federal Plaza, Suite 1500, Hammond, IN 46320

Spring, 1996; Spring, 1997; Fall, 1999; Fall, 2000
Valparaiso University School of Law
Valparaiso, IN 46383
Adjunct Professor of Law

May, 1987 to August, 1990
Kirkland & Ellis
200 East Randolph Dr.
Chicago, IL 60601
Associate Attorney

Spring, 1987
Indiana University School of Law
211 S. Indiana Ave.
Bloomington, IN 47405
Associate Instructor

Summer, 1986
Baker & Botts
One Shell Plaza
910 Louisiana St.
Houston, TX 77002
Summer Associate

Summer, 1985
Carponelli, Krug & Adamski
55 West Monroe, Suite 2350
Chicago, IL 60603
Law Clerk

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

None

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

In 1999, I was awarded the Director's award by the Executive Office of U.S. Attorneys. This award is the highest award given Assistant United States Attorneys by the Executive Office of U.S. Attorneys. It is given annually to a select few Assistant U.S. Attorneys nationwide for superior performance. I was presented this award by Attorney General Janet Reno for my handling of the case of U.S. v. Fuchs and Reagan, 218 F.3d 957 (9th Cir. 2000).

In 1998, I was voted prosecutor of the year in the District of Arizona by a vote of all federal agents working in Arizona.

In 1995, I was presented the Sherlock Award by the Mutual Insurance Companies of Indiana, a trade association of Indiana insurance companies. This award is given to the person in the State of Indiana, in the view of the trade association, who has done the most to combat insurance fraud in any given year. I was given this award for my work in the conviction of approximately thirty defendants -- including a lawyer, two doctors, two nurses and a private investigator -- for their roles in the staging of automobile accidents and the filing of fraudulent insurance claims.

I have received 7 special achievement awards from the U.S. Attorney.

I have received several letters of commendation from the Director of the FBI for my handling of various cases on behalf of the FBI.

I am a cum laude graduate of the Indiana University School of Law.

While in law school I was a semi-finalist in the Sherman Minton Moot Court Competition and was a member of the National Moot Court Team which competed in a regional moot court competition in Milwaukee, Wisconsin.

10. **Bar Associations**: List all bar associations or legal or judicial-related committees, selection panels 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.

- Federal Bar Association

- Illinois State Bar Association (1987-1990)

- Chicago Bar Association (1987-1990)

I am also a former member of the Department of Justice's Criminal Chief's Working Group. This is a committee made up of nine Criminal Chiefs from U.S. Attorneys' offices from around the country which helps to formulate Department of Justice policy in criminal law.

11. **Bar and Court Admission**: List each state and court in which you have been admitted to practice, including dates of admission and any lapses in membership. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

The Supreme Court of Illinois -- 1987
United States District Court for the Northern District of Illinois -- 1987
United States District Court for the Northern District of Indiana -- 1990
United States Court of Appeals for the Seventh Circuit -- 1990
United States Court of Appeals for the Ninth Circuit – 1998
United States District Court for the District of Arizona 1997

12. **Memberships**: List all memberships and offices currently and formerly held in professional, business, fraternal, scholarly, civic, charitable, or other organizations since graduation from college, other than those listed in response to Questions 10 or 11. Please indicate whether any of these organizations formerly discriminated or currently discriminates on the basis of race, sex, or religion - either through formal membership requirements or the practical implementation of membership policies. If so, describe any action you have taken to change these policies and practices.

- St. Paul Catholic Church, Valparaiso, Indiana (1990-1997; 1999- present)

- Fraternal Order of Police, Associate Member, Valparaiso, Indiana (1992-1997)

- Autism Research International (2000 - present)

- Autism Society of America, Northwest Indiana Chapter (2000 - present)

- Aberdeen Men's Golf League (2002)

- Valparaiso Country Club (1991-1996)

- Valparaiso Park's Department Soccer Coach (2000-02)

I've held no position in any of these organizations and none discriminate on any basis to the best of my knowledge.

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

None

14. **Congressional Testimony**: List any occasion when you have testified before a committee or subcommittee of the Congress, including the name of the committee or subcommittee, the date of the testimony and a brief description of the substance of the testimony. In addition, please supply four (4) copies of any written statement submitted as testimony and the transcript of the testimony, if in your possession.

None

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

The present state of my health is excellent. My last physical examination was November 25, 2002

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

Not applicable

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

(b) a short summary and citations for all rulings of yours that were reversed or

significantly criticized on appeal, together with a short summary of and citations for the opinions of the reviewing court; and

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

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

17. **Public Office, Political Activities and Affiliations**:

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

None

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

No

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

(a) Describe chronologically your law practice and legal experience after graduation from law school including:

(1) whether you served as clerk to a judge, and if so, the name for the judge, the court and dates of the period you were a clerk;

I have never served as a law clerk to a judge.

(2) whether you practiced alone, and if so, the addresses and dates;

I have never practiced law alone.

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

May, 1987 to August, 1990
Kirkland & Ellis
200 East Randolph Dr.
Chicago, IL 60601
Associate Attorney

September, 1990 to May, 1997
U.S. Attorney's Office for the Northern District of Indiana
Assistant United States Attorney
U.S. Attorney's Office, 5400 Federal Plaza, Suite 1500, Hammond, IN 46320
(219) 937-5500

Spring, 1996; Spring, 1997; Fall, 1999; Fall, 2000
Valparaiso University School of Law
Valparaiso, IN 46383
Adjunct Professor of Law

May, 1997 to January, 1999
U.S. Attorney's Office for the District of Arizona
Assistant United States Attorney
110 South Church Ave.
Tucson, AZ 85701
(520) 620-7300

January, 1999 to present
U.S. Attorney's Office for the Northern District of Indiana
Chief Criminal Division, Assistant United States Attorney
U.S. Attorney's Office, 5400 Federal Plaza, Suite 1500, Hammond, IN 46320
(219)937-5500

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

Upon graduation from law school, I accepted a position with the law firm of Kirkland & Ellis in Chicago, Illinois. Kirkland & Ellis is a large national law firm with offices in Washington D.C., Los Angeles, New York City, and the flagship office in Chicago which is located at 200 East Randolph Dr., Chicago, Illinois. There are roughly 850 attorneys at Kirkland & Ellis. During my 3 ½ year tenure with Kirkland & Ellis I was assigned to the firm's litigation section.

While at Kirkland & Ellis, I handled a wide variety of commercial litigation matters. For example, I represented an architectural firm in a variety of construction related litigation matters including a case brought by the owners of the Metrodome in Minneapolis, Minnesota alleging flaws in the design and construction of that stadium. I also represented General Motors in products liability matters relating to alleged design defects

in various GM automobiles. I represented Motorola, Marshall Fields and other companies in employment discrimination lawsuits. I represented a consortium of east coast utilities in a lawsuit against General Electric and Stone & Webster Engineering Company relating to the design and construction of the Nine Mile Nuclear Power Plant in New York.

In 1990, I applied for a position as an Assistant United States Attorney in the Northern District of Indiana. I was hired by then U.S. Attorney James Richmond. From 1990 through 1997, I was an Assistant United States Attorney in the Northern District of Indiana. In May, 1997, I accepted a position as an Assistant United States Attorney in the District of Arizona, Tucson, Arizona. I remained at the U.S. Attorney's Office for the District of Arizona until February, 1999.

In my nine years as a line Assistant U.S. Attorney I handled hundreds of cases from routine drug cases, firearms violations, mail and wire frauds, government program fraud, kidnaping, bank robberies, public corruption and sophisticated white collar crime.

In January, 1999, I was recruited back to the Northern District of Indiana by then U.S. Attorney Jon DeGuilio to serve as the Chief of the Criminal Division for the United States Attorney's Office for the Northern District of Indiana. In 2001, when Mr. Joseph Van Bokkelen was appointed U.S. Attorney for the Northern District of Indiana, he retained me as his Chief of the Criminal Division.

In my four years as Chief of the Criminal Division, I have had the supervisory responsibility for overseeing all criminal prosecutions in the Northern District of Indiana. As part of that duty, I have supervised a public corruption task force that focuses on corruption in Lake County, Indiana. In addition to public corruption, my position as Chief of the Criminal Division also requires me to supervise a variety of other kinds of prosecutions including large scale drug distribution rings, illegal firearms trafficking, white collar fraud cases, environmental crimes and cases involving the death penalty.

In addition to my supervision of cases in the Northern District of Indiana, I have also served on a committee made up of Criminal Chiefs from around the country. Nine Criminal Chiefs were selected from the 94 judicial districts to form a working group that meets regularly to consider issues and make recommendations to the Attorney General's Advisory Committee on Department of Justice policy.

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

As mentioned above, while I was in private practice at Kirkland & Ellis, my clients consisted mostly of large and medium sized corporations who were involved in civil litigation. However, I also represented some smaller companies and some trade associations. In addition, I did some pro bono work as described below.

While at the Department of Justice my practice has focused almost exclusively in the area of federal criminal law and procedure.

Here are the areas that I have specialized in, or did at one time:

Federal criminal law
Federal criminal procedure
United States Sentencing Guidelines
Employment discrimination
Products liability

(c) (1) Describe whether you appeared in court frequently, occasionally, or not at all. If the frequency of your appearances in court varied, describe each such variance, providing dates.

I have appeared in court frequently over the last twelve ten years. In the last 4 years as the Chief of the Criminal Division, I have not appeared in court as often as I did prior to that assignment. However, I would still characterize my appearances in court as "frequent." I still carry an active, although reduced, caseload, and I am in court often. For example, I have participated in six jury trials since becoming Criminal Chief.

While at Kirkland & Ellis I appeared in court only occasionally.

(2) Indicate the percentage of these appearances in

(A) federal courts – 98%
(B) state courts of record -- 2%
(C) other courts.

(3) Indicate the percentage of these appearances in:

(A) civil proceedings – 2%
(B) criminal proceedings – 98% (Although almost all of my time has been spent in the area of federal criminal law in the last ten years, I do participate in and review civil forfeiture cases that are often filed as an adjunct to criminal cases. In addition, I also have spent approximately 5% of my time in the last ten years handling federal habeas corpus petitions under Title 28, United States Code, Section 2255. While these are, strictly speaking, civil cases, because they arise out of criminal convictions, I have included these in the "criminal" percentage denoted above).

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

During my tenure with the Department of Justice, I have tried 26 cases to verdict in the United States District Court. I was the sole counsel in 12 of those cases, associate counsel in 5 of them and chief counsel in 9 of them. In addition to the cases that went to trial, I have handled hundreds of other cases in a variety of areas that were resolved via a plea agreement.

In addition to my work in district courts, I have also handled approximately 15 cases in the United States Court of Appeals for the Seventh Circuit and one in the United States Court of Appeals for the Ninth Circuit.

(5) Indicate the percentage of these trials that were decided by a jury.

100%

(d) Describe your practice, if any, before the United States Supreme Court. Please supply four (4) copies of any briefs, amicus or otherwise, and, if applicable, any oral argument transcripts before the U.S. Supreme Court in connection with your practice.

I have never appeared in the United States Supreme Court

(e) Describe legal services that you have provided to disadvantaged persons or on a *pro bono* basis, and list specific examples of such service and the amount of time devoted to each.

While at Kirkland & Ellis, I participated in the representation of a class of inmates who were assigned to the protective custody units of Illinois prisons. We represented this class of inmates on a *pro bono* basis in a lawsuit against the Illinois Department of Corrections. See Williams v. Lane, 851 F.2d 867 (7th Cir. 1988). I would estimate that I worked approximately 200 hours on this litigation. While at Kirkland & Ellis, I also represented, on a *pro bono* basis, an indigent woman in a dispute with her landlord. I worked roughly 15 hours on this litigation.

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

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

(b) a detailed summary of the substance of each case outlining briefly the factual and legal issues involved;

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

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

1. United States v. Fuchs and Reagan, 218 F.3d 957 (9th Cir. 2000) -- This case involved the theft of 28 C130 aircraft from the Air Force and was tried in the Fall of 1997 in the United States District Court for the District of Arizona before the Honorable William Browning. What made this case particularly significant was the magnitude of the loss to the United States Air Force, the high profile witnesses who testified (including General Ron Fogelman, former Chairman of the Joint Chiefs of Staff), and the media attention that it garnered. The case took 6 weeks to try, and I was co-lead counsel. My co-counsel was Ms. Claire Mann, Assistant U.S. Attorney, District of Arizona, 405 West Congress, Suite 4800, Tucson, Arizona 85701 (520)620-7300. I did both the opening statement and the closing argument at trial, handled approximately 50 witnesses, drafted many of the pleadings in the district court and argued several motions. This was an extremely complex case to put together and to try. It involved over 100 witnesses and 1000 exhibits. The witnesses included four generals from the United States Air Force and many senior members of the U.S. Forest Service. In summary, the case involved a fraud that was perpetrated on the Air Force by a high ranking employee of the U.S. Forest Service (Fuchs) and by a private airplane broker (Reagan). Through the misuse of excess property regulations, Fuchs and Reagan were able to hoodwink the Air Force out of 28 C130 airplanes valued at several million dollars. The airplanes were fraudulently transferred to the U.S. Forest Service and then, through a bogus aircraft exchange program, transferred to private companies. Fuchs received kickbacks to arrange the bogus exchanges and Reagan actually received two of the aircraft which he later sold in the open market. Both were convicted at trial. I was not involved in the appeal of the matter. (I had returned to the Northern District of Indiana by the time the appeal was written and argued). On appeal before the United States Court of Appeals for the Ninth Circuit, and over a strongly worded dissent, the case was reversed on a statute of limitations issue. United States v. Fuchs and Reagan, 218 F.3d 957 (9th Cir. 2000). The defense attorneys in the case were Melvin McDonald, 2901 N. Central Ave., Suite 800, Phoenix, AZ 85012 (520) 263-1700; Gerald Cunningham, 1951 Airport Road, Atlanta, GA 30341.

2. United States v. Green, et. al., 114 F.3d 613 (7th Cir. 1997) and United States v. Boatner, 99 F3d 831 (7th Cir. 1996) (related case) – This case involved the prosecution of a staged automobile accident insurance fraud ring. An attorney, two doctors, two nurses, a private investigator and about 20 others were all charged with and convicted of mail fraud for their roles in the staging of automobile accidents and the filing of fraudulent insurance claims that netted approximately $300,000. I handled the case in its entirety by myself. The case was filed in 1995 and was heard in the U.S. District Court for the Northern District of Indiana with the Honorable Rudy Lozano presiding. What made this case significant is that in the mid-1990s there was an enormous problem in Indiana with frivolous lawsuits being filed alleging personal injuries that were either nonexistent or seriously exaggerated. Through the presentation of this case, we disabled a major

organized fraud ring. The scheme operated as follows: A private investigator would recruit people to participate in an "accident." He would secure a car and obtain insurance on it in the name of one of the participants. It was critical that the policy that was obtained had high limits of uninsured motorist coverage. The private investigator would then bring the participants in the "accident" to a remote location in either Hammond or Gary, Indiana. He would pay an owner of a beat up truck to repeatedly ram the "accident" car while it was unoccupied. The participants would then get in the car and pretend to be in substantial pain as if they were in the car when it was struck. The police would be called and the "accident" would be reported as a hit and run. All of the participants would then be taken to the emergency room complaining of serious – but nonexistent – neck and back pain. Since the "accident" was a hit and run, this enabled the participants to pursue a claim against their own insurance company. There were two doctors and two nurses involved in the scam. The participants would be directed to see these medical providers who would prepare bogus medical bills to support a fraudulent claim. An attorney, who was also involved in the scam, would then handle the claims process. The attorney, two doctors, one nurse and approximately 20 others all pled guilty. Only two of those charged went to trial (one of the nurses and one of the participants in the "accidents"). I was sole counsel in the case that was tried before the Honorable Rudy Lozano. I believe this case had an excellent deterrent effect on fraudulent insurance claims. As a result of my work on this case, I was honored by a trade association of Indiana insurers for being the person in the State of Indiana who did the most to combat insurance fraud during the year in question. The defense attorneys in this matter included: Dan Toomey, Federal Public Defender, 219 Russell St., 6th Floor, Hammond, IN, 46325 (219) 937-8020; Kevin Milner 202 Joliet St., Dyer, IN 46311, (219) 836-6138; Joe Cioe 11 E. Lincolnway, Valparaiso, IN 46383 (219) 477-6490; Gary Germann, 3437 Airport Road, Portage, IN 46368 (219) 762-9710; Frank Martinez, 9105 Indianapolis Blvd., Highland, IN 46322 (219) 923-9922; Kevin Marshall, Smith & Marshall, 5253 Hohman. Hammond, IN 46320 (219) 932-1817; David Braatz, 1920 N. Main St., Crown Point, IN 46307 (219)663-8044; James Meyer, Meyer & Wyatt, 363 S. Lake St., Gary, IN 46403 (219) 938-0800; Kevin Schmidt, 370 West 80th Place, Merrillville, IN 46410 (219) 756-0555; Ross Hubbell, 4231 Broadway, Gary, IN 46409 (219) 884-2388; Tim Bemis, 2022 45th St., Highland, IN 46322 (219) 924-9124; John Maksimovich, 3145 45th Ave., Suite G, Highland, IN 46322 (219) 922-1441.

3. United States v. Morgano, et. al., 39 F.3d 1358 (7th Cir. 1994) – This case involved the prosecution of a major organized crime ring including five members of the Chicago mob. The defendants were charged in 1990 under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961. The case went to trial in 1991 in the U.S. District Court for the Northern District of Indiana before the Honorable James T. Moody. During trial, the case had a very high profile and was the subject of dozens of newspaper articles and television reports. All defendants were convicted on all counts. The significance of the prosecution was that it helped to dismantle Italian organize crime in the south suburbs of Chicago and in northwest Indiana. The case involved use of a wire tap that was placed in the Taste of Italy Restaurant in Calumet City, Illinois. Several months of secretly recorded conversations gave the jury an inside view of the operation of an

organized crime street crew. The crew would meet every morning at the restaurant before it opened. (The restaurant was owned by one of the defendant's brothers). At these daily meetings, business was discussed and proceeds from the collection of "street tax" were distributed. My personal role in the case was as the second chair at trial. The lead counsel in the trial was Michael Thill who is now deceased. During the trial I conducted approximately 30 witness examinations. I also did much of the brief writing in the district court and participated in the drafting of the appellate brief in the Seventh Circuit Court of Appeals. Two of the lead defendants also filed federal habeas corpus petitions both of which were denied in unpublished opinions by the Seventh Circuit but which can be found on Westlaw. See Guzzino v. United States, 2002 WL 378161 (7th Cir. 2002); Palermo v. United States, 1999 WL 417867 (7th Cir. 1999). The defense attorneys in this matter were: Kevin Milner 202 Joliet St., Dyer, IN 46311, (219) 836-6138; Richard James, James, James & Manning, 200 Monticello Dr, Dyer, IN 46311, (219) 865-8376; Robert Truitt, Federal Public Defender, 227 S, Main Suite 100, South Bend, IN 46601; Ronald Menaker, Arnstein & Lehr, 120 South Riverside Plaza, Suite 1200, Chicago, IL 60606 (312) 876-7100.

4. United States v. Carlino, 143 F.3d 340 (7th Cir. 1998) – This case involved the prosecution of the Business Agent for the Boilermakers Union for various acts of embezzlement and for the misuse of union funds. It was a complex prosecution involving hundreds of documents and over 50 witnesses. The Boilermaker's Local in Indiana had 1200 members making it the largest local in the country. The trial of this case was extremely contentious because Carlino was such a polarizing figure in the union. Half the members loved him; half could not stand him. As a result, the trial led to much infighting within the ranks of the union. I was lead counsel in the trial which lasted approximately two weeks and was tried in 1995 before the Honorable Rudy Lozano in the Northern District of Indiana. My co-counsel was Sharon Johnson, 5400 Federal Plaza, Suite 1500, Hammond, IN 46320, (219) 937-5500. Carlino was represented by Robert Stevenson, P.O. Box 503, Palos Heights, IL 60464 (708) 923-1111.

5. United States v. Joseph and Jayne Lanza, 2: 96 CR 1 JM (N.D. Ind. 1997) – This was an extremely complex fraud and tax matter. It involved approximately 15 wealthy victims who were defrauded out of approximately $5 million by the defendant and his wife who sold interests in oil wells in central Indiana. Although a small amount of oil was actually mined, the bulk of the money invested by the victims went to support the defendants' lavish lifestyle. The difficulty with the case was that the victim's were so wealthy, many of them did not particularly care that they were cheated. Both defendants eventually pled guilty. The case was heard in the U.S. District Court for the Northern District of Indiana, Hammond Division and was before the Honorable James T. Moody. The defense attorney was Don Tabbert, Tabbert, Hahn, Earnest & Weddle, 1 Indiana Square, Suite 1900, Indianapolis, IN 46204 (317) 639-5444.

6. United States v. Stewart, 33 F.3d 764 (7th Cir. 1994) – This case involved a massive fraud scheme perpetrated on elderly citizens in the Lafayette, Indiana area. In summary, the defendant was president and the operator of Pre-Need Services, Inc., an insurance firm

specializing in the sale of annuities to the elderly. The defendant induced 316 elderly persons to forward $1.1 million for the purpose of purchasing annuities to compensate designated funeral directors for performing funeral services. Instead, through an elaborate scheme, the defendant converted the money to his own use. I was sole counsel in the case. The defendant pled guilty and was sentenced by the Honorable Rudy Lozano. I initiated an appeal of the sentence given by Judge Lozano because I believed it was contrary to the United States Sentencing Guidelines. The Seventh Circuit agreed with me, reversed the district court and remanded the case for re-sentencing. Stewart was represented by Attorney Forrest Bowman, Attorney at Law, 1 North Pennsylvania, Suite 630, Indianapolis, IN 46204 (317) 687-6275.

7. United States v. Zaragoza et. al. 117 F.3d 342 (7th Cir. 1997) – This case involved the prosecution of the owners of Zaragoza Oldsmobile in Gary, Indiana for racketeering, mail fraud, bank fraud and arson. In summary, the owners of Zaragoza Oldsmobile defrauded General Motors, its customers, various insurance companies and a bank in a massive conspiracy operated out of the dealership. The various frauds culminated in an attempted arson of the dealership. I was sole counsel in the trial of the case which was tried before the Honorable James T. Moody. See also United States v. Altier, 91 F.3d 953 (7th Cir. 1996); United States v. Steele, 91 F.3d 1046 (7th Cir. 1996) (related cases). The attorneys on the matter were Joan Kouros, Judge, Criminal Court, Room 3, 2293 N. Main St., Crown Point, IN 46307 (219) 755-3500; Gary Germann; 3437 Airport Road, Portage, IN 46368 (219) 762-9710; and Mike Ettinger 6815 W. 95th St. Oak Lawn, IL 60454 (708) 598-1111.

8. United States v. Wilderness, 160 F.3d 1173 (7th Cir. 1998) – This case involved a violent carjacking in Gary, Indiana. The victim was an elderly woman who was pistol whipped during the robbery. What made this otherwise routine case noteworthy is that it was the first federal prosecution in the Northern District of Indiana of a juvenile pursuant to Title 18, United States Code, Section 5031 et. seq. I was sole counsel in the case. Many interesting and complicated legal issues were presented by the fact that Wilderness was a juvenile. The trial of the case took approximately 1 week and it was tried before the Honorable Rudy Lozano. The defense attorney in the matter was Donald Capp, James, James & Manning, 200 Monticello Dr, Dyer, IN 46311, (219) 865-8376

9. United States v. Streeter et. al., 2: 00 CR 125 JM (N.D. Ind.) – This case involved a scheme to defraud cancer patients by a doctor and two members of his staff. The victims in this case were all terminally ill cancer patients who were fraudulently sold on Streeter's bogus treatment protocol. In all, approximately 50 terminally ill cancer patients and various insurance companies were defrauded out of approximately $2 million. All three defendants pled guilty, and I was sole counsel in the case. The case was heard in the U.S. District Court for the Northern District of Indiana before the Honorable James T. Moody. The defense attorneys were James Richmond, Greenberg & Traurit, 77 W. Wacker, Suite 2500, Chicago, Il 60601; Kevin Milner, 202 Joliet St., Dyer, IN 46311, (219) 836-6138; and Dan Ostojic, Ostojic & Ostojic, 6287 Central Ave., Portage, IN 46368 (219) 764-0042.

10. United States v. Golden, 102 F.3d 936 (7th Cir. 1996) – This case involved the prosecution of a large scale crack cocaine distribution ring. The case took approximately 2 weeks to try and I was lead counsel. My co-counsel was Joe Cooley, Assistant U.S. Attorney, Southern District of Florida, 99 NE 4th Street, Miami, FL 33132, (305) 961-9405. It was tried in the Northern District of Indiana before the Honorable Rudy Lozano. The lead defendant was sentenced to life imprisonment. The defense attorney was Cordell Funk, 5253 Hohman Ave., Hammond, IN 46320 (219) 933-4700.

11. United States v. White, 2: 02 CR 21 JM (N.D. Ind.) – This case involved prosecution of a Gary, Indiana police officer for violating the civil rights of a citizen through the use of excessive force. It was tried in June, 2002 before the Honorable James T. Moody in the Northern District of Indiana. It is currently pending appeal in the United States Court of Appeals for the Seventh Circuit. I was co-lead counsel in the case. My co-counsel was Seth Rosenthal, U.S. Department of Justice, Civil Rights Division, 601 D Street, Washington D.C. 20005, (202)514-3870. The defense attorney in the matter was Jeff Schlesinger, One Professional Center, Suite 306, Crown Point, IN 46307 (219) 663-3197.

20. **Criminal History**: State whether you have ever been convicted of a crime, within ten years of your nomination, other than a minor traffic violation, that is reflected in a record available to the public, and if so, provide the relevant dates of arrest, charge and disposition and describe the particulars of the offense.

I have no convictions in the last ten years.

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

None.

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

As Chief of the Criminal Division in the United States Attorney's Office, I oversee the prosecution of all criminal cases in the U.S. District Court for the Northern District of Indiana. As such, if I am confirmed, I believe that I could not sit on any criminal case that is filed in the Northern District of Indiana that was pending in our office while I was

Criminal Chief. The procedure that I would follow in determining if there is a conflict is as follows: For my first five years as judge I would require, whenever a criminal case got assigned to me, that the Assistant United States Attorney responsible for the case file under seal an affidavit stating when the case first came into the U.S. Attorney's Office. If the case came into the office while I was still in the office as Criminal Chief, then I would recuse myself from the case. Due to the high number of reactive cases that are filed each year in the Northern District of Indiana I do not believe that my recusal on criminal cases that were in the office while I was Criminal Chief would pose too great a burden on the other judges of the District Court.

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

No.

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

See attached financial disclosure report

25. **Statement of Net Worth**: Complete and attach the financial net worth statement in detail. Add schedules as called for.

See attached net worth statement

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

There was no selection commission in my jurisdiction. The selection process was handled solely by Senator Richard Lugar and his staff.

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

Senator Lugar recommended me for nomination.

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

In June, 2002, Senator Lugar posted on his website an application for two openings for District Court Judgeships in the Northern District of Indiana. I submitted my application

to Senator's Lugar's office in August, 2002. In September, I was interviewed by Senator Lugar in his office in Washington. A few weeks later, I was notified by Senator Lugar that he was submitting my name, along with two others, to the White House for the two openings in the Northern District of Indiana. In October, 2002 I was interviewed at the White House by the Deputy White House Counsel, and on Monday, November 18, 2002 I was advised by the White House Counsel's office that, pending completion of the FBI background, my name would be submitted to the Senate for nomination.

(c) Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as asking or seeking a commitment as to how you would rule on such case, issue, or question? If so, please explain fully.

No.

'2000

Nomination Report

on Reporting (Last name, first, middle initial)	2. Court or Organization	3. Date of Report
n, Philip P.	Northern District of Indiana	02/03/2003
t (Article III judges indicate active or senior status; magistrate judges indicate full- or part-time)	5. Report Type (check type)	6. Reporting Period
inee U.S. District Judge	X Nomination, Date 01/29/2003	01/01/2001 to 01/15/2003
	Initial Annual Final	
mbers or Office Address	8. On the basis of the information contained in this Report and any modifications pertaining thereto, it is in my opinion, in compliance with applicable laws and regulations.	
Attorney's Office		
Federal Plaza, Suite 1500		
nd, IN 46320	Reviewing Officer _____ Date _____	

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

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

POSITION	NAME OF ORGANIZATION / ENTITY
NONE (No reportable positions.)	

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

DATE	PARTIES AND TERMS
NONE (No reportable agreements.)	

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

DATE	SOURCE AND TYPE	GROSS INCOME (yours, not spouse's)
NONE (No reportable non-investment income.)		
000	Valparaiso University School of Law	$1,500

I. BIOGRAPHICAL INFORMATION (PUBLIC)

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

   Mary Ellen Coster Williams, Mary Coster Williams, formerly Mary Ellen Coster.

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

   Residence: Bethesda, MD 20817

   Office: General Services Board of Contract Appeals
   1800 F Street, N.W.
   Room 7023
   Washington, DC 20405

3. **Date and place of birth.**

   April 3, 1953; Flushing, 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).**

   Married to Mark Calhoun Williams since April 24, 1982.

   Spouse's Occupation: Sales

   Unemployed since March 31, 2001

   Previous Employer: Xcert International, Inc.
   1400 15th St., Suite 225
   Washington, DC 20036

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

   College: Catholic University of America, 1970-1974
   Degrees Received: MA, December 1974; BA, May 1974

   Law School: Duke University School of Law, 1974-1977
   JD, 1977

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.

5/74-7/74	Catholic University, Latin Instructor.
5/75-7/75	Catholic University, Latin Instructor.
5/76-8/76	Comptroller of the Currency, Enforcement and Compliance Division, Law Clerk.
5/76-7/76	Catholic University, Latin Instructor (evenings).
8/76-5/77	Law Clerk, C. L. Haslam, University Counsel, Duke University.
12/76-1/77	Comptroller of the Currency, Enforcement and Compliance Division, Law Clerk.
5/77-7/77	Catholic University, Latin Instructor.
8/77-7/79	Associate Fulbright and Jaworski, Washington, DC (trained in Houston office 8/77-12/77).
8/79-11/83	Associate, Schnader, Harrison, Segal, and Lewis, Washington, DC.
11/83-3/87	Assistant U.S. Attorney, Civil Division, Washington, DC.
3/87-3/89	Partner, Janis, Schuelke, and Wechsler, Washington, DC. (Salaried contract partner, not general partner.)
3/89-present	Administrative Judge, General Services Administration, Board of Contract Appeals, Washington, DC.

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

None.

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

Duke Law Review, Editorial Board

Phi Beta Kappa, President's Award to Outstanding Undergraduate Woman at Catholic University.

Scholarships: Academic half-tuition scholarship to Catholic University.

Life Fellow, American Bar Foundation (elected 1985).

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.**

Member, U.S. Court of Federal Claims Advisory Council, Bid Protest Group, 1997-present.

American Bar Association (ABA)

Section of Public Contract Law

Vice-Chair 2000-present, Secretary 1999-2000, Council Member, 1996-1999; Young Lawyers Division Representative, 1986-1988.

Chair, Judicial Remedies Committee, 1994-1997, Vice Chair, 1989-1993.

Liaison, Government and Public Sector Lawyers Division, 1997.

ABA Young Lawyers Division

Chair, Associate Training Committee, 1983-1985.

Membership Chair, DC, 1982-1984.

Membership Chair, Northeast US, 1984-1985.

Young Lawyers Division Liaison, Administrative Law Section, 1984-1986.

Other ABA Sections/Divisions/Task Force

ABA Section/Division Committee on Professionalism and Ethics and Advisory Committee to ABA Commission on Evaluation of the Rules of Professional Conduct, 1/98-8/00.

Member, ABA Task Force on Government Lawyer Participation in the ABA, 8/00-8/01.

Member, Litigation Section, Judicial Administration Division, Dispute Resolution Section, Margaret Brent League.

District of Columbia Bar (D.C. Bar) (Mandatory Bar)

Secretary, 1988-1989.

Board of Governors, (Young Lawyers Section Representative), 1986-1987.

Member, Government Contracts and Litigation Section.

Bar Association of DC (Voluntary Bar) (BADC)

Foundation President, 1996-1997; Foundation Trustee, 1995-1998; Board of Directors, 1993-1995, 1985-1988; Chair, Young Lawyers Section, 1985-1986; Vice Chair, 1984; Secretary, 1983; Treasurer-elect, 1982; Executive Council, 1980-81; Editor-in-Chief, The Young Lawyer, 1980-1982; Chair, Ad Hoc Committee on Model Rules of Professional Responsibility.

Other Legal Organizations

Policy Board, Legal Counsel for the Elderly, 1981-1983.

Federal American Inn of Court, Master of the Bench, 1990-1991.

Women's Bar Association of DC.

Assistant United States Association.

Executive Women in Government.

United States Court of Federal Claims Bar Association.

Judicial Conference, United States Court of Appeals for the District of Columbia.

Judicial Conference, United States Court of Appeals for the Federal Circuit.

Judicial Conference, United States Court of Federal Claims.

Federal Bar Association.

National Lawyers Club.

Board of Contract Appeals Judges Association.

Board of Contract Appeals Bar Association.

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

Lobbying Organizations: ABA, BADC.

Other Organizations: John Carroll Society, St. Bartholomew Parish, Montgomery Soccer, Inc. (Coach), Department of Interior Recreation Association.

11. **Court Admission: List all courts in which you have been admitted to practice, with dates or 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.**

District of Columbia, Date of admission 1/78.[1] Converted active membership to judicial membership following appointment to the GSA Board of Contract Appeals. Converted back to active membership due to D.C. Bar requirement.

U.S. Court of Appeals for the D.C. Circuit, Date of admission 2/28/78.

U.S. Court of Appeals for the Federal Circuit, Date of admission 2/17/88.

12. **Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you**

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[1] Passed the D.C. Bar exam in 1977, but waited until return to D.C. from Houston to be sworn in.

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.

The following is a list of all speeches or published comments I have made, to the best of my recollection.[2] My speeches did not involve constitutional law and primarily focused on the nuts and bolts of litigating and procedural issues.

4/16/86	Public Administration Forum. Taught advocacy program to Federal employees for EEO cases.
6/26/89	Federal Computer Week "profile" article on me (summarizing interview of me and some quotations).*
10/25-31/89	The Computer Law Association, San Francisco, CA, panelist with other judges on "Should There be a Specialized Forum for Computer Cases?"*
12/14/89	DOD Training Course for contracting officers, lecturer on appearing as witnesses in board proceedings.
4/4/90	Administrative Law Section, Bar Association of D.C., luncheon speaker on how to litigate a bid protest at the board.
6/28/90	Legal Education Institute (LEI), Department of Justice, lecturer on GSBCA practice.
7/26/90	National Association of Black Procurement Professionals (NABPP), panelist on recent issues in GSBCA protests.

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[2] None of my speeches were prepared for publication. If I possess an outline or draft, I have marked the speech with an asterisk and included these in chronological order in Attachment 1. Otherwise, I have described the speech above.

11/2/90	Federal American Inn of Court, judge in advocacy program, issued ruling and critiqued student advocates.
11/5/90	First Annual Philadelphia Procurement Law Conference, Philadelphia, PA, panelist on GSBCA protest procedures.
11/9/90	Luncheon Speaker, Melrod, Redman and Gartlan, Washington, DC on litigating cases at the boards of contract appeals.
12/19/90	LEI, Department of Justice, lecturer on GSBCA practice.
2/27/91	Moot Court, judge for Board of Contract Appeals Judges Association (BACAJA) program.
1/30/92	Speech to interns at GSA's Information Resource Management Section on the GSBCA in general.
1/23/92	Navy, Office of General Counsel, East Coast Regional Seminar, Orlando, FL, lecturer on protective orders.
3/6/92	CLE Program, Georgetown University, panelist on protective orders.*
3/16/92	Trail Boss, Lancaster, PA, lecturer.*[3]
3/30/92	FOSE '92, Washington, DC, panelist on A Simpler Protest Process.
5/11/92	Government Computer News article reporting on FOSE speech.*

[3] "Trail Boss" was a training program run by GSA for procurement executives in Federal agencies. My presentation was designed to walk the audience through a bid protest proceeding from cradle to grave -- the "grave" being the witness chair in a GSBCA protest. These "speeches" evolved into interactive discussions, with the audience educating me on the practical aspects of conducting a procurement. I used the same notes for all Trail Boss speeches, until our protest jurisdiction expired in August 1996. After that, I talked about alternative dispute resolution.

9/21/92	Trail Boss, Lancaster, PA, lecturer.*
12/11/92	George Washington University luncheon speaker on protest process.*
6/29/93	George Washington University luncheon speaker on protest process.
9/21/93	Trail Boss, Lancaster, PA.*
10/7/93	Federal American Inn of Court, taught pupilage group deposition skills.
12/13/93	Trail Boss, Lancaster, PA.*
1/10/94	Judge Advocate General (JAG) School, Charlottesville, VA, 1994 Government Contract Law Symposium; "The New Rules of the General Services Board of Contract Appeals."*[4]
2/22/94	Taught trial advocacy at ABA's National Institute of Trial Advocacy (NITA) program.
1/25/94	Taught trial advocacy program.
3/14/94	Taught seminar at American University School of Law on GSBCA protest practice.
3/15/94	Panelist on "Computer Procurement in Government" Program sponsored by Federation of Government Information Processing Councils. My topic was bid protests.
4/21/94	Taught Professor Lee's class on "Administration of Government Contracts" at GW Law School (evening).
5/13/94	Calendar indicates speech at BWI, but no recollection. Probably was ABA Public Contract Section, Spring Seminar 1994; speech on "Significant Changes in GSBCA Rules Re Protests."*
5/25/94	Trail Boss, Lancaster, PA.*

[4] This speech was also videotaped, but I do not have a copy. (JAG School - (804) 972-6365.)

5/26/94	Industry Advisory Council (computer industry), luncheon speaker, GW University on protests at the Board.
6/27/94	Seminar on GSBCA practice and procedure.
10/31/94	Panelist on protests.
12/8/94	Panelist in roundtable discussion on bid protests reprinted in Washington Technology, February 9, 1995.*
3/31/95	Teach government contracts class at American University.
4/14/95	Speech to Spring Seminar of the National Contract Management Association, Twin Cities Chapter, Minneapolis, MN. Discussed Government contract litigation.
6/9/95	Georgetown University Law Center, Bid Protest Symposium. Panelist on standards of review -- APA or de novo?*
11/3/95	Presentation to Chinese delegation on American Procurement System and Dispute Resolution Process at the Boards. Hosted by Gibson, Dunn, and Crutcher.
11/13/95	Trail Boss, Lancaster, PA.*
11/27/95	Government Contract Litigation Workshop, judge in direct examination and cross examination workshop in mock trial, GWU, Washington, DC.
11/30/95	National Contract Management Association program (local), panelist on bid protests at the GSBCA.
12/4/95	Panelist on bid protests at ABA program at the Sphinx Club, Washington, DC.
2/7/96	Lecture GW Law School class in Government contracts.
3/1/96	ABA NITA program at Court of Federal Claims, trial judge critiquing participants.

4/18/96	National Contract Management Association, Minneapolis Chapter, speech on perspective from the GSBCA.*
10/23/96	Board of Contract Appeals Bar Association, panelist "Litigation Tactics, Techniques, and Strategies -- What Works and What Doesn't."*
4/8/97	Board of Contract Appeals Judges' Association Annual Seminar, moderator, panel on "Bid Protests: The Impact of the New Scanwell Legislation."
6/12/97	U.S. Court of Appeals for the Federal Circuit Judicial Conference, speaker Court of Federal Claims breakout session, "Procedural Parallels in Takings and Government Contract Litigation: Narrowing the Issues and Streamlining the Process."*[5]
6/26/97	Panel on Government Contract Practice, 1900 K Street. To the best of my recollection, this was an ABA Public Contract Section program for summer associates. I discussed litigating cases at the boards.
9/24/97	Speaker GSA Office of General Counsel Seminar, Columbia, MD, "ADR at the GSBCA."*
2/9/98	Panelist on Judging the Scheduling Experts: Effective Direct and Cross Examination of Scheduling Experts.*[6]
3/13/98	Moderator for panel on Update from the Courts and the Boards at the ABA's Federal Procurement Institute.*
6/9/98	National Conference for Women Government Contract Professionals, panelist on "A View from the Bench" with Judge Fennessy, DOTBCA,

[5] This speech was published with the proceedings of the judicial conference in the Federal Reporter, 180 FRD 467.

[6] This was the panel's outline; we answered questions from the moderator. My focus was effective direct, and cross-examination techniques.

	Judge Horn, COFC, and Judge Newman, Federal Circuit.*
9/29/98	George Mason Law School, Teach Government Contracts Class on Bid Protests with Judge Loren A. Smith.*
11/6/98	ABA Section of Public Contract Law, Fall Program, Colorado Springs. Moderator, Panel on Fostering Professionalism. Topics included candor and civility and ethical issues facing the litigator, in particular what do you do with inadvertently disclosed privileged material?*
4/21/99	Board of Contract Appeals Judges Association, Panelist "The CDA Claims Process -- Is it Working? What Needs Fixing?" Responded to a series of questions on the process.*
6/8/99	Women Government Contract Professionals "A View From the Bench." Panelist with Judge Christine O. C. Miller on insights on effective litigation styles.
10/19/99	George Mason Law School. Taught Government Contracts Class on Bid Protests with Judge Loren A. Smith.* (Same outline as 9/29/98.)
1/13/00	Board of Contract Appeals Judges Association, Annual Education Program. Panelist on "Computer Forensics." My remarks concerned "Ubiquitous E-Mail: Discovery and Evidentiary Issues Faced by the Boards."*
5/4/00	ABA Forum on the Construction Industry, The Construction Lawyer's Toolbox, Panelist on "Judging the Experts." Discussed techniques for presenting expert testimony in construction cases involving delay and labor inefficiency; voir dire; direct and cross examination; foundation; and use of experts in ADR.*
3/1/01	ABA Federal Procurement Institute, Panelist on "The Future of the Disputes Process: Rethinking the Contract Disputes Act." Panelists were asked to address whether there

should continue to be two fora (the COFC and the Boards) for resolving Government contract disputes. I answered yes, pointing to the different statutes of limitation for filing (90 days at Boards, 1 year at COFC) and the different attorneys representing the Government, DOJ at COFC and agency counsel at the Boards. I also recommended some minor changes for improving the process, such as imposing deadlines for resolving disputes.*

3/21/01 — Briefed Seventh Grade students from Mater Dei School on Boards' contract disputes process when they observed an oral argument being presented to me.

4/9/01 — George Mason Law School. Critique students' oral arguments in Appellate Advocacy course with Judge Loren A. Smith.

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

Excellent health. (run approximately 25 miles per week; completed the 1996 and 1998 Marine Corps marathons). Last physical exam was May 1, 2001.

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

Administrative Judge, General Services Administration, Board of Contract Appeals. Appointed as the result of a competitive process pursuant to the Contract Disputes Act of 1978, 41 U.S.C. § 607(b).[7] Appeals from the Board's contract decisions are resolved by the United States Court of Appeals for the Federal Circuit.

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[7] The statute provides that board members shall be selected and appointed in the same manner as administrative law judges under section 3105 of Title 5, with an additional requirement that board members "have not fewer than five years of experience in public contract law."

Jurisdiction

The GSA Board is the largest of the civilian boards of contract appeals. Under the Contract Disputes Act of 1978, it adjudicates contract claims by and against GSA and 22 other agencies.[8]

The Board also resolves cost applications filed by prevailing private parties for the recovery of litigation costs pursuant to the Equal Access to Justice Act, 5 U.S.C. § 504.

In accordance with the Administrative Dispute Resolution Act, the Board provides its judges to serve as neutrals in alternative dispute resolution proceedings in Government contract matters for any Government agency -- not limited to the agencies whose cases we hear. Pursuant to a Memorandum of Understanding, the Board regularly conducts ADR for the Federal Aviation Administration, including resolution of protests. The Board has also designated a standing panel of neutrals, including myself, to resolve disputes as they

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[8] These agencies are:

Agency for International Development
Broadcasting Board of Governors
Commission on Civil Rights
Consumer Products Safety Commission
Department of Commerce
Department of Education
Department of Justice (Suspension and Debarment)
Department of State
Department of the Treasury
Equal Employment Opportunity Commission
Federal Communications Commission
Federal Trade Commission
International Boundary and Water Commission
Interstate Commerce Commission
Merit Systems Protection Board
National Archives and Records Administration
National Endowment for the Arts
National Gallery of Art
National Labor Relations Board
Navajo and Hopi Indian Relocation Commission
Small Business Administration
Social Security Administration

arise in an ongoing construction project at the National Institutes of Health.

The Board also resolves claims for reimbursement of expenses incurred by Federal civilian employees while on official travel when relocating to a new duty station pursuant to 31 U.S.C. § 3702(a)(3) and a delegation of authority from the GSA Administrator.

Finally, the Board has jurisdiction to review claims made by a carrier or freight forwarder for transporting individuals or property for the Government pursuant to 31 U.S.C. § 3726(g)(1) and a delegation of authority from the GSA Administrator.

Under the Competition in Contracting Act (CICA), the Board also had jurisdiction over protests brought by vendors on procurements of automatic data processing (ADP) resources conducted by any agency under the authority of the Brooks Act.[9] However, the Board's protest jurisdiction expired in August 1996, with the repeal of the Brooks Act.

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

1. Raytheon STX Corp. v. Department of Commerce, GSBCA 14296-COM, 00-1 BCA ¶ 30,632.

2. Sun Microsystems Federal, Inc. v. Department of the Army, GSBCA 13615-P (Aug. 7, 1996), 1996 BPD ¶ 111, 96-2 BCA ¶ 28,507.

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[9] In general, protests challenged the award of, or process of awarding, a Government contract brought by disappointed bidders on the grounds that the competition was unfair or illegal.

3. Grumman Data Systems Corp. v. Department of the Air Force, GSBCA 11635-P, 92-2 BCA ¶ 24,999.

4. Grumman Data Systems Corp. v. Department of the Air Force, GSBCA 11939-P, 93-2 BCA ¶ 25,776, aff'd, 15 F.3d 1044 (Fed. Cir. 1994).

5. Computer Data Systems, Inc. v. Department of Energy, GSBCA 12824-P, 95-2 BCA ¶ 27,604, motion for clarification granted in part and dismissed in part, 94-3 BCA ¶ 27,153, motion to vacate denied, motion for relief from decision granted in part, GSBCA 12824-P-REM, 95-2 BCA ¶ 605.

6. Sterling Federal Syscems, Inc. v. General Services Administration, GSBCA 10000-C(9835-P), 92-3 BCA ¶ 25,118, at 125,222-23 (1992) (Dissenting opinion) (Majority opinion reversed in Sterling Federal Systems, Inc. v. Goldin, 16 F.3d 1177 (Fed. Cir. 1994).

7. Integrated Systems Group, Inc. v. Social Security Administration, GSBCA 14054-SSA, 98-2 BCA ¶ 29,848.

8. Caelum Research Corp., GSBCA 13139-P, 13155-P, 95-2 BCA ¶ 27,733 (Apr. 13, 1995) (Redacted version published May 25, 1995).

9. A. C. Nielsen Co., GSBCA 13466-P, et al., 96-1 BCA ¶ 28,253, motion for stay pending appeal denied (June 5, 1996), motion for relief from decision denied (Dec. 17, 1996) (Redacted issued Jan. 21, 1997).

10. Computer Literacy World, Inc., et al. v. Department of the Air Force, GSBCA 13438-P, 96-1 BCA ¶ 28,119 (dissenting opinion).

(2) Summary of Reversals by U.S. Court of Appeals for the Federal Circuit

Decisions Which I Authored

Reversals

1. Ace-Federal et al. v. Barram, GSBCA-13298,99-1 BCA ¶ 30139, rev'd and remanded, 226 F.3d 1329 (Sept. 28, 2000).

Ace involved the interpretation of highly unusual contracts which were susceptible to differing views. Six court reporting companies collectively sought $4.9 million in lost profits due to alleged breaches of their multiple award schedule contracts by numerous user agencies. Finding that the contracts at issue were not requirements contracts, I concluded that the appellants had no contractual right to any set amount of business under their contracts and, in fact, had received business, so no damages for lost profits were available. The Federal Circuit saw it differently, finding that being listed on the schedule had value and damages for diverted orders were available. The Court of Appeals remanded the case to us with instructions to make a fair and reasonable approximation of the damages, and this matter is currently pending.

2. PRC, Inc. v. Department of the Air Force, GSBCA 11864-C(11532-P) (dismissed for lack of jurisdiction) 94-3 BCA ¶ 27,159, reversed, 64 F.3d 644 (Fed. Cir. 1995).

In the underlying protest, PRC challenged the Air Force's award of a contract to EDS on multiple grounds. I found that the award was illegal and directed the agency to resolicit or otherwise proceed in accordance with statute and regulation. This decision was appealed. The Federal Circuit dismissed the appeal as moot because the parties settled the appeal and vacated my decision, with instructions to dismiss the complaint.

In light of the vacatur I believed that I had no authority to award costs, since the vacatur order rendered my decision and, therefore, my determination that there had been a violation, a nullity.[10] The Federal Circuit reversed.

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[10] The Board's authorizing statute provided that: "If the Board determines that a challenged agency action violates a statute or regulation . . . the Board may suspend, revoke, or revise the procurement authority. . . . Whenever the Board makes such a determination, it may . . . declare an appropriate interested party to be entitled to costs . . ." (Emphasis added.)

The Circuit disagreed with my conclusion that I now lacked a necessary predicate for awarding costs.

3. Network Solutions, Inc. v. Department of the Air Force, GSBCA 11863-C(11498-P), 94-3 BCA ¶ 27,160, rev'd, 70 F.3d 1289 (Fed. Cir. 1995). This decision, a companion case to PRC, is unpublished, and reverses the Board's decision for the reasons set forth in PRC.

4. Marketing and Management Information, Inc. v. Beale, vacating A. C. Nielsen, et al. v. Defense Commissary Agency, GSBCA 13466-P, et al., 96-1 BCA ¶ 28,253 (Feb. 23, 1996). The U.S. Court of Appeals for the Federal Circuit vacated the Board's decision granting a protest. Vacatur was based solely upon the appeal becoming moot when the agency decided to cancel the resolicitation effort.

5. Grumman Data Systems v. Department of the Air Force, GSBCA 11799-C(11635-P), 93-2 BCA ¶ 25,773, vacated in part sub. nom., Grumman Data Systems Corp. v. Widnall, 33 F.3d 65.

I awarded expert and consultant costs following Sterling Federal Systems v. NASA, GSBCA 10000-C, 92-3 BCA ¶ 25,118, in which a majority of the Board held consultant fees were not compensable under the Brooks Act. (I had dissented in Sterling.) Subsequently, the Court of Appeals overturned the majority opinion in Sterling, 16 F.3d 1177. Because the precedent on which I had relied in denying the expert fees was no longer good law, the Circuit vacated that portion of my decision.

Decision Which My Colleague Authored in Which I Concurred

Ed A. Wilson v. General Services Administration, GSBCA 13532-C(12596), aff'd in part, rev'd in part, and remanded, 126 F.3d 1406 (Fed.Cir. 1997).

In this case of first impression, the Court of Appeals differed with the Board's statutory interpretation.

The Court of Appeals reversed the part of the decision in which we denied attorney fees to a successful litigant under the Equal Access to Justice Act (EAJA). 5 U.S.C.A. § 504 (West 1994 & Supp. 1997). We denied fees reasoning that Wilson had not "incurred" fees, within the meaning of the statute,[11] because Wilson's insurer was paying its attorney fees.

As both the Board and the Court of Appeals recognized, neither EAJA nor its legislative history defines the word "incur." The court disagreed with the Board's reliance on the plain meaning of the word incur and instead looked to the overall purpose of EAJA.

Affirmances

In affirming my decisions, the Federal Circuit did not criticize my substantive or procedural rulings. The Federal Circuit affirmed my decisions in Grumman Data Systems Corp. v. Widnall, 15 F.3d 1044, a bid protest against the award of a contract for the Joint Chiefs of Staff, as referenced above, and Kimbrell v. Fischer, 15 F.3d 175 (Fed. Cir. 1994). The latter case involved the interpretation of the tax escalation clause in a lease. In addition, the Court of Appeals agreed with my dissent in Sterling Federal Systems. v. Goldin, 16 F.3d 1177 (1994). By a vote of the full Board, 7 to 4, the majority held that the Brooks Act's fee-shifting provision which permits it to award costs did not authorize the award of expert witness or consultant fees. I dissented from the majority opinion, because I believed that the majority's reliance on Supreme Court decisions construing 28 U.S.C. § 1920 were simply inapplicable. Instead, I focused on construing the Board's statutory authorization which I interpreted to permit award of these types of fees.

(3) None of my decisions involved constitutional issues.

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[11] EAJA provides in pertinent part: "[a]n agency that conducts an adversary adjudication shall award to a prevailing party other than the United States fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicating officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust." 5 U.S.C. § 504(a)(1) (1994) (Emphasis added).

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

None.

17. Legal Career:

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

1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;

No judicial clerkship.

2. whether you practiced alone, and if so, the addresses and dates;

Never a solo practitioner.

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

8/77-12/77	Associate Fulbright and Jaworski 1301 McKinney, Suite 5100 Houston, TX 77010-3095
1/78-7/79	Associate Fulbright and Jaworski 1150 Connecticut Avenue, N.W. Washington, DC
8/79-11/83	Associate Schnader, Harrison, Segal and Lewis 1111 19th Street, N.W. Washington, DC 20036

11/83-3/87	Assistant U.S. Attorney U.S. Attorney's Office Civil Division 441 G Street, N.W. Washington, DC 20001
3/87-3/89	Partner Janis, Schuelke, and Weschler 1728 Massachusetts Ave., N.W. Washington, DC 20036
3/89-present	Administrative Judge General Services Administration Board of Contract Appeals 1800 F Street, N.W. Washington, DC 20405

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?**

8/77-12/77	Litigation/corporate/labor. Rotated through these sections of Fulbright and Jaworski's Houston office for training.
1/78-8/79	Civil litigation in energy regulatory matters and Government contract matters.
8/79-11/83	Civil litigation in Government contract, employment, commercial, and tort matters.
11/83-3/87	(Assistant U.S. Attorney) Civil litigation in Federal court in Government contract, Administrative Procedure Act (APA) review, tort, employment discrimination, and affirmative litigation matters.

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

1977-1979

At Fulbright and Jaworski, I represented corporate and academic clients specializing in labor law, Federal energy regulatory law, and Government contract litigation. In the labor area, I represented Browning Ferris Industries, Duke University.

In the Federal regulatory arena, I assisted in preparing amicus briefs before the Temporary Emergency Court of Appeals (TECA) on behalf of Exxon. While in the Houston office, I also represented a prisoner, Albert Houston Carter, in a habeas corpus proceeding pro bono.

In the Government contracts arena, I represented Klate Holt, a small services company, and CompuServe Data Systems, in bid protests at GAO and in the District Court. I also worked for transportation companies in Interstate Commerce Commission (ICC) matters, and for Texas International Airlines in Civil Aeronautics Board (CAB) matters.

8/79-11/83

At Schnader, I handled a variety of civil litigation, primarily Government contract, labor, EEO, and commercial matters, representing small and large businesses as well as individuals and trade associations.

I litigated bid protests at the GAO and in Federal District Court representing CompuServe Data Systems, and Polymembrane Systems, contract disputes representing Marmac Industries, Algernon Blair, at the Armed Services Board of Contract Appeals (ASBCA), and construction litigation for Romar Construction Corporation in State Court in Suffolk County, New York, and a tortious interference case for Chicago Aerial Survey in Federal District Court in DC.

I handled a protest for a minority contractor before the D.C. Lottery Board, and represented an individual, John Bishop, in a contract dispute against the McCormick Company in State Court in Baltimore, Maryland.

In other employment litigation, I represented Ogden Food Services, the National Rural Electric Cooperative and United Parcel Service, in EEOC and union grievance matters, and Agricultural Council of America (ACA) in a sexual harassment matter which I settled before the complaint against my client was filed.

On a pro bono basis, I handled a litigation for Gala Hispanic Theatre, the National Black Children's Development Institute, and a veteran who was injured during his active duty service.

11/83-3/87

At the Civil Division in the United States Attorney's Office, all of my clients were Federal agencies. I was lead counsel in a variety of civil litigation in Federal Court, with a substantial number of Government contract cases, since I enjoyed bid protests and frequently volunteered to handle temporary restraining order cases.[12]

I was fortunate to handle some major cases representing the Commanding General of the Army's Communications Electronic Command, the Secretary of HHS, the Inspector General of HHS, the Commissioner of the PTO, and a number of other agency officials in a wide variety of civil litigation.

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[12] The Government contract cases which I handled as an AUSA typically did not involve trials because the Court's jurisdiction arose under the Administrative Procedure Act. They entailed frequent court appearances, often on an emergency basis, some discovery, and extensive briefing.

I handled several interesting trials as lead counsel in the Title VII arena, as well as some complicated Administrative Procedure Act review cases and a wrongful death action on behalf of St. Elizabeth's.

In affirmative litigation, I worked with the criminal division seeking parallel civil remedies. In one case, I obtained a TRO against a financial institution on very short notice, assisting the Secret Service in freezing assets which were the fruits of a crime.

1987-1989

At Janis, Schuelke, and Weschler, I continued to specialize in civil litigation, handling as sole counsel a large litigation before the Armed Services Board of Contract Appeals for a defense contractor, Cubic Corporation. That case challenged the Navy's partial termination for default of a contract for simulators and its assessment of millions of dollars in reprocurement costs.[13]

I also did Government contract work for Federal Electric Corp., Wyse Technology, and smaller clients.

In the administrative law area, I represented the American Chiropractic Association in a challenge to the Department of Education's decision to recognize an accreditation entity for chiropractic schools, which did not impose sufficiently stringent standards.

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[13] "Termination for default" and "reprocurement costs" are terms of art in Government contracts. A termination for default is a drastic sanction imposed by the Government which abruptly halts the contractor. The Government has the burden of proving that a termination for default is proper. Once an agency terminates a contractor for default, it may reprocure the services or products the terminated contractor did not complete and assess the excess costs of reprocurement.

In a litigation in Federal District Court, I was co-counsel representing a student at Catholic University who was shot and raped on campus. We settled this case just before trial, after extensive discovery.

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.**

1977-1979: Infrequently.

8/79-11/83: Much more frequently, but often as co-counsel. Only occasionally as lead counsel.

11/83-3/87: Frequently and exclusively as lead counsel (Federal Court exclusively).

3/87-3/89: Frequently, mostly as lead counsel, occasionally as co-counsel.

3/89-present: Frequently, exclusively as a judge on the Board of Contract Appeals.

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

   (a) Federal - 80%
   (b) State - 5%
   (c) Other - 15%

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

   (a) 90%
   (b) 10%

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

Sole counsel: 5 cases.

Associate counsel: 5 cases.

Trial judge: over 60 cases.

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

(a) None.
(b) 100%.

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

(a) the date of representation;
(b) the name of the court and the name of the judge or judges before whom the case was litigated; and
(c) The individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

1. Harris Corporation v. United States, Civil Action No. 86-0255, 628 F.Supp. 813 (D.D.C. 1986).

I was lead counsel defending the Army in an action seeking to overturn the Army's award of a contract for the Starwars defense program. Harris Corporation, the low offeror, challenged the Army's award of an $105 million contract for ground-based satellite terminals to Magnavox Electric Systems Co. Harris alleged that the Army had assigned extra credit to Magnavox, improperly evaluated risk, price, past performance, and integrated logistics systems, and that it failed to conduct meaningful discussions regarding cost realism.

The court initially entered a temporary restraining order stopping all performance on the contract, but ultimately denied the protest. I had complete responsibility for the litigation, including

supervising agency counsel and a team of specially assigned officers and civilian personnel. I presented all oral arguments to the District Court (TRO, sealing, discovery, and preliminary injunction) and wrote all the briefs. Since the Court permitted expedited discovery on very short notice, I prepared my witnesses and defended the depositions of Major General Robert D. Morgan, Commanding General, U.S. Army Communications Electronics Command (Ft. Monmouth, New Jersey), Colonel Allen McCahan, and the contracting officer in a matter of days.

(a) Oral argument occurred in late 1985 and the Court's opinion was issued on February 19, 1986.

(b) United States District Court for the District of Columbia, the Honorable Barrington D. Parker, Senior District Judge.

(c) Co-counsel

Col. Edward W. France, III
Judge Advocate General, OSJA
United States Army Space and Missile Defense Command
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Telephone: (205) 955-4520

Opposing Counsel

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Counsel for Intervenor

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Smith, Pachter
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2. Hardy v. Bowen, Civil Action No. 85-2119 (D.D.C. 1986), 1986 WL 15710.

Plaintiff sued the Secretary of the Department of Health and Human Services (HHS) under Title VII of the Civil Rights Act as well as the Equal Pay Act. Plaintiff claimed that the agency's Inspector General, Richard Kusserow, illegally failed to promote her and that males performing substantially equal work received a higher salary. I was lead counsel and sole litigation counsel for HHS.

After three days of testimony, at the close of plaintiff's case in chief, I moved for dismissal under Rule Fed.R.Civ.P. 41(b), arguing that plaintiff had failed to establish a prima facie case. The court granted my oral motion and subsequently issued a detailed decision.

(a) The representation occurred in 1986. The trial commenced on October 6, 1986, and the opinion was issued on November 19, 1986.

(b) United States District Court for the District of Columbia, Magistrate Arthur L. Burnett, Sr. The trial was conducted by the Magistrate by the consent of the parties pursuant to 28 U.S.C. § 636(c).

(c) Co-counsel (no litigating co-counsel)

Opposing Counsel

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3. Caiola v. Carol, Civil Action No. 85-3767 (D.D.C. Sept. 30,1986, Curran, J.), rev'd, 851 F.2d 395 (D.C.Cir. 1988).

In this significant case of first impression, I persuaded the District Court that the Defense Logistics Agency's (DLA's) debarment of individual officers of a convicted corporation was proper despite the fact that

these individuals, the corporate secretary who was also the wife of the CEO, and the corporate president had no actual knowledge of the company's wrongdoing. The District Court found that they had "reason to know" of the conduct, citing the Federal Acquisition Regulation on imputation and concluding that they were "affiliates." After I left the office, the case was reversed on appeal.

(a) Date of representation: 1986.

(b) United States District Court for the District of Columbia, the Honorable Edward M. Curran.

(c) Opposing Counsel

George M. Coburn, Esq.
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1661 Crescent Place, N.W.
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C. William Tayler, Esq.
Whiteford, Tayler & Preston
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4. Perry v. Beggs, Civil Action No. 83-2086 (D.D.C. 1983).

In this three and a half week trial, I defended NASA against the plaintiff's allegations that the agency had discriminated against her on the basis of her race and sex. I was the lead and sole trial counsel. Plaintiff was an EEO specialist, and the alleged discriminating officials were the Director of NASA's EEO Office and his deputy. The case was noteworthy due to the length of the trial and the myriad factual allegations. Defendant prevailed.

(a) The date of representation: 1983.

(b) United States District Court for the District of Columbia, the Honorable Arthur L. Burnett, Jr., United States Magistrate

(c) Co-counsel

Roger Hamby, Esq. (returned to Tennessee, but location unknown)

Opposing Counsel

Karl W. Carter, Esq. (location unknown)

5. Calvin Simon v. United States, Civil Action No. 83-1304 (D.D.C. 1981).

Plaintiff claimed that the Patent and Trademark Office (PTO) illegally discharged him in retaliation for his "whistleblower" complaints regarding alleged waste and mismanagement and in violation of his First Amendment rights. I tried the case as lead counsel for the Government over the course of four days calling at least a dozen witnesses who had observed first-hand some 25 different incidents of plaintiff's disruptive behavior. I represented the Commissioner of the PTO as well as his deputy. The court concluded that there was substantial doubt whether plaintiff's speech was entitled to First Amendment protection and that, in any event, plaintiff was discharged for failure to maintain professional working relationships. Judgment was entered in defendant's favor.

(a) Date of representation: 1986-1987; Trial: January 15-21, 1987.

(b) United States District Court for the District of Columbia, the Honorable Louis F. Oberdorfer.

(c) Opposing Counsel

Joseph E. Kolick, Esq.
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Washington, DC
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6. Federal Electric Corp. v. Carlucci, Civil Action No. 87-1747, 687 F.Supp. 1 (D.D.C. 1988)

While at Janis, Schuelke and Weschler, I represented plaintiff, Federal Electric Corporation, which challenged the release of its proprietary cost data by the Navy. Plaintiff was the incumbent contractor

maintaining and operating the Trident Submarine Base in Kings Bay, Georgia. The Navy released plaintiff's direct costs associated with its performance of that contract to its competitors and other bidders on the follow-on contract.

The case was litigated in two phases. In the initial phase, I was not involved. Rather, the litigation was handled by James M. McHale, who filed suit challenging the Navy's release of FEC's proprietary data. The court dismissed that case for lack of ripeness because the follow-on contract had not been awarded.

Once the follow-on contract was awarded to United Airlines Services, Mr. McHale requested that I take over the case as lead counsel. I did so, writing the briefs and handling the oral arguments.

Although the court recognized that there were problems in the way the Navy had released plaintiff's data without affording it any written notice or adequate oral notice, it found the plaintiff had failed to timely object to the release. The court granted summary judgment in defendant's favor.

(a) Date of representation: early 1988. The court's memorandum opinion was issued on April 28, 1988.

(b) United States District Court for the District of Columbia, the Honorable John Garrett Penn.

(c) Co-counsel

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Opposing Counsel

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7. Jamison v. Federal Trade Commission, Civil Action No. 85-3916, 628 F.Supp. 1548 (D.D.C. Mar. 3, 1986)

Seven anesthesiologists brought suit against the Federal Trade Commission (FTC) to enjoin an enforcement action alleging anticompetitive behavior. I was lead counsel. The court heard argument on our threshold defenses simultaneously with the plaintiffs' motion for preliminary injunction.

We successfully argued that the District Court lacked jurisdiction and the case was transferred to the United States Court of Appeals for the DC Circuit. Because final orders resulting from FTC proceedings under 15 U.S.C. § 45(b) (1982) are originally reviewable in the Court of Appeals, the District Court agreed that statute committed review of the FTC's action to the Court of Appeals and that plaintiff's request for an injunction might affect the future jurisdiction of that court.

(a) Date of representation: 1985-1986.

(b) United States District Court for the District of Columbia, the Honorable Oliver Gasch.

(c) Co-counsel

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Federal Trade Commission
6th and Pennsylvania Avenue, N.W.
Washington, DC 20580
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Opposing Counsel

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New York, New York 10036
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8. Ontario Air Parts v. United States, Civil Action No. 85-0533, (Flannery, J.).

Plaintiff, while proposed for debarment, was unable to receive Government contracts pending the debarment decision. Claiming that such blacklisting was unconstitutional, plaintiff sought a TRO and injunctive

relief. Although the District Court was troubled by the due process allegations, the court upheld the Air Force's debarment procedure, after extensive briefing and oral argument on a very expedited basis. I was the sole counsel representing the Government.

(a) Date of representation: 1985.

(b) United States District Court for the District of Columbia, the Honorable Thomas J. Flannery.

(c) Opposing Counsel

Joseph J. Petrillo, Esq.
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Suite 605
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9. Aviation Enterprises v. United States, Civil Action No. _____ (D.D.C. 1986).

I represented the Air Force in a suit by a small business challenging the Government's failure to resolicit a procurement for lease of aircraft under a small business set-aside. Plaintiff had initially sued in the Claims Court challenging both the cancellation of the set-aside and the failure to resolicit. The Claims Court upheld the cancellation and found that it lacked jurisdiction over the resolicitation, but decided the issue nonetheless.

After extensive briefing on standing, collateral estoppel, jurisdiction, and the merits of the case, and relying upon the Claims Court's transcript, I persuaded the District Court to uphold the decision not to resolicit. However, the court found that the Air Force had failed to give adequate notice of its intention to lease aircraft by exercising an option under another contract.

(a) Date of representation: 1986.

(b) United States District Court for the District of Columbia, the Honorable Louis F. Oberdorfer.

(c) Opposing Counsel

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Jackson and Campbell
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Telephone: (202) 457-1600

10 . Coleman v. Casey, Civil Action No. 84-3071 (D.D.C. June 19, 1986).

I represented the United States Postal Service in a Title VII trial, as lead counsel. Plaintiff contended that the defendant's failure to select her as one of the candidates for promotion was based upon her race. Plaintiff claimed that she should have been included in the pool of "best qualified applicants" based upon her experience and qualifications. The facts elicited at trial did not support her position.

Significantly, the court rejected plaintiff's expert's testimony finding that he had no experience in Postal Service personnel matters, that he had made erroneous assumptions about the Post Service selection process and misconstrued the Vacancy Announcement at issue.

I tried the case on June 2-4, 1986, and with some deletions and minor changes the court adopted my proposed findings of fact and conclusions of law.

(a) Dates of representation: 1986.

(b) United States District Court for the District of Columbia, the Honorable George Revercomb.

(c) Co-counsel

(cannot recall)
United States Postal Service
Office of General Counsel
Washington, DC

Opposing Counsel

Plaintiff was represented by counsel, but I do not recall his name.

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

1. Legal Activities Involving Experience as a Mediator

I have recently facilitated the settlement of a number of contract disputes via mediation. Although the details and dollar amounts of the settlements are confidential, these disputes typically involved large dollar claims, complex technical issues and numerous expert witnesses. In most cases I gave the parties an "early neutral evaluation" of their legal positions which lead to settlement.

Most recently, I conducted a mediation which spanned six months in a highly technical procurement dispute on behalf of FAA's Office of Dispute Resolution.

2. Legal Activities Pertinent to the COFC's Protest Jurisdiction

The Court of Federal Claims acquired bid protest jurisdiction over post-award bid protest suits effective December 31, 1996.

The ADR Act authorized the COFC as well as District Courts to grant injunctive and declaratory relief in bid protest suits as well as monetary relief for bid preparation and proposal costs.[14]

As a result of the significant number of bid protests which I have handled, as a litigator on behalf of vendors and the Government, and as a judge resolving these disputes from March 1989 until August 1986, I

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[14] The Act further provided for the elimination of the bid protest jurisdiction of the District Courts after the expiration of a four-year sunset period on January 31, 2001, unless Congress affirmatively acted to extend jurisdiction. The District Court's jurisdiction did expire, and I understand that the Court of Federal Claims has seen a significant increase in bid protest cases.

gained a close familiarity with both the procedural and substantive issues which arise. Since becoming a judge, I have resolved some 43 bid protests after conducting a trial.[15] Not only do these suits involve the legal merits of the challenge to the procurement, they often involve issues such as whether a party has standing, whether temporary injunctive relief is warranted, what type of protective order is appropriate, what parties should be permitted to intervene in the case, the extent of discovery, if any, and what comprises the record.

3. **Familiarity with Expert Witness Issues**

Another significant legal activity in which I have been involved has been the handling of expert testimony as both a judge and counsel.

Beginning with my representation of CompuServe in 1979, I handled expert witnesses, preparing my client's experts as well as deposing and cross-examining opposing experts.

As a trial judge, I have dealt with numerous procedural issues involving experts, including Rule 26 Statements, qualification of experts, scope of expertise and opinion, permissible voir dire, admissibility of opinions, disqualification of experts for conflicting representations, and the weight to accord testimony of experts.

4. **Miscellaneous Legal Activities**

I have served on the Court of Federal Claims Advisory Counsel on Bid Protests since its inception, and I frequently speak on protests, contract disputes, ADR, and litigation techniques. By last count, I have given approximately 60 speeches. As an officer in the American Bar Association Section of Public Contract Law, I keep abreast of current developments in the field.

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[15] This does not include protests resolved on motion, record submissions, or via settlement. Because the Board employed, by statute, a de novo standard of review in resolving bid protest cases, it conducted numerous trials or merits hearings.

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

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

   Ricardo Homero Hinojosa

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

   Commissioner, United States Sentencing Commission

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

   Bentsen Tower, Suite 1028
   1701 West Business Highway 83
   McAllen, TX 78501
   Telephone: (956) 618-8100

4. **Birthplace**: State date and place of birth.

   January 24, 1950
   Rio Grande City, Texas

5. **Marital Status**: (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es). Please also indicate the number of dependent children.

   Single.

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

   Law School: Harvard University
   September 1972 - June 1975
   J.D. Degree, June 1975

College: University of Texas at Austin
June 1968 - May 1972
B.A. with honors in Government, May 1972

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

U.S. District Judge, Southern District of Texas, 1701 West Business Highway 83, McAllen, Texas (1983-Present)

Adjunct Professor, The University of Texas Law School, 727 East 26th Street, Austin, Texas (Spring and Fall Semesters, 2001, Fall Semester 2002)

Partner, Ewers, Toothaker, Ewers, Abbott, Talbot, Hamilton & Jarvis law partnership, 1111 Nolana, McAllen, Texas (law firm no longer in existence), Partner (2/82-5/83), Special Partner (2/79-1/82), Associate (8/76-1/79)

Briefing Attorney for the Texas Supreme Court assigned to Judge Thomas M. Reavley, 201 West 14th Street, Austin, Texas (8/75-7/76)

Summer Clerk, Graves, Dougherty, Hearon, Moody & Garwood, 515 Congress Avenue, Suite 2300, Austin, Texas (6/74-8/74)

Director, Starr County Texas Summer Youth Program, Starr County Courthouse, 401 Britton Avenue, Rio Grande City, Texas (6/73-8/73)

Republican Party of Texas, Executive Director, Texas Young Republican Federation, 1011 Congress Avenue (Littlefield Building), Austin, Texas (9/70-8/72) - job while in college but also included the summer after I graduated from college before I went to law school

Judicial Liaison Member, Texas State Bar Board of Directors, Austin, Texas (2000-2001)

Member, Executive Council, The University of Texas Ex-Students' Association, Austin, Texas (1987-Present)

President-Elect (1995-1996), President (1996-1997) and Chairman (1997-1998), The University of Texas Ex-Students' Association, Austin, Texas

Steering Board Member, Leadership McAllen, McAllen, Texas (1988-1991)

Member, Harvard Law School Association Council, Cambridge, Massachusetts (1986-1991)

Member, Board of Directors, Pan American University Bronc Athletic Club, Edinburg, Texas (1983) - no longer in existence

Member, Board of Directors, Texas Women's Employment and Education, Inc. (1982-1983) - no longer in existence

Member, Board of Directors, McAllen 100 Club, McAllen, Texas (1982-1983) - no longer in existence

Member, Interim Board of Directors, Lone Star National Bank, Pharr, Texas, (8/82-1/83)

Member, Board of Directors, Saida II Condominiums Homeowners' Association, South Padre Island, Texas (March 1982-April 1983)

Member, Board of Directors, Rio Grande Valley Council for the Arts (1981-1983)

Member, Board of Directors, Water Walk Homeowners' Association, McAllen, Texas (1981-1982)

Member, Board of Directors, Texas Lyceum, Austin, Texas (1980)

Member and Chairman, Pan American University Board of Regents, Edinburg, Texas (1979-1983)

Member (representing Hidalgo County Bar Association), Board of Directors, Texas Rural Legal Aid, Inc., Weslaco, Texas (1979-1980)

Member, Board of Directors, South Texas Symphony Association, Edinburg, Texas (1979-1981)

Member, Board of Directors, St. Andrews Publishing Company, Inc. (1978-1980) - no longer in existence

Member, Board of Directors, Common Sense, Inc. (1976) - no longer in existence

Member, Board of Directors, Harvard Law Record, Cambridge, Massachusetts (1973-1975), Editor in Chief (Fall, 1974)

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

Not applicable

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

Phi Beta Kappa

Pi Sigma Alpha (Honorary for Government Majors)

Graduated B.A. with honors, University of Texas at Austin, 1972

Graduated Valedictorian, Rio Grande City High School in 1968 (Class Size 165)

Selected as a "Notable Valley Hispanic" by the University of Texas-Pan American Library in 2002

Recipient of the 2001 "Distinguished Alumnus Award" from the University of Texas at Austin Ex-Students' Association

Recipient of the 1997 "Top Hand Award" from the University of Texas at Austin Ex-Students' Association

Selected in 1987 as one of "America's Top 40 Public Servants - 40 years of Age and Younger" by Management magazine

Recipient of the 1986 Pan American University "Distinguished Service Award" from the Pan American University Alumni Association

Selected as one of the 100 influential Hispanics in the country by Hispanic Business magazine in 1984, 1985 and 1991

Recipient of the 1984 "Outstanding Young Texas Ex Award" from the Ex-Students' Association of the University of Texas at Austin

Recipient of the 1984 "Five Outstanding Young Texans" award from the Texas Jaycees

Selected by the Hidalgo County Bar Association as the "Outstanding Young Lawyer" of Hidalgo County in 1983

Selected by Texas Business magazine as one of the "Rising Stars in Texas" in 1980

10. **Bar Associations**: List all bar associations or legal or judicial-related committees, selection panels 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.

State Bar of Texas

American Bar Association

Hidalgo County Bar Association

Cameron County Bar Association

Member, The Committee on Defender Services of the Judicial Conference of the United States (1996-2002)

Magistrate Judges Committee of the Judicial Council of the Fifth Circuit (1999-Present)

Member, Judge Advisory Group for the Federal Judicial Center's District Court Case Weighing Study (2000)

Judicial Liaison Member, Texas State Bar Board of Directors (2000-2001)

American Law Institute, Member, Advisers Group to the Model Penal Code: Sentencing Project (2002-Present)

11. **Bar and Court Admission**: List each state and court in which you have been admitted to practice, including dates of admission and any lapses in membership. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

All Texas State Courts October 21, 1975

United States District Court August 18, 1977
Southern District of Texas

12. **Memberships**: List all memberships and offices currently and formerly held in professional, business fraternal, scholarly, civic, charitable, or other organizations since graduation from college, other than those listed in response to Questions 10 or 11. Please indicate whether any of these organizations formerly discriminated or currently discriminates on the basis of race, sex, or religion-either through formal membership requirements or the practical implementation of membership policies. If so, describe any action you have taken to change these policies and practices.

Member, Executive Council, The University of Texas Ex-Students' Association (1987-Present)

Member, Commission of 125, The University of Texas at Austin (2002-Present)

Member, Tower Club, McAllen, Texas (1980-Present)

Member, The Club at Cimarron, Mission, Texas (1989-Present)

Member, Cornerstone Health Club (2000-Present)

President-Elect (1995-1996), President (1996-1997) and Chairman (1997-1998), The University of Texas Ex-Students' Association

Member, McAllen Athletic Club (sometime between 1988 and 1997)

Steering Board Member, Leadership McAllen (1988-1991)

Sunset Health Club, South Padre Island, Texas (sometime between 1983-1988)

Member, Harvard Law School Association Council (1986-1991)

Member, Harvard University Board of Overseers Committee to Visit the Harvard Law School (1979-1985)

Member, Board of Directors, Pan American University Bronc Athletic Club (1983)

Member, Board of Directors, Texas Women's Employment and Education, Inc. (1982-1983)

Member, Board of Directors, McAllen 100 Club (1982-1983)

Member, Board of Directors, Saida II Condominiums Homeowners' Association (March 1982-April 1983)

Member, Board of Directors, Rio Grande Valley Council for the Arts (1981-1983)

Member, Board of Directors, Water Walk Homeowners' Association (1981-1982)

Member, Board of Directors, Texas Lyceum (1980)

Member, Board of Directors, South Texas Symphony Association (1979-1981)

Member, Advisory Board of McAllen Office of National Economic Development Association (1979-1980)

Member (representing Hidalgo County Bar Association), Board of Directors, Texas Rural Legal Aid, Inc. (1979-1980)

Member, Board of Directors, St. Andrews Publishing Company, Inc. (1978-1980)

Member, McAllen Chamber of Commerce (sometime between 1977-1983)

Member, McAllen Jaycees (approximately 1977-1983)

Member, Board of Directors, Common Sense, Inc. (1976)

As far as I am aware, none of these organizations, other than the McAllen Jaycees, formerly discriminated or presently discriminate on the basis of race, sex or religion-either through formal membership requirements or the practical implementation of membership policies. At the time I was a member, the McAllen Jaycees was an organization whose membership consisted of young men but now has both male and female members.

13. **Published Writings**: List the titles, publishers, and dates of books, articles, reports, other material you have written or edited, including material published on the Internet. Please supply four (4) copies of all published material to

the Committee, unless the Committee has advised you that a copy has been obtained from another source. Also, please supply four (4) copies of all speeches delivered by you, in written or videotaped form over the past ten years, including the date and place where they were delivered, and readily available press reports about the speech.

Since completing my higher education (1975), I do not have any published material to list other than the Attachments A-1 and A-2 which are entitled "An Introduction to Removals" and were passed out at a seminar of the Hidalgo County Young Lawyers Association on March 13, 1998 and the Hidalgo County Bar Association on March 21, 2002. With regards to any published material prior to completing my higher education, the readily accessible material I have are the articles published in the Harvard Law Record (Harvard Law School student newspaper) which I wrote as a reporter. I have also attached the unsigned editorials published the semester (Fall 1974) when I was editor in chief, as I either wrote them or edited them. (See Attachment A-3.)

In the last ten years, I have given numerous speeches to civic, educational and professional groups, as well as spoken at citizenship naturalization ceremonies, at swearing-ins of individuals to office or membership in the State Bar, and delivered eulogies at funerals for family and friends. The topics of the speeches have varied and some have included discussions on the federal court system, statements on leadership and remarks about the individual(s) being sworn in. However, other than the below listed speeches, I have spoken from handwritten notes to myself, written on note cards, which do not reflect the full content of the speeches.

I do have in my possession the full text and/or video of the following speeches:

(a) The brief speech delivered at the close of the University of Texas at Austin Spring Commencement as President of the University of Texas Ex-Students' Association, May 15, 1997, in Austin, Texas (Attachment A-4)

(b) The speech delivered as a recipient of the University of Texas Ex-Students' Association, Distinguished Alumnus Award, October 19, 2001, in Austin, Texas (Attachment A-5)

14. **Congressional Testimony**: List any occasion when you have testified before a committee or subcommittee of the Congress, including the name of the committee or subcommittee, the date of the testimony and a brief description of the substance of the testimony. In addition, please supply four (4) copies of any written statement submitted as testimony and the transcript of the testimony, if in your possession.

United States Senate Judiciary Committee (April 27, 1983) - appeared at confirmation hearing on nomination as United States District Judge, Southern District of Texas. (See Attachment B for the transcript.)

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

Good.
January 18, 2003

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

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

(1) United States of America v. Rudolph Compton Walcott, Feleno Archibald-Barnard, and Eladio Alvarez-Meña, Crim. A. No. B-84-170 (S.D.Tex. August 14, 1984), Memorandum and Order not reported, aff'd, U.S. v. Alvarez-Meña, 765 F.2d 1259 (5th Cir.1985) - Defendants, non-resident aliens, challenged exercise of criminal jurisdiction where the Coast Guard stopped and boarded a stateless vessel in international waters, in which they were a crew, and the vessel contained marijuana. Defendants further challenged Coast Guard's search of the vessel. The District Court found that Defendants were subject to criminal jurisdiction in the United States and that the search of the vessel did not violate the Fourth Amendment. (Attachment C-1)

(2) United States of America v. John A. Garcia, Nos. 84-1164, 84-1173, reported in U.S. v. Garcia, 762 F.2d 1222 (5th Cir.) cert. denied, 474 U.S. 907, 106 S.Ct. 238, 88 L.Ed.2d 239 (1985) - Defendant-Appellant appealed his conviction on two counts of knowingly making and subscribing false tax returns in violation of 26 U.S.C. § 7206(1). In an

opinion written by Ricardo H. Hinojosa, sitting by designation on the Fifth Circuit Court of Appeals, the appellate court affirmed the judgment of the district court. In doing so, the appellate court found no merit in Defendant-Appellant's assertions: (1) that the district court erred in its instruction to the jury on "willfulness"; (2) that there was insufficient evidence to support the verdict; and, (3) that Defendant-Appellant was denied effective assistance of counsel.

(3) Thanh Tran v. Manitowoc Engineering Company, Manitowoc Coastal Sales and Service, Co., Inc., and Taulli Construction Company, Inc., v. Becker & Associates, Inc., No. 83-3775, reported in Tran v. Manitowoc Engineering Co., 767 F.2d 223 (5th Cir. 1985) - The Third-Party Defendant-Appellant sought review of the district court judgment imposing liability for indemnity and contribution. The original action was brought by a stevedore injured during the loading of pilings by a crane onto a barge. The stevedore asserted claims against an entity which conducted repairs to the crane and an entity which leased the crane to the stevedore's employer. Those entities, in turn sought contribution and contractual indemnity from the employer. The district court entered judgment awarding relief to the stevedore, but awarding contribution and indemnity to the entities which repaired and leased the crane. In an opinion written by Ricardo H. Hinojosa, sitting by designation on the Fifth Circuit Court of Appeals, the appellate court found that, while the Longshoremen's and Harbor Workers' Compensation Act did not bar joint tort-feasor contribution claims, the action needed to be remanded for specific findings as to the percentage of negligence attributable to the employer. The finding that the employer indemnified the leasing company was affirmed.

(4) Carolyn King Palermo v. Dewayne Rorex, Jack Chivatero, and Charles Hoyle, No. 85-3127, reported in Palermo v. Rorex, 806 F.2d 1266 (5th Cir.) cert. denied 484 U.S. 819, 108 S.Ct. 77, 98 L.Ed.2d 40 (1987) - The Plaintiff-Appellant, widow of an IRS agent, appealed the district court's denial of her motion for remand and dismissal of her claims. She had brought a tort action in the state court, but asserted Fifth and Eighth Amendment claims in a separate federal court action. The Defendants-Appellees, IRS

supervisors, removed the state court action, which was then consolidated with the federal court action. The Plaintiff-Appellant claimed that the actions of Defendant-Appellees resulted in her husband's suicide. The district court found that the state court action was properly removed under 28 U.S.C. § 1442, providing for removal by federal officers, when acting "under color of federal office." The district court dismissed the constitutional claims under the grounds that the Plaintiff-Appellant failed to state any due process or cruel and unusual punishment claims. The district court dismissed the state law tort claim on the grounds that the Defendant-Appellees were shielded by absolute immunity. The appellate court, in an opinion written by Ricardo H. Hinojosa, sitting by designation on the Fifth Circuit Court of Appeals, affirmed the district court's actions.

(5) Eddie Lee Graham v. Milky Way Barge, Inc and Chevron U.S.A., Inc. v. Land and Offshore Services, Inc., *et al.*, v. American Fidelity Ins. Co. and Southern American Insurance Co., No. 84-3695, reported in Graham v. Milky Way Barge, Inc., 824 F.2d 376 (5th Cir.1987) - This appeal of several actions consolidated for trial arose from a capsizing of a barge conducting work on an offshore platform. Upon a rehearing of the appeal, the appellate court addressed various issues concerning insurance coverage, admiralty law, negligence, and the propriety of a prejudgment interest award. In an opinion written by Ricardo H. Hinojosa, sitting by designation on the Fifth Circuit Court of Appeals, the appellate court determined that the barge was operating outside of limits imposed by insurance policies and that further proceedings were required. The appellate court affirmed in part, reversed in part, and remanded the action.

(6) United States of America v. Jose Gerardo Muñoz-Fabela, Crim. A. No. B-87-349-01 (S.D.Tex. January 12, 1988), Memorandum and Order not reported, aff'd U.S. v. Muñoz-Fabela, 861 F.2d 1278 (5th Cir. 1988) (Table, No. 88-2092), see also U.S. v. Muñoz-Fabela, 896 F.2d 908 (5th Cir.) cert. denied, 498 U.S. 824, 111 S.Ct. 76, 112 L.Ed.2d 49 (1990) - The Defendant was charged with knowingly and intentionally using a firearm during the commission of a drug trafficking crime. In a

motion to dismiss, Defendant alleged the Government failed to allege an offense or, alternatively, that the offense was barred on double jeopardy grounds. The District Court rejected Defendant's assertions that a conviction for possession with intent to distribute cocaine could not support the firearm charge or that the drug conviction barred a subsequent firearm charge. (Attachment C-2)

(7) Jose Rudolfo Alvarado Guevara, et al. v. Immigration and Naturalization Service, et al., Civ. A. No. B-86-106 (S.D.Tex. March 30, 1989), Memorandum and Order not reported, aff'd, Alvarado Guevara v. I.N.S., 902 F.2d 394 (5th Cir.1990) (*per curiam* opinion adopting the District Court's Memorandum) - Plaintiffs, alien detained by the INS, were employed in a detention center in various maintenance and other service positions at a rate below that mandated by the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.* The District Court dismissed the complaint, noting that the Plaintiffs were not covered by the FLSA, but rather by another statute, 8 U.S.C. § 1555(d), setting the exact pay rate available to detainees employed by the INS, which was in fact being paid by the INS. (Attachment C-3)

(8) Catholic Diocese of Brownsville, Texas v. A.G. Edwards & Sons, Inc., and Dennis J. Frank, Civ. A. No. B-87-051 (S.D.Tex. December 19, 1989), Memorandum and Order not reported, aff'd, Catholic Diocese of Brownsville, Tex. v. A.G. Edwards & Sons, Inc., 919 F.2d 1054 (5th Cir. 1990) - Defendants sought to compel arbitration of action arising from Plaintiff's claims of fraud, civil RICO violations, and securities violations related to various accounts and contracts with Defendants. The District Court found that, while the parties' contracts mandated arbitration of certain claims, the federal securities violations which survived dismissal were not subject to the arbitration clauses of the contracts. (Attachment C-4)

(9) Leonel Torres Herrera v. James A. Collins, Director, Texas Department of Criminal Justice, Institutional Division. Several habeas petitions were filed by Herrera, who was tried and convicted by a state court jury for capital murder and sentenced to death.

(a) Leonel Torres Herrera v. O.L. McCotter, Director, Texas Department of Corrections, Civ. A. No. B-85-343 (S.D.Tex. October 23, 1989), Second Amended Memorandum and Order not reported, aff'd, Herrera v. Collins, 904 F.2d 944 (5th Cir.), cert. denied 498 U.S. 925, 111 S.Ct. 307, 112 L.Ed.2d 260 (1990) - In this, his first federal habeas petition, Petitioner asserted claims surrounding photographic and identification evidence admitted at trial, statements made during the sentencing phase, ineffective assistance of counsel, and improper burden of proof applied by the state appellate court. The District Court found that the Petitioner failed to establish any grounds for relief. (Attachment C-5)

(b) Leonel Torres Herrera v. James A. Collins, Director, Texas Department of Criminal Justice, Institutional Division, Civ. A. No. M-92-030 (S.D. Tex. February 18, 1992), Memorandum and Order not reported, rev'g Herrera v. Collins, 954 F.2d 1029 (5th Cir. 1992), aff'd, Herrera v. Collins, 506 U.S. 390, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993) - Defendant filed his second federal habeas petition asserting several claims, including his actual innocence, through multiple affidavits. Although the District Court dismissed most of the Petitioner's claims for abuse of writ, the District Court granted Petitioner's request for a stay of execution in order to allow a state court to hear the free-standing actual innocence claim and, after initially dismissing a Brady claim but upon reconsideration, the District Court granted an evidentiary hearing on that claim. The Fifth Circuit, however, vacated the stay of execution stating the Brady claim, standing alone, did not state a claim upon which habeas relief could be granted. The Supreme Court affirmed the Fifth Circuit, but a majority of the justices indicated that a showing of actual innocence standing alone could entitle a petitioner to constitutional relief in a federal habeas proceeding, however, a majority of the Justices felt the Petitioner had not produced the necessary evidence to show he was actually innocent. (Attachment C-6)

(c) Leonel Torres Herrera v. James A. Collins, Director, Texas Department of Criminal Justice, Institutional Division, Civ. A. No. M-92-031 (S.D. Tex. May 6, 1993), Memorandum and Order not reported - In his third federal habeas petition, Petitioner sought review of the same actual innocence claim as presented and denied in Herrera v. Collins, 506 U.S. 390, 113 S.Ct. 853, 122

L.Ed.2d 203 (1993). For the reasons stated by the Supreme Court, the District Court dismissed this action. (Attachment C-7)

(d) Leonel Torres Herrera v. James A. Collins, Director, Texas Department of Criminal Justice, Institutional Division, Civ. A. No. M-93-106 (S.D. Tex. May 12, 1993), Memorandum and Order not reported - In his fourth federal habeas petition, Petitioner asserted a free-standing claim of actual innocence, with evidence almost identical to that presented in M-92-030 and M-92-031. For the reasons stated in Herrera v. Collins, 506 U.S. 390, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993), the District Court dismissed this action. (Attachment C-8)

(10) Jeff Kapche v. City of San Antonio, No. 00-50588, reported in Kapche v. City of San Antonio, 304 F.3d 493 (5th Cir. 2002) - This was the second appeal of an action seeking relief under the Americans with Disabilities Act, 42 U. S.C. §§ 12101-213, (ADA). Plaintiff-Appellant, with insulin-treated diabetes mellitus, was an applicant to the Defendant-Appellee's police department. The Defendant-Appellee maintained that any applicant with insulin-dependent diabetes was disqualified as a candidate for police officer. Plaintiff-Appellant brought suit under the ADA. The District Court granted summary judgment on behalf of Defendant-Appellee. In the first appeal, the Appellate Court instructed the District Court to determine whether the facts of the case precluded application of a *per se* rule. Upon remand, the District Court again granted summary judgment for Defendant Appellee. In this second appeal, a *per curiam* decision authored by Ricardo H. Hinojosa, sitting by designation on the Fifth Circuit Court of Appeals, the appellate court again vacated the judgment, holding that recent Supreme Court cases, confirming that the ADA required individualized assessments, rendered a temporally limited *per se* rule inapplicable.

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

As a United States District Judge for almost twenty years, I have handled thousands of cases and the following represents the list of cases I was able to

find, after a diligent search of the records was made, which need to be listed in response to this question.

(1) United States of America v. Roberto Garza Colunga, No. 85-2378, reported in U.S. v. Colunga, 786 F.2d 655 (5th Cir. 1986), aff'd after remand, 812 F.2d 196 (5th Cir. 1987), cert. denied, 484 U.S. 857 (1987) - Defendant pled guilty to a conspiracy to manufacture PCP and a conspiracy to manufacture PCC, the immediate chemical precursor of PCP. The District Court sentenced the Defendant to a five year imprisonment term and a $10,000.00 fine on both counts, and ordered the sentences to run consecutively. The Fifth Circuit held that under the Double Jeopardy Clause, the Defendant could only commit one conspiracy under the law and facts. The Fifth Circuit vacated both sentences and remanded the case with instructions that one count, at the election of the Government, was to be vacated and dismissed, while on the remaining count, the Defendant would be given the opportunity to elect to withdraw his plea, or in the alternative, the plea conviction would stand and be deemed affirmed and Defendant would be resentenced on the remaining conspiracy count consistent with the opinion.

(2) United States of America v. Gustavo Olivares, et al., No. 85-2292, reported in U.S. v. Olivares, 786 F.2d 659 (5th Cir. 1986). Two Defendants were tried and convicted by a jury on four counts for conspiracy to manufacture PCP, under the same set of facts as United States v. Colunga, No. 85-2378 - The Fifth Circuit held that the multiple conspiracy convictions violated the Double Jeopardy Clause. The Fifth Circuit vacated the sentences on all the conspiracy counts and remanded with instructions that the convictions on all but one of the counts be reversed and dismissed, and the conviction on the remaining count be affirmed, and both Defendants be resentenced on the remaining conspiracy conviction.

(3) United States of America v. Humberto Gonzalez Acosta, No. 85-442 (5th Cir. 1986), not reported - Defendant was tried and convicted by a jury for transporting securities of the value of $5,000.00 or more in foreign commerce knowing the securities were taken by fraud in violation of 18 U.S.C. §§ 2314, 2. The Fifth Circuit held that the evidence was insufficient to prove that the Defendant

committed the fraud charged in the indictment and vacated the Defendant's conviction. (Attachment D-1)

(4) In Re: Margarito Reyes, et al., No. 86-1773, Petition for Writ of Mandamus, reported in In re Reyes, 814 F.2d 168 (5th Cir. 1987), cert. denied, 487 U.S. 1235 (1988) - Petitioners brought a mandamus to direct the District Court to withdraw a discovery order, which in part directed Petitioners to respond to questions concerning whether Petitioners were citizens of the United States of America. The Fifth Circuit directed the District Court to withdraw the citizenship portion of the discovery order because it was not relevant to the case.

(5) United States of America v. Mario Antonio Torres-Flores, No. 86-2940, reported in U.S. v. Torres-Flores, 827 F.2d 1031 (5th Cir. 1987) - Defendant was tried and convicted by a jury for assaulting an agent of the United States Border Patrol in violation of 18 U.S.C. § 111. The Fifth Circuit reversed and remanded the case for a new trial for the stated reason that photographs of the Defendant were introduced in an impermissibly suggestive manner.

(6) United States of America v. Carlo Palella, No. 87-2247, reported in U.S. v. Palella, 846 F.2d 977 (5th Cir. 1988), cert. denied, 488 U.S. 863 (1988) - Defendant was tried and convicted by a jury on both conspiracy and substantive counts for trafficking heroin. The evidence established that the quantity involved 977 grams of heroin. The sentencing order contained statutory citations and references to convictions of "approximately 1,000 grams" of heroin. The Fifth Circuit affirmed the convictions, vacated the sentences, and remanded the case for resentencing because the quantity involved in the convictions did not reach the threshold of 1,000 grams as stated in part of the sentencing order.

(7) United States of America v. Carlos Humberto Hernandez-Beltran, No. 88-2493, reported in U.S. v. Hernandez-Beltran, 867 F.2d 224 (5th Cir. 1989), cert. denied, 490 U.S. 1094 (1989) - Defendant was tried and convicted by a jury on three counts of possession of heroin with the intent to distribute. The Fifth Circuit, however,

reversed the conviction of the Defendant on one of the counts holding that there was insufficient evidence to convict the Defendant on that count and affirmed the conviction on the remaining two counts.

(8) United States of America v. Jose Oscar Cantu, No. 88-2530, reported in U.S. v. Cantu, 876 F.2d 1134 (5th Cir. 1989) - Defendant was tried and convicted by a jury of conspiracy to import and conspiracy to distribute in excess of 100 grams of heroin in violation of 21 U.S.C. §§ 963 & 846, two counts of importing heroin in violation of 21 U.S.C. § 952(a), and two counts of possession of heroin with intent to distribute in violation of 21 U.S.C. § 841(a)(1). The Fifth Circuit reversed the convictions and remanded the case for a new trial because the District Court excluded proffered statements by the Defendant on hearsay grounds, and the prosecutor made impermissable statements in closing arguments.

(9) United States of America v. Lorenzo Pulido, No. 88-2974, reported in U.S. v. Pulido, 879 F.2d 1255 (5th Cir. 1989) - Defendant was tried and convicted by a jury on one count of conspiracy to possess and one count of possession with intent to distribute marijuana. A previous trial of the Defendant on the same counts ended in a mistrial after the Government attempted to introduce unrelated marijuana samples. After the mistrial, defense counsel requested a free copy of the transcript of the mistrial. The District Court returned Defendant's request unexecuted and denied Defendant's motion for reconsideration of the denial of the transcript request. The Fifth Circuit reversed the convictions holding that the Defendant had a right to a free transcript of the prior proceeding.

(10) United States of America v. Arnoldo Villaseñor and Fidel Villaseñor, No. 88-2838, reported in U.S. v. Villaseñor, 894 F.2d 1422 (5th Cir. 1990) - Defendants were tried and convicted by a jury for conspiracy to possess marijuana with intent to distribute in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B), & 846, and Defendant Arnoldo Villaseñor was also tried and convicted by the jury for possession of marijuana with intent to distribute in violation of 21 U.S.C. §§ 841(a)(1) & 841(b)(1)(B), and 18 U.S.C. § 2. The Fifth Circuit, however, reversed the conspiracy

convictions holding that there was insufficient evidence to sustain either Defendants' conspiracy convictions and affirmed the possession conviction as to Defendant Arnoldo Villaseñor.

(11) Jerry Joe Bird v. James A. Collins, Texas Department of Criminal Justice, No. 90-2378, reported in Bird v. Collins, 924 F.2d 67 (5th Cir. 1991), cert. denied, 501 U.S. 1213 (1991) - Defendant Bird was tried and convicted for capital murder and sentenced to death by a Texas state jury. Bird then filed a petition for writ of habeas corpus with the District Court attacking his state court conviction. The District Court denied the petition, but in the course of doing so, raised and rejected, *sua sponte*, Penry claims never asserted by Bird. The Fifth Circuit vacated the District Court's ruling regarding any Penry issues and affirmed the denial of habeas corpus. (See Attachment D-2 for District Court opinion.)

(12) Gloria A. Storey v. Shearson-American Express, et al., No. 90-2285, reported in Storey v. Shearson-American Exp., 928 F.2d 159 (5th Cir. 1991) - Plaintiff-Appellee Gloria Storey sued Defendants-Appellants under several causes of action centering around commodities trading fraud. Appellant Shearson sought to enforce the submission of the controversy to arbitration. The District Court declined to enforce the arbitration clause and, instead, ruled that the 1983 amendments to the Commodities Futures Trading Commission required certain procedures to ensure the voluntariness of arbitration agreements and that the procedures were not met under the facts of the case. The Fifth Circuit held that the amendments did not apply retroactively, reversed and remanded the case.

(13) United States of America v. Maximiliano Sanchez-Escareno, Adolfo Ayala Sanchez and David Garcia Lopez, No. 90-2577 Consolidated with Nos. 90-2613 & 90-2614, reported in U.S. v. Sanchez-Escareno, 950 F.2d 193 (5th Cir. 1991), cert. denied, 506 U.S. 841 (1992) - The District Court dismissed criminal charges alleging possession of marijuana with intent to distribute and importation of marijuana against the Defendants on the grounds of Double Jeopardy. Prior to the criminal indictment charging the Defendants, the Defendants had

already executed promissory notes on civil fines the Government assessed based on the same conduct at issue in the criminal indictment. The Fifth Circuit held that the Double Jeopardy clause was not violated and reversed the judgments of the District Court dismissing the indictments. (See Attachment D-3 for District Court opinion.)

(14) Leonel Torres Herrera v. James A. Collins, Texas Department of Criminal Justice, No. 92-2114, reported in Herrera v. Collins, 954 F.2d 1029 (5th Cir. 1992), judgment aff'd, 506 U.S. 390 (1993) - Defendant was tried and convicted by a state court jury for capital murder and sentenced to death in 1982. In 1992, Defendant filed a second habeas petition asserting his actual innocence through multiple affidavits as well as other claims. Although the District Court dismissed most of the Petitioner's claims for abuse of writ, the District Court granted Petitioner's request for a stay of execution in order to allow a state court to hear the actual innocence claim and, after initially dismissing Petitioner's Brady claim but upon reconsideration, the District Court granted an evidentiary hearing on Petitioner's Brady claim. The Fifth Circuit, however, vacated the stay of execution because the Brady claim, standing alone, did not state a claim upon which habeas relief could be granted. The Supreme Court affirmed the Fifth Circuit, but a majority of the justices stated that a showing of actual innocence standing alone would entitle a petitioner relief in a federal habeas proceeding. (See previous Attachment C-6 for District Court opinion.)

(15) United States of America v. Maria V. Garza-Bocanegra, No. 91-2675 (5th Cir. 1992), not reported - Defendant was tried and convicted by a jury for possession of marijuana with intent to distribute and conspiracy to possess marijuana with intent to distribute. The Fifth Circuit reversed, vacated and remanded with instructions to enter a judgment of acquittal because there was insufficient evidence of Defendant's possession of the marijuana and of her participation in the conspiracy to support the convictions. (Attachment D-4)

(16) United States of America v. Pedro Villarreal Muñiz, No. 92-7226 (5th Cir. 1992), not reported - Defendant pled guilty to conspiracy to possess with intent to distribute more that 100 kilograms

of marijuana in violation of 21 U.S.C. § 846. Defendant filed a motion pursuant to Fed.R.Crim.P. 36 asserting that there was a clerical mistake in the judgment. The District Court characterized the motion as a Fed.R.Crim.P. 35(b) motion to reduce sentence and dismissed the motion. The Fifth Circuit held that the District Court should have treated the motion as a habeas petition, vacated the District Court's dismissal of the motion, and remanded for further proceedings. (Attachment D-5)

(17) United States of America v. John William Ray, Sr., No. 94-60160 (5th Cir. 1995), not reported - Defendant pled guilty to one count of conspiracy to possess with intent to distribute methamphetamine. The Defendant's sentence was enhanced pursuant to U.S.S.G. § 4B1.1 (the career-offender provision). An intervening Fifth Circuit case held that a conspiracy conviction was not a "controlled substance offense" under section 4B1.1 and thus it could not trigger the career-offender enhancement. The Fifth Circuit vacated the Defendant's sentence and remanded for resentencing. (Attachment D-6)

(18) Heralio Flores & Marco Antonio Flores v. Citizens State Bank of Roma, et al., No. 96-41088 (5th Cir. 1997), not reported - Plaintiffs-Appellants filed a civil rights and RICO complaint against Defendants-Appellees. The District Court granted summary judgment to Defendants and entered a take-nothing judgment. The Fifth Circuit vacated the District Court's take-nothing judgment and remanded with instructions that the District Court dismiss the action for lack of subject matter jurisdiction. (Attachment D-7)

(19) Oscar Guerra, et al. v. Celanese Corp., et al., Nos. 95-40874, 95-40889, 95-40910, 96-40333, 96-40451, 97-40525, 97-40527 (5th Cir. 1998), not reported - Plaintiffs-Appellants filed suit against Defendants-Appellees for employment discrimination under Title VII. Following settlement of the dispute, Plaintiffs-Appellants sought an award of attorney's fees pursuant to 42 U.S.C. § 1988. The District Court denied the motion for attorney's fees. The Fifth Circuit affirmed in part, reversed in part and remanded in part holding that Plaintiff Guerra was entitled to attorney's fees because he was a "prevailing party" under 42 U.S.C. § 1988, and that Plaintiff

Mireles was entitled to attorney's fees because Defendant Celanese waived the argument that it was not a party to the suit and Mireles was a "prevailing party." (Attachment D-8)

(20) United States of America v. Edelmiro Delagarza-Villarreal, No. 97-40172, reported in U.S. v. Delagarza-Villarreal, 141 F.3d 133 (5th Cir. 1997) - Defendant was tried and convicted by a jury for conspiracy to possess with intent to distribute marijuana and possession with intent to distribute marijuana. The Fifth Circuit affirmed the conspiracy conviction and reversed the conviction for possession because of insufficient evidence that the Defendant aided and abetted any co-conspirator's possession of marijuana.

(21) Larry Skinner v. Weslaco Independent School District, et al., No. 99-40541 (5th Cir. 2000), not reported - Plaintiff-Appellee Skinner filed an employment discrimination suit against the Weslaco Independent School District. After his first attorney withdrew, Skinner retained and entered into a formal contingency fee arrangement with the law firm of Royston, Rayzor, Vickery & Williams, L.L.P., which arrangement promised the Royston law firm 40% of the total recovery from the proceeds of any settlement or judgment. A little more than a month later, Skinner terminated the Royston law firm. The case eventually settled and the Royston law firm filed a motion to intervene as of right to recover attorney's fees for legal work performed on Skinner's behalf. The Fifth Circuit reversed the District Court's ruling which denied the intervention for failing to intervene in a timely manner and remanded for further proceedings. (Attachment D-9)

(22) United States of America v. Ignacio Lopez Villareal, Israel Alvarez, Evelyn Jones, Billy Wayne Sessions and Baltazar Cantu, No. 97-40346 (5th Cir. 2001), not reported - Defendants were tried and convicted by a jury of numerous crimes ranging from conspiracy to possess with intent to distribute to money laundering. The Fifth Circuit affirmed the convictions in every case but as to one of the counts of convictions for one of the Defendants. The Fifth Circuit held that the Government failed to establish beyond a reasonable

doubt that Defendant Baltazar Cantu possessed with the intent to distribute cocaine. (Attachment D-10)

(23) United States of America v. Guadalupe Gomez-Cortez, No. 01-40512 (5th Cir. 2002), not reported - Defendant pled guilty to smuggling illegal aliens into the United States in violation of 8 U.S.C. § 1324(a) and appealed her sentence due to the addition of two levels to her base offense level for "recklessly creating a substantial risk of death or serious bodily injury to another person" pursuant to U.S.S.G. § 2L1.1(b)(5), and the imposition of eight more levels for a death that occurred during the course of the offense. The Fifth Circuit reversed the addition of the two levels pursuant to § 2L1.1(b)(5) but affirmed the rest of the guideline applications and remanded for resentencing. (Attachment D-11)

(24) In Re: Banco del Atlantico, No. 01-40964, Petition for Writ of Mandamus, not reported - Petitioners filed a petition for writ of mandamus to direct the District Court to withdraw an order which transferred their case back to Chief Judge George P. Kazen, who recused himself because an opposing Party filed a motion to add local counsel from a law firm in which Judge Kazen's son was an associate. Before there was a ruling on the motion to add local counsel, said motion was withdrawn by the moving Party once the conflict was discovered. The District Court, upon motion from one of the Parties, ordered the case transferred back to Judge Kazen. The Fifth Circuit, however, granted the petition for writ of mandamus and ordered the District Court to vacate its transfer order, to reinstate Judge Kazen's recusal, and to retain the case of Banco del Atlantico, S.A. v. Alfred Max Strauder et al., Docket No. L-96-139, for further proceedings. (Attachment D-12)

(25) United States of America v. Jose Prisciliano Gracia-Cantu, No. 01-41029 (5th Cir. 2002), reported in U.S. v. Gracia-Cantu, 302 F.3d 308 (5th Cir. 2002) - Defendant pled guilty to the offense of illegal re-entry after deportation in violation of 8 U.S.C. § 1326(a) & (b) and appealed his sentence because the District Court classified his prior felony conviction for injury to a child as a crime of violence. The Fifth Circuit held that a conviction of Tex. Penal Code § 22.04

(injury to a child) was not a crime of violence, vacated the sentence, and remanded for resentencing.

and

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

As a United States District Judge for almost twenty years, I have dealt with constitutional issues on a regular basis in both criminal and civil cases. The issues raised in those cases have dealt with established constitutional legal principles. However, in one written opinion, the constitutional issues raised in that case did rise to the level of being able to be described as dealing with a significant constitutional issue not previously established. In Leonel Torres Herrera v. James A. Collins, Director, Texas Department of Criminal Justice, Institutional Division, Civ. A. No. M-92-030 (S.D. Tex. February 18, 1992), Memorandum and Order not reported, rev'g Herrera v. Collins, 954 F.2d 1029 (5th Cir. 1992), aff'd, Herrera v. Collins, 506 U.S. 390, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993), referred to in 16(a)(9)(b) above (see previous Attachment C-6), there was a constitutional issue asserted by the Petitioner as one of his claims where he stated he was entitled to make a free-standing constitutional claim of actual innocence and have his habeas petition granted on those grounds. I granted a stay of execution to allow the Petitioner the opportunity to present his actual innocence claim before the state court. The Fifth Circuit Court of Appeals reversed the stay and the United States Supreme Court granted *certiorari* on that issue. After hearing, the Supreme Court upheld the Fifth Circuit Court of Appeals, however, a majority of the justices expressed the view that it would be a constitutional violation to execute an individual who was actually innocent even without an additional showing of another constitutional violation, as had previously been required. In this case, however, a majority of the justices felt that Petitioner Herrera had not produced evidence to show he was actually innocent.

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

17. **Public Office, Political Activities and Affiliations**:

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

Public Office:
Hidalgo County Republican Chairman
Term of Service: June 1978-June 1982
Elected in Republican Primaries, May of 1978 and 1980

Member, Pan American University Board of Regents
Term of Service: September 1979-1983
Appointed by Governor William P. Clements and confirmed by Texas State Senate
Elected Chairman (August 1981-1983) by fellow Board Members

Member, President's Commission on White House Fellows
Term of Service: 1981-1983
Appointed by President Ronald Reagan

Chairman, Texas Commission on the Bicentennial of the United States Constitution
Term of Service: 1987-1988
Appointed by Governor William P. Clements

Member, Governor's Task Force on Undocumented Workers
Term of Service: 1981
Appointed by Governor William P. Clements

Member, Texas Election Code Revision Advisory Committee
Term of Service: 1979-1980
Appointed by Governor William P. Clements

Unsuccessful Candidacy:
Candidate for State Senator, District 27, in Special Elections held in 1981. First special election held on February 10, 1981 and by virtue of coming in first out of seven candidates was in

run-off with Hector Uribe who defeated me in second election on February 24, 1981.

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

Hidalgo County Republican Chairman (June 1978-June 1982)-campaigned for Republican candidates at all levels

Member, State Steering Committee of Attorneys for Governor William P. Clements (1982)-campaigned for re-election of Governor Clements with the legal community

Hidalgo County Campaign Chairman for Bill Meier for Texas Attorney General (1982)-coordinated county campaign efforts

South Texas Co-Chairman of Reagan-Bush Campaign (1980)-coordinated campaign efforts in 22 South Texas counties

Member, State Steering Committee of Attorneys for Reagan-Bush (1980-campaigned with the legal community

Advisory Committee, Texans for John Tower (1978)-provided advice to campaign

Republican Party of Texas (employment during college years), Executive Director, Texas Young Republican Federation (9/70-8/72), Assistant Director, Mexican American Voter Division (1/70-8/70)-campaigned for Republican candidates at all levels

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

(a) Describe chronologically your law practice and legal 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 dates of the period you were a clerk;

Served as a Briefing Attorney for the Texas Supreme Court assigned to Justice Thomas M. Reavley
August 1975 - July 1976

(2) whether you practiced alone and, if so, the addresses and dates;

Not applicable

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

August 1976 - May 1983
Law Firm of Ewers & Toothaker
McAllen, TX 78501
Associate (August 15, 1976-January 31, 1979)
Special Partner (February 1, 1979-January 31, 1982)
Partner (February 1, 1982-May 21, 1983)

May 21, 1983 - Present
United States Courts
United States District Judge,
Southern District of Texas

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

A general practice which included appearances in court, appearances before administrative agencies and office practice. Court appearances were in state courts of record at all levels, as well as municipal and justice courts, and in federal district courts, as well as before magistrates. Appearances before administrative agencies included the Texas Employment Commission, Immigration tribunals, County and City Commissions, City Planning and Zoning Commissions, County and City Boards of Equalization, and Social Security hearings. Office practice included municipal, corporate, partnership, real property, probate and international matters.

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

My clients were representative of most of the sectors of the local community. They included small and large businesses; individuals with

varied problems ranging from family law to real property law matters; the City of Hidalgo, Texas, which representation included prosecuting in their municipal court, personnel matters, drawing up ordinances, defending suits and specialized knowledge of the election code. I was also involved in several federal court criminal appointments, representing indigents, most of whom had been charged with illegal alien status or transportation of same. Because of my fluency in Spanish, I represented a good number of Mexican nationals who were conducting personal or business matters in the United States and worked with American individuals and businesses who had transactions in Mexico.

(c) (1) Describe whether you appeared in court frequently, occasionally, or not at all. If the frequency of your appearances in court varied, describe each such variance, providing dates.

Frequently.

(2) Indicate the percentage of these appearances in:

(A) federal courts;

Approximately 10%.

(B) state courts of record;

Approximately 80%.

(C) other courts.

Approximately 10%.

(3) Indicate the percentage of these appearances in:

(A) civil proceedings;

Approximately 80-85%.

(B) criminal proceedings.

Approximately 15-20%.

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

Fourteen (sole counsel in seven; chief counsel in one; associate counsel in six).

(5) Indicate the percentage of these trials that were decided by a jury.

Approximately 10%.

(d) Describe your practice, if any, before the United States Supreme Court. Please supply four (4) copies of any briefs, amicus or otherwise, and, if applicable, any oral argument transcripts before the U.S. Supreme Court in connection with your practice.

Not applicable

(e) Describe legal services that you have provided to disadvantaged persons or on a *pro bono* basis, and list specific examples of such service and the amount of time devoted to each.

Having grown up in Starr County, Texas, which was then the poorest county in the state and seventeenth poorest county in the nation, I developed an early understanding of the needs of the disadvantaged in the field of legal services, and attempted to conduct my professional career in a manner which showed a concern for those needs. I was involved in numerous civic activities, including serving as one of the Hidalgo County Bar Association representatives to the Texas Rural Legal Aid, Inc. Board. In addition to representing several criminal defendants in federal court by appointment, I also performed *pro bono* work in my practice by doing legal work for some individuals for no fee or at a reduced fee on civil matters.

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

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

(b) a detailed summary of the substance of each case outlining briefly the factual and legal issues involved;

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

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

(i) Carlos Gallegos and wife, Adela Gallegos vs. Alfonso A. Guerra, Ignacio Moreno, and Esperanza Z. Moreno - Suit filed in the 92nd District Court of Hidalgo County, Judge Fortunato Benavides presiding, on behalf of my Plaintiff clients, seeking to enjoin two foreclosure sales. Plaintiffs had purchased two properties from Defendants Moreno executing two promissory notes of approximately $63,000 and $121,000, which notes were secured by Deeds of Trust with Defendant Guerra as Trustee. After receiving notice of foreclosure the Plaintiffs came to see me and after a review of the notes, I prepared and filed a petition alleging usurious notes and faulty acceleration. Temporary Restraining Order was granted on July 6, 1980. After service with the TRO and negotiation with me, Defendants agreed to reinstate monthly payments, to re-work the notes, and to refrain from foreclosure. After drawing up the appropriate settlement documents, my client took a non-suit on September 11, 1981. Action displays the posture parties are placed in when relying on documents which do not properly comply with usury statutes. Opposing counsel was Alfonso A. Guerra (Deceased).

(ii) McAllen General Hospital, a municipally owned hospital, acting herein by and through its owner, the City of McAllen, Texas vs. Patricia Harris, Secretary of Health, Education and Welfare of the United States of America - Suit filed in U. S. District Court, Southern District of Texas, Brownsville Division, Judge James DeAnda presiding, by my Plaintiff hospital client, seeking to set aside an administrative decision of the HEW Secretary, which reversed a lower administrative decision allowing Plaintiff Medicare reimbursement for its costs attributed to a licensed vocational nursing school program. The Complaint stated said disallowance was inconsistent with the Social Security Act, was not supported by substantial evidence nor adequate findings of fact and that all administrative remedies had been exhausted. The Defendant filed Motion for Summary Judgment and I responded to said Motion and also filed a Motion for Summary Judgment. The Court on December 1, 1982 entered

Judgment granting my client Summary Judgment and denying the Defendant's Motion. Suit significantly points out the relationship between administrative decisions and procedures and court review of same. Opposing counsel was Vidal G. Martinez, former Assistant U. S. Attorney, now with Winstead, Sechrest & Minick, P.C., 2400 Bank One Center, 910 Travis Street, Houston, Texas 77002-5895. (713) 650-8400.

(iii) United States of America vs. Rodrigo Zuniga-Cisneros, Miguel Herrera-Mendoza, Pablo Valdez - Criminal action in the United States District Court, Southern District of Texas, Brownsville Division, based on five count felony indictment alleging conspiracy and transportation of illegal aliens. By court appointment I represented one of the indigent Defendants, Miguel Herrera-Mendoza, a Mexican citizen, who after several conferences with me indicated he wanted to plead guilty as he was involved in the transportation of the aliens. I conferred with the United States Attorney who was agreeable to reducing the charge to a two-count misdemeanor of aiding and abetting unlawful entry into the United States. My client pled guilty before Magistrate William Mallet in Brownsville, Texas on November 14, 1980 and was given a probated sentence and deported to Mexico. The attempt to provide fairness by our system to indigent defendants is a significant feature of this case. Opposing counsel was Daniel Ramirez, who was Assistant U.S. Attorney at the time and is now at 1536 Dove Avenue, McAllen, Texas 78504. (956) 686-2401.

(iv) Manuel Garza Carmona and wife, Herminia Lozano Garza vs. Don Vannerson and Van Vannerson, individually, and Don Vannerson and Van Vannerson d/b/a Space City Bonding Company a/k/a Space City Bail Bond - Suit filed in the 93rd District Court of Hidalgo County, Texas, Judge Mario E. Ramirez, Jr. presiding, by my Plaintiff clients seeking to have a Deed of Trust on their home declared void and of no force and effect on the grounds that it was a forgery and in the alternative that it was an invalid lien on homestead. Defendants filed answer and asked for judicial foreclosure. I filed Motion for Summary Judgment on the invalidity theory based on homestead. Said Motion was granted and Judgment entered on November 22, 1982. The result in this case signifies the traditional importance our system places on

homesteads. Original opposing counsel was J. Charles Whitfield, Suite 240, 2472 Bolsover St., Houston, Texas 77005, (713) 521-2536. Substituted counsel was Earl B. Erwin, Jr., whose last known address to me was 2700 South Post Oak, Suite 1700, Houston, Texas 77056. (713) 627-9610.

(v) Eduardo Vela, Relator vs. Enedina F. Garza, Mayor of the City of Hidalgo, Texas, Irma Calderon, City Secretary of the City of Hidalgo, Texas and Ester Franz Rodriguez, Alderman and Chief Administrative Officer of the City of Hidalgo, Texas - Petition for Writ of Mandamus filed in the 139th District Court of Hidalgo County, Texas, Judge Fidencio M. Guerra presiding, against my Respondent clients seeking to have certain information requested under the Texas "Open Records Act" made available for inspection. I filed Respondents' answer stating they had complied with the statute and that the records were in active use and not available for inspection until May 25, 1979. After hearing on May 11, 1979 the Court ordered that the records be made available on June 4, 1979 and a Judgment approved as to form and substance by counsel was so entered. Case points out the availability of legal procedures to private citizens who feel elected officials are not in compliance with certain statutes. Opposing counsel was Ronald B. Layer, 5230 De Zavala Road, Suite 230, PMB 270, San Antonio, Texas 78249-1731. (210) 601-4314.

(vi) Sergio Trevino-Gonzalez vs. Ramiro Guerra - Suit filed in the 206th District Court of Hidalgo County, Texas, Judge Joe B. Evins presiding, by my Plaintiff client from Mexico seeking specific performance of two real estate sales contracts prepared by an attorney who represented the buyer and seller. The contracts involved about 500 acres of land. Plaintiff had complied with all of his obligations and Defendant, the Hidalgo County Judge at the time, was reneging. After completion of discovery, I filed a Motion for Summary Judgment; Defendant responded and also filed Motion for Summary Judgment. Upon hearing of the Motions, the Judge granted Defendant's Motion on the grounds that the contracts were vague and unenforceable and denied my Motion and entered Judgment on June 10, 1982. After conferring with my client, he decided he did not wish to prosecute an appeal and instead decided to buy other property. The significance of well drawn

contracts despite the parties' original amicability is highlighted by this case. Opposing counsel was John Lewis (Deceased).

(vii) Juan Jose Barragan H. and Jaime Ruiz Llaguno vs. Starr Produce Company - Suit filed in the United States District Court, Southern District of Texas, Brownsville Division, Judge Filemon Vela presiding, by Plaintiffs against my Defendant client, Starr Produce Company, alleging that a produce contract existed between the parties. Plaintiffs claimed to be Defendant's agents in Mexico and entitled to approximately $60,000 commission on a $600,000 plus operation. I answered and defended on the grounds that the parties were involved in a joint venture with profits and losses to be shared. After discovery, which included depositions, showed our defense was correct, Plaintiffs dismissed their action April 21, 1982. The nature of certain international transactions and the availability of an American forum for disputes in some of those transactions is pointed out by this case. Counsel for Plaintiffs was Kurt Stephen of Cardenas & Whitis, 100 S. Bicentennial Blvd., McAllen, Texas 78501. (956) 631-3381.

(viii) The State of Texas vs. Marco Garza - Prosecution by me in City of Hidalgo Municipal Court, jury trial, Judge Siglinde Franz presiding, against Defendant for using abusive language, making offensive gestures which tended to incite a breach of the peace and abusing or threatening a person in a public place. The Defendant was accused of having done this against a City of Hidalgo policeman. The jury returned a guilty verdict on April 20, 1979. The conviction in this case emphasized the importance of enforcing the law at all levels of our judicial system. Opposing counsel was J. Roberto Rodriguez (Deceased).

(ix) Maria M. Collins vs. Carlos Miranda and Arturo Miranda d/b/a Lidos Restaurant - Suit filed in the 92nd District Court of Hidalgo County, Judges J.R. Alamia and Fortunato Benavides presiding, in which Plaintiff alleged partnership with my Defendant clients in a restaurant business and was seeking an accounting, one-half of the assets, and damages. I filed a Plea in Abatement on behalf of Defendant Arturo Miranda, which was granted, and an Answer, counterclaim and set-off for Defendant Carlos Miranda. After discovery, pre-trial

hearings and negotiations Plaintiff agreed to dismiss her suit with prejudice and Defendant dismissed his counterclaim with prejudice. Judgment was entered by the Court on June 19, 1981. Case signifies the importance of written documents when parties engage in business ventures. Opposing counsel was Richard R. Alamia, 113 South 10th Street, Edinburg, Texas 78539. (956) 381-5766.

(x) In the Matter of The Marriage of Gary D. Putz and Judy S. Putz, and in the Interest of John Lawrence Putz, a child - Motion for Modification of Order in Suit Affecting Parent-Child Relationship filed in the 206th District Court of Hidalgo County, Texas, Judge Joe B. Evins presiding, filed by Movant Judy S. Putz seeking to change the periods of possession granted in divorce decree to my client, Gary D. Putz, of their minor child. I filed Answer on behalf of my client and a Motion seeking to change custody. After extensive negotiations between myself, opposing counsel and the parties, an agreed Order was signed by the Court on April 7, 1982 which restructured the visitation rights in a manner where the parties retained the same amount of time with the child, but in a more acceptable manner to both and in the best interests of the child. The role attorneys play in working out family law matters for the benefit of their clients when the clients bear strong personal feelings was pointed out in this case. Opposing counsel was Ruben Pena, 222 West Harrison Street, Harlingen, Texas 78550. (956) 412-8200.

20. **Criminal History**: State whether you have ever been convicted of a crime, within ten years of your nomination, other than a minor traffic violation, that is reflected in a record available to the public, and, if so, provide the relevant dates of arrest, charge and disposition and describe the particulars of the offense.

No.

21. **Party to Civil or Administrative Proceedings**: State whether you, or any business of which you are or were an officer, have ever been a party or otherwise involved as a party in any civil or administrative proceedings, within ten years of your nomination, that is reflected in a record available to

the public. If so, please describe in detail the nature of your participation in the litigation and the final disposition of the case. Include all proceedings in which you were a party in interest. Do not list any proceedings in which you were a guardian *ad litem*, stakeholder, or material witness.

In 2000, in Civil Action Number M-96-231, *Charles Raymond Wedgeworth vs. David K. Longoria, et al.*, in the Southern District of Texas, McAllen Division, Mr. Robert Clarke, a *pro se* litigant, filed a "Motion for Entry of Complaint for Violation of Civil Right of Due Process Title 42 U.S.C.*** 1986, 1985, 1983" which seemed to want to assert a claim against several individuals, including myself. Although it was previously assigned to me, I recused myself in this case. On December 5, 2000, the Magistrate Judge assigned to this case entered an order striking the "Motion for Entry of Complaint for Violation of Civil Right of Due Process Title 42 U.S.C.*** 1986, 1985, 1983" and said motion was not refiled. Final Judgment against Plaintiff was entered in this case on August 6, 2001. The case was appealed and subsequently dismissed on appellant's motion to dismiss.

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

I would refrain from involvement in any proceeding where I would have a conflict of interest, as I have as a United States District Judge, in accordance with law and the Code of Conduct for United States Judges.

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

I have served as an Adjunct Professor at the University of Texas School of Law teaching a seminar in the Spring and Fall Semesters of 2001 and the Fall Semester of 2002. I may pursue teaching the seminar again at some other time, if it would be agreeable to the school and

if I were to receive permission pursuant to the Code of Conduct requirements.

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

See AO 10 Financial Disclosure Report. (Attachment E)

25. **Statement of Net Worth**: Complete and attach the financial net worth statement in detail. Add schedules as called for.

See Attachment F

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

Not applicable

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

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

(c) Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as asking or seeking a commitment as to how you would rule on such case, issue, or question? If so, please explain fully.

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

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

   Michael Evan Horowitz

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

   Commissioner, United States Sentencing Commission

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

   Cadwalader, Wickersham & Taft
   1201 F Street, N.W.
   Suite 1201
   Washington, DC 20004
   202-862-2407
   I reside in the State of Maryland

4. **Birthplace:** State date and place of birth.

   September 19, 1962 in New York, New York

5. **Marital Status:** (including maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es). Please, also indicate the number of dependent children.

   Alexandra Leigh Horowitz (nee Kauffman)
   Television Business News Producer
   Currently performing freelance work
   No children

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

Harvard Law School
August 1984 to June 1987
Received J.D. degree in June 1987

Brandeis University
August 1980 to May 1984
Received B.A. degree in May 1984

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

Cadwalader, Wickersham & Taft
1201 F St., N.W., Suite 1100
Washington, DC 20004
Litigation Partner, September 2002 to Present

U.S. Department of Justice, Criminal Division
950 Pennsylvania Ave., N.W.
Washington, DC 20530
Deputy Assistant Attorney General, January 1999 to December 1999
Chief of Staff, January 2000 to June 2002

Georgetown University Law Center, 600 New Jersey Avenue, NW, Washington, DC 20001
Adjunct Professor, August 2000 to December 2000

George Washington Univ. Law School, 2000 H Street, NW, Washington, DC 20052
Catholic University Law School, 3600 John McCormack Rd., NE, Washington, D.C. 20064
American Univ. College of Law, 4801 Massachusetts Ave., NW, Washington, DC 20016
Adjunct Professor, August 1999 to December 2000

U.S. Attorney's Office, Southern District of New York
1 St. Andrew's Plaza
New York, NY 10007
Assistant U.S. Attorney, May 1991 to August 1995
Deputy Chief, Criminal Division, August 1995 to December 1997
Chief, Public Corruption Unit, March 1997 to January 1999

Debevoise & Plimpton
919 Third Avenue
New York, NY 10022
Associate, December 1988 to April 1991

U.S. District Judge John G. Davies
United States Courthouse
312 North Spring Street
Los Angeles, CA 90012
Law Clerk, September 1987 to September 1988

Paul, Weiss, Rifkind, Wharton & Garrison
1285 Avenue of the Americas
New York, NY 10019
Summer Associate, May 1987 to July 1987

Sullivan & Worcester
One Post Office Square
Boston, MA 02109
Summer Associate, July 1986 to August 1986

Debevoise & Plimpton
919 Third Avenue
New York, NY 10022
Summer Associate, May 1986 to July 1986

Paul Alfred, Inc.
1400 Broadway
New York, NY 10018
Sales Assistant, January 1985 and May 1984 to August 1984

Sherin & Lodgen
100 Summer Street
Boston, MA 02110
Summer Associate, June 1985 to August 1985

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

None

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

Attorney General's Award for Distinguished Service, 1995
Graduated *Magna Cum Laude* from Harvard Law School
Graduated *Summa Cum Laude*, with high honors in Economics Major, from Brandeis Univ.
Elected to Phi Beta Kappa

10. **Bar Associations:** List all bar associations or legal or judicial-related communities, selection panels 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.

Edward Bennett Williams Inn of Court
American Bar Association
Federal Bar Council
Association of the Bar of the City of New York

11. **Bar and Court Admissions:** List each state and court in which you have been admitted to practice, including dates of admission and any lapses in membership. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

New York State, June 1988
District of Columbia, April 1990
U.S. District Court, Southern District of New York, March 1990
U.S. Court of Appeals, Second Circuit, July 1993

12. **Memberships:** List all memberships and offices currently and formerly held in professional, business, fraternal, scholarly, civic, charitable, or other organizations since graduation from college, other than those listed in response to Questions 10 or 11. Please indicate whether any of these organizations formerly discriminated or currently discriminates on the basis of race, sex or religion – either through formal membership requirements or the practical implementation of membership policies. If so, describe any action you have taken to change these policies and practices.

B'nai Brith, current member; former trustee of local unit in New York City
Brandeis University Alumni Association
Harvard Law School Alumni Association
U.S. Holocaust Museum
Supreme Court Historical Society

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

"Artists' Rights in the United States: Toward Federal Legislation"
Harvard Journal on Legislation, Vol. 25, 1988

Keynote address, International Law Enforcement Academy program in Bangkok, Thailand, entitled "Developing Strategies for the Prevention and Detection of Terrorism, " March 2002

I also participated in numerous CLE presentations and panel discussions during my tenure at the Department of Justice. While I do not have a complete list of all my presentations, those I can recall include: various DOJ training (on grand jury practice, trial advocacy workshop, production of discovery, and investigating public corruption); various FBI training on investigating public corruption; an ATF training session on searches, seizures and arrests; various NYPD training on preventing and investigating police corruption; panels at conferences of the International Association of Prosecutors (a Foreign Corrupt Practices Act panel, panels on recent developments in the US, and a presentation on best practices in investigating child pornography); a panel for Kahn Consulting on prosecuting fraud cases; a panel at Fordham Law School on international ethics and corruption; panels for the Edward Bennett Williams Inn of Court on civil vs. criminal matters and developments in privilege law; panels at several American Bar Association conferences (on white collar crime and the Sentencing Guidelines); an American Corporate Counsel Association panel on production of grand jury documents; and an Ethics Officers Association on the Organizational Sentencing Guidelines. I also participated in a panel entitled "Defending an Open Society" for the John F. Kennedy Library in November 2001. However, in connection with my participation in each of these events, I did not prepare any formal text or give a prepared speech. I do have a copy of the powerpoint presentation I gave at the ABA White Collar Crime conference in 2002, and have included a copy with my questionnaire.

14. **Congressional Testimony:** List any occasion when you have testified before a committee or subcommittee of the Congress, including the name of the committee or subcommittee, the date of the testimony and a brief description of the substance of the testimony. In addition, please support four (4) copies of any written statement submitted as testimony and the transcript of the testimony, if in your possession.

October 4, 2000 – House Committee on the Judiciary, Subcommittee on Crime – Hearing on H.R. 469, "Jeremy and Julia's Law," a bill that would have created federal criminal penalties for certain acts by child day care providers.

May 15, 2001 – House Committee on the Judiciary, Subcommittee on Crime – Hearing on the Reauthorization of the Department of Justice.

December 13, 2001 – House Committee on Government Reform – Hearing on the President's invocation of executive privilege regarding the production of prosecution memoranda.

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

My health is excellent. My last physical examination was in December 2002.

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

I am not now and have never been a judge.

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

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

(c) a short summary of and citations for all significant opinions on federal or state constitutional issues, together wit the citation for appellate court rulings on such opinions. If any of the opinions or rulings listed were in state court or were not officially reported, please provide copies of the opinions.

17. Public Office, Political Activities and Affiliations:

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

Volunteer part-time summer intern, Rockland County District Attorney's Office
Summer 1982
Appointed by Assistant District Attorney in charge of hiring (I do not recall his name)

Volunteer intern, Office of Congressman James Shannon, Washington, DC
January 1982
Appointed by Administrative Assistant (I do not recall the person's name)

Paid Summer Intern, Rockland County Legislature
Summer 1983
Appointed by Herbert Reisman, Chairman of the Legislature

Brandeis University internship for school credit and volunteer intern
Office of Congressman Barney Frank, West Newton, MA
Spring 1982, Spring 1983 and Spring 1984
Appointed by Administrative Assistant Dorothy Reichard

Law Clerk to U.S. District Judge John G. Davies, Central District of California,
September 1987 to September 1988
Appointed by Judge Davies

Assistant U.S. Attorney, U.S. Attorney's Office for the Southern District of New York
May 1991 to August 1995
Appointed by U.S. Attorney Otto G. Obermaier

Deputy Chief, Criminal Division, U.S. Attorney's Office, SDNY, Aug. 1995 to Dec. 1997
Chief, Public Corruption Unit, U.S. Attorney's Office, SDNY, March 1997 to January 1999
Appointed by U.S. Attorney Mary Jo White

Deputy Assistant Attorney General, Criminal Division, January 1999 to December 1999
Chief of Staff, Criminal Division, January 2000 to June 2002
Initially appointed by Assistant Attorney General James K. Robinson
Reappointed by Assistant Attorney General Michael Chertoff

Commissioner (ex-officio), Child Online Protection Act Commission
October 1999 to October 2000
Appointed by Attorney General Reno

Commissioner (ex-officio), U.S. Sentencing Commission
January 2001 to August 2001
Appointed by Attorney General Ashcroft

Member, Advisory Group to the U.S. Sentencing Commission on
the Organizational Guidelines
February 2002 to Present
Appointed by Judge Diana Murphy, Chair, U.S. Sentencing Commission

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

Since leaving law school in 1987, I have not played a role in any political campaigns. As a college student, I volunteered on an unpaid basis for a few political campaigns (and I may have also participated in a campaign in law school, but I do not recall any). I do not have a list of those campaigns. The ones I can recall are John Anderson for President, Alan Cranston for President, Herbert Reisman for Rockland County Legislature, and Barney Frank for Congress. I have never had a formal position in any campaign.

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

(a) Describe chronologically your law practice and legal experience after graduation from law school including:

(1) whether you served as clerk to a judge, and if so, the name for the judge, the court and dates of the period you were a clerk;
Law clerk to U.S. District Judge John G. Davies
Central District of California, September 1987 to September 1988

(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 affiliated, and the nature of your affiliation with each.

Cadwalader, Wickersham & Taft,
1201 F Street, N.W., Suite 1100, Washington, DC
I have been a Litigation Partner from September 2002 to the present

U.S. Department of Justice, Criminal Division,
950 Pennsylvania Ave., N.W., Washington, DC
I was Deputy Assistant Attorney General from January 1999 to December 1999, and Chief of Staff from January 2000 to June 2002

U.S. Attorney's Office, Southern District of New York
1 St. Andrew's Plaza, New York, NY
I was an Assistant U.S. Attorney from May 1991 to August 1995, Deputy Chief of the Criminal Division from August 1995 to December 1997, and Chief of the Public Corruption Unit from approximately March 1997 to January 1999

Debevoise & Plimpton,
875 Third Avenue (now located to 919 Third Avenue), New York, NY
I was an Associate from December 1988 to April 1991

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

I have just recently begun working again in private practice. I anticipate that my practice will involve representing individuals and companies involved in complex civil litigation, conducting internal investigations, and representing clients in administrative, regulatory and criminal investigations.

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

For the past 11 years, while I was in government service, my client was the U.S. Government and its agencies. As a prosecutor in the U.S. Attorney's Office from 1991 to 1999, I specialized in investigating and prosecuting white collar crime. I also oversaw a wide variety of cases while serving as a supervisor in the office. During my tenure at Main Justice from 1999 to 2002, I performed a variety of tasks including supervising cases, participating in policy decisions, and overseeing administrative matters in the Criminal Division. As an associate at Debevoise & Plimpton, I worked on a variety of matters for firm clients, which included companies, individuals and non-profit organizations.

(c) (1) Describe whether you appeared in court frequently, occasionally, or not at all. If the frequency of your appearances in court varied, describe each such variance, providing dates.

While working in the U.S. Attorney's Office for the Southern District of New York, I appeared in court frequently. While serving at Main Justice in Washington, and while working as an associate at Debevoise & Plimpton, I only occasionally appeared in court.

(2) Indicate the percentage of these appearances in:

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

Almost all of my work has been in federal courts, although I have appeared on occasion in state court.

(3) Indicate the percentage of these appearances in:

(A) civil proceedings;
(B) criminal proceedings.

The vast majority of my court appearances have been in connection with criminal proceedings, although I have had occasion to appear in civil proceedings.

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

I have tried seven cases to verdict. I was sole counsel on two of those cases, chief counsel on one of the cases, and co-counsel on four of the cases.

(5) Indicate the percentage of these trials that were decided by a jury.

Six of the cases were decided by a jury.

(d) Describe your practice, if any, before the United States Supreme Court. Please supply four (4) copies of any briefs, amicus or otherwise, and, if applicable, any oral argument transcripts before the U.S. Supreme Court in connection with your practice.

I have not practiced before the U.S. Supreme Court

(e) Describe legal services that you have provided to disadvantaged persons or on a pro bono basis, and list specific examples of such service and the amount of time devoted to each.

While employed at Main Justice, I taught a law school class on a pro bono basis for three semesters to law students at Georgetown, George Washington, Catholic and American Law Schools, entitled "The Role of the Federal Prosecutor." The class met two hours each week, but also involved significant amounts of preparation time each week outside the classroom.

While employed at Debevoise & Plimpton, I handled a number of matters on a pro bono basis. I do not, however, have a list of each of those matters. The matters I recall are as follows: (a) a mid-level associate and I represented a plaintiff in an employment discrimination case in federal court, which was settled on the eve of trial. The matter required a substantial amount of my time to prepare for trial; (b) a senior associate and I represented a defendant in a narcotics trafficking case in federal court, which resulted in the defendant's acquittal. The matter required a substantial amount of my time to prepare for trial and to try the case; (c) I conducted an internal investigation for a community organization regarding an alleged theft of funds. The matter required a considerable amount of my time; and (d) I represented on two separate occasions individuals who applied for political asylum in the United States. The matter required a considerable amount of my time.

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

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

(b) a detailed summary of the substance of each case outlining briefly the factual and legal issues involved;

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

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

1. U.S. v. Ramon Rojas, et. al., 90 Cr. 220 (RJW) – While at Debevoise & Plimpton, another associate and I were appointed counsel for a defendant charged in a narcotics trafficking case. The representation occurred from early 1990 through June 1990. The case was brought in the U.S. District Court for the Southern District of New York and was tried before U.S. District Judge Robert Ward. Mr. Rojas was acquitted of all charges. I tried the case with my co-counsel, Linda Imes. Ms. Imes is now at Richards, Spears, Kibbe & Orbe, 1 Chase Manhattan Plaza, New York, NY, (212) 530-1810. Opposing counsel was then-Assistant U.S. Attorney Robert Ray, who is now at Pitney, Harden, Kipp & Szuch, Morristown, NJ, (973) 966-6300.

2. U.S. v. David Lew, et. al., 91 Cr. 367 (KC) – This was a multi-defendant bribery investigation and prosecution involving restaurant owners in New York City who were paying bribes to an undercover IRS employee in order to eliminate federal tax liabilities. I worked on the case from mid-1991 through 1993. The case was filed in the U.S. District Court for the Southern District of New York and was tried before U.S. District Judge Kenneth Conboy. Mr. Lew went to trial and was convicted by a jury. I prosecuted the case with my co-counsel, Andrea Likwornik Weiss. Ms. Weiss is now at Levi Lubarsky & Feigenbaum, 845 Third Ave., New York, NY, (212) 308-8830. Defense counsel at trial was Jonathan Marks, 600 Madison Ave., New York, NY, (212) 319-4000.

3. U.S. v. Sandaq, et. al., 92 Cr. 381 (CMM) – This was one of the first uses of the RICO statute to prosecute an environmental crime case. Sandaq and its two officers were charged with defrauding the New York City School Contruction Authority in order to obtain asbestos removal contracts that they were not qualified to perform. The fraud cost New York City millions of dollars in losses. I was the lead prosecutor on the case and worked on it from 1992 to 1993. The cases were filed in the U.S. District Court for the Southern District of New York and were assigned to U.S. District Judges Charles Metzner and Robert Carter. All three defendants pleaded guilty. Opposing defense counsel was Ozro T. Wells, 401 Broadway, New York, NY, and Ronald Garnett, 299 Broadway, New York, NY, (212) 587-5159.

4. U.S. Eddie Kassab, 92 Cr. 828 (MBM) – This was one of a series of drug money laundering cases that I prosecuted. This defendant was involved in laundering millions of dollars in drug proceeds through bank accounts opened in the names of fictitious individuals. I was sole counsel on the case and worked on it from 1991 through 1994. The case was filed in the U.S. District Court for the Southern District of New York and was assigned to U.S. District Judge Michael Mukasey. Principal opposing defense counsel was Mark Baker of Brafman & Ross, 767 Third Avenue, New York, NY, (212) 750-7800.

5. New York City Police Department ("NYPD") Corruption Investigation – This was an investigation, worked jointly with the Manhattan District Attorney's Office, into corruption at the NYPD's 30th Precinct. I had primary federal responsibility for handling the investigation and prosecution of over 30 police officers assigned to the precinct who were involved in drug dealing, extortion, robbery, perjury, and tax evasion. This was one of the largest and most sophisticated police corruption investigations in the history of the NYPD, and I received the Attorney General's Distinguished Service Award (the Department's second highest award) in 1995 for my efforts. I worked on this matter from early 1993

through approximately 1998. Assisting me at the U.S. Attorney's Office was Andrew Dember. The cases were filed in the U.S. District Court for the Southern District of New York and the Supreme Court of New York County. All but one of the officers was convicted of serious federal and/or state charges. AUSA Dember and I handled the one federal trial, and I assisted the state prosecutors with trial preparation on two or three of the cases that went to trial in state court. The cases were handled by over 20 federal and New York state judges, with numerous defense counsel. Counsel for one of the lead defendants was Amy Attias, who I believe is now with the Legal Aid Society, 1020 Grand Concourse, Bronx, NY.

6. U.S. v. Joseph Termini, et. al., 93 Cr. 413 (LLS) – Three law enforcement officers, assigned to the New York Drug Enforcement Task Force, stole heroin and other valuables from the evidence locker. I was co-lead prosecutor on the cases, which ran from 1992 until 1995. The cases were filed in the U.S. District Court for the Southern District of New York and were assigned to U.S. District Judges Louis Stanton, Michael Mukasey, and John Keenan. All three defendants pleaded guilty. My co-counsel was David Fein, now with Wiggin & Dana, 3 Stamford Plaza, 301 Tresser Blvd., Stamford, CT, (203) 363-7600. Principal opposing defense counsel was Mark Pomerantz, now with Paul, Weiss, Rifkind, Wharton & Garrison, 1285 Avenue of the Americas, New York, NY, (212) 373-2000.

7. U.S. v. Robert Felzenberg and George Gillmore, 93 Cr. 460 (SS) – The defendants, the owner and treasurer of a payroll cashing company, engaged in $40 million check-kiting scheme. The crime caused millions of dollars of losses for the clients of the company, including the City of New York and numerous philanthropies. I was the sole prosecutor assigned to the case, and worked on the matter from 1992 to 1996. The cases were filed in the U.S. District Court for the Southern District of New York. Felzenberg's case was assigned to U.S. District Judge Sonia Sotomayor. I do not recall which District Judge was assigned Gillmore's case. Both Felzenberg and Gillmore pleaded guilty. Principal opposing defense counsel was Edward M. Shaw, 420 Fifth Avenue, New York, NY, (212) 732-2380.

8. U.S. v. Nicholas Rudi, 95 Cr. 166 (LLS) – This securities fraud prosecution, involving an alleged fraud on a public agency, grew out of a bond refinancing. The case was reassigned to me after indictment, and I argued various pretrial motions and was co-counsel during trial. My involvement ran from 1995 until 1996. The case was filed in the U.S. District Court for the Southern District of New York and was assigned to U.S. District Judge Louis Stanton. The defendant was acquitted after trial. My co-counsel was Karen Seymour, now Chief of the Criminal Division at the U.S. Attorney's Office for the Southern District of New York. Opposing counsel was Thomas Puccio, 277 Park Avenue, New York, NY, (212) 421-7889.

9. U.S. v. Jillian Hernandez, 95 Cr. 281 (RO) – Three Drug Enforcement Administration employees were charged with stealing cocaine and money from the DEA. I worked on the case from approximately 1994 through approximately 1996. The case was brought in the U.S. District Court for the Southern District of New York and was handled by Judge Richard Owen. Two employees plead guilty and Ms. Hernandez was convicted by a jury. I had sole responsibility for the investigation. My co-counsel at trial was Suzanne Jaffe Bloom, now with the U.S. Attorney's Office for the Eastern District of New York. Defense counsel was Thomas Roth of Fleming, Roth & Fettweis, 744 Broad St., Newark, NJ, (973) 565-9495.

10. U.S. v. Stephen Mighdoll, 97 Cr. 431 (JES) – The defendant, an attorney and court-appointed trustee for the Resolution Trust Corporation (RTC), embezzled monies that were due to the RTC. I was the sole prosecutor on the case and worked on it from 1995 until 1997. The case was filed in the U.S. District Court for the Southern District of New York and was assigned to U.S. District Judge John Sprizzo. The defendant pleaded guilty. Opposing defense counsel was Elkan Abramowitz of Morvillo, Abramowitz, Grand, Iason & Silberberg, 565 Fifth Avenue, New York, NY, (212) 880-9500.

20. **Criminal History:** State whether you have ever been convicted of a crime, within ten years of your nomination, other than a minor traffic violation, that is reflected in a record available to the public, and if so, provide the relevant dates of arrest, charge and disposition and describe the particulars of the offense.

I have never been convicted of a crime.

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

I have not been involved in any civil or administrative proceedings.

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

If I find myself in a situation where there is an appearance of a conflict of interest or a potential conflict of interest, I intend to consult with both the Chair and General Counsel of the U.S. Sentencing Commission, and, if appropriate, with the Administrative Office of the U.S. Courts and with counsel at Cadwalader, Wickersham & Taft. I am unaware of any potential conflicts of interest that are likely to exist during my service as a Commissioner.

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

Because the position of Commissioner is only a part-time position, I plan to remain a partner at Cadwalader, Wickersham & Taft during my service as Commissioner.

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

    Attached is a copy of the financial disclosure report I am filing in connection with my nomination.

25. **Statement of Net Worth:** Complete and attach the financial net worth statement in detail. Add schedules as called for.

    Attached is a financial net worth statement, as of January 5, 2003.

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

    I am not being nominated for a position on the federal bench.

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

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

    (c) Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as asking or seeking a commitment as to how you would rule on such case, issue, or question? If so, please explain fully.

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

AFFIDAVIT

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

SUBSCRIBED AND SWORN TO before me this 24th day of January, 2003.

Notary Public

Deborah D. Lee-Urquhart
Notary Public District of Columbia
My Commission Expires April 30, 2006

Senator CHAMBLISS. I thank my former colleague over on the House side. Ruben Hinojosa is here, and Ruben, we look forward before this next panel is seated to you coming forward and making some comments about a nominee that I know you have an interest in. We are glad to have you here, Ruben, if you will just have a seat right there in the center. I will tell you that Senator Hutchison and Senator Cornyn have already spoken and gave accolades with respect to Mr. Hinojosa. By the way, is he kin to you?

PRESENTATION OF RICARDO H. HINOJOSA, NOMINEE TO BE UNITED STATES SENTENCING COMMISSIONER BY HON. RUBEN E. HINOJOSA, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

Representative HINOJOSA. Not yet.

[Laughter.]

Representative HINOJOSA. Mr. Chairman, I am pleased to have the opportunity to introduce a gentleman from the great State of Texas, U.S. District Judge Ricardo Hinojosa, who has been nominated to serve on the U.S. Sentencing Commission. I want to thank Chairman Hatch and Ranking Member Leahy for having given me this opportunity to address the Senate Judiciary Committee, and furthermore, I wish to acknowledge and thank you for allowing me this opportunity. I wish that Senator Durbin could have stayed just a few more moments so that he could have learned about this great gentleman that I am introducing.

Judge Hinojosa is one of the most highly respected Federal judges in the State of Texas. He is a judge who is fair and impartial. Since 1983, he has served as the United States District Judge for the Southern District of Texas. A graduate of Harvard School of Law, Judge Hinojosa has been active in the legal community, serving on the Committee on Defender Services of the Judicial Conference of the United States, the Magistrate Judges' Committee of the Judicial Council of the Fifth Circuit, and the Judicial Liaison member of the Texas State Bar Board of Directors.

He has combined his service to the law with his outstanding service to his local community. He has served as Chairman of the Board of Regents of the University of Texas–Pan American and as Chairman of the Texas Commission on the Bicentennial of the United States Constitution.

As you know, the U.S. Sentencing Commission is a unique body charged with establishing sentencing guidelines for those individuals convicted of Federal crimes. Judge Hinojosa's recent position as a member of the American Law Institute Advisors Group to the Model Penal Code Sentencing Project has given him experience and insight into the challenges that the Sentencing Commission faces in recommending policy.

Born and raised in South Texas, I have known Judge Hinojosa for over 20 years. Although we are not related, he grew up in my wife's hometown, Rio Grande City. I have always found him to be tough, but fair, in his judicial decisions.

In closing, I wish to say that, as I am sure you are aware, Judge Hinojosa's nomination has the strong support of Senator John Cornyn and Senator Kay Bailey Hutchison. Without any reservations, I strongly recommend Judge Ricardo Hinojosa. This country

will be well served if Judge Hinojosa's nomination is approved by your committee.

Thank you again for allowing me the privilege of testifying on behalf of this outstanding American, and I welcome any questions that you might have.

Senator CHAMBLISS. Well, thank you very much, Congressman Hinojosa. Coming from you, that is a strong recommendation in my book and we look forward to the nominee coming forward and speaking and having an opportunity to ask questions.

Representative HINOJOSA. Thank you, sir.

Senator CHAMBLISS. Thank you very much.

Representative HINOJOSA. Thank you very much for the opportunity and I look forward to visiting with you again.

Senator CHAMBLISS. We will now ask that Judge Hinojosa and Mr. Horowitz come forward, please. Before you take your seats, if each of you will raise your right hand, please.

Do you solemnly swear that the testimony you are about to give before this Committee shall be the truth, the whole truth, and nothing but the truth, so help you, God?

Judge HINOJOSA. I do.

Mr. HOROWITZ. I do.

Senator CHAMBLISS. Thank you. Let me ask each of you if you have any opening statement you want to make or if you have any family or friends here that you want to recognize. We certainly want to give you the opportunity to do that. Judge Hinojosa?

STATEMENT OF RICARDO H. HINOJOSA, NOMINEE TO BE UNITED STATES SENTENCING COMMISSIONER

Judge HINOJOSA. Senator, thank you very much. First of all, I don't really have an opening statement, but I do want to thank the President for this nomination and this Committee for this hearing. I do want to thank Senators Hutchison and Cornyn and Congressman Hinojosa for their nice remarks this afternoon.

I do have in the audience today a Godchild of mine, Emily Williford [ph.] from Austin, Texas, who is presently working here in Washington, D.C., and I appreciate her showing up here this afternoon.

And there is another person in the audience I would also like to thank and that is Ms. Sheila Joy, who works with the Justice Department, and 20 years ago, she held my hand through the nomination and confirmation process. She has done it again this year and she has done it throughout this period of time for all these administrations and for all these people that go through this process and she makes it a lot easier and I appreciate her help.

Senator CHAMBLISS. It sounds like she is your good luck charm.

Judge HINOJOSA. I hope so. And I also want to thank the people I work with who I believe are listening and possibly watching as we are having this hearing. Thank you very much, Senator.

Senator CHAMBLISS. Thank you.

Mr. Horowitz?

STATEMENT OF MICHAEL E. HOROWITZ, NOMINEE TO BE UNITED STATES SENTENCING COMMISSIONER

Mr. HOROWITZ. Mr. Chairman, I do not have an opening statement. I want to echo what Judge Hinojosa said. I am certainly honored that the President has nominated me. I am honored that the Committee is having this hearing.

I do have some family members with me that I would like to introduce to the committee. With me is my wife, Alexandra, my mother, Ann, who came from Florida, and my mother-in-law, Sandra Kaufman [ph.], and my father-in-law, directly behind me, Charles Kaufman [ph.], so hopefully, he won't throw anything at me during the hearing.

[Laughter.]

Senator CHAMBLISS. All right. Great. We are happy to have all of you here.

Mr. Horowitz, let me start with you. You have served for many years as a prosecutor, first in the U.S. Attorney's Office for the Southern District of New York, then in the Criminal Division of the Department of Justice. I understand that you now work for a major law firm and engage in criminal defense work. What is your view as to the general appropriateness of the sentencing guidelines and what perspective will you bring to the Sentencing Commission as a former prosecutor who now does defense work?

Mr. HOROWITZ. Well, Mr. Chairman, I believe that the experiences I have had, first as a law clerk and then as a prosecutor for 11 years, representing clients who have been under investigation, both before I became a prosecutor and since, will hopefully give me a breadth of experience in viewing the guidelines, in looking at them. The Commission has right now an interesting array of experiences among their Commissioners. There are a number of judges. and hopefully, I can add to that through the perspective of my experience.

I know, as you know, the current head of the Criminal Division, Mike Chertoff, who I work for, as well as his predecessor, Jim Robinson, who I worked for, both served as defense lawyers and as prosecutors and U.S. Attorneys and I think it does allow you to look at problems from a big picture and understand from all sides of the issue what these guidelines mean and how they should be considered and applied.

Senator CHAMBLISS. Judge Hinojosa, as a sitting Federal District Court judge, you have been called upon to apply the sentencing guidelines countless times. I am sure you have also gotten earfuls from many of your colleagues about the guidelines. I know you have gotten an earful from those of us who did defense work from time to time. What is your view as to the general appropriateness of the sentencing guidelines, and specifically, do you think it works well or does it work most of the time?

Judge HINOJOSA. Senator, I guess I am one of the group that gets smaller as each year goes by that actually has done sentencing both under the old system as well as under the guidelines system. From 1983 to 1987, I actually sentenced individuals under the old system, and I have to say that I find the Sentencing Commission guidelines very helpful for the system.

Under the old system, we would spend a lot of time, or at least I did, trying to figure out what I had done with a particular kind of case and a particular kind of defendant with certain characteristics that were similar to the present defendant and the amount of drugs involved in a drug case, for example, and trying to make things work on in an equal fashion and in a fair fashion. So you would spend a lot of time trying to go back, trying to find other cases that you had worked on and sometimes talking to other judges about the same kind of cases.

Under the guidelines, we have a totally different system because, as you know, the Commission guidelines set the procedure and the parameters that the judges are to follow. And I have to say that I find them helpful because, in many ways, they basically have the same factors I used to consider myself when I had to make a decision with regards to a particular sentence as far as the role in the offense of an individual, the involvement in the crime itself, in a drug case, for example, the amount of drugs, whether there was a firearm involved and the relevant conduct involved and acceptance of responsibility, all these factors that are put into the Commission guidelines which makes us think about these in every single case and I find them to be helpful.

Senator CHAMBLISS. Do you think the guidelines give you enough flexibility? That was a question that I raised a lot of time with judges, and I didn't do an extensive amount of Federal criminal work, but I occasionally did and the guidelines—I practiced under the old system as well as under the guidelines themselves, just like you having been on the bench, and I sometimes had a problem with the judge not having flexibility, particularly with a defendant or an accused who, in trying to negotiate some sort of settlement of the case, there just—the judge's hands were somewhat tied. Have you ever been in those kind of positions, where you didn't feel like you had enough flexibility?

Judge HINOJOSA. To some extent, I guess in some cases, you might feel that way, Senator, but I have to say that within the guidelines themselves, there are a lot of fact findings that a judge has to make that give you the discretion within the guidelines themselves, and, of course, in the very unusual situations where someone is cooperating with the government, as you well know, the government can file a motion to depart based on cooperation and assistance. I say unusual, which really it is not, because that does happen and it is a tool that is used to help make bigger cases.

In the situations where one finds that it is totally out of the heartland of the cases, a judge has the opportunity to depart. In the *Koon* case, the U.S. Supreme Court certainly gives a judge an opportunity to do that.

Senator CHAMBLISS. Let me ask to both of you, do you believe that a member of the Sentencing Commission should implement the sentencing guidelines in a way that he or she believes that Congress would have intended even if the member disagrees with that Congressional intent? Is there any question in your mind about that?

Mr. HOROWITZ. No question about that at all.

Judge HINOJOSA. I do feel that part of the responsibility of the Sentencing Commission is to look at the directives from the Congress, sir.

Senator CHAMBLISS. Okay. Would you agree with me that the central premise of the Sentencing Reform Act was to create uniformity of sentences and try to eliminate disparities in the sentences handed out by different judges for similar offenses, and do you think that is a fair and desirable goal?

Mr. HOROWITZ. Mr. Chairman, I do believe that eliminating the unwarranted disparities that existed before the system was put in place is the correct goal of the guidelines and would certainly be part of my responsibility in serving in this position.

Judge HINOJOSA. I agree with that also, Senator, and I think that is the reason that the Congress saw fit to create the United States Sentencing Commission, because there was a viewpoint from all segments and members of Congress that that was important, and I think that is the viewpoint of the public in the United States.

Senator CHAMBLISS. Gentlemen, let me assure you, the fact that none of my colleagues are here in no way diminishes what we know to be the importance of the job to which you have been nominated. You both have the kind of experience and you obviously, from just looking and talking to both of you, you have the right kind of temperament to be confirmed for this position. So let me assure you that we take this seriously. We know you are going to take your job seriously and we appreciate very much you being here today and sitting through the previous panel and having a little patience with us to do that. So thank you very much for being here and thank your family members for being here, also.

[The biographical information of Judge Hinojosa and Mr. Horowitz follow.]

Senator CHAMBLISS. I would like unanimous consent to insert Senator Hatch's statement for the record, and without objection, that is done.

I would also like to insert into the record statements from Senator Leahy and Senator Boxer.

I announce to all of my colleagues on the Committee that the record will remain open until 5:00 p.m. one week from today, Wednesday, March 13, for anyone to submit additional questions or additional matters for the record. Excuse me, I said the 13th. The 19th. The record will remain open until the 19th.

This hearing is concluded. Thank you.

[Whereupon, at 4:00 p.m., the Committee was adjourned.]

[Additional material is being retained in the Committee files.]

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

QUESTIONS AND ANSWERS

The Honorable Cormac J. Carney
Central Justice Center
700 Civic Center Drive West
Santa Ana, California 92701

March 19, 2003

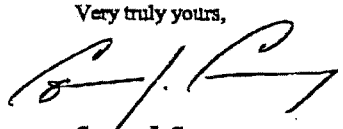
Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary of the U.S. Senate
223 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator Hatch,

I am enclosing my responses to the follow-up questions sent to me by Senator Leahy. I hope my responses adequately address any concerns or questions that he or any other Senator may have with respect to my nomination.

I appreciate the Committee's consideration of my nomination.

Very truly yours,



Cormac J. Carney

cc: Honorable Patrick J. Leahy

Follow-Up Questions from Senator Patrick Leahy to Cormac Joseph Carney:

1. Judge Carney, before being appointed to the bench, you practiced as a litigator for fourteen years. In your Senate Questionnaire, you indicate that all of your appearances in court as a litigator involved civil matters. Since being appointed to the bench, you have presided over mostly criminal misdemeanor trials. When you were appointed to the state court, what did you do to get up to speed to handle the criminal matters that were to come before you? If you are confirmed to the federal district court, how will you get up to speed to handle the complex criminal, and civil, matters that will come be before you?

There were several things I did to get up to speed to handle the criminal matters that came before me. First, I took on a large volume of criminal matters each day, believing that the best way to learn criminal law was to dive into it with enthusiasm. I endeavored to study the law carefully and found that the more criminal matters I handled each day, the sooner I learned criminal law. I believe that the hundreds of criminal arraignments, preliminary hearings and trials that I handled gave me a very good understanding and knowledge of criminal law. Another step I took was to ask pointed questions of the attorneys who appeared before me concerning not only the specifics of their positions, but also the statutory or case authority that supported those positions. The interaction with the attorneys was intellectually challenging and educational. Finally, I was not afraid to ask questions of my fellow judges who had extensive experience in criminal law. I often consulted with my colleagues and received practical advice regarding complex evidentiary issues, difficult witnesses, sentencing and courtroom control.

If I have the fortunate opportunity to be confirmed to the United States District Court for the Central District, there undoubtedly will be complex issues, both in the criminal area and in the civil area, which I will have to handle. I believe my experience in transitioning to the state bench has helped to prepare me for any such transition to the federal bench. My strategy for handling any complex issues on the federal bench would be similar to the one I used to get up to speed on criminal law. I will attempt to get as much experience in the area as quickly as possible, realizing the more matters in the area that I handle, the sooner I will learn the area. I, of course, will conduct my own independent research as I do now, but I also will use the attorneys as an educational resource by posing pointed questions to them regarding their legal positions and the legal support for those positions. Lastly, I will consult with my colleagues and tap into their wealth of wisdom and experience.

2. You have served on the Superior Court in the State of California since 2001. Please tell the Committee what you have learned from your experience on the state court that you will bring with you to the federal district court, if confirmed.

I have learned from my experience on the state bench how to maintain the dignity and decorum of the courtroom and how to manage a heavy caseload. Specifically, I learned how important it is to treat the parties with respect and to give them each the opportunity to be heard. I also have learned how important it is for me and the attorneys appearing before me to maintain a high level of professionalism to one another. It has been of the utmost importance for me to be prepared and familiar with the facts and the law in each case that comes before me. Similarly, the Court functions much more effectively and efficiently when the attorneys are prepared when they come to court, make good faith efforts to resolve their discovery disputes and engage in meaningful settlement negotiations before trial. I have resolved hundreds of cases in a fair and efficient manner because the attorneys exhibited such professionalism. If I were fortunate enough to be confirmed to the United States District Court for the Central District, I would bring these experiences and expectations with me to the federal bench.

JAMES V. SELNA
Judge of the Superior Court
Orange County Court House
700 Civic Center Drive West
Post Office Box 1994
Santa Ana, CA 92702
Telephone 714-569-4816
March 19, 2003

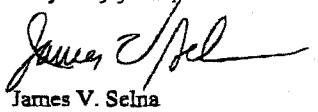
The Honorable Orrin G. Hatch
Chairman, Senate Committee on the Judiciary
United States Senate
223 Hart Office Building
Washington, D. C. 20510

Re: James V. Selna, Nominee for the United States District Court
For the Central District of California

Dear Senator Hatch:

Attached hereto are my responses to questions posed to me by Senator Patrick J. Leahy following my appearance before the Committee on March 12, 2003. If I can provide you or any other member of the Committee additional information, I would be happy to do so promptly.

Very truly yours,



James V. Selna

cc: The Honorable Patrick J. Leahy (w/encl.)

Not Printed or Mailed at Government Expense

Responses of James V. Selna, nominee for the United States District Court for the Central District California to Written Follow-Up Questions from Senator Patrick J. Leahy:

1. **Judge Selna, you indicate in your Senate Questionnaire that you invest in common stock in your personal accounts and that you manage your own retirement fund, which is principally invested in common stocks. You state that you "have been infrequently required" to recuse yourself because of a financial interest, however, you state that if your individual holdings did result in an inappropriate number of holdings, you would liquidate the holdings. One practice that I find particularly interesting is that you said you make a copy of the conflict of interest disclosure statement available for the public to review or copy at the courthouse. Do you plan to continue this practice if you are confirmed to the federal district court, even though such a practice is not required?**

   I would follow the policies and rules of the United States District Court for the Central District of California with regard to financial disclosures. If permissible under those policies and rules, I would continue my past practice of making my financial disclosure statement available at the court house where I sit. Financial Disclosure Report, Form A0-10, is a public document, available through the Administrative Office of the United States Courts in Washington, D. C. The individuals most likely to be interested in my Financial Disclosure Report reside in the Central District of California. There is no burden in making my Report available through the Clerk's office, and it would facilitate the availability of what is already a public document.

2. **Judge Selna, in your Senate Questionnaire, you indicate that during 20 years of your private practice you have represented a number of oil and gas firms. You served as defense counsel for Exxon for over 11 years primarily for claims arising out of the Exxon Valdez oil spill. The environmental damage caused by that spill continues today. Given your extensive experience in defending Exxon against these claims, do you believe that damage suits serve as a deterrent for large oil and gas firms? If not, what do you think would be an adequate deterrent? What can Congress do to ensure that our natural resources are protected from large oil spills that are damaging to the environment and to our economy?**

   During my representation of Exxon, I became familiar with the Clean Water Act, the Oil Pollution Act of 1990, and other statutes designed to protect the environment. If confirmed, I am prepared to follow to the fullest Congress' mandate, as reflected in these and other statutes, to protect the environment. Because I am a sitting judge and in fact handle environmental matters from time to time, I am precluded from commenting on potential legislation which might come before me on the Superior Court, or in the District Court should I be confirmed.

3. **You have served on the Superior Court in the State of California since 1998. Please tell the Committee what you have learned from your experience on the state court that you will bring with you to the federal district court, if confirmed.**

In the past four years, I have made the transition from advocate on behalf of clients to judge. I have come to appreciate in a palpable way the importance of presiding in an impartial, deliberative manner that ensures each party a fair day in court. A trial judge's style and demeanor have as much to do with public confidence in the Judiciary as technical accuracy.

In my current assignment as a member of the Civil Complex Panel, I have gained substantial experience in managing a wide variety of complex cases, including class actions, antitrust and trade regulation cases, environmental and toxic tort cases, construction defect cases, and securities matters. In many ways, this assignment parallels the civil docket of a United States District Judge in terms of intellectual challenge, the novelty of questions presented, and case management responsibility.

PHILIP P. SIMON
275 Brumtsfield Ct.
Valparaiso, IN 46385
(219) 937-5500 (work)
(219) 548-3009 (home)

March 19, 2003

Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
223 Hart Building
Washington DC. 20510

Dear Senator Hatch:

Attached are my responses to the follow-up questions of Senator Leahy in connection with my hearing before the Judiciary Committee on March 12, 2003. If you should need any additional information, please feel free to give me a call. Thank you.

Sincerely,

Philip P. Simon

Answers of Philip Peter Simon to Follow-up Questions from Senator Patrick Leahy

1. Mr. Simon, you have served for the past four years as the Chief of the Criminal Division for the United States Attorney's Office for the Northern District of Indiana. In this capacity, you indicate that you have supervised a variety of prosecutions, including large scale drug distribution rings, illegal firearms trafficking, and cases involving the death penalty.

   Over the last few years, many prominent Americans have begun raising concerns about the death penalty. Some are current or former supporters of capital punishment. For example, in a speech in 2001, Justice O'Connor said there were serious questions about whether the death penalty is fairly administered in the U.S., and added: "[T]he system may well be allowing some innocent defendants to be executed." As you may know, I am particularly concerned with the significant number of cases across the country where death row inmates are subsequently found to be innocent.

a. Do you believe the death penalty is fairly administered? What changes, if any, do you think are warranted in Indiana or on the federal level?

The national debate over the continued use of the death penalty is an important and serious matter worthy of extensive discussion. I share your concern over the issue of death row inmates being subsequently found innocent. However, the propriety of the death penalty is a policy question best left to the political branches of government. From a legal perspective, the Supreme Court has made it clear that the death penalty is a constitutional punishment in the appropriate circumstances. See e.g. Sattazahn v. Pennsylvania, 123 S.Ct. 732, 742 (2003). My obligation as a district court judge will be to follow the Supreme Court's mandate and to fairly apply the law to the facts and circumstances before me. I will do that in the most vigilant of ways, especially in cases involving the death penalty where the stakes are so high.

On the federal level, the Department of Justice has set up a thorough review process that ensures that similarly situated people are treated similarly. In federal cases where defendants are eligible for the death penalty, the U.S. Attorney must justify his decision whether to seek or not to seek the death penalty by submitting a comprehensive memorandum to the Attorney General's Capital Litigation Unit setting forth the facts of the case and applying those facts to the statutory aggravating and mitigating factors. The process also allows defense attorneys to argue their case against the filing of the death penalty with the Department of Justice's Capital Litigation Unit. Thus, they are given the opportunity to argue the matter *before* the death penalty is even sought. The ultimate decision to seek the death penalty in each federal case is made by the Attorney General. While I may not agree with every decision of the Attorney General and his Capital Litigation Unit, this centralized review process has served as an important mechanism to ensure fairness. As I have no experience with the Indiana or any other state's death penalty system, I cannot provide the Committee with any meaningful insight on how to improve state systems.

b. What role, if any, do you believe a federal district court judge plays, or should play, in balancing a criminal defendant's right to a full and fair trial, particularly in capital cases, against the government's interest in prosecuting a person accused of a crime in an expeditious manner?

As mentioned above, the role of a district court judge is to be extremely active in ensuring fairness in the system. Criminal defendants are often represented by sole practitioners or small law firms who work extremely hard to protect the rights of the defendant. However, against the power and resources of the federal government, this can be a daunting task. Protecting a defendant's constitutional rights must be paramount to everything else. By doing this in individual cases, especially death penalty cases, a message is sent that the government cannot cut corners, cannot let the ends justify the means, and cannot act in an unconstitutional way. Many of the problems associated with the death penalty trace back to defendants not receiving effective assistance of counsel. The best way to achieve justice is to ensure that defendants facing the death penalty have high quality criminal defense attorneys who are certified to handle such matters.

2. As you are no doubt aware, many people's only interaction with the Federal government is in our nation's courtrooms. Accordingly, it is very important that federal officials treat all people with patience and dignity. When Strom Thurmond was Chair of this Committee he would ask judicial nominees if they would promise to be courteous if confirmed as a judge. He said that the more power a person has, the more courteous a person should be. Please share with us your thoughts on the importance of treating all persons who appear before you with courtesy and how you intend to instill public confidence in our federal government and our federal justice system.

Judicial temperament is among the most critical factors in the performance of a judge. Discourteous and rude behavior is more than unnecessary; it is simply wrong. A judge should be able to balance the need to control his or her courtroom with the right of people to be treated respectfully. These are not mutually exclusive concepts. I make every effort to treat people with decency and respect now, and I pledge to continue to do so if I am fortunate enough to be confirmed. This means that a judge, for example, should care about other people's time as much as he cares about his own, should listen intently and respectfully to litigants and their counsel, and should treat everyone who comes into the courtroom with the same degree of respect that he would afford a fellow judge. This should be the easiest part of the job. To treat people in a way that you would like to be treated in return is not a difficult endeavor. I will continue to strive to do just that; it is, quite simply, the way I was raised.

The best way to instill confidence in the judicial system is to leave those who pass through the system – lawyers, litigants, jurors and others – with an unmistakable feeling that they were treated fairly. This is not to say that everyone will agree with all of the decisions that one might make. But if those people who participate in the judicial system feel that they received full and fair consideration of their issue, then a judge will have done all that he can do. Another way to instill confidence in the federal government is to lead by example. I have tried to do this as Chief of the Criminal Division by being the first to volunteer for assignments that were not the most

attractive. Leading by example also means giving the public an honest day's work for an honest day's pay. The public deserves nothing less. I will continue to work hard to accomplish this goal.

3. Mr. Simon, you indicate on your Senate Questionnaire that you have served on a committee made up of Criminal Chiefs from around the country that meets regularly to consider issues and make recommendations to the Attorney General's Advisory Committee on Department of Justice policy. As I am sure you know, there is considerable debate about the need for legislation to address the risk of more terrorist attacks. Without getting into any specific proposals, what do you think the trade-off needs to be between liberty and security?

This country was founded on the principles of liberty and freedom. These concepts are embodied in the Constitution and are what allows this country to thrive. A balance must be struck between protecting our most precious commodity -- our liberty -- and providing citizens with collective security. To be sure, that is a balance for Congress to make. But it should be made carefully, thoughtfully, deliberately and, of course, within the confines of the Constitution. A district court judge should afford that decision much deference and give it a strong presumption of constitutionality. In the end, it is for the Supreme Court to decide whether Congress went too far and ran afoul of the Constitution.

4. According to your Senate Questionnaire, your legal career has focused primarily on criminal matters, particularly as a prosecutor. In fact, on your Questionnaire you advised the Committee that only 2% of your legal practice focused on civil matters. In addition, although you indicate that you have participated in civil forfeiture cases filed as an adjunct to criminal cases, it appears that all of the significant opinions that you list in your Senate Questionnaire involved criminal matters. As you know, a significant portion of the federal judicial docket deals with (often complex) civil matters. Please tell the Committee whether and how your legal experience has prepared you to adjudicate complex civil cases and manage a busy docket involving such matters. Should you be confirmed, how will you get up to speed and respond to the challenge of handling the civil matters that will be before you?

Individuals who are appointed to the federal bench bring with them a variety of strengths and weaknesses. What I may lack in the area of civil litigation, I more than make up for in the area of criminal litigation. In addition, although in the last twelve years my practice has focused almost exclusively in the criminal area, for the three and a half years before that I was involved in extremely complex civil litigation at the law firm of Kirkland & Ellis. While at the firm, I built a very solid foundation in civil practice. I worked extensively, for example, on complex litigation in federal court involving the design and construction of the Nine Mile Nuclear Power Plant in upstate New York and the Shoreham Nuclear Plant on Long Island. I was also very involved in complex civil litigation involving the design and construction of the Metrodome in Minneapolis, Minnesota. In that case, I handled a variety of discovery issues, took dozens of depositions including experts, and drafted and argued many motions. I was also very involved in a class

action case in federal court, and I handled a variety of products liability matters for General Motors. In addition, I litigated a wide variety of employment discrimination cases.

I believe that my involvement in all of these matters while at Kirkland & Ellis has provided me with a solid foundation for addressing complex and routine civil matters. I nonetheless have a lot to learn. But I have a track record of working hard, and I pledge to put my nose to the grindstone. To that end, in the hopes of being confirmed, I have already begun preparing myself by reading all new opinions from the Seventh Circuit in the civil area in an effort to familiarize myself with the myriad of civil issues that could conceivably come before me. I promise that when a civil case is before me and a decision must be made, I will make sure that I become an expert on that particular area of law before rendering a decision. Litigants and their counsel deserve nothing less.

United States District Court
Northern District of Indiana
Hammond Division

Chambers of
Theresa L. Springmann
Magistrate Judge

5400 Federal Plaza
Suite 3500
Hammond, IN 46320
Telephone: (219) 852-6700

March 19, 2003

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
223 Hart Senate Office Building
Washington, D.C. 20510

Re: Hearing of Wednesday, March 12, 2003, on the Nomination of Theresa Lazar Springmann to the United States District Court for the Northern District of Indiana

Dear Senator Hatch:

Please find enclosed my responses to the three follow-up questions from Senator Patrick J. Leahy submitted after the confirmation hearing conducted on Wednesday, March 12, 2003.

Sincerely,

Theresa L. Springmann

Honorable Theresa L. Springmann
Magistrate Judge, United States District Court

cc: The Honorable Patrick J. Leahy

Follow-Up Question Number 1 from Senator Patrick Leahy to Theresa Lazar Springmann:

Judge Springmann, you have served as a federal Magistrate Judge for the U.S. District Court for the Northern District of Indiana for approximately eight years. Please tell the Committee what you have learned from your experience on the bench that you will bring with you to your new position as a district court judge, if confirmed.

I have been privileged to serve as a magistrate judge in the Hammond Division of the United States District Court for the Northern District of Indiana since March of 1995. Five full-time district court judges and four full-time magistrate judges serve in the Northern District of Indiana. In the Hammond Division, the two magistrate judges are fully utilized by the two district court judges in managing the criminal and civil case dockets. The magistrate judges are responsible for conducting all pre-trial proceedings and ruling on all non-dispositive motions in the civil and criminal cases filed before the district court. The magistrate judges also manage their own caseload of civil cases in which the parties have consented to the jurisdiction of a magistrate judge for all purposes including trial. I currently have one hundred fifteen (115) such fully consented civil cases before me. The magistrate judges also conduct settlement conferences in both the district court's civil cases and the fully-consented civil cases. In the past eight years, I have presided over thirty-seven (37) jury trials and eleven (11) bench trials as a magistrate judge.

My experience of being a magistrate judge in the Hammond Division is relatively unusual when compared to the more limited utilization of magistrate judges in other district courts across the country. The broad-based responsibilities that magistrate judges have in the Hammond Division result from the heavy criminal caseload carried by the district court judges, who have on average three to four (3-4) criminal trial settings each week. Full utilization of the magistrate judges allows consenting civil litigants definite pre-trial and trial settings that will not be continued due to a criminal case taking statutory precedent on the court's calendar. If confirmed, I believe that the responsibilities and experiences I have had as a magistrate judge will greatly assist the transition to managing a district court case docket and continuing the practice of fully utilizing magistrate judges within the statutory limits established by Congress.

From my experience on the bench over the last eight years, I have learned that the best way to manage a case is to work with the parties in setting reasonable deadlines and require the parties to adhere to them. Indeed, courts must insist on compliance with procedural rules to promote the interest in the uniform administration of justice, and one of the best guarantees of evenhanded administration of the law is strict adherence to the procedural requirements specified by the legislature. I have also learned to expect and require parties and their attorneys to show respect to each other and their respective positions throughout the litigation, especially at trial. Courts play an important role in requiring attorneys to maintain the highest levels of civility in dealing with each other, the opposing parties, witnesses, and the court. In conducting over three hundred settlement conferences in which I have related directly with parties and their counsel, I have learned how to assist the parties in resolving their cases and structuring settlements that are tailored to their specific needs and interests.

Follow-Up Question Number 2 from Senator Patrick Leahy to Theresa Lazar Springmann:

Judge Springmann, since 1998, you have been a member of the Seventh Circuit Committee for a Model Employment Dispute Resolution Plan, a position to which you were appointed by the Chief Judge of the Seventh Circuit, Richard Posner. Please describe for us what the Committee is working on and the role that you have played on this Committee. Given this experience, what more do you think the federal courts, or Congress, should do to ensure that justice is served in employment discrimination and other employment litigation cases?

I was appointed in September of 1997 by then Chief Judge Richard A. Posner of the United States Court of Appeals for the Seventh Circuit to serve as a member of an ad hoc Committee on the Model Employment Dispute Resolution Plan. The mission of the committee was to review the Federal Judiciary Model Employment Dispute Resolution Plan (EDR Plan) approved by the Judicial Conference in March of 1997. The EDR Plan's purpose was to provide rights and protections to judiciary employees comparable to those provided to legislative branch employees under the Congressional Accountability Act of 1995.

The circuit committee was chaired by then Chief District Judge Marvin Aspen of the Northern District of Illinois and included representative members from each of the district courts within the Seventh Circuit. Members included a bankruptcy clerk, district court clerk, chief probation officer, bankruptcy judge, the circuit executive, a circuit judge, and a magistrate judge. After many meetings and discussions regarding the EDR Plan, the committee in January of 1998 issued a Final Draft of a Proposed Plan to the districts for comment. Ultimately, a final version of the Seventh Circuit Model Equal Employment Dispute Resolution Plan was approved on May 20, 1998, by the Seventh Circuit Judicial Council and provided to the district courts within the circuit for modification and adoption. My involvement in the project thus concluded.

If confirmed, I will adhere to the constitutional limitations on judges in interpreting laws passed by Congress. I recognize that laws in the area of employment discrimination and other employment litigation generally are very important. However, decisions on policy in these areas are for Congress to make. As with any law enacted by Congress, there is a strong presumption of its constitutionality. I will also look to the precedent established by the United States Supreme Court and the United States Court of Appeals for the Seventh Circuit when interpreting laws enacted to protect the rights of parties in employment-related litigation.

Follow-Up Question Number 3 from Senator Patrick Leahy to Theresa Lazar Springmann:

One of the important traits for a judge to have is open-mindedness and fair-mindedness. Judges need to be able to listen to arguments and change their minds about an issue if warranted by the law and facts. Judge Springmann, could you give me an example from your legal career where you have changed or reversed a position based on the arguments that you heard in court or the information that a client or another lawyer presented to you?

One of the most important aspects of a proper judicial temperament is being open-minded, fair, and impartial. Judges should not impose or project their personal beliefs on the litigants who bring their cases to court. Nor should a judge be predisposed or prejudge a case before the evidence has been fully developed and both sides have been given an opportunity to argue what the evidence proves and how the law should be applied.

As a magistrate judge, I have conducted many hearings in both civil and criminal cases. I have ruled on innumerable motions after they have been fully briefed. I have presided over both bench and jury trials. In each instance, I have strived to listen carefully and patiently to both sides of every argument and to allow the parties to make their record before ruling. This practice avoids judges having to reverse themselves because they formed opinions on what the outcomes should be before it was appropriate to do so.

This habit of being open-minded, fair, and impartial is a carryover from private practice as an attorney. In private practice, it was my responsibility to keep my clients appraised of developments in their cases. Information from discovery, motion practice, and investigation had to be reviewed and assessed objectively so that my clients could make fully informed decisions on whether to continue litigation, settle, go to trial, or take an appeal. To prejudge a case as a lawyer and advise a client without giving consideration to the evidence and arguments developed by the opposing party would have worked a disservice to my client. Often in practice, first impressions of the relative strengths and weaknesses of a case would shift by the time the case went to trial. Therefore, effective trial lawyers cannot be closed-minded or adverse to changing their minds about the merits of a case.

Follow-Up Questions for Victor Wolski
Senator Richard J. Durbin

1. Q. Mr. Wolski, at your March 12 hearing we discussed your *National Journal* quote from 1999: "[E]very single job I've taken since college has been ideologically oriented, trying to further my principles.... I believe in limited government, individual liberty, and property rights." Please describe each job you have had since college and discuss how each one advanced the principles of limited government, individual liberty, and property rights.

A. It is my recollection that the second portion of this quote, following the ellipsis, was in response to a question concerning my economic policy perspective as a member of the Joint Economic Committee staff, and was not an elaboration on the "principles" referenced in the first quote. The principles I have furthered throughout much of my professional career are much broader than these free market prescriptions, and include a commitment to public service through public policy work at non-profit organizations and through work in the public sector.

My first two jobs out of college were economic research positions with a supply-side economist at two non-profit think tanks, the Center for Strategic and International Studies and the Institute for Political Economy. I came to Washington, D.C. to become involved in public issues and sought to contribute to public policy proposals that would promote economic growth and prosperity. My primary responsibility was in the area of federal tax policy, although I also conducted research in Soviet economic history and international development. In the area of tax policy, I focused on lowering marginal tax rates, which implicates all three of the aforementioned economic prescriptions. In the other two areas, my work would have been critical of socialist economic policy, again addressing all three economic prescriptions.

I then served as Confidential Assistant and Speechwriter to Secretary of Agriculture Richard Lyng, during the drought of 1988. My work furthered my belief in service in the public sector, but would not, as I remember it, have had anything to do with advancing limited government, individual liberty, or property rights.

In my next job, I was a paralegal specialist in the Office of the General Counsel of the Department of Energy. The primary focus of my work was on the drug-free federal and contractor workplaces, conflict-of-interest requirements, and whistleblower protection. It would not have been appropriate for me to seek to advance my personal economic or other public policy views in that position, and thus the three economic prescriptions were not involved. My work, however, did further my belief in service in the public sector.

I was next a summer associate in the Los Angeles office of a large law firm. In that job I sought to advance the interests of the firm's clients, and the job did not involve the economic prescriptions of limited government, individual liberty, or property rights in any way.

After law school, I clerked for a United States District Court Judge in San Francisco, California. This job entailed assisting my judge in deciding cases based on the law—it would not

have been proper for my personal views to influence my work, and they did not. This position was certainly not the place to advance my personal economic policy views. This position, however, advanced my belief in the principle of public service.

Wishing to stay in the area for family reasons and not being interested in work for a big law firm, my next job was with Pacific Legal Foundation (PLF) in Sacramento. PLF was a non-profit public interest law organization, which represented clients pro bono who lacked the financial resources or interest to hire private counsel but whose cases raised constitutional or other important public law issues. My work at PLF furthered my belief in public service, as it was personally gratifying to represent clients who otherwise would not have their day in court. Because of my economics background I was asked to join the Property Rights section, as the inability of our clients to hire experts often required our attorneys to cover the economic issues themselves. Since my work at PLF involved advocacy on behalf of clients, and not policy making, the free market economic prescriptions of limited government, individual liberty, and property rights were not advanced as such. Much of my work involved attempts to clear up murky procedural areas of takings law. However, the result of some of my cases was to obtain court judgments that limited government within constitutional bounds, and consequently extending individual liberty, or that established legal recognition of property rights.

I then returned to Washington to work as an aide to Senator Connie Mack. In the 105th and 106th Congresses, I served as his tax counsel. In the 106th Congress I also served as the General Counsel to the Joint Economic Committee. This work was consistent with my long-standing interest in tax policy (dating back to my first think tank jobs and including my membership on the editorial board of the Virginia Tax Review while in law school), and my previous public sector service. As the Senator's tax counsel, I sought to further his objectives, not my own personal policy choices. As General Counsel of the JEC, I had a hand in the drafting and editing of a number of reports relating to economic policy, and sought to advance the free market principles shared by all of the Senator's JEC staff, including the importance of limited government, individual liberty, and property rights to the sustenance of a society's economic prosperity.

My work as a litigator in private practice over the last two and one-half years has not involved the furthering of my personal policy goals, but has instead concerned furthering the interests of my clients. I have represented the interests of government entities in this practice, including state and local governments, the Governor of Puerto Rico, and the Medicare system.

2. Q. You have devoted the largest part of your legal career to working at the Pacific Legal Foundation; you worked there from 1992-1997. The Pacific Legal Foundation's website lists over 20 cases it has worked on in which it has challenged affirmative action programs in California and throughout the country. Which of these cases did you work on? Please provide all briefs in which you were the principle drafter or played a significant role.

A. I believe you are referring to the "Securing Individual Rights" listing under the "Case Index" on the Foundation's website. I was not involved in any of these cases and have no knowledge of them. After my initial year as a fellow, I was assigned to the Property Rights section, and these types of cases would have been the work of the General Law section. During my fellowship, I worked on one *amicus curiae* brief in a case concerning an affirmative action program—*Northeastern Florida Chapter of the Assoc. Gen. Contractors of America v. City of Jacksonville*, a copy of which has been submitted to the Committee.

3. Q. According to a recent Pacific Legal Foundation press release, announcing its filing of amicus briefs in opposition to the University of Michigan's affirmative action programs, "PLF has long been an outspoken critic of race and gender preferences and has won several precedent-setting cases involving California's Proposition 209, a constitutional amendment which bans race and gender preferences in public contracting, hiring and education." Please describe your involvement, if any, in the Pacific Legal Foundation's Proposition 209 case. If you did not personally work on the case, please explain whether or not you agree with the Foundation's position.

A. I have had no involvement in any cases involving California's Proposition 209. It is my recollection that it was adopted by the voters in November, 1996, and I have not worked at the Foundation since April, 1997. I have not read any of the Foundation's briefs concerning this matter, and thus have no knowledge of the Foundation's litigation position.

4. Q. In its amicus briefs in opposition to the University of Michigan's affirmative action programs, the Pacific Legal Foundation argues that the University's programs not only fail to meet the narrow tailoring provision of the strict scrutiny test but also that the University's diversity rationale fails to be a compelling state interest. This position goes well beyond that of the Bush Administration, which addresses only narrow tailoring. Which of these positions do you find more persuasive?

A. I have not read the Administration's brief nor have I read the briefs of Pacific Legal Foundation in the University of Michigan case. I have read press reports concerning the former, but as this area of the law has not been a part of my practice, I have not taken the time to acquaint myself with the arguments made nor with the cases relied upon. If I am fortunate enough to be confirmed as a judge, in deciding such a case I would carefully review the briefs filed by counsel and the cases cited, carefully consider the particular facts of the case, and evaluate compelling interest and narrow tailoring arguments based on the principles established by Supreme Court and Federal Circuit precedent.

5. Q. In the amicus brief you co-authored in the case *General Contractors of America v. City of Jacksonville*, 508 U.S. 656 (1993), you wrote:

> It has been nearly four decades since the pernicious "separate but equal" doctrine of *Plessy v. Ferguson*, 163 U.S. 537 (1896), was put to rest by the Court in *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954). The Eleventh Circuit decision would turn back the clock to the days when distinctions based on race were presumed valid by insulating from facial challenges government enactments that discriminate on the basis of race.

Do you believe that if the Supreme Court had ruled that the plaintiff in this case, a white contractor who was challenging a race-based affirmative action contracting program, did not have standing, that such a ruling would have been analogous to the *Plessy* decision?

A. The passage cited is from a brief filed on behalf of clients. We were not arguing that the Eleventh Circuit's decision, or a Supreme Court decision upholding it, would have been analogous to *Plessy*. The argument we were advancing on behalf of our clients was that contractors who are foreclosed from bidding upon certain public contracts because of their race should not have to prepare a bid and demonstrate that they would have been awarded the contract in order to have standing to challenge a set-aside program. The reference to *Plessy* was meant to underscore that several decades after that case was decided, it had been recognized that the Fourteenth Amendment generally prohibits government discrimination on the basis of race, and that exclusionary government policies based on race are subject to heightened scrutiny. The argument we made on behalf of our clients was that to base standing solely on the economic impact of the loss of a contract would overlook several decades of development of Equal Protection law that were rooted in the recognition that people who are excluded from government programs based on their race may suffer personal injury due to the act of being so singled out.

6. 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. While some members of the academic community have dissented from these views, by and large they are taught simultaneously with (and indeed as if they were) the law. The Federalist Society for Law and Public Policy Studies is a group of conservatives and libertarians interested in the current state of the legal order."

As a member of the Federalist 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?

A. I do not remember ever seeing this statement before. As I had no part in the drafting of the statement and do not recall it ever being expressly discussed at any Federalist Society functions I have attended, I do not know the meaning of "orthodox liberal ideology" in that context. It has been some time since I have been on a law school campus, so it is hard for me to evaluate the state of affairs currently in the law schools. Based on my contacts with members of the legal profession, I cannot make the blanket statement that it is "strongly dominated" by persons advocating "a centralized and uniform society." I have worked with many lawyers who considered themselves political liberals as well as many who call themselves conservatives.

Without regard to their own political philosophies, lawyers throughout the political spectrum should vigorously and forcefully advocate the interests of their clients.

7. 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 need to be reordered? If so, which ones? On which traditional values should there be a premium, and why?

A. Again, I do not remember ever seeing this statement before. I had no part in the drafting of this statement and do not recall it ever being expressly discussed at any Federalist Society functions I have attended. I do not know what priorities the statement refers to other than those listed, and do not know how one determines their current priority. I do not believe it is the function of a judge to "reorde[r] priorities within the legal system." Certainly, the rule of law must be a top priority of any judge, which to me means following the Constitution and laws, and the precedents of higher courts, and not usurping the policymaking functions of the executive and legislative branches. The protection of individual liberty is without question one of the goals of the U.S. Constitution, particularly the Bill of Rights and subsequent amendments. I believe that in interpreting the Constitution, it is important to keep in mind the traditional political and philosophical values that underlie broad conceptions such as "due process," "liberty," and "equal protection."

8. During the 2000 presidential campaign, President Bush pledged that he would appoint "strict constructionists" to the federal judiciary, in the mold of Supreme Court Justices Clarence Thomas and Antonin Scalia.

(1) How would you describe the judicial philosophy of Justices Scalia and Thomas?

I have not read enough of Justice Thomas's opinions to be able to confidently describe his judicial philosophy. I have read Justice Scalia's book A Matter of Interpretation, which sets out his interpretive philosophy and contains essays criticizing it. Justice Scalia is a textualist, focusing on the common meaning of words at the time they were used in a document, whether that document is the Constitution or a law passed by Congress.

(2) How would you describe your own judicial philosophy, and how do you believe it is different from or similar to Justices Scalia and Thomas?

In many respects it is difficult to compare the judicial philosophy of a trial court judge, as I would be if fortunate enough to be confirmed, with that of Supreme Court justices. The role of a trial judge is much different—he or she must carefully consider the factual record and make the factual findings to which the law is to be applied, and must follow the precedents of higher courts. To the extent that certain provisions of the Constitution or laws of the United States have been interpreted in a certain manner by the Supreme Court or the Federal Circuit, I would be bound to follow that approach. I believe that a judge should start the interpretive process by examining the text of the Constitutional, statutory, regulatory, or contractual provisions at issue. I would also look at extrinsic aids

to determine the meaning of such words that were terms of art, ambiguous, or susceptible to different meanings. In this regard my approach would differ from Justice Scalia's, at least as I understand his approach. Having worked in the Senate and being familiar with the legislative process, I am inclined to consult such documents as Conference and Committee Reports to clarify the meaning of statutes.

(3) As a judge, would you interpret the Constitution strictly according to its original understanding in 1789?

I would not try to "strictly" or "leniently" interpret the Constitution, and would instead attempt to construe its provisions in the fairest manner possible, in light of the applicable higher court precedents. Many of the provisions of the Constitution, such as "due process," "liberty," and "equal protection," represent broad categorical concepts whose general contours might be drawn with reference to the meaning of the concepts at the time the provisions were adopted, but which necessarily must be adapted to current factual circumstances.

(4) Do you think that the Supreme Court's most important decisions in the last century – *Brown v. Board of Education, Miranda v. Arizona, Roe v. Wade* – are consistent with strict constructionism? Why or why not?

If by strict constructionism it is meant that the particular results were necessarily compelled by express terms of the Constitution, these decisions may not have been consistent with this approach. The Constitution is not a legal code, but rather contains broad principles constituting the relationships between our branches and levels of government and the people. In construing these principles, it is often necessary to apply Constitutional provisions in contexts that are not explicitly provided for in the document itself.

9. List three Supreme Court cases with which you disagree, and explain why.

As a lower court judge, I would be bound to follow all applicable Supreme Court precedents, regardless of whether I agreed with them. As a litigator, as a practical matter I have accepted such precedents as given, rather than attempt to categorize them as ones with which I agreed or disagreed (my view of the latter seems to change from case to case, with respect to whether the precedent helps or hinders the interests of each client). Some cases that I have read back in my law school days have stuck with me as ones with which I would disagree. In *Dred Scott v. Sandford*, I recall that Justice Curtis's dissent thoroughly and in a scholarly manner disputed the basis of the majority opinion. The Court's creation of the "separate-but-equal" doctrine in *Plessy v. Ferguson* in order to allow malicious racial segregation is another decision with which I disagreed. It has, fortunately, since been established beyond question that the Fourteenth Amendment bars such racial discrimination. I find the Supreme Court decision in *Buck v. Bell*, 274 U.S. 200 (1927), upholding the government-coerced sterilization of individuals, to be inconsistent with the most elementary notions of equal protection and due process.

10. In terms of judicial philosophy, please name several Supreme Court Justices, living or dead, whom you admire and would like to emulate on the bench.

While there are many Justices whose lives, integrity, and dedication to public service I find commendable, it is difficult to identify ones I would emulate were I to be confirmed, as the role of a trial court judge is very different from that of a Justice of the Supreme Court. Certainly, I think that Chief Justice John Marshall was instrumental in establishing respect for the federal judiciary as an equal branch of the government. His efforts to develop a consensus on the court, including instituting the practice of having a single opinion issued for the Court, have made it much easier for lower court judges to determine and apply the precedents of higher courts. Justice Joseph Story is another figure from the Court's past that I particularly admire. Although Story, like Marshall, had previously served in the Congress and was associated with certain political views, he endeavored to keep the Court from becoming a political body. Justice Benjamin Curtis's dissent in *Dred Scott* has always stood out in my mind as a tremendously forceful document. Curtis criticized the majority opinion on its own terms, demolishing its underpinnings. Curtis's subsequent resignation from the Court due to his disagreement with the decision was a commendable early profile in courage.

VICTOR J. WOLSKI
1500 K Street, N.W., Suite 200
Washington, DC 20005

March 17, 2003

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

Re: Additional Information Requested at March 12, 2003 Hearing

Dear Chairman Hatch:

At my confirmation hearing this past Wednesday, March 12, Senator Schumer asked for additional information pertaining to two matters:

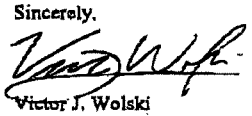
1. *Westchester County land use matter.* In early 2002, my firm was retained by the Village of Pelham, the Town of Pelham, the Village of Pelham Manor, and the Pelham Union Free School District ("the Pelhams"). Our clients were challenging a late December, 2001 decision of the Westchester County Board of Acquisition and Contract that approved the relocation of a sewer line to allow the development of a cluster of discount stores on East Sandford Boulevard in Mount Vernon. This "big box" development project would border on their communities, raising environmental, traffic and other issues relating to uncontrolled suburban growth. The Pelhams had filed a petition in the Supreme Court of the State of New York, County of Westchester (*Maisano, et al., v. Spano, et al.*, Index No. 236/02), and were considering a companion case in federal court. I was the primary attorney who researched and developed potential federal claims, and prepared a draft complaint. Our clients ultimately decided not to pursue a federal court action.

2. *State of Nevada, et al., v. United States Department of Energy, et al.* (D.C. Circuit, Nos. 01-1516, 02-1036, 02-1077, 02-1179 & 02-1196); *State of Nevada, et al., v. United States Nuclear Regulatory Commission* (D.C. Circuit, Nos. 02-1116 & 03-1058); *State of Nevada, et al., v. United States, et al.*, (D.C. Circuit No. 03-1009). I am a member of the litigation team representing the State of Nevada, Clark County, and the City of Las Vegas, in their opposition to the location of a nuclear waste repository at Yucca Mountain. Several lawsuits are pending before the U.S. Court of Appeals for the District of Columbia Circuit, challenging the repository siting decisions. My work on

these matters has involved both procedural and substantive law issues relating to the various challenges.

I would be happy to meet with any members of the Senate Judiciary Committee at any time to answer further questions they might have.

Sincerely,



Victor J. Wolski

cc: Honorable Patrick J. Leahy, Ranking Member

Questions from Senator Edward M. Kennedy
To Victor Wolski, Nominee to the Court of Federal Claims

1. As an attorney at the Pacific Legal Foundation, you co-authored a brief to the Supreme Court in *Northeastern Florida, Chapter of the Associated General Contractors of America v. City of Jacksonville, Florida*, 508 U.S. 656 (1993), in which the Court upheld the right of white contractors to challenge affirmative action "set-asides" even without a showing that contractors would have bid successfully for any of the contracts. In the context of making your arguments in support of standing, your brief argued:

> It has been nearly four decades since the pernicious "separate but equal" doctrine of *Plessy v. Ferguson*, 163 U.S. 537 (1896), was put to rest by the Court in *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954). The Eleventh Circuit decision would turn back the clock to the days when distinctions based on race were presumed valid by insulating from facial challenges

1. Please explain how a denial of standing in this case would "turn back the clock to the days" of *Plessy v. Ferguson*.
2. Do you believe affirmative action "set-aside programs" such as those at issue in this case are equivalent to the kinds of "separate but equal" programs struck down by the Supreme Court in *Plessy*?

A. 1. The passage cited is from a brief filed on behalf of clients. The argument we were advancing on behalf of our clients was that contractors who are foreclosed from bidding upon certain public contracts because of their race should not have to prepare a bid and demonstrate that they would have been awarded the contract in order to have standing to challenge a set-aside program. The reference to "turn[ing] back the clock" meant that, many decades since *Plessy*, it has been recognized that the Fourteenth Amendment generally prohibits government discrimination on the basis of race, and that exclusionary government policies based on race are subject to heightened scrutiny. The argument we made on behalf of our clients was that to base standing solely on the economic impact of the loss of a contract would overlook several decades of development of Equal Protection law that were rooted in the recognition that people who are excluded from government programs based on their race may suffer personal injury due to the act of being so singled out.

A. 2. The cited brief is from the only case that I have worked on involving the issue of set-aside programs or other forms of affirmative action, and this brief dealt exclusively with the issue of standing. I am not familiar with the factual record that may have been developed in the case later with respect to the merits questions. After *Brown*, it is no longer a defense to race-based programs that they offer a "separate-but-equal" opportunity, and clearly the sort of malicious, race-based discrimination upheld in *Plessy* would not meet the heightened scrutiny standard under current law. As I explained in my response above, I was not comparing the set-aside program to any of the "separate-but-

equal" programs upheld under *Plessy*. Rather, I referred to *Plessy* in the context of standing.

2. In Department of Defense v. Meinhold, 34 F.3d 1469 (9th Cir. 1994) you argued in favor of the United States military's policy of discharging gay and lesbian servicemembers based on homosexual statements. You did this by filing an *amicus curiae* brief on behalf of the Pacific Legal Foundation.

I support the filing of *amicus* briefs, especially in important litigation such as the Meinhold case, because I believe it is important for courts to be made aware of viewpoints that might not be represented by the parties. Please describe the viewpoints that Pacific Legal Foundation held in this case that you felt would not adequately be represented by the parties to the Meinhold litigation?

Please provide a copy of your briefs in this litigation.

A. In the *Meinhold* case, the brief we submitted on behalf of our clients did not take any position on the military policy in question. We made two arguments on behalf of our clients. The first was that the district court failed to give the proper deference to the policy judgments of the Congress and the President in this area of military policy. The second was that the district court exceeded its authority in enjoining regulations and branches of the military that were not at issue in the case.

Although it might not be apparent from the Ninth Circuit's opinion in this case, the brief we filed was just not on behalf of Pacific Legal Foundation. My clients in the matter included a sergeant in the U.S. Army Reserve, a private first class in the U.S. Army, and 19 nationally prominent military and veterans organizations with combined membership of over 4 million citizens: Veterans of Foreign Wars of the United States; Air Force Association; Air Force Sergeants Association; Association of the United States Army; Enlisted Association of the National Guard of the United States; Fleet Reserve Association; Jewish War Veterans of the United States of America; Marine Corps League; Marine Corps Reserve Officers Association; National Association for Uniformed Services/Society of Military Widows; National Guard Association of the United States; Naval Reserve Association; Navy League of the United States; Non Commissioned Officers Association; Reserve Officers Association; The Retired Enlisted Association; The Retired Officers Association; United States Army Warrant Officers Association; and United States Coast Guard Chief Petty Officers Association. The active service members we represented had a viewpoint distinct from that of the Department of Defense and the Department of Navy, as these individuals are subject to military regulations and would be directly and personally affected by any shift in military decision making from the Congress and the Executive to the courts. Several of the organizations we represented had participated in the decision making process concerning the policy at issue in the case, having submitted written statements to Executive branch offices and having testified in Congressional hearings, and these groups had a distinct viewpoint—they wished to preserve their role in policymaking by keeping military decisions in the hands of the political branches.

Victor Wolski
Nominee to the Court of Federal Claims
Written Questions Submitted by Senator Leahy

1. Q. Do you believe that the test announced by the Supreme Court in *Penn Central Transportation v. New York City*, 438 U.S. 104 (1978), and its subsequent application allows for the consideration of the public's interest in determining whether a government action exacts a taking?

   A. Yes. The Supreme Court most recently in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 122 S. Ct. 1465, 1477-78 (2002), stated that this balancing test includes evaluation of "the importance of the public interest served by the regulation, [and] the reasons for imposing the temporary restriction."

2. Q. Do you personally believe there is a public interest in protecting the environment?

   A. Judges must follow the law, including judicial precedents according to the doctrine of *stare decisis*, and apply the law to the facts of each particular case before them. The Supreme Court has long held, most recently in *Tahoe-Sierra*, that protection of the environment serves a public interest, and I will apply those precedents.

3. Q. Given your demonstrated ideological orientation, please explain why you would want to be a judge on this court when it would require you to set your principles aside and act as a neutral arbiter?

   A. I would respectfully disagree that throughout my career I have demonstrated an "ideological orientation." I have held several positions during my professional career for which I have set aside my personal political or policy views. During my clerkship with a United States District Court Judge, for instance, it was my responsibility to assist a neutral arbiter in deciding cases based on the law. Similarly, my work at the Department of Energy's Office of the General Counsel did not involve my personal political or policy views. These jobs, and my work as an assistant to the late Secretary of Agriculture Richard Lyng, were motivated by my belief in service in the public sector—a principle that similarly motivates my interest in a judgeship. During my three and one-half years as an aide to Senator Connie Mack, it was my duty to put aside any personal policy goals in order to advance the Senator's own interests. Furthermore, my work as a litigator in private practice over the last two and one-half years has not involved the furthering of my personal policy goals, but instead has concerned furthering the interests of my clients.

I would like to be a judge on the United States Court of Federal Claims because I believe that this court serves a very important role in our democratic republic. It is significant that, in a society whose government is of the people, the government has waived sovereign immunity to allow money damages claims to be brought against it, in a forum in which the citizens are treated as equals with their government. On this court, it is important to have judges who can balance the interests of the private citizens against important public goals and purposes, the pursuit of which may have given rise to their claims. I believe that I have a broad and balanced perspective, with a strong appreciation for the policymaking role of Congress after 3 and ½ years of service to the Senate, and a respect for the executive branch based, in part, on service in two Cabinet-level departments. As a litigator I have represented the interests of private individuals, and have represented the interests of government entities--including state and local governments, the Governor of Puerto Rico, and the Medicare system. I am also familiar with three areas of the law that constitute a large portion of the court's docket: federal taxes, government contracts, and takings.

4. Q. Do you personally hold the belief that "[w]hen a city imposes restrictions on the right to develop or use real property, usually in the context of a permit application process, the city is affecting a fundamental right" as you argued while employed by the Pacific Legal Foundation?

A. This quotation is taken from a petition for a writ of certiorari in a case that concerned whether Due Process Clause protections apply when a family's building permit applications are denied. We made this argument on behalf of our client, under our ethical obligation, per the Model Rules of Professional Conduct, to zealously make all reasonable arguments that can be made to advance the interests of our clients. In that matter, the deciding vote against renewing their expired permits was cast by a council member who had a personal interest in seeing the applications denied. At the time of the petition, there was a Circuit split between two federal Courts of Appeals that held that Due Process considerations applied in the permit process, and five that held that the Due Process Clause does not apply unless the property owners had an entitlement or vested right to the permit. That particular quote was based on the Supreme Court's statement that "the right to build on one's own property—even though its exercise can be subjected to legitimate permitting requirements—cannot remotely be described as a 'governmental benefit.'" *Nollan v. California Coastal Commission*, 483 U.S. 825, 833 n.2 (1987). The right to due process in the various Circuits' analysis turned, I believe, on whether the administrative decision involved a right as opposed to a "governmental benefit."

The issues involved in that case have not come up in my litigation practice

since that petition was filed (in February, 1997), and thus I do not know if the Circuit split persists. The Due Process Clause is not a money damages-mandating provision, and it is settled that actions in the Court of Federal Claims cannot be based on this provision. *See, e.g., Carruth v. United States*, 627 F.2d 1068, 1081 (Ct. Cl. 1980). Thus, these issues are beyond the jurisdiction of the court. Were the issues to somehow come before me on the court, I would follow the law as determined by the applicable precedents of the Federal Circuit and the Supreme Court, and not my personal beliefs on the subjects.

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March 12, 2003

Senator Orrin Hatch
Chair, Senate Judiciary Committee

Senator Patrick Leahy
Ranking Member, Senate Judiciary Committee

PRESIDENT
NAN ARON
CHAIR
JAMES D. WEILL

Dear Senators:

We write to express our serious concerns about the nomination of Victor J. Wolski to the United States Court of Federal Claims (CFC). Mr. Wolski has spent much of his legal career challenging environmental protections on behalf of the Pacific Legal Foundation, an ultra right-wing property rights group funded largely by private industry. Moreover, Mr. Wolski admits that he has taken those positions because he personally believes in them. Indeed, he told the *National Journal* in 1999 that "every single job I've taken since college has been ideologically oriented, trying to further my principles," which he describes as a Libertarian view on government power and "property rights." These positions and statements make him an inappropriate choice for the CFC, which decides many such property rights cases.

The Importance of the Court of Federal Claims

Due to its exclusive jurisdiction over certain types of cases, the CFC is one of the most important courts in the country for those seeking to enforce legal protection of the environment. Created by Congress in 1982, the court was given exclusive jurisdiction over most "takings" claims against environmental and other regulations. Recent CFC rulings illustrate the court's ability to take an activist stance that harms the environment, ignoring Supreme Court precedent and forcing taxpayers to pay corporations large sums to compel them to follow basic health, safety and environmental protections. Last year, for example, the CFC awarded over $10 million to a chicken factory, in two separate rulings, for complying with regulatory requirements against salmonella poisoning, and it rewarded a coal company with $40 million just for seeking a "compatibility" ruling before mining coal in a national forest. Another initial ruling by the CFC found that water left in a stream to protect endangered species constituted a physical taking.

As illustrated by these instances of anti-environmental activism, the court seems to already have on its bench a number of property rights extremists. David Coursen, a former senior counsel for the Environmental Protection Agency, stated that "in the CFC the identity of the judge seems to be an unusually good indicator of the likely outcome of the cases," noting that "fourteen wetlands decisions, from a wide range of judges, reject takings claims. Only four decisions find takings, and three of these decisions are from a single judge [former Chief Judge Loren Smith], who, in turn, has never decided an environmental takings case in favor of the government." David F. Coursen, *The Takings Jurisprudence of the Court of Federal Claims and the Federal Circuit,* 29 Envtl. L. 821, 829-830 (1999).

The Disturbing Ideology of Victor J. Wolski

Given the CFC's increasing bias against environmental regulation, the nomination of Mr. Wolski is not only inappropriate, but potentially dangerous. The arguments that Mr. Wolski has made on behalf of Pacific Legal Foundation indicate the extreme nature of his ideology and suggest that, as a judge, he would pose a serious threat to the entire nation's health, safety and environmental protections. In one case, for example, Mr. Wolski argued that a well-respected plan that had been established on a region-wide basis to save Lake Tahoe from pollution constituted a categorical "taking" of property, ignoring the fact that all affected landowners were allowed to sell their development rights, many of them for far more than their lot's purchase price. *See* Petition for Writ of Certiorari, *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1987) (No. 96-243). Had the Supreme Court agreed with Mr. Wolski's argument, the plan to save Lake Tahoe would have failed, and similar plans that protect and preserve unique places such as New York's Pine Barrens, New Jersey's Pinelands, and Florida's Everglades would have also been struck down.

Mr. Wolski has also characterized the right of a property owner to develop his or her property as a fundamental, constitutional right. *See* Petition for Writ of Certiorari at 9, *Clark v. Hermosa*, *cert. denied*, 520 U.S. 1167 (1997) (No. 96-1278) ("When a city imposes restrictions on the right to develop or use real property, usually in the context of a permit application process, the city is affecting a fundamental right."). And, in keeping with that position, he argues that a "special" form of "due process" is required whenever the government denies any form of zoning permit or variance. *See* Brief Amicus Curiae of Pacific Legal Foundation at 13, Rivkin v. Dover, *cert. denied*, 519 U.S. 911 (1996) (No. 95-1980) ("a special process is 'due' when property rights are at stake."). This argument, if adopted as law, would turn the federal courts into zoning boards of appeals, a step that even conservative judges and justices have not been willing to take. *See Sylvia Dev. Corp. v. Calvert County*, 48 F.3d 810, 828 (4th Cir. 1995) (Niemeyer, J.) ("Resolving the routine land-use disputes that inevitably and constantly arise among developers, local residents, and municipal officials is simply not the business of the federal courts."); *River Park, Inc. v. City of Highland Park*, 23 F.3d 164, 165 (7th Cir. 1994) (Easterbrook, J.) ("Federal Courts are not boards of zoning appeals."). The financial cost and logistical burden of the system Wolski advocates would make it virtually impossible for states or cities to ever pass regulations or deny permits.

In a third case, Mr. Wolski argued that Congress went "far beyond" its Commerce Clause power in working to protect ponds that served as habitat for 55 different species of migratory birds. Brief Amicus Curiae of Pacific Legal Foundation at 5, *Cargill, Inc. v. United States*, *cert. denied*, 516 U.S. 955 (1995) (No 95-73). In the brief, he praised the Supreme Court's 5-4 ruling in *United States v. Lopez*, for beginning to "rein in the abuses of the commerce power justification for acts of Congress," referred repeatedly to the more than twelve acres of seasonal ponds at issue as "puddles," and dismissed the idea that there might be a national interest in protecting migratory birds. *See, e.g., id.* at 6-7 ("[j]urisdiction over puddles * * * was justified by the Ninth Circuit on the basis that birds might frolic in these puddles."); *id.* at 7 ("Will one fewer puddle for the birds to bathe in have some impact on the market for these birds?"). If the Supreme Court were to adopt Mr. Wolski's views on the limits of Congress' power to legislate under the Commerce Clause, innumerable federal protections vital to the health of our nation and planet would be jeopardized.

We urge you to question Mr. Wolski about these issues at his hearing, and to carefully consider his troubling record before deciding how to vote on his nomination. Thank you.

Sincerely,

Nan Aron
President

AMERICAN PLANNING ASSOCIATION ♦ CLEAN WATER ACTION
COMMUNITY RIGHTS COUNSEL ♦ DEFENDERS OF WILDLIFE
EARTHJUSTICE ♦ ENDANGERED SPECIES COALITION
FRIENDS OF THE EARTH ♦ MINERAL POLICY CENTER
NATIONAL ENVIRONMENTAL TRUST
NATURAL RESOURCES DEFENSE COUNCIL ♦ OCEANA
SIERRA CLUB ♦ SOUTHERN UTAH WILDERNESS ALLIANCE

March 12, 2003

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

The Honorable Patrick Leahy
Ranking Member, Senate Committee on the Judiciary
United States Senate
Washington, DC 20510

Re: Nomination of Victor J. Wolski to the U.S. Court of Federal Claims

Dear Chairman Hatch and Ranking Member Leahy:

We urge you to consider our very serious concerns about Victor J. Wolski's pending nomination to the United States Court of Federal Claims (CFC). Mr. Wolski, is a 40-year old lawyer who has spent a considerable portion of his legal career bringing challenges to environmental protections on behalf of the industry-funded Pacific Legal Foundation. Mr. Wolski is a self-described ideologue on the very property rights issues that he would decide as a CFC judge. He told the *National Journal* in 1999 that "every single job I've taken since college has been ideologically oriented, trying to further my principles," which he describes as a "libertarian" view on government power and "property rights." These statements raise serious questions about whether Mr. Wolski has the appropriate temperament to be a fair and neutral federal judge.

The Importance of the Court of Federal Claims

The CFC is one of the most important environmental courts in the country. The court was created in 1982 and given exclusive jurisdiction over most "takings" claims against environmental and other protections. Recent rulings by the CFC illustrate the court's ability to sidestep binding Supreme Court precedent and to make taxpayers pay corporations millions of dollars simply for following basic health, safety and environmental protections. For example, in August 2002, in two separate rulings, the CFC awarded over $10 million to a corporate chicken farmer for complying with protections against salmonella poisoning and $40 million to a coal company simply for having to bear the burden of seeking a "compatibility" ruling before mining coal in the

Daniel Boone National Forest. Another initial ruling by the CFC found a physical taking of water that was left in a stream to protect endangered species.

Sadly, ideology already appears to play too large a role in the rulings of the CFC. David Coursen, a former senior counsel for the Environmental Protection Agency, has written that "in the CFC the identity of the judge seems to be an unusually good indicator of the likely outcome of the cases." Coursen notes that "fourteen wetlands decisions, from a wide range of judges, reject takings claims. Only four decisions find takings, and three of these decisions are from a single judge [former Chief Judge Loren Smith], who, in turn, has never decided an environmental takings case in favor of the government." David F. Coursen, *The Takings Jurisprudence of the Court of Federal Claims and the Federal Circuit,* 29 Envtl. L. 821, 829-830 (1999).

The Disturbing Ideology of Victor J. Wolski

Against this background, the undersigned groups find Mr. Wolski's nomination enormously disturbing. Mr. Wolski has devoted his entire career to furthering his libertarian views on government power and property rights. As a CFC judge, Mr. Wolski would have a considerable amount of power to write his principles into law, if he so chooses. But that is not the proper role of a federal judge.

The arguments Mr. Wolski has made in his legal work on behalf of Pacific Legal Foundation indicate that Mr. Wolski's ideology is extreme and threatens health, safety and environmental protections across the board. For example, in *Suitum v. Tahoe Regional Planning Agency*, Mr. Wolski argued that a much-heralded regional plan established to save Lake Tahoe from pollution worked a categorical "taking" of property even though affected landowners were permitted to sell their development rights, often for far more than their lot's purchase price. *See* Petition for Writ of Certiorari, Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725 (1987) (No. 96-243). Had the Supreme Court accepted Mr. Wolski's argument, the plan to save Lake Tahoe would have failed, and similar plans preserving unique places such as New York's Pine Barrens, Florida's Everglades and New Jersey's Pinelands would have failed with it.

Mr. Wolski has also described the right to develop property as a fundamental constitutional right. *See* Petition for Writ of Certiorari at 9, Clark v. Hermosa, *cert. denied*, 520 U.S. 1167 (1997) (No. 96-1278) ("When a city imposes restrictions on the right to develop or use real property, usually in the context of a permit application process, the city is affecting a fundamental right."). He has argued that a "special" form of "due process" is required whenever the government denies any form of zoning permit or variance. *See* Brief Amicus Curiae of Pacific Legal Foundation at 13, Rivkin v. Dover, *cert. denied*, 519 U.S. 911 (1996) (No. 95-1980) ("a special process is 'due' when property rights are at stake.").

Mr. Wolski's argument would turn the federal courts into zoning boards of appeals, something even conservative judges and justices have been loath to do. *See* Sylvia Dev. Corp. v. Calvert County, 48 F.3d 810, 828 (4th Cir. 1995) (Niemeyer, J.)

("Resolving the routine land-use disputes that inevitably and constantly arise among developers, local residents, and municipal officials is simply not the business of the federal courts."); River Park, Inc. v. City of Highland Park, 23 F.3d 164, 165 (7th Cir. 1994) (Easterbrook, J.) ("Federal Courts are not boards of zoning appeals.").

Finally, in *Cargill, Inc. v. United States*, Mr. Wolski argued that it was "far beyond" Congress's power under the Commerce Clause to protect ponds that served as habitat for 55 different species of migratory birds. Brief Amicus Curiae of Pacific Legal Foundation at 5, Cargill, Inc. v. United States, *cert. denied,* 516 U.S. 955 (1995) (No 95-73). Mr. Wolski praised the Supreme Court's 5-4 ruling in *United States v. Lopez*, for beginning to "rein in the abuses of the commerce power justification for acts of Congress." *Id.* at 6. Mr. Wolski's intemperate brief repeatedly refers to the more than twelve acres of seasonal ponds at issue as "puddles" and belittles the possibility that there might be a national interest in protecting migratory birds. *See, e.g., id.* at 6-7 ("[j]urisdiction over puddles * * * was justified by the Ninth Circuit on the basis that birds might frolic in these puddles"); *id.* at 7 ("Will one fewer puddle for the birds to bathe in have some impact on the market for these birds?"). If Mr. Wolski's views on the Commerce Clause were ever adopted by the Supreme Court, innumerable federal protections would be rendered unconstitutional.

Are Any New CFC Judges Needed?

Before filling any of the vacant judicial seats on the CFC, the Senate has a responsibility to consider the shocking results of an empirical analysis of the court's workload and jurisdiction recently published by George Washington Law Professor Steven Schooner. (Professor Schooner's study—*The Future: Scrutinizing The Empirical Case For the Court of Federal Claims*—will be published in an upcoming edition of the George Washington Law Review; it is available now online at http://papers.ssrn.com).

Professor Schooner, a director of GW's Government Contracts Law program, demonstrates that "a federal district court judgeship bears more than eight cases for each case allocated to a CFC judgeship." Schooner also notes that even this remarkable statistic exaggerates the CFC's workload, because it does not take into account the court's "inefficient" life tenure system that accelerates the path of CFC judges to senior status and has resulted in the CFC's current 1-to-1 relationship between active and senior judges. By way of comparison, the ratio for active to senior judges in the federal district courts is 2.3 to 1. Factoring the CFC's "abundance of senior judge resources" into the equation, an active CFC judge has approximately one-tenth the caseload of the average federal district judge.

Each year, federal judges cost taxpayers an average of more than $1 million per judge. If confirmed, Mr. Wolski, who is 40 years old, would likely spend many decades as a member of the CFC, costing taxpayers tens of millions of dollars. Before adding new judges to the CFC--particularly young new judges like Mr. Wolski--Congress has a responsibility to assess Professor Schooner's indictment of the CFC's life tenure system and his compelling evidence indicating that no additional judges are needed on the CFC.

We strongly believe that such an assessment must be done before any new judges are confirmed to the Court of Federal Claims.

Thank you for considering these important environmental concerns with Mr. Wolski's record, and for considering the need for new CFC judges before confirming any new judges to this important court.

Sincerely,

Jeffrey Soule, FAICP
Policy Director
American Planning Association

Doug Kendall
Executive Director
Community Rights Counsel

Vawter Parker
Executive Director
Earthjustice

Sara Zdeb
Legislative Director
Friends of the Earth

Philip E. Clapp
President
National Environmental Trust

William Butler
General Counsel
Oceana

Heidi McIntosh
Conservation Director
Southern Utah Wilderness Alliance

Paul Schwartz
National Campaigns Director
Clean Water Action

William Snape
Vice President and Chief Counsel
Defenders of Wildlife

Beth Lowell
Policy Analyst
Endangered Species Coalition

Lexi Shultz
Legislative Director
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Gregory Wetstone
Director of Advocacy
Natural Resources Defense Council

Pat Gallagher
Director, Environmental Law Program
Sierra Club

CC: Members, Senate Committee on the Judiciary

14

BARBARA BOXER
CALIFORNIA

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STATEMENT OF U.S. SENATOR BARBARA BOXER
ON THE NOMINEES FOR THE U.S. DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA: CORMAC J. CARNEY AND JAMES V. SELNA

Mr. Chairman, Senator Leahy, and members of the Senate Committee on the Judiciary, I am pleased to offer my support for the two nominees for the Central District Court of California before you today -- Cormac J. Carney and James V. Selna. Both are very well regarded by those who know them and their work. I am confident that, should they be confirmed, they will discharge their responsibilities with dignity, integrity and intelligence.

I first want to comment on the process that brought these two accomplished individuals before you today. In a truly bipartisan fashion, the White House Counsel, Senator Feinstein and I worked together to create four judicial advisory committees for the State of California, one in each federal judicial district in the state. Each committee has a membership of six individuals: three appointed by the White House, and three appointed jointly by Senator Feinstein and me. Each member's vote counts equally, and a majority is necessary for recommendation of a candidate. Both of the nominees before you today were reviewed by the Central District Committee and strongly recommended. I continue to support this excellent bipartisan process and the high quality nominees it has produced, including the two before you today.

Cormac Carney's experience is broad and impressive. He attended the United States Air Force Academy and graduated from the University of California-Los Angeles, where he was an accomplished student athlete. His remarkable feats both on the football field and in the academic arena continue to make Bruins fans proud.

After a brief career in the United States Football League, Judge Carney pursued his law degree at Harvard University on an NCAA Post-Graduate Scholarship. He served as a well-respected business attorney in Orange County for several years before his appointment to the California Superior Court in 2001.

James Selna also brings a wealth of experience to the federal bench. A native Californian, he received both his undergraduate and law degrees from Stanford University. His time at Stanford was marked by outstanding scholastic achievements, including membership in Phi Beta Kappa and service on the editorial staff of the *Stanford Daily*. He has also distinguished himself as a talented litigator, handling several complex cases in private practice.

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In addition to his long list of professional accomplishments, Judge Selna has dedicated considerable time and effort to many community organizations in Orange County. His work on behalf of the arts should be particularly noted, especially his strong affiliation with the Newport Harbor Art Museum and the Orange County Museum of Art.

The Central District will benefit greatly from the exemplary services of Judge Carney and Judge Selna, and I fully support their nominations and quick confirmation.

Senator Dianne Feinstein
Statement of Introduction for Judge Cormac Carney
Judicial Nominations Hearing
March 12, 2003

I am pleased to introduce to the Committee Judge Cormac Carney who is being nominated to the Central District of California.

Judge Carney's nomination is the successful product of the Bipartisan Screening committee Senator Boxer and I have set-up with the White House. Judge Carney received an unanimous **6-0 vote** from our screening committee in California.

Judge Carney is joined today by his wife, Mary Beth, his son Thomas (age13); his son John (a fifth grader), and his daughter Claire (age 9).

His father Padraig, his mother Mary and his sister, Shiela Thalhimer (Thallmer) are here today as well.

I would like you all to take a moment to stand-up so you can be recognized by the Committee.

Background Nominee:

Judge Carney comes before this committee with impressive credentials. He received his undergraduate degree from UCLA cum laude in 1984.

While at UCLA, he played varsity football and earned all-American recognition. After playing one year of professional football in the United States Football League (USFL), Judge Carney attended Harvard Law School and obtained his law degree in 1987.

Judge Carney spent his entire legal career in the private sector until he was appointed to the Superior Court in 2001.

From 1987 to 1991, Judge Carney worked as an associate at the firm of Latham and Watkins, where he practiced business litigation on behalf of Fortune 500 companies.

He subsequently moved onto another prestigious Los Angeles firm, O'melveny and Myers. In 1995, Judge Carney became a partner at the firm and remained there until his appointment to the Superior Court.

To give you a flavor of the strong support for Judge Carney, I would note the following comments of his peers.

- **Deputy District Attorney Michael Lubinski** writes that "*in every respect, [Judge Carney] is professional, judicious, hard working, very well-prepared, and impeccably fair.*"

- **Assistant Public Defender Robert A. Knox** describes Judge Carney as an *"outstanding Superior Court judge who has the aptitude and ability to be an exceptional Federal judge.*"

- **California Appellate Justice Richard Fybel** notes that Judge Carney "enjoys an excellent judicial temperament, fairly approaches problems and is actively engaged in the administration of justice."

Despite his heavy court workload, Judge Carney still has time to serve on the Governing Board of Victim Assistance Programs.

I am please to introduce Judge Carney to this committee, and strongly support his nomination.

Senator Dianne Feinstein
Statement of Introduction for Judge James Selna
Judicial Nominations Hearing
March 12, 2003

I am pleased to introduce Judge James Selna who is nominated to be a District Judge for the Central District of California.

Judge Selna passed through California's Bipartisan Judicial Selection Committee unanimously by a 6-0 vote. The Committee gave him a rating of "**exceptionally well qualified.**"

Judge Selna is joined today by his wife Harriet and daughter Christine.

Judge Selna has truly impressive academic and legal credentials. He graduated Phi Beta Kappa from Stanford University in 1967, where he was Editor-in Chief of The Stanford Daily.

Three years later, he obtained his law degree at Stanford, earning Order of the Coif. He also received the Urban Sontheimer Prizer for graduating 2nd in his class.

After a brief stint in the military, Judge Selna joined the Los Angeles firm of O'Melveny & Myers where he practiced law for 25 years.

At O'Melveny, Judge Selna specialized in litigating complex commercial disputes, typically involving high technology issues and/or companies. He also developed expertise in antitrust and trade regulation as well as trade secret law.

After a highly successful career in private practice, he was appointed to the Superior Court in 1998. Judge Selna has served with distinction on the Superior Court and enjoys tremendous respect from the trial bar.

Smart Jasper, a prominent local attorney, said he has the "*highest regard for [Judge Selna's] professional experience and abilities.*"

Some of the highest praise for Judge Selna comes from attorneys who litigated against him in private practice.

> For example, attorney Maxwell Blecher notes that "*I litigated extensively against Judge Selna on several matters while he was at O'Melveny and Myers. I can testify that he is a scholarly, knowledgeable, and eminently fair advocate who always exhibited sound judgment and courtesy.*"

Kevin Prongay, another attorney who litigated against Judge Selna, notes that "*.. as Jim Selna's counterpoint in the litigation, I came to appreciate his intelligence, outstanding analytical skills and good judgment.*"

I would also note Judge Selna's tremendous commitment to the civic life and health of Orange County.

He has served as:

- Member of the Board of Trustees and Vice-Chairman of the Orange County Museum of Art;

- President of the Newport Harbor Art Museum;

- a member of the Board of Directors of the Orange County Business Community for the Arts; and

- a Member of the Board of Visitors of the medical school at UC-Irvine.

In sum, I would like to welcome to the Committee a truly accomplished and well-rounded attorney.

I believe he will be a credit to the Federal bench in the Central District. I urge the Committee to support his nomination.

Statement
United States Senate Committee on the Judiciary
Judiciary Nomination
March 12, 2003

The Honorable Orrin Hatch
United States Senator , Utah

Today the Committee is considering eight very qualified nominees: Four for the federal district courts, two for the U.S. Court of Federal Claims, and two for the U.S. Sentencing Commission. These nominees enjoy bi-partisan support, and I am glad we can bring them before the Committee this afternoon for a hearing. On a side note, I know that the ABA worked hard on the ratings of the district court nominees, and I appreciate those efforts.

Before we turn to the panel of Senators here to introduce the nominees, I would like to say a bit about each of our nominees and offer them my support.

Our first nominee for the Central District of California, Judge Cormac Carney, has served with distinction on both sides of the bench. After graduation from Harvard Law School, he worked for two very prestigious law firms, Latham & Watkins and, later, O'Melveny & Myers, where he was a partner. He maintained a very sophisticated and varied practice, representing Fortune 500 companies in the areas of real estate, partnership, lender liability, environmental law, intellectual property and insurance coverage. Since 2001, he has served as a Superior Court judge for state of California.

Judge James V. Selna, our second nominee for the Central District of California, graduated from Stanford Law School in 1970. He then became an associate and later a partner at O'Melveny & Myers, where his practice included antitrust and complex commercial litigation. Since 1998, Judge Selna has served as a judge on the Orange County Superior Court.

Our first nominee for the Northern District of Indiana, Philip Simon, has spent a good deal of his distinguished legal career in the public sector. Upon graduation from Indiana University Law School, Mr. Simon entered private practice, where he focused on general commercial litigation matters. Soon thereafter, he began a long career a an Assistant United States Attorney, first serving in the Northern District of Indiana, then moving to the District of Arizona, and finally returning to the Northern District of Indiana, where he currently serves as Chief of the Criminal Division. In his thirteen years as a federal prosecutor, Mr. Simon has handled a variety of issues ranging from routine drug cases to large scale drug distribution rings, public corruption cases, firearms violations, kidnapping, and white collar fraud.

Judge Theresa Lazar Springmann, our second nominee for the Northern District of Indiana, comes before us with several years of judicial experience. Upon graduation from the University of Notre Dame Law School, Judge Springmann clerked for the Honorable James T. Moody, a federal district judge sitting on the very bench she hopes to join. She then entered private practice with the firm of Spangler, Jennings & Dougherty, where she became the first woman partner. Since 1995, she has served as a federal magistrate judge.

Our first nominee for the Court of Claims, Mary Ellen Coster Williams, graduated from Duke University Law School in 1977. After several years of private practice here in Washington, she joined the Civil Division of the D.C. United States Attorney's in 1983. In 1987, she returned to private practice for two years before becoming an administrative judge on the General Services Administration Board of Contract Appeals. Her eight years in private practice, three and a half years

as an Assistant United States Attorney, and thirteen years as an administrative judge add up to an impressive amount of experience, undoubtedly qualifying her for the federal bench.

Victor Wolski, our other Court of Claims nominee, is an accomplished trial attorney, having handled a wide variety of issues during his legal career. His varied background includes several years as a public interest lawyer, service as General Counsel and Chief Tax Advisor to the congressional Joint Economic Committee, a federal clerkship, and private practice experience. With a reputation for being a thoughtful and hard-working attorney, Mr. Wolski promises to be a fine addition to the Court of Claims.

One of our two nominees for the U.S. Sentencing Commission, Judge Ricardo Hinojosa, has twenty years of distinguished service on the United States District Court for the Southern District of Texas. Following his graduation from Harvard Law School in 1975, he worked as a briefing attorney for the Texas Supreme Court, then in private practice, before becoming a federal judge in 1983. There is no question that Judge Hinojosa has presided over hundreds, if not thousands, of sentencings, both before and after implementation of the Sentencing Guidelines. He thus will bring a valuable perspective to the Commission, which will undoubtedly benefit from his input.

Michael Horowitz, our second Sentencing Commission nominee, has extensive experience in both practicing and teaching law. Upon graduating magna cum laude from Harvard Law School in 1987, Mr. Horowitz clerked for Judge John Davies of the United States District Court for the Central District of California. He then worked as a general litigation associate at the law firm of Debevoise & Plimpton before becoming an Assistant United States Attorney in the Southern District of New York. In 1999, he joined the United States Department of Justice Criminal Division under Clinton Administration Assistant Attorney General James Robinson, who has specifically called the Committee on behalf of Mr. Horowitz to offer his unequivocal support. Mr. Horowitz later served as Chief of Staff to Bush Administration Assistant Attorney General Michael Chertoff. In 2002, he joined the law firm of Cadwalader, Wickersham, & Taft as a partner. He has taught law as an Adjunct Professor at Georgetown, George Washington, Catholic, and American University Law Schools. Mr. Horowitz's experience and knowledge of criminal law will make him an asset to the Sentencing Commission.

I am pleased to welcome these nominees to the Committee today, and I commend the President on selecting them for the very important positions that they will assume upon confirmation.

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Statement Of Senator Patrick Leahy
Judicial Nominations Hearing
Senate Judiciary Committee
March 12, 2003

This week the Judiciary Committee is holding its fourth and fifth hearings this year involving a total of 20 Article III judicial nominees, three nominees to the Court of Federal Claims and two nominees to the Sentencing Commission. This is so much faster and more extensive than in prior years in which the Republican majority was last in charge, it makes one's head spin. This week, the Republican-led Senate Judiciary Committee will hold its sixth hearing for a circuit court nominee since January. In all of 1996 and in all of 2000, the Republican majority did not hold hearings on as many as six circuit nominees. In 1997 and 1999, Republicans did not hold a hearing for as many as six circuit nominees until September and, in 1995, this mark was not reached until June. Never in any of their most recent six and one-half years in the majority did Republicans hold hearings for as many as six circuit court nominees by March, never. In addition, it was not until the fall of 1997 that Republicans proceeded with hearings as many as 20 Article III judicial nominees of President Clinton and in the three other years in which they were in the majority during the Clinton Administration, they took until the summer to reach that benchmark. The current pace makes the editorial cartoons about assembly line rubber-stamping of lifetime appointments to the federal bench all too accurate. The Senate Judiciary Committee review and hearing process has been changed overnight by the Republican majority as have so many aspects of the confirmation process. Their double standards are showing in the way they approach hearings, Committee debates and floor action on judicial nominees.

We all know that we work better when we work together in a bipartisan manner; when we honor traditions and rules that respect both sides of the aisle; when there is give and take; when there is advising, as well as consenting. I am sorry that the Bush Administration is so resistant to those traditions, those processes and bipartisanship. I believe that we need to uphold the "advice" prong of our advise and consent responsibilities by involving home-state Senators, this Committee and the Senate. I continue to hear from home-state Senators that they receive little more than notification from this Administration and that it remains most reluctance to consult about potential nominations. When Democrats were in the majority in the 107th Congress, we took many steps in good faith to repair damage done to the confirmation process through the intransigence shown to President Clinton's nominees by a Republican Senate. We confirmed 100 of President Bush's judicial nominees in that time – including to circuits for which Republicans had repeatedly refused to act on Clinton nominees. The Democratic Senate acted far faster and more fairly than the Republican-led Senate had with Clinton nominees.

government and ensure the fair and equal administration of justice and enforcement of the law.

This President's White House Counsel has indicated publicly that he disfavors bipartisan committees because he believes that they "usurp the president's constitutional authority to choose judges." That is so unfortunate. Recommendations from bipartisan commissions have helped me, many other Senators and many other Presidents as we fulfill our constitutional duties in connection with judicial appointments. Bipartisan commissions do not make nominations in lieu of the President and do not confirm in place of the Senate. The Administration's disdain for bipartisan commissions ignores past precedent and longstanding traditions.

To their credit, the Senators from California have persevered in their efforts to have potential candidates for at least the federal district courts in their State to be reviewed by bipartisan review committees. I am pleased to see two nominees from California on today's hearing who are the product of the bipartisan selection commission established by the Senators from California and the White House. Both of these nominees are current judges who come before us with the support of California's highly-regarded selection commissions. I welcome Judge Carney and Judge Selna and their families here today. I regret that the President and his advisors have resisted naming other qualified recommendations from those commissions over the last two years.

The two other District Court nominees before us today are from Indiana. They, too, are supported by their home-state Senators, a bipartisan delegation. Senator Bayh supports them and Senator Lugar wrote me a wonderful letter about the outstanding qualifications of these two nominees. I have a great deal of respect for their judgment and I look forward to hearing from Magistrate Judge Springman and Mr. Simon today.

Today, we also have before us two nominees each to the Court of Federal Claims and the U.S. Sentencing Commission. Appointments to these two specialized bodies have enjoyed a tradition of bipartisanship. I fear that bipartisan cooperation is breaking down, however. The rules are again changing and this Administration appears to be acting unilaterally in disregard for tradition and bipartisanship in the selection of nominees to this court and commission as it has so far in connection with the U.S. Parole Commission. That, too, is most unfortunate and unnecessary.

The process for nominating judges to the Court of Federal Claims has traditionally included accommodation and compromise. For more than two years Senate Republicans blocked President Clinton's appointment of Larry Baskir to the court until a compromise could be reached. They refused to give him a hearing and refused to allow any of the other vacancies to be

Upon Chief Judge Smith's "retirement," President Clinton named Judge Baskir the Chief Judge. Shortly after his inauguration, President George W. Bush summarily removed Judge Baskir as Chief Judge and installed Judge Damich as the Chief Judge.

Last fall when the Democrats were in the majority, we took the exceptional action of quickly moving the nomination of Larry Block to the Court of Federal Claims at the request of the Ranking Republican, Senator Hatch. At that time, I noted that we would expect fairness and consideration in return, including true bipartisan consultation with respect to Federal Court of Claims nominations. Despite our accommodation on Judge Block's nomination, the White House refused to act on the nomination of Judge Sarah Wilson, who up until a few months ago was already serving with distinction on the Court of Federal Claims. Judge Wilson is a well-respected and talented lawyer who graduated from Columbia Law School, clerked for a federal judge, was a fellow with the Administrative Office of the Courts, and served in the Department of Justice and in a prior White House. Yet the Administration and the Senate Republicans refused to accommodate our request to consider her nomination for a continued position on the court. Indeed, none of this Administration's nominations to the Court of Federal Claims are being made at the suggestion of the Senate's Democratic Leader.

It troubles me that despite a long history of compromise and accommodation regarding appointments to this court, there has been no consultation with the Democratic leadership regarding the remaining nominations to the Court of Federal Claims. Instead, the White House proceeds as it does with most things- unilaterally.

It is unfortunate that this Administration has adopted the same approach with respect to the Sentencing Commission. As my colleagues well remember, President Clinton worked long and hard at reaching a compromise with Senate Republican leaders on a slate of nominees to this important Commission. Seats went unfilled for too long while a Democratic White House negotiated with Majority Leader Lott and Chairman Hatch. Finally, in late 1999, we were able to get agreement from the Republican caucus and nominations went forward. Instead of honoring this tradition and doing what President Clinton had done, President Bush did not consult with Senate Democrats. Thus, with respect to the nominations before us today for the Sentencing Commission, they are not based on recommendations of the Senate's Democratic Leader or leadership. That is certainly not consistent with the traditions and understandings so long adhered to between White Houses and Senate leaders. It is just another example of the serious lack of consultation between the White House and Senate Democrats on nominations of all sorts.

Mr. Victor Wolski is one of the President's nominees to the Court of Federal Claims. In 1999,

was selected for this particular nomination to implement an ideological agenda from the bench.

I am also concerned that this particular court has no pressing need for additional judges in light of its caseload. My friends on the other side of the aisle repeatedly asserted when a Democratic President occupied the White House that we should not be confirming nominees to courts where the caseload is especially light. Senators Sessions and Grassley have both argued that vacancies on courts such as the D.C. Circuit should remain open due to the enormous costs that are involved in filling positions. Senator Grassley told us that it costs U.S. taxpayers about a million dollars per judge. A recent law review article by Professor Schooner at the George Washington Law School has issued a comprehensive report on the Court of Federal Claims. In this report, he compiles data on the surprisingly light caseload of the 24 judges who currently serve on the Court of Federal Claims. We will need to consider whether there is a sufficient need for additional judges on this specialized court.

If we decide that additional positions are necessary on the Court of Federal Claims, I urge the White House and Chairman Hatch to work with us to assemble the type of bipartisan panel that Senator Hatch helped assemble in 1997 and 1998 to fill the justified vacancies on the Court of Federal Claims in a way that respects the tradition of bipartisanship that has been required for appointments to this court.

It is one thing for a President to appoint members of his Cabinet to carry out his political agenda, but it should be different with respect to judicial appointments. When a President makes nominations for positions to a co-equal branch of government, he should not be able to tip the scales of justice by packing the courts with ideologues who are selected to implement his political agenda. Recently, Walter Dellinger noted that the President's "slate of nominees, considered as a whole, . . .[is] a list tilted to the right and from which any other views have been carefully culled." I agree that we need to broaden the slate. Working together on the Court of Federal Claims, traditional bipartisan commission, through bipartisan judicial selection commissions and in other ways are important places to continue our traditions of bipartisanship on which Republicans were so insistent during the Clinton Administration.

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NOMINATIONS OF EDWARD C. PRADO, NOMINEE TO BE CIRCUIT JUDGE FOR THE FIFTH CIRCUIT; RICHARD D. BENNETT, NOMINEE TO BE DISTRICT JUDGE FOR THE DISTRICT OF MARYLAND; DEE D. DRELL, NOMINEE TO BE DISTRICT JUDGE FOR THE WESTERN DISTRICT OF LOUISIANA; J. LEON HOLMES, NOMINEE TO BE DISTRICT JUDGE FOR THE EASTERN DISTRICT OF ARKANSAS; SUSAN G. BRADEN, NOMINEE TO BE JUDGE FOR THE COURT OF FEDERAL CLAIMS; AND CHARLES F. LETTOW, NOMINEE TO BE JUDGE FOR THE COURT OF FEDERAL CLAIMS

THURSDAY, MARCH 27, 2003

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

The Committee met, pursuant to notice, at 3:07 p.m., in Room SD–226, Dirksen Senate Office Building, Hon. John Cornyn, presiding.

Present: Senators Cornyn, Sessions, and Leahy.

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

Senator CORNYN. The Senate Committee on the Judiciary on judicial nominations will come to order. It is my pleasure to be chairing this and I am certainly pleased to be with the ranking member, Senator Leahy, on this important occasion. We have a number of distinguished members who are here before us who I know are on tight schedules. We are here, of course, to consider the nominations of Edward Prado, to be a United States Circuit Judge for the Fifth Circuit; Richard D. Bennett, to be United States District Judge for the District of Maryland; Dee D. Drell to be United States District Judge for the Western District of Louisiana; J. Leon Holmes, to be United States District Court Judge for the Eastern District of Arkansas; Susan Braden, to be Judge of the Court of Federal Claims; and Charles F. Lettow, to be Judge of the Court of Federal Claims.

Senator Leahy and I have both agreed that we will reserve our statements, in the interest of time, and because we know our colleagues who are here to introduce these judges are on a tight schedule, themselves.

We will, in the order of seniority, recognize Senator Sarbanes for his introduction.

PRESENTATION OF RICHARD D. BENNETT, NOMINEE TO BE DISTRICT JUDGE FOR THE DISTRICT OF MARYLAND, BY HON. PAUL SARBANES, A U.S. SENATOR FROM THE STATE OF MARYLAND

Senator SARBANES. Mr. Chairman, Senator Mikulski and I are pleased to be here to present Richard Bennett to the Committee. Understanding the press on your time, I will try to be brief. But let me say it is a pleasure to appear today on behalf of this distinguished member of Maryland's legal community.

Dick Bennett was educated in Maryland at the Severn School in Severna Park. Actually, he is now on the Board of Trustees of the school. He went to the University of Pennsylvania, where he had high academic honors and was also honorable mention All-Ivy League Lacrosse. That may not mean much to you, but it means a lot in Maryland, I want you to know.

[Laughter.]

Senator SARBANES. And then he went from the University of Pennsylvania to the University of Maryland School of Law, where he was on the Maryland Law Review.

I am not going to go through all of his legal background. He has been associated with three Baltimore law firms, two very large ones. He is now a partner at Miles and Stockbridge, which is one of our leading law firms. But early on in his legal career, he went into the U.S. Attorney's Office as an Assistant U.S. Attorney and worked there for a little more than 4 years. This was not too long after he graduated from law school.

At the same time, he was in the Army, the U.S. Army, and then in the Army Reserve and subsequently in the Maryland National Guard, serving in the Adjutant General's Division. He rose to be a major in the National Guard.

I just want to mention a couple of things about him because he came back to become the U.S. Attorney for the District of Maryland and to serve with distinction in that office. We have had a string of very good U.S. Attorneys in our State and Dick was certainly among the top of the group. In fact, he is now on the Board of Directors of the National Association of Former U.S. Attorneys, which is obviously some recognition with respect to his abilities on the part of his peers.

I want to mention for just a moment his political involvement. That may sound a little strange here, but I think it is important. It helps to make a point I want to make.

He went on the Baltimore City Republican Central Committee, which is kind of a lonely place, I have to say, to succeed Fred Motts, who became a U.S. District Judge and just stepped down as the Chief Judge not too long ago of our District Court. In 1982, he ran for the Maryland State Senate, was defeated. In 1994, he was the Republican candidate for Attorney General. That didn't prove

out. And in 1998, he was a candidate for Lieutenant Governor. In a way, I think we may have done him a favor in those elections. Otherwise, I am not sure he would now be here to be a Federal District Judge.

The important point I want to emphasize, though, is I respect this political involvement on his part. It was always done in an honorable way. As is important in our system, he was contributing to the functioning and the workings of our political democracy. I have known him a long time. We have been on opposite sides of the political fence, but I certainly respect him personally and professionally and I believe he will make a good Federal District Judge.

We have a very good bench in our State and we are very proud of it. We work very hard at trying to protect its quality. Dick Bennett, I think, reflects the respect for others, an open mind. I think he will be fair. I think he will hear people out. He has had extended trial experience. He is really a very experienced litigator, much of it in the Federal Court. So he knows the workings of the Federal Court and he knows how the system operates and I think he will be a very effective judge.

He has taken a strong interest in our community. He has been on the Board of Directors of the Kennedy Krieger Institute in Baltimore, one of the leading institutions in the world dealing with the problems of disabled children.

So I am pleased to come today to speak on behalf of someone with whom I contended politically over the years, but for whom I have a high regard and whom I am convinced will make a very fair and honorable Federal District Judge. I very much hope that the Committee, after hearing him out, will see fit to report him favorably to the United States Senate. Thank you very much.

Senator CORNYN. Thank you very much, Senator, for those comments.

Senator Mikulski, we would be delighted to hear from you.

PRESENTATION OF RICHARD D. BENNETT, NOMINEE TO BE DISTRICT JUDGE FOR THE DISTRICT OF MARYLAND, BY HON. BARBARA MIKULSKI, A U.S. SENATOR FROM THE STATE OF MARYLAND

Senator MIKULSKI. Thank you very much, Mr. Chairman and members of the Committee. I am here today to really enthusiastically support the nomination of Dick Bennett to be a Federal District Court judge in Maryland.

I sat at this table in 1990 to support his nomination to be the U.S. Attorney under President Bush's dad, and I will tell you, as U.S. Attorney, he did not disappoint us. He was an outstanding U.S. Attorney and the way he conducted himself, conducted the office, and brought honor and integrity to the U.S. Attorney's office.

When I look to how am I going to support a Federal judge, I have three criteria: Judicial competence, highest integrity, and demonstrated dedication to protecting core constitutional values and guarantees. Dick Bennett is more than well qualified in all three of those areas. He has been recognized as one of the best trial lawyers in America. He has received numerous awards from professional legal organizations. And at the same time, he has been hon-

ored for his work in the field of victims' rights, so he brings balance.

In terms of integrity, he has decades of community service that Senator Sarbanes has talked about. He served for 20 years in the Army National Guard.

When you look at his family background, you will see that he is a product of the greatest generation. He dad was an electrician. His dad fought at Okinawa and then came home to raise a family, and his mom was a school teacher. Mr. Bennett put himself through law school by coaching sports at a local Catholic high school. So it has been just hard work, dedication, values around patriotism, and then really developing outstanding skills as a lawyer.

I am just going to submit my statement for the record. Senator Sarbanes covered it, and I note others.

When you have got someone who was honored by the Maryland State Attorneys' Association, by getting an award from a Democratic Governor for his work on victims' rights, for also being a volunteer at a soup kitchen, and found time to be a U.S. Attorney, to be a dad. I think this is the kind of person we want, and his peers say this man is tough, fair, balanced, and one smart lawyer, and I think he will be a terrific judge.

Senator CORNYN. Thank you very much, Senator Mikulski and Senator Sarbanes, for your introductions. We appreciate that very much.

I know that a number of members both on the Senate side and the House side have other conflicts. I am trying to accommodate your schedule the best I can. I know, Senator Bingaman, I know you have a pressing engagement elsewhere, but we would be delighted to hear from you and any comments you might have.

The CHAIRMAN. Mr. Chairman, before he starts, I just couldn't help but notice all the Senators here endorsing President Bush's nominees. They are all Democrats. It is just somewhat unusual because we so rarely were able to get a lineup like that when President Clinton was here for Republicans to endorse his nominees. I am glad to see bipartisanship is back.

Senator CORNYN. It is refreshing. I am happy, as you are, to see such consensus selections and such bipartisan support.

Senator Bingaman?

PRESENTATION OF SUSAN G. BRADEN, NOMINEE TO BE JUDGE FOR THE COURT OF FEDERAL CLAIMS, AND CHARLES F. LETTOW, NOMINEE TO BE JUDGE FOR THE COURT OF FEDERAL CLAIMS, BY HON. JEFF BINGAMAN, A U.S. SENATOR FROM THE STATE OF NEW MEXICO

Senator BINGAMAN. Thank you, Mr. Chairman. I will be very brief, but enthusiastic, in speaking on behalf of two of the nominees, the two nominees before you today for the U.S. Court of Federal Claims, Charles Lettow and Susan Braden.

Chuck Lettow and I became acquainted—he and my wife and I became acquainted when we were all in law school at Stanford over 35 years ago. He is a superb lawyer. He has been with the Cleary Gottlieb firm for over 25 years. He has had raw litigation experience. He clerked for the Supreme Court and for the Court of Appeals before that. His reputation as a lawyer, as a litigator, as a

fair, balanced, even-handed individual, I think, is unparalleled. So we are very fortunate to have him as a nominee for this position.

Susan Braden, I have also known for a long time, not as long as I have known Chuck, but she is also extremely accomplished and respected in her field. She has over 30 years of litigation experience, both in the Federal Government and the private sector. She is now with Baker and McKenzie, practices in antitrust, intellectual property, tax and property rights areas, and specializes in complex civil litigation. She, again, is an extremely qualified nominee for this important position.

I commend both nominees to the Committee and I urge you to act favorably upon them and do so quickly. Thank you very much for allowing me to speak today.

Senator CORNYN. Thank you very much, Senator Bingaman. We appreciate your testimony here today.

Since we have such a distinguished panel and I know everybody has got various other pressing engagements, I understand Congressman Tauzin has an appointment at 3:30. Senator Landrieu, would you mind if we turn to our colleague from the House first?

Senator LANDRIEU. Go right ahead.

Representative TAUZIN. It is not necessary. I always yield to my colleague.

Senator LANDRIEU. Ooh, he is being so nice today.

[Laughter.]

Senator LANDRIEU. Thank you, Mr. Chairman.

Senator CORNYN. We would be delighted to hear from you, Senator.

PRESENTATION OF DEE D. DRELL, NOMINEE TO BE DISTRICT JUDGE FOR THE WESTERN DISTRICT OF LOUISIANA, BY HON. MARY LANDRIEU, A U.S. SENATOR FROM THE STATE OF LOUISIANA

Senator LANDRIEU. I will just be very brief, and I thank the Congressman. I will submit this statement on behalf of actually Senator Breaux and myself and the Congressman will add his own personal words. But we are all pleased to be here today to really enthusiastically support this nominee, Dee Drell, for the Western District.

Dee has practiced law for over 30 years. He started out as an Advocate General for the Corps with the Army and then spent 30 years with the Gold law firm. But his career has not only spanned 30 years, Mr. Chairman, but he has done almost every aspect or practiced every aspect of law from criminal prosecution to criminal defense, insurance defense, plaintiffs' work, and has a wide array of other litigation cases.

In addition to this broad and very deep understanding of the law, he has also served his community in many special ways. I particularly was impressed with his commitment as a lay preacher with the Episcopal Church in his home district, as well as volunteering a great many hours to the Louisiana Task Force on Racial and Ethnic Fairness in the Courts. He is a board member for the Family Mediation Council, which I think is also very impressive as we try to keep our families together and strengthen them and minimize the conflict in divorce and separation. I think that goes a long way.

He stepped out, Mr. Chairman, many years ago, before we really had come together as a community to understand how to advocate for those stricken with AIDS and spoke out in this community and advocated for their legal defense and their fair shake under the law.

With that, I will submit the rest of my statement. His wife, Susannah, is here, and I know Congressman Tauzin joins me in saying how pleased and proud we are to support someone with such excellent legal credentials, but also has shown such a compassion and a heart for the people that he represents and seeks to serve. Thank you.

Senator CORNYN. Thank you, Senator Landrieu. We will certainly make your statement, as well as Senator Breaux's in support of this nominee, part of the record, without objection.

Congressman Tauzin, we would be delighted to hear from you.

PRESENTATION OF DEE D. DRELL, NOMINEE TO BE DISTRICT JUDGE FOR THE WESTERN DISTRICT OF LOUISIANA, BY HON. BILLY TAUZIN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF LOUISIANA

Representative TAUZIN. Senator, thank you and greetings from the Governor. I have to tell you, I recently had the pleasure of cooking him a gumbo at his mansion in Austin, and I am becoming an honorary Texan, I think.

[Laughter.]

Representative TAUZIN. Let me thank Mary and John for their excellent statements in support of our candidate, Dee Drell. He is truly, as Mary said, a remarkable individual.

How many nominees do you find who have practiced both as trial attorneys and as defense council for insurance firms, and criminal defense, as well? His background is truly extensive in that regard. It includes, by the way, service in the United States Army in the JAG Corps, stationed in Fort Benning.

He and Susannah are the proud parents and even grandparents now of three children and two grandchildren. They are sort of the rock-bed people you want to live next door to, just great individuals, dedicated to his work and service to the bar and to legal counsel.

Mary has articulated some of the most, I think, sterling qualities about Dee personally, and that is his commitment to community, his work with his church and his work for those less fortunate, his defense of indigents in his community on the Indigent Defender Board, his work with the AIDS victims in his community and their legal rights, and his work for families in trouble and trying to help them out through difficult times.

He has got what we would all want in a judge if we were ever called before the bench, and as someone who knows the law, loves the law, respects it, and at the same time has a sterling heart and understands human nature. He is the kind of person, I think, that the Senate will feel extraordinarily proud the day you bring him up and vote him into the membership of the United States District Courts.

He is going to make our State proud, too. We produce some pretty interesting and very dramatic personalities in our politics, but

we also produce some incredible jurists. He would be one of those. I predict that once you take our recommendation to heart and act on it and the Senate acts on it, that there will be a day when you look back on this and say, boy, that was a good move we made because we put a great person on the Federal bench who is going to serve this country well and be a model for other jurists around the country.

I really feel good about this nominee. Our whole delegation worked hard in selecting him. We work as a team, Democrats and Republicans, when we make our nominations, and as you can see with John and Mary's support, that is evident here today. We hope that you will act speedily on his nomination and present him to a life of service on the Federal bench. Thank you.

Senator CORNYN. Thank you.

Senator LEAHY. Merci. Merci.

Representative TAUZIN. I don't talk French any more, Senator.

[Laughter.]

Representative TAUZIN. In fact, I apologize for the fleur de lis on my tie today.

Senator LEAHY. You never spoke it very well to begin with.

[Laughter.]

Representative TAUZIN. Well, I didn't speak that real French. We speak a Cajun variety.

Thanks again.

Senator CORNYN. Congressman Tauzin, thank you very much. We appreciate your appearance here today and your contribution on the House side and certainly here today, as well. Thank you.

Representative TAUZIN. Thank you very much.

Senator CORNYN. I would be delighted to hear from our colleagues from Arkansas. Senator Lincoln, we would be delighted to hear your testimony.

PRESENTATION OF J. LEON HOLMES, NOMINEE TO BE DISTRICT JUDGE FOR THE EASTERN DISTRICT OF ARKANSAS, BY HON. BLANCHE LINCOLN, A U.S. SENATOR FROM THE STATE OF ARKANSAS

Senator LINCOLN. Thank you, Mr. Chairman, and I will try to be brief, as well. To the Chairman and members of the Judiciary Committee, I certainly appreciate the opportunity to appear before you this afternoon to introduce Leon Holmes, who has been nominated to be United States District Judge for the Eastern District of Arkansas.

As the senior Senator from Arkansas—

Senator PRYOR. She likes to rub that in.

[Laughter.]

Senator LINCOLN. Well, I am the last of four children. I never got to be senior anything.

[Laughter.]

Senator LINCOLN. I am very pleased to support Mr. Holmes for this very important post.

We are joined today by his wife, Susan, and two of his five children, J. Frank and Hannah, and I know they are very, very proud of their father and I certainly know why, having visited with him,

and I am sure the Committee will be, as well, as they finish these proceedings.

After reviewing his record and speaking with many of his friends and colleagues in Arkansas, I can assure the Committee that Leon Holmes is not only a superb lawyer and a distinguished scholar, he is also a very trusted friend by many. They hold him in high regard, and that goes for many people across our great State.

Mr. Holmes is a native of Hazen, Arkansas, which isn't too far from my hometown of Helena over in East Arkansas. After high school, Leon graduated with special distinction from Arkansas State University in 1973. Not satisfied with only a baccalaureate degree, he continued his education by earning a law degree from the University of Arkansas, a master's degree in political philosophy from Northern Illinois University, and a doctorate in political science from Duke University.

Leon's professional career is equally as impressive. In addition to being named as a partner at the law firm of Quattlebaum, Grooms, Tull and Burrow in Little Rock, Mr. Holmes has held a variety of positions, including law clerk for Justice Frank Holt on the Arkansas Supreme Court, also as assistant professor at Augustana College in Rock Island, Illinois, and adjunct facility member of the University of Arkansas at Little Rock School of Law.

Additionally, which I found to be very interesting, you all may also find as interesting, that while pursuing his education, Mr. Holmes worked as a door-to-door salesman, a newspaper carrier, a carpenter's helper, and my favorite, a pea picker.

[Laughter.]

Senator LINCOLN. Well, as a farmer's daughter, let me tell you, I hold that in great esteem, having worked the land myself. And I also believe the fact that Mr. Holmes knows the value of an honest day's work, both as a lawyer and as a laborer, I think it is a good indication that he has the life experience required to administer the law in a fair and impartial manner regardless of who the litigants before him may be.

Even though Mr. Holmes and I may not agree on every issue, that is not the only test I apply to determine an individual's fitness for the Federal Judiciary. I evaluate judicial nominees based on their willingness to cooperate with the Senate during the confirmation process. Then in addition, I carefully consider a nominee's skills, their experience, intellect, and ability to understand and apply established precedent.

Fundamentally, I am very interested in knowing that a nominee can fulfill his responsibility under the Constitution to apply the law fairly, without political favor or bias. Having visited with Mr. Holmes in my office extensively, I am satisfied that Mr. Holmes has met that standard.

In closing, I want to thank Chairman Hatch and Senator Leahy for working with Mr. Holmes and with me and my staff in preparing for this hearing today. I appreciate the consideration of this nominee and I encourage members of the Committee to support his confirmation and do it in an expeditious way, and I would like to take this opportunity to congratulate Mr. Holmes and his family for such much in terms of the achievements they have already

made and the many ways I know that they will make all Arkansans very proud. Thank you, Mr. Chairman.

Senator CORNYN. Thank you very much, Senator Lincoln.

We would now be delighted to hear from the junior Senator from Arkansas, Senator Pryor.

[Laughter.]

PRESENTATION OF J. LEON HOLMES, NOMINEE TO BE DISTRICT JUDGE FOR THE EASTERN DISTRICT OF ARKANSAS, BY HON. MARK PRYOR, A U.S. SENATOR FROM THE STATE OF ARKANSAS

Senator PRYOR. Thank you, Mr. Chairman. It is an honor for me to be here today and introduce to the Committee Leon Holmes.

One thing I have to disclose on the front end is that I have known Mr. Holmes since 1986, when I was a summer law clerk at his law firm of Wright, Lindsey and Jennings in Little Rock. After I graduated from law school, I joined that firm as an associate and he and I worked together there until he left a year or two later. I consider him a friend. He has gained the reputation in the last several years as being one of the finest lawyers in Arkansas and I am very, very proud of his career and very proud to have watched him develop and grow as a person and as a lawyer over the years.

There is no question in my mind that Leon is very qualified for this position. Also, I have no question and no doubt about the fact that he will be fair and impartial. I have talked to a number of lawyers in Arkansas. They are very pleased with President Bush's selection here. There are a lot of lawyers and a lot of people in the State that may not agree with him completely on some issues, but they certainly feel like he is qualified to be on the bench, he will set his personal feelings aside, and he will administer justice fairly and impartially.

Whenever you talk to lawyers in Arkansas about Leon Holmes, there is one word that keeps coming up. First, they always say how smart he is and how hard he works and just what a decent human being he is. But the one word that keeps coming up is "integrity," and he has it, and I am very proud that President Bush has nominated him and I am proud to support his nomination today. Thank you.

Senator CORNYN. Thank you, Senator Pryor, and thank you, Senator Lincoln. We are glad to have you here today.

Chairman Hatch, who was not able to be here, does have a written statement for the record which will be entered in the record, without objection, as does Senator Grassley supporting Charles Lettow. Senator DeWine has a statement supporting Susan Braden. Senator Hutchison has a written statement concerning Judge Edward Prado and Susan Braden, as well. It is without objection, each of those will be entered in the record.

PRESENTATION OF EDWARD C. PRADO, NOMINEE TO BE CIRCUIT JUDGE FOR THE FIFTH CIRCUIT, BY HON. JOHN CORNYN, A U.S. SENATOR FROM THE STATE OF TEXAS

Senator CORNYN. I am happy that Chairman Hatch has asked me if I could help fill in today to chair this proceeding for many reasons, but especially because of my admiration for and support

for President Bush's nomination of Edward Prado to the U.S. Court of Appeals.

I have known Ed and Maria and their son, Edward, for many years, since we are natives of San Antonio, Texas, and I can say that in the years that Ed Prado has served on the bench, first as a State District Court judge and in recent years as a United States District Court judge, he is an exceptional jurist and I am confident he will continue to serve with great distinction on the Fifth Circuit Court of Appeals.

There are actually three vacancies on the Fifth Circuit, and two vacancies from Texas, alone. President Bush has nominated Priscilla Owen to fill one of the others and her nomination was acted on favorably by the entire Judiciary Committee this morning and will now be reported to the floor.

The Judicial Conference has designated both of these vacancies on the Fifth Circuit as judicial emergencies. The American Bar Association, which has sometimes been referred to as the gold standard, has unanimously rated Judge Prado "well qualified," a rating that he is certainly deserving of.

So I look forward to today's hearing and my hope is that Judge Prado's nomination will be acted on favorably not only by the entire Judiciary Committee, but then he will be swiftly confirmed and will be serving soon on the Fifth Circuit Court of Appeals.

Prior to his service, or, I should say, after he served on the State District Court bench, Ed Prado served as a public defender in the Western District of Texas and then as U.S. Attorney from 1981 to 1984. He is a graduate of the University of Texas, receiving both his undergraduate and law degrees there, and started his career as an Assistant District Attorney in Bexar County, of which San Antonio is the county seat, and also served in the U.S. Army Reserves from 1972 to 1987.

Throughout his two decades of service, both to the State of Texas and to the nation while in the Federal system, Judge Prado has served with compassion, respect for the law and for the lawyers and litigants who come before him, and, I might add, with good humor, something he is especially noted for. His courtroom demeanor not only has served to help put litigants, witnesses, and jurors at ease, which is an important characteristic of a trial judge, but it has not detracted from the appropriate seriousness of the proceedings in which he has presided.

Those same characteristics, each of those characteristics, I am confident, would serve him well in his new role in the Federal Judiciary on the Fifth Circuit. Obviously, he would be interacting not only with counsel, but with his colleagues on the court and with others who come in contact with the court, should he be confirmed.

I urge all the members of this Committee to give Judge Prado favorable consideration.

At this point, I am going to withhold any further sort of general statement and ask the ranking member, Senator Leahy, to make any remarks that he may wish to make. Senator Leahy?

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

Senator LEAHY. Thank you, Mr. Chairman. We kind of have to be here, but our colleagues wanted to leave, so I wanted to give them a chance to speak first.

This is our sixth Judiciary Committee hearing for the 29th judicial nominee held in the last 2 months. We have moved expeditiously. We have confirmed 11 judicial nominees, a couple more next week, which will bring us to about 15. I commend my colleagues on the other side of the aisle, because I remember the last time the Republicans were in the majority in the first session of a Congress, they didn't confirm 15 judges until September. In fact, they didn't have the sixth hearing until the end of October. It is probably coincidence that there was a Democratic President at that time and that is why it took until September to get 15 judges, a Republican President now, and I just mention that for whatever it is worth.

I am pleased to see a new nominee from Texas to the Fifth Circuit, Judge Prado, and I have read with a great deal of interest his background, especially a couple of the trials he held. It has been a long time since we have had a Latino nominee to the Fifth Circuit. I think it was Chairman Biden who had the last nomination, and that was for Judge Benavides 9 years ago.

Of course, President Clinton did nominate two talented Hispanic nominees to vacancies in the Fifth Circuit, Enrique Moreno and Judge Jorge Rangel, and you were referring to the ABA. They had the highest possible ratings, but it wasn't that they got voted down, they just never had a hearing. They never had a vote, never had a hearing. Actually, there was a third nominee of President Clinton's to the Fifth Circuit, Alston Johnson of Louisiana, with strong support of both his home State Senators, but he was never allowed to have a hearing, either.

I mention this because sometimes there is a question of how hearings go. None of these Fifth Circuit nominees were ever allowed to have hearings. There are a lot of others. Ricardo Morado was never given a hearing, Christine Arguello another. Judge Richard Paez, Sonia Sotomayor, and Hilda Tagle were held up.

We have tried to do different here. In fact, in 17 months when I was Chairman, we whipped through about 100 judges, setting an all-time record, an all-time record at least during the last two Presidencies.

So I congratulate you, Judge Prado and the others. Judge Ruben Castillo, who is a U.S. District Court judge in Illinois and a member of the Sentencing Commission, speaks very highly of you, and he came in and told me that. I have a high regard for him, so I was pleased with that. The Congressional Hispanic Caucus is impressed with you, sent the Committee a letter supporting your confirmation.

Then we have the three District Court nominees, Richard Bennett, Dee Drell, and Leon Holmes. Mr. Holmes' record does leave me with some concern, and I will submit a number of questions for the record. I know it was, Mr. Chairman, when your party controlled this Committee during the Clinton Presidency, we were told that if you had somebody with a record of activism like Mr.

Holmes, that they would not be allowed to have a hearing, and your side was always very consistent on that. They didn't.

I take that back. There was one of Senator Specter's former aides who said she was an activist, Mary McLaughlin, and made her really fight to get out of Committee. But then, of course, an anonymous hold was put on by your side, so she was never allowed a vote. Apparently, it appeared that in private practice in a firm in Philadelphia where they handled pro bono cases, she dared to handle one involving choice issues. I don't think anybody is going to do that on Mr. Holmes, but I am sure we will be told if we do that we are resorting to inflammatory rhetoric.

I mention this because there seems to be very, very much of a double standard. We have two more of this President's nominees to the Court of Federal Claims. As I explained at our last hearing, appointments to this court have—I have been here with six Presidents—have always had a tradition of bipartisan cooperation. Federal Claims have had a certain number of Democrats, a certain number of Republicans. The first time—I have been here with President Ford, President Carter, President Reagan, former President Bush, President Clinton, now this President Bush.

All the other Presidents always followed what had been the practice for Presidents long before I came here of having that accommodation and compromise, both parties. This has not been here. For more than 2 years, Republicans blocked President Clinton's appointment, Larry Baskir, until a compromise could be reached. They refused to give him a hearing, refused to allow any other vacancies to be filled until the administration promised to keep conservative Judge Loren Smith as the Chief Judge.

Finally, Senator Hatch agreed to allow President Clinton's nominees to have hearings and votes if the administration named a staff member of his to the court. Shortly after President George Bush was inaugurated, he removed the court's chief judge and installed Senator Hatch's staff member as the new and current chief judge. It may be fine and all that, but it is different than the way it was done.

Last fall, the Democrats were in the majority. We took the exceptional action of moving the nomination of Larry Block, another staff member for Senator Hatch, to the Court of Federal Claims at the request of the ranking Republican, even though it was a turn for a Democrat. We thought we would have some kind of bipartisan fairness. We didn't get it. In fact, Judge Sarah Wilson, who was serving with distinction on the Court of Federal Claims, well respected, talented lawyer, graduate from Columbia and so on, was bounced out by the President and Senate Republicans refused to accommodate a request to consider her nomination for a continued position there.

I say this because we see the same thing with respect to the Sentencing Commission, Parole Commission, and others, and I worry that we are allowing that kind of accommodation, the kind of bipartisanship that usually moves things along very well, something I tried to do by setting a record, I don't think during the 6 years that the Republicans controlled this Committee and President Clinton was there, I don't think there was ever a time in 17 months when they moved as many judges as I did for President Bush. They cer-

tainly didn't for the 17 months prior to me taking over. We thought there would be some recompense, but there has not been.

I will point out what Senator Sessions, who is here, and Senator Grassley have argued, that vacancies on courts such as the D.C. Circuit remain open due to the enormous costs that are involved in filling that position.

Senator SESSIONS. That still may not need to be fully filled.

Senator LEAHY. I believe their report was that it costs about $1 million per judge. The Washington Post wrote today the Court of Federal Claims should be eliminated altogether. They do have a case load that is about an eighth that of the District Court.

So I just mention that. It is funny how some of these things that are raised, depending upon who is in the White House, suddenly change. I would urge the White House and Chairman Hatch to work with us to assemble the type of bipartisan panel that Senator Hatch helped assemble in 1997 and 1998 when President Clinton was there to fill the remaining vacancies that showed balance.

I am hopeful by nature. In my faith, we always believe in redemption. In this Lenten season, I just pray for such redemption, Mr. Chairman. Now that the white-haired group have taken over the thing, I will leave you to your own devices, but I will submit a number of questions for the record.

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

Senator CORNYN. Thank you, Senator Leahy.

I want to recognize Senator Sessions in just a moment, but your comments do provoke a few thoughts of mine that are not new—

Senator LEAHY. I thought they might.

Senator CORNYN. —not new to you, since we have discussed them previously. I must tell you that for somebody who is new to this institution, but somebody who has been in public service before at the State and local level, I really think that the judicial confirmation process needs some serious work. I think we need a fresh start.

I do not see that we are doing the job that we should be doing for the American people in a bipartisan way by pointing to past grievances on both sides, and I realize that for every one that Republicans might point to, Democrats would point to some that they perceive as being wrong. I really would not—and I am sure it goes both ways—I would not really want to make any judgment about that because, frankly, I think there is nothing that I could say or that anybody else could say that would probably convince either side that they are wrong.

All I would say is that as somebody who is new to the Senate and somebody who is an eternal optimist, as you are—I think you have to be an optimist to be in public life today because you have to look for opportunities toward the future and hope rather than get bogged down into the sins of the past—that we could, on a bipartisan way, come up with some process that would be a tremendous improvement over the current judicial confirmation process.

I think the depths to which the process has sunk at this point is really one that does not reflect well on this institution. I don't think it serves the interests of the American people well. I think it also does not serve the people who are nominated by the Presi-

dent, whether they be a Republican or a Democrat office holder, well. I think it probably discourages people who are nominated or who might be nominated to serve in these important positions when their nominations are left pending for so long or when, as you point out, they don't get a vote, an up-or-down vote either in the Committee or, as we see now, on the Senate floor in the case of Miguel Estrada.

I wish, and this is maybe just an expression of my hopefulness and my optimism, that we can look beyond what has happened in the past and look forward and try to find a way that we can do the job that we have been elected to do here in the Senate better than we have done in the past.

I understand, since you have been here longer than I have, much longer, you have a knowledge and an experience that I do not have in terms of how the process has worked in the past, but I would, rather than look to the past, I would look to the future as an opportunity to perhaps break with that past to the extent that this process has not served the American people or the United States Senate very well.

Senator LEAHY. Mr. Chairman, if I could just respond to that very briefly, the Senator from Texas comes from a great State. He has one of the finest backgrounds of any Senator here, having served in all three branches of government and having done that with distinction. I mean that very seriously and I think he is a welcome addition to the Senate and improves the gene pool to the extent that we have that. And again, I mean that very seriously.

I take to heart what he has said. I find myself in agreement with almost all of it, or probably all of it. The only thing I would look to for the past is it has been my experience, and my experience with five of the last six Presidents of both parties, that there was always an effort, a real effort on the part of the White House to work with both parties in the Senate when it came to judicial nominations.

In talking when I was first here with Senators, again from both parties, who had been here at that time a long time, they told me that had always been their experience. At that time, when I was first here at the age of 34, some of the much older ones at that time had served in the time of President Truman and said that through all those Presidents, Truman, Eisenhower, Kennedy, Johnson, Nixon, there had always been this effort on judicial nominations.

I could say honestly that this White House, there has not been that effort, and I think that if there was, I think that there would be, certainly among the Senators in both parties who care, as the Senator from Texas obviously does, there would be a response to it in such a way that most of these problems would not exist, and I have discussed this with a number of senior members of the Senator's party as well as senior members of my party who are no longer here, who have just observed it from the outside. They all feel the same way.

I pass that on because I share his hope that that may change, but it is a change that has to come from both ends of Pennsylvania Avenue. It can't be simply a case of dictating. The Constitution does say "advise and consent," not "advise and rubber stamp." I

think it could be better, especially as I find with our personal friendships. The Senator Alabama, who is here, and I are not ideological soul mates, but time and time again, we have accommodated each other on things of interest to each other because we realize that life has to go on.

I pass that on. We are waiting to talk to these nominees, and I would be glad to work with the Senator from Texas in the future on this.

Senator CORNYN. Thank you, Senator Leahy. I appreciate that. I will take you up on that.

STATEMENT OF HON. JEFF SESSIONS, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator SESSIONS. Senator Leahy, I would nominate Judge Cornyn. Maybe we can nominate Judge Cornyn and find him a partner and lead us out of this thicket, smooth over some of the difficulties we have had.

Senator LEAHY. If you didn't have white hair before, you would after that.

[Laughter.]

Senator SESSIONS. I would just like to say in brief response that in President Clinton's administration, there were 377 judges confirmed, only one voted down. None were ever filibustered on the floor. None were ever voted down in Committee on a party-line vote. And when he left office, there were only 41 nominees left pending unconfirmed. When former President Bush left office and the Democrats controlled the Senate, there were 54 nominees unconfirmed.

I think the record is—there has been far too much criticism of the Republican record on confirmation of President Clinton's judges. The numbers do not justify that. But we can discuss that, and maybe it is time for us to see if we can reach some more harmony. Judge Cornyn, I nominate you to maybe lead us into a more happy day.

Senator CORNYN. Thank you for your vote of confidence, Senator Sessions. I appreciate that. It is my hope that we can do better than we have in the past.

The Committee will now hear from Judge Edward Prado of San Antonio, who has been nominated to the U.S. Circuit Court for the Fifth Circuit. Judge Prado, if you come forward, and if you would please raise your right hand before you sit down so that I can administer the oath.

Do you swear that in the testimony you are about to give before the Committee, you will tell the truth, the whole truth, and nothing but the truth, so help you, God?

Judge PRADO. I do.

Senator CORNYN. Thank you. Please have a seat.

Judge Prado, if you would like to give an opening statement or introduce perhaps your better half or any other friends or supporters you have here with you, please feel free to do so.

STATEMENT OF EDWARD C. PRADO, NOMINEE TO BE CIRCUIT JUDGE FOR THE FIFTH CIRCUIT

Judge PRADO. Thank you, Senator, and thank you for the opportunity—thank the Committee for the opportunity of accommodating us today and hearing us. I know that the Senate has a very busy schedule this week, a hectic schedule, and I know I speak for the other nominees and we appreciate you taking the time to accommodate us and giving us the opportunity to appear before the Committee today.

With me today is my wife of 29-and-a-half years, my best friend, the judge at home. She is the one that wears the robe, Maria Prado. Some dear friends from the Administrative Office of the Courts, the Chief of the Defender Services Division of the Administrative Office of the Court, Ted Lidz, two of my dear friends that are in that office with him, Merrill Friedman and Dick Wolfe, and also from the Administrative Office, Richard Jaffee is here and I appreciate them coming over.

I would like to also recognize our son, who is not here today. He is in college and could not be here, Edward. He is here in spirit. Hopefully, he is hitting the books and studying, as well.

Also, my parents who could not be here. My father, who is 87 years old, my Little League coach, my soccer coach, disabled veteran from World War II and past President of his DFW Post, and up until last year, he was still driving to the bingos and helping run the bingos at his DFW Post every night. My mother, who is 84. She was my Den Mother when I was a Cub Scout, was PTA President when I was in elementary school, was PTA President when I was in high school. So I would like to recognize my parents who have done a lot for me and I appreciate it.

Senator CORNYN. Thank you, Judge Prado.

[The biographical information of Judge Prado follows:]

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

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

   Edward Charles Prado
   Ed Prado

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

   United States Circuit Judge, United States Court of Appeals for the Fifth Circuit

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

   John H. Wood, Jr. United States Courthouse
   655 East H. F. Garcia Boulevard
   San Antonio, Texas 78206
   (210) 472-4060

4. **Birthplace**: State date and place of birth.

   June 7, 1947; San Antonio, Texas

5. **Marital Status**: (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es). Please also indicate the number of dependent children.

   Married to: Maria Anita Prado (nee: Jung); Spouse is not employed
   One dependant child

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

   University of Texas School of Law; Austin, Texas; 1969-1972;
   Juris Doctor Degree, May, 1972

   University of Texas; Austin, Texas; 1967-1969;
   Bachelor of Arts Degree, May, 1969

   San Antonio Junior College; San Antonio, Texas; 1965-1967;
   Associate of Arts Degree, May, 1967

Board Member
Family Services Association of San Antonio
230 Pereida
San Antonio, Texas 78210
1973-1979

Assistant District Attorney
Bexar County District Attorney's Office
Bexar County Justice Center
300 Dolorosa
San Antonio, Texas 78205
1972-1976

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

Commissioned Second Lieutenant, U. S. Army, May, 1972;
Infantry Officer in the U. S. Army Reserve from 1972-1987

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

2000 - St. Thomas Moore Award, St. Mary's University School of Law

1989 - Outstanding Alumnus, San Antonio College

1982 - Leadership of San Antonio (Chamber of Commerce)

1981 - LULAC State Award for Excellence

1981 - Edgewood Independent School District Hall of Fame

1981 - Junior Chamber of Commerce (JAYCEES) Outstanding Young Men of America Award

1980 - U. S. Attorney General's Achievement Award

1980 - LULAC National Conference Award for Meritorious Legal Service

1980 - Outstanding Young Lawyer of San Antonio

Member, William S. Sessions American Inn of Court, 1988-1996
President, William S. Sessions American Inn of Court, 1989-1991
President, San Antonio Bar Foundation, 1988
Member, Defender Services Committee, Judicial Conference of United States, 1987-1993
Member, Attorney General's Advisory Committee, 1981-1983
Member, U.S. Bureau of Prisons Correction Council, 1981-1984

11. **Bar and Court Admission**: List each state and court in which you have been admitted to practice, including dates of admission and any lapses in membership. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

Supreme Court of Texas; September 25, 1972
U. S. District Court, Western District of Texas; February 12, 1976
Fifth Circuit Court of Appeals; February 23, 1977
Supreme Court of the United States; September 9, 1977
Eleventh Circuit Court of Appeals; October 1, 1981

12. **Memberships**: List all memberships and offices currently and formerly held in professional, business, fraternal, scholarly, civic, charitable, or other organizations since graduation from college, other than those listed in response to Questions 10 or 11. Please indicate whether any of these organizations formerly discriminated or currently discriminates on the basis of race, sex, or religion - either through formal membership requirements or the practical implementation of membership policies. If so, describe any action you have taken to change these policies and practices.

Witte Museum Community Advisory Committee, (Altered States: Alcohol and Other Drugs in America Exhibit/Project), 2000-2001
The Philosophical Society of Texas, 2002-present
Rotary of San Antonio, 1983-2001
Leadership San Antonio, San Antonio Chamber of Commerce, 1982-1983 and 2000-2001
Board Member, Family Services Association of San Antonio, 1973-1979
Member, University of Texas Ex-Students' Association, 1969-present
Member, St. Mark's Catholic Church, 1995-present

13. **Published Writings**: List the titles, publishers, and dates of books, articles, reports, or other material you have written or edited, including material published on the Internet. Please supply four (4) copies of all published material to the Committee, unless the Committee has advised you that a copy has been obtained from another source. Also, please supply four (4) copies of all speeches delivered by you, in written or videotaped

Montemayor v. City of San Antonio, SA-98-CV-615 (W.D. Tex. May 23, 2000)
Aff'd, 276 F.3d 687 (5th Cir. 2001)
The plaintiff sued the City of San Antonio (the City) for employment discrimination for initially rejecting her as an applicant for the fire department, retaliating against her for comments she made during the interview process, and by refusing to promote her after she successfully completed the fire department's academy pursuant to a court order. After the trial of the cause, the jury found that the City had discriminated against the plaintiff when it initially refused to hire the plaintiff and later when the City did not promote her. The City asked me to set aside the jury's verdict. I consider this case significant because although I upheld the jury's verdict in regard to the City's initial rejection of the plaintiff, I concluded that no evidence existed upon which a reasonable juror could base a finding that the plaintiff was terminated for any reason other than her deficient performance. As a result, I set aside that portion of the jury's verdict and entered an amended judgment. The plaintiff appealed, but the Fifth Circuit agreed with my assessment of the evidence and affirmed the judgment.

Kapche v. City of San Antonio, SA-95-CA-1215 (W.D. Tex. Nov. 18, 1997)
Rev'd, 176 F.3d 840 (5th Cir. 1999)
SA-95-CA-1215, 2000 WL 33348192 (W.D. Tex. Jul. 7, 2000)
Rev'd, 304 F.3d 493 (5th Cir. 2002)
The plaintiff, a county sheriff detective, applied for a job as a city police officer. Although the applicant passed the written examination, background checks, and physical endurance examination, the defendant city revoked a conditional offer of employment because the plaintiff had insulin-treated diabetes mellitus. The plaintiff then sued the defendant under the Americans with Disabilities Act and the Texas Commission on Human Rights Act (the federal equivalent to the federal act). The defendant moved for summary judgment on the basis that the plaintiff was not qualified to be a police officer because persons with insulin-treated diabetes mellitus were a direct threat as a matter of law. I followed the precedent set out by the United States Court of Appeals for the Fifth Circuit in *Chandler v. City of Dallas*, 2 F.3d 1385(5th Cir. 1993) wherein the court of appeals determined that a person with insulin-dependent diabetes was not qualified as a driver because his medical condition presented a genuine substantial risk that he could injure himself or others, and granted summary judgment in favor of the defendant. The plaintiff appealed. I consider this case significant because although I followed clear Fifth Circuit precedent, the court of appeals vacated my order, questioning the continuing viability of its own per se rule that insulin-treated diabetes mellitus are not qualified to perform an essential function of the job of being a police officer. The court of appeals remanded the case with the instruction that I determine whether "today" there exists new or improved technology, not available at the time *Chandler* was decided, that could permit an insulin-dependent diabetic driver to safely operate a vehicle. Perplexed by how the court of appeals could ask me to revisit an issue it had previously decided, I felt bound to the authority that controlled at the time of the plaintiff's rejection

consider this case significant because it raised comprehensive issues surrounding federal election law and the necessary procedures for making various changes related to voting. Additionally, the Voting Rights Act is one of the few statutes that requires a three-judge panel to decide dispositive matters.

Valdespino v. Alamo Heights Indepen. Sch. Dist., SA-95-CA-817 (W.D. Tex. Jul. 15. 1997)
Aff'd 168 F.3d 848 (5th Cir. 1999)
The plaintiffs sued a local school district board and claimed the at-large, by-place, majority-vote elections for positions on the school board of trustees diluted their votes as Hispanics in violation of Section 2 of the Voting Rights Act of 1965. I found that the plaintiffs failed to make out a vote dilution claim because they could not prove, under the first required threshold factor, that Hispanics were a sufficiently large and geographically compact group to constitute a majority in a single-member district. As a result, I denied the plaintiff's motion for partial summary judgment, and after a trial before the bench, entered judgment in favor of the school district. The plaintiffs appealed. This case is significant because the United States Court of Appeals for the fifth Circuit agreed with me, rejecting the plaintiffs' contention that a "majority" may be less than 50% of the citizen voting-age population.

Stucky v. City of San Antonio, SA-96-CV-1285 (W.D. Tex. Aug. 25, 1998)
Rev'd 204 F.3d 1115 (5th Cir. 1999)
No. SA-96-CV-1295, 2000 WL 33348252 (W.D. Tex. Apr. 4, 2000)
Rev'd, 260 F.3d 424 (5th Cir. 2001), *cert. granted and judgment vacated*, 122 S. Ct. 2617 (2002)
The plaintiffs, towing company owners, sued the City of San Antonio (the City), challenging ordinances prohibiting tow trucks from removing disabled vehicles from public streets without being directed to do so by the City, and creating an option to extend the City's exclusive contract with a rival towing company. Initially, I determined that two city ordinances governing the City's non-consensual towing business were preempted by federal law. On appeal, the United States Court of Appeals for the Fifth Circuit vacated most of my order having to do with this issue and remanded the case for consideration in light of an intervening Fifth Circuit opinion. On remand, I interpreted the Fifth Circuit's opinion and determined that the ordinances were not preempted. On appeal on the second time, the Fifth Circuit determined the ordinances were preempted. Subsequently, the United States Supreme Court vacated the Fifth Circuit's judgment and remanded for consideration in light of a recent Supreme Court opinion. The Fifth Circuit, in turn, remanded the case to me. At this writing, the parties have not approached me about how they would like to proceed in this case. This case is significant because it is still pending after six years.

maintain employment. Although the plaintiff interpreted *Watson* to mean the Commissioner must make an explicit finding that the claimant is/is not capable maintaining some level of employment, a finding that the claimant can perform work on a regular and continuing basis is inherent in a residual functional capacity assessment as defined in 20 C.F.R. §404.1545(b). Although it isn't clear whether the *Watson* court considered the definition of residual capacity assessment, or the effect of an implicit finding, the only other time the court of appeals has required an explicit finding is in the context of a finding that an impairment is not severe. In that circumstance, the court of appeals did not indicate a remand was always appropriate. As a result, I affirmed the Commissioner's denial of benefits. This case is significant because it will undoubtably serve as the basis for a Fifth Circuit review about the court's intention in *Watson*.

Kelley v. Am. Heyer-Schulte Corp., 957 F. Supp. 873 (W.D. Tex. 1997)
The plaintiff in this case sued the manufacturer of breast implants claiming the implants caused her to develop Sjogren's Syndrome. The defendant manufacturer moved to exclude the proposed testimony of the plaintiff's epidemiologist and rheumatologist as unreliable. This case was significant because it required me to exercise my role as a gate-keeper under the Supreme Court's decision in *Daubert*. I determined that (1) as a matter of law, it would be unreasonable for epidemiologist to rely on one study cited to establish causal link; (2) the epidemiologist's proposed re-analysis of that study did not meet *Daubert* standard; (3) the plaintiff could not meet the cause-in-fact requirement with regard to her claim that her implants caused Syndrome-related symptoms; (4) the probative value of epidemiologist's proposed testimony was outweighed by its prejudicial impact; (5) the rheumatologist could not testify as to general causation and thus could not testify as to specific causation; and (6) the rheumatologist's proposed testimony as to specific causation failed test of parsimony and also did not meet *Daubert* standard. As a result, I granted the defendant's motion to exclude the plaintiff's expert testimony, and entered judgment as a matter of law as it related to the applicable claims. My ruling effectively ended that portion of the plaintiff's case.

b) If you are or have been a judge, provide a short summary and citations for all rulings of yours that were reversed or significantly criticized on appeal, together with a short summary of and citations for the opinions of the reviewing court.

Criminal cases:
U.S. v. Tippie, No. DR-85-CR-12
Rev'd, No. 85-1303 (5th Cir. Sept. 27, 1985)
Defendant was convicted in a bench trial of violating 18 U.S.C. § 472 by knowingly passing two altered $1 bills with intent to defraud. Defendant appealed challenging the sufficiency of the evidence. The United States Court of Appeals for the Fifth Circuit reversed finding the evidence insufficient "when weighed

U.S. v. Evans, EP-90-CR-159
Aff' in part, rev'd in part, vacated in part and remanded, 950 F.2d 187, (5th Cir. 1991), *reh'g denied*, 958 F.2d 1285
Defendant was convicted of possession of marijuana with intent to distribute, being a felon in knowing possession of a firearm, and using firearm in relation to drug trafficking crime. Defendant appealed and the United States Court of Appeals for the Fifth Circuit held that: (1) even if hearsay was admitted, error was harmless with respect to conviction for marijuana possession in light of overwhelming evidence, and (2) nontestifying witness' statement on defendant's possession of identical gun was hearsay, requiring reversal of weapons convictions.

U.S. v. De La Rosa, SA-89-CR-269
Rev'd, No. 90-5588 (5th Cir. Mar. 15, 1991)
Defendant was convicted by a jury of conspiracy to distribute and import heroin. Defendant appealed arguing that his conviction constituted double jeopardy. At the beginning of the first trial during jury voir dire, there were eight defendants whose cases were to be severed into two cases. Then, six of the defendants pleaded guilty. One of the remaining two defendants objected to the jury venire because the panels were divided based on persons who indicated that they were not available absent extreme hardship for one of the trials that was presumed to take much longer than the other and that it was indicated that this case may not be as important as the other. Considering that one defendant objected to the current jury, that the jurors, having seen eight defendants in the morning, but later that day only two, may have assumed that the others pleaded guilty, that the jurors had been sitting around for six hours and may have started second-guessing their positions and that the Government may have been able to shorten its case if given an opportunity to re-evaluate the case with only the two remaining defendants, I excused the jury and rescheduled the trial. The United States Court of Appeals for the Fifth Circuit held that the second trial was double jeopardy since there was no "manifest necessity" for excusing the jury as required by *U.S. v. Dinitz*, 424 U.S. 600, 606-07 (1976).

U.S. v. Kyle, SA-91-CR-59
Conviction aff'd, sentence vacated and remanded for resentencing, No. 91-5766 (5th Cir. Aug. 4, 1992)
Defendant was convicted on three counts of filing a false tax return–one committed in 1985, one in 1986 and one in 1987. The 1987 count was imposed under the Sentencing Guidelines and I increased the offense level for the use of a sophisticated means and for the use of a special skill or abuse of a position of public trust. Defendant appealed arguing that the 1987 offense was wrongly calculated and then used to determine the sentences for the 1985 and 1986 offenses. The United States Court of Appeals for the Fifth Circuit agreed with Defendant and remanded for resentencing.

U. S. v. Martinez-Deleon, SA-91-CR-06
Rev'd and remanded, No. 92-8012 (5th Cir. Nov. 2, 1992)
Five defendants were convicted in a consolidated case of various drug related offenses. Two defendants appealed, arguing that the evidence was insufficient to support their convictions. The United States Court of Appeals for the Fifth Circuit agreed and reversed those convictions.

U.S. v. Valdez, SA-89-CR-10, SA-91-CA-153
Vacated and remanded for clarification, No. 91-5717 (5th Cir. May 28, 1992)
Pro se defendant pleaded guilty to one count of possession of cocaine with intent to distribute, and was sentenced to serve 65 months in prison. Defendant did not appeal but filed a motion raising four issues: (1) he was not advised of his right to appeal; (2) the amount of cocaine considered for sentencing purposes was incorrect and the presentence report made incorrect statements about him; (3) a DEA agent induced him to commit the offense; and (4) prosecution by both Texas and the United States violated the Double Jeopardy Clause. The Magistrate Judge recommended that post-conviction relief be denied, but found that Defendant had not been advised of his right to appeal, and recommended he be granted an out-of-time appeal. Defendant objected to the out-of-time appeal because of the unavailability of witnesses and difficulty in restructuring events would result in an adverse and unjust outcome on appeal. Unaware of that Defendant had filed objections (filed three days late), I adopted the Magistrate Judge's report and recommendation and denied Defendant's motion with no mention of the recommended out-of-time appeal. The United States Court of Appeals for the Fifth Circuit vacated and remanded for consideration of Defendant's objections or a statement of why the objections were not considered and to clarify whether the judgment includes granting an out-of-time appeal.

U.S. v. Carrillo, SA-91-CR-354
Vacated and remanded for new trial, 981 F.2d 772 (5th Cir. 1993)
A jury found Defendant guilty of distribution of heroin and cocaine based on an undercover officer's testimony that he purchased a narcotics-filled balloon from Defendant. Defendant claimed that the police officer misidentified him as the seller. I allowed the Government to present evidence of two other sales of controlled substances by Defendant as modus operandi to help establish his identity as the drug seller in the case at issue. Defendant appealed challenging the admission of those extrinsic acts under the identity exception of Rule 404(b) of the Federal Rules of Evidence. The United States Court of Appeals for the Fifth Circuit held that those acts did not bear a sufficient degree of similarity to the charged offense to mark it as the handiwork of Defendant, and vacated the conviction and remanded it for a new trial.

commerce as required by *U. S. v. Lopez*, 2 F.3d 1342 (5th Cir. Sept. 15, 1993). The United States Court of Appeals for the Fifth Circuit agreed. Remanded with instruction to dismiss.

U.S. v. Longoria, SA-92-CR-336-2
Vacated and remanded, No. 93-8129 (5th Cir. Jan. 12, 1994)
Defendants were charged with conspiracy to distribute an unspecified quantity of cocaine and two counts of distributing cocaine. The Government filed notices of sentence enhancement against each defendant pursuant to 21 U.S.C. § 841 (b)(1)(A), alleging that the conspiracy charge involved over five kilograms of cocaine. Section 841 (b)(1)(A) provides for a mandatory minimum ten-year sentence if the offense conviction involves over five kilograms of cocaine. Defendants pleaded guilty to the conspiracy charge and the Government agreed to dismiss the other counts. Defendants disagreed with the factual basis submitted by the Government as to the amount that was negotiated for sale with an undercover agent. At the rearraignment hearing, the prosecutor, the defense attorney and I all misstated the quantity of cocaine that would require the imposition of a mandatory minimum sentence by stating that if the court finds that the conspiracy involved 10 kilos or more there would be a minimum sentence of 20 years and if there was less than 10 kilos, there would be a maximum of 20 years with no minimum. Defendants were sentenced to the statutory minimum of 120 months. On appeal, the United States Court of Appeals for the Fifth Circuit held that the district court must inform the defendant of "all possible minimums and maximums of punishment . . . which could possibly be applicable as a result of the appropriate determination of quantities using relevant conduct under the guidelines," *U.S. v Herndon*, 7 F.3d 55 (5th Cir. 1993), and that there is a significant possibility that the error affected the defendants' decisions to plead guilty.

U.S. v. McCord, DR-92-CR-78
Aff'd in part, rev'd, vacated and remanded in part, 33 F.3d 1434 (5th Cir. 1994)
Following a jury trial, Defendant bank officers were convicted of conspiring to violate a statute prohibiting trustees of employee stock ownership plans from receiving kickbacks, and one defendant was additionally convicted of filing false tax return, making false entries on bank records, misapplication of bank funds, unlawfully receiving proceeds of bank loan, and money laundering. Defendants appealed many issues. The United States Court of Appeals for the Fifth Circuit affirmed all issues except for one defendant's contention that the *ex post facto* clause, U.S. Const. art. I, § 9, prohibits his prosecution for money laundering, an issue that the Government conceded.

U.S. v. Parada-Talamantes, DR-93-CR-42
Rev'd and remanded, 32 F.3d 168 (5th Cir. 1994)
Defendant was convicted of importing and possessing marijuana and conspiring to import and possess it, and he appealed. During the trial, I admitted evidence that

U.S. v. Manges, SA-94-CR-319
Aff'd in part and rev'd and dismissed in part, 110 F.3d 1162, (5th Cir. 1997), *reh'g and suggestion for reh'g en banc denied*, May 21, 1997
Defendants were convicted of conspiracy and mail fraud charges arising out of plot to retain oil and gas rights to tract by preventing leased mineral rights from reverting to state by submitting false documents to state general land office and making corrupt payments to state official. On appeal, Defendants raised many issues, only one of which persuaded the appellate court–that one defendant's appeal that the conspiracy charge against him was time-barred. The United States Court of Appeals for the Fifth Circuit held that the conspiracy charge against that defendant was time barred.

U.S. v. Bribiesca, SA-95-CR-171-2
Convictions aff'd, sentences vacated and remanded for resentencing, No. 97-50405 (5th Cir. Jun. 29, 1999)
Three defendants were convicted of violations of the Travel Act, money laundering, and conspiracy. All three defendants argued that I applied the Sentencing Guidelines incorrectly in determining their sentences. They argued that the money laundering guideline is not premised upon the amount of "loss" a scheme produced, but rather on the "value of the funds" that were laundered. The United States Court of Appeals for the Fifth Circuit agreed and vacated the defendants' sentences and remanded for resentencing.

U.S. v. Lopez-Benitez, SA-98-CR-101-1
Aff'd in part, rev'd and remanded, No. 98-50936, (5th Cir. Oct. 15, 1999)
Defendant was convicted for possession with intent to distribute marijuana in violation of 21 U.S.C. § 841 (a)(1). Defendant appealed arguing that I erred in denying his motion to suppress (reasonable suspicion to stop the vehicle), denying his motion for mistrial despite prosecutor questioning regarding Defendant's post-arrest silence and denying his request for jury instructions regarding the knowledge element of the charged crime. During the trial, the prosecutor asked Defendant if he was read his rights, if he asked to speak to a lawyer and if he had a chance to tell the border patrol what he told the jury in court. Each of the questions was objected to and each time sustained. The defense counsel then moved for a mistrial, which I denied. The United States Court of Appeals for the Fifth Circuit held that patrol officers had reasonable suspicion to stop the vehicle, but that the prosecutor misconduct prejudiced Defendant's rights to a fair trial. The case was remanded for a new trial.

U.S. v. Ramirez, SA-98-CR-411-2
Sentence vacated and remanded for resentencing, No. 99-50768 (5th Cir. Aug. 7, 2000)
Defendant was found guilty by a jury of conspiracy to distribute heroin and with possession with intent to distribute heroin. I sentenced Defendant in the middle of

Civil cases:

A.L.T. Corp., v. Small Bus. Admin., SA-83-CA-2251-EP*[1]
Aff'd in part, rev'd in part and remanded, 801 F.2d 1451 (5th Cir. 1986)
Plaintiff filed an action in state court against Defendant government agency for breach of contract and deceptive trade practices. Defendant failed to respond and Plaintiff obtained a default judgment. Plaintiff filed an action in federal court to enforce the state court judgment. I dismissed the action, finding that the state court judgment was not entitled to full faith and credit because the state court never had personal jurisdiction over Defendant. The United States Court of Appeals for the Fifth Circuit reversed the dismissal on the contract claims, finding the state court judgment was entitled to full faith and credit. The judgment was not subject to collateral attack as to personal jurisdiction and due process was not violated because Defendant had full knowledge of the action and chose to ignore it. The Fifth Circuit affirmed my dismissal as to the deceptive trade practices claims because the federal court had exclusive jurisdiction over tort claims against government agencies. On remand, I found the state court judgment enforceable against Defendant but denied an award of post-judgment interest, which was affirmed by the Fifth Circuit.

Melia v. Bowen, SA-84-CA-309-EP*
Vacated and remanded, No. 86-2553 (5th Cir. Nov. 13, 1986)
Plaintiff sued Defendant, the Secretary of Health and Human Services, for refusing to reopen Plaintiff's claim for social security disability insurance benefits. Plaintiff first filed for disability benefits in 1962, and was denied initially and upon rehearing. Plaintiff filed two more applications in 1973 and 1978, and was denied each time. In 1981, Plaintiff submitted evidence of his fractured tibia, but the Administrative Law Judge found it did not constitute good cause for reopening his prior denial determinations. The Appeals Council also denied review, finding the evidence was not "new and material." In 1984, Plaintiff filed this lawsuit in federal district court claiming that he was entitled to disability benefits. I adopted the Magistrate Judge's recommendation to dismiss the case, finding that if Plaintiff's 1981 submissions were construed as a request to reopen, the court lacked jurisdiction to review the agency's denial of that request and that evidence of the fracture could not be considered material to plaintiff's 1978 application. The United States Court of Appeals for the Fifth Circuit vacated the judgment and remanded the case because it was not clear that I dismissed Plaintiff's claims for the proper reason. The Fifth Circuit remanded with instructions to dismiss Plaintiff's claims for lack of subject-matter jurisdiction because Plaintiff's appeal was not from a "final decision of the Secretary after a hearing" under § 405(g) and because Plaintiff had not exhausted his Federal Tort Act claims.

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[1]We are attempting to locate the unpublished opinions for those case numbers marked with an asterisk.

Perales v. Casillas, SA-86-CV-910-EP
Aff'd in part, vacated in part, 903 F.2d 1043 (5th Cir. 1990)
Vacated and remanded, 950 F.2d 1066 (5th Cir. 1992)
Immigrant visa applicants brought class action requesting the Immigration and Naturalization Service (INS) change its method of considering petitions for voluntary departure and employment authorization. After a two-day trial, I entered an injunction, which the INS appealed. The United States Court of Appeals for the Fifth Circuit vacated the judgment in part, holding that because the agency's decision to grant voluntary departure and work authorization has been committed to agency discretion by law, those parts of the injunction regulating what the INS may consider in making these decisions must be vacated. While appeal was pending, I awarded Plaintiffs attorney's fees under the Equal Access to Justice Act (EAJA). Defendants appealed the award of fees in light of their successful appeal. The Fifth Circuit vacated the award and remanded, instructing me to first determine first whether Defendants' conduct constituted bad faith; if not, then whether Defendants' actions were substantially justified for entire litigation. If Plaintiffs were entitled to partial fees, I was directed to determine the cost-of-living adjustment by applying the appropriate adjustment on an annual basis. The Fifth Circuit affirmed my denial of enhancement based on the attorneys' expertise and availability.

Cordova v. Lynaugh, SA-86-CA-1056-EP
Rev'd and remanded, 838 F.2d 764 (5th Cir. 1988)
Petitioner filed a habeas corpus petition, contending that his constitutional rights were violated by the state trial court's failure to instruct on the lesser included offense of murder in his trial for capital murder, for which he was convicted and sentenced to death. I denied the petition. The United States Court of Appeals for the Fifth Circuit reversed and remanded, instructing me to grant the writ, conditioned upon retrial by the State of Texas. The Fifth Circuit found that the proof of Petitioner's agreement to rob the victim, unlike the proof of his intent to kill the victim, was circumstantial and ambiguous. Because the jury was not instructed on the lesser included offense of murder, the jury had to choose between capital murder and acquittal, which violated Petitioner's due process and Eighth Amendment rights.

Hernandez v. Aldridge, SA-88-CA-237-EP
Aff'd, 866 F.2d 800 (5th Cir. 1989), *cert. granted and j. vacated*, 494 U.S. 1013 (1990); *j. rev'd on remand*, 902 F.2d 386 (5th Cir. 1990), *cert. denied* 498 U.S. 1086 (1991)
Plaintiff sued the Department of the Air Force for discrimination. When Plaintiff filed his complaint, the clerk marked it received, but did not file it until the Magistrate Judge granted Plaintiff's motion to proceed *in forma pauperis* 30 days later. I dismissed Plaintiff's discrimination complaint for lack of jurisdiction, finding that Plaintiff did not timely file his federal complaint within thirty days of

Jefferson Sav. & Loan Assoc. v. Gates Dev. Corp., SA-90-CA-663
Rev'd and remanded, No. 91-5595 (5th Cir. Mar. 6, 1992)
The United States Court of Appeals for the Fifth Circuit found that my *sua sponte* remand more than thirty days after the filing of the notice of removal on the ground that removal was untimely was improper. Accordingly, the Fifth Circuit reversed and remanded for further proceedings, as appropriate.

Gutierrez v. Wales, SA-91-CA-281-EP
Vacated and remanded, No. 91-5775 (5th Cir. Mar. 25, 1992)
Plaintiff filed a *pro se* civil rights claim, alleging he was beaten by two policemen on two occasions. The Magistrate Judge ordered Plaintiff to amend his complaint to include the specific dates of the beatings. Plaintiff failed to respond to the order or a second order warning of possible dismissal if he did not respond. After the first policeman filed a motion to dismiss, the Magistrate Judge ordered Plaintiff to file an advisory motion and to respond to the motion to dismiss. Plaintiff did not respond. Six weeks later, on September 19, 1991, Plaintiff requested an extension, explaining that he had put his home address on his pleadings, not knowing that he would be in prison after filing the case, and that he had just received the court's orders. On September 23, 1991, I accepted the Magistrate Judge's recommendation to dismiss the case with prejudice. The United States Court of Appeals for the Fifth Circuit vacated the order and remanded because I did not address Plaintiff's reasons for his delay and the record did not indicate a clear pattern of delay or a finding that a lesser sanction would not better serve the interests of justice.

Querner v. Querner (In re Querner), SA-92-CA-32-EP
Rev'd and remanded, 7 F.3d 1199 (5th Cir. 1993)
Plaintiff legal guardian of her father filed for bankruptcy on his behalf. The father died before the reorganization was complete and pursuant to his will, the probate court appointed Plaintiff and her brother, as executors. The bankruptcy court proceeded with the reorganization of the bankruptcy estate and ordered a division of the property. I affirmed the bankruptcy court's division of the probate estate after the close of Chapter 13 proceedings. The United States Court of Appeals for the Fifth Circuit reversed, finding that the bankruptcy court abused its discretion in retaining jurisdiction over the probate estate because the record indicated that judicial economy did not favor retention of jurisdiction at the time the underlying bankruptcy case terminated and the bankruptcy court had no special knowledge regarding the disputes between parties. The Fifth Circuit instructed me to direct the bankruptcy court to transfer the assets of the probate estate to the Probate Court of Bexar County, Texas.

Rizzo v. Children's World Learning Ctr., Inc., SA-94-CA-417-EP*
Rev'd and remanded, 84 F.3d 758 (5th Cir. 1996).
Plaintiff sued her employer under Title I of the American with Disabilities Act (ADA) after she was removed from her duties driving a childcare center van because of her hearing impairment. I granted summary judgment in favor of the defendant. The United States Court of Appeals for the Fifth Circuit reversed, finding a genuine issue of material fact existed about whether Plaintiff was a direct threat, and thus, whether she was a qualified individual with a disability. The Fifth Circuit also found an issue of material fact as to whether assigning Plaintiff to kitchen duty was an adverse action taken because of her disability.

Super Van, Inc., v. City of San Antonio (In re Super Van), SA-94-CA-580-EP
Rev'd and remanded, 92 F.3d 366 (5th Cir. 1996)
Plaintiff filed for bankruptcy and later filed an adversary proceeding in the bankruptcy court against Defendants, the City of San Antonio (the City) and the City's officials, for having denied its charter application. I granted summary judgment in favor of Defendants, finding that their claims were barred by *res judicata*. The United States Court of Appeals for the Fifth Circuit reversed, holding that even if the parties' first adversary proceeding in bankruptcy and the instant suit involved the same causes of action, *res judicata* did not bar the instant action because Defendants acquiesced in the splitting of Plaintiff's claims. On remand, the parties settled their claims.

Shaboon v. Duncan, SA-94-CA-697-EP
Aff'd in part and rev'd in part, 252 F.3d 722 (5th Cir. 2001)
Plaintiff, a medical resident, alleged that she was wrongfully terminated from a medical residency program. I found that the program's director was not entitled to qualified immunity for his actions in releasing Plaintiff's medical records and psychological history for evaluation. The United States Court of Appeals for the Fifth Circuit reversed, finding that the director's actions were reasonable because Plaintiff had a reduced expectation of privacy. The Fifth Circuit reversed my holding that a question of fact existed as to Plaintiff's intentional infliction of emotional distress claims, finding that the conduct was not sufficiently extreme and outrageous. The Fifth Circuit reversed my holding that a question of fact existed as to the chief psychiatrist's claim of immunity because the evidence indicated that a reasonable doctor would have made a similar determination. The Fifth Circuit affirmed my dismissal of Plaintiff's claims regarding her wrongful discharge. The Fifth Circuit remanded the case as to the medical school's claims regarding denial of sovereign immunity, in light of the Supreme Court's decision in *Board of Trustees of the University of Alabama v. Garrett*. Subsequently, the parties entered a joint stipulation of dismissal with prejudice.

Murr v. Hartford Cas. Ins. Co., SA-96-CA-247-EP
Aff'd in part, vacated and rev'd in part and remanded, 156 F.3d 181 (5th Cir. 1998)
The plaintiffs, parents of a decedent of a car accident, sued for uninsured/underinsured motorist coverage and for breach of two provisions of the Texas Insurance Code (the Code). I rendered judgment as a matter of law in favor of Plaintiffs as to their claims under the Code. The United States Court of Appeals for the Fifth Circuit affirmed my judgment as a matter of law under Article 21.55 of the Code, but reversed my holding as to Article 21.21. The Fifth Circuit also found that I erred in defining "knowingly" for the jury and vacated the damage awards and remanded the case for a new trial.

County of Kendall v. Chrysler Credit Corp. (In re Boerne Hills Leasing Corp), SA-97-CA-823; *Rev'd and remanded*, 15 F.3d 57 (5th Cir. 1994)
The bankruptcy court awarded the entirety of proceeds from the sale of the estate of Boerne Leasing Corporation to Defendant. I affirmed the bankruptcy court's decision. Plaintiffs appealed, claiming that under section 32.05 of the Texas Tax Code, their liens had priority over the liens of consensual creditors such as Defendant, therefore they had superior claims to the sale proceeds. The United States Court of Appeals for the Fifth Circuit reversed my holding, finding that even though Plaintiffs' liens were unenforceable against personal property transferred to a bona fide purchaser for value who did not have actual notice of the lien, because Defendant failed to seek authorization to initiate avoidance, Plaintiffs' liens took priority.

County of Kendall v. Chrysler Credit Corp. (In re Boerne Hills Leasing Corp), SA-97-CA-823
Rev'd and remanded, No. 98-50383 (5th Cir. May 25, 1999)
In its 1994 reversal (above), the United States Court of Appeals for the Fifth Circuit held that "the taxing units are entitled to distribution of the proceeds of sale of the debtor's inventory in satisfaction of their secured claims." On remand, the bankruptcy court determined that Defendant need not refund the value of the tax liens. The Fifth Circuit found this was not consistent with its opinion and reversed and remanded again, directing the bankruptcy court to grant the refund of erroneously distributed proceeds.

Durbin v. Reno, SA-98-CA-35-EP
Aff'd in part, vacated in part and remanded, No. 98-50742 (5th Cir. Aug. 30, 1999)
Plaintiffs sought mandamus compelling the Attorney General to issue a certificate of citizenship to Lucrecia Durbin after an immigration judge ordered her deported. Plaintiffs also sought money damages for alleged constitutional violations committed during Lucretia's application for citizenship and deportation proceedings and David Durbin claimed he was unlawfully arrested by border

remanded for a determination of Defendant's purposeful contacts with the Western District of Texas. On remand, the parties settled.

Burleson v. Johnson, SA-99-CA-519-EP
Vacated and remanded, No. 00-50454 (5th Cir. Dec. 19, 2000)
Petitioner filed a habeas corpus petition challenging his conviction, which was assigned to another judge. That judge denied Respondent's motion to dismiss the petition as time-barred, finding that the time during which Petitioner's previous federal habeas petition was pending should not count toward the one-year limitations period. The case was later transferred to my court. I accepted the Magistrate Judge's recommendation declining to revisit the limitations question and denying Petitioner's application on the merits. The United States Court of Appeals for the Fifth Circuit vacated and remanded, finding that Petitioner's limitations period was not tolled by either his state habeas application or his previous federal habeas petition. On remand, I dismissed Petitioner's claims as time-barred.

Stirman v. Exxon, SA-99-CA-763
Rev'd and remanded, 280 F.3d 554 (5th Cir. 2002)
The plaintiff-royalty interest owners sued the defendant oil company for breach of the implied covenant to diligently market gas as a reasonably prudent operator. The plaintiffs sought class certification for royalty owners in fifteen states. After reviewing significant evidence and case law on the matter, I certified the class. The defendant appealed. On appeal, the United States Court of Appeals for the Fifth Circuit determined that the differences in state law in about half of the states destroyed the predominance of law needed for class certification, and reversed my order. At this writing, an amended motion for class certification is pending.

Gordon v. Atacosa County, SA-00-CA-49
Aff'd in part, rev'd in part and remanded, No. 01-50486 (5th Cir. Jul. 1, 2001)
The plaintiffs filed a civil rights suit against three local governments and multiple individual defendants. I denied the defendants' motions for summary judgment on qualified-immunity grounds and the individual defendants appealed. Although the United States Court of Appeals for the Fifth Circuit affirmed my order as to seven defendants, the court of appeals determined that one defendant was entitled to the qualified immunity defense and reversed as to that defendant. The case then proceeded to trial.

Alamo Moving and Storage One Corp. v. Mayflower Transit L.L.C., SA-01-CV-411
Aff'd in part, rev'd in part and remanded, No. 02-50070 (5th Cir. Jul. 31, 2002)
The plaintiff moving company sued its employer for wrongful termination of its agency agreement. On the defendant's motion, I compelled arbitration. The plaintiff lost in arbitration after the arbitrator found that the plaintiff's financial situation and performance warranted the termination of the agency relationship. I

After considering the evidence, I found no evidence that suggested that as a result of reading the article anyone thought less of the plaintiff in a personal or business sense, and no evidence that the plaintiff's business was harmed as a result of the article. I also found insufficient evidence of emotional injury to support a finding of actual injury under Texas state law. Because the United States Supreme Court had indicated that proof of actual injury, whether impairment of reputation and standing in the community, personal humiliation, mental anguish, or suffering precede recovery, I found no evidence of actual injury. I also found insufficient evidence that the defendants acted with reckless disregard of the falsity of the article. At most, the evidence showed that the author acted negligently by failing to verify the facts of the article. Without an actual showing of malice, the article was protected by the First Amendment. As a result, I set aside the jury's verdict and entered judgment in favor of the defendants.

Rothe Dev. Corp. v. United States Dept. of Defense, 49 F. Supp.2d 937 (W.D. Tex. 1999)
Appeal transferred, 194 F.3d 622 (5th Cir. 1999), *rev'd*, 262 F.3d 1306 (Fed. Cir. 2001)
An unsuccessful bidder sued the United States Department of Defense and the Department of the Air Force, seeking injunctive and declaratory relief and monetary damages for violation the plaintiff's right to equal protection after the defendants awarded a contract to a higher, but socially and economically disadvantaged, bidder. The contract was awarded pursuant to a federal statute which permits the Department of Defense to preferentially select bids submitted by small businesses owned by socially and economically disadvantaged individuals. Known as the 1207 program, the statute permits the Department to increase the bid of a non-minority-owned firm by up to ten percent via a mechanism called a "price-evaluation" adjustment. I determined the 1207 program was constitutional, as enacted and as applied in this case, and entered summary judgment in favor of the defendants. The plaintiff appealed. The United States Court of Appeals for the Fifth Circuit determined it lacked jurisdiction because the unsuccessful bidder's claims were based on Tucker Act, and transferred the appeal to the United States Court of Appeals for the Federal Circuit. The Federal Circuit determined that I had applied a differential standard of review rather than "strict scrutiny," and impermissibly relied on post-reauthorization evidence to support the program's constitutionality as reauthorized. The Federal Circuit vacated my judgment and remanded the case for further proceedings consistent. The case is still pending.

Koog v. United States of America, 852 F. Supp. 1376 (W.D. Tex. 1994)
Rev'd, 79 F.3d 452 (5th Cir. 1996)
The sheriff of a Texas county sued the United States seeking a declaration that the Brady Handgun Control Protection Act (the Act) was unconstitutional. The Act created and changed the procedure for buying handguns in this country, in part, by requiring the chief law enforcement officer in a county to conduct background

Texas State District Judge; March 1980-November 1980. Appointed to fill unexpired term by Texas Governor William P. Clement. Sought election, but was defeated.

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

Was a candidate for office as State District Judge in 1980 and was unsuccessful.

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

(a) Describe chronologically your law practice and legal experience after graduation from law school including:

(1) whether you served as clerk to a judge, and if so, the name for the judge, the court and dates of the period you were a clerk;

I did not serve as a clerk.

(2) whether you practiced alone, and if so, the addresses and dates;

I did not practice alone.

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

1972-1976
Bexar County District Attorney's Office
Bexar County Justice Center
300 Dolorosa
San Antonio, Texas 78205
Assistant District Attorney, Bexar County, Texas;
Served as a State prosecutor on all types of criminal matters.

the head of one of the larger U. S. Attorney's offices. In 1984, I was appointed a United States District Judge where I have served for eighteen and a half years.

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

As an Assistant District Attorney, I represented the State of Texas in criminal matters, and as Federal Public Defender, I represented individuals charged with criminal offenses who could not afford representation. Before being appointed to the Federal Bench most of my work was in criminal matters, although as United States Attorney, I was also responsible for civil matters involving the United States.

(c) (1) Describe whether you appeared in court frequently, occasionally, or not at all. If the frequency of your appearances in court varied, describe each such variance, providing dates.

During my period as an Assistant District Attorney and Federal Public Defender, I appeared in court on a regular basis and handled hundreds of cases and numerous trials. While a State Judge, I presided over several hundred cases and approximately 25 trials. As United States Attorney, I appeared in Court occasionally and was primarily responsible for other attorneys under my supervision who appeared in Court on behalf of the United States Government. As a United States District Judge for almost 19 years, I have handled thousands of cases and hundreds of trials.

(2) Indicate the percentage of these appearances in

(A) federal courts;

80% of my career has been spent exclusively in federal court.

(d) Describe your practice, if any, before the United States Supreme Court. Please supply four (4) copies of any briefs, amicus or otherwise, and, if applicable, any oral argument transcripts before the U. S. Supreme Court in connection with your practice.

I have never appeared before the United States Supreme Court.

(e) Describe legal services that you have provided to disadvantaged persons or on a *pro bono* basis, and list specific examples of such service and amount of time devoted to each.

My past and present positions have prevented me from providing pro bono legal representation; however, I have given motivational speeches to children in poor areas of our community, encouraging them to stay in school. I have also opened the courthouse to students to learn about our system of law.

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

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

(b) a detailed summary of the substance of each case outlining briefly the factual and legal issues involved;

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

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

I have been a United States District Judge for almost 19 years, and a long time has elapsed since I have personally handled any cases as an attorney. I am including the 10 cases included in the forms submitted when I was considered by the Committee for the District Court position. Because of the length of time many of the Judges and attorneys are no longer available for interview.

1. NAME OF CASE: United States of America v. Albert Castano, Jr.

CITATION OR
CASE NUMBER: DR-76-CR-31

TRIAL DATE; February 4, 1977

PRESIDING JUDGE AND COURT: Honorable Adrian A. Spears (Deceased)
United States District Court

OPPOSING COUNSEL: James W. Kerr, Jr. (then Assistant U. S. Attorney)
Current address: Administrative Law Judge
Office of Hearings and Appeals
12770 Merit Drive, Suite 800
Dallas, Texas 75251
Phone: (972) 341-5123 Ext. 3108

OPPOSING COUNSEL ON APPEAL: LeRoy Jahn, Assistant U. S. Attorney
Current address: U. S. Attorney's Office
601 N. W. Loop 410, Suite 600
San Antonio, Texas 78216
Phone: (210) 384-7124

COUNSEL FOR CO-DEFENDANTS: Robert E. L. Looney (Deceased)

SUMMARY: This was one of the longest trials in which I was involved in as a lawyer. It dealt with a substantial amount of heroin, and the appeal made significant case law regarding the husband/wife privilege in the Fifth Circuit. Co-defendants with my client, Arturo Reyes-Mendoza, were his wife, June Bunch Mendoza, and his brother, Oscar Reyes-Mendoza. All three defendants were charged with possession with intent to distribute heroin, conspiracy, and distribution of heroin. A substantial amount of the evidence against my client involved statements by his co-conspiring wife. The husband/wife privilege was argued as grounds for the inadmissibility of any statements by her incriminating her husband. The objection was overruled, all three defendants were convicted, and the Trial Court was affirmed on appeal.

4. NAME OF CASE: United States of America v. Patrick Spiller

CITATION OR CASE NUMBER: SA-78-CR-148

TRIAL DATE: August, 1978

PRESIDING JUDGE AND COURT: Honorable John H. Wood, Jr. (Deceased)
United States District Court

SUMMARY: This case received a large amount of publicity since it was tried at the time of the Iranian demonstrations against the United States government. The defendant was an Iranian student charged with a minor immigration violation. As appointed counsel, I raised the issue of selective prosecution due to the prevailing public sentiment as it related to the defendant's nationality at that time. The Trial Court overruled the defense motion, the case was tried, and the defendant was convicted, being assessed a $100.00 fine. He chose not to appeal the case. The case addressed the basic constitutional rights guaranteed an individual, regardless of the unpopularity of his cause. As much as I disagreed with my client personally, as appointed counsel I had a duty to represent him to the best of my ability.

7.	NAME OF CASE:	United States of America v. Antonio E. Nanez
	CITATION OR CASE NUMBER:	694 F.2d 405 (5th Cir. 1982)
	TRIAL DATE:	February 2, 1982
	PRESIDING JUDGE AND COURT:	Honorable Fred Shannon (Retired) United States District Court Current address: 226 Five Oaks San Antonio, Texas 78209 Phone: (210) 826-2146
	CO-COUNSEL:	Bill Blagg (former Assistant U. S. Attorney) Current address: District Attorney's Office Cadena-Reeves Justice Center 300 Dolorosa, 5th Floor San Antonio, Texas 78205 (210) 335-2736
	OPPOSING COUNSEL:	Julie Marquez (Disbarred) Current address: Unknown

SUMMARY: This was one of the first cases I prosecuted as United States Attorney for the Western District of Texas. Antonio Nunez was a major heroin trafficker and was also reputedly a "hit man" for an organized crime ring in this area. Nanez had been a major target of the Drug Enforcement Administration for some time, and was considered one of the major drug traffickers within our division. This conviction for the sale of heroin was a significant one for both the U. S. attorney's Office and the Drug Enforcement Administration. Upon conviction, Mr. Nanez received a sixty-year sentence.

PRESIDING JUDGE AND COURT: Honorable William S. Sessions (Retired)
United States District Court
Current address: Holland & Knight, L.L.P.
112 E. Pecan, 29th Floor
San Antonio, Texas 78205
Phone: (210) 229-3000

CO-COUNSEL: Mitchell Weidenbach, Assistant U. S. Attorney
Current address: U. S. Attorney's Office
601 N. W. Loop 410, Suite 600
San Antonio, Texas 78216
Phone: (210) 384-7360

OPPOSING COUNSEL: Dorothy Ann Flores
Current address: 115 E. Travis Street #444
San Antonio, Texas 78205
Phone: (210) 223-1948

and

Oscar Cisneros
Current address: 819 S. General McMullen
San Antonio, Texas 78237
Phone: (210) 435-2135

SUMMARY: The two defendants were females who were part of a large-scale alien smuggling ring. It is believed that the smuggling ring felt that if females were used as drivers prosecution would be declined or the charges would be substantially reduced. The defendants had been arrested while transporting sixteen illegal aliens, both were convicted on all counts, and both received jail sentences.

10. NAME OF CASE: United States of America v. Joe R. Rangel

CITATION/CASE NO: SA-83-CR-38

TRIAL DATE: May 24, 1983

PRESIDING JUDGE AND COURT: Honorable William S. Sessions (Retired)
United States District Court
Current address: Holland & Knight, L.L.P.
112 E. Pecan, 29th Floor
San Antonio, Texas 78205
Phone: (210) 229-3000

proceeding, Cause No. 1995-CR-201(2). The particular plaintiff/defendant has filed forty-eight other lawsuits in federal court and is now in federal custody. The individual's co-defendant also filed a lawsuit naming me as one of eight defendants. The assigned judge dismissed the lawsuit, Cause No. 1997-CV-1002, as frivolous and barred the plaintiff/defendant from ever filing another lawsuit in the district without first obtaining court permission. In an much older case, Cause 1988-CV-1120, a pro se plaintiff sued me and my Court for a civil rights violation. The assigned judge dismissed the lawsuit as frivolous. Another pro se plaintiff filed a civil rights lawsuit against me in Cause No. 1994-CV-350. The assigned judge dismissed the lawsuit as frivolous. After the plaintiff lost his appeal, the United States Court of Appeals for the Fifth Circuit banned the plaintiff from ever filing another lawsuit without court permission. A state inmate named me as one of sixteen defendants in a civil rights lawsuit, Cause No. 1995-CV-125. A few months later, the assigned judge dismissed the allegations against me. In the most recent case against me, Cause No. 99-CV-319, a state inmate named me as one of 116 defendants in a civil rights lawsuit. The assigned judge dismissed the lawsuit as frivolous and malicious. I do not know of any other lawsuits naming me as a defendant..

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

As a United States District Judge for almost 19 years, I am familiar with the need to recuse myself from hearing matters where there might be a perception of conflict.

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

There are no plans to have any employment outside of the Court position.

Senator CORNYN. Since you and I know each other very well and have for, as best I can figure, about the last 23 years—

Judge PRADO. I won't tell on you if you won't tell on me.

[Laughter.]

Senator CORNYN. I want to recognize Senator Sessions, I guess, for any questions he may have at this point and I will reserve.

Judge PRADO. Senator Sessions and I also go back a long way. We were part of the Department of Justice and we were U.S. Attorneys in our respective divisions some time back.

Senator CORNYN. That is what I hear, so he may have some questions for you.

Senator SESSIONS. Judge Prado, it is a delight to see you in this position. It was all of us in the U.S. Attorney team who were so happy when you were appointed to the District bench. I can say without hesitation, Senator Cornyn, that there were none of the 94 United States Attorneys better liked and more respected than Judge Prado and it was a real day of celebration when he ascended to the bench and left the pit of the United States Attorney's Office. He did a great job as United States Attorney and I really—he was well known for that. So I salute you and congratulate you, Judge.

I notice you have written about the courtroom and technology. I go back to my old courtroom in Alabama now and they have got it wired and Assistant United States Attorneys are using all kinds of things. Do you think that is helpful, and what can we do to improve technology in the courtroom?

Judge PRADO. I am fortunate enough that the Administrative Office of the U.S. Courts has its national training center for judges in San Antonio and Federal judges from around the country come to San Antonio for computer training. As part of that program, they were able to put all sorts of technology in my courtroom. We have real-time instant transcript for the lawyers, videotaping ability, videoconferencing ability, Internet access and computers for the lawyers. It has really made trials easier, quicker. The juries understand. The lawyers are able to make their presentations through use of the technology and get their points across a lot easier and I think it has really helped the justice system having all this technology that makes it easier for everyone.

Senator SESSIONS. Judge, one thing that I think is important to the democratic process, since you will be, I am confident, receiving a lifetime appointment, will not be subject to the voters or the public in any way, do you have a philosophy that properly respects the democratic branches of government that pass the laws and make the laws? I know Judge Paez was brought up. I was concerned about that. I voted for cloture and voted against his confirmation, but he had written, well, judges have a right to act when the legislature fails to act. It is incumbent on judges to act, he wrote, and that troubled me.

Do you think, Judge, that the judicial branch is bound to the orthodox interpretation of language in statutes and that they should not reach beyond that to impose personal views through the court?

Judge PRADO. Senator, the law means what it says. It should be clear on its face what it means. We as judges are called upon to interpret the law. We are not there to set our judgment as to what is right or wrong. The laws are there to decide what is right and

wrong and we are not there to clean up everything that we perceive as being wrong. That is not our responsibility. Our responsibility is to interpret the law as best we can that has been passed by the Senate, signed off by the President. Two branches of government had decided this is the law and we are, as judges, are bound to follow that law unless it is clear to us that for some reason that law is unconstitutional and violates the Constitution.

I have always given due deference to laws passed by Congress and assumed that when the House of Representatives, the Senate, and the President have said that this is the law of the country, that myself as a District judge should give due deference to that law, and unless it is clear on its face to me that I am convinced that it is unconstitutional, I will follow the law as it was intended to be followed by Congress and the President.

Senator SESSIONS. Thank you, and I think that is correct. In fact, I believe we are in some ways maybe having more of a confirmation and a deeper understanding of that, maybe not in this Senate, but I believe among the Bar as a whole, people are realizing that a lifetime-appointed judge must be neutral on political issues and it must be an arbiter of the law as written, and that does mean sometimes you may have to declare a statute unconstitutional. If it violates the Constitution, that is following the law. We do need to show restraint, I think.

One more question. You have been a District judge now for a number of years. Do you have any thoughts about being a Circuit judge and some things you might be different than you have been subjected to over the years?

Judge PRADO. I think I will be more sympathetic and understanding of what took place at the District Court level, and I think that is what I bring to the Circuit Court. Nineteen years ago—19 years and one week ago, I had my confirmation hearing before this Committee for my District Court bench, and so it has been 19 years that I have sat there and I think I bring the practical experience of a trial judge to the Circuit Court and that will be invaluable experience that enables me to better understand what took place on the District Court level to determine if it was appropriate or not, and I think that experience that I have is going to be invaluable to me on the Circuit Court.

Senator SESSIONS. I think it will, too. Judge, congratulations. I think your integrity, your work ethic, your commitment to America are going to stand you in good stead. I know you are going to be a great judge on the Court of Appeals and we are proud of you.

Judge PRADO. Thank you.

Senator CORNYN. Thank you, Senator Sessions.

Judge Prado, I, of course, know you appreciate the important distinction between your role as a trial judge and the role that you will now serve when confirmed as an appellate judge. I have heard appellate judge defined as a person who hides in the hills while the battle rages below, and when it is over, swoops down to shoot the wounded.

[Laughter.]

Senator CORNYN. Seriously, how do you regard the difference in the way that you will approach your job as a District judge with

the collegial decision making process on an appellate court, where you will be a member of a panel, perhaps, in an en banc court?

Judge PRADO. It will be different, but I think my experience in different avenues is going to be invaluable. I talked with Senator Sessions about my experience on the District Court level, but having been an assistant Federal public defender and attempting to defend people in Federal Court was a humbling experience. Then running the U.S. Attorney's Office and seeing it from the avenue was very valuable. The short time I was on the District Court bench, the short time I was an Assistant District Attorney on the county level, bringing all those avenues of experience to the Circuit Court, I think is going to be invaluable.

It will be a different job, dealing with—trying to work with other judges in reaching a decision. You won't be seeing as many people. It certainly will be a more isolated position. But I am looking forward to the challenge of doing something different and using all this experience I have to try to make as good a decision as I can on the cases that will be coming before me as a Circuit judge.

Senator CORNYN. Thank you, Judge. I don't have any more questions myself personally, but as you can imagine at this time in our Nation's history, there is a lot going on here in Washington and particular here at the U.S. Senate. I know there are other members of the Committee who would like to be here today that are unavoidably absent who may want to submit questions to you in writing, and so the record will be left open for that process.

But unless we have any further questions today from Senator Sessions, then we thank you for being here and would be glad to excuse you at this time.

Judge PRADO. Thank you.

Senator SESSIONS. Congratulations.

Senator CORNYN. Now, the Committee will hear from Richard D. Bennett, nominated to be the United States District Judge for the District of Maryland; Dee D. Drell, nominated to be United States District Judge for the Western District of Louisiana, which is within the Fifth Circuit; J. Leon Holmes, nominated to be U.S. District Court Judge for the Eastern District of Arkansas; and Susan G. Braden and Charles F. Lettow, who have both been nominated to serve as judge on the U.S. Court of Federal Claims.

Before we get started, ladies and gentlemen, if you would please raise your right hand so you can be sworn.

Do each of you swear that the testimony you are about to give before this Committee is the truth, the whole truth, and nothing but the truth, so help you, God?

Mr. BENNETT. I do.

Mr. DRELL. I do.

Mr. HOLMES. I do.

Ms. BRADEN. I do.

Mr. LETTOW. I do.

Senator CORNYN. Thank you very much. Please, have a seat.

If any of you would like to give an opening statement or introduce any family member or friends who have come here to support you here at this hearing, I know that joining the bench, ascending to the bench, as sometimes people refer to it, is a momentous event in the career of any lawyer and certainly I am glad that those of

you who have been able to do so have brought friends and family with you to observe this hearing and to celebrate this important milestone in your career.

I would like to go ahead and first recognize Mr. Bennett for that purpose, for any statement you might have or any introductions you might like to make.

STATEMENT OF RICHARD D. BENNETT, NOMINEE TO BE DISTRICT JUDGE FOR THE DISTRICT OF MARYLAND

Mr. BENNETT. Thank you, Mr. Chairman. I would first like to thank President Bush for nominating me for this position and I certainly want to thank the strong support I have received here today from my two home State U.S. Senators, Senator Paul Sarbanes and Senator Barbara Mikulski. I am, indeed, humbled by their comments.

My family, due to the confusion between yesterday and today, is not able to be here. My wife, Jane, daughter Ridgely, daughter Lizzy, and son Craig cannot be here. Particularly Craig is disappointed because he was able to cut classes yesterday for college, but I said 1 day is enough, so he is back up at college. My sister, Jackie, and particularly my mother, Mary Lou Bennett, to whom Senator Mikulski made reference earlier today. Today is her 85th birthday, so I will be with her later and would like to pay tribute to my mother on her 85th birthday.

I thank you, Mr. Chairman.

Senator CORNYN. Very good. Thank you, Mr. Bennett.

Mr. Drell?

STATEMENT OF DEE D. DRELL, NOMINEE TO BE DISTRICT JUDGE FOR THE WESTERN DISTRICT OF LOUISIANA

Mr. DRELL. Thank you, Senator. I want to, first of all, acknowledge the presence of my wonderful wife, Susie, who is right behind me here, literally standing or sitting behind me on purpose. She and I have been married for 33 years and we have three great children who could not be here. We had some friends here, as well, but they had to unfortunately fly home today.

I have three wonderful children, as I said. Brad, my won, is an attorney, as well. He is back home holding down the fort at the firm, fielding my phone calls. I have another child who is in the—at the University of Texas in Austin, I might add, and my daughter graduated from there and is actually doing graduate work at LSU. So we have lots of connections there.

I want to also express my gratitude to the President for the nomination, for the Congressional—to the Louisiana Congressional Delegation for its support.

And I want to just say one other thing, and that is that I really—I had occasion to visit some folks ta a newspaper not too many moons ago and they asked me my impressions about the process for being nominated as a District judge, and the first words I could think of were that I was very pleased that the process really had a lot of integrity, and I mean that sincerely. I have been very pleased to see the manner in which I have been dealt with through certainly kindness, understanding, and I am most appreciative of being here today. Thank you.

Senator CORNYN. Thank you, Mr. Drell.

You and Mr. Bennett have both alluded to the fact, I believe, that we were supposed to proceed at a different time for this hearing and had to reschedule because of what is affectionately called the vote-a-rama during the budget resolution at which the Senators were required to vote every ten minutes on numerous amendments offered to the budget resolution, and so we appreciate your understanding of that and your flexibility.

One of the things I have had to learn, being new to the Senate, is that once you become a member of the Senate, you no longer have any control whatsoever over your schedule, and so you are experiencing perhaps what Senators experience on a daily basis and it can be a little disorienting at times, but we appreciate your patience and your understanding on behalf of all your families and those who would have loved to have been here but cannot be here now.

Mr. DRELL. Thank you.

Senator CORNYN. Mr. Holmes?

STATEMENT OF J. LEON HOLMES, NOMINEE TO BE DISTRICT COURT JUDGE FOR THE EASTERN DISTRICT OF ARKANSAS

Mr. HOLMES. Thank you, Senator. I want to introduce my wife of 31 years, Susan, who is with me here. Two of our children are here, Hannah and J. Frank. Also with me is my secretary from my law firm, Lisa Cox, and Lisa tells me that she has met you, Senator Cornyn, when she worked for John Casey, and she refers to you as Justice Cornyn, so—

Senator CORNYN. I am known by many names and titles.

Mr. HOLMES. It is always with great respect and affection in the way that you—in the kind and respectful way that you introduced yourself to her when you met her in John Casey's office when she was employed there.

I do have a son who is married and has three children and lives in Michigan. They could not come. I have a son who is married and has two children and lives in the great State of Wisconsin. I have a daughter who is in college and as we speak is in Austria studying, I hope.

I want to thank Senator Tim Hutchinson for submitting my name on a list to the President of the United States for consideration for this position. I want to thank the President for nominating me. And I do know that before the nomination, the President consulted with Senator Lincoln and with then Senator-elect Pryor and spoke with both of them before I was nominated, and it was before Senator Pryor was sworn in, and they both told him that they would support me and I very much appreciate their gracious and enthusiastic support through this process and the words that they said for me today.

Senator CORNYN. Thank you.

Ms. Braden?

STATEMENT OF SUSAN G. BRADEN, NOMINEE TO BE JUDGE FOR THE COURT OF FEDERAL CLAIMS

Ms. BRADEN. I would like to thank the President for this great honor—

Senator CORNYN. There is a little button there you need to press. There you go.

Ms. BRADEN. I would like to thank the President for the honor of nomination to this interesting and very special court, and I think one that will be even more important to the country in the aftermath of the war and in the war on terrorism.

I would like to mention, I was nominated for the seat of Roger Anderwalt, who was a colleague of mine in the Justice Department who passed away 2 years ago. We grew up together. We were friends. We had—our children were in school together. They were in bar or bat mitzvah classes together. It was very special to me to be nominated for Roger's seat. I will have a lot of work to do and big shoes to fill if I am fortunate enough to be confirmed through this process.

I am very grateful to Senator Sessions and Senator Hutchinson, Senator Thurmond, who is not here, Senator Bingaman, all of which wrote letters to help me advance to become nominated by the President. Senator Cornyn, obviously, you have been a supporter, and all of their staffs. You know, the truth of the matter is, without them, all of this would have never been possible for me. I have had so many people who have been very helpful and I am very grateful for that.

I would like to introduce my husband who is with me, Tom Susman, who is the Bruce Willis look-alike over here.

[Laughter.]

Ms. BRADEN. Tommy is going to have to leave because his daughter, Shana, is being—getting married, and he is going to run out of the hearing as soon as this is finished, I think, to get an airplane to see her. Our daughter, Daley Susman, is a freshman—a sophomore—excuse me, a junior at Yale, and she is currently in Madrid studying at NYU abroad for this semester and I am grateful that she is there and safe. And I am very grateful for all of you to make this hearing possible today and the great folks at the Justice Department who helped us prepare.

Senator CORNYN. Thank you very much.

Mr. Lettow, because of my last name, I am sensitive to mispronouncing others' last names and I hope I haven't butchered yours. Would you pronounce it for me?

STATEMENT OF CHARLES F. LETTOW, NOMINEE TO BE JUDGE FOR THE COURT OF FEDERAL CLAIMS

Mr. LETTOW. Mr. Chairman, you have done just fine, in fact, perfectly. It is Lettow.

Senator CORNYN. Lettow, okay. Very good. Thank you very much. please proceed with any statement or introductions you would like to make.

Mr. LETTOW. Mr. Chairman, I am especially grateful for the hearing. I know it has been a difficult hearing for the members of the Committee and so on, but I am actually very, very grateful that we are able to appear before you today. I am especially appreciative of the support of Senator Bingaman. We have known each other a long time and have been friends throughout that time. I am also especially grateful for the support of Senator Grassley, because our families have known each other also for even longer. And I am

very grateful, as well, for the support of the Virginia Senators, John Warner and Senator George Allen.

It happens that I am lucky, living in the immediate area, to have most of my family here. I actually am fortunate enough to have a bride. We have been married not quite 40 years. It shows a little bit about my age, but in any—probably hers, too—

Senator CORNYN. Your good judgment, no doubt.

Mr. LETTOW. Well, it has all worked out very well. And my wife, Sue, is here, and most of our children are here, as well.

Our daughter, who is a law professor in this city, had to teach class. She teaches criminal procedure, a favorite topic of hers, and has to teach this afternoon, so she is not here.

Our eldest son, Carl, is here. He happens to be a litigator. I don't know how he got that particular profession in mind, but he is a litigator with a firm in the Virginia area.

Our next son, John, is here. He is a scientist and engineer. John is accompanied by his wife, Phoebe, who is a graphic artist. They did not bring along their little son, Eli. That might have caused a little more disruption to the Committee than the Committee might want.

And then, finally, our youngest son, Paul, who is in law school, but this happens to be his spring break, so he is in quite good shape.

I also have been very fortunate in having had the same secretary for—I am going to say it, I am not sure she will appreciate it—29-and-a-half years. Cheyenne Cashin is here, and she doesn't look like we have been working together for that long, but she has been of great help to me and my colleagues.

And I am also very lucky in having one of my colleagues here with whom I have worked for many years, Matthew Slater, and he is a fellow who has experience in all three branches of government and, in fact, served the last administration as the principal Deputy General Counsel of the Air Force, but has been a fellow with whom I have litigated cases for a long time.

Senator CORNYN. Thank you very much.

I just have really one question for each of you, and as I said, you have already been through a very extensive process, FBI background investigation, thorough vetting by the Justice Department obviously before the President chose to nominate you. There has been a thorough investigation of your qualifications and experience and I commend each one of you for meriting the confidence of the President for these important positions that you have been nominated to fill.

I can tell you from personal experience that changing roles from that of a practicing lawyer to that of a judge is, indeed, a transformation, certainly a transformation in attitude and approach because, of course, the role that you will play once confirmed is different from the role that you have performed in the past as a practitioner.

But I would just like to ask each one of you to comment in turn on this question, really. As you know well, the role of judge in our Federal constitutional system is unique. The people choose their Representatives in Congress and the President and Vice President in large part because of their position on a variety of political

issues, both large and small, and, of course, they are frequently controversial, the positions that candidates for Congress or the executive branch may take.

Judges are different. Judges are selected for their legal skills and for their ability to set aside your personal views in order to interpret and apply the law as written by others. What can each of you do to assure this Committee that, if confirmed, you will be able to put aside any personal views you may have, whether they be political or just deeply held personal convictions, on any particular matter and interpret and apply the law as written by others, whether it be the acts of Congress or precedents of a higher court?

Mr. Bennett, if you would start with that.

Mr. BENNETT. Yes, Mr. Chairman. I just had the privilege of finishing reading David McCullough's book John Adams and was greatly moved by the passages there with respect to Chief Justice Marshall and the ultimate impact of Marbury v. Madison and what is the judiciary stays out of the political fray and merely interprets the law.

And having been a U.S. Attorney on one side of the aisle in the courtroom and then having been an active lawyer on the other side, having been a counsel to a Congressional Committee before, I have a strong respect for the judiciary and its role and that is not to be a super-legislature, and I don't believe it is the role of a judge to aggressively try to impose his or her views, but merely to interpret the law, and indeed, to the extent that judges don't do that, it throws the whole system out of kilter.

So I think it is very important to observe the fact that people arrive to this Congress, a strong presumption of constitutionality should be given to all the laws passed by Congress and all the emotions that are brought to the floor of the Congress and it is merely the role of a judge to interpret the law and apply the law as best he or she can.

Senator CORNYN. Thank you, Mr. Bennett.

Mr. Drell?

Mr. DRELL. Thank you, Mr. Chairman. What Mr. Bennett has said, of course, is correct, and interestingly, I come from the only what we call civil law State in the Union, Louisiana. Louisiana has always had the concept that the judge's role was to interpret the law as written by the legislature. The legislature has been deemed from the earliest days as the ground bulwark from which the other part springs, and interpretation comes second.

The role of a judge is indeed to put one's personal business aside. The role of a judge is indeed to follow the law as is proclaimed by the legislature. It is not much different moving up to a Federal District Court in terms of the way I understand the role of a judge to be. It comes from that Louisiana background.

So it is always—it is always possible, of course, for a judge to think about his or her personal feelings. The key is the ability to look at both sides of an issue, to be absolutely fair, to give the deference that is due to the statute, to the will of the legislature, if you will. And it is not that hard to do if you take your role and your duty and your oath seriously. So that is where I come down on it.

Senator CORNYN. Thank you.

Mr. Holmes, I would like to know whether you agree with the comments of Mr. Bennett and Mr. Drell, but I would also like to know, if you do agree, why in the world would you want to serve in a position where you would have to exercise restraint and you could not, if you were true to your convictions about what that role as a judge should be, how you could feel like you have done everything you could in order to perhaps achieve justice in any given case.

Mr. HOLMES. Senator, thank you very much for the question and for giving me the opportunity to say something about that topic.

Let me say that, first of all, I know it is going to be difficult for this Committee to assess that question, and I know it is a very important question. The judiciary, above all, needs to be impartial, and it needs to not only to be impartial, but also to appear impartial.

And the question that you asked really relates to integrity. It really relates to how seriously do you take your oath to be a judge and the recognition of the difference between the role as a judge and the role as a lawyer, an advocate, the role as a citizen participating in the democratic process and advocating sometimes views that are controversial for the sake of what that particular individual believes to be creating a better and more just society.

I have always taken my obligations very seriously. I believe that I have the reputation in Arkansas, as reflected by the support of my Senators and the support that they reflected—they said that I have from the Bar, of taking my obligation seriously. One of the obligations that we have as citizens is to participate in the democratic process and try to advance beliefs that we think will create a more just society, and I have taken that obligation as a citizen seriously. I have taken my obligations as a member of my church, as my faith, seriously, and all the other obligations that I have done as a lawyer, I have done that.

I have represented the parents of staff members of both of my Senators, and so they know how seriously I take my obligation to represent my clients, and I will bring that same commitment to fulfill my obligations to the judiciary. I will honor my oath. I will set aside my personal views. And I will enforce the law as decided by the Congress, as interpreted by the Eighth Circuit Court of Appeals and the United States Supreme Court.

And let me say on that, you asked us, what could we tell you that would—tell the Committee that would help show that we can set aside our personal views, and I want to tell you one thing and then I will pass on. But my uncle, my oldest—my mother's oldest brother, Morris Greenwald, was a part-time policeman. When he was the age that I am now, he was murdered by prison escapees. My wife's oldest uncle on our mother's side was murdered by prison escapees. For the last 4 years, I have represented a man who has been twice convicted of killing a State policeman while he was an escapee for prison. I can and I will and I have set aside my personal views.

Senator CORNYN. Thank you, Mr. Holmes.

Ms. Braden?

Ms. BRADEN. I think your question also relates to the earlier one that Senator Sessions asked in the prior panel, which is I under-

stand your respect for separation of powers. The court in which I have been nominated has even more restricted jurisdiction than my colleagues on the District Court. We have very limited jurisdiction. And it is also trial court. So it would be quite unusual for our court, at least, to have an opportunity to consider a constitutional question. Perhaps, we were thinking hypothetically, that perhaps in a tax case. But otherwise, simply, we don't have jurisdiction. That is the answer to that question.

Certainly, we have no question as trial judges to be other than totally obedient to the Supreme Court and our Circuit Court, which is the Federal Circuit. However, I must say that if I disagreed with a decision of the Federal Circuit in some respects, having total obedience for the case, I would probably take the time to put in a paragraph why I would differ, or perhaps because the court may reconsider the issue in a different case down the road and may find that perspective to be helpful. But in terms of the decision before you, I mean, it is not—it is a non-starter. I mean, it is a total obedience question.

The last thing I was going to say was, you know, among the institutions in our government that share high public opinion is the bench, the judiciary and our Supreme Court. People in our country believe that our judicial system is fair and the responsibility for ensuring that that continues rests on our shoulders for the remainder of our generation to preserve that for our children.

I would say that one final thing my—I have a relative who signed the Declaration of Independence, and so I guess it is something I do think about. He gave his fortune to the army, to General Washington, essentially, to support his troops, and died bankrupt because of it. And so I have to think about the fact that I was given this legacy, the freedom that I share today to be able to walk up and down the street in this city and to enjoy the privileges of freedom that we hope to bring to other nations. So I have got a job to ensure that the judicial branch continues that reputation in our country.

Senator CORNYN. Mr. Lettow?

Mr. LETTOW. I think, Mr. Chairman, there are at least three things that anyone who is offered or contemplated the task of being a Federal judge ought to keep in mind. The first, I think, is certainly to be not only fair and even-handed in addressing facts and the law, but to be perceived as such. That just goes without saying. Certainly, one's own attitude and approach toward that has a lot to do with how the courtroom actually works, and Judge Prado, who was here earlier, is a very good example of that. I think he is sensitive to the people who are in his courtroom.

The second thing is there has to be a sense of equal justice, that there is justice for each person individually that is equal.

And third, there has to be a respect for separation of powers, as Ms. Braden said. I happened to be lucky enough to clerk for two people who believed quite strongly in separation of powers, Chief Justice Burger and Judge Dunaway on the Ninth Circuit, and, in fact, sorted through Chief Justice Burger's jurisprudence in the context of administrative law in an article that I had written because he felt so strongly about it and adopted canons of construction that would enhance or ensure that that separation was main-

tained, and certainly the respect for Congressional enactments through plain meaning and the Chevron case, for example, in administrative construction, and I happened to be counsel, not lead counsel, but a counsel in the Chevron case, so I was particularly happy that that has been a lodestar for administrative law jurisprudence. Thank you.

Senator CORNYN. Thank you very much.

Senator Sessions?

Senator SESSIONS. Thank you, Mr. Chairman. It is a delight to be with you. To all of you, I say congratulations. You have gone through, as Senator Cornyn said, reviewed by Senators and the Department of Justice and the President of the United States and the ABA, the FBI, and then the people on this Committee, and don't think they don't scour through everything. Sometimes, they don't have to find anything, really, to cause a ruckus. But this time, you have cleared all of those hurdles. It is a thing to celebrate and I congratulate you for it.

Richard Bennett, good to see you again.

Mr. BENNETT. Good to see you again, Senator.

Senator SESSIONS. You came in as United States Attorney at the end of my tenure, and Judge Prado came in at the beginning, and both of you are extraordinary members of that fine group of United States Attorneys. You had a terrific reputation. I know the ABA has given you the highest rating and I have the strong feeling, the support from your Senators, it speaks so well of you.

Mr. BENNETT. Thank you, Senator.

Senator SESSIONS. Susan Braden, it is good to see you.

Ms. BRADEN. It is good to see you.

Senator SESSIONS. I remember when you were battling for truth and justice for an Alabama corporation and I enjoyed talking with you about it and seeing your passion for the employees and everybody involved in that and tried to do something good, and it almost worked. I really admired you greatly for that.

Mr. Chairman, I think these are fine nominees. You have asked an important question and they have answered it truthfully. Their backgrounds speak for themselves. I have no doubt that each of them will be tremendous members of the judiciary.

Senator CORNYN. Thank you, Senator Sessions.

I share your view about each of these nominees and am hopeful that they will be voted on favorably by the entire Judiciary Committee when we have that opportunity, hopefully very soon, and then will be referred to the floor for a vote of the entire Senate and hopefully confirmed to the important positions that you have been nominated to serve in.

[The biographical information of Messrs. Bennett, Drell, Holmes, Ms. Braden, and Mr. Lettow follow.]

QUESTIONNAIRE FOR NOMINEES REFERRED TO THE UNITED STATES SENATE COMMITTEE ON THE JUDICIARY

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

   Richard D. Bennett

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

   United States District Judge, District of Maryland

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

   Work: Miles & Stockbridge P.C., 10 Light Street, Baltimore, Maryland 21202; 410-727-6464

4. **Birthplace**: State date and place of birth.

   August 12, 1947, Baltimore, Maryland

5. **Marital Status**: (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es). Please, also indicate the number of dependent children.

   Jane Logan Bennett
   currently unemployed/seeking new employment

   One dependent child

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

   University of Maryland School of Law – Baltimore, MD
   September, 1970 – June, 1973
   Juris Doctor – June 1, 1973

   University of Pennsylvania – Philadelphia, PA
   September, 1965 – May, 1969
   Bachelor of Arts – Political Science – May 19, 1969

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

May, 1993 to Present
Principal/Partner
Miles & Stockbridge P.C.
10 Light Street
Baltimore, Maryland 21202-1487

April, 2002 to Present
Member
Board of Directors
Kennedy Krieger Institute
707 North Broadway
Baltimore, Maryland 21205

January, 2002 to Present
Member
Executive Board
University of Maryland
Center for American Politics and Citizenship
1108 Tawes Hall
College Park, Maryland 20742-7215

2002 to Present
Member
Board of Directors
National Association of Former United States Attorneys
1701 West Charleston Boulevard, Suite 500
Las Vegas, Nevada 89102

1993 to October, 2002
Member
Board of Trustees
Severn School
201 Water Street
Severna Park, Maryland 21146-4522

April, 1991 to April, 1993
U.S. Attorney for Maryland
U.S. Courthouse
101 West Lombard Street
Baltimore, Maryland 21201

1988 to Present
Member
Board of Governors
Federal Bar Association
Maryland Chapter
Rubin & Rubin, Chartered
One Church Street, Suite 101
Rockville, Maryland 20850

January, 1989 to April, 1991
Partner
Weaver, Bendos, and Bennett
117 Water Street – 5th Floor
Baltimore, Maryland 21202

January, 1981 to December, 1988
Partner
Marr and Bennett
10 North Calvert Street
Baltimore, Maryland 21202

August, 1976 to December, 1980
Assistant U.S. Attorney for Maryland
U.S. Courthouse
101 West Lombard Street
Baltimore, Maryland 21201

September, 1973 to August, 1976
Associate Lawyer
Smith, Somerville, and Case
100 Light Street
Baltimore, Maryland 21201

June, 1972 to August, 1972
June, 1971 to August, 1971
Summer Law Clerk
Smith, Somerville, and Case
100 Light Street
Baltimore, Maryland 21201

March, 1970 – August, 1970 (Employment interrupted for
June, 1969 – October, 1969 active military service)
Commercial Banking Division
Commercial Bank Officer
Maryland National Bank
10 Light Street
Baltimore, Maryland 21202

September, 1972 – May, 1973
September, 1971 – May, 1972
September, 1970 – May, 1971
Part-time employment as law student
Athletic Director/Coach
Cathedral School
111 Amberly Way
Baltimore, Maryland

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

October, 1969 to February, 1970
Fort Knox, Kentucky
Serial No. 214-48-0569

U.S. Army Reserve
March, 1969 to March, 1975
2053rd Reception Station
Sheridan Reserve Center
5515 Liberty Heights Avenue
Baltimore, Maryland
Specialist Fifth Class
Honorable Discharge

April, 1983 – July, 1997
Maryland Army National Guard
Commissioned – April 21, 1983
Major
Staff Judge Advocate
Troop Command Attachment One
Headquarters
State Area Command
Fifth Regiment Armory
Baltimore, Maryland

U.S. Army Reserve (Retired)
Major
Judge Advocate General Corp
July, 1997 – Present
I have not resigned my commission

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

A. Professional Awards/Recognition

Selection – *The Best Lawyers in America*
November 2002
The Best Lawyers in America 2003-2004 (10th Ed.)

Published biennially since 1983, *The Best Lawyers in America* is widely regarded as the preeminent referral guide to the legal profession in the United States. Lawyers are not allowed to pay a fee to be listed, and this publication has received accolades from presidents of the American Bar Association. The Best Lawyers in America lists are compiled through an exhaustive peer review survey of leading lawyers in the United States who evaluate their professional peers. The current 10th edition (2003-2004) lists me as one of the best litigators in the category of criminal defense.

Fellow of the Maryland Bar Foundation
June, 1993
Maryland Bar Foundation
Maryland Bar Center
520 West Fayette Street
Baltimore, Maryland 21201

Election as a Fellow is a professional honor and is limited to not more than 2.5% of the membership for the Maryland State Bar Association. The purposes of the Foundation are to foster and maintain the honor and integrity of the law and to improve and to facilitate the administration of justice.

Certificate of Merit for Outstanding Contributions in the Field of Victim's Rights
awarded by the Governor of Maryland
April 30, 1992

Maryland State's Attorney's Association Outstanding Service Award
June, 1993

Fourth Circuit Judicial Conference Permanent Member
November, 1995

"AV" Rating – Martindale Hubbell Law Directory

B. Military/Maryland National Guard

Maryland Commendation Medal for Meritorious and Outstanding Service
May, 1991
Awarded for Meritorious Service as Staff Judge Advocate
Maryland State Area Command
Maryland Army National Guard
August 1990 – April 1991 – in connection with mobilization deployment of units of the Maryland Army National Guard to Operation Desert Storm

United States Meritorious Service Medal for Exceptional Meritorious Service
July, 1997
As Staff Judge Advocate for Maryland National Guard
January, 1992 – January, 1997

State of Maryland Military Department Maryland Distinguished Service Cross
September, 1997
For service beyond the call of normal duty

C. Educational Background:

University of Maryland School of Law:
Selected to Maryland Law Review – September, 1971
Moot Court Award Recipient
Recipient of prize for Highest Scholastic Average – Commercial Transactions
Scholarship Recipient – 3rd year in law school

University of Pennsylvania:
Selected to Sphinx Senior Class Honor Society
Elected Secretary of Senior Class
President of Junior Class Honor Society
Honorable Mention – All – Ivy League Lacrosse – 1968 and 1969

Severn School, Severna Park, Maryland
Class President – 2 years
Class Vice President – 1 year
National Football Foundation Scholar – Athlete Award Recipient
Co-Captain – Football Team
McCormick Award – Unsung Hero
All-Maryland Lacrosse Selection - 1965

10. **Bar Associations**: List all bar associations or legal or judicial-related committees, selection panels 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.

Member of Federal Bar Association – Maryland Chapter
Member of the Board of Governors since 1982
Member of American Bar Association
Member of Maryland State Bar Association
Member of Baltimore City Bar Association
Member District of Columbia Bar Association
Member Republican National Lawyers Association
Member of the Federalist Society
Member of Rule Day Club
President 2000 - 2001
Member of Barrister's Law Club

11. **Bar and Court Admission**: List each state and court in which you have been admitted to practice, including dates of admission and any lapses in membership. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

Court of Appeals of Maryland – December 13, 1973
U.S. District Court for the District of Maryland – December 14, 1973
U.S. Court of Federal Claims – January 8, 1975
U.S. Court of Appeals – Fourth Circuit – 1976
U.S. Tax Court – 1981
Member of Bar – District of Columbia – 1981

12. **Memberships**: List all memberships and offices currently and formerly held in professional, business, fraternal, scholarly, civic, charitable, or other organizations since graduation from college, other than those listed in response to Questions 10 or 11. Please indicate whether any of these organizations formerly discriminated or currently discriminates on the basis of race, sex, or religion – either through formal membership requirements or the practical implementation of membership policies. If so, describe any action you have taken to change these policies and practices.

I am a member of the L'Hirondelle Club of Ruxton, Maryland which is a community swimming, eating and tennis club. That club does not discriminate in its membership on the basis of race, sex or religion. I have previously confirmed with officials of the club that there are no such membership restrictions. I am a member of the Center Club of Baltimore, Maryland which is a professional meeting and eating club. That club does not discriminate in its membership on the basis of race, sex or religion. From 1980 to 1990 I

was a member of the Maryland Club in Baltimore, Maryland. That club is a men's club which has male members of different race, color, religion and national origin. That club restricted its membership on the basis of sex and I openly supported the effort to admit women as members of the club. I resigned from that club in 1990. I am a member of the Penn Club in New York which is maintained for alumni who attended the University of Pennsylvania for at least one year. I currently hold a tennis membership at the Perring Athletic Club, Inc. located in Baltimore, Maryland. That club does not discriminate in its membership on the basis of race, sex or religion. I served as a member of the Board of Trustees of the Severn School in Severna Park, Maryland from 1993 to 2002. I have served on the Board of Governors of the Maryland Chapter of the Federal Bar Association for the past 15 years. I have recently been selected to the Board of Directors of the Kennedy Krieger Institute in Baltimore, Maryland for disabled children.

I was invited to membership of two private law clubs in Baltimore, Maryland. Those clubs are the Rule Day Club and the Barristers Club. The Rule Day Club meets at the West Hamilton Street Club in Baltimore and the Barristers Club meets at Johns Hopkins University in Baltimore. Memberships are by invitation and there is no discrimination of any kind with respect to invitations for membership. Both clubs include male and female members as well as members of minority groups. Those clubs include members of the federal judiciary and prominent members of the Bar. I served as the President ("Pooh Bah") of the Rule Day Club from 2000 to 2002. (Jim Gray/President – Rule Day Club – 410-244-7400)(Stephen Schenning/Secretary-Treasurer – Barristers Club)

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

As a second and third year law student, chosen for the Maryland Law Review of the University of Maryland Law School, I co-authored with another student the following case note:

Note, Kastigar v. United States, *Self-Incrimination: Choosing A Constitutional Immunity Standard,* 32 Maryland Law Review 289 (1972) (See Attachment C)

I do not have copies of any speeches which I have delivered, either in written or videotaped form. I have delivered public speeches while serving from 1991 to 1993 as United States Attorney for Maryland. Those speeches dealt with topics ranging from application of federal criminal law, to environmental policy and federal collection efforts. I also delivered speeches as a candidate for public office on a wide range of public issues. The groups to whom I have spoken have included kiwanis clubs, rotary clubs and various other civic organizations.

14. **Congressional Testimony**: List any occasion when you have testified before a committee or subcommittee of the Congress, including the name of the committee or subcommittee, the date of the testimony and a brief description of the substance of the testimony. In addition, please supply four (4) copies of any written statement submitted as testimony and the transcript of the testimony, if in your possession.

    I have never testified before a committee or subcommittee of the Congress. I served from August of 1997 to June of 1998 as Special Counsel to the Government Reform and Oversight Committee of the United States House of Representatives. The Committee retained my services through my law firm – Miles & Stockbridge P.C., 10 Light Street, Baltimore, Maryland, and my firm was paid a retainer for my services. I remained a principal/partner of my firm during the entire time of service and was not an employee of the House.

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

    I am in good physical health. My last physical was January 30, 2003.

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

    Not applicable

17. **Public Office, Political Activities and Affiliations**:

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

    Public Office

    From 1976 to December 31, 1980 I served as Assistant U.S. Attorney for Maryland. I was appointed by United States Attorney Jervis S. Finney and served under Mr. Finney and his successor, United States Attorney Russell T. Baker, Jr.

    From 1991 to 1993 I served as the U.S. Attorney for Maryland after having been nominated by President George Bush and confirmed by the United States Senate.

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

Personal Political Activities

In 1981 I was selected to serve on the Baltimore City Republican Central Committee to complete the term of the Honorable J. Frederick Motz, now United States District Judge, who had been confirmed as the U.S. Attorney for Maryland.

In 1982 I was the Republican candidate for the Maryland State Senate from the 43rd legislative district in Baltimore City and was defeated in the general election.

In September of 1986 I was elected as Chairman of the Baltimore County Republican Central Committee in a countywide vote by the Republican voters of Baltimore County, Maryland.

In March of 1988 at a convention of the Maryland State Republican Party I was elected as a Delegate at Large to the 1988 Republican National Convention.

In September of 1990 I was not challenged and was automatically reelected as the Chairman of the Baltimore County Republican Party. In that nonpaying position, I served as a member of the Executive Committee of the Maryland Republican Party.

In 1994 I was the Republican candidate for Attorney General of Maryland and was defeated in the general election.

In 1998 I was selected by the Honorable Ellen R. Sauerbrey to be her running-mate as the candidate for Lieutenant Governor in her candidacy for Governor of Maryland. We were defeated in the general election.

In 1996 and 2000 I was elected as a Delegate to the Republican National Conventions from the 3rd Congressional District in Maryland.

In December of 1998 I was elected at a convention of the Maryland State Republican Party as the State Party Chairman and served in that nonpaying position until December of 2000. As the Maryland State Party Chairman I served on the Republican National Committee.

Assistance on Political Campaigns of Others

In 1976 prior to my appointment as an Assistant U.S. Attorney, I assisted State Senator John Carroll Byrnes, who is now a judge of the Circuit Court for Baltimore City, in his unsuccessful campaign for the Democratic nomination for the U.S. Congress.

As the Baltimore County Republican Chairman from 1986 to 1990 and as the Maryland State Republican Chairman from 1998 – 2000 I was involved in efforts in support of Republican candidates generally. As the State Republican Chairman and as a Delegate to the 2000 Republican National Convention I worked on behalf of the election of President George W. Bush.

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

(a) Describe chronologically your law practice and legal experience after graduation from law school including:

(1) whether you served as a clerk to a judge, and if so, the name for the judge, the court and dates of the period you were a clerk;

After graduation from law school I did not serve as a clerk to a judge, but was hired as an associate lawyer at the Baltimore law firm of Smith, Somerville and Case where I had been employed as a summer law clerk during my law school education.

(2) whether you practiced alone, and if so, the addresses and dates;

I have never been a sole practitioner.

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

From September of 1973 to August of 1976 I served as an associate at the Baltimore law firm of Smith, Somerville and Case, specializing in civil and some criminal litigation. The bulk of my practice was devoted to the defense of insurance industry clients in the areas of automobile tort, products liability, commercial contracts, and other general areas of litigation. The firm is no longer in existence. The previous addresses had been 100 Light Street, Baltimore, Maryland 21202 and One Charles Center, 1 North Charles Street, Baltimore, Maryland 21202.

In August of 1976 I was appointed as Assistant U.S. Attorney for Maryland and served in that office until the end of December of 1980. I prosecuted white collar criminal offenses, drug offenses, environmental violations, bank robberies, sexual assault cases, and probably any type of criminal case brought by that office during my 4 1/2 year tenure. I also handled the defense of major medical malpractice cases brought pursuant to the Federal Tort Claims Act.

In January of 1981 I formed a partnership with Michael E. Marr, a former Assistant U.S. Attorney for Maryland, and practiced with Mr. Marr and other attorneys under the general name of Marr and Bennett, at office addresses of 36 South Charles Street and 10 North Calvert Street in Baltimore. That association lasted until December of 1988. My practice specialized strictly in litigation in the federal and state courts, with particular emphasis on insurance defense work for the Allstate Insurance Company as well as some white collar criminal defense. The firm was accorded the maximum "AV" rating by the Martindale – Hubbell Legal Directory Service, P.O. Box 1001, Summit, New Jersey. I believe it was during this period of time that I was personally accorded that maximum "AV" rating which I have maintained to this day.

Having dissolved my partnership with Mr. Marr in December of 1988, I merged my practice in January of 1989 with the firm of Weaver and Bendos, 117 Water Street, 5th Floor, Baltimore, Maryland. The firm of Weaver, Bendos and Bennett was formed in January of 1989 and continued until April of 1991 when I became the U.S. Attorney for Maryland. During my association with Weaver, Bendos and Bennett my specialization continued to be that of litigation in both the federal and state courts. This firm was also accorded the maximum "AV" rating by Martindale-Hubbell.

From 1991 until April of 1993 I served as the U.S. Attorney for Maryland, having been Presidentially nominated and Senate confirmed. During my tenure I handled the normal administrative duties of that position as well as personally participated as trial counsel for the government in two fraud prosecutions as well as the prosecution of a narcotics case.

On May 1, 1993 I became a Partner in the Maryland law firm of Miles & Stockbridge P.C. with my principal office at the firm's 10 Light Street, Baltimore, Maryland offices. The firm was ultimately incorporated and all Partners became Principals. I remain an equity principal to this day. My practice has increasingly focused upon white collar criminal defense, government investigations, internal investigations, and grand jury practice.

In August of 1997 my law firm and I were retained by the Government Reform and Oversight Committee of the United States House of Representatives for my legal services in connection with the investigation of possible irregularities involving foreign campaign contributions in the 1996 Presidential Election. The House of Representatives paid a retainer each month to my law firm for my services and an overwhelming amount of my time was devoted to this task until June of 1998.

(b)

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

During my early years the general character of my law practice was devoted to general insurance defense and some white collar criminal practice. With two different tenures with the U.S. Attorney's Office for Maryland in my association with my current firm since May 1, 1993, my practice has increasingly focused in the area of white collar criminal defense, government investigations and grand jury practice.

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

My clients have included a member of the Maryland State Legislature, (Delegate Tony E. Fulton – Democrat/Baltimore City) whom I successfully defended two years ago in a political corruption case – as well as business people accused of fraud. The internal investigations have included an inquiry into construction contracts for the School Board of Carroll County, Maryland, and investigation of the Office of the Chief of Police of Salisbury, Maryland. In light of the fact that my law firm maintains a network of offices throughout the state of Maryland and Northern Virginia, my practice has increasingly been a statewide practice not necessarily limited to the Baltimore Metropolitan area.

(c)

(1) Describe whether you appeared in court frequently, occasionally, or not at all. If the frequency of your appearances in court varied, describe each such variance, providing dates.

Frequency of appearance – I have tried over 55 civil and criminal jury trials and have appeared in numerable non-jury hearings. Prior to my appointment as U.S. Attorney for Maryland I spent approximately 30% of my time in federal court and approximately 70% of my time in state court. However, since joining my present law firm in May of 1993 my practice has overwhelmingly been focused in the federal courts. I am scheduled to appear as defense counsel in a federal jury trial in the United States District Court for the District of Maryland in a white collar fraud case. I am presently handling two appeals of white collar criminal cases in which briefs have been filed with the United States Court of Appeals for the Fourth Circuit.

(2) Indicate the percentage of these appearances in:

(A) federal courts;

Approximately 75% of my practice has been in the United States District Court for the District of Maryland.

(B) state courts of record;

Approximately 20% of my practice has been in the Maryland State Courts.

(C) other courts.

Approximately 5% of my practice has been in handling matters in other federal jurisdictions.

(3) Indicate the percentage of these appearances in:

While it is difficult to give precise percentages, I believe that there was a greater percentage of civil cases than criminal cases in my practice prior to my service as the U.S. Attorney for Maryland beginning in 1991. Since my association with this law firm in May of 1993 there is a far higher percentage of white collar criminal cases than civil cases.

(A) civil proceedings;

50%

(B) criminal proceedings.

50%

(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 believe I have tried approximately 55 civil and criminal jury trials during my career, most of which were either as lead counsel or sole counsel. It is difficult to estimate the number of non-jury trials I have tried throughout my career in light of the considerable number of small cases tried early in my career as sole counsel in the District of Maryland for Baltimore City and surrounding counties. I believe that these non-jury trials would number another 50 or 55 cases.

(5) Indicate the percentage of these trials that were decided by a jury.

As reflected in number 4 above, over the course of my career , and in light of the number of non-jury trials early in my career, I believe that approximately 50% of my trials have been decided by a jury.

(d) Describe your practice, if any, before the United States Supreme Court. Please supply four (4) copies of any briefs, amicus or otherwise, and, if applicable, any oral argument transcripts before the U.S. Supreme Court in connection with your practice.

I have never practiced before the United States Supreme Court.

(e) Describe legal services that you have provided to disadvantaged persons or on a *pro bono* basis, and list specific examples of such service and the amount of time devoted to each.

With respect to the providing of legal services to the disadvantaged persons or on a *pro bono* basis, my law firm has made a strong commitment to *pro bono* services. As the head of the charitable arm of my law firm, the Miles & Stockbridge Foundation, I have been involved in financial support for the Maryland Volunteer Lawyers Service. I have recently agreed to serve as the

chairman of a managing panel of lawyers for that volunteer service. Personally, I serve as a Panel Attorney on the Criminal Justice Act Panel of the United States District Court for the District of Maryland. Each year I accept several cases as a panel attorney on which my time is billed at the rate of $55.00 per hour in lieu of my normal billing rate of $325.00 per hour. Hundreds of hours have been spent on these cases. Both of the appeals which I am handling to the United States Court of Appeals for the Fourth Circuit are court appointed matters. Those two cases are United States v. Lee, Appeal No. 02-4151 and United States v. Hendricks, Appeal No. 01-4974. I also handled the trial of the Hendricks case after an earlier successful appeal. My law firm also participates in a volunteer program serving meals to the homeless at Our Daily Bread, which provides meals to the homeless. Approximately once a month I serve meals at that facility.

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

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

(b) a detailed summary of the substance of each case outlining briefly the factual and legal issues involved;

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

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

In response to the inquiry concerning the ten most significant litigated matters which I have personally handled, I would list the following:

1. United States v. Shaneybrook
United States District Court for the District of Maryland
Case No. S-00-0220
January – February 2001

I represented a Baltimore appraiser who had been charged with knowingly engaging in a fraud with real estate developers who were illegally "flipping" property in certain sections of Baltimore City. My client, Mr. Guy Shaneybrook, was charged with mail fraud. The case was tried before United States District Judge Frederic N. Smalkin who granted my Motion for Judgment of Acquittal on behalf of Mr. Shaneybrook at the conclusion of the government's case pursuant to Rule 29 of the Federal Rules of Criminal Procedure. The government was represented by Assistant U.S. Attorneys Virginia Evans and Robert Harding (410-209-4800) 101 West Lombard Street, Baltimore, Maryland 21201. Co-counsel for other defendants in the case were Peter D. Ward (410-532-7400), P.O. Box 4821, Baltimore, Maryland 21211-0821 and Kenneth W. Ravenell (410-332-

0850), Suite 1800, The World Trade Center, 401 East Pratt Street, Baltimore, Maryland 21202. My client is one of only two defendants to have been acquitted in the ongoing "flipping" investigation over the past three years.

2. United States v. Fulton
United States District Court for the District of Maryland
Case No. JFM-99-0574
June – July 2000

I represented Delegate Tony E. Fulton (Democrat, Baltimore City) in a public corruption case in which he was charged with engaging in a conspiracy with lobbyist Gerald Evans. While Mr. Evans was convicted, Delegate Fulton was acquitted on half of the charged accounts. The jury was deadlocked on the other counts and the government subsequently dismissed any remaining counts against Delegate Fulton, who remains a member of the Maryland State Legislature. United States District Judge J. Frederick Motz presided over the trial. Assistant U.S. Attorney Dale P. Kelberman, U.S. Courthouse, 101 West Lombard Street, Baltimore, Maryland 21201 (410-209-4800) prosecuted the case for the government. Robert C. Bonsib, 6411 Ivy Lane, Greenbelt, Maryland 20770 (301-441-3000) represented the lobbyist Evans.

3. United States v. Perdue et al.
United States Court of Appeals for the Fourth Circuit
Appeal No. 99-4563
Fall 1999 - January 2000
United States District Court for the District of Maryland
Case No. MJG-98-0515
October - November 2000

I acted as court appointed counsel for Robert Hendricks in a case involving immigration and visa fraud on the part of a Pentecostal Christian Church. A conditional guilty plea was entered pursuant to which I retained an appeal issue to raise before the United States Court of Appeals for the Fourth Circuit. Co-counsel and I were able to win a remand of the case back to the United States District Court for the District of Maryland and the case was ultimately tried before United States District Judge Marvin J. Garbis. In a non-jury trial Judge Garbis ultimately convicted all of the defendants. I continue to act as court appointed counsel on the appeal of that case. Assistant United States Attorneys Gregory Welsh and Bonnie Greenberg (410-209-4800), 101 West Lombard Street, Baltimore, Maryland 21201 represented the government. My co-defense counsel in the case have been Thomas L. Crowe (410-685-9428), Suite 1622, The World Trade Center, 401 East Pratt Street, Baltimore, Maryland 21202 and John C. Fones (410-539-0950), 116 West Mulberry Street, Baltimore, Maryland 21201.

4. United States v. Robert C. Brown
United States District Court for the District of Maryland
Case No. DKC-96-0482
April – 1997

I represented the defendant in a fraud trial before United States District Judge Deborah K. Chasanow. The defendant was charged with mortgage banking fraud in engaging in a scheme to defraud individuals of money while purportedly refinancing their mortgages. First mortgages were not paid as promised. The jury convicted my client of bank fraud. Assistant U.S. Attorney Susan Ringler and Jane Barrett, U.S. Courthouse, 5600 Cherrywood Lane, Greenbelt, Maryland 20770 represented the government.

5. Yenchi Thie Rogers v. Krishan K. Singal
Circuit Court of Maryland for Anne Arundel County (Annapolis)
Case No. C-1993-01565
1996
I represented an Annapolis area physician in the Circuit Court for Anne Arundel County in a jury trial before Circuit Court Judge Eugene M. Lerner. The opposing counsel in the case was David F. Albright, Jr. (410-727-2168), Suite 200, Court Square Building, 200 East Lexington Street, Baltimore, Maryland 21202. My client was charged in a civil case with sexual harassment by a former patient. The case was settled during the trial. Pursuant to that settlement, Judge Lerner Sealed the file.

6. United States v. Odiko
United States District Court for the District of Maryland
Case No. MJG-92-0231
November - 1992
As the U.S. Attorney for Maryland I participated as co-counsel with Assistant U.S. Attorney Douglas Farquhar, now in private practice ((202-737-9624) 700 13th Street Northwest, Suite 1200, Washington, D.C. 20005) in the prosecution of the defendant for insurance fraud. The fraud involved fake automobile accidents and false claims to automobile insurance companies. The case was tried before United States District Judge Marvin J. Garbis. The defense counsel was Richard W. Winelander (410-342-3200), 1 East Chase Street, Suite 1132, Baltimore, Maryland 21202. The jury found the defendant guilty on all counts.

7. United States v. Mostaan
United States District Court for the District of Maryland
Case No. S-92-0033
(1992)

As the U.S. Attorney for Maryland I appeared as co-counsel with Assistant U.S. Attorney Jaime Bennett (410-209-4800), 101 West Lombard Street, Baltimore, Maryland 21201 in the prosecution of a mail fraud case. The case was tried before a jury and United States District Judge Frederic N. Smalkin. Defense counsel for the defendant were M. Albert Figinski (410-332-8634), 100 South Charles Street, Baltimore, Maryland 21201 and Stuart R. Berger, now a Circuit Court Judge for Baltimore City (410-396-5008), Clarence M. Mitchell Courthouse, 100 North Calvert Street, Baltimore, Maryland 21202. Stephen M. Schenning, who was then in private practice and is now an Assistant U.S. Attorney for Maryland (410-209-4800), also acted as defense counsel. The case involved medicaid fraud and false submissions of medical vouchers for payment. The jury found the defendants guilty on all counts.

8. Lamay v. Grant
United Sates District Court for the District of Maryland
MJG-89-1572
January – 1991

I represented a plaintiff in a property damage dispute and obtained a jury verdict in his favor in a trial before United States District Judge Marvin J. Garbis. The defendant was represented by C. Lamar Garen, who was then with the law firm of Piper and Marbury, and whose practice is now located at 418 East Water Street, Charlottesville, Virginia (804-296-2161). The plaintiff had purchased a home from the defendant only to discover serious structural defects upon taking title. Those defects included severe termite damage in the beams under the home.

9. Morley v. Cohen, et al.
United States District Court for the District of Maryland
610 F.Supp. 798 (D. Md. 1988)
United States Court of Appeals for the Fourth Circuit
888 F.2d 1006 (4th Cir. 1989)

I represented the plaintiffs in a Civil RICO prosecution against a tax shelter promoter named Irving Cohen. This jury trial was tried before the late United States District Judge Joseph C. Howard and resulted in a verdict totaling over $800,000.00 in damages, attorney's fees and interest in favor of my clients. The plaintiffs had invested in coal mines only to later learn that the mines were inoperative and incapable of producing coal. The IRS disallowed any deductions with respect to these investments and the plaintiffs had lost hundreds of thousands of dollars. The judgment was affirmed after modification of the damages awarded by the United States Court of Appeals for the Fourth Circuit. The defendant was represented at trial by New York attorneys Carol A. Jablonski and Lawrence M. Nessenson and the law firm of Jaffe and Asher (212-687-3000), 600 3rd Avenue, New York, New York 10016. The appeal was handled by New York attorney Peter A. Jaffe.

10. State of Maryland v. John T. Kahl, Jr.
Circuit Court for Baltimore City
Case No. 18730821
April - May 1988

I represented Mr. Kahl, an insurance executive who was handling the pension plan of Baltimore City, in a case in which he was charged with theft of city insurance/pension funds. Mr. Kahl had failed to forward premiums to the underwriting insurance company. He fell behind in the forwarding of these premiums and was alleged to have used this money to support his own personal business expenses. The case was tried before a jury with Judge Arrie W. Davis (410-333-3200), Courthouse East, Room 630, 111 North Calvert Street, Baltimore, Maryland 21202, presiding. (Judge Davis is now a state appellate judge.) The state prosecutor in the case was Patricia C. Jessamy, then the Deputy State's Attorney, and now the State's Attorney for the City of Baltimore (410-

396-4986), 208 Clarence M. Mitchell, Jr. Courthouse, Baltimore, Maryland 21202. After a jury trial lasting over 1 week Mr. Kahl was convicted.

20. **Criminal History**: State whether you have ever been convicted of a crime, within ten years of your nomination, other than a minor traffic violation, that is reflected in a record available to the public, and if so, provide the relevant dates of arrest, charge and disposition and describe the particulars of the offense.

    I have never been convicted of a crime, other than a minor traffic violation.

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

    I have not been a party or otherwise involved as a party in any civil or administrative proceedings. Within the past ten years the law firm Miles & Stockbridge P.C., of which I am an equity Principal, may have been involved in some matters that in no way related to my legal practice or involve me personally.

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

    If I were to be confirmed as United States District Judge I would recuse myself from any cases involving the law firm of Miles & Stockbridge P.C., and its clients for an appropriate period of time. In all cases I would follow the guidelines of the Code of Judicial Conduct.

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

    None

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

    I am enclosing a copy of the Financial Disclosure Report, required by the Ethics in Government Act of 1978.

25. **Statement of Net Worth**: Complete and attach the financial net worth statement in detail. Add schedules as called for.

See attached net worth

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

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

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

(c) Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as asking or seeking a commitment as to how you would rule on such case, issue, or question? If so, please explain fully.

There is not a formal selection commission in Maryland to recommend candidates for nomination to the federal courts. I was among three people interviewed by the Counsel to the President in April of 2002 in connection with an earlier judicial vacancy. No one from the Office of the Counsel to the President, the Department of Justice or the Federal Bureau of Investigation has discussed with me any specific case, legal issue or question in a manner that could reasonably be interpreted as asking or seeking a commitment as to how I would rule on any case, issue or question.

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

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

   Dee Dodson Drell

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

   United States District Judge, for Western District of Louisiana, Alexandria Division

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

   Gold, Weems, Bruser, Sues & Rundell, a P.L.C.
   2001 MacArthur Drive, Alexandria, Louisiana 71301; (318) 445-6471

4. **Birthplace**: State date and place of birth

   New Orleans, Louisiana November 4, 1947.

5. **Marital Status**: (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es). Please also indicate the number of dependent children.

   Married to Marion Suzanne Weber Drell since August 2, 1969. "Susie" is a social worker, employed by the State of Louisiana as the Coordinator of the Rapides Parish, Louisiana Drug Treatment Court program

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

   Tulane University School of Law (September 1968 - May 1971), Juris Doctor, Spring 1971 (combined degree program)
   Tulane University (September 1965 - May 1969), College of Arts & Sciences, Bachelor of Arts, Spring 1969

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

June, 1981 to present	Member and Director, Law Offices of Gold, Weems, Bruser, Sues & Rundell, a P.L.C., Alexandria, Louisiana. Practice primarily civil including insurance defense, contracts, employment law, health benefits and civil litigation. 2001 MacArthur Drive, Alexandria, Louisiana 71301
1995-1997	Corporate Secretary, Pin Guide Group, Inc. - A small enterprise to produce a collector pin guide for the Atlanta Olympics. No longer in business.
March, 1975 - June, 1981	Law Offices of Gravel, Roy and Burnes, and successor firms, Alexandria, Louisiana. Primarily practice with personal injury (plaintiff's side), criminal defense and general civil practice. 711 Washington Street, Alexandria, Louisiana 71301
1986-1992	Board Member, Family Mediation Council of Louisiana Present Address: c/o Susan Norwood, 6031 Perrier Street, New Orleans, LA 70118
Fall, 1971 - Spring, 1975	Captain, US Army Judge Advocate General's Corps Stationed at Fort Benning, Georgia; Defense Counsel, Trial Counsel, and Chief of Military Justice in all Courts-Martial. Designation: Senior Trial Lawyer
Summer 1969 - Fall1971	Student, Tulane School of Law, New Orleans, Louisiana, with part-time and summer employment as cataloguer and clerk, James H. Cohen, Rare Coins, 319 Royal Street, New Orleans, Louisiana 70113

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

US Army, Judge Advocate General's Corps. Entered active duty in the fall of 1971. Completed 3 months temporary duty at Military Police School, Fort Gordon, Georgia, and at "JAG" School in Charlottesville, Virginia. Reported to Ft. Benning, Georgia in December, 1971. Served there until release in March, 1975. Duties began as a defense

counsel. Moved to trial counsel and then became Chief of Military Justice before leaving. Left to return to Louisiana for private practice. Rank: Captain. Recognitions: Designated as Senior Trial Lawyer by Judge Advocate General. Received Army Commendation Medal and Honorable Discharge.

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

Army Commendation Medal, 1975
Outstanding Young Men of American, 1976
Episcopal Lay Leaders Directory, 1989 and following
Pro Bono Publico Award - AIDSLaw of Louisiana, Inc., 1997
Louisiana Bar Foundation Charter Fellow, 1998
Kiwanis International Foundation - George F. Hixson Fellow, 1999
La-Miss-Tenn Kiwanis District Foundation River of Life Fellow, 1999
Professionalism Award, Crossroads-American Inn of Court, 2000

10. **Bar Associations**: List all bar associations or legal or judicial-related committees, selection panels 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.

Louisiana State Bar Association, House of Delegates, 1979, 1981-1986, 1988-1992, 1994-1996; Probation Monitor for Office of Disciplinary Counsel (current)
American Bar Association
Alexandria Bar Association, Executive Committee, 1976-1977; Chairman of Professional Responsibility Committee, 1980-1981; Nominating Committee, 1989-1990
American Judicature Society
Board Member, Family Mediation Council of Louisiana, 1986-1992
Bar Association of the Fifth Federal Circuit
Crossroads-American Inn of Court of Alexandria-Pineville (Master of the Bench)
Louisiana State Bar Association - Committee on Lawyer Advertising, 1991-1994; Committee to Study Impact of Specialization, 1996; Lawyer and Judicial Conduct Committee, 1997-1999; Committee for Post Conviction Representation, 1997-2002; Nominating Committee, 1998 and 2002
Rapides Parish Indigent Defender Board, 1987-1994
Louisiana Task Force on Racial and Ethnic Fairness in the Courts, 1994-1996
Board Member, Family Mediation Council of Louisiana, 1986-1992

11. **Bar and Court Admission**: List each state and court in which you have been admitted to practice, including dates of admission and any lapses in membership. Please explain

the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

Louisiana Supreme Court and all Louisiana Courts - September 9, 1971
Supreme Court of the United States - April 18, 1977
United States Court of Claims (now United States Court of Federal Claims) - May 24, 1977
United States Court of Military Appeals - December 3, 1971
United States Court of Appeals, Fifth Circuit - April 8, 1976
United States Court of Appeals, for the Federal Circuit - October 1, 1982
United States District Court for the Western District of Louisiana - October 14, 1975
United States District Court for the Middle District of Louisiana - July 18, 1975
United States District Court for the Eastern District of Louisiana - May 5, 1976

12. **Memberships**: List all memberships and offices currently and formerly held in professional, business, fraternal, scholarly, civic, charitable, or other organizations since graduation from college, other than those listed in response to Questions 10 or 11. Please indicate whether any of these organizations formerly discriminated or currently discriminates on the basis of race, sex, or religion - either through formal membership requirements or the practical implementation of membership policies. If so, describe any action you have taken to change these policies and practices.

Chairman, Legal Committee and Member of Executive Committee, Shepherd Ministries, Inc., Alexandria, Louisiana, 1987-1998
Board Member, Family Mediation Council of Louisiana, 1986-1992
Volunteer Counsel for AIDSLaw of Louisiana and Central Louisiana AIDS Support Services
Past Faculty Member and Presenter, Delta Region AIDS Education and Training Center
Qualified Family Mediator
Member, St. James Episcopal Church, Alexandria, Louisiana, former member of the Vestry (last term 1995-1997); Senior Warden, 1999-2001; Distinguished Service Award, 2001; Licensed Lay Eucharistic Minister, Episcopal Disceses of Atlanta, Louisiana and Western Louisiana (licensed since 1973)
Licensed Lay Preacher, Episcopal Diocese of Western Louisiana
Former Member, Diocesan Commission on Evangelism, Episcopal Diocese of Western Louisiana
Chairman, Department of Evangelism, St. James Episcopal Church, Alexandria, Louisiana, 1995-1997
Member, Diocesan Ecclesiastical Trial Court, Episcopal Diocese of Western Louisiana, 1997-1999; Member Diocesan Standing Committee, 2001-2003; Chairman, Bishop Election Committee, 2001-2002
Member, Kiwanis Club of Central Louisiana, Past President
Past Distinguished Lt. Governor, Kiwanis District of Louisiana-Mississippi-West Tennessee, 1990-1991; past Kiwanis International Accredited Representative and present Certified Kiwanis Trainer

Former Member, Kent House Board, Alexandria, Louisiana
Krewe of Boogaloo (Mardi Gras organization)

None of these organizations discriminated on the basis mentioned above. However, Kiwanis International was formerly an all-male organization. That policy voluntarily changed in the late 1980's, I believe. Women are, since the 1980's, an important part of that organization. At one point, I assisted as Division Lieutenant Governor with one of the Key Clubs at a local high school in also admitting females. Its population had been all male and I explained that the club could not discriminate.

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

Lawyer Advertising: No Way, Louisiana Bar Journal, February 1992, Vol. 39, No. 5, Page 464 (attached)

I have also delivered various sermons of my own composition in Episcopal settings. These are not "speeches" per se, and they only involved living in good ways. These are not attached, but copies of my notes can be furnished for review, if necessary. However, they were not covered by media or otherwise made public except in the delivery of them. A few may have been audio taped, but were not regularly kept. I have also been a speaker and Master of Ceremonies occasionally at civic clubs and luncheons. I have spoken on the nature of family mediation, and on the goals, objectives, and skills for Kiwanis Clubs and Kiwanians, individually. None of these are recorded or written or covered by the press.

There is, however, a series of published comments and I have provided a number of "Q & A's" on the internet. These are located at www.diocesewla.org , the website of the Episcopal Diocese of Western Louisiana, which I served over 2001-2002, as Chairman of a committee to elect a Bishop-Coadjutor. Copies of the materials, including my comments on the website, are attached. One may also go to the website and click on the section referencing Bishop-Coadjutor.

14. **Congressional Testimony**: List any occasion when you have testified before a committee or subcommittee of the Congress, including the name of the committee or subcommittee, the date of the testimony and a brief description of the substance of the testimony. In addition, please supply four (4) copies of any written statement submitted as testimony and the transcript of the testimony, if in your possession.

None.

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

My health is excellent.

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

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

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

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

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

Not applicable.

17. **Public Office, Political Activities and Affiliations**:

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

Not applicable.

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

Yes, I was a local coordinator for a candidate for U. S. Senate (1990) and State Attorney General (1991), Bernard Bagert. In addition, I served on steering committee several years ago for a local judge, Lewis O. Lauve, when he ran for the Louisiana Third Circuit Court of Appeal unsuccessfully. All involvement was uncompensated.

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

(a) Describe chronologically your law practice and legal experience after graduation from law school including:

(1) whether you served as clerk to a judge, and if so, the name for the judge, the court and dates of the period you were a clerk;

(2) whether you practiced alone, and if so, the addresses and dates;

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

I graduated from Tulane Law School, New Orleans, Louisiana, in the spring of 1971. I began immediately with military service in the fall of 1971, attending first, the Military Police School at Ft. Gordon, Georgia for one month for an orientation on military police activities and their relationship to military law. I then had a two-month temporary duty responsibility at the Judge Advocate General's school at the University of Virginia at Charlottesville, Virginia. I reported to Ft. Benning, Georgia over the Christmas holidays in 1971 (Office of the Staff Judge Advocate, U. S. Army Infantry School and Fort Benning, Fort Benning, GA 31905). Immediately after the holidays, I was designated as a defense counsel for courts martial, and handled courts-martial on a daily basis, both at the misdemeanor and felony levels. Approximately eighteen months later, I was moved to the position of trial counsel (prosecutor) where I stayed until the completion of my obligation in the spring of 1975. In the course of that position, I was also named Chief of Military Justice.

In the spring of 1975, we returned home to Louisiana and I commenced employment at Gravel, Roy and Burnes (711 Washington Street, Alexandria, LA 71301). The Gravel Firm underwent several name changes before I relocated in 1981 to Gold, Little, Simon, Weems and Bruser (now Gold, Weems, Bruser, Sues and Rundell, 2001 MacArthur Drive, Alexandria, LA 71301), the present firm of my employment.

I have never practiced as a solo practitioner.

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

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

While at Gravel, Roy and Burnes, my primary focus was general law practice, with an emphasis on plaintiff personal injury and criminal defense. I also handled a number of family law cases. The general part of the practice also included real estate and miscellaneous.

When I relocated to Gold, Little, Simon, Weems and Bruser, my primary activity consisted of insurance defense work for a number of years. In the middle-1980's, however, I represented one company in the construction business which had begun to grow substantially. In addition to a substantial insurance defense trial practice, I also began to handle that company's general business law questions, including litigation, and questions involving employment relationships and issues. My practice has evolved since then. I have continued to do litigation, but also have been involved with mentoring younger lawyers in this firm, and also in handling a substantial level of administrative responsibility within the firm. The past few years have involved fewer appearances in court for trials and far more involvement in the negotiation of contracts, transactional work including corporate acquisition and employment law, more significantly for the client mentioned above. I have also spoken at certain seminars on continuing legal education (two presentations), once for the Alexandria Bar Association and once for the Baton Rouge Bar Association on professional responsibility.

(c) (1) Describe whether you appeared in court frequently, occasionally, or not at all. If the frequency of your appearances in court varied, describe each such variance, providing dates.

During the first 25 years of my practice, I appeared in court very frequently in many venues.

(2) Indicate the percentage of these appearances in

(A) federal courts
(B) state courts of record
(C) other courts

I evaluate my civil practice appearances recently (past ten years or so) as 90% in state courts and 10% in federal courts. Earlier percentages were:

(A) federal courts - 7%;
(B) state courts of record - 90%;
(C) other courts - 3%.

(3) Indicate the percentage of these appearances in:

(A) civil proceedings;
(B) criminal proceedings.

My early practice (1971-1975 military) was entirely criminal.

My practice between 1975 and 1981 was probably 50% criminal and civil.

My practice 1981 to date has been almost entirely civil with the exception of no more than three matters of representation as to court-martial.

(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 regret that I do not have sufficient records dating back thirty years to answer this inquiry with perfect accuracy. However, I can say that since approximately 1992, I have tried as sole counsel over forty cases based on an earlier personal count. Unfortunately, many of the older files have been destroyed based on firm file destruction policies. Generally, I have been sole counsel. In recent years, I have been engaged in less frequent appearances because in some cases I appear primarily as co-counsel of record with younger lawyers in the firm. Part of my current firm responsibilities involve the mentoring of younger lawyers.

(5) Indicate the percentage of these trials that were decided by a jury.

I believe that jury cases have accounted for fifteen percent of the cases tried. I tried many more jury trials in the early days of my practice.

(d) Describe your practice, if any, before the United States Supreme Court. Please supply four (4) copies of any briefs, amicus or otherwise, and, if applicable, any oral argument transcripts before the U.S. Supreme Court in connection with your practice.

I have never appeared before the United States Supreme Court, but applied for writs to that court on several occasions. I do not have, nor have access to, copies of writs which I may have filed in criminal cases during the early years of my practice. However, I did prepare and file an application for writs in the case of *Meche v. Meche*, 93-1045 (La. App. 3 Cir. 4/6/94); 635 So.2d 614 after the Louisiana Supreme Court declined a state court writ application. A copy of the writ application which I prepared and filed is attached. Writs were, unfortunately, denied in that case.

(e) Describe legal services that you have provided to disadvantaged persons or on a *pro bono* basis, and list specific examples of such service and the amount of time devoted to each.

My practice has always been active in the area of *pro bono* work. First of all, I served as legal advisor to the Board of Shepherd Ministries, Inc., a local ecumenically-based religious organization which provides services to the economically disadvantaged. The organization provides food, clothing, and assist with shelter. My services in this area were not direct legal services, but were directed toward assisting the organization while I served on the board, in its efforts to serve the disadvantaged. I have since rotated off of that board.

This firm also has a commitment to *pro bono* services. The firm routinely accepts cases from the Rapides Pro Bono Agency, in great part to my urging, and attorneys in the firm, including me, handle those cases on a rotating basis.

More specifically, I am directly involved as volunteer counsel for Central Louisiana AIDS Support Services and AIDSLaw of Louisiana, Inc. These two organizations provide services to persons with AIDS and AIDS-related complex. I regularly receive calls or requests for help from AIDSLaw of Louisiana, and am considered on an active basis with that organization. I have not received any recent referrals from Cental Louisiana AIDS Support Services. I have also been a presenter of legal issues for the Delta Region AIDS Education and Training Center where I have discussed issues involving confidentiality in the handling of persons with AIDS. I was honored by AIDSLaw of Louisiana in 1996 with its *Pro Bono Publico* Award.

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

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

(b) a detailed summary of the substance of each case outlining briefly the factual and legal issues involved;

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

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

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1. Meche vs. Meche, 93-1045 (La. App. 3d Cir. 4/6/94), 635 So2d. 614, writ denied, 94-1174 (La. S.Ct. 6/24/96), writ denied, 513 U.S. 1001, 115 S.Ct. 513, 130 L.Ed. 2d 419 (1994).

My client was Norwood Meche. This was a suit against his former wife to determine whether his military retirement benefits were subject to Louisiana community property laws based upon the date of the termination of the marriage and the laws in force at the time. Meche particularly involved the interpretation of a federal statute concerning entitlement to military retirement benefits. Though Mr. Meche did not prevail, his position was later vindicated when the Louisiana Supreme Court actually heard a later case with different parties. The points were presented in a writ application I prepared for the U.S. Supreme Court.

Trial Judge: Hon. B. Dexter Ryland
9th Judicial District Court
Rapides Parish, Louisiana

Opposing Counsel: Chris Roy, Jr.
1100 M. L. King Drive
Alexandria, LA 71309
Telephone: 318.487.9537

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2. Essex Crane Rental Corp. vs. D & L Machine Works, 93-1656 (La. App. 3d Cir. 10/5/94), 643 So.2d 913.

This case involved suit by my client, Essex Crane Rental, to enforce a money judgment rendered in Texas against a Louisiana company, D & L Machine Works. I handled the entire case. The case involved interesting issues of enforcement of the Full Faith and Credit clause of the U.S. Constitution, including issues of service of process in a sister state, litigation of jurisdiction over the person there and in Louisiana. After numerous hearings, a trial and an appeal, my position was sustained and the judgment was entered in Louisiana and made executory.

Trial Judge: Hon. Hugh Brunson
15th Judicial District Court
Acadia Parish, Louisiana

Opposing Counsel: Malcolm Brasseaux
202 W. Plaquemine Street
Church Point, LA 70525
337.684.3355

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3. Red Simpson, Inc. vs. Lewis, 583 So2d 918 (La.App. 1st Cir. 1991).

Although finally settled on the eve of trial, this case spawned interesting litigation regarding enforceability of a Mississippi Deed of Trust and a note in Louisiana. The reported case dealt with issues of pledge, agency, and delivery of negotiable instruments. I represented Red Simpson, Inc. to enforce the Deed of Trust and note prepared by another lawyer. I handled all hearings and depositions, ultimately forcing the defendants to transfer the Mississippi property to Red Simpson, Inc. on the day of trial.

Trial Judge: Hon. F. W. Watts
22nd Judicial District
Washington Parish, Louisiana

Opposing Counsel: G. Wayne Kuhn
1027 Main Street
Franklinton, LA 70438
985.839.4462

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4. Pitts vs. Bailes, 551 So.2d 1363 (La.App. 3d Cir. 1989).

This was an extended jury trial in Concordia Parish, Louisiana in which I represented the Concordia Parish Police Jury. I handled all important aspects including multiple depositions, hearings, conferences, pretrial proceedings, and a two-week trial, as well as the appeal. Allegations against my client were in regard to a defective roadway which contributed to a serious vehicle accident, severing plaintiff's leg. The jury's verdict dismissed the Police Jury, but rendered judgment against multiple other parties. The appeal resulted in a trial verdict in favor of the Police Jury being affirmed.

Trial Judge: Hon. Glenn B. Gremillion
7th Judicial District
Concordia Parish, Louisiana

Opposing Counsels (Plaintiffs):	Robert Keaty and Thomas S. Keaty, Jr. Suite 2140 World Trade Center New Orleans, LA 70130 (We understand that Mr. Robert Keaty has since been disbarred.)	J. Robert Wooley and Hon. James Brown 3753 Hyacinth Avenue Baton Rouge, LA 70808 225.383.8038
Opposing Counsel (Other Defendants):	John Hoychick, Jr. 607 Madeline Street Rayville, LA 71269 318.728.2051	Steven C. Graalman 2828 Hill Street Alexandria, LA 71301 318.487.4589
	Dan E. West One American Place, 9th Floor Baton Rouge, LA 70825 225.383.9000	James Ryan, III 201 St. Charles Avenue Suite 3500 New Orleans, LA 70170 504.582.1500
	Kenneth Barnett *(Present location unknown)*	C. Michael Hill (Now a U.S. Magistrate Judge) 800 Lafayette Street, Suite 3400 Lafayette, LA 70501 337.593.5160
	Henry H. Lemoine, Jr. 607 Main Street Pineville, LA 71360 318.473.4220	W. T. Armitage, Jr. 418 DeSoto Street Alexandria, LA 71309-0342 318.445.3127

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5. Renda vs. Brown, 563 So.2d 328 (La.App. 3d Cir. 1990)

This was a motor vehicle accident case with insurance coverage issues, resolved by a motion for summary judgment in the 7th Judicial District. Judgment was for my client, General Agents Insurance Company. The suit involved issues of differences in types of insurance policies and coverages under those policies. This suit arose from a motor vehicle accident wherein a driver of a truck owned by Brown, the defendant, struck a pedestrian on a major highway. I handled all pertinent matters for General Agents Insurance Company of America. I briefed and argued all matters, including the appeal, affirming dismissal of General Agents.

Trial Judge: Hon. Glenn B. Gremillion

7th Judicial District
Concordia Parish, Louisiana

Opposing Counsel:	Jack F. Owens, Jr. 117 Pine Street Harrisonburg, LA 71340 318.744.5431	Norman M. Magee 1007 N. E. Wallace Blvd. Ferriday, LA 71334 318.757.4771
	William H. deLaunay 934 Third Street Alexandria, LA 71309-1791 318.445.3631	Larry A. Stewart 3112 Jackson Street Alexandria, LA 71309 318.487.4910
	David H. Nelson 1507 Royal Avenue Monroe, LA 71207 318.388-4454	

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6. Hebert vs. Red Simpson, Inc., 544 So.2d 751 (La.App. 3d Cir. 1989).

This action was a claim against my client, Red Simpson and its ERISA medical benefit plan for maternity benefits(prior to the legal maternity mandates). Mrs. Hebert claimed and argued that her pregnancy was covered under the plan. After trial granting judgment in favor of plaintiff, I obtained a reversal in the Court of Appeal which sustained my arguments of no coverage under these facts.

Trial Judge: Hon. L. O. Fuselier (retired)
13th Judicial District
Evangeline Parish, Louisiana

Opposing Counsel:	Raymond J. Lejeune 1401 Poinciana Avenue Mamou, LA 70554 337.468.2229	Clair F. White 2627 Fairfield Avenue Shreveport, LA 71104 318.221.6190

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7. Cloud vs. Cajun Contractors & Engineers, Inc., 517 So.2d 1010 (La.App. 3d Cir. 1987).

In this workers' compensation case involving a two-accident situation, the trial judge found plaintiff totally disabled. After trying this suit in the district court, I obtained reversal on appeal on behalf of my client, Cajun Contractors. Pointing to cross-examination, the Court of Appeal found that Cloud was not totally and permanently disabled and indeed, was not

temporarily totally disabled. I also obtained a reversal of the award of attorney's fees given by the trial court to Mr. Cloud.

Trial Judge:	Hon. Edward M. Mouser 33rd Judicial District Allen Parish, Louisiana (resigned from office)	
Opposing Counsel:	John P. Navarre (Former City judge) 207 W. Dixie Street Oakdale, LA 71463-3111 318.335.2803	Russell Potter 3112 Jackson Street Alexandria, LA 71309 318.487.4910

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8. Lonco Trucking Co., Inc. vs. American Road Ins. Co., 378 So2d 569 (La.App. 3d Cir. 1979)

In this case, I represented the plaintiff, Lonco. My client had suffered significant vehicle downtime resulting from an accident. The issues involved proof of facts and methods of proving damages on the loss of use of a vehicle. The case was significant because in trial and on appeal I established a previously untried method of computing damages in such cases where other evidence was unavailable, thereby prevailing and obtaining a damage award for Lonco.

Trial Judge:	Hon. Jules L. Davidson (deceased) 9th Judicial District Rapides Parish, Louisiana
Opposing Counsel:	William P. Polk (later judge, now retired) P. O. Box 368 Alexandria, LA 71309 318.776.5674

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9. Devore vs. Hobart Mfg. Co., 367 So.2d 836 (La. 1979).

This suit involved interesting issues of negligent misrepresentation. I represented Mrs. Devore who had been injured when a food steamer spewed steam on her, a cafeteria worker at a local public school. Devore's previous counsel had requested and received erroneous information from her employer, the school board, regarding the name of the manufacturer of a defective machine. My task was to test issues of negligent misrepresentation against the employer. In connection with exceptions (objections) from opposing counsel, I had the

opportunity to research and file substantial briefs on the issues. In this contested case, although the ultimate decision was against Ms. Devore, I succeeded in establishing a cause of action in Louisiana for negligent misrepresentation, where it had not previously been recognized.

Trial Judge:	Hon. Jimmy M. Stoker (retired) 9th Judicial District Court Rapides Parish, Louisiana	
Opposing Counsel:	Grove Stafford, Jr. 3112 Jackson Street Alexandria, LA 71309 318.448.8484	John C. Pickels 901 Sixth Street Alexandria, LA 71309 318.445.5317

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10. Elvin Ray Williams vs. Roy O. Martin Lumber Co., LLC, 01-CV-317 on the Docket of the U.S. District Court, Western District of Louisiana, Alexandria Division. Appeal in Case No. 02-30401, U.S. Court of Appeals for the 5th Circuit.

This is a "Family and Medical Leave Act" and Title VII case decided in federal court and recently affirmed.

The case presented a range of FMLA issues dealing with unauthorized absences, as well as a claim of racial discrimination under Title VII. At my direction, a motion for summary judgment on behalf of our client, Roy O. Martin Lumber Company, was filed. I handled the necessary depositions to get this case into a posture for disposition on motion, supervised and edited trial court memoranda in support of the motion for summary judgment. The trial court agreed with Martin's position and dismissed the suit. Likewise, I supervised and edited the brief filed at the Court of Appeals on Martin's behalf. On September 30, 2002, the Fifth Circuit affirmed the dismissal of all claims.

Trial Judge:	Hon. F. A. Little United States District Court Western District of Louisiana
Co-counsel for Roy O. Martin (within the firm)	Trevor S. Fry Gold, Weems, Bruser, Sues & Rundell P. O. Box 6118 Alexandria, LA 71307-6118 318.445-6471

Opposing Counsel: Dianne Hill
130 DeSiard Street
Monroe, LA 71201
318.325.6398

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20. **Criminal History**: State whether you have ever been convicted of a crime, within ten years of your nomination, other than a minor traffic violation, that is reflected in a record available to the public, and if so, provide the relevant dates of arrest, charge and disposition and describe the particulars of the offense.

No.

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

A. I was named as a party in Civil Suit Nos. 176,518 - 176,519, John A. Price vs. Rapides Parish Indigent Defender Board, et al. This was a suit filed on May 20, 1994. John Price filed an action in the Ninth Judicial District Court, Rapides Parish, Louisiana, for the purpose of realigning the Rapides Parish Indigent Defender Board in accordance with Louisiana statutes, to match the proportions of women and minorities as required by the 1990 census. I was, until then, a member of that Board, which was previously constituted by orders of the Ninth Judicial District Court. Mr. Price named all of the judges of the court, together with all of the members of the Indigent Defender Board as parties defendant. As a result of the filing of the suit, the members of the Board, in consultation with the plaintiffs and the court, all agreed to resign so that a proper evaluation and realignment could be accomplished. All matters were resolved as of September 22, 1994 through a joint motion advising the court that the plaintiff and all defendants desired that the Indigent Defender Board be lawfully constituted and all parties moved the court for approval of the reconstituted Board.

B. I was not an original defendant, but was added as a party defendant in Civil Suit No. 0034356LA, 7th Federal District, Concordia Parish, Louisiana, in June, 1997. This suit by Brenda Sanders against Brent Gore made claims for alleged damages for invasion of privacy. The claims arose out of the litigation between them. The suit was ordered dismissed with prejudice for abandonment in the spring of 2001 as Sanders took no action to prosecute the suit after initial pleadings.

C. A suit was filed in Cobb County, Georgia against the Pin Guide Group, Inc. for alleged services rendered by certain vendors. I was Secretary of the small

corporation, but was not a party to the suit. My only role was to help the president of the company with referral of matters to outside counsel. The suit was concluded by an agreed consent judgment against the company in 1997. The reference is Docket No. 97-A-001408-4, Cobb County, GA. Dwight Howard and Parie Davis vs. The Pin Guide Group, Inc.

D. In addition to the foregoing, our law firm, a Professional Law Corporation, has been engaged in certain collection litigation over the past ten years, but I have never been a direct part of any of these actions except that I am one of the firm directors. For reference purposes and to the best of my knowledge, the following is a list of these actions:

Suit	Court	Filed	Status
#36,944-01 Gold, Weems, Bruser, Sues & Rundell and Jimmy E. Hammond v. Judith T. Bridges	8th Judicial District Court, Winn Parish, Louisiana	12/13/2001	6/21/2002 Judgment/Settlement
#205,761 Gold, Weems, Bruser, Sues & Rundell, P.L.C. v. Glenn Alexander	9th Judicial District Court, Div. G, Rapides Parish, Louisiana	9/7/2001	Settled 12/31/2001
#205,470 Gold, Weems, Bruser, Sues & Rundell v. Tommie Mack Granger	9th Judicial District Court, Div. G, Rapides Parish, Louisiana	8/15/2001	Active
#202,883 Gold, Weems, Bruser, Sues & Rundell, P.L.C. v. Rick Griffith	9th Judicial District Court, Div. F, Rapides Parish, Louisiana	1/16/2001	Settled 4/12/2002
#202,779 Gold, Weems, Bruser, Sues & Rundell v. Blainey J. Nicholas	9th Judicial District Court, Div. D, Rapides Parish, Louisiana	1/8/2001	Default judgment 2/12/02

Suit	Court	Filed	Status
#198,285 Gold, Weems, Bruser, Sues & Rundell v.Icon Technology, Inc.	9th Judicial District Court, Rapides Parish, Louisiana	12/3/1999	Settled 1/2000
#198,279 Gold, Weems, Bruser, Sues & Rundell v. Terry and Jennifer Tuberville	9th Judicial District Court, Rapides Parish, Louisiana	12/3/1999	Settled; closed 2/9/2000
#197,153 Gold, Weems, Bruser, Sues & Rundell v. International Computer Systems, Inc.	9th Judicial District Court, Rapides Parish, Louisiana	8/27/1999	Default judgment 10/20/1999
#194,678 Gold, Weems, Bruser, Sues & Rundell v. Ricky L. Johnson	9th Judicial District Court, Rapides Parish, Louisiana	1/20/1999	Judgment; closed as uncollectible
#191,563 Gold, Weems, Bruser, Sues & Rundell v. Holly Bellino	9th Judicial District Court, Rapides Parish, Louisiana	4/7/1998	Settled 8/20/1998
#191,097 Gold, Weems, Bruser, Sues & Rundell v. Terry L. Karnowski	9th Judicial District Court, Rapides Parish, Louisiana	2/25/1998	Dismissed 6/12/1998
#189,378 Gold, Weems, Bruser, Sues & Rundell v. Kimberly Ann Bailey, et al	9th Judicial District Court, Rapides Parish, Louisiana	9/16/1997	Default judgment 1/22/1998

Suit	Court	Filed	Status
#188,644 Gold, Weems, Bruser, Sues & Rundell v. Michael J. Johnson	9th Judicial District Court, Rapides Parish, Louisiana	7/11/1997	Settled 8/4/1998
#187,670 Gold, Weems, Bruser, Sues & Rundell v. Advertising Management Associates, Inc.	9th Judicial District Court, Rapides Parish, Louisiana	4/11/1997	Uncollectible; closed 11/2/1999
#CV96-2653 Gold, Weems, Bruser, Sues & Rundell (P.L.C.) v. Metal Sales Manufacturing Corporation	United States District Court for the Western District of Louisiana	11/15/1996	Judgment affirmed 12/19/2000 5th Circuit
#185,341 Gold, Weems, Bruser, Sues & Rundell v. Yolondia J. Rodland	9th Judicial District Court, Rapides Parish, Louisiana	9/6/1996	Dismissed by abandonment
#183,677 Gold, Weems, Bruser, Sues & Rundell v. Joe H. Rankin	9th Judicial District Court, Rapides Parish, Louisiana	4/4/1996	Settled 11/14/1996
#169,162 Gold, Weems, Bruser, Sues & Rundell v. Park Investments, Ltd.	9th Judicial District Court, Rapides Parish, Louisiana	7/9/1992	Closed

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

I do not foresee substantial issues with regard to conflicts of interest. My only primary conflict issues will revolve around my current law firm where my son is also in practice, and immediate past clients of mine. Cases involving this law firm will require diversion from my docket so long as he practices here. I do not foresee any other difficulty in that regard. I have no particular financial entanglements with other parties that would present conflicts of interest. Former clients would have to be considered for conflict of interest and recusation on a case-by-case basis. I am prepared to follow the Code of Judicial Conduct in all matters requiring disclosure of a possible or potential conflict of interest.

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

No.

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

See attached Financial Disclosure Report.

25. **Statement of Net Worth**: Complete and attach the financial net worth statement in detail. Add schedules as called for.

See attached Net Worth Statement.

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

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

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

In early 2002, in learning that the Western District, Alexandria Division position might be coming open because of the pending senior status of Judge Little, I evaluated whether the position was a possibility for me. In February, I submitted my written application, on-line, to the White House. Thereafter, I was granted the opportunity, on two occasions, to travel to Washington, D.C. to meet with members of the congressional delegation and representatives of Louisiana's two senators. I also met with members of the committee recommending potential nominees for appointment. All of these interviews were primarily "get acquainted" interviews because I did not already know some of the other persons

serving in that capacity. I was also granted interviews with representatives of the Office of White House Counsel in March and May, 2002. Thereafter, beginning in early August, 2002, I was contacted by White House Counsel and was directed to respond to a U. S. Justice Department request for background information. I have since been interviewed by an agent of the Federal Bureau of Investigation. I have also been requested to provide and have provided numerous references and documentation to the FBI. I have also had multiple contacts with responsible persons in the Justice Department by telephone for the purpose of answering all questions posed to me in the continuing background investigation.

(c) Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as asking or seeking a commitment as to how you would rule on such case, issue, or question? If so, please explain fully.

No one has discussed with me any case, issue or question seeking a commitment from me on ruling on any case in any particular way. If such an entré were attempted, however, I would decline to engage in the same.

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

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

   James Leon Holmes; J. Leon Holmes.

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

   United States District Judge for the Eastern District of Arkansas.

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

   Quattlebaum, Grooms, Tull & Burrow PLLC
   111 Center Street, Suite 1900
   Little Rock, Arkansas 72201
   (501) 379-1716.

4. **Birthplace**: State date and place of birth.

   March 31, 1951.
   Hazen, Arkansas.

5. **Marital Status**: (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es). Please also indicate the number of dependent children.

   Married to Susan Abigail Byrd Holmes. Susan is a homemaker. We have three dependent children.

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

   J. D., University of Arkansas (1982). Attended 1981-82 and 1973-75.
   (Attended 1974-75 at the night division in Little Rock, now the University of Arkansas at Little Rock School of Law).
   Ph.D., Duke University (1980). Attended 1976-79.
   M.A., Northern Illinois University (1976). Attended 1975-76.
   B.A., Arkansas State University (1973). Attended 1969-73.

7. **Employment Record**: List in reverse chronological order, listing most recent first, all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, non-profit or otherwise, with which you have

been affiliated as an officer, director, partner, proprietor, or employee since graduation from college, whether or not you received payment for your services. Include the name and address of the employer and job title or job description where appropriate.

EMPLOYMENT

Partner, Aug. 2000 to present
Quattlebaum Grooms Tull & Burrow PLLC
111 Center Street, Suite 1900
Little Rock, Arkansas 72201
(501) 379-1700

Adjunct faculty, 2002 Fall Term
University of Arkansas at Little Rock School of Law
1201 McAlmont
Little Rock, Arkansas 72202-5142
(501) 327-9952

Equity Partner, Jan. 1, 1999-Aug. 2000
Non-equity Partner, Jan. 1, 1989-August 1990 and Jan. 1, 1993-Dec. 31, 1998
Of counsel, June 1992-Dec. 31, 1992.
Williams & Anderson LLP
111 Center Street, Suite 2200
Little Rock, Arkansas 72201
(501) 372-0800

Tutor, Sept. 1990-June 1992
Thomas Aquinas College
10,000 N. Ojai Road
Santa Paula, CA 93060
(805) 525-4417

Associate, Aug. 1983-Dec. 1988
Wright Lindsey & Jennings LLP
200 West Capitol Avenue, Suite 2200
Little Rock, Arkansas 72201
(501) 371-0808

Adjunct faculty, Spring term 1983
Department of Political Science
University of Arkansas at Little Rock
2801 S. University Avenue
Little Rock, Arkansas 82201
(501) 569-3331

Law Clerk, Aug. 1982-Aug. 1983
Supreme Court of Arkansas
625 Marshall Street
Little Rock, Arkansas 72201
(501) 682-6861

Law Clerk, May 1980-Aug. 1981
Katz McAndrew Durkee & Telleen
1705 Second Avenue, Suite 200
Rock Island, Illinois 61201
(309) 788-5661

Assistant Professor, Sept. 1979-May 1981
Department of Political Science
Augustana College
639 38th Street
Rock Island, Illinois 61201
(309) 794-7214

Part-time Instructor, Jan. 1979-May 1979
Research Assistant, Aug. 1977-May 1978
Department of Political Science
326 Perkins Library, Box 90204
Duke University
Durham, N. C. 27708-0204
(919) 660-4300

Carpenters' Helper, Summer 1978
Employed by Edward McMullen, now deceased.

Newspaper Carrier, Aug. 1977-May 1978
Durham Herald
2828 Picket Road
Durham, NC 27705
(919) 419-6500

Houseparent, Aug. 1976-Aug. 1977
Elon Home for Children
P.O. Box 157
Elon, NC 27244
(336) 584-0091

Operator of a pea-picker, Summer 1976
Del Monte Corporation
Dekalb, Illinois

Research Assistant, Aug. 1975-May 1976
Department of Political Science
Northern Illinois University
Dekalb, Illinois 60115
(815) 753-1091

Claims Examiner, June 1974-Aug. 1975
Disability Determination for Social Security Administration
701 Pulaski
Little Rock, Arkansas 72201
(501) 682-3030

Door-to-door salesman, Summers 1971, 1972 and 1973
Southwestern Company
2451 Atrium Way
Nashville, Tennessee 37214
(800) 522-6122

BOARDS OF DIRECTORS

Director, Saint Thomas More Society of Arkansas (nonprofit), June 2002-present
P.O. Box 907
Little Rock, Arkansas 72203
[contact Frank Sewall at (501) 378-3297]

Director, Florence Crittenton Home of Little Rock (nonprofit), 1986-87
3600 West 11th Street
Little Rock, Arkansas 72204
(501) 663-0772

President, Arkansas Right to Life, Inc. (nonprofit), 1986-87
1515 S. University Ave.
Little Rock, Arkansas 72204
(501) 663-4237

Secretary, Unborn Child Amendment Committee (nonprofit), 1984
c/o Robert S. Shafer
400 W. Capitol Ave.
Little Rock, Arkansas 72201
(501) 370-1519

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

None.

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

Writing Excellence Award, Arkansas Bar Association (2001)
Best of CLE, Arkansas Bar Association (1998, 2000, 2001, 2002)
Mary Rose Doe Award, Arkansas Right to Life (1999)
Shell Award Fellowship, Duke University (1976)
Phi Beta Kappa, Duke University (1976)
Outstanding Political Science Student, Arkansas State University (1973)

10. **Bar Associations**: List all bar associations or legal or judicial-related committees, selection panels 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.

Member of Volunteer Organization for Central Arkansas Legal Services since 1997. No positions held.
Member of Federalist Society since 1997. No positions held.
Member of National Lawyers Association since 1997. No positions held.
Member of Arkansas Trial Lawyers Association since 2000. No positions held
Member of Pulaski County Bar Association since 1983. No positions held.
Member of Saint Thomas More Society of Arkansas since 1999 and director since June 2002.
Former member of American Bar Association from 1983 until mid-1990s.
Former member of Defense Research Institute from mid-1990s until 2001.
Former member of Arkansas Association of Defense Counsel. Do not remember dates.
Former member of Christian Legal Society in early or mid-1980s. Do not remember dates.
Member of Arkansas Bar Association since 1983.
Editorial Advisory Board for *The Arkansas Lawyer* since 2001.
Judicial Nominations Committee since 2001.

11. **Bar and Court Admission**: List each state and court in which you have been admitted to practice, including dates of admission and any lapses in membership. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

I have been admitted in the Supreme Court of Arkansas from August 23, 1982, through the present.

I have been admitted in the United States District Courts for the Eastern and Western Districts of Arkansas from December 9, 1983, through the present.

I have been admitted in the United States Court of Appeals for the Eighth Circuit from April 4, 1984, through the present.

I have been admitted in the United States Court of Appeals for the Sixth Circuit from January 22, 2002, through the present.

I have been admitted in the Supreme Court of the United States from August 7, 1992, through the present.

12. **Memberships**: List all memberships and offices currently and formerly held in professional, business, fraternal, scholarly, civic, charitable, or other organizations since graduation from college, other than those listed in response to Questions 10 or 11. Please indicate whether any of these organizations formerly discriminated or currently discriminates on the basis of race, sex, or religion - either through formal membership requirements or the practical implementation of membership policies. If so, describe any action you have taken to change these policies and practices.

I am a member of Phi Beta Kappa and the Society of Catholic Social Scientists. I have been a member of the American Political Science Association and the Knights of Columbus. The Knights of Columbus is a Catholic fraternal organization that admits only males. I was a member for a few weeks in 1994, attended one meeting after being admitted, and then resigned because it appeared that the time demands for attending meetings would be greater than I was willing to give. I helped form the Pro-Life Educational Alliance in Fayetteville, Arkansas, in 1981 or 1982. My memory is that I was not a member or an officer of that organization after it was formed, but I may have been. In 1980-1981 I was a member of a local affiliate of Illinois Right to Life in Rock Island, Illinois. I have been President of Arkansas Right to Life, Secretary of the Unborn Child Amendment Committee, and a director of Florence Crittenton Home of Little Rock.

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

Book Review:

"America's Declaration Principles in Thought and Action," *NLA Review* (Spring 2002)

Articles and Newspaper Columns:

"Catholic Social Thought and the American Regime," Symposium Contributor, *The Catholic Social Science Review*, Vol. VI (2001)

"The First Vatican Council," *The Arkansas Catholic* (February 3, 2001)

"Clothed with the Sun," *Homiletic and Pastoral Review* (January 2001)

"The Reformation," *The Arkansas Catholic* (December 2, 2000)

"Moses, Elijah and the Garden of Eden," *The Aquinas Review*, Vol. VII, No. 1 (2000)

"The Rise of Scholasticism," *The Arkansas Catholic* (September 2, 2002)

"Pitfalls of the Appellate Practice: Avoiding the Serbonian Bog," *The Arkansas Lawyer* (Summer 2000)

"Civil Liability of Bank Directors," *The Arkansas Community Banker* (Winter 1997)

"Solomon and Elijah," *The Aquinas Review*, Vol. III, No. 1 (1996)

"Gender Neutral Language," *The Arkansas Catholic* (April 12, 1997)

"Revive Fatherhood," *The Arkansas Catholic* (June 29, 1993)

"Generation Faces Major Questions Over Nation's Soul," *Arkansas Democrat-Gazette* (July 4, 1992)

"Death Penalty," *The Arkansas Catholic* (July 8, 1990)

"Anti-abortion Movement Has Only One Goal: Life," *Arkansas Democrat* (June 24, 1987)

"Should We Protect the Unborn Child: Yes," *Arkansas Gazette* (October 18, 1984)

"Lincoln-Douglas Debates: The Jury Is Not Yet In," *Arkansas Gazette* (Feb. 12, 1984)

"The Scary New Argument For Abortion," *Arkansas Gazette* (September 28, 1982)

"Booker T. Washington: Freeing the Spirit for Service," *Christianity Today* (October 2, 1981)

During the school year 1982-83, I wrote a weekly sports article for the *Lonoke Democrat* regarding high school athletic teams at Lonoke High School.

On October 21, 1971, while a student at Arkansas State University, I published articles in an independent student newspaper regarding a member of the

university board of trustees whom many students, including myself, wanted to see reappointed to the board when his term expired, and regarding a popular teacher whose contract was not renewed.

Letters to the Editor:

Arkansas Democrat-Gazette, November 27, 2000
Grapevine, June 27, 1982
Moline Daily Dispatch, December 24, 1980
Christian Science Monitor, December 23, 1980
Moline Daily Dispatch, December 4, 1980

Speeches in the Past Ten Years:

"From Aristotle To Tocqueville on the Relationship Between Church and State," given at the annual meeting of the Society of Catholic Social Scientists in Ann Arbor, Michigan, on October 19, 2002.

"The Concept of the Abyss in the Book of Revelation," given at Franciscan University of Steubenville in Steubenville, Ohio, on October 17, 2001, and at the International Theological Institute for Studies in Marriage and the Family in Gaming, Austria, on April 20, 2001.

"Moses, Elijah, and the Garden of Eden," given at Thomas Aquinas College in Santa Paula, California, on January 15, 1999.

"Solomon and Elijah," given at Thomas Aquinas College in Santa Paula, California, on January 13, 1995.

In addition, I have given several Continuing Legal Education presentations, I led a practice-skills workshop that met once per week for a semester at the University of Arkansas at Little Rock School of Law, and I have taught an introduction to philosophy course for diaconate candidates of the Catholic Diocese of Little Rock.

Other:

Editorial Board Chairman, *Handling Appeals in Arkansas* (Arkansas Bar Association 1998)

14. **Congressional Testimony**: List any occasion when you have testified before a committee or subcommittee of the Congress, including the name of the committee or

subcommittee, the date of the testimony and a brief description of the substance of the testimony. In addition, please supply four (4) copies of any written statement submitted as testimony and the transcript of the testimony, if in your possession.

None.

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

My health is good. My last physical examination was December 16, 2002.

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

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

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

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

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

I have been a special judge of the Supreme Court of Arkansas on two occasions. The opinions are reported at:

Hoyle v. Faucher, 334 Ark. 529, 975 S.W.2d 843 (1998); and
Dolphin v. Wilson, 328 Ark. 1, 942 S.W.2d 815 (1997).

The issues in *Hoyle v. Faucher* were (1) the constitutionality of a statute exempting certain property taxes from the roll-back requirements of the Arkansas Constitution and (2) which lower court had subject matter jurisdiction of that issue in the first instance. I wrote a concurring opinion arguing that prior decisions of the Court were inconsistent on the jurisdictional issue and one line of cases should be overruled.

The issues in *Dolphin v. Wilson* involved (1) whether a trial judge should have recused because her former partner was a party in the case and (2) whether sufficient partial performance had occurred to remove an agreement for the sale of real estate from the statute of frauds. I did not write an opinion.

17. **Public Office, Political Activities and Affiliations**:

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

None.

(2) 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 was on the campaign committee of Lavinski R. Smith when Judge Smith (now a judge of the United States Court of Appeals for the Eighth Circuit) was a candidate for a position on the Arkansas Court of Appeals.

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

(1) Describe chronologically your law practice and legal experience after graduation from law school including:

(1) whether you served as clerk to a judge, and if so, the name for the judge, the court and dates of the period you were a clerk;

Law Clerk for the Honorable Frank Holt of the Supreme Court of Arkansas from August 1982-August 1983.

(2) whether you practiced alone, and if so, the addresses and dates;

Not applicable.

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

Associate with Wright Lindsey & Jennings from August 1983-December 1, 1988. The address and telephone number for Wright Lindsey & Jennings are 200 West Capitol Avenue, Suite 2300, Little Rock, Arkansas 72201, (501) 371-0808.

Associate, non-equity partner, of counsel, and equity partner with Williams & Anderson LLP from December 1, 1988-August 1990 and June 1992-August 2000. [From August 1990-June 1992, I was a member of the faculty of Thomas Aquinas College and was not practicing law.] The address and telephone number for

Williams & Anderson are 111 Center Street, Twenty-second Floor, Little Rock, Arkansas 72201, (501) 372-0800.

Partner, Quattlebaum Grooms Tull & Burrow PLLC from August 2000 through present. The address and telephone number are 111 Center Street, Suite 1900, Little Rock, Arkansas 72201, (501) 379-1700.

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

The vast majority of my work has been litigation. In the early years of my practice, I did more personal injury defense work and tried more cases. In later years, my caseload has been more commercial, and fewer cases have gone to trial; and in later years, more of my work has been appellate in nature.

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

My clients and former clients primarily are businesses, both large and small.

(3) (1) Describe whether you appeared in court frequently, occasionally, or not at all. If the frequency of your appearances in court varied, describe each such variance, providing dates.

As mentioned above, the vast majority of my work has always been litigation. Hence, I have always appeared frequently in court as counsel of record in pleadings and motions. I have always appeared frequently in court for hearings of various sorts. In the earlier years of my practice, more of my cases went to trial than has been the case in the past few years; and in later years, more of my work has been in the Supreme Court of Arkansas than in earlier years.

(2) Indicate the percentage of these appearances in:

(1) federal courts;
(2) state courts of record;
(3) other courts.

I estimate that 75% of my appearances have been in state courts and the rest in federal courts.

(3) Indicate the percentage of these appearances in:

(1) civil proceedings;
(2) criminal proceedings.

More than 95% of my appearances have been in civil proceedings. Less than 5% of my appearances have been in criminal proceedings.

(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 tried forty-seven cases to judgment, not counting cases decided on motions to dismiss or motions for summary judgment. I was either sole counsel or lead counsel in thirty-two of those cases and associate counsel in fifteen.

(5) Indicate the percentage of these trials that were decided by a jury.

Twenty-five of these trials (53%) were decided by a jury.

(4) Describe your practice, if any, before the United States Supreme Court. Please supply four (4) copies of any briefs, amicus or otherwise, and, if applicable, any oral argument transcripts before the U.S. Supreme Court in connection with your practice.

I have appeared in the Supreme Court on a few occasions seeking or opposing certiorari. I have not had any case in which the Supreme Court accepted certiorari.

(5) Describe legal services that you have provided to disadvantaged persons or on a *pro bono* basis, and list specific examples of such service and the amount of time devoted to each.

I am currently providing *pro bono* legal services to an elderly, widowed woman who believes that a local business next door to her property is trying to force her to sell her property. I have spent six to ten hours on her problems in the past month. No court proceeding has been filed, so I cannot divulge her name in a public document.

Over the past two years, I provided *pro bono* legal services to Michael Lee Kraft, an indigent with felony charges of possession of methamphetamine, as well as numerous traffic-related misdemeanor charges in various municipal courts. I devoted several dozen hours to helping Michael resolve his problems.

Since the fall of 1998, I have provided *pro bono* legal services to Clay Anthony Ford, an indigent incarcerated in the Arkansas Department of Correction. Mr. Ford was convicted of first-degree murder. I provided *pro bono* representation in post-conviction proceedings in state court. He filed a petition for writ of *habeas corpus* in May 2001, and I have been appointed to represent him in his federal case under the Criminal Justice Act. I continue to provide *pro bono* representation in matters other than his *habeas corpus* proceedings.

This past year, I provided *pro bono* legal services to Mrs. Nong Phimmachack, a 56 year old immigrant from Laos with terminal liver disease. Mrs. Phimmachack was a Medicaid recipient whose application for a liver transplant was denied. I spent approximately ten to twenty hours on Mrs. Phimmachack's case.

In 2001 and 2002, I provided *pro bono* legal services to Denise Faucher. Ms. Faucher had lost custody of her children to her ex-husband and could not afford to pay for an appeal. I handled her appeal without charge. I estimate that I spent approximately sixty hours on her appeal.

These are recent examples. I have provided *pro bono* legal services to other persons recently and in the more distant past. Ordinarily, I do not keep time records on *pro bono* matters. I estimate that I have spent approximately 200 hours per year providing *pro bono* legal services for disadvantaged persons during the past three or four years. I probably spent less than 100 hours per year providing *pro bono* legal services to disadvantaged persons in prior years.

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

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

(2) a detailed summary of the substance of each case outlining briefly the factual and legal issues involved;

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

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

I. *Advocat, Inc., et al., v. Lon C. Sauer, et al.*, Supreme Court of Arkansas No. 02-189. This is a case of a 92 year old woman, Margaretha Sauer, who died allegedly as a result of nursing home neglect. A jury found in favor of the estate of Mrs. Sauer and awarded compensatory and punitive damages totaling $78 million against three related companies. The nursing home companies appealed. I did not participate in the trial, but I have been engaged as lead counsel for the estate of Mrs. Sauer on appeal. I am associated with Bennie Lazzara and Brian Reddick of Wilkes & McHugh, 425 W. Capitol Ave., Suite 3500, Little Rock, Arkansas 72201, (501) 371-9903. Counsel on appeal for the nursing home companies are Philip S. Anderson, Peter G. Kumpe, and Jess Askew of Williams & Anderson LLP, 111 Center Street, Suite 2200, Little Rock, Arkansas 72201, (501) 372-0800, and Darrell D. Dover of Dover & Dixon, Suite 3700, 425 W.

Capitol Avenue, Little Rock, Arkansas 72201. This case has been briefed but not argued or decided. Argument is scheduled for March 13, 2003. The appeal is pending before the seven current justices of the Supreme Court of Arkansas.

II. *Republican Party of Arkansas v. Kilgore*, Supreme Court of Arkansas No. 02-1181. This was an election case in which I represented the Republican Party in an emergency petition to the Supreme Court of Arkansas. The Democratic Party obtained an order at 6:46pm on election night extending the voting hours from 7:30pm, the statutory time for concluding voting, until 9:00pm for Pulaski County. We asked for and received an emergency hearing in the Supreme Court of Arkansas by telephone conference, and the Supreme Court reversed the order. Co-counsel for the Republican Party was Andrew J. Russell III, 650 South Shackleford, One Financial Centre, Suite 229, Little Rock, Arkansas 72211, (501) 537-2252. The attorneys for the Democratic Party were Robin Carroll, Suite 620, 200 N. Jefferson, El Dorado, Arkansas 71730 (501), 862-1080, and Nate Coulter, 200 South Commerce, Suite 600, Little Rock, Arkansas 72201, (501) 375-6453. This case was decided by the seven current justices of the Supreme Court of Arkansas.

III. *Roll Off Service, Inc. v. Waste Management of Arkansas, Inc.*, U.S.D.C., W.D. Ark. No. 01-5059. This was an antitrust case in which I was designated as lead counsel for discovery and trial for the defense. Roll Off Service alleged that Waste Management had monopolized the market for commercial trash hauling services in northwest Arkansas. The Honorable Jimm Larry Hendren was the judge. The case settled after discovery had been concluded in a mediation directed by Magistrate Judge Beverly Stites Jones. Co-counsel for the defense were James R. Weiss and Melanie J. Sabo, 1735 New York Avenue NW, Suite 500, Washington, D.C. 20006-5209, (202) 661-3790. Counsel for Roll Off Service was Peter G. Kumpe, 111 Center Street, Suite 2200, Little Rock, Arkansas 72201, (501) 372-0800.

IV. *Code J Transport, Inc. v. Hanson Aggregates West, Inc., et al.*, U.S.D.C., W.D. Ark. No. 4:01-CV-4022. I represented Code J Transport in a suit alleging interference with contractual relations and conspiracy to monopolize the market for hauling concrete aggregates in southwest Arkansas and northeast Texas. The judge was Magistrate Judge Bobby E. Shepherd. The case settled at the conclusion of discovery in a mediation directed by Magistrate Judge J. Thomas Ray. Defense counsel were Nathan M. "Mac" Norton and Charles L. Schlumberger, 200 W. Capitol Avenue, Suite 2200, Little Rock, Arkansas 72201, (501) 371-0808.

V. *Harrison v. Coffman, et al.*, U.S.D.C., E.D. Ark. No. LRC-98--716. In this case I defended two members of the Arkansas Workers' Compensation Commission in a claim by a former administrative law judge that she had been terminated in violation of the first amendment to the United States Constitution. The case presented a constitutional issue of first impression, which was whether an official

opinion issued by an administrative law judge on behalf of the State is speech that is protected by the first amendment. The judge was the Honorable Howard Sachs of the United States District Court for the Western District of Missouri, sitting by designation, who recused before the conclusion of the case. His successor was the Honorable John Tunnheim of the United States District Court for Minnesota. The case settled after the conclusion of discovery in a mediation before Magistrate Judge Henry L. Jones, Jr. Co-counsel for the defense was Timothy Gauger, Deputy Attorney General, Suite 200, 323 Center Street, Little Rock, Arkansas 72201, (501) 682-8219. Plaintiff's attorneys were John T. Lavey, 904 W. 2nd Street, Little Rock, Arkansas 72201 (501), 376-2269, and Janet L. Pulliam, Suite 552, 1501 N. University Avenue, Little Rock, Arkansas 72207, (501) 604-4100. One published opinion was issued in this case. *Harrison v. Coffman*, 111 F. Supp. 2d 1130 (E.D. Ark. 2000).

VI. *Murphy Oil USA, Inc., v. United States Fidelity & Guaranty Co., et al.*, Circuit Court of Union County, Arkansas, No. 91-439-2. This case involves a series of environmental disputes and related insurance coverage disputes regarding a site in Mobile, Alabama, that had been leased by Murphy Oil USA, Inc., from the 1950s until 1985. Murphy Oil USA, Inc., has been sued three times in Mobile, Alabama, regarding environmental problems at the site. In turn, Murphy Oil USA, Inc., filed suit in Union County, Arkansas, against a number of insurance companies who provided coverage during that time. The coverage litigation ultimately focused on three insurers who had provided umbrella coverage at different times: Unigard Insurance Company; Employers Surplus Lines Insurance Company; and Associated International Insurance Company. A jury trial was held in Union County on one of the coverage disputes in June 1995. I tried the 1995 jury trial with my partner, Steven W. Quattlebaum. I have been lead counsel for Unigard in all proceedings after the 1995 trial. The jury returned a verdict in favor of Murphy Oil USA, Inc. On appeal, the Supreme Court of Arkansas reversed. *Unigard Sec. Ins. Co. v. Murphy Oil USA, Inc.*, 331 Ark. 211, 962 S.W. 2d 735 (1998). In the coverage dispute regarding one of the later cases against Murphy Oil USA, Inc., the circuit court granted summary judgment on the in favor of the insurers, and the Supreme Court of Arkansas reversed. *Murphy Oil USA, Inc. v. Unigard Sec. Ins. Co.*, 347 Ark. 167, 615 S.W. 2d 807 (2001). This case is still ongoing. The trial judge is the Honorable C. David Burnett (870) 933-4579. The first appeal was decided by four of the current members of the Supreme Court (Chief Justice Arnold and Associate Justices Brown, Imber, and Thornton) and by now-retired Justice David Newbern, (501) 663-1222, Special Justice Keith Rutledge, (501) 698-0733, and Special Justice Odell Pollard, (501) 268-8493. The second appeal was decided by five of the current members of the Supreme Court (Chief Justice Arnold and Associate Justices Brown, Imber, Thornton, and Hannah) and by Special Justice Charles A. Banks, (501) 280-0100 and Special Justice W. H. "Sonny" Dillahunty, (501) 225-5113. Murphy Oil USA, Inc., is represented by M. Samuel Jones III, 200 West Capitol Avenue, Suite 2200, Little Rock, Arkansas 72201, (501) 371-0808; and Robert C. Compton, 423 N. Washington Avenue, El Dorado, Arkansas 71730, (870)

862-3478. At the trial in 1995, Murphy Oil USA, Inc., also was represented by James M. Moody, who now is a judge of the United States District Court for the Eastern District of Arkansas. Judge Moody's address is United States Courthouse, 600 W. Capitol Ave., Little Rock, Arkansas 72201, (501) 604-5150. Employers Surplus Lines Insurance Company is represented by Daniel R. Carter, Suite 400, 500 Broadway, Little Rock, Arkansas 72201, (501) 372-1414; G. Kenneth Norrie, 1301 Riverplace Blvd., Suite 1500, Jacksonville, Florida 32207, (904) 398-3911; and James W. Christie, 1880 JFK Boulevard—Tenth Floor, Philadelphia, Pennsylvania 19103, (215) 587-1600. Associated International Insurance Company is represented by Teresa M. Wineland, 100 E. Church St., El Dorado, Arkansas 71731, (870) 862-5523.

VII. *Community Publishers, Inc., et al. v. NAT, L.C. et al.*, 892 F. Supp. 1146 (W.D. Ark. 1995), *affirmed*, 139 F.3d 1180 (8th Cir. 1998). This was an antitrust case in which our firm (then Williams & Anderson) represented plaintiffs in an antitrust case seeking and obtaining an injunction against a newspaper acquisition. I participated actively at trial, along with Philip S. Anderson, Peter G. Kumpe, and John E. Tull III for the plaintiffs. I was the principal author of all of the significant briefs for the plaintiffs, both in the District Court and in the Eighth Circuit. The trial judge was the Honorable H. Franklin Waters, now deceased. The United States intervened on the side of the plaintiffs. The trial attorneys for the United States were Craig W. Conrath, Allee A. Ramadhan, and Phillip R. Malone of the antitrust division of the U.S. Department of Justice. NAT, L.C., was represented by Jerry Jones, Kenneth Shemin, Amy Lee Stewart, Grant Fortson, and Woody Bassett. Mr. Jones' address and telephone number are #1 Information Way, Little Rock, Arkansas 72202, (501) 252-1350. Mr. Shemin's address and telephone number are 1944 E. Joyce Avenue, Fayetteville, Arkansas 72703, (479) 973-4442. Ms. Stewart is at 120 E. 4th Street, Little Rock, Arkansas 72201, (501) 375-9131. Mr. Fortson is at 24th Floor, 400 W. Capitol Ave., Little Rock, Arkansas 72201, (501) 376-6565. Mr. Bassett is at 221 N. College Ave., Fayetteville, Arkansas 72701, (479) 521-9996. Donrey Media Group was represented by James M. Dunn, 214 N. 6th Street, Ft. Smith, Arkansas 72902, (479) 782-6041. Thompson Newspapers, Inc., was represented by Wm. Jackson Butt II, 19 E. Mountain St., Fayetteville, Arkansas 72701, (479) 521-7600.

VIII. *Dennis Young v. Arkansas Democrat-Gazette*, Circuit Court of Pulaski County, Arkansas, No. 95-8411. This was a libel case brought by a member of the Arkansas House of Representatives against the *Arkansas Democrat-Gazette*. The alleged libel was based on statements made in an editorial commenting on a vote cast for benefits for members of that legislative body. The judge was the Honorable Morris Thompson. I defended the newspaper. I conducted all discovery and tried the case to a successful jury verdict. Counsel for Dennis Young was Brady Paddock, 2900 St. Michael Drive, 5th Floor, Texarkana, Texas 75503-5208, (903) 223-3999.

IX. *Resolution Trust Corp. v. Benafield, et al.*, U.S.D.C., E.D. Ark., No. LR-C-92-805. This was a case in which the RTC brought suit against former officers and directors of a failed savings & loan association. Philip Anderson and I represented the former outside directors. Mr. Anderson's address and telephone number are 111 Center Street, Suite 2200, Little Rock, Arkansas 72201, (501) 372-0800. The judge was the Honorable Stephen M. Reasoner. The case settled after discovery had been concluded. I participated actively in all aspects of the litigation. The RTC was represented by Bradley K. Beasley and Lavinski R. Smith. Mr. Beasley's address and telephone number are Suite 800 Oneok Plaza, 100 West Fifth Street, Tulsa, Oklahoma 74103, (918) 583-1777. Lavinski R. Smith is now a judge of the United States Court of Appeals for the Eighth Circuit. His office is at the United States Courthouse, 600 W. Capitol Avenue, Little Rock, Arkansas 72201, (501) 604-5130. An inside-director was represented by Philip E. Kaplan, 415 Main Street, Little Rock, Arkansas 72201, (501) 372-0400. An officer who was not a director was represented by Clayton R. Blackstock, 1010 W. 3rd Street, Little Rock, Arkansas 72201, (501) 378-7870.

X. *Arkansas Gazette Co. v. Little Rock Newspapers, Inc.*, U.S.D.C., E.D. Ark. No. 84-1020. This was an antitrust case between the two largest daily newspapers in the State of Arkansas. The judge was the Honorable William R. Overton, now deceased. I participated in a secondary role in the defense of the case at trial. I prepared and made motions, prepared jury instructions, assisted in strategy decisions, and assisted the more senior defense attorneys in preparing for witnesses and for closing argument. The senior defense attorneys were Philip S. Anderson and Peter G. Kumpe, whose address and telephone number are stated above, and Honorable Annabelle Clinton Imber, now an associate justice of the Supreme Court of Arkansas. Justice Imber's address and telephone number are 625 Marshall Street, Little Rock, Arkansas 72201, (501) 682-6867. Lead counsel for the plaintiff was Stephen D. Susman, Suite 5100, 1000 Louisiana Street, Houston, Texas 77002-5096, (713) 651-9366. Local counsel for the plaintiff was James M. McHaney, Jr., 8th Floor, One Riverfront Place, P.O. Box 5551 North Little Rock, Arkansas 72119, (501) 372-0110.

20. **Criminal History**: State whether you have ever been convicted of a crime, within ten years of your nomination, other than a minor traffic violation, that is reflected in a record available to the public, and if so, provide the relevant dates of arrest, charge and disposition and describe the particulars of the offense.

No.

21. **Party to Civil or Administrative Proceedings**: State whether you, or any business of which you are or were an officer, have ever been a party or otherwise involved as a party in any civil or administrative proceeding, within ten years of your nomination, that is reflected in a record available to the public. If so, please describe in detail the nature of your participation in the litigation and the final disposition of the case. Include all

proceedings in which you were a party in interest. Do not list any proceedings in which you were a guardian *ad litem*, stakeholder, or material witness.

I was named as a defendant in *Ronnie Johnson v. Floyd E. Emerson, et al.*, W. D. Ark. 02-6087 (Hot Springs Division). While I was with Williams & Anderson, I had defended a state-court case in which Mr. Johnson had been the plaintiff. After I left Williams & Anderson, the court entered summary judgment against Mr. Johnson, and the Arkansas Court of Appeals affirmed. See *Johnson v. Sentinel-Record*, 2002 WL 22036 (Ark. App. Jan. 9, 2002). Mr. Johnson then filed a suit in federal court against the same persons that he had sued in state court and also against the attorneys who had successfully represented the defendants in state court. The District Court dismissed the case on October 18, 2002.

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

I will follow the provisions of 28 U.S.C. Sec. 455. I will disqualify myself from cases in which my current law firm is counsel for an approximate period of ten years. I am not aware of any financial arrangements that are likely to present conflicts of interest.

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

No.

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

See attached Financial Disclosure Report.

25. **Statement of Net Worth**: Complete and attach the financial net worth statement in detail. Add schedules as called for.

See attached net worth statement.

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

No.

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

Not applicable.

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

I was one of several persons recommended to the President by Senator Tim Hutchinson. I was interviewed in person by two lawyers from the Executive Office of the President and one lawyer from the Justice Department. I have since been interviewed by telephone by another lawyer from the Justice Department and in person by an agent of the Federal Bureau of Investigation.

(3) Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as asking or seeking a commitment as to how you would rule on such case, issue, or question? If so, please explain fully.

No one discussed any specific case, legal issue or question in a manner that could reasonably be interpreted as asking or seeking a commitment as to how I would rule on anything.

FINANCIAL STATEMENT

NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) and all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS		LIABILITIES	
Cash on hand and in banks	44000	Notes payable to banks-secured	0
U.S. Government securities-add schedule	0	Notes payable to banks-unsecured	0
Listed securities-add schedule	0	Notes payable to relatives	0
Unlisted securities–add schedule	0	Notes payable to others	0
Accounts and notes receivable	0	Accounts and bills due	5000
Due from relatives and friends	0	Unpaid income tax	0
Due from others	0	Other unpaid income and interest	0
Doubtful	0	Real estate mortgages payable-add schedule	0
Real estate owned-add schedule (home)	130000	Chattel mortgages and other liens payable	0
Real estate mortgages receivable	0	Other debts-itemize:	0
Autos and other personal property	35000		
Cash value-life insurance	4000		
Other assets itemize:			
401k Regions Bank-Federated Total Return Bond Fund	78000		
TIAA-CREF	13000		
		Total liabilities	33500
		Net Worth	266500
Total Assets	300000	Total liabilities and net worth	300000
CONTINGENT LIABILITIES		GENERAL INFORMATION	
As endorser, comaker or guarantor	3500	Are any assets pledged? (Add schedule)	No
On leases or contracts: None other than Quattlebaum Grooms Tull & Burrow debts and contracts	0	Are you defendant in any suits or legal actions?	No
Legal Claims	0	Have you ever taken bankruptcy?	No
Provision for Federal Income Tax	25000		
Other special debt	0		

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

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

   Susan Gertrude Braden 11/80-present
   Susan B. Cyphert or Susan Braden Cyphert 6/70-11/80
   Susan Gertrude Braden 11/48-6/70

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

   United States Court of Federal Claims

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

   Office Address:
   Baker & McKenzie
   815 Connecticut Avenue N.W
   Washington, D.C. 20006
   Telephone 202-452-7075

4. **Birthplace**: State date and place of birth.

   Youngstown, Ohio- Mahoning Valley Hospital, November 8, 1948

5. **Marital Status**: (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es). Please also indicate the number of dependent children.

   Since May 31, 1981 Married to:

   Thomas Michael Susman (attorney)
   Partner, Ropes & Gray
   1301 K Street N.W., Suite 800-East
   Washington, D.C. 20005

   One dependent

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

1979 Harvard Law School-Summer postgraduate courses in antitrust, economics, and federal jurisdiction-Sponsored by the Department of Justice, Antitrust Division

1970-1973 Case Western Reserve University School of Law-J.D.(June 1973)

1966-1970 Case Western Reserve University B.A.(June 1970)

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

September 1997 to Present
Baker & McKenzie, Of Counsel
815 Connecticut Avenue N.W.
Washington, D.C. 20006

December 1992- August 1997
Ingersoll & Bloch, Chartered L.L.P.,Partner
1401 16th Street N.W.
The Sherman House
Washington, D.C. 20036

September 1990-October 1992
Anderson, Kill, Olick & Oshinsky,
Partner 2000 Pennsylvania Avenue, N.W., S
Suite 7500
Washington, D.C. 20006

August 1987-August 1990
Wilner & Scheiner, Partner
The Thurmond Arnold Building
1200 New Hampshire Ave. N.W.,Suite 300
Washington, D.C. 20036

February 1985-December 1986
Porter, Wright, Morris & Arthur, Partner
1133 15th Street N.W., Suite 1100,
Washington, D.C. 20005

November 1983- February 1985
Senior Counsel and Special Assistant to
Chairman James C. Miller, III
Federal Trade Commission
Washington, D.C.(GS 15-40PA level)

November 1980-October.1983
Senior Attorney Advisor to
Commissioner and Acting Chairman
David A. Clanton
Federal Trade Commission
Washington, D.C. (GS 15-3)

December 1978-November 1980
Senior Trial Attorney
Department of Justice
Antitrust Division
Energy Section Washington, D.C. (GS 15-1)

June 1973-December 1978
Trial Attorney
Department of Justice
Antitrust Division
Great Lakes Field Office
Cleveland, Ohio (GS-11-GS-14)

June 1972-July 1973
Law Clerk
Department of Justice
Antitrust Division
Great Lakes Field Office
Cleveland, Ohio (GS-9)

Summer 1970-July 1973
Director
Housing Bureau
Case Western Reserve University
Cleveland, Ohio

Summer 1971
Law Clerk

Cleveland Legal Aid Society
Cleveland, Ohio

In addition, I was a member of the Board of Directors of the Republican National Lawyers Association from 1987 to May 2, 2002, the date of my resignation. *See* attached Exhibit 1.

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

None.

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

Education: (1966-1973)

1966- National Honor Society
1970- Phi Alpha Theta- Honorary Society for History Majors
1971-1972- Tau Epsilon Rho Scholarship
1972-1973- John Rufus Ranney Scholarship

Department of Justice: (June 1973-November 1980)

May 17, 1973 - Selected to join Department of Justice, Antirust Division under the Attorney General's Program for Honor Law Graduates.

January 7, 1975- Letter from Attorney General for exemplary service on discovery team for *United States* v. *IBM Corp.*

September 9, 1980- Special Achievement Award nomination by Assistant Attorney General.

1973- November 1980- Received all grade and step increases at Department of Justice from GS-11 entry to GS-15 in minimum required time-periods.

Federal Trade Commission: (November 1980- February 1984)

September 25, 1981, April 26,1982, September 21, 1983- Received Cash Quality Performance or Incentive Awards for service of an exemplary nature and Outstanding Performance Ratings for entire period of service.

1981-1882-Women's Bar Association-Certificate of Appreciation For Service.

September 21, 1984- Federal Bar Association Distinguished Service Award.

Private Practice: (February 1984-present)

April 1996- Computer Law Association Award- 25th Anniversary of Computer Law Association (Only occasion that one lawyer was presented awards in two case categories).

10. **Bar Associations**: List all bar associations or legal or judicial-related committees, selection panels 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:

Section on Administrative Law and Regulatory Practice:
1996-1999- Member of Council
1993-1994- Vice Chair, International Committee
1992-1993- Chair, Antitrust Law and Trade Regulation Committee
1992-1993- Liaison- National Association Attorneys General
1984-1985- Vice Chair Antitrust Law Committee
1983-1984- Co-Chair of Task Force on Proposed Guidelines for DOJ and FTC Intervention and Amicus Activity

Section on Antitrust Law:
1990-1992-Vice Chair, Industry Regulation Committee
1987-1992-Vice Chair, National Institutes Committee
1985-1986-Ad Hoc Task Force on Regulatory Reform

1984-1987- Chair, Transportation Subcommittee
1984- Spring Meeting Panelist on FTC Competition Advocacy Program; Annual Meeting Program Chair and Panelist on Antitrust Law and Competition Policy in Transportation Industry

1983-1984- FTC Representative to Criminal Practice and Procedure Committee Task Force on Informer Incentives
1982- Program Chair, Antitrust Law and Agency Proceedings.
1980-1984 Editor, *Regulation Newsletter*
1979 Author, Fuel and Energy Supplement to *Antitrust Developments*

District of Columbia Bar Association:
1993-Co-Chair, Intellectual Property Committee, Computer Law Section; Steering Committee Concerning Commercial and Government Contracts

Federal Bar Association:
1984-1985-Chairman-Antitrust and Trade Regulation Section and Program Chair

D.C. Women's Bar Association:
1980-1981-Chair, Program Committee
1979 Nominating Committee

Computer Law Association: Member 1992-present

Federalist Society: Member 1989-present (Madison Club)

Washington Legal Foundation: Legal Advisory Board Member 1992-present

Supreme Court History Society: Member since 1994

United States Court of Appeals for the District of Columbia Circuit Judicial Conference: Member 1993

11. **Bar and Court Admission:** List each state and court in which you have been admitted to practice, including dates of admission and any lapses in membership. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which

require special admission to practice.

State of Ohio-1973*
District of Columbia-1980
United States Supreme Court-1980
U.S. Court of Appeals for the D.C. Circuit-1992
U.S. Court of Appeals for the Second Circuit-1993
U.S. Court of Appeals for the Federal Circuit-2001
U.S. District Court for the District of Columbia-1980
U.S. District Court for the Northern District of Ohio-1973
U.S. District Court for the Eastern District of Michigan-1978
U.S. District Court for the Western District of Kentucky-1978
U.S. District Court of Maryland-1985 (not trial bar)
U.S. District Court for the Eastern District of New York-1989
U.S. District Court for the Southern District of New York-1986
U.S. District Court for the Northern District of Texas-1993
U.S. Court of International Trade- 2000

*During my FBI background investigation, I learned of a lapse in my Ohio bar membership occasioned by failing timely to report completed CLE credits. In January 2002, however, my active status was reinstated after I made required filings to evidence CLE compliance. The relevant documents were provided to the FBI to be made part of my file.

12. **Memberships**: List all memberships and offices currently and formerly held in professional, business, fraternal, scholarly, civic, charitable, or other organizations since graduation from college, other than those listed in response to Questions 10 or 11. Please indicate whether any of these organizations formerly discriminated or currently discriminates on the basis of race, sex, or religion - either through formal membership requirements or the practical implementation of membership policies. If so, describe any action you have taken to change these policies and practices.

Fraternal Memberships: None.

Religious Organizations: Our family is a member of Adas Israel Congregation, Washington, D.C.

Private Club Memberships: The University Club of Washington, D.C. See attached Exhibit 2 (By-Laws).

Civic Memberships: Crestwood Citizens Association

Social Memberships: None.

Charitable Memberships: Washington Opera Lawyers Committee; The Shakespeare Theater; National Cathedral Greenhouse; Friend of the Phillips Gallery; Member of National Women in Arts Museum; Friend of Hillwood Museum & Gardens; Friend of National Trust for Historic Preservation; Friend of Whitman-Walker Clinic; Friend of Rashi School (Boston); Member of WETA and Maryland Public Television; Friend of Washington Humane Society; Member of Smithsonian Museum; Member of National Gallery of Art.

Educational Memberships: None.

Other Memberships: American Association of Retired Persons; Citizens for a Sound Economy; Competitive Enterprise Institute; Defenders of Property Rights; Heritage Foundation; Women in Government Relations; Washington International Trade Association; Women in International Trade.

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

I authored the following articles or speeches, which have been published primarily in ABA, PLI, or other similar CLE publications, unless otherwise noted. Where I have a copy of the publication, I have enclosed a copy for the Committee's review.

April 7, 2000- Litigating Internet Technology Disputes: How To Frame New Legal Questions For Appellate Courts, Computer Litigation and Corporate Counsel Committees, ABA Section of Litigation Spring Meeting, Seattle, Washington. *See* attached Exhibit 3.

October 15-16,1998-"Copyrightability of Computer Programs," Patent Resources Group, Inc., Palm Springs, California. *See* attached Exhibit 4.

May 9, 1996-"How to Litigate Technology Disputes: Making New Law on Appeal," American Conference Institute, New York.

October 19, 1995-"Making Technology Comprehensible to Judges and Juries," American Conference Institute, San Francisco. *See* attached Exhibit 5.

April 26, 1995-"Evaluating Fair Use in the Context of Photocopying," American Intellectual Property Law Association, Washington State Patent Law Association and Oregon Patent Law Association, Seattle, Washington.

January 20, 1995-"Fair Use and the *Texaco* Decision," American Committee for Interoperable Systems, Mountain View, California.

November 19, 1994-"Antitrust and Trade Regulation," National Intellectual Property Law Institute, Washington, D.C. *See* attached Exhibit 6.

September 1994, When The Dealing Is Done: A Look At The Microsoft Settlement, *Computer Law Reporter*, Vol. 20, Number 1. *See* attached Exhibit 7.

August *29, 1984*, Antitrust Is Alive, Well, And Relevant, *Computerworld*, Vol. 28, No. 35. *See* attached Exhibit 8.

August 26, 1994, Comments Needed On Justice Department's Intellectual Property Guidelines, Counsel's Advisory-Washington Legal Foundation. *See* attached Exhibit 9.

March 24, 1994, Anne K. Bingaman, *FTC:WATCH*, No. 409. *See* attached Exhibit 10.

March 23, 1994-"Has Competition for Computer Software *Really* Arrived at GSA?" Computer Section of the D.C. Bar Association, Washington, D.C.

March 10, 1994-"Winning Strategies in Computer Software Litigation," Georgetown University Law Center, 1994 Advanced Computer Law Institute, Washington, D.C.

January 13-14, 1994-"Observations About Opening Statement: How To Try High-Technology Cases," ABA National Institute, Section of Litigation, Florida Bar Computer Law Committee and Computer Law Section of Bar Association of San Francisco, Orlando, Florida.

December 2, 1993-"New Antitrust Developments on the Horizon for the Computer Software Industry," CLE International Seminar-Software Protection and current Litigation, New Orleans.

October 21, 1993-"New Competition Issues in the Computer and Software Industries," PLI 15th Annual Computer Law Institute, New York. *See* attached Exhibit 11.

October 20, 1993-"Has Predation Come to the Software Industry - FTC/DOJ Microsoft Investigation and Beyond?" Intellectual Property Committee, Computer Law Section of the D.C. Bar Association, Washington, D.C.

August 10, 1993-"Reverse Engineering of Computer Software: 'Fair Use' Viewed As An Antitrust Doctrine-A New Way To Look At *Sega*," ABA Section of Litigation, Computer Litigation Committee Annual Meeting, New York. *See* attached Exhibit 12.

June 24-25, 1993-"Copyright Misuse and Fraud on the Copyright Office--If Not a Shield; a Sword?" PLI Intellectual Property/Antitrust, New York. *See* attached Exhibit 13.

March 3, 1993-"Madison's Cautious View of Copyright and Monopoly Power," 11 *Cardozo Arts & Entertainment Law Journal* 721, 741 *(1993)* (Symposium: Copyright Protection: Has Look and Feel Crashed? Benjamin N. Cardozo School of Law, New York.) *See* attached Exhibit 14.

October 22, 1992-Debate with former Assistant Secretary of Commerce and Commissioner of U.S. Patent and Trademark Office regarding the *Altai* and *Sega* cases." The Copyright Society of the U.S., New York.

October 14, 1992-"Trade Secrets," CLE International Conference on Software Protection and Current Litigation, Atlanta.

September 25, 1992-"Derivative Works," Prentice Hall Law & Business 13th Annual Computer Law Institute, New York.

September 17, 1992-"*Computer Associates v. Altai*," University of Texas School of Law and Computer Association - 6th Annual Computer & Information Technology Law Institute, Dallas.

1979-Author, Fuel and Energy Supplement to *Antitrust Developments*, published by American Bar Association, Section on Antitrust Law.

Other:

1989- Deregulation: Self Regulation, 57 *Antitrust Law Journal*, 809 (1989)(transcript of panel discussion). *See* attached Exhibit 15.

1992-present, Board of Editors, *Computer Law Reporter*

1980-1984 Editor, ABA Section of Antitrust Law, *Regulation Newsletter*

14. **Congressional Testimony**: List any occasion when you have testified before a committee or subcommittee of the Congress, including the name of the committee or subcommittee, the date of the testimony and a brief description of the substance of the testimony. In addition, please supply four (4) copies of any written statement submitted as testimony and the transcript of the testimony, if in your possession.

I submitted testimony to the Senate Steel Caucus on December 12, 2000 regarding the "Impact of the Steel Import Crisis," a copy of which is attached. *See* attached Exhibit 16.

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

Excellent. Last physical examination: August 7, 2001

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

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

Not applicable.

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

Not applicable.

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

Not applicable.

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

Not applicable.

1. Public Office, Political Activities and Affiliations:

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

May 2000-Elected At-Large Member of D.C. Republican Committee. Resigned May 2, 2002. *See* attached Exhibit 17.

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

2000-D.C. Co-Chair, Lawyers for Bush-Cheney

November 3-4,2000-Campaign Volunteer in West Virginia, Bush-Cheney Campaign

2000-Republican National Convention (Philadelphia), Counsel

1999-2000-D.C. Steering Committee for George W. Bush for President:

June 22, 1999- Governor George W. Bush Presidential Exploratory Committee

June 16,1998- Re-Election of Governor George W. Bush Committee

October 27, 1998- Alabama Attorney General William Pryor-Fighting Crime Caravan-Campaign Volunteer

1996- Transition Task Force on Regulation, Dole-Kemp Campaign

1996-General Counsel to Dole-Kemp Campaign Presidential Debate Negotiating Team

1996-Dole Voting Analysis Team Leader- Dole-Kemp Campaign

1996- Republican National Committee Convention (San Diego)-Counsel to the Reforming Government and the Legal System Platform Subcommittee; Caucus Teams; Counsel and Security Team

1996-Campaign Volunteer in New Hampshire and South Carolina primaries, Bob Dole for President

1995-1996-Coordinator for Regulatory Reform and Antitrust Policy, Bob Dole for President; Co-Chair and founding member of Lawyers for Bob Dole for President

1992-Lawyers for Bush-Quayle, National Steering Committee

1992- Republican National Committee Convention (Houston), Assistant General Counsel

1988-Lawyers for Bush-Quayle, National Advisory Committee

1988- Republican National Committee Convention (New Orleans), Assistant General Counsel

1988- Lawyers for Dole National Steering Committee; Coordinator for Regulatory Policy

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

(a) Describe chronologically your law practice and legal experience after graduation from law school, including:

See below.

(1) whether you served as clerk to a judge, and if so, the name for the judge, the court and dates of the period you were a clerk;

Not applicable.

(2) whether you practiced alone, and if so, the addresses and dates;

See below.

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

See below.

Government Service:

June 1973-December 1978- Trial Attorney Department of Justice Antitrust Division Great Lakes Field Office leveland, Ohio (GS-11-GS-14)

I began my career, as a lawyer, in June 1970, as a Trial Attorney in the Department of Justice, Antitrust Division, in the Great Lakes Field Office, in Cleveland, Ohio, which was responsible for antitrust enforcement activities in Ohio, Michigan, West Virginia, and Kentucky. At that time, our office handled approximately 25-30% of all the cases filed by the Antitrust Division. Among my responsibilities included several major merger and grand jury investigations, one of which culminated in felony bid rigging indictments that spawned a series of highway contracting bid rigging cases. The most significant experience that I had in this office was serving as second chair counsel in the first antitrust felony case tried to a jury. Although the case was settled prior to verdict, as a result of that experience, I had the opportunity to transfer to Washington in 1978, where I was assigned to

the newly formed Energy Section.

December 1978-November 1980- Senior Trial Attorney
Department of Justice
Antitrust Division
Energy Section
Washington, D.C. (GS 15-1)

Among my initial assignments in the Energy Section was as lead counsel in a significant merger investigation concerning a prior divestiture of one of the most important independent oil refineries on the West Coast. When that assignment was concluded, I became lead counsel of licensing proceedings before the Nuclear Regulatory Commission that ultimately resulted in requiring electric utilities in the State of Texas to be connected to the national grid and subject to FERC jurisdiction. In addition, I also had the opportunity to represent the Antitrust Division in OECD meetings concerning oil policy, held in Paris, Dusseldorf, and London during this period.

November 1980-October 1983- Senior Attorney Advisor to
Commissioner and Acting
Chairman
David A. Clanton
Federal Trade Commission
Washington, D.C. (GS 15-3)

In November, 1980, I joined the staff of Federal Trade Commissioner David A. Clanton as a Senior Attorney Advisor. A few months later, he was appointed Acting Chairman of the agency. My responsibilities included providing legal advice on antitrust, consumer protection, and administrative law matters, as well as handling certain congressional and administrative matters. In addition, I represented the agency in intergovernmental meetings and served as a Commission liaison with bar associations and other groups.

When Commissioner Clanton's term expired in October 1983, I joined the staff of Chairman James C. Miller, III, as a Senior Counsel and Special Assistant.

November 1983- February 1985-Senior Counsel and Special
Assistant to
Chairman James C. Miller III
Federal Trade Commission
Washington, D.C.(GS 15-40PA)

While working for Chairman Miller, I continued some of my prior duties and, in addition, assumed responsibility for special policy and legislative projects, such as drafting a potential set of guidelines concerning interlocking directorates and issues concerning enforcement of the antitrust laws to professionals. In March 1985, around the time that Chairman Miller was appointed to become Director of OMB, I went into private practice, joining the Columbus, Ohio firm of Porter, Wright, Morris, & Arthur, as a partner in its Washington, D.C. office.

Private Practice:

February 1985-December 1986-Partner
Porter, Wright, Morris & Arthur,
1133 15th Street N.W., Suite 1100
Washington, D.C. 20005

During the period that I practiced with Porter Wright, I specialized primarily in antitrust law and complex civil litigation. In May 1986, my youngest sister died in an automobile accident and several months thereafter, my mother, was diagnosed with Alzheimer's disease. At the end of December 1986, I resigned from Porter Wright, although I continued to maintain a financial relationship with the firm until July 1987. Because of the time and travel required to attend to matters associated with the death of my sister and my mother's condition, I was not engaged in the active practice of law until I joined the Washington, D.C. firm of Wilner & Scheiner as a partner in August 1987. From January 1987 until joining Wilner & Scheiner in August 1987, however, I maintained an office in my husband's law firm, Ropes & Gray.

August 1987-August 1990-Partner
Wilner & Scheiner
The Thurmond Arnold Building
1200 New Hampshire Ave. N.W.,
Washington, D.C. 20036

Initially, my practice at Wilner & Scheiner focused on antitrust and international trade matters for industrial clients, as well as certain lobbying assignments before Congress and federal agencies. In mid-1989, however, I was retained as lead trial counsel by a small Texas computer software company Atari, Inc. and became involved in litigation in the United States and France that changed the direction of my legal career. This case is described in detail herein. In 1990, Wilner & Scheiner dissolved; members joined other firms or went to work for clients. In September 1990, I joined the Washington, D.C. office of the New York firm of Anderson, Kill, Olick, and Oshinsky as a partner.

September 1990- October 1992- Partner
Anderson, Kill, Olick & Oshinsky
2000 Pennsylvania Avenue, N.W., Suite 7500
Washington, D.C. 20006

At Anderson Kill, I continued to work for clients that I represented before joining the firm. My practice at this time was split between antitrust and related complex civil litigation and appellate proceedings concerning the computer software litigation mentioned above. A conflict developed between the D.C. office of the firm and my largest client at that time. In October 1992, I resigned and established a sole practice for two months to complete an ongoing litigation commitment for this client. After that project was completed, in December 1992, I joined the Washington firm of Ingersoll & Bloch as a partner, where I practiced for the next five years.

December 1992-August 1997- Partner
Ingersoll & Bloch, Chartered
1401 16th Street N.W.
The Sherman House
Washington, D.C. 20036

During the initial period I practiced with Ingersoll & Bloch, I continued a variety of antitrust, administrative law, and litigation assignments for prior clients, but in 1995 assumed the role of an outside general counsel to Gulf States Steel, which occupied approximately 50% of my practice. I continued, however, to spend approximately 30-40% of my time working on intellectual property litigation,

concerning in the copyright and trade secret cases in both federal and state appellate courts. The remaining 10% of my practice concerned handling antitrust and administrative law matters for long standing clients. In September 1997, Ingersoll & Bloch dissolved and I joined the joined Baker & McKenzie's Washington, D.C. office, where former Commissioner Clanton was a partner.

September 1997-present- Of Counsel
Baker & McKenzie
815 Connecticut Avenue N.W.
Washington, D.C.20006

At Baker & McKenzie, I have worked primarily for many of the same clients that I previously represented in private practice. From 1997-2000, my time was split between computer software litigation and lobbying for the passage of the Emergency Steel Loan Guarantee Act of 1999. And, later in 2000, I worked to help a client attempt to qualify for the benefits of that program. In the fall of 2000 to the present, my practice shifted again back to complex civil litigation, but with an increased emphasis on patent infringement cases, including some with related antitrust issues.

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

During the period June 1973-1978, I was employed by the Department of Justice, Antitrust Division as a Trial Attorney in the Great Lakes Office, located in Cleveland, Ohio, where I handled both criminal and civil litigation, including serving as second chair in the trial of the first felony case and lead counsel on several major grand jury investigations that led to criminal indictments and civil cases. I also was lead counsel or was second counsel on several significant merger investigations.

During the period 1978-1980, I was a Senior Trial Attorney in the newly formed Energy Section of the Department of Justice, Antitrust Division, Washington, D.C. My first assignment was as lead counsel of an investigation and enforcement action concerning the proposed acquisition of an independent oil refinery, subject to a prior divestiture order. My next assignment was as lead counsel in a licensing proceeding before the Nuclear Regulatory Commission that ultimately brought Texas utilities into the national power

grid and subject to FERC jurisdiction. In addition, during this period, I also represented the Department of Justice in OECD meetings in Paris, Dusseldorf, and London concerning the international oil industry emergency allocations.

During the period 1980-1984, I was a Senior Attorney Advisor to David A. Clanton, Commissioner and Acting Chairman of the Federal Trade Commission (1980-1983) and then a Senior Counsel and Special Assistant to the Chairman of the Federal Trade Commission Counsel (1983-1984). During this period, I provide legal counsel to the above on antitrust law, competition policy, consumer protection matters, and handled certain legislative and administrative matters. In addition, I served as an agency representative in intergovernmental meetings and with various groups, including bar associations.

During the period 1984-1989, my private practice focused primarily on antitrust, international trade, and administrative law issues, primarily for the industrial and trade association clients.

During the period 1989-1998, my private practice shifted to intellectual property litigation (75%), with a substantial amount of time spent on the *Computer Associates v. Altai, Inc.* cases which were litigated simultaneously in the United States (in federal and state court venues) and in France. I also represented other computer software clients with litigation matters during this period and continued to handle antitrust, international trade, and administrative law matters for industrial clients.

During the period 1999-mid 2000, almost 90% of my private practice was devoted to helping Gulf States Steel and other domestic steel mills secure the Emergency Steel Loan Guarantee Act of 1999,which is described below, and then assisting Gulf States Steel to qualify for that program.

During the period mid 2000-present, my private practice has returned primarily to representing clients with complex civil litigation, primarily in intellectual property area, with an emphasis on patent infringement and related antitrust issues.

(2) Describe your typical former clients, and mention the areas, if any, in

which you have specialized:

Typical clients: 1.) Small to mid-sized industrial companies, including a fully integrated (iron-ore to finished) steel mill; 2.) a computer hardware manufacturer, computer software developers and vendors, and high technology companies; 3.) a service industry and a manufacturer of consumer products; 4.) trade associations; and 5.) Non-profit institutions and research universities.

Areas of Specialization: Intellectual Property (Copyright, Patent, Trade Secrets); Antitrust Law; International Trade; Administrative Law; Complex Civil Litigation.

(1) Describe whether you appeared in court frequently, occasionally, or not at all. If the frequency of your appearances in court varied, describe each such variance, providing dates.

Depending on the year, my practice has varied between appearing in court frequently to occasionally, as described in more detail below.

(2) Indicate the percentage of these appearances in

(A) Federal courts;

97% (est.) over 29 year period

(B) state courts of record;

3% (est.) over 29 year period. See Response below to Question 18, Case C-4 and Case E, described below, and served as lead counsel for *Plaintiff-Allied Mineral Products* v. *Thomas E. Robson and Martin Marietta Corp.*, (Cir. Ct.

Mont. Co., MD 1986) [trade secret misappropriation] (case settled).

(C) other courts.

Although I did not appear as counsel of record before the courts of France, from 1989-1998, I worked closely with French counsel in *Computer Assoc. Int'l, Inc., v. Altai, Inc.*, as described below.

(3) Indicate the percentage of these appearances in:

(A) civil proceedings;

1993-1978-50%;
1978-present 100%

(B) criminal proceedings.

1973-78-50%

During this period, I was second chair in the first felony case tried by the Antitrust Division to a jury, although the case was settled before a verdict was rendered. In addition, I had extensive experience with criminal pre-trial proceedings and grand jury investigations during this time.

1978-present-0%

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

Two civil cases tried to judgment: in one I was chief counsel and in the other co-counsel of record.

(5) Indicate the percentage of these trials that were decided by a jury.

None, although I was associate counsel in a felony jury trial that was settled before verdict.

(d) Describe your practice, if any, before the United States Supreme Court. Please supply four (4) copies of any briefs, amicus or otherwise, and, if applicable, any oral argument transcripts before the U.S. Supreme Court in connection with your practice.

I have authored three petitions for certiorari, two amicus briefs, and co-authored one amicus brief.

PETITIONS FOR CERTIORARI:

Petition 1: *See* attached Exhibit 18

Citation: *International Business Machines Corp. v. United States*, 201 F.3d 1367 (Fed. Cir. 2000), *petition for cert. filed*, 69 U.S.L.W. 3259 (U.S. Sept. 28, 2000) (No. 00-482), *cert. denied*, 69 U.S.L.W. 3556 (U.S. Feb. 20, 2001).

Summary of Proceeding: Petition for a Writ of Certiorari. Questions Presented: (1) whether decision below was precluded either by the final judgment in *United States* v. *United States Shoe Corp.*, 523 U.S.360 (1998)(holding that the Harbor Maintenance Tax (HMT) violated the Export Clause)) or the constitutional requirements exception to the no-interest; (2) whether in holding the HMT unconstitutional, the Court recognized a taking of private property for which just compensation is required by the Fifth Amendment; (3) whether the Government's retention of interest earned on monies collected under the unconstitutional HMT is a taking of private property for which just compensation is required by the Fifth Amendment.

Client Represented: Petitioner International Business Machines Corp.
Client Contact: Marcus P. Williams, Corporate Counsel (tel.202-515-5522)

Nature of Representation: Lead counsel of record and principal author of petition.

Final Disposition: Petition denied, February 20, 2001

Plaintiffs' Steering Committee Counsel:

Steve Becker
Coudert Brothers
New York, New York
212-626-4400

M. Page Hall
Dorsey & Whitney
Washington, D.C.
202-824-8800

Counsel for Respondent United States:

Jeffrey A. Belkin, Department of Justice
Washington, D.C.
202-305-7762

Petition 2: *See* attached Exhibit 19.

Citation: *Computer Assocs. Int'l, Inc.* v. *Altai, Inc.*, 126 F.3d 365 (2d Cir.1997), *cert. denied*, 118 S. Ct. 1676 (1998).

Summary of Substance of Proceeding: Petition for a Writ of Certiorari. Question Presented: Whether a prevailing defendant, having obtained a final judgment from a federal court adjudicating worldwide claims of copyright infringement is entitled to an anti-suit injunction where the plaintiff is re-litigating the same claim in a foreign court that does not recognize the preclusive effect of a United States final judgment.

Client Represented: Petitioner Altai, Inc.

Client contact: Michael Wyatt, former General Counsel, Platinum *technology,inc.*, of which Altai Inc. was a wholly owned subsidiary (tel: 317-507-8836 or 317-453-1288)

Nature of Representation: Lead counsel of record and principal author of petition.

Final Disposition: Petition denied.*

* In October 1998, the Cour de Appel de Paris affirmed the 1995 judgment of the Commercial Court of Bobiny holding that Altai, Inc. did not violate French copyright law. In those proceedings I directed and worked closely with French counsel Bertrand Nouel, Gide,Loyrette Nouel, Paris-(tel.01-40-75-60-00)and Astrid Baumgartner, Gide Loyrette Nouel, New York-(tel.212-644-1201)(now retired).

Dates of Representation: September 1997-1998

Co-Counsel: Professor Charles Allen Wright
(now deceased)
University of Texas School of Law

Professor Marc Arkin
Fordham Law School
New York, New York
212-636-6850

Professor David Post
Temple Law School
Philadelphia, Pa.
215-204-4539 or 202-364-5010

Counsel for Respondent:

Steven Kahn
Weil Gotshal
New York, New York
212-310-8000

Petition 3: *See* attached Exhibit 20.

Gulf States Steel, Inc. v. *LTV Corporation*, 969 F.2d 1050 (D.C. Cir.),*cert denied*, 506 U.S. 1022 (1993).

Summary of Proceeding: Petition for a Writ of Certiorari. Question presented: Whether a federal court of appeals has the power to modify *de facto* a final antitrust consent decree by issuing a mandate that reverses orders,entered by the

supervising district court to enforce environmental obligations assumed under the decree, without a showing on the public record which establishes that a "significant change in facts or law" warrants revision of the decree and that the proposed modification is suitably tailored to the changed circumstances, as required by Fed. R. Civ. P. 60 (b).

Client Represented: Petitioner Gulf States Steel, Inc.
Client Contact: John S. Steinhauer, former General Counsel, Gulf States Steel Inc., 330-535-1010.

Nature of Representation: Lead Counsel of Record and principal author of the petition.

Final Disposition: Petition denied.

Counsel for Respondent: Guy Struve
Davis Polk
New York, New York
212-450-4000

Counsel for Amicus Curiae: Attorney General of Alabama
Mark Givhan, former
Assistant Attorney General
now at Johnson, Barton, Proctor
Birmingham, Alabama
205-458-9400

SUPREME COURT AMICUS BRIEFS

Amicus Brief 1: *See* attached Exhibit 21.

Citation: *Festo Corporation* v. *Shoketsu Kinzoku Kogyo Kabushiki Co., Ltd.*, 234 F. 3d 558 (Fed. Cir. 2000)(en banc), *cert. granted*, 69 U.S.L.W. 3779 (2001).

Summary of Proceeding: Whether the scope and continued vitality of the doctrine of equivalents in patent infringement cases continues to be the standard unanimously affirmed in *Warner-Jenkinson Co.* v. *Hilton Davis Chem. Co.*, 520 U.S. 17 (1997).

Clients Represented: Wisconsin Research Alumni Foundation; The Regents of the University of California; Massachusetts Institute of Technology; Washington Research Foundation;

University of Pennsylvania; University of Minnesota; The Board of Trustees of the Leland Stanford Junior University; SUNY Research Foundation; Cornell Research Foundation; Inc., University of Florida; University of Utah; Oregon Health & Science University; University of Texas-Medical Branch; University of Vermont; M.D. Anderson Cancer Center-Houston; Cold Spring Harbor(Woods Hole Oceanographic Center); The American Council on Education; The Association of American Universities; The National Association of State Universities and Land-Grant Colleges; Council on Governmental Relations; and Research Corporation Technologies.
Client contact: Sheldon Steinbach, General Counsel, American Council on Education, 202-938-9355

Nature of Representation: Lead Counsel of Record and principal author of brief in support of continued vitality of scope of equivalents.
Final Disposition: Oral argument January 8, 2002

Counsel for Petitioner: Robert H. Bork 202-862-5851

Counsel for Respondent: Arthur Newstadt 703-413-3000

Counsel for United States in Support of Petitioner: Solicitor General Theodore B. Olson 202-514-2201

Amicus Brief 2: *See* attached Exhibit 22.

Citation: *Lotus Development Corp. v. Borland Int'l, Inc.*, 49 F.3d 807 (1st Cir. 1995), 516 U.S. 233 (1996).

Summary of Proceeding: Question presented: Whether a menu command hierarchy for computer spreadsheet program was protected expression under 17 U.S.C. § 102(a) or a method of operation, process, or procedure foreclosed from protection under 17 U.S.C. § 102(b).

Client Represented: Amicus Curiae, Altai, Inc.
Client Contact: Michael Wyatt, former General Counsel, Platinum *technology, inc.*, parent of Altai, Inc., 317-507-8836 or 317-507-8836.

Nature of Representation: Principal author of Amicus Brief suggesting that the Court in deciding the question granted also instruct the lower courts to require plaintiff to assume

proof of copyrightability before discovery of defendant's computer programs is permitted.

Final Disposition: Following briefing and oral argument, the Court affirmed the decision of the First Circuit by an equally divided vote.

Counsel for Petitioner: Henry B. Gutman
Simpson Thatcher
New York, New York
212-415-2502

Counsel for Respondent: Gary Reback
Wilson Sonsini
Palo Alto
415-493-9300

Counsel for Amicus Curiae: Professor Dennis Karjala
University of Arizona School of Law
602-965-4011

Peter S. Mendell
University of California (Berkley) School of Law
310-643-5489

Amicus Brief 3: See *attached Exhibit 23.*

Citation: *Kraft General Foods, Inc. v. Iowa Department of Revenue and Finance*, 505 U.S.1022 (1992).

Summary of Proceeding: Question presented concerned whether Iowa tax which included dividends received from subsidiaries incorporated abroad, but excluded dividends received from domestically incorporated subsidiaries, was unconstitutional under the Foreign Commerce Clause, the Import-Export Clause, or the Equal Protection Clause.

Client Represented: Amicus Curiae Washington Legal Foundation

Nature of Representation: Counsel of Record and co-author of amicus curiae brief in support of petitioner.

Final Disposition: Iowa tax at issue held to violate Foreign Commerce Clause.

Co-Counsel: Paul D. Kamenar
Washington Legal Foundation
202-857-0240

18. Describe legal services that you have provided to disadvantaged persons or on a *pro bono* basis, and list specific examples of such service and the amount of time devoted to each.

I have not directly provided legal services to disadvantaged persons although I have financially, and otherwise, supported such efforts through the American Bar Association and individual charitable contributions listed herein.

I have utilized my skills as a lawyer, however, on behalf of individuals on a *pro bono* basis. For example, from October 1992 until early winter 1994, Dennis Dunbar worked for me as a Legal Assistant and Secretary. When he became ill from AIDS, I worked under the direction of the staff of Walker Whitman Clinic to get Dennis' legal, financial, and personal affairs in order and assumed financial responsibility for payment of his health and life insurance policies, until his death in the fall of 1995.

In addition, over 15 years, I mentored two students of the District of Columbia schools from their junior high school experience through graduation and have remained in contact with them, even though they are now adults. One is now a graduate of George Washington University and is working as a journalist in California; the other is currently working as an automobile mechanic and is married with a new son. During 1986-1996, I also funded YMCA summer camp opportunities for pre-junior high students in the Gadsden (Alabama) City School system, who demonstrated significant improvement of their reading skills.

I have contributed my legal services *pro bono* on two occasions, as described below.

In the spring of 1989, I was retained to represent about a half dozen witnesses subpoenaed to testify before the House Committee on Standards of Official Conduct following the public release of the Special Outside Counsel's Report concerning then Speaker James C. Wright, Jr. These witnesses established that the former Speaker, in fact, was not culpable for certain allegations made by the Special

Counsel. After the proceedings were concluded, I declined to bill any of these clients for my legal services.

In the spring of 1990, former Congressman Tom Bevill asked if I could help him. The Federal Trade Commission approved the divestiture sale of a large bakery facility to an individual who decided to sell off the assets and discharge several hundred employees in Congressman Bevill's district. Having failed to get the FTC to take any action, he asked what I could do to help. I suggested that he ask if the Alabama Attorney General would be inclined to seek an injunction in state court, under his *parens patriae* authority, to stop further sale of the assets. A few days later, I was called by the Governor's Office and informed that I had been deputized as a Special Assistant Attorney General to represent the State's interest in this matter. After a TRO was secured in Alabama Circuit Court, the case was removed to the United States District Court for the Northern District of Alabama, where by stipulation, the sale of the divested assets was enjoined. A few months later, the state Economic Development Authority was able to help another purchaser assume title of the assets and the bakery was reopened. I donated my services to the State in honor of Congressman Bevill's commitment to his community.

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

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

See below.

(2) a detailed summary of the substance of each case outlining briefly the factual and legal issues involved;

See below.

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

See below.

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

See below.

Case 1:

Citation: *International Business Machines Corp.* v. *United States*, No. 94-10-0065 slip op. 02-17(CIT Feb. 21,2002)(order declining to decide March 16, 2001 motion for summary judgment),appeal docketed, No. 02-___(Fed. Cir. April 14, 2002).

Summary of Proceeding:

"Test case" seeking the award prejudgment and post-judgment interest on taxpayer refunds required by *United States Shoe Corp.*, pursuant to the Just Compensation Clause, the Export Clause, and/or the equitable doctrine of restitution.

Client Represented: Plaintiff International Business Machines Corp.; Client Contact: Marcus P. Williams, Corporate Counsel(tel: 202-515-5522).

Nature of Representation: Lead Counsel and Principal Author of Summary Motion for Summary Judgment.

Final Disposition: Appeal filed in the United States Court of Appeals for the Federal Circuit on April 14,2002 to mandate decision on pending summary judgment motion.

Court: United States Court of International Trade
Judge Jane Restani.

Plaintiffs' Steering Committee Counsel:

Steven H. Becker
Coudert Brothers
New York, New York
212-626-4400

M. Page Hall
Dorsey & Whitney
Washington, D.C.
202-824-8800

Counsel for Defendant United States:

Jeffrey A. Belkin
Department of Justice
Washington, D.C.
202-305-7562

Case 2:

Citation: *United States* v. *Gulf States Steel, Inc.*, No. 97-S-2755-M (N. D. Ala. 1997).

Summary of Proceeding: Civil Action Seeking Civil Penalties and Injunction for violations of the Clean Water Act.

Client Represented: Defendant, Gulf States Steel, Inc.;
Client Contact: Steve Karol, Chairman of Board, Watermill Ventures, Waltham, Mass.(tel. 617-891-6660).

Nature of Representation: Lead counsel, principal author of court pleadings and briefs, including motion for summary judgment, defended client in depositions, and chief negotiator of terms of consent decree entered as a final judgment.

Final Disposition: Case settled and consent decree settlement entered as final judgment regarding pending Clean Water Act claims and novel resolution regarding potential CERCLA claims.

Court: United States District Court for the Northern District of Alabama, Judge Dean Buttram.

Local Co-Counsel: Thomas H. Wells
Maynard, Cooper & Gale
Birmingham, Alabama
205-254-1062

Counsel for Amicus Curiae United Steelworkers of America:

Joe Whatley
Whatley Drake
Birmingham, Alabama
205-328-9576

Counsel for Plaintiff United States:

Brian Israel
Washington, D.C.
202-942-5000(now at Arnold & Porter)

CASE 3: The following five proceedings are related aspects of a decade of litigation in the United States before: the United States District Court of the Eastern District of New York; the United States Court of Appeals for the Second Circuit; the Supreme Court of Texas; the Supreme Court of the United States (as described above); and before the courts of France: the Commercial Court of Bobiny, France and the Cour de Appel de Paris. In each of these proceedings, I was the lead or co-lead counsel of record. Because different stages of this litigation entailed distinct substantive issues, however, they are described in separate entries.

Proceeding 1:
Citation: *Computer Assocs. Int'l Inc. v. Altai, Inc.*, 775 F. Supp. 544 (E.D.N.Y. 1991).

Summary of Proceeding: Bench trial regarding copyright infringement and trade secret misappropriation claims concerning (OSCAR 3.4 and 3.5) computer programs.

Client Represented: Defendant, Altai,Inc.
Client contact: Gary Leslie (former CEO and Director, Altai, Inc.)(tel.303-545-5843)

Nature of Representation: Lead counsel and architect of legal strategy to set this up as test case to change the scope of copyright protection for computer software. Authored all pretrial and discovery motions and proceedings, handled all discovery re software, economic, and damages experts. Principal author of all trial pleadings, briefs, and expert reports. Second chair in bench trial March 28-April 6, 1990.

Final Disposition: Judgment entered in favor of defendant on copyright claim re. OSCAR 3.4 program for $364,444 plus prejudgment interest; copyright claim re OSCAR 3.5 program dismissed; trade secret claim dismissed.

Court: Former United States Court of Appeals Circuit Judge George C. Pratt, sitting by designation.

Lead Trial Counsel for Defenant:

Stephen D. Susman
Susman Godfrey
1000 Louisiana, Suite 5100
Houston, Texas
713-653-7801 or 888-562-1184

Counsel for Plaintiff:

Steven Kahn
Weil Gotshal
767 Fifth Avenue
New York, New York
212-310-8000

Proceeding 2:

Citation: *Computer Assocs. Int'l Inc.* v. *Altai, Inc.*, 982 F.2d 693 (2d Cir. 1992).

Summary of Proceeding: Appeal of judgment entered in *Computer Assocs. Int'l Inc. v. Altai, Inc.*, 775 F. Supp. 544 (E.D.N.Y. 1991) regarding the scope of copyright protection extended for non-literal elements of computer software and whether trade secret misappropriation claims are pre-empted, as a matter of law, upon the adjudication of copyright infringement claims regarding the same subject matter.

Client Represented: Appellee Altai, Inc.
Client contact: Gary Leslie (former CEO and Director, Altai, Inc.)(tel.303-545-5843).

Nature of Representation: Principal Author of Brief for Appellee and Argued Case Before the United States Court of Appeals for the Second Circuit.

Final Dispostion: Judgment regarding copyright claims affirmed; on rehearing, judgment regarding trade secret claims reversed and remanded on motion for rehearing.

Court: United States Court of Appeals for the Second Circuit, opinion authored by now Chief Judge John M. Walker, Jr.

Counsel for Appellant:

Steven Kahn
Weil Gotshal
767 Fifth Avenue
New York, New York
212-310-8000

Counsel for Amicus Curiae American Committee for Interoperable Systems and Sun Microsystems:

Jon Bande	Peter Choy
Morrison & Forester	former Dep.General Counsel
Washington, D.C.	Sun Microsystems, Inc.
202-887-1500	415-731-9299

Proceeding 3:

Citation: *Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 22 F.3d 32 (2d Cir. 1994)

Summary of Proceeding: Appeal of judgment entered on remand in *Computer Assocs. Int'l Inc. v. Altai, Inc.*, 832 F. Supp.50 (E.D.N.Y. 1993) holding that under Texas law, the discovery rule would not extend the statute of limitations in trade secret misappropriation cases, but suggesting that this issue be certified to the Texas Supreme Court.

Client Represented: Appellee Altai, Inc.
Client contact: Gary Leslie (former CEO and Director, Altai, Inc.)(tel.303-545-5843)

Nature of Representation: Lead counsel, principal author of appellee's briefs, argued the appeal, and lead counsel and principal author of briefs in underlying remand proceedings.

Final Disposition: Question certified to Texas Supreme Court.

Court: United States Court of Appeals for the Second Circuit; opinion authored by now Chief Judge John M. Walker, Jr.

Counsel for Appellant:

Steven Kahn
Weil Gotshal
767 Fifth Avenue
New York, New York
212-310-8000

Proceeding 4:

Citation: *Computer Assocs. Int'l, Inc.* v. *Altai, Inc.*, 918 S.W. 2d 453 (Tex. 1996).

Summary of Proceeding: Consideration of two certified questions: (1) whether the discovery rule exception to section 16.003(a) the Texas Civil Practice and Remedies Code applies to claims for misappropriation of trade secrets; and (2) if not, whether the application to such claims of the two-year limitations period provided in section 16.003(a) contravenes the "open courts" provision of article I, section 13 of the Texas Constitution.

Client Represented: Appellee Altai, Inc.
Client contact: Gary Leslie (former CEO and Director, Altai, Inc.)(tel.303-545-5843).

Nature of Representation: Co-lead counsel and co-author of appellee's briefs.

Final Disposition: Held that the discovery rule does not apply to claims for misappropriation of trade secrets, and that application of section 16.003 (a) does not violated the Texas Constitution.

Court: The Texas Supreme Court; opinion authored by Justice Enoch.

Co-Lead Counsel: Dean William Powers,
University of Texas School of Law
Austin, Texas
512-471-5151 or 512-471-1163

Counsel for Appellant:
Steven Kahn
Weil Gotshal
767 Fifth Avenue
New York, New York
212-310-8000

Proceeding 5:

Citation: *Computer Assocs. Int'l, Inc.* v. *Altai, Inc.*, 126 F.3d 365 (2d Cir. 1997).

Summary of Proceeding: Appeal of judgment entered in *Computer Assocs. Int'l, Inc.* v. *Altai, Inc.*, 950 Supp. 48 (E.D.N.Y. 1996) denying defendant's motion for issuance of an anti-suit injunction to bar plaintiff from continuing to litigate a parallel copyright infringement case brought in France, after a final judgment was entered under United States law regarding the same parties and claims.

Client Represented: Appellant Altai, Inc.
Client contact: Gary Leslie (former CEO and Director, Altai, Inc.) (tel.303-545-5843) or Michael Wyatt, former General Counsel, Platinum *technology, inc.*, of which Altai, Inc. became a wholly owned subsidiary during this period (tel: 317-507-8836 or 317-453-1288)

Nature of Representation: Lead counsel, principal author of appellant's briefs, argued the appeal, and lead counsel and principal author of briefs in underlying injunction proceedings.

Final Disposition: Judgment denying anti-suit injunction affirmed.

Court: United States Court of Appeals for the Second Circuit, opinion authored by now Chief Circuit Judge John M. Walker, Jr.

Co-Counsel:

Professor Marc Arkin
Fordham Law School
New York, New York
212-636-6850

Counsel for Appellee:

Steven Kahn
Weil Gotshal
767 Fifth Avenue
New York, New York
212-310-8000

CASE 4:

Citation: *Applied Systems, Inc. v. Harbor Software, Inc.*, 936 F. Supp. 167 (S.D.N.Y.), *appeal filed* Oct. 9, 1996, No. 97-7197L (2d Cir.1999).

Summary of Proceeding: Appeal to overrule judgment entering jury verdict of computer software trade secret misappropriation because:(1) plaintiff did not meet the requirements of Illinois law to identify the specifics regarding trade secrets; present evidence of economic value and that its secrets were not generally known in the industry, or provide proof of copying;(2) trial court's charge erroneously permitted the jury to find trade secrets that are in the public domain or obvious; and (3) the trial court erroneously place the burden of proof on plaintiff to prove independent design of its computer program.

Client Represented: Appellant-Cross-Appellee- Applied Systems, Inc.
Client Contact: Mark Camasta, General Counsel
tel. 800-999-5368).

Nature of Representation: Co-counsel and co-author of appellate briefs and coordinated with counsel for amicus curiae.

Final Disposition: Case settled after oral argument.

Court: United States Court of Appeals for the Second Circuit.

Lead Co-Counsel: George C. Pratt
Farrell Fritz
Uniondale, New York
516-277-0700

Of Counsel: Jeff Ullman
Furham Ullman
Morristown, NJ
201-993-1744

Counsel for Appellee:
Jeffrey Slade
Leventhal & Slade
New York, New York
212-935-0800

Counsel for Amicus Curiae: Professor Marc Arkin
Fordham Law School
New York, New York
212-636-6850

CASE 5:

Citation: *Gulf States Steel, Inc. of Alabama* v. *State Industrial Development Authority*, (Montgomery Circuit Court, Ala. 1995).

Summary of Proceedings: Declaratory judgment action challenging the industrial incentive laws under the Constitution of the State of Alabama and certain actions taken in violation of state administrative procedure and sunshine laws.

Client Represented: Plaintiff Gulf States Steel, Inc.
Client Contact: Steve Karol, Chairman of Board, Watermill Ventures, Waltham, Mass.(tel. 617-891-6660).

Nature of Representation: Lead counsel for plaintiff.

Final Dispostion: Case dismissed without prejudice upon enactment of special law by Alabama legislature and signed by Governor exempting Gulf States Steel, Inc. from paying Alabama sales and use tax for 20 years and thereby removing plaintiff's standing to sue.

Court: Montgomery Circuit Court, Alabama, Judge Charles Price.

Co-Counsel: Joe Whatley and Peter Burke
Whatley Drake
Birmingham, Alabama
205-328-9576

Counsel for Defendant:

Attorney General for the State of Alabama
William Pryor
Montgomery, Alabama
334-242-7401

CASE 6

Citation: *Gulf States Steel, Inc.* v. *LTV Corp.*, 133 B.R.665 (D.D.C. 1991).

Summary of Proceeding: Motion to enforce terms of an antitrust divestiture entered as a final judgment in *United States* v. *LTV Corporation*, No. 84-0884 (D.D.C. 1994) requiring defendant to indemnify new purchaser for claims arising from pre-existing environmental liabilities.

Client Represented: Plaintiff Gulf States Steel, Inc.
Client Contact: John Steinhauer, former General Counsel, Gulf States Steel, Inc. (tel. 330-535-1010)

Nature of Representation: Lead trial counsel.

Final Disposition: Judgment entered for plaintiff Gulf States Steel, Inc. requiring defendant to pay plaintiff $31 million for costs incurred to correct pre-existing environmental liabilities. (Case reversed on appeal where I was not lead counsel.)

Court: United States District Court, Judge John Pratt (now deceased).

Counsel for Defendant:

Guy Struve
Davis Polk
New York, New York
212-450-4000

Counsel for Amicus Curiae Attorney General of Alabama:

Mark Givhan (former Assistant Attorney General)
Johnson, Barton, Proctor
Birmingham, Alabama
205-458-9400

Client Represented: American Library Association as *amicus curiae* in support of reversal of decision below.

Nature of Representation: Principal author of amicus brief.

Final Disposition: The judgment of copyright infringement entered below was affirmed.

Court: The United States Court of Appeals for the Second Circuit.

Counsel for Appellant Texaco, Inc.:
Thomas A. Smart
Kaye Scholer
New York, NY
212-836-800

Counsel for Respondent American Geophysical Union:
Stephen Kaye
Proskauer Rose
New York, New York
212-969-3000

20. **Criminal History:** State whether you have ever been convicted of a crime, within ten years of your nomination, other than a minor traffic violation, that isreflected in a record available to the public, and if so, provide the relevant dates of arrest, charge and disposition and describe the particulars of the offense.

None.

21. **Party to Civil or Administrative Proceedings:** State whether you, or any business of which you are or were an officer, have ever been a party or otherwise involved as a party in any civil or administrative proceeding, within ten years of your nomination, that is reflected in a record available to the public.

No.

If so, please describe in detail the nature of your participation in the litigation and the final disposition of the case. Include all proceedings in which you were a party in interest. Do not list any proceedings in which you were a guardian *ad litem*, stakeholder, or material witness.

Not applicable.

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

I have no financial arrangements or on-going litigation responsibilities that will present a conflict or potential conflict of interest. I do not own any individual corporate stocks and my private practice retirement and personal accounts are invested in certificates of deposit or mutual funds. My husband has a retirement brokerage account that invests in stocks, but he does not direct the investments. I would intend to consult with and follow the advise of the Administrative Office of the U.S. Courts to prevent any conflict from arising, including setting up an appropriate internal screening mechanism in my office.

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

None at present, although after a year or so, I would like to teach a civics class one day a week in a non-paying position as an adjunct junior high school teacher in the D.C. public schools.

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

See Financial Disclosure Report.

25. **Statement of Net Worth**: Complete and attach the financial net worth statement in detail. Add schedules as called for.

See Statement of Net Worth.

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

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

There is no judicial selection commission in the District of Columbia that recommends candidates for the United States Court of Federal Claims.

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

In late February 2001, I contacted the Deputy Counsel to the President, to ascertain the process for being considered for one of the current or future vacancies on the United States Court of Federal Claims. He advised me to submit a resume to his office, which I did. On March 27, 2001, I was interviewed by two Associate Counsels to the President. On May 1, 2001, I was interviewed by the Deputy Counsel to the President and an Associate Counsel and later on the same day by the Counsel to the President and another Associate Counsel.

On October 25, 2001, I was contacted by an Associate Counsel and asked whether I had an interest in being considered for the vacancy occasioned by Judge Andewelt's recent death. I said I did. On November 6, 2001, I was contacted by the Office of the Counsel to the President and asked to provide some preliminary background information. On November 14, 2001, I was contacted by an Associate Counsel and advised that the Department of Justice would be providing me with certain background and financial forms to complete for further consideration. During January - March 2002 I was interviewed and responded to questions by various FBI Agents conducting my background check. On March 6, 2002, I was interviewed by the Deputy Counsel to the President. On May 1, 2002, I was contacted by the Office of Legal Policy of the Department of Justice and informed that my name had been forwardedby the President to the United States Senate as a nominee for a position as a judge on the United States Court of Federal Claims.

(b) Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as asking or seeking a commitment as to how you would rule on such case, issue, or question? If so, please explain fully.

No.

I. BIOGRAPHICAL INFORMATION (PUBLIC)

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

Charles Frederick Lettow

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

McLean, VA 22101

Cleary, Gottlieb, Steen & Hamilton
2000 Pennsylvania Avenue, N.W.
Washington, D.C. 20006-1801

3. Date and place of birth.

Iowa Falls, Iowa, February 10, 1941

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

Married, Bonnie Sue Todoroff Lettow, retired bookstore manager.

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

Brown University
Sept. 2000 to May 2001
M.A. awarded May 2001
(on sabbatical leave from Cleary, Gottlieb, Steen & Hamilton during academic year)

Stanford University Law School
August 1965 to May 1968
LL.B. awarded May 1968

Iowa State University
August 1958 to May 1962
B.S.Ch.E. awarded May 1962

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.

Cleary, Gottlieb, Steen & Hamilton
February 1973 to present

Council on Environmental Quality, Executive Office of the President
July 1970 to February 1973

Law Clerk to Chief Justice Warren E. Burger, Supreme Court of the United States
August 1969 to July 1970

Law Clerk to Judge Ben. C. Duniway, U.S. Court of Appeals for the Ninth Circuit
August 1968 to August 1969

Spaeth, Blase, Valentine & Klein
May 1968 to June 1968
May 1967 to August 1967

U.S. Army active duty, 3d Inf. Div.
April 1963 to April 1965

Procter & Gamble Co.
May 1965 to August 1965
June 1962 to April 1963

Busy Way Farms, Inc.
President, Director—April 1989 to present
(previously Vice-President and Director)

The Potomac School
July 1983 to June 1990
Trustee, 1983-1990
Chairman of Board, 1985-1988
Treasurer, 1988-1990

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.

Yes. United States Army Reserve, active duty, April 1963 to April 1965, 3d Infantry Division, Wuerzburg, Germany, 2d Lt. and 1st Lt.; reserve duty from 1965 to 1972 to rank of Captain. Serial number: 0-5517052. Honorable discharge with rank of Captain, 17 February 1972.

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

Award from the National Association of Attorneys General in 1992 "for sustained assistance to the States in their preparation for appearances before the Supreme Court of the United States".

Awards from the National State and Local Legal Center in 1997 and 1998 for amicus briefs in the U.S. Supreme Court.

In law school, Order of the Coif and Note Editor, Stanford Law School.

In college, recipient of National Science Foundation grant for undergraduate research work.

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 Law Institute
American Bar Association (Chairman, Environmental Controls Committee, Section of Corporation, Banking and Business Law, 1983-1987)
The District of Columbia Bar
The Maryland State Bar
The Iowa State Bar Association
The California State Bar

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.

The bar groups listed in item 9 above (excepting the American Law Institute, which does not lobby). None others.

Other organizations to which I belong:

American Law Institute
University Club of Washington, D.C.
Stanford Alumni Association
Iowa State Alumni Association
Lutheran Church of the Redeemer

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.

U.S. Supreme Court	January 8, 1973
U.S. Courts of Appeals for the	
D.C. Circuit	July 3, 1973
Second Circuit	March 9, 1981
Third Circuit	June 13, 1974
Fourth Circuit	January 20, 1975
Fifth Circuit ("former Fifth"—superseded)	September 29, 1977
Fifth Circuit ("new Fifth")	June 19, 2001
Sixth Circuit	December 17, 1981
Eighth Circuit	February 7, 1975
Ninth Circuit	August 15, 1969
Tenth Circuit	September 16, 1980
Federal Circuit	April 26, 1993
U.S. District Courts for the	
District of Columbia	May 7, 1973
District of Maryland	March 29, 1985
Northern District of California	January 9, 1969
U.S. Court of Federal Claims	November 5, 1982
District of Columbia Court of Appeals	September 12, 1972
Iowa Supreme Court	June 12, 1969

Maryland Court of Appeals	June 4, 1991
California Supreme Court	January 9, 1969

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.

Looking at Federal Administrative Law With a Constitutional Framework in Mind, 45 Okla. L. Rev. 5 (1992).

Strategic Choices in the Selection of Expert Witnesses, 2 Nat. Res. & Env. 6 (1986).

Generator-Disposer Indemnity Agreements, 39 Bus. Law 315 (1983) (co-author with John Byam).

"The Control of Marine Pollution" and "The Impact of Federal Institutional Arrangements" (co-author of latter with J. Clarence Davies III) in Federal Environmental Law (West 1974).

The Disclosure-Hearing Dilemma in Maritime Subsidy Disputes, 19 Stan. L. Rev. 420 (1967).

A packet of (a) presentations made as part of Continuing Legal Education programs and (b) similar publications in practice-oriented looseleaf services.

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

Excellent. June 2001.

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

None.

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

N/A

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

Counsel, Council on Environmental Quality, Executive Office of the President, July 1970 to February 1973 (appointed).

17. Legal Career:

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

1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;

Law Clerk to Chief Justice Warren E. Burger, Supreme Court of the United States, August 1969 to July 1970.

Law Clerk to Judge Ben. C. Duniway, U.S. Court of Appeals for the Ninth Circuit, August 1968 to August 1969.

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;

I have been with Cleary, Gottlieb, Steen & Hamilton from February 1973 to the present. From February 1973 through June 1976, I was an associate. From July 1976 to the present I have been a partner.

From July 1970 to February 1973, I served as Counsel to the Council on Environmental Quality, Executive Office of the President.

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

I have always been a litigator. I have argued three cases in the U.S. Supreme Court and over 40 cases in the U.S. Courts of Appeals. I have handled numerous cases in the U.S. District Courts and the U.S. Court of Federal Claims.

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

I have generally represented business entities, but I have also represented individuals, trade associations, a state government, and a federal agency in litigation. I have done pro bono litigation work for individuals and a very few entities.

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.

98% federal and 2% state.

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

97% civil and 3% criminal.

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

Roughly 20-30, usually as lead counsel.

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

Roughly 5% jury and 95% non-jury.

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

   (a) the date of representation;
   (b) the name of the court and the name of the judge or judges before whom the case was litigated; and
   (c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

(1) The Stauffer litigation produced what continues to be the leading precedent in the U.S. Supreme Court on mutual, defensive collateral estoppel. There were four reported decisions:

U.S. v. Stauffer Chemical Co., 464 U.S. 165 (1984);
U.S. v. Stauffer Chemical Co., 684 F.2d 1174 (6th Cir. 1982);
Stauffer Chemical Co. v. EPA, 647 F.2d 1075 (10th Cir. 1981); and
U.S. v. Stauffer Chemical Co., 511 F.Supp. 744 (M.D. Tenn. 1981).

Two district court actions were involved, the first in the District of Wyoming and the second in the Middle District of Tennessee. In each case, a private contractor for the Environmental Protection Agency had sought to inspect a plant owned and operated by Stauffer Chemical Company. I represented the Company in seeking and obtaining orders quashing or staying the administrative search warrants issued to the contractor and then litigating the issue whether the Agency was authorized to empower private contractors to conduct searches and inspections. The underlying issue was the protection accorded the Company's intellectual property.

In chronological order, the Company prevailed in the District of Wyoming, lost in the Middle District of Tennessee, prevailed in the 10th Circuit on the statutory issue, prevailed in the 6th Circuit on both collateral estoppel and the statutory issue, and ultimately prevailed in the U.S. Supreme Court on collateral estoppel.

I was lead counsel for the Company throughout, from the initial temporary restraining order and then two-day trial of the issues in the U.S. District Court for the District of Wyoming (on an emergency basis) to the argument in the U.S. Supreme Court.

The proceedings extended from 1980 through 1984.

The judges involved were as follows:

D. Wyo. - Judge Clarence A. Brimmer
M.D. Tenn. - Judge Thomas A. Wiseman, Jr.

Tenth Circuit - Judges McWilliams, Breitenstein, and Logan
Sixth Circuit - Judges Weick, Jones, and Siler
U.S. Supreme Court - All of the Justices.

Co-counsel were Blair Trautwein (Wick, Campbell, Bramer, Ukasick & Trautwein, #3 Clock Tower Square, 323 South College Avenue, P.O. Box 2166, Fort Collins, CO 80522), (970) 482-4011; Eric Jeffrey (Shea & Gardner, 1800 Massachusetts Avenue, N.W., Washington, D.C. 20036), now (202) 828-2000, and Robert Walker (Walker, Bryant & Tipps, 2100 First Union Tower, 150 Fourth Avenue North, Nashville, Tennessee 37219), (615) 313-6000.

Principal opposing counsel were Louis F. Claiborne and Joshua Schwartz, now a Professor of Law at George Washington University, 2000 H Street, N.W., Washington, D.C., 20052, (202) 994-0008, then both of the Solicitor General's Office, and Dirk Snell, Judson Starr, and Peter Beeson of the U.S. Department of Justice. Judson Starr is now at Venable, Baetjer, Howard & Civiletti, 1201 New York Avenue, N.W., Washington, D.C. 20005, (202) 962-4800.

(2) The PPG Industries litigation produced an important decision in the U.S. Supreme Court on judicial review of informal agency actions and on allocation of responsibility for judicial review within the federal judiciary. There were three reported decisions:

Harrison v. PPG Industries, Inc., 446 U.S. 578 (1980);
PPG Industries, Inc. v. Harrison, 660 F.2d 628 (5th Cir. 1981); and
PPG Industries, Inc. v. Harrison, 587 F.2d 237 (5th Cir. 1979).

This "federal courts" case began as a protective action for judicial review of an informal decision by EPA that new source performance standards for fossil fuel-fired generating units under the Clean Air Act applied to "waste heat" boilers that were part of a cogeneration system.

The Fifth Circuit dismissed a petition for review (at the filing Company's request, over the protests of the government) on the ground that jurisdiction to review the

informal decision, which had been rendered by a letter, belonged in a federal district court.

The U.S. Supreme Court reversed, holding that an "any other final action" clause in the statute pertaining to review jurisdiction gave the court of appeals responsibility to undertake judicial review in the first instance. Five Justices wrote opinions, canvassing a number of issues relating to judicial review.

On remand to the Fifth Circuit, that court granted the petition for review on the merits, holding that the standards did not apply to waste-heat boilers.

I was lead counsel for the Company throughout the proceedings, which extended from 1977 through 1981.

The judges involved were as follows:

Fifth Circuit - Judges Roney, Tjoflat, and Hill
The U.S. Supreme Court - All of the Justices.

Co-counsel were Oliver Stockwell (Lake Charles, Louisiana), deceased, and Janet L. Weller (Cleary, Gottlieb, Steen & Hamilton, 2000 Pennsylvania Avenue, N.W., Washington, D.C. 20006-1801), (202) 974-1620. A party taking a similar position, Continental Oil Co., was represented by J. Berry St. John Jr. (Liskow & Lewis, 50th Floor, One Shell Square, New Orleans, Louisiana 70139), (504) 581-7979.

Principal opposing counsel were William Alsup, Assistant to the Solicitor General, now a U.S. District Judge for the Northern District of California, 450 Golden Gate Avenue, P.O. Box 36060, San Francisco, California 94102, (415) 522-2020, and Michael Carlton, U.S. Department of Justice.

(3) The Environmental Technology Council litigation addressed topics involving both the dormant and the exercised Commerce Clause of the U.S. Constitution. There were four reported decisions:

Environmental Technology Council v. Sierra Club, 98 F.3d 774 (4th Cir. 1996);
Hazardous Waste Treatment Council v. South Carolina, 945 F.2d 781 (4th Cir. 1991);

In Re: Sierra Club, 945 F.2d 776 (4th Cir. 1991); and Environmental Technologies Council v. South Carolina, 901 F.Supp. 1026 (D.S.C. 1995).

I represented the State of South Carolina, its governor, a state agency, and state officials in this litigation.

The litigation arose when the Hazardous Waste Treatment Council (which later changed its name to "Environmental Technology Council"), a trade association of entities engaged in treating and disposing of hazardous waste, brought a suit in federal district court seeking an injunction against South Carolina laws and rules governing the transportation and disposal of hazardous waste within the State. After hearings, the district court issued successive temporary restraining orders against certain of the laws and regulations and then entered a preliminary injunction. The district court also denied the Sierra Club's motion to intervene on the State's behalf. The State and the Sierra Club appealed to the Fourth Circuit which affirmed the preliminary injunction in part and remanded it in part. The Fourth Circuit reversed the denial of intervention to the Sierra Club. In the litigation, the Sierra Club supported the State and was supported by the State.

After further proceedings in the district court, judgment was entered by that court enjoining certain South Carolina laws and rules. On appeal, that judgment was affirmed by the Fourth Circuit.

The litigation began in 1990 and ended on the merits in 1996.

Throughout, I was lead counsel for the State of South Carolina, its governor, a state agency, and state officials.

The judges involved were:

D.S.Car. - Judge Matthew J. Perry
Fourth Circuit - Circuit Judges Murnaghan, Sprouse, and Motz, and Senior District Judges Murray and Young.

Co-counsel were James Patrick Hudson, Deputy Attorney General, Treva G. Ashworth, Deputy Attorney General, and Kenneth P. Woodington, Senior Assistant Attorney General (all at the South Carolina Attorney General's Office, P.O. Box 11549, Columbia, South Carolina 29211), (803) 734-3680, and Matthew Slater (Cleary, Gottlieb, Steen & Hamilton, 2000 Pennsylvania Avenue, N.W., Washington, D.C. 20006-1801), (202) 974-1930.

Principal opposing counsel were Stuart Henry Newberger (Crowell & Moring, 1001 Pennsylvania Avenue, N.W., Washington, D.C. 20004-2595), (202) 624-2649, and Jeter E. Rhodes, Jr. (Columbia, South Carolina), deceased.

Counsel for the Sierra Club were James Stuart Chandler, Jr. (P.O. Box 1380, Pawleys Island, South Carolina 29585), (803) 527-0078, and Robert Guild (314 Pall Mall, Columbia, South Carolina 29201), (803) 252-1419.

(4) The Southern Railway litigation concerned ICC tariffs for refrigerated car service. There were two reported decisions:

> Southern Ry. v. U.S., 502 F.Supp. 975 (D.D.C. 1980) (three-judge district court); and
> Southern Ry. v. U.S., 412 F.Supp. 1122 (D.D.C. 1976) (three-judge district court).

This complex litigation began with a suit filed in 1973 ostensibly to review an order entered by the Interstate Commerce Commission in 1962. However, it was strongly affected by a declaratory order issued by the Commission in 1972, a year prior to the actual suit. The case in essence addressed the interrelationships of numerous railroads throughout the country respecting their interchange of refrigerator cars under a "Division Sheet." There were numerous procedural contentions in addition to complex substantive issues, all of which are explicated in the excellent opinion for the three-judge court by Circuit Judge Leventhal in 1976 (412 F. Supp. 1122).

I was initially the second-chair to a senior partner, John Mallory. At his untimely death in 1975, I stepped forward and proceeded with the case.

The judges involved were:

Circuit Judges Harold Leventhal and Patricia Wald
District Judge William Jones
District Judge June Green.
District Judge Louis Oberdorfer.

Co-counsel was John Mallory (deceased).

Principal opposing counsel were John Wigges of the U.S. Attorney's Office and Hanford O'Hara for the Interstate Commerce Commission.

Intervening Defendant Pacific Fruit Express Co. was represented by David McDonald and John Guandalo.

To my knowledge, current addresses and telephone numbers are not readily available for these counsel.

(5) The Cane litigation involves takings issues and is still pending. There are two reported decisions:

Cane Tennessee, Inc. v. U.S., 54 Fed.Cl. 100 (2002);
and
Cane Tennessee, Inc. v. U.S., 44 Fed.Cl. 785 (1999).

Cane brought suit seeking just compensation for the taking by the Department of Interior's Office of Surface Mining of its embedded coal on land in Tennessee. The reported decisions address a number of issues involving Tennessee mineral and royalty interests, as well as several procedural issues.

I have been lead counsel for Cane throughout the proceedings, which began in 1996. My partner, Matthew Slater, handled this matter during my sabbatical leave for the academic year 2000-2001.

The judge of the U.S. Court of Federal Claims who is hearing the matter is Judge Emily Hewitt.

My co-counsel is Matthew Slater (Cleary, Gottlieb, Steen & Hamilton, 2000 Pennsylvania Avenue, N.W., Washington, D.C. 20006-1801), (202) 974-1930.

Principal opposing counsel was Marc A. Smith of the U.S. Department of Justice (950 Pennsylvania Avenue, N.W., Washington, D.C. 20530), (202) 305-0244. The principal opposing counsel is now Kristine S. Tardiff of the U.S. Department of Justice (55 Pleasant Street, Room 352, Concord, NH 03301), (603) 225-1562 ext. 283. Daniel Kilduff, who at first was with the U.S. Department of Justice and now is with the U.S. Department of Interior (1849 C Street, N.W., Washington, D.C. 20240), (202) 208-4083, also has participated.

(6) The Horn & Hardart litigation concerned the "further relief" provision of the Declaratory Judgment Act, 28 U.S.C. § 2202, and various "federal courts" issues. There is one reported decision in the portion of the proceedings in which I was lead counsel:

> Horn & Hardart Co. v. National Railroad Passenger Corp., 843 F.2d 546 (D.C. Cir. 1988).

The underlying dispute arose when Amtrak terminated Horn & Hardart leases for premises in Amtrak's Pennsylvania Station in New York City, and Horn & Hardart held over in the premises after the termination. Horn & Hardart brought a declaratory judgment action in district court claiming the termination violated the lease provisions, but the district court upheld the termination. That decision was affirmed on appeal. Amtrak then brought an action for "further relief," seeking enforcement of the end-of-term holdover and cost-on-default clauses in the leases. The district court awarded judgment for Amtrak and that decision was affirmed on appeal.

The decision by the D.C. Circuit on appeal is a leading precedent respecting the further-relief provision of the Declaratory Judgment Act.

I served as lead counsel for Amtrak during the further-relief appellate proceedings and through post-judgment satisfaction.

The judges were:

> D.C. Circuit - Circuit Judges Wald (then Chief Judge), Starr, and Williams.

My co-counsel was Matthew Slater (Cleary, Gottlieb, Steen & Hamilton, 2000 Pennsylvania Avenue, N.W., Washington, D.C. 20006-1801), (202) 974-1930.

Opposing counsel was John D. Roberts, Jr. (Hogan & Hartson, 555 Thirteenth Street, N.W., Washington, D.C. 20004-1109), (202) 637-5810.

(7) The Dico litigation concerned a reimbursement provision set out at 42 U.S.C. § 9606(a). The primary litigation engendered two reported decisions:

> Dico, Inc. v. Diamond, 35 F.3d 348 (8th Cir. 1994); and
> Dico, Inc. v. Diamond, 821 F.Supp. 562 (S.D. Iowa 1993).

The case arose when Dico complied with an order from EPA, requiring that Dico provide a remedy for contamination at industrial and other property in Des Moines, Iowa. Dico claimed that a discrete portion of the contamination was attributable solely to others and it applied for reimbursement of that part of its costs and expenses incurred in addressing this contamination. EPA denied the claim, and Dico then brought suit in the U.S. District Court for the Southern District of Iowa. The district court granted summary judgment in favor of the defendants. On appeal, the Eighth Circuit reversed and remanded, reinstating Dico's claim.

The Eighth Circuit's opinion deals with issues of judicial deference and with application of the doctrines explicated in Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984), and Adams Fruit Co. v. Barrett, 494 U.S. 638 (1990).

I was lead counsel for Dico from the outset of the administrative proceedings in 1986 to 1994, when the Eighth Circuit's decision was rendered.

The judges were

> S.D. Iowa - Judge Harold D. Vietor
> Eighth Circuit - Circuit Judges Bowman, Heaney, and Beam.

My co-counsel were Michael R. Lazerwitz and Michael A. Mazzuchi (Cleary, Gottlieb, Steen & Hamilton, 2000 Pennsylvania Avenue, N.W., Washington, D.C. 20006-1801), (202) 974-1680 and (202) 974-1572.

Principal opposing counsel were Marc A. Smith, (202) 305-0244, and Jacques B. Gelin of the U.S. Department of Justice (950 Pennsylvania Avenue, N.W., Washington, D.C. 20530), then (202) 514-2762.

In a secondary litigation, there were two reported decisions on jurisdictional issues:

> Dico, Inc. v. U.S., 48 F.3d 1199 (Fed. Cir. 1995); and
> Dico, Inc. v. U.S., 33 Fed.Cl. 1 (1993).

Dico filed the secondary action in the U.S. Court of Federal Claims just as the U.S. Court of Appeals for the Federal Circuit was reconsidering prior precedents interpreting 28 U.S.C. § 1500, which governs the jurisdiction of the U.S. Court of Federal Claims where a related action is pending in another court. The decisions in UNR Indus., Inc. v. United States, 962 F.2d 1013 (Fed. Cir. 1992) (in banc), aff'd sub nom., Keene Corp. v. United States, 508 U.S. 200 (1993), and Loveladies Harbor, Inc. v. United States, 27 F.3d 1545 (Fed. Cir. 1994) (in banc), recast and clarified the pertinent jurisdictional precedents. I participated in Keene as counsel for an amicus curiae, and, at the Court's suggestion, also as counsel for an amicus curiae in Loveladies Harbor. The Federal Circuit's Dico decision in 1995 is part of this jurisdictional evolution. The judges in these cases were

> Federal Circuit - Circuit Judges Rich, Plager, and Lourie.
> U.S. Court of Federal Claims - Judge Weinstein.

(8) The litigation known as The Benzene Case addressed the rulemaking power of the Occupational Health and Safety Administration. There were two reported decisions:

> Industrial Union Department, AFL-CIO v. American Petroleum Institute, 448 U.S. 607 (1980); and

American Petroleum Institute v. Occupational Safety and Health Administration, 581 F.2d 493 (5th Cir. 1978).

The litigation began with seven petitions for review of OSHA's standard limiting occupational exposure to benzene. The agency's standard was set aside by the Fifth Circuit, and that decision was affirmed by the U.S. Supreme Court.

The proceedings began in 1978 and concluded in 1980.

I was lead counsel for the Rubber Manufacturers Association, and argued for a "user" group.

Lead counsel for a "producer" group was Edward W. Warren (Kirkland & Ellis, 655 15th Street, N.W., Washington, D.C. 20005), (202) 879-5018. My role for the user group was secondary to that of Mr. Warren's for the producer group, although both of us presented arguments at each stage of the proceedings.

Principal counsel for the agency in the U.S. Supreme Court was William Alsup, an Assistant to the Solicitor General, now a U.S. District Judge for the Northern District of California (450 Golden Gate Avenue, P.O. Box 36060, San Francisco, California 94102), (415) 522-2020. Lead counsel for the agency in the court of appeals was Benjamin W. Mintz.

Principal counsel for the Industrial Union Department, AFL-CIO (an intervenor in the court of appeals and a petitioner in the U.S. Supreme Court) was George H. Cohen (Bredhoff & Kaiser, 1000 Connecticut Avenue, N.W., Washington, D.C. 20036), (202) 833-9340.

The judges were:

Fifth Circuit - Circuit Judges Coleman, Clark, and Tjoflat
The U.S. Supreme Court - All of the Justices.

(9) The SCM cases were suits brought under the Clean Air Act. The first suit was brought by the United States for civil penalties and injunctive relief and a later "citizen's suit" was brought by the Maryland Waste

Coalition for injunctive relief. There were three reported decisions:

U.S. v. SCM Corp., 667 F.Supp. 1110 (D. Md. 1987);
Maryland Waste Coalition v. SCM Corp., 616 F.Supp. 1474 (D. Md. 1985); and
U.S. v. SCM Corp., 615 F.Supp. 411 (D. Md. 1985).

This was a classic "overfiling" case. SCM conducted industrial operations at a large plant complex in Baltimore, Maryland. Emissions from three units at the plant, "calcining kilns," were regulated by the state pursuant to a State Implementation Plan approved by EPA. SCM entered into an administrative consent order with the state agency responsible for regulating air emissions, and carried out required actions under the consent order. EPA was dissatisfied with this resolution and filed an enforcement action in federal district court, covering the same matters as were addressed by the state consent order.

The first reported opinion addressed the company's arguments that the overfiling suit was improper. The district court denied relief.

The second reported opinion concerned the suit by the Maryland Waste Coalition. That action was ordered dismissed to the extent that it overlapped with the government's suit but the Coalition was given leave to file an amended complaint with respect to any specific non-overlapping claims it might have.

The third reported decision came after a trial of more than three weeks' duration and sets out the basis for the court's judgment. EPA obtained an additional penalty but was denied all injunctive relief. The intervening plaintiff, the Maryland Waste Coalition, was denied all injunctive relief and judgment was entered for the company against the Coalition. The case is one of a very few enforcement actions of its type to be tried to judgment in a federal district court.

The proceeding began in 1985 and judgment was entered in 1987.

The judge in the U.S. District Court for the District of Maryland was Norman P. Ramsey.

I was lead counsel for the Company throughout the proceedings, including the trial. My co-counsel were Matthew Slater (Cleary, Gottlieb, Steen & Hamilton, 2000 Pennsylvania Avenue, N.W., Washington, D.C. 20006-1801), (202) 974-1930, and Joseph S. Kaufman (100 Light Street, Suite 1330, Baltimore, Maryland 21202-1183), (410) 576-0400.

Principal counsel for the United States were Fred R. Disheroon and David I. C. Thomson of the U.S. Department of Justice (950 Pennsylvania Avenue, N.W., Washington, D.C. 20530), (202) 633-4797.

Principal counsel for the Maryland Waste Coalition, intervening plaintiff, was G. Macy Nelson (401 Washington Avenue, Suite 803, Towson, Maryland 21204-4806) (410) 296-8166.

(10) Smith v. Ehrlich was a suit by an attorney for a legal services agency in Greenville County, South Carolina, against the president of the Legal Services Corporation and the Corporation.

There was one reported decision:

> Smith v. Ehrlich, 430 F.Supp. 818 (D.D.C. 1976) (three-judge district court).

At the time, the Legal Services Corporation Act and regulations issued under that Act barred staff attorneys from seeking election to political offices during a period when they were receiving compensation from the Corporation. Plaintiff and an intervenor brought suit, alleging that they had engaged in prohibited political activities, and they sought an injunction against the operation of the pertinent portions of the Act and regulations on the grounds that they abridged the First and Fifth Amendments to the U.S. Constitution.

The three-judge district court granted defendants' motion for judgment on the pleadings, upholding the constitutionality of the Act and regulations.

The judges in the U.S. District Court for the District of Columbia were Circuit Judge Carl McGowan and District Judges George L. Hart, Jr. and June L. Green.

I was the lead, and indeed only, counsel for the defendants, Thomas Ehrlich, then-president of the Legal Services Corporation, the Corporation, and another individual with the Corporation, throughout the proceedings.

Counsel for the plaintiff and intervenor were Leon Friedman (Hempstead, New York), then (516) 560-3859, and Melvin L. Wulf (Beldock Levine & Hoffman, 99 Park Avenue, New York, New York 10016-1503), (202) 490-0400.

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

Besides litigation, I have also represented parties to major business transactions, addressing regulatory aspects of the transactions.

I have also been called upon to provide a second opinion on litigated disputes, controversies, and regulatory matters.

20. Criminal History: State whether you have ever been convicted of a crime, within ten years of your nomination, other than a minor traffic violation, that is reflected in a record available to the public, and if so, provide the relevant dates of arrest, charge and disposition and describe the particulars of the case.

I have never been convicted of a crime other than a minor traffic violation.

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.

Under a retirement plan with my law firm, set out in an agreement dated January 1, 1993, I will receive annual payments. Prior to my leaving the firm, those payments will be resolved to a fixed annual sum certain.

There are no other deferrals of income or receipts.

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 would not handle any matters in which my firm was representing a party. I have otherwise identified the entities as to which I would have a conflict, and those entities would be maintained on a currently applicable list.

There are no general categories of matters as to which I would have a conflict.

I would follow the Code of Conduct for United States Judges with respect to any conflicts that might arise.

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

Yes, I plan to serve without compensation as a trustee of a testamentary trust established by a member of my immediate family and also as the president and a director of Busy Way Farms, Inc., a Subchapter S Iowa family-farm corporation. I anticipate that certain out-of-pocket expenses would be reimbursed by the family-farm corporation.

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.)

The Financial Disclosure Report for Nominees is attached.

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

A financial net worth statement is attached.

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

No, apart from contributions to campaigns by others.

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.

Throughout my professional career, I have represented indigent and other disadvantaged persons on a pro bono basis. Some of those representations have involved criminal defendants appealing their convictions.

For example, in the year prior to going on sabbatical leave, I provided such assistance to a woman who had been convicted of first-degree murder in a Maryland state court and was appealing her conviction. The resulting decision is reported as Jensen v. State, 127 Md. App. 103, 732 A.2d 319 (1999), cert. denied, 356 Md. 178, 738 A.2d 855 (1999). I and others at my firm continued to assist this woman in seeking post-conviction relief.

Among earlier such cases, two produced significant reported decisions. They were Kidwell v. Department of the Army, 56 F.3d 279 (D.C. Cir. 1995), and Perkins v. United States, 446 A.2d 19 (D.C. 1982). In these cases as in others, the matters were assigned to our firm by the court as part of programs to provide legal assistance to indigent persons. In each instance, I supervised and worked with younger lawyers at our firm.

Kidwell concerned a discharged serviceman who had requested that the Army Board for Correction of Military Records change his general discharge to a medical discharge. The Board refused and the serviceman sought review in the U.S. District Court for the District of Columbia. That court also denied relief, holding that it had no jurisdiction to hear the case. Our representation on appeal concerned the jurisdictional implications of the Little Tucker Act, which gives federal district courts concurrent jurisdiction with the U.S. Court of Federal Claims in most Tucker Act cases seeking less than $10,000. The decision by the U.S. Court of Appeals for the D.C. Circuit is significant for its explication of the jurisdictional reach of the U.S. District Courts and the U.S. Court of Federal Claims.

Perkins was an appeal by two men who were convicted in the Superior Court of the District of Columbia of malicious disfigurement while armed and of assault with a dangerous weapon. Mr. Hamilton was our client on appeal and his co-defendant, Mr. Perkins, was represented on appeal by the Public Defender Service. The opinion by the District of Columbia Court of Appeals traces the history of the common law crime of malicious disfigurement and explains and delineates the elements of that crime as it is applied in the District of Columbia.

Apart from legal work on behalf of disadvantaged persons, I have also led civic activities that benefit people in need of assistance. For example, my family and I led a disaster-relief team from our church to Iowa to help with rebuilding homes damaged by floods. In addition, for seven years I served on the board of trustees of an independent school that provides financial aid to a substantial number of needy students. For three years I served as the chairman of the board of that school.

2. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates -- through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What you have done to try to change these policies?

No. N/A. N/A.

3. Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).

No. N/A. My resume was actually forwarded by one or more of my children while I was on an academic sabbatical at Brown University and interviews followed from that. I was initially asked to participate in interviews at the White House. I thereafter was contacted by the Department of Justice and provided written materials to the Department and had additional interviews with the Department. A background check was undertaken and completed by the Federal Bureau of Investigation. I was informed that I would be nominated.

4. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as asking how you would rule on such case, issue,or question? If so, please explain fully.

No. N/A.

5. Please discuss your views on the following criticism involving "judicial activism."

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped-many of the prerogatives of other branches and levels of government.

Some of the characteristics of this "judicial activism" have been said to include:

a. A tendency by the judiciary toward problem-solution rather than grievance-resolution;

b. A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;

c. A tendency by the judiciary to impose broad, affirmative duties upon governments and society;

d. A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and

e. A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

The judiciary, along with each of the other two branches of the federal government, must adhere to its assigned role in our Nation's constitutional structure. The framework of our government is built upon such a separation of powers.

My views on these matters are generally expressed in the attached law review article entitled Looking at Federal Administrative Law With a Constitutional Framework in Mind, 45 Okla. L. Rev. 5 (1992).

Senator CORNYN. We will leave the record open until 5:00 p.m. on Wednesday, April 2, for any Senators who wish to submit written questions to any of the nominees appearing before the Committee this afternoon.

With that, ladies and gentlemen, this hearing on judicial nominations is now adjourned.

[Whereupon, at 4:37 p.m., the Committee was adjourned.]

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

[Additional material is being retained in the Committee files.]

QUESTIONS AND ANSWERS

Response to Questions for Susan G. Braden
Nominee to the United States Court of Federal Claims
Submitted by Senator Leahy

Question 1

According to your Senate questionnaire, you have been a member of the Federalist Society for more than 14 years. The Federalist Society website describes itself as "a group of conservatives and libertarians interested in the current state of the legal order." One of its stated goals is "reordering priorities within the legal system to place a premium on individual liberty, traditional values, and the rule of law."

a. Please explain your understanding of what legal rights are included in the phrase "individual liberty" and what values are included in the term "traditional values?"

b. If you are confirmed as a judge on the Court of Federal Claims, how would you continue your interest in "reordering priorities" "to place a premium on individual liberty" and "traditional values?"

Answer to Question 1(a):

I am aware of no partisan nor ideological litmus test for membership or attendance at any event, all of which are conducted in the public domain. Indeed, my husband, a life-long liberal Democrat, also has been a member of the Federalist Society. I have enjoyed attending and participating in a wide range of substantive programs and seminars sponsored by the Federalist Society over the years and am proud of my affiliation with this organization.

I assume that the term "individual liberty" refers to individual rights enumerated in the Declaration of Independence and Bill of Rights and guaranteed protection under law by the Constitution, as interpreted by the Supreme Court of the United States. I assume that the term "traditional values" refers to such values as government by democracy, respect for the institutions and individuals that ensure its continuity, respect for the rights of the individual and self-determination, and respect for the importance of family and community.

Answer to Question 1(b):

If I am fortunate enough to be confirmed, my only duty as a judge will be to construe the Constitution and laws enacted by Congress, as interpreted by the Supreme Court and/or the United States Court of Appeals for the Federal Circuit. I intend to fulfill and honor that duty.

Question 2

In your questionnaire, you also list your membership in groups such as the Defenders of Property Rights, Competitive Enterprise Institute and Citizens for a Sound Economy. These organizations all take a very strong position on property rights and takings issues that frequently come before the Court of Federal Claims. As you are undoubtedly aware, all of these organizations strongly supported federal legislation that would have required compensation for any federal regulation that reduced the value of any portion of any parcel of property by more than 50 percent.

a. Do you agree with these organizations' view that Supreme Court "takings" rulings do not adequately protect property rights? If so, please explain. If not, please explain why have you been a member of each of these organizations?

b. In light of your support of these organizations, and their advocacy of compensating landowners whenever regulations impact any portion of their property, what facts demonstrate that you will be able to put aside your personal views and be a fair and neutral adjudicator of takings claims that come before you as a judge, if you are confirmed?

Answer to Question 2(a):

I have not been involved in the formulation or advocacy of any positions that the Defenders of Property Rights, the Competitive Enterprise Institute, and/or Citizens for a Sound Economy may have taken before the Congress, in general, and specifically have not participated in any way or advocated any positions that these organizations may have taken with regard to property rights. In fact, I believe that the Supreme Court's guidance in this area has been clear and that legislation is not necessary to protect the Fifth Amendment rights of property owners.

I have made financial contributions to these organizations and others because I believe that our democratic system of government benefits from having competing points of view on all public policy matters.

Answer to Question 2(b):

If I am fortunate enough to be confirmed, my only duty as a judge will be to construe the Constitution and laws enacted by Congress, as interpreted by the Supreme Court and/or the United States Court of Appeals for the Federal Circuit. I intend to fulfill and honor that duty.

Question 3

You are also on the Legal Advisory Board of the Washington Legal Foundation (WLF) and you have represented the WLF in several cases. For example, you co-wrote an amicus brief for the WLF arguing that an Iowa tax was unconstitutional. *Kraft Gen. Foods, Inc. v. Iowa Dept of Revenue & Finance*, 505 U.S. 1022 (1992). According to the WLF website, this nonprofit legal group "publishes and litigates to promote free enterprise legal principles" and is the favorite voice of noted conservatives. Please explain what you have done to support the "free enterprise" objectives of the WLF. Please explain any facts that can assure the Senate that you will fairly consider the propriety of governmental regulations against challenges from entities similar to or affiliated with the WLF, despite your alliance with this organization? Will you continue to be affiliated with the WLF, the Federalist Society, the Defenders of Property Rights, the Competitive Enterprise Institute and the group called Citizens for a Sound Economy, if you are confirmed? Have you continued to be involved with these groups since you were first nominated? If so, please explain how so.

Answer to Question 3:

I also am proud of my membership on the Legal Advisory Board of the Washington Legal Foundation, the current Chairman of which is former Attorney General Richard Thornburgh. During my tenure, the Board has been comprised of academics, former federal and state government officials, corporate general counsels, and members of private practice, including such prominent Democrats as former Ambassador Robert S. Strauss and Thomas Hale Boggs.

During my tenure on the Board, beginning in 1992 and ending in 2002, I believe that I attended all of the semi-annual lunch meetings, where Board members are provided with an update on the activities of the Foundation and asked for comment. In addition, over the years, I have attended many of the public press briefings on current legal issues, such as cases before the Supreme Court. In addition, I also have made sporadic modest financial contributions to the Washington Legal Foundation and, as you noted, co-authored an amicus brief in a case challenging the imposition of a state tax that the Supreme Court held was unconstitutional. In addition, I authored a briefing paper soliciting public comment on the Antirust Division's Intellectual Property Guidelines.

If I am fortunate enough to be confirmed, my only duty as a judge will be to construe the Constitution and laws enacted by Congress, as interpreted by the Supreme Court and/or the United States Court of Appeals for the Federal Circuit. I intend to fulfill and honor that duty.

Since my nomination on May 1, 2002, I have not participated in nor contributed financially or otherwise to the Defenders of Property Rights, the Competitive Enterprise Institute, or Citizens for a Sound Economy. Since there is no formal membership in any of these groups, there was no reason to write a formal withdrawal notice. In 2002, I resigned from the

Washington Legal Foundation, but made a modest financial contribution last year. I have not resigned from the Federalist Society and in the fall of 2002 sponsored a table at the annual dinner, which I have done for many years.

I will comply with the Code of Judicial Conduct with respect to my future participation in any and all organizations. I would hope to be able participate in the activities of the American Bar Association, the American Intellectual Property Law Association, the Federal Circuit Bar Association, the United States Court of Claims Bar Association, the D.C. Women's Bar Association, and the Federalist Society in the same manner as other members of the federal bench.

Question 4

According to your Senate questionnaire, you have been extremely active in Republican politics. For example, you co-chaired Lawyers for Bush-Cheney and volunteered for the campaign in West Virginia and served as counsel to the Republican National Conventions in 2000, 1996, 1992, and 1988. You were also on the Steering Committee for George W. Bush for President and the Presidential Exploratory Committee for Governor Bush. You were similarly active in the campaigns of Dole-Kemp and Bush-Quayle. You were also a member of the Board of Directors of the Republican National Lawyers Association for fifteen years and were also elected as an At-Large Member of the D.C. Republican Committee in 2002 and recently resigned. While political experience is certainly not a disqualifier, what assurances can you give the Committee that you will be able to put aside your partisan background and be an impartial judge, if you are confirmed?

Answer to Question 4:

I also am very proud of my activity in the political process of our country. Upon my nomination in May 1, 2002, I resigned from my elected position in the D.C. Republican Committee and voluntary association with the Republican Lawyers Association. Since May 1, 2002, I have not participated in any partisan activities nor made any political contributions. From 1972-1984, I served as a career lawyer in two agencies of the federal government and was not involved or associated in any political activities. Therefore, I am sensitive and have been faithful to the requisite that career members of the federal government should avoid even the appearance of engaging in partisan political activity; and, as a judge, I will not be involved in any partisan political activity.

Question 5

You are nominated to fill the seat of the Honorable Roger Andewelt, who passed away in 2001 after battling cancer. Judge Andewelt was well known and well respected for his fairness, his courtesy and the dignity with which he treated all litigants, as well as

the members of the court family. If you are confirmed to his seat, how will you conduct yourself to ensure that litigants are accorded respect and treated with patience and compassion, no matter how difficult the legal issues or circumstances may be?

Answer to Question 5:

As I mentioned at the beginning of my hearing, I was deeply honored to be nominated by President Bush to fill the vacancy created by Judge Andewelt's untimely death. I did so because I wanted to honor his memory. I was a colleague of Roger's in the Antitrust Division of the Department of Justice for over a decade. Our children attended the same school from pre-K through high school. We shared many of the same personal and professional friends. And, after he went on the bench, we often spoke on CLE programs about our mutual interest in antitrust and intellectual property law, many years before this topic was in vogue. I know what a decent and brilliant man Roger was and how much he was and is beloved by many. It would be presumptuous of me to promise this Committee that I will be able to replicate Roger's legacy. We are different people, but I believe we share respect for the rule of law and understand the important contribution the United States Court of Federal Claims has and can make in this regard. I can promise the Committee that I will try to honor Roger's legacy by according respect to all litigants and treating all with patience, no matter how difficult the legal issue or circumstances.

Responses to Written Questions of Senator Richard J. Durbin
by J. Leon Holmes
Nominee to the U.S. District Court for the Eastern District of Arkansas
April 4, 2003

1. **Mr. Holmes, you have been the founder and leader of several organizations whose mission is to oppose abortion rights, and you have written many articles advocating anti-abortion positions. For example, you have written that abortion is murder and "the slaughter of unborn children." You have stated that abortions should not be available for rape victims "because conceptions from rape occur with the same frequency as snow in Miami." You have written that "the abortion issue is the simplest issue this country has faced since slavery was made unconstitutional and it deserves the same response." You wrote a column attempting to recast the Lincoln-Douglas debates as equivalent to the abortion debate, and you stated that Douglas was "pro-choice on the slavery issue." And you have compared abortion to the Holocaust, writing: "The proabortionists counsel us to respond to these [societal] problems by abandoning what little morality our society still recognizes. This was attempted by one highly sophisticated, historically Christian nation in our century – Nazi Germany." You have been very critical of *Roe v. Wade* and *Planned Parenthood v. Casey*, and you have written that they are the "antithesis of natural law."**

(A) Mr. Holmes, given your strong views against abortion, how could you be fair and open-minded if a case involving abortion came before you?

RESPONSE: Senator Durbin, I recognize, as you do, that the judiciary must not only be fair and impartial but also must appear to be fair and impartial. I also recognize, as you do, that the issue of abortion has divided our society, that the issues that divide the two sides are terribly important, and that those issues evoke very strong emotions. I have to acknowledge that my own rhetoric, particularly when I first became involved in the issue in 1980 and perhaps for some years thereafter, has sometimes been unduly strident and inflammatory. The sentence about rape victims, which was made in a letter to the editor in 1980, is particularly troublesome to me from the distance of 23 years later. Regardless of the merits of the issue, the articulation in that sentence reflects an insensitivity for which there is no excuse and for which I apologize. I hope that you will consider the fact that this comment, and many others in the preface to your questions, are not indicative of the courtesy, civility, gentleness, and reasonableness for which I believe that I have become known in the Arkansas legal community over the past several years.

If I am confirmed as a district court judge, I could be fair and impartial. I have been encouraged in this belief by the confidence reposed in me by numerous lawyers in the Arkansas legal community who disagree with the views that I have espoused, as a private citizen, regarding the abortion issue. Let me be clear that *Roe v. Wade*, as affirmed by *Casey*, is the law of the land. As a district judge, I would be bound to follow it and would do so.
My belief that I could be fair and impartial is supported by pro-choice lawyers

who know me well and who have written to the Committee in support of my nomination. I know that the representative from the American Bar Association who investigated my nomination posed this question or questions like it to numerous lawyers and judges who know me. Both Senator Lincoln and Senator Pryor spoke with me and with numerous other lawyers about this issue.

(B) In order to allay any concerns that litigants may have, are you prepared to recuse yourself in cases that came before you involving abortion rights?

RESPONSE: Senator Durbin, I place a very high value on my reputation for integrity. As I understand it, I am prohibited from committing in advance as to what I might do in any particular case or kind of case, and I presume that the prohibition against committing in advance would include a prohibition on committing as to whether I would or would not recuse. In any case in which litigants were concerned about my fairness and impartiality, or the appearance of impropriety, I would take those concerns seriously. I would follow 28 U.S.C. § 455 and the Code of Conduct for United States Judges when making recusal decisions.

(C) I understand that you will follow the law if confirmed, but do you feel morally bound to restrict the rights established in *Roe* if given that opportunity in cases that would come before you?

RESPONSE: In my understanding, the role of a judge differs from the role of a citizen. I believe that citizens have the duty to participate in the democratic process and, within the bounds of the law, to work toward what they believe to be a more just society by advocating and promoting their political views. The role of a judge is different. A judge, when ruling on a legal issue, does not speak in the judge's name or in the judge's capacity as a citizen participating in the democratic process. The judge is an instrument of the court and hence of the law. Thus, the judge's personal moral views are irrelevant. *Roe v. Wade* is the law of the land. As a judge, I would be bound by oath to follow that law. I do not see how a judge could follow the law but restrict the rights established by that law.

(D) Do you believe that a judge who accepts *Roe* as settled law and rules to continue its protection of a woman's right to choose is a "proabortionist?" How do you define "proabortionist?"

RESPONSE: Senator Durbin, I want to reassure you that it is not my habit to call any judge or any court "proabortionist." I have used that term to refer to persons who support abortion rights in the political debate over abortion, as distinct from those who see themselves as supporting the right to life of the unborn child. I do not believe that a judge who accepts *Roe* as settled law and continues its protection is a "proabortionist," because such a judge does not speak in his or her own name but in the name of the court and as a voice of the law. I do

not believe that any of my published writings have ever attacked the dignity of any court or any judge with respect to the abortion issue (or any other issue). I believe that any disagreements that I have expressed with the Supreme Court of the United States or any other court have always been done respectfully and in a manner that is consistent with continued respect for the rule of law and for the role of courts within the rule of law.

2. **In *Griswold v. Connecticut*, the Supreme Court for the first time recognized the constitutional right to privacy. It went on to reaffirm and expand this right in *Eisenstadt v. Baird*. Following from these decisions, the Supreme Court then recognized constitutional protections for a woman's right to choose in *Roe v. Wade*.**

(A) Do you believe in and support a constitutional right to privacy?

RESPONSE: I recognize the binding force of the court's holding in *Griswold* and *Eisenstadt* recognizing a right to privacy. I have never engaged in political activity directed toward overturning the result obtained in *Griswold* or *Eisenstadt*. If I am confirmed by the Senate, I would follow the rulings of the Supreme Court in these cases, as in other cases decided by the Supreme Court or the United States Court of Appeals for the Eighth Circuit.

(B) If so, do you believe the constitutional right to privacy encompasses a woman's right to have an abortion?

RESPONSE: *Roe v. Wade* establishes that the constitutional right to privacy includes a woman's right to have an abortion.

3. **In a recent article published in the March 9, 2003 *New York Times* magazine, Judge Luttig of the 4th Circuit discussed the politics of judicial appointments. He said: "Judges are told, 'You're appointed to do these things.' So then judges start thinking, Well, how do I interpret the law to get the result that the people who pushed for me to be here want me to get? I believe that there's a natural temptation to line up as political partisans that is reinforced by the political process." Do you agree with this analysis by Judge Luttig? Why or why not?**

RESPONSE: I must respectfully disagree with this analysis by Judge Luttig. It has not been my observation of the federal judges in Arkansas that they line up as political partisans. My observation has been to the contrary.

I have committed both to Senator Lincoln and to Senator Pryor that I will be fair and impartial, and I make that commitment to the Committee. I made that same commitment to the representative from the American Bar Association. Hence, my experience is not at all like that described in the quotation from Judge Luttig in your question.

4. During the 2000 presidential campaign, President Bush pledged that he would appoint "strict constructionists" to the federal judiciary, in the mold of Supreme Court Justices Clarence Thomas and Antonin Scalia.

(A) How would you describe the judicial philosophy of Justices Scalia and Thomas?

RESPONSE: As I understand it, Justice Scalia and Justice Thomas have, in separate writings, explained that their goal in interpreting the Constitution or acts of Congress is to give effect to the original meaning of the document being construed.

(B) How would you describe your own judicial philosophy, and how do you believe it is different from or similar to Justices Scalia and Thomas?

RESPONSE: In my view, the notion that government is a rule of law and not of men implies certain consequences. First, it implies that the law should, at least in principle, be ascertainable at any given moment. If so, the law must be something with some objective existence that can be discovered, rather than something that a judge is free to create *post hoc*. In aid of this aspiration toward the rule of law and not of men, the founders recognized that the Constitution should provide for a separation of powers so that the branch of government that makes the law is separate from the branch of government that interprets the law, as well as the branch of government that enforces the law. As Madison stated in Federalist No. 47, "[t]he accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." Therefore, it is essential in our scheme of government that judges do their utmost to interpret the law and to refrain in all instances from efforts to usurp the functions of the legislative branch.

(C) As a judge, would you interpret the Constitution strictly according to its original understanding in 1789?

RESPONSE: As a judge of the United States District Court, if confirmed, I will be bound to follow the interpretation of the Constitution adopted by the Supreme Court of the United States and the United States Court of Appeals for the Eighth Circuit; and I will do so to the best of my ability. In cases on which neither the Supreme Court nor the Eighth Circuit have spoken, I will follow the reasoning of the precedents most closely on point in an effort to arrive at the result that would be reached by the Supreme Court or the Eighth Circuit were one of them sitting in my place.

(D) Do you think that the Supreme Court's most important decisions in the last century – *Brown v. Board of Education, Miranda v. Arizona, Roe v. Wade* – are consistent

with strict constructionism? Why or why not?

RESPONSE: I do not recall that I have used the term "strict constructionists" in reference to the federal judiciary or any line of thought that judges should follow in interpreting the constitution or statutes generally. Some have defined "strict constructionism" as the view that judges should interpret a document according to its literal terms, without looking to other sources to ascertain its meaning. If that is what is meant by strict construction, *Brown v. Board of Education* is compatible with that view, while *Miranda v. Arizona* may be, depending on the "literal meaning" of the Fourth Amendment. I do not understand that the court in *Roe v. Wade* contended that the decision there was mandated by "strict construction" as that term is defined above. I recognize that these decisions are the law of the land. They are binding precedent on all courts. If I am confirmed, I would do my utmost to follow these and all other precedents of the Supreme Court of the United States.

5. The legal profession puts a strong emphasis on service to our communities and to those in our society who are disadvantaged.

(A) Can you cite examples in your career as a lawyer that show you have a demonstrated commitment to equal rights and that you are devoted to continuing the progress made on civil rights, women's rights, and individual liberties?

RESPONSE: In the late 1990's, I served on a commission to draft a proposed plan of redistricting for the judges of the Arkansas Court of Appeals and to recommend such a plan to the Arkansas General Assembly. The majority of the commission recommended a redistricting plan that would have had the effect of permitting each judge to have the opportunity to run for re-election except for the one African-American woman who serves on that court, Judge Andree Roaf. As to Judge Roaf, the redistricting plan would have placed her residence in a district without an open seat at the time her term was to expire. Consequently, the plan would have effectively removed from office the only African-American woman on the Arkansas Court of Appeals. I opposed that plan because it would have deprived Judge Roaf, and only Judge Roaf, of the opportunity to seek re-election when her term expired. I testified in the House of Representatives sitting as a committee of the whole against the plan proposed by the commission and in favor of a plan proposed by an African-American member of the House of Representatives, Michael Booker, whose plan would have permitted each judge, including Judge Roaf, the opportunity to seek re-election at the expiration of his or her term.

I have represented persons of many races and both genders. I have appeared before judges who are male and female, African-American and Caucasian. I have practiced law as an associate in the Wright, Lindsey & Jennings law firm, which was the first large law firm in the state of Arkansas to have an African-American

partner, Wendell Griffen. Mr. Griffen (now Judge Griffen) was the person to whom I sent my letter when I first inquired about employment at that firm. Some of the partners at that firm were women. One of the partners was Annabelle Clinton Imber, who now serves on the Supreme Court of Arkansas. When Justice Imber first ran for that office, I was approached about seeking that position but declined to enter a race against Justice Imber, whom I count as a friend. Justice Imber became the first woman elected to the Supreme Court of Arkansas.

(B) In your experience as a lawyer, how would you assess the quality of legal representation provided to indigent criminal defendants? As a federal judge, what steps would you take to assure that all defendants received competent counsel?

RESPONSE: The quality of legal representation provided to indigent criminal defendants has been greatly improved by the creation of the federal public defender's office. I know our federal public defender, Jennifer Horan, and some of her deputies. I believe that they do an excellent job. The lawyers who work in the federal public defenders' office in the Eastern District of Arkansas are talented and experienced criminal defense lawyers. They are equal in talent and experience to the lawyers in the United States attorneys' office. As a federal judge, I would strive to ensure that each criminal defendant had an attorney, either from the public defenders' office or from the panel of attorneys who are appointed to represent indigent criminal defendants, with the requisite talent and experience to provide competent legal defense in the particular case. In addition, to the extent that the federal judges have authority to do so, I would take steps to see that the attorneys representing indigent criminal defendants have sufficient resources to perform the kind of investigation necessary for an adequate defense, and to obtain expert witnesses that may be required.

6. You are a member of the Federalist Society. 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. While some members of the academic community have dissented from these views, by and large they are taught simultaneously with (and indeed as if they were) the law. The Federalist Society for Law and Public Policy Studies is a group of conservatives and libertarians interested in the current state of the legal order."**

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?

RESPONSE: My experience is primarily with the law schools and the legal profession in the state of Arkansas. My impression is that the law schools and the legal profession in the state of Arkansas are not strongly dominated by any form

of ideology, conservative or liberal. I am not sufficiently acquainted with law schools and the legal profession across the country to be able either to criticize or to defend the statement that you quote from the Federalist Society's mission statement.

7. **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 need to be reordered? If so, which ones? On which traditional values should there be a premium, and why?**

RESPONSE: My primary concern as a practicing lawyer over the past 20 years has been with the efficient and fair administration of justice in the courts in which I have appeared. I believe that our courts in Arkansas, both state and federal, typically have functioned with a high degree of efficiency and fairness. I do not think it is possible to make a blanket statement about "the legal system" that would be accurate with respect to every state, each of which has its own system of courts, or every district court or circuit court of appeals in the federal system. I have no quarrel with the priorities of the courts, state or federal, in Arkansas.

8. **List three Supreme Court cases with which you disagree, and explain why.**

RESPONSE: As a citizen, I am troubled by the Supreme Court decisions in *Dred Scott v. Sandford*, *Buck v. Bell*, and *Roe v. Wade*, because in my view each of those decisions failed to respect the dignity and worth of the human person. As a judge, I would follow every decision of the Supreme Court that has not been subsequently overruled.

9. **In terms of judicial philosophy, please name several Supreme Court Justices, living or dead, whom you admire and would like to emulate on the bench.**

RESPONSE: Our country has been served by many great jurists on the United States Supreme Court. My personal favorites include Justice Byron White, Justice Robert Jackson, Justice Benjamin Nathan Cardozo, and the elder Justice Harlan, all of whom were intellectually honest and fair in their rulings, and all of whom endeavored to follow the law without regard to personal beliefs. In my view, the greatest era of intellectual discourse in the court was during the term of the debate over the incorporation of the Bill of Rights into the Fourteenth Amendment. I was strongly impressed with the intellectual honesty and integrity of Justices Black and Frankfurter, who had different views on the interpretation of the Fourteenth Amendment, who debated those views respectfully and with dignity appropriate to the court, and who followed their respective views without regard to the result in a particular case. Among the current justices on the Supreme Court, I have had the opportunity to hear Justice Clarence Thomas speak, and I am greatly impressed with his intelligence, his courtesy, and the

dignity with which he conducts himself.

10. You co-wrote an article in which you stated that "the wife is to subordinate herself to her husband" and "the woman is to place herself under the authority of the man." What did you mean by this? What are the implications of this subordination of a wife to a husband when it comes to a wife's right as a woman to: (a) choose to terminate a pregnancy without her husband's consent, (b) choose to practice birth control without her husband's consent, (c) file a complaint against her husband for domestic violence, and (d) pursue child support and custody of her children in a divorce action?

RESPONSE: The article that you mention was a discussion of the historic teachings of the Catholic Church and is based upon the sacramental theology of the Catholic Church. In my view, these teachings ennoble and dignify both men and women; they do not demean either. The purpose of the article was to address the nature of the liturgical language and the issue of ordination of women, both of which are theological issues. I have not attempted to impose these theological views on anyone.

(a) The Supreme Court has clearly and unequivocally decided that a woman may choose to terminate a pregnancy without her husband's consent. In keeping with my views stated in response to question 4(B) above, if I am confirmed, I would follow that ruling.

(b) It follows from the Supreme Court's decision that a woman has a right to choose to terminate a pregnancy without her husband's consent that she has the right to practice birth control without her husband's consent. I would follow the law as determined by the Supreme Court of the United States.

(c) Any person who is the victim of violence is entitled to protection of the law and redress by the courts. Nothing in my theological views would interfere with my ability as a judge to provide that redress in accordance with the law.

(d) Divorce actions, child support, and issues of custody, are within the province the state courts. I am not aware of any situation in which such cases come before the federal courts. Nothing in my theological views would inhibit my ability to be fair and impartial in a case with such issues, if I am confirmed and such a case were to come before the court. I have provided pro bono representation of a woman seeking custody of her children in a divorce action. I have also made my time available to her and to her lawyers who have represented her in attempting to collect child support.

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April 7, 2003

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

In reviewing old correspondence files for information responsive to Senator Durbin's supplemental written questions, I found a 1989 letter that I wrote to a priest declining his suggestion that I consider representing a death row inmate named Charles Pickens. I explained in the letter that I was then working on a case for another death row inmate, Ricky Ray Rector, and could not take a second death row case at that time. I submit this information as a correction to the first sentence of the last paragraph of my answer dated April 4, 2003, to Senator Leahy's question 1.C.

Very respectfully,

Leon Holmes

J. Leon Holmes

cc: The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, D.C. 20510

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April 7, 2003

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

Under cover of this letter, I am sending to you my responses to the supplemental written questions submitted to me by Senator Durbin.

Very respectfully,

J. Leon Holmes

cc: The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
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Supplemental Written Questions for J. Leon Holmes
Senator Richard J. Durbin
April 7, 2003

According to your Senate Questionnaire, you have been an officer of several pro-life organizations – President of Arkansas Right to Life, Secretary of the Unborn Child Amendment Committee, and founder of the Arkansas Pro-Life Educational Alliance – and you have been a member of other pro-life organizations.

(A) **Please provide a description of the nature of your work with each pro-life organization with which you have been involved, including the legal and non-legal services you performed on their behalf.**

RESPONSE: I was President of Arkansas Right to Life in the time frame of 1987-1988, and a board member for a couple of years before that. I do not recall the exact dates. As President, I conducted the meetings of the Board of Directors and was the primary person on the board with whom the sole employee, whose title was Executive Director or Office Manager, would communicate. I performed duties typical of those of a President of a small, nonprofit, social welfare or educational organization. As an attorney, I have worked on proposed legislation and written *amicus curiae* briefs.

I was Secretary of the Unborn Child Amendment Committee in 1984. I assisted in writing a proposed amendment to the Arkansas Constitution. I also represented the Unborn Child Amendment Committee in ballot title litigation in 1984. I worked in organizing the efforts to have the amendment placed on the ballot and in advocacy for the proposal in different elections. The proposed amendment was adopted by the voters of the State of Arkansas at the general election in 1988. To my knowledge, that organization has not been active in several years.

The Pro-Life Educational Alliance was formed, I believe, in the latter part of my third year in law school. I participated in its formation. I was not an officer or director. I have had no contact with this organization in many years. I do not know whether it still exists.

I have provided legal advice for St. Joseph's Helpers of Pulaski County, which does business as Arkansas Pregnancy Resource Center, and which provides assistance to pregnant women in need, including indigent women referred by the Arkansas Health Department. I specifically recall assisting in the negotiation and drafting of a lease and giving legal advice regarding compliance with IRS guidelines. I am sure that St. Joseph's Helpers of Pulaski County has called me for advice on other occasions, but

no specific instances come to mind.

I have provided legal advice to Birthright of Greater Little Rock, which also provides assistance to pregnant women in need, regarding its by-laws.

In the mid-1980's, I provided legal services to another organization similar to St. Joseph's helpers and Birthright, but I cannot remember its name. It is defunct and has been for many years.

I know that I participated in a local pro-life organization in Rock Island, Illinois, in approximately 1980 or 1981, but I do not recall specific activities.

I have given legal advice to Family Council, primarily involving legal issues that have arisen during sessions of the Arkansas General Assembly and also on compliance with IRS guidelines.

(B) **Are you prepared to recuse yourself in cases that come before you involving these organizations?**

RESPONSE: I would follow 28 U.S.C. 455 and the Code of Conduct for United States Judges, paying close attention, if one of these organizations came before me, to the provision requiring a judge to recuse in any case in which his impartiality might reasonably be questioned.

Responses to Written Questions of Senator Patrick Leahy
by J. Leon Holmes
Nominee to the U.S. District Court for the Eastern District of Arkansas
April 4, 2003

1. **Mr. Holmes, in a newspaper column you have stated that for convicted murderers "[a]nything less than the death penalty is a devaluation of the victim, a statement that society values the murderer more than his victim. It is an insult to God, whose image has been desecrated."**

Over the last few years, many prominent Americans have begun raising concerns about the death penalty, including current or former supporters of capital punishment. For example Justice O'Connor recently said there were "serious questions" about whether the death penalty is fairly administered in the U.S., and added: "[T]he system may well be allowing some innocent defendants to be executed." To take another example, Federal District Court Judge Michael Ponsor, who presided over the first death penalty case in Massachusetts in several decades, wrote that his experience left him with the "unavoidable" conclusion that "a legal regime relying on the death penalty will inevitably execute innocent people – not too often, one hopes, but undoubtedly sometimes. Mistakes will be made because it is simply not possible to do something this difficult perfectly, all the time. Any honest proponent of capital punishment must face this fact."

A. How can you be so confident about an issue that is, almost by definition, riddled with uncertainty, as recognized by Justice O'Connor, Judge Ponsor and others?

RESPONSE: With all due respect, I do not believe that my 13-year-old statement about the death penalty reflects a confidence about the uncertainties described by Justice O'Connor or Judge Ponsor. The issue that I addressed is whether one of three goals of the criminal justice system (justice or retribution) is advanced by the notion that government has the authority to impose the death penalty. I did not intend to say that the only appropriate penalty for any murder is death. The quotations from Justice O'Connor and Judge Ponsor address the issue of whether the death penalty is or can be administered in such a way as to ensure that no innocent persons are executed, which was not the subject of my column. I have never advocated any approach that would be careless with regard to whether innocent persons are executed. As a judge, I would make sure that anyone accused of a capital offense is afforded all of the legal protections required by the Constitution and the laws of the land to ensure that no innocent person is put to death.

B. As a federal district court judge, you may be assigned federal death penalty cases, and you would certainly get your share of habeas corpus petitions from state death row inmates. How can you be certain that your strongly held views on the virtues of capital punishment will not influence in any way your decisions?

RESPONSE: I have never espoused any view that would support the conclusion that I am in favor of the execution of innocent persons, nor have I ever advocated any views that would interfere with my ability to provide fair and impartial adjudication of habeas corpus petitions from state death row inmates. The view I espoused 13 years ago that the death penalty is appropriate in general does not imply that it is appropriate to execute a particular individual. Nothing in that article nor any views that I currently hold would cause me to prejudge any case regarding any particular individual who came before the court.

C. At your hearing, you stated – as you did in your article quoted above – that your uncle and your wife's brother, who was a law enforcement officer, had been tragically killed by convicted felons. Then you stated, with significant emotion, that you had set aside your deeply held views in favor of capital punishment to represent a man convicted of killing a police officer. Please describe how that case came to you, the name and docket number(s) of the case, the names of all attorneys working on either side of the case, the facts at issue and your legal arguments in that case, as well as the current status of that case. Also, please provide a copy of your most recent substantive brief filed in that case. In addition, have you declined any other opportunities to represent individuals accused or convicted of murder?

RESPONSE: The person I have represented for the past four years is Clay Ford. Mr. Ford was convicted of capital murder in 1981. That conviction was subsequently set aside in federal habeas corpus proceedings. Mr. Ford was re-tried in 1997 and convicted of first degree murder. He was sentenced to life imprisonment without parole. The lawyer who defended Mr. Ford at the 1997 trial called me and said that there was an issue as to whether he had provided effective assistance of counsel at the punishment phase of the proceeding. Since there was an issue about the effectiveness of his own representation, he had a conflict of interest in representing Mr. Ford. He asked me if I would represent Mr. Ford, and I agreed to do so.

I initially filed a petition for post-conviction relief in state court under Rule 37 of the Arkansas Rules of Criminal Procedure. The case is styled *State of Arkansas v. Clay Anthony Ford*, in the Circuit Court of Mississippi County, Arkansas, Chickasawba District, No. CR-81-64. The prosecuting attorneys at the 1997 trial were Brent Davis and Fred Thorne. Mr. Davis and Mr. Thorne were assisted in the post-conviction proceedings in the Circuit Court of Mississippi County by Todd Newton, Assistant Attorney General. The lead defense attorney, before I commenced the post-conviction proceedings, was Timothy O. Dudley. Mr. Dudley was assisted at the 1997 trial by Ricky Hicks and Brian Ratcliff. Mr. Dudley is the person who called me to ask if I would represent Mr. Ford.

After an adverse decision in the Circuit Court of Mississippi County on the petition for post-conviction relief, I appealed on Mr. Ford's behalf to the Supreme Court of Arkansas. The decision is found at *Clay Ford v. State of Arkansas*, 2001

WL1203446 (Ark.). The State's brief on appeal was written by Brad Newman, Assistant Attorney General.

After the Supreme Court of Arkansas decided Mr. Ford's petition for post-conviction relief, Mr. Ford filed a petition for writ of habeas corpus in the United States District Court for the Eastern District of Arkansas. The case is styled *Clay Anthony Ford v. David White, Warden*, Case No. 5-01-CV-00408. Mr. Ford also filed a motion requesting that the court appoint me as his attorney in the federal habeas proceedings, and the court did so. The petition has been briefed and argued orally to Magistrate Judge John F. Forster, Jr. The case was argued on December 20, 2002. It is ripe for decision. The State was represented at that hearing by Assistant Attorney General Teena Watkins. A copy of my most recent brief in that case is attached.

Mr. Ford escaped from a prison in Memphis, Tennessee, in 1980. While he was an escapee, he was confronted by law enforcement officers and gunfire ensued. Mr. Ford's conviction arises from the death of a state policeman during that episode.

The principal issue in the proceedings in which I have represented Mr. Ford is whether Mr. Ford was afforded effective assistance of counsel during the closing arguments at the penalty phase of the trial in 1997. Since Mr. Ford was convicted of first degree murder, under Arkansas law the choices for the jury were 10 to 40 years imprisonment or life imprisonment without parole. During the course of rebuttal closing argument, the prosecuting attorney made statements to the effect that Mr. Ford had accumulated sufficient "good time" during his 17 years in the Arkansas Department of Corrections to "flatten" a 40-year sentence. The prosecuting attorney told the judge that sentencing Mr. Ford to anything less than life imprisonment would be tantamount to giving him the keys to the prison. Those statements were untrue. They were also outside the record inasmuch as there was no testimony regarding what good time Mr. Ford may have accumulated. Although these arguments were untrue, outside the record, and highly prejudicial, the defense attorney made no objection. The principal basis for the claims that I have asserted for Mr. Ford are claims that the failure to object at this point constituted ineffective assistance of counsel.

Aside from Mr. Ford's post-conviction proceedings, I have also attempted to help him, on a pro bono basis, to obtain relief from the Tennessee Department of Corrections. Due to a "hold" that Tennessee has on Mr. Ford, the Arkansas Department of Corrections imposes a limit on the prisoner classification that he can attain, which in turn interferes with his ability to engage in certain employment or other activities in the system. I have corresponded and spoken with authorities in Tennessee in an effort to remove the "hold" that Tennessee has on his record so as to enable him to achieve a more favorable prisoner classification.

I have not, as I recall, declined an opportunity to represent an individual accused or convicted of murder. My practice does not involve criminal defense, so I have not often been presented with the situation. I have represented three other individuals convicted of murder. One of those cases resulted in a published opinion. *Dyas v. Lockhart*, 771 F.2d 1144 (8th Cir. 1985).

D. Aside from the single case mentioned at your hearing, have you ever taken any other cases or clients on a *pro bono* basis or otherwise in which you have made arguments or taken positions contrary to your public statements, such as your reported statements in the areas of school busing, school prayer, voting rights, women's equal rights, creation science, gay rights, or related in any way to artificial conception, contraception, pregnancy, abortion, or adoption.

RESPONSE: As mentioned above, I have represented a total of four individuals who were convicted of murder. The one person with whom I have been most involved is Clay Ford, whom I have now represented for more than four years. I have represented other individuals whose conduct I did not necessarily approve or whose views I did not necessarily espouse, but I have not been asked to do so with reference to any of the specific topics listed in your question.

2. Mr. Holmes, for the last seven years you have been a member of the National Lawyers Association (NLA), which adopted a resolution that "all officeholders, including judges, in the performance of their official duties, are to interpret the Constitution in light of those truths and principles" in the Declaration of Independence.

A. While the Declaration and the Federalist papers can provide aid in interpreting the Constitution, do you believe that the Declaration establishes or references rights that are not listed in the Constitution or that have not been interpreted to be constitutional rights by the Supreme Court? If so, what are those rights?

RESPONSE: I do not believe that the Declaration of Independence establishes judicially enforceable rights. The Declaration justifies why our forefathers were justified in dissolving their political bonds with Britain.

B. Are there any Supreme Court decisions in conflict with the principles of, or rights referred to in, the Declaration? If so, please list each of them. Do you have any reservations about following these precedents faithfully and to their full effect, if you are confirmed as a judge? If you did have such reservations, what process would you follow to decide whether to recuse yourself from cases that conflict with your views about the meaning of the Declaration or any other matter?

RESPONSE: In my opinion, *Dred Scott v. Sandford*, *Buck v. Bell*, and *In Re: Korematsu* are contrary to the principles of the Declaration. As with any Supreme Court case that has not been overruled, the duty of a district judge is to follow and enforce that precedent. In making any decision to recuse myself from any

particular case, I would follow 28 U.S.C. § 455, the relevant cases, and the Code of Conduct for United States Judges; and I would examine my conscience closely to see whether I could, in fact, act impartially in the context of the particular case.

C. The Declaration mentions "unalienable rights." Are there any unalienable rights guaranteed by the Constitution? If so, what are those rights and what level of scrutiny applies if those rights are deprived or alienated? Are there any unalienable rights in the Declaration that the Constitution must or should be interpreted to protect?

RESPONSE: As I understand the concept of "unalienable rights," it refers to rights that go to the essence of what it means to be a human being. Hence, according to the Declaration, every human has the rights to life, liberty, and the pursuit of happiness. Also according to the Declaration, government is instituted to secure these rights, which is to say, government is instituted to protect life and liberty.

The Constitution as a whole is aimed at securing the rights described as unalienable by the Declaration of Independence. The entire structure of government, including the separation of powers and the system of checks and balances, is aimed at that goal. As Madison said in Federalist No. 51:

> But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controuls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to controul the governed; and in the next place, oblige it to controul itself.

As I understand it, this statement by Madison is a reiteration in other terms and in another context of the basic premises of the Declaration of Independence. If so, the structure of the government, itself, is designed to lead to a system that protects unalienable rights. That system includes representative government, an extended republic, the principle of federalism, separation of powers, checks and balances, the power of the people to amend the Constitution, and the other provisions of the Constitution. Working altogether, the entire system of government should (and has) result in a free country, a country without tyranny, which, in the terms that the founders used, is equivalent to saying a country in which natural rights generally are respected. However, there is no constitutional authority for the courts to use the Declaration of Independence to overrule the Constitution. The authority of the courts is granted by the Constitution, not the Declaration.

D. Is not the NLA's focus on the Declaration part of this organization's desire to overturn the Supreme Court precedents that it believes conflict with the Declaration?

Would you think there would be any appearance of conflict in continuing to belong to this voluntary, non-religious organization, if you are confirmed as a judge and thus obligated to follow Supreme Court precedents, even those that the NLA thinks should be overruled? Why or why not?

RESPONSE: I have never attended a meeting of the National Lawyers Association, nor do I recall having a conversation with any officer or member of the board of directors of that organization, so I am not in a position to comment on the reason for the NLA's focus on the Declaration. My only involvement with that organization, other than paying dues and receiving a quarterly magazine, has been to send one book review for consideration to be published. I am not aware that the NLA engages in lobbying of the legislative branch or the executive branch, nor that the NLA has participated as a litigant or as an amicus curiae.

3. Mr. Holmes, in your article, "Comment on Shankman," you discussed whether, in your view, "the Constitution was intended to reflect the principles of natural law, and, by doing so, to eliminate the need for an appeal to natural law."

A. When you wrote that article, in your view, was the Constitution intended to reflect principles of natural law? If so, what principles? Was it your view that the language of the Constitution eliminates the need for an appeal to natural law? If so, what language? Was it your view that the Constitution, in fact, reflect or constitute natural law? If so, please describe how so, and if not, please tell us why not?

RESPONSE: The article you mention was part of a scholarly discussion on the relationship between Catholic social thought and the American regime. I was privileged to participate in that scholarly discussion. I recognize the distinction between the role of a judge and the role of a scholar. When I wrote "Comment on Shankman" and said, in my view, "the Constitution was intended to reflect the principles of natural law, and, by doing so, to eliminate the need for an appeal to natural law[,]" I was referring to the Declaration of Independence. As I noted in that article, the Declaration of Independence asserts, among other things, the right of revolution to overthrow tyranny. The structure of the Constitution of the United States is designed to foreclose the possibility of tyranny and therefore foreclose an appeal to the right of revolution. The extended nature of the republic, as described in Federalist No. 10, was designed to minimize the influence of faction, which leads to tyranny. The separation of powers and the system of checks and balances was designed to foreclose the possibility of tyranny and therefore foreclose an appeal to the right of revolution. The Constitution as a whole, not any specific provision to the exclusion of others, was designed to establish a government that would avoid the kind of tyranny described in the Declaration of Independence and therefore avoid the kind of appeal that the founders of our country were making to the right of revolution in the Declaration of Independence. In my view, the founders succeeded.

B. Given your support for appealing to natural rights, are there any natural rights that are not expressly provided by the Constitution that should be or have been recognized? If so, please name them.

RESPONSE: As explained above, it is the structure of government, including the extended republic, as well as the system of checks and balances, and the other provisions of the Constitution as a whole that are designed to create a system that avoids tyranny and therefore protects natural rights.

C. Which branch or branches of the federal government has the authority to recognize natural rights?

RESPONSE: As designed by the framers of the Constitution, each branch of government has the obligation to fulfill its separate duties under the Constitution. When each branch of government fulfills its separate duties under the Constitution, as described in the Federalist papers, the system that results is neither tyranny nor despotism but a system in which the rights of all are generally secured. No one branch of government can appeal to natural rights as a basis for exceeding or altering its authority under the Constitution. When citizens believe that natural rights are not safeguarded adequately by the present system of government, they may express that view in the electoral process, or they may seek to amend the Constitution pursuant to Article V. When all else fails, the appropriate manner for citizens of this country to seek to protect what they regard as natural rights is through the Article V amendment process. Hence, it is the people as a whole, acting through their capacity to elect representatives or to amend the Constitution, who have the ultimate authority to recognize natural rights.

D. What are the sources of natural rights? Is there any agreement on which rights are natural rights?

RESPONSE: As described in the Constitution, "all Men are created equal" and "they are endowed by their creator with certain unalienable rights, that among these are Life, Liberty and the Pursuit of Happiness . . . ." This explains the view of the founders of our country as to the source of natural rights and what the founders of our country agreed were the rights that are natural rights. I recognize that the view of the founders was not and still is not shared by everyone.

E. What rights do you consider to be natural rights? How are those rights ranked in the hierarchy of other rights in the Constitution? Are natural rights fundamental ones that warrant strict scrutiny review? How should a federal judge resolve, or approach resolving, a conflict between a claim of natural rights and other rights recognized by higher courts as constitutional rights?

RESPONSE: As I have stated in public comments in the past, my view of

natural rights derives from the Declaration of Independence. The natural rights that I recognize are listed there. As explained above, I do not believe that the judiciary has any authority to enforce rights beyond those specified in the Constitution. The protection for natural rights lies in the entire system of government, including the extended nature of the republic, the system of checks and balances and separation of powers, the process by which the Constitution may be amended by the people acting in their capacity as sovereign above all three branches of government, and the other provisions in the Constitution as a whole.

4. Mr. Holmes, in your article, "Comment on Shankman," you discussed the meaning of the 14th Amendment and you stated that the text of the 14th Amendment does not open "the door to 'substantive due process,' and, hence, to natural law."

A. The Supreme Court, however, has repeatedly held that substantive due process rights do derive from the language of the 14th Amendment. For example, the right to privacy has been held to derive in part from the liberty clause of the 14th Amendment. How can you square your view about substantive due process with numerous Supreme Court decisions to the contrary?

RESPONSE: The Supreme Court has, of course, recognized substantive due process in several decisions. At least since the decision of the Supreme Court in *Lochner v. New York* nearly a century ago, scholars have discussed and debated the issue of whether the Fourteenth Amendment includes substantive due process. I joined in the scholarly debate when I responded to the argument of my colleague, Dr. Shankman. Dr. Shankman argued that the Fourteenth Amendment was intended to include substantive due process. In that scholarly discussion, I respectfully disagreed, as have many other legal scholars far greater in stature than I. The duty of a judge of the United States District Court, however, is not to engage in academic discussions but to follow and apply the law. As an example, the Fourteenth Amendment has been construed to include the First Amendment guarantees of freedom of the press. For most of my legal career, I have represented newspapers and other media entities. In the representation of newspapers and other media entities, I have always supported, defended, and advocated the rights guaranteed by the First Amendment through the Fourteenth Amendment, which is a matter of substantive due process. Notwithstanding any academic discussions, that the Fourteenth Amendment includes substantive due process, as well as procedural due process, is settled law. I have never made a legal argument asking any court to hold otherwise.

B. Given your view that the 14th Amendment does not open the door to natural law, are there any other provisions of the Constitution that do open the door to natural law?

RESPONSE: In my scholarly capacity, I wrote in my "Comment on Shankman" that there are no other provisions that open the door to natural law.

C. During his Supreme Court confirmation hearings, Clarence Thomas testified that he did not "see a role for the use of natural law in constitutional adjudication." Do you agree or disagree? Please explain why or why not.

RESPONSE: As I have stated above, I do not believe that the courts are empowered by the Constitution to appeal to natural law as a basis for their decisions. The courts are given whatever authority they have by the Constitution. The Constitution does not authorize the courts to use natural law as a basis for overruling acts of Congress or acts of the state legislatures.

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April 8, 2003

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

Under cover of this letter, I am sending to you my responses to the follow-up questions submitted to me by Senator Schumer.

Very respectfully,

J. Leon Holmes

cc: The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, D.C. 20510

J. Leon Holmes Answers to Follow-up Questions Submitted by Senator Schumer
April 8, 2003

1. **I want to follow-up on some of you answers to Senator Durbin's questions regarding your views on women's rights and the distinction between being an activist and being a jurist.**

   a. **You state that you are committed to being a "fair and impartial" jurist. I think we all want jurists who are fair and impartial, but judging is not always so easy. I believe that jurists bring personal experiences, worldviews, philosophies, and ideologies with them to the bench. If judging were so cut and dried, we would not need human judges because computers could do the job for us. How does an individual with a lengthy history of zealous activism simply set aside his passionately and deeply held genuine beliefs and act "fairly and impartially"?**

   RESPONSE: Personal experiences, worldviews, philosophies, and ideologies might interfere in a judge's decision in one of two ways. A judge might lack sufficient self-transcendence to become aware that these personal experiences, worldviews, philosophies, and ideologies affect a decision; or a judge might be aware of these personal experiences, worldviews, philosophies, and ideologies but lack the integrity to set them aside in making a decision. With my training in philosophy and my study of the history of ideas, I am probably more aware than most judges of the effect of personal experiences, worldviews, philosophies, and ideologies on my thinking. I am certainly aware of my own personal experiences, worldviews, philosophies, and ideologies in matters on which I have had a history of activism, which means that the issue as to me is more one of integrity or intellectual honesty than lack of awareness of biases or presuppositions. I am also a lawyer with fairly extensive experience. I note that Senator Pryor commented on my reputation for integrity among lawyers in Arkansas. Some of the letters from pro-choice lawyers to the Committee have made the same observation. Everyone is influenced by personal experiences, worldviews, philosophies, and ideologies, but not everyone is aware of those influences. A good judge should be someone who has the wherewithal to become aware of the personal experiences, worldviews, philosophies, and ideologies that affect his or her thought and also the integrity to set them aside and make decisions based on the law and the evidence. If I am fortunate enough to be confirmed, I would commit with all of my soul to being such a judge.

   b. **Given that you believe "the wife is to subordinate herself to her husband" and "the woman is to place herself under the authority of the man," are you concerned that, for example, a female defendant advancing a battered woman's defense for an assault on her husband**

or boyfriend would lack confidence in your impartiality? If you are confirmed, what will you say to female parties who raise such concerns?

RESPONSE: With all due respect, I do not believe that the article you cite, read as a whole, says anything that would justify any concern that I could not be impartial in a case such as the one you mention; and I do not believe that my conduct of my professional life justifies any such concern. I have been an associate in a law firm with female partners. I have been a partner in firms that employed female associates. I have participated in decisions to make female associates partners in two firms. I supported the first woman elected to the Supreme Court of Arkansas and have in my files letters from her thanking me for my support. I have engaged in litigation with and against female lawyers. I have appeared before female judges. I have represented women in litigation against men. The investigation into my nomination by the American Bar Association was conducted by a woman, and I know that she spoke with women who know me well, including present and past partners. All of this is to say that I have had a lengthy professional career in a fairly small legal community wherein I am well known, and I believe that I have conducted myself in such a manner as to belie any such concerns.

c. **You have said that you will make recusal decisions in accord with 28 U.S.C. Sec. 455 and the Code of Judicial Conduct. The statute requires a judge to recuse himself "in any proceeding in which his impartiality might reasonably be questioned." Given the comments you have made on a woman's duty to "place herself under the authority of a man," might your impartiality reasonably be questioned in any case where a woman is in a legal dispute with a man?**

RESPONSE: For the reasons stated in response to question b, I do not believe so.

d. **Do you agree that, if confirmed, you are likely to encounter numerous cases where no higher court has ruled and you will have to make judgments based on limited persuasive (but not controlling) precedent? How can you be confident that your personal experience, legal philosophy, worldview, and ideology will not affect your rulings in those cases?**

RESPONSE: Senator Schumer, since you raise a question as to whether there might be "numerous cases" in which my personal experience, legal philosophy, worldview, and ideology might affect my rulings, let me first observe that, in my observation, the overwhelming majority of the cases in a federal district court are lawsuits that are terribly important to the parties but which have no ideological connotations. As to those few cases that

(a) may involve larger social questions and (b) for which there is no controlling precedent, I would, if I am confirmed, be as committed as any judge to deciding cases in conformity with the rulings of the appellate courts and as able as any judge to discern the principles that guide those rulings.

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**SPECIAL LEGAL CONSULTANT ADMITTED TO PRACTICE IN ITALY

***SPECIAL LEGAL CONSULTANT ADMITTED TO PRACTICE IN AUSTRALIA

April 3, 2003

The Honorable Orrin G. Hatch
Chairman, Committee on Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

Please accept my responses (attached) to post-hearing questions submitted by Senator Patrick Leahy.

Thank you for your consideration and courtesy.

Very truly yours,

Charles F. Lettow

CFL/cc
cc: The Honorable Patrick Leahy

Response of Charles Lettow to questions from Senator Patrick Leahy

Question:

1. In *Cane Tennessee, Inc. v. U.S.*, 54 Fed.Cl. 100 (2002), you represented a coal mining company in a takings claim against the Department of Interior (DOI). In that case, you argued that the refusal by the DOI to reissue a coal mining permit under the Surface Mining Control and Reclamation Act constituted a partial taking of all economic value on the grounds that the mining interests were eliminated. The Court of Federal Claims rejected your argument.
   a. What is your understanding of current takings jurisprudence regarding partial takings?
   b. Do you believe that the test announced by the Supreme Court in *Penn Central Transportation v. New York City*, 438 U.S. 104 (1978), and its subsequent application allows for the consideration of the public's interest in determining whether a government action exacts a taking?
   c. Do you personally believe there is a public interest in protecting the environment? Do you believe the federal government has the constitutional power to protect the environment, including wetlands?

Response:

Note: In *Cane Tennessee, Inc. v. United States*, 54 Fed. Cl. 100 (2002), our firm represents property owners, not a coal mining company. The claim by the property owners is based on a determination by the Secretary of Interior that lands were unsuitable for surface mining, including surface entrances for underground mining. Permitting elements in the case have been overtaken by the unsuitability determination.

a. Partial takings claims continue to be governed by *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978). *Penn Central* does not establish a test for whether a taking has occurred. Rather, that decision specifies that "this Court [i.e., the U.S. Supreme Court], quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." 438 U.S. at 124. To guide "these essentially ad hoc, factual inquiries," the Court listed three "factors that have particular significance": (1) "[t]he economic impact of the regulation on the claimant," (2) "the extent to which the regulation has interfered with distinct, investment-backed expectations," and (3) "the character of governmental action." *Id.*

Further, more detailed guidance to lower courts is provided by the Supreme Court's recent decisions in *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 122 S. Ct. 1465 (2002), and *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001). Justice Stevens' opinion for the Court in *Tahoe-Sierra* discusses *Penn Central*

and elaborates on the three factors by drawing heavily upon Justice O'Connor's concurring opinion in *Palazzolo*. *See, e.g., Tahoe-Sierra*, 122 S. Ct. at 1486 (quoting *Palazzolo*, 533 U.S. at 636) (O'Connor, J., concurring)).

The resulting factor-based, case-by-case approach to decisionmaking is the classic mode of common-law jurisprudence.

b. Yes. An important aspect of the third *Penn Central* factor, i.e., the character of governmental action, encompasses among other things the public's interest in such action.

c. Yes. Indeed, I sought to serve that public interest in protecting the environment through my first post-clerkship position as a lawyer—working for two and one-half years from July 1970 to February 1973 as Counsel to the Council on Environmental Quality under Russell Train's leadership.

Question:

2. You stated in your hearing testimony that you are proud of your involvement in *Chevron*. The states of Vermont, Colorado, Connecticut, Maine, New Jersey, New York, and Wisconsin as well as the Commonwealth of Pennsylvania, opposed your position in that case stating that the "waiver of new source review for new and modified facilities at existing industrial plants results in weakened emission limits and reduced incentives for compliance." *Chevron v. NRDC*, 467 U.S. 837 (1984), Brief for the Commonwealth of Pennsylvania, State of Colorado, State of Connecticut, State of Maine, State of New Jersey, State of New York, State of Vermont, State of Wisconsin, Nos. 82-1005, at 2 (1983) (LEXIS pagination).
   a. What exactly are you proud of, given that coal-fired power plants pump tens of millions of tons of toxic pollutants into the air each year, endangering our health and the health of our environment and given that the "bubble" concept you argued for in *Chevron* has contributed to additional pollution?
   b. The Bush administration has utilized the Supreme Court's decision in *Chevron* to further expand loopholes in the definition of new source standards. These changes benefit industry but reduce the ability of the Clean Air Act to protect the environment and ensure protection of "public health," the primary goal of the Act. During the floor debates on the 1977 amendments, Congressman Waxman stated that the legislation established a "proper balance between environmental controls and economic growth in the dirty air areas of America. . . ." 123 Cong. Rec. 27076. Would you please explain how the "bubble" concept you advocated in *Chevron* maintains this "proper balance"? The current administration's "Clear Skies Initiative" continues to lessen ambient air quality standards. Do you support the measures pursued as part of this Initiative?

Response:

a. In my hearing testimony, I responded to a question that addressed important elements in adjudication. To the best of my recollection, I indicated that anyone who would undertake the responsibility of being a federal judge had to be mindful always to adhere to (1) fairness and evenhandedness, (2) equal justice for all, and (3) a deep respect for the role of Congress in its legislative function. In that latter connection, I cited the *Chevron* case because it lays out a constitutionally appropriate role for the judiciary in our tripartite system of government. Others have described that role in terms that are more eloquent than I have. Prior to *Chevron*, Professor Monaghan had written, "to borrow from Brandeis, 'the function of the courts is not one of review but essentially of control—the function of keeping [agencies] within their statutory authority.'" Henry P. Monaghan, *Marbury and the Administrative State*, 83 Colum. L. Rev. 1, 27-28 (1983). This control function is what the Supreme Court adopted in *Chevron* when it explicated a two-pronged test for judicial review of administrative action. The first prong calls upon the reviewing court to determine whether there is a plain meaning to the statute or whether Congress's intent is otherwise clear; the second step applies if the statute is silent or ambiguous and requires the Court to give deference to a "permissible construction" of the statute by an agency charged with administering it. The Supreme Court's unanimous opinion in *Chevron* abjured any policy role for courts: "federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do." *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 866 (1984).

b. As an advocate, I made the best possible arguments for my client, as required by the ABA's Model Rules of Professional Conduct. As to the current administration's effort to adopt regulations, I am neither familiar with those rules nor with the current litigation about them.

Question:

3. In *Keene Corporation v. U.S.*, 508 U.S. 200 (1993), you argued "claimants against the United States may litigate simultaneously in the Claims Court and another court, where each court's jurisdiction extends to a separate part of the remedies to which the claimant is entitled." Brief of DICO, Inc. as Amicus Curiae in Support of Petitioner, No. 92-166, at 3 (1993)(LEXIS pagination). Recently, a Washington Post editorial stated that the Claims Court is "an unnecessary waste of judicial resources that should be abolished." "Court of Extravagance," Washington Post Editorial, 3/26/2003.
   a. Should the remedies available to the plaintiff be identical in the Claims Court and another court, would you please explain the need for the CFC?
   b. The Administrative Office of the United States Courts released a study stated that on average a district court judge annually hears 478 cases while a Claims Court judge hears only 45 cases on average. Please explain how your role on the Claims Court, should you be confirmed, would benefit the federal jurisprudential system despite this insubstantial caseload.

Response:

a. Because the remedies available to a claimant in the U.S. Court of Federal Claims are nearly always limited to monetary damages, virtually any claimant who wishes declaratory, injunctive, or other equitable relief must seek such other relief in another forum. The interplay of this parallel jurisdiction is addressed by a statute, 28 U.S.C. § 1500, that was specifically at issue in *Keene*. In that connection, my firm filed a brief for an *amicus curiae* who was affected by the *en banc* reinterpretation of the jurisdictional statute by the U.S. Court of Appeals for the Federal Circuit, that was before the Supreme Court in *Keene*. There are, and have been, suggestions for Congress to amend certain of the numerous statutes governing the jurisdiction of the U.S. Court of Federal Claims, but nearly all of these suggestions focus on particular elements of this jurisdiction. Most of the proposals of which I am aware would expand the Court of Federal Claims' jurisdiction over federal contract issues, which form the largest part of its jurisdiction. For example, there is a proposal to add to the Court of Federal Claims' jurisdiction federal contracts implied in law. The Court of Federal Claims now has jurisdiction over federal contracts and federal contracts implied in fact, but not federal contracts implied in law. (Its contract jurisdiction is one of the areas in which it may provide declaratory and injunctive relief in some circumstances. *See, e.g.*, 28 U.S.C. § 1491(b)(2).) The only suggestion of which I am aware to abolish the jurisdiction of the Court of Federal Claims comes from Professor Schooner. His proposal appears not to take into account the historical fact that the Court of Federal Claims was formed in 1855 to provide a remedy for those who had a claim against the Federal Government. Initially, the Court only dealt with referrals from Congress (it still has that function). *See* Floyd D. Shimomura, *The History of Claims Against the United States: The Evolution From A Legislative Toward A Judicial Model Of Payment*, 45 La. L. Rev. 625, 651-652 (1985). President Lincoln's message to Congress in 1862 explained the reason for expanding that role: "It is as much the duty of government to render prompt justice against itself, in favor of citizens, as it is to administer the same between private individuals." *Cong. Globe*, 37th Cong., 2d Sess. 1671 (1862) (President Lincoln's annual message to Congress).

b. The caseload of the Court of Federal Claims is entirely comprised of civil cases that typically are quite complex. For example, the contract and tax cases, which by a considerable margin are the most prevalent on the Court's docket, are akin to the more demanding cases on a district court's docket. A numerical comparison does not take this circumstance into account. The docket of the Court of Federal Claims actually is quite challenging.

Question:

4. In several cases you have argued to restrict the rights of Native American tribes. Please explain how, despite your experience opposing the rights of Native Americans, you will be able to provide a balanced, unbiased review of Native American claims.

Response:

My involvement in cases concerning Native American tribes is very limited, involving only two briefs for *amici curiae* that addressed purely jurisdictional issues. I have not been involved in cases with substantive claims of or by Native American tribes. Similarly, my only writings in the area were set out in an article, Charles Lettow, *Looking At Federal Administrative Law With A Constitutional Framework In Mind*, 45 Okla. L. Rev. 5 (1992), in which I analyzed certain Supreme Court decisions in which the majority opinion was authored by Chief Justice Burger. Two such decisions addressed claims by Native Americans. *Id.* at 21-23. Those decisions, *Tooahnippah v. Hickel*, 397 U.S. 598 (1970), and *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195 (1985), ruled that the Department of Interior did not have power to limit or regulate certain activities of Native Americans. My experience has thus been varied, and I have no identification with any particular view about Native American claims. I would apply the law evenhandedly in this area, as in all others that would come before the Court of Federal Claims.

Question:

5. Please explain how you will be fair to all parties, including the government, in environmental cases given your career assisting the mining industry.

Response:

To the best of my recollection, I have had only one case involving the mining industry and that is the *Cane* case identified in question 1 above, in which our firm represents property owners, not a mining company. Also, to the best of my recollection, I have had only one takings case and that too is the *Cane* case. I have been with my firm for over 30 years, and throughout that time I have represented in litigation a wide variety of parties. They have included business entities in the agricultural processing, railroad, financial services, oil, rubber, and chemical industries, trade associations in those industries, numerous private individuals (both on a paid and *pro bono* basis), a charitable foundation, a state (South Carolina in a Commerce Clause case, in which it was supported by the Sierra Club), and a federal agency (the Legal Services Corporation in a First and Fifth Amendment case). Throughout, I have also represented both plaintiffs and defendants. In my litigation over the years, I have not been identified with any particular industry or group, or type of litigation.

Question:

6. I noticed that you have received an award from the National Association of Attorneys General for "sustained assistance to the States in their preparation for appearances before the Supreme Court of the United States" and an additional award for service to the National State and Local Legal Center. In the past few years, the Supreme Court has struck down a number of federal statutes, most notably several designed to protect the civil rights and prerogatives of our more vulnerable citizens, as beyond Congress' power under Section 5 of the Fourteenth Amendment. The Supreme Court has also struck down a statute as being outside the authority granted to Congress under the Commerce Clause. These cases have been described as creating new power for state governments, as federal authority is being diminished. At the same time, the Court has issued several decisions, most notably in the environmental arena, granting states significant new authority over the use of land and water, despite long-standing federal regulatory protection of the environment. Taken individually, these cases have raised concerns about the limitations imposed on Congressional authority; taken collectively, they appear to reflect a "new federalism" crafted by the Supreme Court that threatens to alter fundamentally the structure of our government. What is your view of these developments?

Response:

None of the matters that I addressed in the efforts that led to the awards cited involved the Commerce Clause or Section 5 of the Fourteenth Amendment. To my knowledge, I have never addressed a matter in which a claim was made that a statute was beyond the authority granted to Congress under those constitutional provisions. As a judge, in these matters as in all others, I would apply applicable precedents decided by the U.S. Supreme Court and the U.S. Court of Appeals for the Federal Circuit. Also, in these matters, as a trial judge I would apply the strong presumption of constitutionality that attaches to all Congressional enactments.

SUBMISSIONS FOR THE RECORD

George Allen

Judiciary Committee
Introduction of Charles Lettow
Nominee: Judge on the U.S. Court of Federal Claims
March 27, 2003, 2:00pm, SD-226

Mr. Chairman and members of the Committee, I am very pleased to support the nomination of a fellow Virginian, Charles Lettow, to be a Judge on the U.S. Court of Federal Claims.

Mr. Lettow is currently a partner in the law firm of Cleary, Gottlieb, Steen & Hamilton. During his time as an attorney, Mr. Lettow has argued three cases before the Supreme Court of the United States and over forty cases in the U.S. Courts of Appeals. In addition, Mr. Lettow has handled numerous cases in federal district courts and the Court of Federal Claims, the court on which he has been nominated to serve. Over the years, Mr. Lettow has taken on numerous pro bono cases, representing needy and other disadvantaged persons in litigation before State and federal courts.

Prior to joining his current law firm, Mr. Lettow served as a legal advisor to the Council on Environmental Quality in the Executive Office of the President, a law clerk to Supreme Court Chief Justice Warren Burger, and a law clerk to Judge Ben Duniway on the U.S. Court of Appeals for the Ninth Circuit. Mr. Lettow also served as a Lieutenant in the United States Army Reserve in Germany from 1963 to 1965.

Mr. Lettow received his undergraduate degree in Chemical Engineering from Iowa State University and his law degree from Stanford University. In addition, Mr. Lettow recently took sabbatical leave to get a Master's degree in History from Brown University.

Mr. Lettow was born in Iowa Falls, Iowa, but I am pleased to say that Mr. Lettow and his family now reside in Virginia. Mr. Lettow still has a vested interest in Iowa as he is currently the President of Busy Way Farms, a small family farm in Iowa Falls.

I would like to recognize Mr. Lettow's family members and colleagues who are here today: his wife, Sue; his daughter, Rene; his sons, Carl, John and Paul; and his assistant, Cheyenne.

Mr. Chairman, members of the Committee, it is my sincere pleasure to introduce this exceptional nominee and outstanding Virginian to you this morning, and I recommend his swift approval by this Committee.

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JANET B. ANDERSON, P.C.

March 26, 2003

The Honorable Orrin Hatch
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

RE: United States District Judge Edward Prado

Dear Mr. Chairman:

I have had the privilege of practicing law in San Antonio, Texas, since January 1976. Over the past twenty-seven years, as a state district judge, former state felony prosecutor, and now, general trial practitioner, I have had the opportunity to observe the legal talent, acumen and professionalism that the Honorable Edward Prado possesses and has always exhibited. He is a man of impeccable integrity and moral character. Moreover, he has always shown his natural capacity to be fair and impartial, no matter the issue or the parties.

Judge Prado has a well-known reputation for the timely disposition of cases through his hard work and long hours. He has also been singularly lauded for the efficient and effective use of courtroom technology. Finally, his knowledge of the law and strong intellect are hallmarks of his well-respected legal career.

To sum it up, Judge Prado will make an excellent jurist on the 5th Circuit Court of Appeals, and it is my honor and privilege to recommend him to you. Without a doubt, he is the best choice.

Sincerely,

ROY R. BARRERA, JR.

RRBJR/lms
VIA FACSIMILE: (202) 228-1698 AND REGULAR MAIL

HEARING STATEMENT
INTRODUCTION OF SUSAN BRADEN
JUDICIARY COMMITTEE NOMINATION HEARING
U.S. SENATOR MIKE DEWINE
MARCH 26, 2003

Mr. Chairman, it is my pleasure to introduce Susan Braden to the Committee today. She has been nominated to serve as a judge on the United States Court of Federal Claims. Those of you who have had the opportunity to review her academic and professional accomplishments can have no doubt that she is a qualified candidate for this position. I would like to take a moment now to highlight a few of her impressive credentials and to add my name to the long list of supporters backing her nomination.

A native of Youngstown, OH, Susan Braden attended Case Western Reserve University, where she received her undergraduate and law degrees, as well as several prestigious academic honors. She later attended Harvard Law School, where she conducted post-graduate research in antitrust, economics, and federal jurisdiction.

She began her legal career in the Cleveland office of the Justice Department's Antitrust Division. She later moved to the Energy Section of the Antitrust Division in Washington DC, where she was a Senior Trial Attorney. During her tenure at the Department of Justice, she accomplished much and received many honors, including a letter from the Attorney General commending for her work on the United States v. IBM case. She also received a nomination for a Special Achievement Award by the Assistant Attorney General.

After leaving the Department of Justice, she continued her work in the public sector at the Federal Trade Commission. At the FTC, she first served as the Senior Attorney Advisor to the Commissioner and Acting Chairman of the FTC, David Clanton, and later as the Senior Counsel and Special Assistant to Chairman James C. Miller.

Susan has an impressive professional record in the private sector, as well. She has served as a Partner in several prestigious Washington, DC, law firms and is currently Of Counsel at Baker and McKenzie.

She has been an extremely active member of the American Bar Association, serving on the ABA Section on Antitrust Law, as well as on the ABA Section on Administrative Law and Regulatory Practice. She also has been a leader in the District of Columbia Bar Association, the Federal Bar Association, and the District of Columbia Women's Bar Association.

Additionally, despite her extensive involvement in these legal organizations and the pressures of her successful legal career, Susan has managed to find time to participate in a wide variety of community and charitable activities and organizations. Her charitable memberships cover a broad spectrum of activities and demonstrate her support for historic preservation, theatrical and artistic endeavors, and education, among other things.

She is currently a Friend of the Whitman-Walker Clinic here I Washington, a Friend of the Washington Humane Society, and a member of the National Women in the Arts Museum.

It is not surprising that many highly respected people have taken time to contact me to express their support for Susan Braden's nomination. Her extensive and varied list of supporters includes current members of the Federal bench, some of our colleagues in the Senate -- including members of this Committee -- and representatives of a wide variety of other organizations.

I'd like to quote an excerpt from a letter submitted by someone who knows Susan both professionally and personally. This glowing recommendation really reflects the high caliber of the candidate before us today. Philip Harter, former President of the ABA Section on Administrative Practice, wrote of Susan Braden:

> "Susan has demonstrated an ability to master more than one complicated area of the law, having achieved victories in antitrust, intellectual property, and tax cases. More important, however, she is pragmatic, has common sense, and is not afraid to make a decision -- traits often overlooked in the judicial selection process. In short, Susan will be a terrific addition to that Court."

I join Susan Braden's supporters in their belief that she is an outstanding nominee, and I urge my colleagues to join me in supporting her nomination to the United States Court of Federal Claims.

COURT OF FEDERAL CLAIMS BAR ASSOCIATION
C/O U.S. COURT OF FEDERAL CLAIMS
717 MADISON PLACE, NW
WASHINGTON, DC 20005

28 March 2003

Dear Editor:

This letter is in response to your editorial of March 26, 2003 advocating abolition of the United States Court of Federal Claims and is being sent on behalf of the Court's Bar Association, serving both government and private bar, with national membership. The members of the Bar Association practice in both the Court of Federal Claims and the United States District Courts and are in a good position to assess the value of the Court.

The Court was created some 150 years ago by President Lincoln to assure justice between the federal government and its citizens. Throughout its history it has dealt with issues of tremendous national importance (including resolution in 2002 of nearly $50 billion in claims against the United States) and intentionally strives to be at the cutting edge of creative and efficient techniques for management of the most complex of cases.

As your newspaper concedes, the Court hears a broad array of citizen claims (including a number of important tax refund matters not listed in your editorial). However, the Post has missed the essential point – while the United States District Courts primarily address injunctive and declaratory relief, and also focus on their large criminal dockets, the Court of Federal Claims addresses claims of various types seeking money from the federal government - - the taxpayers' money. The Court of Federal Claims and its predecessor courts have a proud heritage of expertise in dealing with monetary claims against the "sovereign", and in dealing with some of the most complex litigation on the federal judicial docket. Indeed, Congress has recognized time and again this special expertise; and, as recently as 2000, after extensive study, determined that certain government contract claims jurisdiction was better placed solely in the Court of Federal Claims rather than shared with the already burdened federal district courts.

Your comments about the business and "busy-ness" of the Court are also misplaced. Because the Court's business is different from that of federal district courts, as you noted, comparison of output levels are misleading. The Court's docket consists of more than 4,000 cases. The opinions generated by the judges of the Court are recognized as well written and well considered reflecting the complexity of the caseload at the Court. Those practicing before the Court know that the Court and its judges are busy.

This Court has for a number of years taken its role in the federal judiciary very seriously. It has shown a willingness to engage the attorneys appearing before it in significant dialogue regarding a host of issues. Typical of this was the 2002 Judicial Conference. Rather than the "birthday party" described in your editorial, the Judicial Conference focused upon ways to improve the delivery of justice in suits against the United States. Representatives of the Court's bench and bar were joined by experts from nine foreign countries to "compare" systems. The topic was explored in depth and with "no holds barred". Professor Schooner, whose field is government contracts, was but one voice and while his views were heard, other speakers advocated that the Court's role should be increased, not diminished. Among the distinguished panelists reflecting that perspective were Professor Judith Resnik of Yale Law School, a noted expert on the federal court system.

Finally, this Court appreciates that debate can often lead to better understanding of the judicial process and to improvement of the dispensation of justice. That was the spirit and the goal of the conference at which Professors Schooner and Resnik spoke. The Court emerged both affirmed and strengthened.

Sincerely,

S/

John Lodge Euler
President
United States Court of Federal Claims
Bar Association

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Senator Grassley's Hearing Statement on the Nomination of Charles Lettow, Federal Claims Court of the United States, March 27, 2003

Mr. Chairman, I want to thank you for scheduling this hearing on the nomination of Charles Lettow. Unfortunately, I have been unavoidable detained on the Floor and am unable to attend the hearing today. Although I couldn't be here for the hearing, I wanted to express my overwhelming support for the nomination of Charles Frederick Lettow to be a judge on the Federal Claims Court of the United States. Mr. Lettow is a fellow Iowan and farmer, who has shown himself to be a valuable contributor to society. He has maintained his Iowa roots by serving as the President and Director of Busy Way Farms, Inc., a set of family farms just south of Iowa Falls. In this capacity, he has worked to protect the rights of farmers and to ensure that the Iowa farming society continues to prosper.

Mr. Lettow, is also a well respected attorney and partner at the law firm of Cleary, Gottlieb, Steen and Hamilton, where is has proven himself as an outstanding attorney over the past three decades. An active participant with the National Association of Attorneys General, he received an award in 1992 "for sustained assistance to the States in their preparation for appearances before the Supreme Court of the United States." Mr Lettow also has worked with the National State and Local Legal Center on *amicus* briefs in Supreme Court cases. For his exceptional work at this position he received awards in both 1997 and 1998.

Mr. Lettow is not only a distinguished lawyer and farmer, he is a man dedicated to assisting the members of his community. Through his church he has coordinated a disaster relief program to help the victims of devastating floods. Mr Lettow is an accomplished lawyer and a model of the midwestern values of care, thoughtfulness and consideration for others. For these reasons Mr. Lettow has my full support for his nomination to the Federal Claims Court.

News Release

JUDICIARY COMMITTEE

United States Senate • Senator Orrin Hatch, Chairman

March 27, 2003 Contact: Margarita Tapia, 202/224-5225

Statement of Chairman Orrin G. Hatch

Before the United States Senate Committee on the Judiciary

Hearing on the Nominations of

Edward C. Prado to be U.S. Circuit Judge for the Fifth Circuit; Richard D. Bennett to be U.S. District Judge, District of Maryland; Dee D. Drell to be U.S. District Judge, Western District of Louisiana; J. Leon Holmes to be U.S. District Judge, Eastern District of Arkansas; Susan G. Braden to be Judge for the U.S. Court of Federal Claims; and Charles F. Lettow to be Judge for the U.S. Court of Federal Claims

Today the Committee has the privilege of considering the nominations of six outstanding lawyers to be federal judges. I commend President Bush for nominating each of them, and I look forward to their testimony.

The first nominee from whom we will hear is **Edward Prado**, who has been nominated for a position on the Fifth Circuit. He is a native of San Antonio, Texas, and has served his community, state, and nation in a variety of ways. After graduating from both college and law school at the University of Texas, Judge Prado began his legal career in 1972 as an Assistant District Attorney in the Bexar County District Attorney's Office. In 1976 he accepted a position with the Federal Public Defender's Office for the Western District of Texas where he represented indigent criminal defendants in the federal courts.

During 1980 he served as a Texas state district judge, filling the unexpired term of an incumbent. In this position he presided over several hundred cases and felony criminal trials. Judge Prado was unanimously confirmed by the Senate in 1981 and appointed as United States Attorney for the Western District of Texas. In 1984 he was again unanimously confirmed by the Senate, this time to serve as a United States District Judge for the Western District of Texas. His eighteen years on the federal bench, plus prior service as a Texas state judge, have given him the experience and background to make an outstanding Fifth Circuit judge.

In addition to Judge Prado, we will hear from five nominees for the federal trial court bench. The first of our three district court nominees is **Richard Bennett**, who has been nominated for the District of Maryland. Mr. Bennett is a distinguished practitioner whose career

has included two terms of service with the United States Attorney's Office for the District of Maryland, first as a line prosecutor and then as the United States Attorney. He has also spent considerable time in the private practice of both civil and criminal litigation. Mr. Bennett's outstanding legal skills have been widely recognized, including mention in the 2003-2004 edition of *The Best Lawyers in America*.

Our nominee for the Western District of Louisiana is **Dee Drell**. Upon graduation from law school at Tulane University, Mr. Drell joined the United States Army Judge Advocate General's Corp, where he gained experience as both defense counsel and prosecutor. Upon completion of his military service, he embarked on a distinguished career in private practice while still devoting time to extensive pro bono work, including the provision of legal services to Central Louisiana AIDS Support Services, AIDSLaw of Louisiana, Inc., and Shepherd Ministries, an ecumenically-based religious organization that provides services to the disadvantaged.

Leon Holmes, the final district court nominee we will consider today, is widely respected for his intelligence, his legal skills, and his commitment to the rule of law. A distinguished graduate of Duke University, where he received a doctorate in political science, and the University of Arkansas law school, where he graduated first in his class, Mr. Holmes is currently a partner with the Little Rock firm of Quattlebaum Grooms Tull & Burrow, specializing in complex business litigation, torts, and appellate practice. I have no doubt that he will make a fine addition to the United States District Court for the Eastern District of Arkansas,

In addition to these three district court nominees, we will also hear from two exceptional nominees for the Court of Claims. One of them is **Susan Braden**, who began her legal career in the Antitrust Division of the Justice Department. After seven years at DOJ, she spent five years at the Federal Trade Commission before joining the private sector, where she has practiced law for the past 18 years. Her practice has focused on antitrust law, complex civil litigation, international trade matters for industrial clients, and computer software litigation.

Our other nominee for the Court of Claims is **Charles Lettow**. An esteemed federal litigator, Mr. Lettow has shown his commitment to public service, having been a law clerk for both the Ninth Circuit and the U.S. Supreme Court and having served as Counsel to the Council on Environmental Quality in the Nixon Administration. Since 1973 he has worked with the firm of Cleary Gottlieb Steen & Hamilton, focusing on federal litigation and environmental cases.

I am pleased to have these nominees before the Committee today, and I look forward to hearing from them.

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April 10, 2003

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April 11, 2003

Via facsimile to (202) 228-2042

The Honorable Blanche Lincoln
United States Senate
355 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Lincoln:

Certain issues have surfaced about my nomination since we met, and because they have arisen since we met, you and I have not had the opportunity to discuss them personally. Out of respect for you personally, and out of respect for the important constitutional role of the Senate in the appointment process for federal judges, I wanted to write to you this letter to address some of these issues.

In the 1980's I wrote letters to the editor and newspaper columns regarding the abortion issue using strident and harsh rhetoric. I am a good bit older now and, I hope, more mature than I was at that time. As the years passed, I came to realize that one cannot convey a message about the dignity of the human person, which is the message I intended to convey, using that kind of rhetoric in public discussion. While I cannot speak for those who raise these issues, my impression is that my statements about the abortion issue that they criticize are all more than fifteen years old.

As I stated in response to written questions from Senator Durbin, I am especially troubled by the sentence about rape victims in a 1980 letter to the editor regarding the proposed Human Life Amendment; and, as I said there, regardless of the merits of the issue, the articulation of that sentence reflects an insensitivity for which there is no excuse and for which I apologize. I do not propose to defend that sentence, and I would not expect you or anyone else to do so. My impression is that, in fulfilling your responsibilities in this matter, you have spoken with or heard from many Arkansans, male and female, who know me well. I hope, and I believe, that their comments have and will give you assurance that this 23 year-old sentence is not indicative of how I have conducted myself in the past several years and not indicative of how I would conduct myself as a judge.

In 1987, when I was President of Arkansas Right to Life, that organization was attacked in a guest column in a newspaper on the ground that its members allegedly defined life too narrowly and were, as I read the column, hypocrites. That same column stated that abortion involves a taking of human life. In response, I wrote that, if the author believed that abortion takes a human life, he should start his own pro-life organization but should not use our defects as a reason not to act on his beliefs. In

that context, I asked the rhetorical question, what if someone had advanced such a basis as a reason not to save lives during the holocaust? I did not intend to say that supporters of abortion rights should be equated with Nazis. I have never intended anything that I said to give that impression, and I do not think my comments, which now are criticized, were taken to mean that when they were written. From 1983 through 1988, when I was active in pro-life activity and was writing most of the columns that are now criticized, I was an associate at a large law firm, and I worked for and with many lawyers who are pro-choice. Since then, most of my partners have been pro-choice. I have had many cases with and against lawyers who are pro-choice. No one raised this concern at that time nor at any time prior to the past two weeks. I believe that no one raised this concern because everyone who knows me recognizes that I did not intend such a thing. The letters written on my behalf by pro-choice colleagues are strong testimony of their confidence in me.

While I expected that my past activities relating to the abortion issue would draw scrutiny, and properly so, I did not expect that my religious beliefs would draw similar scrutiny, but they have. I am aware that some concern has been expressed about a 1997 column co-authored by my wife and me for our local Catholic newspaper on historic teachings of the Catholic Church. The Catholic faith is pervaded with the view that the visible things symbolize aspects of the spiritual realm. This pervasive element of the faith is manifest in the teaching that the marital relationship symbolizes the relationship between Christ and the Church. My wife and I believe that this teaching ennobles and dignifies marriage and both partners in it. We do not believe that this teaching demeans either the husband or the wife but that it elevates both. It involves a mutual self-giving and self-forgetting, a reciprocal gift of self. This teaching is not inconsistent with the equality of all persons, male and female, and, in fact, in that column we say, "[a]ll of us, male and female, are equally sons of God and therefore brothers of one another." This aspect of my faith–the teaching that male and female have equal dignity and are equal in the sight of God–has been manifest, I believe, in my dealings with my female colleagues in our firm and in the profession as a whole. While I am not at all ashamed of my faith, or any part of it, I do not believe that the historic Catholic teaching that the marital relationship symbolizes Christ and the Church is or has been relevant to my conduct in my professional life, nor would it affect my conduct as a judge, should I be fortunate enough to be confirmed.

Another aspect of my faith is that God brings good out of evil. I wrote about this belief, as taught by Booker T. Washington, in the context of a 1981 article in a religious magazine. Washington taught that God could and would bring good out of evil. Washington, who was born in slavery, recognized it as evil, not only in theory but as a part of his earliest experience. Yet, his faith was so great that he believed that God could bring good from that evil; and his love was so great that he hoped that those of his race would become a beacon of God's love to their oppressors. My article combines his view of providence–that God brings good out of evil–with his view that we all are called to love one another. This teaching can be criticized only if it is misunderstood.

Some of the criticisms directed at things I wrote years ago are just; some of them are not. I hope that my legal career as a whole, spanning the years 1982 through 2003, evidences that I am now ready to assume the responsibility of a United States District Court Judge. I certainly was not ready in 1980, nor for many years thereafter, and I do not claim that I was. My impression is that my colleagues in the Arkansas bar–those who know me well and who represent clients in federal court–believe that my legal career as a whole manifests a readiness to assume the responsibilities of a district court judge, and I hope that you believe so as well.

With best wishes and warmest regards, I am

Very truly yours,

J. Leon Holmes

cc: The Honorable Mark Pryor (*via facsimile* to (202) 228-0908)



The Honorable Kay Bailey Hutchison
Senate Judiciary Hearing
Nominations of Judge Edward Prado and Susan Braden
Wednesday, March 26, 2003

- I am pleased to be introducing two nominees today: Judge Edward Prado for the U.S. 5th Circuit Court of Appeals and Susan Braden for the U.S. Court of Federal Claims.

Ed Prado

- Judge Prado brings a distinguished career of public service as a nominee to the Circuit Court. The ABA rated him unanimously "Well-qualified" for the 5th Circuit.

- Since 1984, Judge Prado has served as a U.S. district court judge for the Western District of Texas, where he earned the district's lowest reversal rate.

- Prior to his service as a federal judge, he served as U.S. Attorney for the Western District of Texas from 1981-1984.

- Judge Prado served as a Texas district court judge in 1980, as assistant federal public defender in the Western District of Texas from 1976-1980, and as Bexar County assistant district attorney from 1972-1976. He was in the U.S. Army Reserve from 1972-1987.

- Judge Prado earned his undergraduate degree from the University of Texas and then his law degree also from the University of Texas in 1972.

- Judge Prado's extensive experience and commitment to the law qualify him for appointment to the 5th Circuit Court of Appeals.

Susan Braden

- Susan Braden is an accomplished nominee for the Federal Claims Court having practiced complex litigation and administrative law at a well-known Washington D.C. law firm (Baker & McKenzie). She has particular expertise in the areas of intellectual property, antitrust, and international trade.

- Ms. Braden has represented clients before almost every department and federal agency and has practiced before the U.S. Supreme Court.

- Before entering private practice, Ms. Braden served as Senior Counsel to the Chairman of the Federal Trade Commission from 1980-1985. From 1973-1980, she worked as a trial attorney in the Department of Justice's Antitrust Division, advancing to Senior Trial Attorney.

- She earned her bachelor's degree in 1970 and her law degree in 1973 from Case Western Reserve University.

- With her previous public service and her private practice experience, Susan Braden will be an excellent claims court judge, if confirmed.

Conclusion

- I urge my colleagues on the Judiciary Committee to support Edward Prado's nomination to the 5th Circuit Court of Appeals and Susan Braden's nomination to the Federal Claims Court.

U.S. SENATOR PATRICK LEAHY

CONTACT: David Carle, 202-224-3693 VERMONT

Statement Of Senator Patrick Leahy
Nominations Hearing
Senate Judiciary Committee
March 27, 2003

Today we are holding our sixth Judiciary Committee hearing for the *twenty-ninth* judicial nominee within the last two months. The Senate has moved forward expeditiously to confirm 11 judicial nominees and may yet consider another four nominees this week, which would bring the Senate's total of judges confirmed this year to 15. The last time Republicans were in the majority in the first session of a Congress, the Senate did not confirm 15 judges until September and did not confirm 11 until late July. It was not until the end of October, 1999, that the Chairman saw fit to hold a sixth hearing on judicial nominees. The difference, then, was that a Democratic President occupied the White House.

I am pleased to see that today we will consider a new nominee from Texas to the Fifth Circuit, the Honorable Edward Prado. It has been a long time since there was a hearing for a Latino nominee to the Fifth Circuit – in fact, not since Chairman Biden scheduled a hearing for Judge Benavides nine years ago.

During my tenure as Chairman, President Bush made three nominations to the Fifth Circuit, but none were Latino. In fact, until last month, President Bush had nominated only one Latino, Miguel Estrada, for any of the 42 vacancies on the circuit courts that he inherited or have arisen since 2000 -- one Latino circuit nominee during his first two years as President.

Of course, two of President Clinton's very talented Hispanic nominees to vacancies on the Fifth Circuit, Enrique Moreno and Judge Jorge Rangel, were denied hearings for years. They both received Well Qualified ratings from the ABA, but despite years of consultation with the home-state Senators, Mr. Moreno and Judge Rangel were never allowed a hearing or a vote before this Committee. A third nominee of President Clinton's to the Fifth Circuit, Alston Johnson of Louisiana, never got a hearing either, despite the strong support of both of his home-state Senators.

During the 17 months I was Chairman of the Judiciary Committee, I worked hard to ensure that Hispanics were confirmed to the federal bench, and I am proud of that record. In addition to Mr. Moreno and Judge Rangel, many other Hispanics nominated by President Clinton were blocked or delayed by the Republican majority, and I did not want to see that repeated. Ricardo Morado was another nominee never given a hearing during the Republican control of the Senate a few years ago, and Christine Arguello was another. Among those delayed were Judge Richard Paez, Judge Sonia Sotomayor and Judge Hilda Tagle, each stalled for no good reason.

I am proud that did not happen on my watch. I am glad to say that we quickly considered and confirmed nominees such as Christina Armijo to the District Court in New Mexico, Philip Martinez to the District Court in Texas, and Randy Crane to the District Court in Texas, Jose Martinez to the District Court in Florida, Alia Ludlum to the District Court in Texas, and Jose Linares to the District Court in New Jersey, as well as other judicial nominees for a total of 100 confirmations in just 17 months of Democratic control.

So I congratulate you, Judge Prado, your friends and your family, on your nomination, and for being accorded the privilege of a hearing before the Senate Judiciary Committee. Judge Ruben Castillo, who is a U.S. District Court Judge in Illinois, and a Member of the Sentencing Commission, speaks very highly of you, and I know he, too, is pleased to see you having a hearing today. And the Congressional Hispanic Caucus, which takes a serious interest in examining the fitness and qualifications of President Bush's nominees to the federal courts, was very impressed with you and has sent the Committee a letter supporting your confirmation.

Today we are also considering three nominees to the District Courts, Richard Bennett from Maryland, Dee Drell from Louisiana and Leon Holmes from Arkansas. My initial examination of Mr. Holmes' record leaves me with concerns. Mr. Holmes is an attorney who has devoted a good deal of his time, both inside and outside of his practice of law advancing controversial positions. He will be given the opportunity today to clarify whether his writings and public comments will inform his judicial decisionmaking, whether as a judge he will uphold the constitutional right to privacy.

I would also note, with regard to Mr. Holmes' record of activism, that I cannot think of a single Clinton nominee to the courts who had a comparable record. In fact, nominees with far less activist records were given a tough time by Republican Senators. I recall, for example, that one of Senator Specter's former aides, Mary McLaughlin of Pennsylvania, almost did not make it out of Committee, and then almost was not allowed a floor vote due to anonymous Republican holds and objections. What was the apparent concern of those anonymous Senators? Ms. McLaughlin, a well-respected litigation partner in Philadelphia, had dared to handle one pro bono case involving choice. Fourteen Senators voted against this nominee, presumably based on her involvement in that single case. None of those who voted against her even placed a statement in the record explaining their votes. If any one dares to express concerns about Mr. Holmes, Republicans and their special interest allies will undoubtedly resort to inflammatory rhetoric. There are legitimate concerns to be addressed when a President nominates someone for a lifetime seat in judgment of others who has such a record of activism, on the right or the left.

Finally, we have two more of this President's nominees to the Court of Federal Claims here today, as well. As I explained at our last hearing, appointments to this court have until recently enjoyed a distinguished tradition of bipartisan cooperation. This cooperation has broken down, however. The rules are again changing and this Administration is acting unilaterally in complete disregard for tradition, bipartisanship and fairness.

The process for nominating judges to the Court of Federal Claims has traditionally included accommodation and compromise. For more than two years Senate Republicans blocked

President Clinton's appointment of Larry Baskir to the court until a compromise could be reached. They refused to give him a hearing and refused to allow any of the other vacancies to be filled unless the Administration promised to keep conservative Judge Loren Smith as the Chief Judge. Republicans also insisted on the reappointment of another Republican appointee, Judge Christine Miller. Finally, Senator Hatch agreed to allow President Clinton's nominees to have hearings and votes if the Administration also named his staffer Edward Damich to the court. Shortly after his inauguration, President George W. Bush summarily removed the court's Chief Judge and installed Judge Damich as the new and current Chief Judge.

Last fall when the Democrats were in the majority, we took the exceptional action of moving the nomination of Larry Block, another staff member for Senator Hatch, to the Court of Federal Claims at the request of the Ranking Republican. At that time, I noted that we would expect fairness and consideration in return, including true bipartisan consultation with respect to Federal Court of Claims nominations. Despite our accommodation on Mr. Block's nomination, the White House refused to act on the nomination of Judge Sarah Wilson who until a few months ago was serving with distinction on the Court of Federal Claims. Judge Wilson is a well-respected and talented lawyer who graduated from Columbia Law School, clerked for a federal judge, was a fellow with the Administrative Office of the Courts, and served in the Department of Justice and in a prior White House. Yet the Administration and the Senate Republicans refused to accommodate our request to consider her nomination for a continued position on the court.

It troubles me that despite a long history of compromise and accommodation regarding appointments to this court, there has been no consultation with the Democratic leadership regarding the nominations to the Court of Federal Claims. Instead, the White House proceeded as it does with most things - unilaterally. The same is true with respect to the Sentencing Commission, the Parole Commission and many other bipartisan boards and commissions.

Republicans have repeatedly asserted that we should not be appointing nominees to courts where the caseload is especially light. Senators Sessions and Grassley have both argued that vacancies on courts such as the D.C. Circuit should remain open due to the enormous costs that are involved in filling positions. I believe Senator Grassley's report noted that it costs U.S. taxpayers approximately one million dollars per judge.

I know that Senator Hatch will be interested that his favorite editorial board, the *Washington Post*, wrote today that the Court of Federal Claims should be eliminated altogether. We may also want to consider a recent law review article by Professor Schooner at the George Washington Law School that includes a comprehensive report on the Court of Federal Claims. In this report, he compiles data on the surprisingly light caseload of the 24 judges who currently sit on the Court of Federal Claims. The caseload of the Court of Federal Claims is less than one-eighth that of the district court. Although there are currently five vacancies on the court, they do not have the physical space for the four new judges pending before this Committee.

We may want to hold hearings on the need for additional judges on this specialized court. Similar hearings for other courts have been very productive in ensuring that our financial and

judicial resources are allocated in a responsible manner. If we decide that additional positions are necessary on the Court of Federal Claims, I urge the White House and Chairman Hatch to work with us to assemble the type of bipartisan panel that Senator Hatch helped assemble in 1997 and 1998 to fill the remaining vacancies on the Court of Federal Claims in a way that respects the tradition that has marked appointments to this court. I also look forward to working with Senate Republicans to preserve our constitutional role in advising the President on judicial nominations to all courts through the use of bipartisan selection commissions.

It is one thing for a President to appoint members of his cabinet to carry out his political agenda but it should be different with respect to judicial appointments. When a President makes nominations for positions to a co-equal branch of government, he should not be able to tip the scales of justice by packing the courts with ideologues who are selected to implement his political agenda. Recently, Walter Dellinger noted that the President's "slate of nominees, considered as a whole, . . . [is] a list tilted to the right and from which any other views have been carefully culled." I agree that we need to broaden and balance the slate.

#####

New York's Senator

CHARLES E. SCHUMER

313 Hart Senate Office Building • Washington, DC 20510
Phone: (202) 224-7433 • Fax: (202) 228-1218

FOR IMMEDIATE RELEASE
April 10, 2003

CONTACT: Phil Singer
(202) 224-7433

Statement of US Senator Charles Schumer on the nomination of James Leon Holmes to the Eastern District of Arkansas

Mr. Chairman, I want to speak for a minute regarding the nomination of James Leon Holmes.

I have voted for 111 of the 116 judges we've confirmed since President Bush took office – I know my friends across the aisle say we're blocking every judge to come before the Senate, but the truth is that the vast majority of nominees are being swiftly confirmed.

If my math is right, with yesterday's confirmations, we're down to the lowest vacancy rate we've had since the first President Bush was in office. There were never this many judgeships filled during the entire 8 years President Clinton held office. So for those who think this is about obstructionism, they need to look at the facts. We're taking a close look at each nominee and we're trying to do our constitutional duty in the process.

As Chairman Hatch said just a few years ago, "I believe the Senate can and should do what it can to ascertain the jurisprudential views a nominee will bring to the bench in order to prevent the confirmation of those who are likely to become judicial activists.

"Determining which [judicial] nominees will become activists is complicated and it will require the Senate to be more diligent and extensive in its questioning of witnesses."

I couldn't agree more with my good friend from Utah who put it more eloquently than I ever could. He got that one just right.

But when it comes to evaluating the candidacy of Mr. Holmes for a district court judgeship, well, it doesn't take very extensive questioning to see what kind of judge he would be. Normally we give less scrutiny to the District Court nominees, but this one calls out for close and careful evaluation.

Mr. Holmes has been an ardent and passionate advocate for causes in which he genuinely believes, and I respect that. But some of the rhetoric he has used and some of the arguments he has advanced, give me real pause. They should give real pause to anyone who cares about the impartial enforcement of the rule of law.

Many of the nominees I've voted for are pro-life and several have been active in the pro-life movement. I was persuaded with each of them that their personal views about the right to choice would not influence their rulings from the bench. So it's crystal clear that being pro-life is no barrier to getting my vote. There's no litmus test with this Senator.

But just as I would worry about any extremist going on the bench, there are pro-life extremists whose views are so strongly held and deeply felt that they would be incapable of being moderate and balanced jurists. That's part of my concern here.

Mr. Holmes has said that our nation's record on abortion is comparable to our record on slavery. Perhaps more disturbingly on this count, he has said that rape leads to pregnancy about as often as snow falls on Miami.

That last comment isn't just about choice or abortion. It's an incredibly offensive and disturbing remark – it's remarkably insensitive to the fear induced in the thousands of women who are raped in this country every year.

According to the weather almanacs we've consulted, it has snowed in Miami exactly once in the last 100 years. According to a study published in the American Journal of Obstetrics and Gynecology, over 32,000 women a year become pregnant as a result of rape or incest.

Those 32,000 women a year aren't a myth. They aren't, to use Mr. Holmes' words, "red herrings." They are real women, in real pain, making traumatic decisions about whether to give birth to their tormentors' children.

But that's no isolated remark. Mr. Holmes has said that it is a woman's duty to "subordinate herself to her husband" and to "place herself under the authority of the man," and you can see, I hope, why we might be concerned that he is insufficiently attuned to women's rights.

I asked Mr. Holmes in written questions whether he was concerned that, for example, a woman advancing a battered woman's defense against her husband would lack confidence in his impartiality. Mr. Holmes said that he doesn't see why anything he's written would justify any concern that he could not be impartial.

Not only does Mr. Holmes not disavow his assertion that women are bound to subordinate themselves to men, he doesn't see why women would be troubled by this? To paraphrase Sir Arthur Conan Doyle, "It's elementary, my dear Mr. Holmes." This is pretty basic stuff.

If I were a woman in a legal dispute with a man and my case were assigned to Mr. Holmes – should he be confirmed – I'd be real worried. That Mr. Holmes can't even see why I'd have these concerns is incredibly troubling.

There's a lot more to be worried about when it comes to Mr. Holmes' nomination.

Mr. Holmes believes that the Supreme Court rulings banning prayer in public schools, compelling public school busing, and guaranteeing a woman's right to choice, among others, constituted a revolution and he accused the judges behind those rulings of being "authoritarians."

Mr. Holmes has defended and endorsed Booker T. Washington's view that slavery was a consequence of divine providence, designed to teach white people how to be more Christlike.

Mr. Holmes has said that of all the cases in history he would want to have argued, the creation case is right there at the top of his list. I'm not really sure why, since John Scopes was convicted. I guess Mr. Holmes thinks he could have done a better job defending a law that bans the teaching of evolutionary theory in our public schools.

Mr. Holmes has not disavowed any of these views. In fact, he has continued to stand by them.

I admire that. I respect that. But I admire and respect that in an advocate, not in a federal judge.

Mr. Holmes believes he possesses sufficient "self-transcendence" – his word – to be able to set aside his views and judge cases impartially. I don't think it's enough to say, "I will follow the law" or that you will snap your fingers and transcend your own deeply-held, passionately-advocated convictions and become an impartial jurist.

I don't mean to be flip, but I just don't think it's that easy.

As my friends here know, I have three criteria I use in evaluating judicial nominees: excellence, moderation, and diversity. Once again, it's moderation that's the problem here.

I wish I could vote for every single one of the President's nominees. But when they are extremists, I have to be concerned. Whether they are too far Left or too far Right, extremists are usually bad for the federal bench and the parties that come to court seeking fairness and justice.

There's no question in my mind that Mr. Holmes qualifies as an extremist. I therefore must vote against him here and urge my colleagues to do the same.

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STATEMENT TO THE JUDICIARY COMMITTEE ON THE
NOMINATION OF CHARLES LETTOW TO SERVE AS A JUDGE
FOR THE UNITED STATES COURT OF FEDERAL CLAIMS
MARCH 26, 2003

Chairman Hatch, Senator Leahy, and my other distinguished colleagues on the Senate's Judiciary Committee, I thank you for holding this confirmation hearing.

Today, I am pleased to introduce a Virginian, Charles Lettow, who has been nominated to serve as a judge on the United States Court of Federal Claims. Mr. Lettow is joined today by his family, including his wife Sue and his four children Renee, Carl, John, and Paul.

As you know, the Court of Federal Claims is an Article I court that is authorized to hear primarily money claims founded upon the Constitution, federal statutes, executive regulations, or contracts with the United States. About 25 percent of the cases before this court involve complex tax issues. The judges on this court serve for a term of fifteen years.

In my view, Mr. Lettow's background makes him well-qualified for a judgeship on this specialized court.

His background with the law is extensive. He graduated from Stanford Law School in 1968 and then went onto serve as a law clerk for a judge on the United States Court of Appeals for the Ninth Circuit. Subsequently, Mr. Lettow served as a law clerk for then Chief Justice Warren Burger of the United States Supreme Court. After completing his clerkships, Mr. Lettow worked for three years, from 1970 to 1973, as Counsel to the Council on Environmental Quality in the Executive Office of the President.

In 1973, Mr. Lettow joined the Washington, DC law firm of Cleary, Gottleib, Steen & Hamilton. Mr. Lettow currently works at the firm, focusing on litigation. During his long career of practicing law, Mr. Lettow has argued three cases before the United States Supreme Court and over forty cases before the U.S. Courts of Appeals, federal district courts, and the Court of

Federal Claims.

Finally, I think it is important to note that Mr. Lettow has served this country before as a U.S. Army lieutenant with the 3rd Infantry Division in Germany from 1963 to 1965. I am thankful for his willingness to serve his country again on this important court.

I look forward to this Committee reporting his nomination favorably, and I look forward to Senate confirmation.

NOMINATIONS OF CAROLYN B. KUHL, OF CALIFORNIA, NOMINEE TO BE CIRCUIT JUDGE FOR THE NINTH CIRCUIT; CECILIA M. ALTONAGA, OF FLORIDA, NOMINEE TO BE DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF FLORIDA; AND PATRICIA A. MINALDI, OF LOUISIANA, NOMINEE TO BE DISTRICT JUDGE FOR THE WESTERN DISTRICT OF LOUISIANA

TUESDAY, APRIL 1, 2003

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

The Committee met, pursuant to notice, at 10:04 a.m., in room SD–226, Dirksen Senate Office, Hon. Orrin G. Hatch, Chairman of the Committee, presiding.

Present: Senators Hatch, Sessions, Chambliss, Leahy, Kennedy, Feinstein, Schumer, and Durbin.

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

Chairman HATCH. All right, we will begin.

It is a pleasure to welcome before the Committee this morning three exceptional nominees for the Federal bench.

Our circuit nominee is Carolyn Kuhl, who has been nominated to fill a judicial emergency on the Ninth Circuit, which is the most notoriously liberal Federal court in the United States. This is the court that gave us the infamous Pledge of Allegiance case, which held that the Pledge of Allegiance is unconstitutional because it contains the word "God" in it. As a result, public school children in nine Western States and two territories that constitute the Ninth Circuit will be forbidden from pledging allegiance to the flag of the United States, even as their mothers and fathers, uncles and aunts, other relatives and friends are fighting in Iraq to preserve our National security and the ideals that we most treasure in this Nation. As my esteemed colleague Senator Schumer put it, this case is "way out of the mainstream on the left side."

Unfortunately, the Pledge of Allegiance case is not an anomaly. Just last month, the Ninth Circuit decided to ignore and distort controlling Supreme Court precedent in order to skew the playing field in favor of criminal defendants. The Court concluded that a

key law prohibiting child pornography was unconstitutional as applied to certain criminal defendants. Amazingly, the panel handed down this ruling to a defendant who had knowingly and voluntarily pled guilty to violating the child pornography law with materials that traveled across State lines. As a result, child pornographers can flock to the Ninth Circuit to practice their trade unfettered by Federal criminal law. As the author of the PROTECT Act and the Comprehensive Child Protection Act of 2003—bills that will toughen laws against child pornography, child abuse, and child victimization—I shudder for the welfare of the millions of children who live in the Ninth Circuit. Decisions like these are the perfect examples for why our country needs good, constitutionalist judges on the Federal bench.

The Ninth Circuit has also held in recent years that California's so-called three-strikes law, which imposes life sentences on career criminals, was unconstitutional. It held that a prisoner who was convicted of making terroristic threats had a right to procreate through artificial insemination. This case, which became known as the procreation by FedEx case, was later reversed by an en banc panel of the Ninth Circuit, but just barely. Yet another gem from the Ninth Circuit held that prisoners have a constitutional right to pornography, which had been banned because inmates had used it to harass women guards. Fortunately, saner heads prevailed, and this case was reversed en banc.

Plenty of Ninth Circuit Court opinions and decisions, however, are not corrected en banc, which has led to the Ninth Circuit holding the dubious distinction of having the highest and widest Supreme Court reversal rate in the country among Federal courts of appeals. Over the past 7 years, the Supreme Court has reversed an average of 80 to 90 percent of the Ninth Circuit cases it hears. Just last term, the Supreme Court reversed the Ninth Circuit in 15 of 19 cases, 8 times unanimously. And so far in the current term, the Ninth Circuit has been reversed in 8 out of 11 cases. Three of these were unanimous summary reversals, which means that the Court simply reversed on the basis of the petition for certiorari, without asking for briefs or even oral arguments.

This pattern of decisions, some of which can be described as downright wacky, and its high reversal rate has led to the perennial introduction of legislation seeking to split the Ninth Circuit, given that so many of its States seek to disassociate themselves from such inherently illogical rulings.

I have taken the time to recite the state of affairs on the Ninth Circuit in brief because I think that it will benefit from the confirmation of such an esteemed and experienced jurist as Carolyn Kuhl, whose record demonstrates her commitment to following precedent and steering clear of judicial activism. At the same time, I want to make clear that I, for one, do not believe that the ideological composition of a court should have any determination on whether an otherwise qualified nominee should be confirmed. As I have said before on numerous occasions, I do not believe that ideology has any role, constitutional or otherwise, in the advice and consent process.

I recognize, however, that some of my Democratic colleagues disagree with me. They place great importance on achieving what

they have referred to as appropriate balance on a court in determining whether to vote to confirm a judicial nominee. So I know that they will find it interesting that of the 25 active judges on the Ninth Circuit, 17 of them were appointed by Democratic Presidents and 14 of them were appointed by President Clinton alone. In fact, four Clinton nominees to the Ninth Circuit were confirmed in 2000, a Presidential election year. Despite this record, only one of President Bush's three nominees to the Ninth Circuit was confirmed in the last Congress. So much for achieving the so-called balance. And while we just confirmed Jay Bybee to the Ninth Circuit last month, it is high time that Carolyn Kuhl is afforded a hearing before this Committee.

Judge Kuhl has an exemplary record that includes service as both a committed advocate and an impartial jurist. The American Bar Association has rated her well qualified for this position. Although the ABA used to be the gold standard as far as my Democratic colleagues were concerned, I am only half joking when I say that the ABA rating of well qualified seems to have become the kiss of death for President Bush's judicial nominees. The two nominees blocked in Committee last year, Charles Pickering and Priscilla Owen, both received well qualified ratings, as did Miguel Estrada, whose nomination has been filibustered on the Senate floor now for nearly 2 months. Carolyn Kuhl deserves to fare better, and I certainly hope she does.

I expect that we will hear a great deal about Judge Kuhl's qualifications during our next panel of witnesses, so I want to focus on the widespread support for her nomination, because the ABA is not alone in its judgment that she is well qualified for the Ninth Circuit.

Since 1995, Judge Kuhl has served as a judge on the Los Angeles County Superior Court. Nearly 100 of her fellow judges on that court have written to the Committee to voice their ardent support for her nomination. Here is what they have to say: "We are Republicans, Democrats, and Independents and have all had the opportunity to observe the leadership and demeanor of Judge Kuhl...We know she is a professional who administers justice without favor, without bias, and with an even hand. We believe her elevation to the Ninth Circuit Court of Appeals will bring credit to all of us and to the Senate that confirms her. As an appellate judge, she will serve the people of our country with distinction, as she has done as a trial judge."

Another letter came from the officers of the Litigation Section of the Los Angeles County Bar Association. With more than 3,000 members, this is the largest voluntary bar association in the United States. They write, "By reputation and our personal experience, Judge Kuhl is extremely intelligent, hard-working and thoughtful. She gained the prestigious appointment as Supervising Judge of the Complex Courts after only a few years on the bench because of those traits. In addition, she has a well-deserved reputation as being a fair-minded judge who follows legal precedent...On a personal level, we have come to know her as a warm, witty and deeply caring person. We could not recommend her more highly for nomination to the Ninth Circuit Court of Appeals."

I will submit copies of these letters for the record, without objection, along with copies of other letters of support we have received for Judge Kuhl's nomination.

Unfortunately, no judicial nominee these days seems to escape criticism, at least circuit nominees, by the liberal special interest groups. Judge Kuhl is no exception. I expect that we will hear attacks on her record as an attorney for the Justice Department during the Reagan administration, when she was doing her duty to represent the position of the United States. We will probably hear attacks on her record in private practice stemming from the types of clients she represented and the positions she took on their behalf. And I expect that we will hear some unfounded criticism of decisions she has made as a California State court judge.

These types of attacks on President Bush's judicial nominees have become so commonplace, and often bear so little relationship to the nominees' actual records, that they bring to mind the children's story of the boy who cried wolf. After 2 years of smear campaigns, with each consecutive nominee being declared more anti-this and pro-that than the former, these groups have simply lost credibility, especially when you consider their poor track record in predicting what kind of judges nominees will turn out to be.

Two cases in point are Supreme Court Justices David Souter and John Paul Stevens. The left-wing groups predicted that both of these nominees would roll back decades of protections for women, minorities, and the general population. Of course, the test of time has told a different story: Justice Souter and Justice Stevens are considered stalwart votes on the Court's liberal wing. We should keep this in mind as we consider the claims of the left-wing groups who oppose Judge Kuhl and other Bush nominees.

In addition to Judge Kuhl, we will hear from two nominees for the Federal district court bench: Cecilia Altonaga, who has been nominated for the Southern District of Florida, and Patricia Minaldi, who has been nominated for the Western District of Louisiana. And I will reserve my remarks on these nominees until after Judge Kuhl's testimony.

I look forward to hearing from all of our nominees on today's agenda, and I commend President Bush for nominating each of them.

We will now turn to the Democrat leader on the Committee.

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

Senator LEAHY. Thank you.

Today we are meeting, as you have said, to consider the nomination of California Judge Carolyn Kuhl. I note you have already attacked anybody who would question her qualifications. There are some who might think that her very, very strong support of Bob Jones University, a university where they teach, Mr. Chairman, that both your religion and mine are basically cult religions, had a very segregationist background, but has been strongly endorsed by a number of members of your party, so I suspect that that is something that can be overlooked.

I am delighted to see the distinguished Majority Leader here. When you were talking about how badly treated Republicans have

been, I think you probably overlooked the fact that the Senate has confirmed five Tennessee judicial nominees since President Bush took office—one circuit court nominee, four district court nominees. In fact, when I moved the Julia Smith Gibbons nomination through this Committee in record time and on to the floor, it was the first nominee confirmed to the Sixth Circuit in almost 5 years. We have since confirmed two of President Bush's nominees to that court.

I mention this, Mr. Chairman, because under the fairness of your reign as Chairman during the Clinton years, you refused to even allow hearings or votes on three of President Clinton's nominees to that same court. There is now just one vacancy in Tennessee, and that is for the seat of Thomas Gray Hull for the Eastern District. President Bush has said that he is going to nominate people to fill vacancies within 180 days. He is probably not aware of the fact that that became vacant way over 180 days ago.

I mention this because sometimes the practice does not match the rhetoric. The rhetoric is printed in the press. The press, unfortunately, rarely picks up the practice, with some notable exceptions.

The district court nominees have the support of their home State Senators, although, as I will discuss in a moment, Senators Graham and Nelson have had a most difficult time getting the White House to agree to continue the tradition of the Florida bipartisan selection commission and have only recently come to a meeting of the minds with the White House.

The circuit court nominee before us today, Judge Carolyn Kuhl, is not supported by both of her home State Senators. Her appearance before this Committee, despite that clearly stated opposition, is the latest in a string of transparently partisan actions taken by the Senate's new majority since the beginning of this Congress. In each of these actions—each of them unprecedented—Republicans have done something that they never did while in the majority from 1995 to 2001. Of course, then there was a Democratic President. Then they were willing to follow the rules as they saw them, especially if those rules worked against a Democratic President. Now they will ignore the rules if following the rules would not work to the benefit of a Republican President. They have taken every one of those steps—every one of those steps of ignoring past precedent, of ignoring our rules, has been done in lockstep with the White House further politicizing the whole question of picking judges. I believe the Republican majority has shown a corrosive and raw-edged willingness to change, bend, even break the rules they followed before when it was a Democratic President there. They will break, bend, and change the rules to help a Republican President. And lest some observers wrongly conclude that this sudden and orchestrated—and it orchestrated with the White House—series of rules changes is just politics as usual, it is not.

First, in January, one hearing was held for three controversial circuit court nominees, scheduled to take place in the course of a very busy day in the Senate. There were also three other judges on that, six in all. There was no precedent for this in the years that Republicans served in the majority and a Democrat was in the White House. In 6 years during the Clinton administration, never once were three circuit court nominees, let alone three very con-

troversial ones, brought before this body in a single hearing. Why the change in practice? There is a Republican in the White House.

When there was a Democratic President in the White House, circuit nominees were delayed and deferred, and vacancies on the courts of appeals more than doubled when the Republicans were in charge of this Committee, from 16 in January 1995 to 33 when the Democratic majority took over partway through 2001.

Then in 17 months, we held hearings on 20 circuit judges. Now, while Republicans averaged seven confirmations to the circuit court every 12 months, the Senate under Democratic leadership confirmed 17 in its 17 months in the majority. We did that with a White House that was more uncooperative than any of the six Presidents I have served with. So we have gone from idling during the time this Committee had during the time when President Clinton was in office to full speed ahead.

That is not the only politicized action. The Republican majority supported and facilitated the renomination of Priscilla Owen to a seat on the U.S. Court of Appeals for the Fifth Circuit even though she had been rejected by this Committee. Then they brought it back during a hearing where no new facts of significance were issued, but a lot of rhetoric about unfairness and so on, a lot of leading questions asked, carefully orchestrated with the White House.

Now the Republican majority has scheduled this hearing for a nominee who does not have blue slips returned from both her home State Senators. Now, we will surely hear today a long recitation of the history of the blue slip. We will hear how unfairly it may have been used before. We will hear how other Chairmen, Senators Kennedy and Biden, modified their policies to allow for more fairness. And we will hear how the Chairman's real objection during the Clinton administration was the so-called lack of consultation with Republican Senators and how fairly and successfully President Bush's White House has consulted. And I am sure the Chairman will tell us he is the heir to Democratic traditions, that he has followed these policies, et cetera, et cetera, et cetera.

Well, it is true various Chairmen of the Judiciary Committee have used the blue slip in different fashions. I will refer to how this Chairman has. Today is the first time that this Chairman will ever have convened a hearing for a judicial nominee who did not have two positive blue slips returned to the Committee. The first time, ever. Of course, we now do have a Republican President. And despite protestations that this has been the Chairman's consistent policy over time, it hasn't been. The facts show exactly the opposite.

These pieces of blue paper are what the Chairman uses to solicit the opinion of home State Senators about the President's nominees. When President Clinton was in office, this was the blue slip sent to Senators asking their consent. It says, "Please return this form as soon as possible to the nomination office. No further proceedings on this nominee will be scheduled until both blue slips have been returned by the nominee's home State Senators."

When President Bush began his term and Senator Hatch took over, the blue slip was then quickly changed. It simply says to return it as soon as possible. The blue slip that was good enough for

Chairman Hatch when there was a Democratic President suddenly changed to benefit a Republican President.

The new blue slip contains no requirement that the President may have to engage in sufficiently meaningful consultation with home State Senators. All it has is a 180-degree turn from what it used to be.

The blue slip was strictly enforced by the Chairman during the Clinton administration. It operated as an absolute bar to the consideration of any nominee to any court unless both home State Senators had returned positive blue slips. I remember going down to meet with President Clinton with the distinguished Chairman with me, and he made that very, very clear in our meetings in the Oval Office with the President. Until both blue slips came back, there would be no hearing. He said that is the way it is, that is the way it has always been, that is the way it always will be. Ah, but then the Presidency changed, and suddenly all the rules changed.

Remember, in the 106th Congress alone, more than half of President Clinton's circuit court nominees in the 106th Congress were defeated through the operation of the blue slip. Maybe the most vivid is the story of the United States Court of Appeals for the Fourth Circuit. Senator Helms was permitted by this Committee to resist President Clinton's nominees for 6 years. The distinguished Chairman told me personally that we couldn't go forward with those nominees, I believe African-Americans and others, because Senator Helms would not return a blue slip. James Beaty was first nominated to the Fourth Circuit for North Carolina by President Clinton in 1995, but there was no action on his nomination in 1995, 1996, 1997, or 1998 because one Senator had not sent back a blue slip. Another Fourth Circuit nominee from North Carolina, Rich Leonard, was nominated in 1995, but no action was taken in 1995 or 1996. James Wynn, again, a North Carolina nominee to the Fourth Circuit, sent to the Senate by President Clinton in 1996, sat without action in 1999, 2000, and 2001 because both blue slips were not back.

That was the rule, and I was told very forcefully and told by the distinguished Chairman in the presence of the former President in the Oval Office because that is the rule. Suddenly, the rule was changed.

I think now we see a bit of revisionism fit for study by Sovietologists saying there was insufficient consultation.

There were many times when the White House under President Clinton made nominations at the direct suggestion of Republican Senators, and there are judges sitting today on the Ninth Circuit, the Fourth Circuit, and the district courts in Arizona, Utah, Mississippi, and many other places only because the voices of Senators in the opposite party were heeded. In fact, in one case, at least one case, in Utah went forward because I went down and personally sat down with the President and urged him to go forward. But, instead, since the beginning of his time in the White House, the Bush administration has sought to divide, not unite, has sought to overturn traditions of bipartisan nominating commissions.

They changed the systems in Wisconsin, Washington, and Florida that had worked so many years. They ignored the protests of Senators like Barbara Boxer and John Edwards who wanted to

reach a true compromise and they even suggested Republican alternatives. They were told they were irrelevant.

Ignoring bipartisan judicial nominating commissions is just another step in the march to entirely politicizing the Federal judiciary. It is exactly what the Bush White House did to the State of Florida. Last year, Senators Graham and Nelson were compelled to write in protest to the White House Counsel's flaunting of the time-honored procedures—a procedure that had been followed when there were both Republican and Democratic Senators in Florida and Republican and Democratic Presidents. A process that had worked to fill 29 district court vacancies over 10 years was bypassed by this President. I am glad the White House has finally agreed to the Florida Senators' proposals so we can get on with processing the nomination of Cecilia Altonaga. And I hope the White House will start working with other Democratic Senators and increase the almost non-existent level of consultation. I have been here during the Ford administration, the Carter administration, the Reagan administration, the former Bush administration, the Clinton administration, and now this administration. I have never—and I can state this categorically—never been here with an administration that has shown less interest in working with Senators on judicial nominees than this one.

I object to this hearing being held, but I will participate in the questioning of Judge Kuhl. I understand the distinguished Chairman has completely turned on end what has been his rule when there was a President of the other party, but he has called it up and we will go forward.

We will talk about her past advocacy for aiding educational institutions which discriminate on the basis of race, like Bob Jones, or on religion, something of interest, I would assume, to Catholics, to Mormons, and others who have been greatly discriminated against by Bob Jones, as well as her work on the case involving fundamental constitutional rights, including the right to privacy. So we will look forward to it, and I think it will be an interesting time.

So nice to be here with you, Mr. Chairman.

Chairman HATCH. Well, it is so nice to have you. I understand you disagree with me somewhat here and, as usual, I think, have misstated the rules and the cases.

Now, we have Hon. Bill Frist, the Majority Leader, who I know has to leave in a short time, so we are going to turn to him next. Then we are going to turn to the distinguished Senator from California who would like to make a statement, and then we will go back to Senator Graham, and then we will go to the witnesses.

PRESENTATION OF CAROLYN B. KUHL, NOMINEE TO BE CIRCUIT JUDGE FOR THE NINTH CIRCUIT, BY HON. BILL FRIST, A U.S. SENATOR FROM THE STATE OF TENNESSEE

Senator FRIST. Mr. Chairman, it is with great pleasure that I am here to commend Carolyn Kuhl to this Committee's consideration, and I thank the Chairman and the Ranking Member and all the members of the Committee for allowing me this opportunity to give you my brief testimony.

I realize that it is unusual for a Senator who is not from a nominee's home State to make such an introduction, but if this helps,

I can tell you that Carolyn Kuhl is as bright as anyone I know in Tennessee, and I can say that because I have known her for 30 years, and a number of classes, but one in particular, a chemistry class, at Princeton University, and everything that I struggled with, she sailed.

I was delighted to read, Mr. Chairman, that along with everyone else the—I was able to read that the President has nominated my friend and classmate, Carolyn Kuhl, to serve on the Ninth Circuit, and that is why I am here.

Judge Kuhl and I attended Princeton University at a time, a unique time in the history of that university, a time of change and formation as an institution, and then also for us as individuals. I can tell you, Mr. Chairman, that a woman graduating from Princeton in those early 1970's with a chemistry degree, and, I should add, with honors, signifies an achievement greater than many may understand. Certainly the fact that Judge Kuhl went on to graduate from Duke Law School in the Order of the Coif makes clear why she sits here today and why I have no doubt she is eminently well qualified.

Like many Senators of late, I have turned for guidance to the Founding Fathers, and especially to the father of the independent Judiciary, John Adams, to find the right standard by which to give advice/consent on a judicial nominee. Adams was clear. He memorialized for us what the standard should be for the men and women who should be our judges: men of experience on the laws, of exemplary morals, invincible patience, unruffled calmness, an indefatigable application, who will be appointed for life and subservient to none.

This is a high standard. It is a standard which knows no politics. It is a standard devised when there were no organized parties. It is a standard both for the nominees and for the Senate as stewards of the independent judiciary. And this is a high standard, but one that Judge Kuhl meets in every single respect.

In reviewing Judge Kuhl's record, I was most struck by the wide support she has received, referred to by the Chairman, without regard to partisan politics. I was impressed by the letter from 23 women, all of whom sit as judges on the Superior Court of Los Angeles, the letter dated February 22, 2002. They write, and I quote, "Judge Kuhl is seen by us and by members of the bar who appear before her as a fair, careful, and thoughtful judge who applies the law without bias. She is respected by prosecutors, public defenders, and members of the plaintiffs' and defense bar. She is conscientious, scholarly, courteous, and willing to listen with an open mind to the arguments of counsel. Judge Kuhl approaches her job with respect for the law and not a political agenda. Judge Kuhl has been a mentor to new women judges who join our court. She has helped promote the judicial careers of women, both Republican and Democrat."

Mr. Chairman, these judges also point out that Judge Kuhl, and I quote, "supported Hon. Margaret Morrow when Judge Morrow was awaiting a hearing. She also wrote in support of President Clinton's nomination of Hon. Richard Paez."

Her colleagues go on to say in this letter, "Carolyn Kuhl is also a very decent, caring, honest, and patient human being who is a

delight to have as a professional colleague and friend. As sitting judges, we more than anyone appreciate the importance of an independent, fair-minded, and principled judiciary. We believe," they conclude, "that Carolyn Kuhl represents the best values of such a judiciary."

Mr. Chairman, as you well know, there are two types of praise that are most significant in public life: the honest praise of your opponents and the informed praise of your colleagues.

In closing, I am pleased to commend to you the nomination of Carolyn Kuhl, and I will leave you with this request: I hope that today you ask her tough questions. I seem to recall that these are the ones she most enjoys answering.

Thank you, Mr. Chairman.

Chairman HATCH. Well, thank you, Leader. We appreciate you taking time from what we know is a tremendously busy schedule to be with us today, and we are glad to have you here. We will allow you to go.

Senator FRIST. Thank you.

Senator LEAHY. I might note, Mr. Chairman, I am a great admirer of John Adams. I love the David McCullough book on him. I would also point out to the distinguished Majority Leader, John Adams was the first President who tried to pack the Federal courts. I just thought I would mention that.

Chairman HATCH. All right. We will turn to the distinguished Senator from California, and then I am going to turn to the distinguished Senator from Florida.

STATEMENT OF HON. DIANNE FEINSTEIN, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator FEINSTEIN. Thank you very much, Mr. Chairman, and I really appreciate this opportunity. I really want to be here during this hearing, particularly for Judge Kuhl. Unfortunately, Senator Byrd has called a meeting of Ranking Members of the Appropriations Committee at 11:00 on the supplemental, and the emergency supplemental is being marked up, as you know, at 2 o'clock this afternoon. That presents real logistical problems for me.

I wanted to say something—

Chairman HATCH. Would it be helpful to you if I turn to you first for questions?

Senator FEINSTEIN. It would. I would appreciate that very much.

Chairman HATCH. With the permission of the ranking member, I will do that so that we can accommodate you.

Senator FEINSTEIN. Well, if that is possible. If not, I can try to work it out some other way. But I have been asked to submit letters from my colleagues Senator Barbara Boxer and Senator Bill Nelson for the record, and with your permission I would like to do that.

Chairman HATCH. Without objection, we will put them in the record.

Senator FEINSTEIN. I want to just make a couple of comments about Judge Kuhl because I think in her nomination we see the classic dilemma. I have never had more letters from sitting judges in support of a candidate than I have with respect to this judge, Carolyn Kuhl. Every one of them went out of their way—and I am

a reader of letters and I know when they pro forma and I know when they are not. And they clearly are not in this case.

I have received a letter from the Los Angeles County Bar Association representing 20,000 Los Angeles lawyers, and I think the letter says something that we ought to take note of, and that is, and I quote, "The recent trend in attacking the qualifications of judicial candidates on the basis of positions advocated on behalf of clients is misguided for a variety of reasons." And then they point out the reasons. And I think we ought to think a little bit about this. I would like to put that letter, if I might, in the record.

Chairman HATCH. Without objection, it will go into the record.

Senator FEINSTEIN. I think it is very rare that we have an appellate court nominee that has this kind of background. Clearly, this is an extraordinarily bright woman. I think it is very rare that we have an appellate court nominee that has the kind of experience that she has had on the court, the most diverse court in the United States, the Los Angeles Superior Court.

I want to just read into the record on e paragraph from one letter from Judge Paul Boland, and you correctly stated there are 94 superior court judges from Los Angeles who have signed in support, and there are 24 other separate letters from judges in support. But I think this paragraph has to be considered, and I would like to read it.

"Judge Kuhl is widely regarded as one of the most dedicated, knowledgeable, skillful, and thoughtful judges sitting on the Los Angeles Superior Court. In criminal and civil judicial assignments, she has distinguished herself as a judge who is highly intelligent, renders balanced, reasoned decisions, is intellectually honest, and is even-handed and fair. In criminal cases, prosecutors and criminal defense lawyers alike single her out for praise. In civil matters, the plaintiffs' bar and the defense bar universally respect her. During our years of service together on the superior court, I have never heard any criminal or civil lawyer express the view that Judge Kuhl issued a ruling or rendered decisions that were in any way influenced by a particular judicial philosophy or political ideology or were motivated by a judicial or political agenda. As a member of the superior court, she has consistently strived to make decisions that are legally correct and devoid of bias."

And then he goes on, as a Supervising Judge of Complex Litigation, to describe how she came into that area and within 6 months ended up supervising the area. You know, clearly this is an outstanding judge.

Now, on the other hand, we have a wide array of letters from socially connected organizations in strong opposition to this nominee. These letters, I would say from my reading, 100 percent point out their concerns, all of which go back to the time before she was a judge and about which I hope to ask a number of questions when my time comes.

I think the job for this Committee is really to reconcile those social viewpoints with her performance over a substantial period of time as a Los Angeles Superior Court judge.

Now, when I have asked questions of people that have come in to see me, well, she didn't demonstrate that as a judge. They would

say to me, "Well, she didn't have a case that would cover that point." So what we have is sort of a complete polarization.

Now, what has concerned me in the time I have sat on this Committee is those judges about which there is the least, we know the least. Those judges that go through very often are those judges that haven't written, haven't spoken, really don't have much record; therefore, there is nothing to pin the tail on the donkey. And what concerns me about the Federal judiciary is what I call the dodo head syndrome, that we end up getting a lot of judges about which we know very little but who are not necessarily the brightest and the best, which I believe the Federal system should be.

So this is a hard case in point, and it may be well that Judge Kuhl is really the one, I think, that is going to make the outstanding point in this regard.

So I guess what I want to say, Mr. Chairman, is that this is a very big hearing, indeed, because the sides are well polarized. On one bench, you have virtually the entire Los Angeles sitting superior court, and on the other, you have some of our finest and best social organizations throughout the United States. It is going to be very interesting to see how it turns out.

I say this as someone that has an open mind. I have not taken a position, but I hope to ask a number of questions.

Also, to kind of identify it, there is one additional letter I would like to read, and it was a surprising letter to me because it is from a Vilma Martinez, who is a Democrat, is a veteran of civil rights battles. She is well known to me. She testified against Judge Robert Bork's nomination to the Supreme Court, and she says, and I quote, "Like others dedicated to the independence of our judiciary, I certainly do not want ideologues serving as judges on our Federal courts. That is why I think Judge Kuhl would make a great addition to the Ninth Circuit. She served for 7 years in the California Superior Court, et cetera." And she says, "Before that, she and I were law partners for 9 years. Judge Kuhl is what I think of as an old-fashioned judge. She cares about due process for everyone. During her service on the superior court, she has shown that she is careful to hear both sides. She doesn't try to influence the outcome of a case in favor of one side or the other. She is serious about her oath to follow the law, whatever the result."

And so I would like to add that record, if I may, as well to the record.

Chairman HATCH. Without objection, we will put it in the record.

Senator FEINSTEIN. I thank you for this courtesy, Mr. Chairman.

Chairman HATCH. Well, thank you, Senator.

We will turn to our distinguished friend from Florida, Senator Graham.

PRESENTATION OF CECILIA M. ALTONAGA, NOMINEE TO BE DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF FLORIDA, BY HON. BOB GRAHAM, A U.S. SENATOR FROM THE STATE OF FLORIDA

Senator GRAHAM. Thank you very much, Mr. Chairman and members of the Committee. In deference to the Committee's very heavy and important agenda today, I am going to abbreviate my

remarks and would ask that my full statement be included in the record.

Chairman HATCH. We will put the full statement in the record, Senator.

Senator GRAHAM. Thank you very much, Mr. Chairman.

I also wish to thank you for your prompt scheduling of this hearing. As I have said before, the Southern District of Florida is one of the largest in terms of case filings and busiest in terms of the complexity of those cases judicial districts in the country, and I appreciate your concern to see that it continues to be fully staffed.

Chairman HATCH. Thank you, Senator.

Senator GRAHAM. Mr. Chairman, on behalf of Senator Bill Nelson and myself, I am pleased to introduce to the Committee Hon. Cecilia M. Altonaga. She currently serves as a judge on the State of Florida's Eleventh Circuit, the highest trial court in our State.

Judge Altonaga is joined today by her husband, George Mencio, Jr., also a lawyer, specializing in international law. Her three daughters—Natalie, 13, Caroline, 10, and Gabriella, 4—are at home in Miami, and I know they are very proud of their mother today.

Mr. Chairman, I am honored to introduce you to this nominee not only because she is an able jurist who hails from our State of Florida, but also because her confirmation will further realize our shared commitment to the goal that our judiciary should be as varied as our society. I would like to submit for the record and read a portion of a letter which I have received from Mr. Victor M. Diaz, Jr., who is the president of the Board of Directors of the Cuban American Bar Association in Miami, Florida. Mr. Diaz writes, "Judge Altonaga is an outstanding jurist who is extremely well qualified for the position to which she has been nominated. Judge Altonaga's appointment also will bring much needed diversity to our local Federal court judiciary. Most importantly, Judge Altonaga represents the highest aspirations of our profession from a personal and ethical standpoint and will serve as a role model to all who will come before her."

I ask that the full letter be included.

Chairman HATCH. Without objection, we will put it in the record.

Senator GRAHAM. Today, with Senator Nelson, I support the nomination of Cecilia M. Altonaga, who is about to become the first Cuban American woman to serve as a Federal judge. Judge Altonaga's solid qualifications make her an ideal candidate for service on the Federal bench. A graduate of Florida International University in Miami and the Yale University School of Law, Judge Altonaga has served her community as assistant county attorney in Miami–Dade County and as a judge on the county court of Florida's Eleventh Circuit prior to her ascending to the circuit court.

Beyond these impressive credentials, Judge Altonaga possesses the temperament that the job requires. Her college alumni publication reports that her professor remembers her as a disciplined, goal-oriented student who wasn't afraid to work hard. And, Mr. Chairman, I think maybe one of the best qualifications for a Federal district judge is this statement by her professor: "She was one of the best listeners I ever had."

She is clearly suited for this challenge work. Judge Altonaga is an intelligent, committed, well-respected candidate for the Federal bench, and I appreciate the Committee's consideration of her nomination and have every expectation that both this Committee and the full Senate will act on this nomination without delay.

Chairman HATCH. Well, thank you, Senator. We appreciate you taking time from your busy schedule to be here, and that is high praise indeed for Judge Altonaga. So we appreciate you being here.

Senator GRAHAM. Thank you.

Senator LEAHY. It is nice to have you back.

Chairman HATCH. It sure is. We have two members of this Committee who need to go to the meeting with Senator Byrd, so we will call on Senator Leahy first and then we will call on Senator Feinstein from California second, and I will defer my questions until after the two of them. We are going to have ten-minute rounds, so Senator Leahy?

I forgot to ask you to give any statement you would care. We will do that, as well.

Senator LEAHY. You can do that first.

Chairman HATCH. Would you raise your right hand. Do you solemnly swear to tell the truth, the whole truth, and nothing but the truth, so help you, God?

Judge KUHL. I do, Senator.

Chairman HATCH. Thank you. Judge Kuhl, we are very grateful to have you before us today and we look forward to hearing your testimony. Do you have a statement you would care to make before we get into—

STATEMENT OF CAROLYN B. KUHL, NOMINEE TO BE CIRCUIT JUDGE FOR THE NINTH CIRCUIT

Judge KUHL. I don't have a statement that I have brought to make. I would like to introduce my family, but being aware of the time, perhaps I could—

Chairman HATCH. No, please do. No, we want you to do that.

Judge KUHL. All right. Thank you. I have with me here today my husband, Hon. William Highberger, who is a judge also on my court and my partner in all things. I have my daughters, Helen and Anna Highberger. Helen is the elder and I am very proud of them—

Chairman HATCH. We are happy to have you here.

Judge KUHL. —and they are here today. And also my father and my brother, who have come from Fort Worth, Texas, to be here. My father is a retired railroad executive and my brother is a computer consultant and they are both learning to fly. My brother soloed last week, so I really proud to have them.

Chairman HATCH. We are really proud to have you here, and that is great that you can do that. Thank you. We are so happy to have your family here with you and we welcome you and hope you can enjoy this hearing.

[The biographical information of Judge Kuhl follows:]

I. BIOGRAPHICAL INFORMATION (PUBLIC)

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

Carolyn Barbara Kuhl; Carolyn Kuhl Highberger (married name)

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

Residence:
Los Angeles, California

Office:
Los Angeles Superior Court
111 North Hill Street
Department 1
Los Angeles, CA 90012

3. Date and place of birth.

July 24, 1952, St. Louis, Missouri

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

Hon. William Foster Highberger
Judge of the Superior Court of the State of California,
County of Los Angeles
111 North Hill St.
Department 32
Los Angeles, CA 90012

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

Duke University School of Law, 1974-1977, JD with distinction 1977
Princeton University, 1970-1974, AB *cum laude* 1974

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.

Judge of the Superior Court for the State of California, County of Los Angeles, 1995-present (Supervising Judge, Complex Litigation Program, 2001 - December 9, 2002; Supervising Judge-Civil, December 9, 2002 - present)
Partner, Munger, Tolles & Olson, 1986-1995
Deputy Solicitor General, U.S. Department of Justice, 1985-1986
Deputy Assistant Attorney General, Civil Division, U.S. Department of Justice, 1982-1985
Special Assistant to the Attorney General, U.S. Department of Justice, 1981–1982
Associate, Munger, Tolles & Rickershauser, 1978-1981
Law Clerk, Hon. Anthony M. Kennedy, U.S. Court of Appeals for the Ninth Circuit, 1977-1978
Research Assistant, Professor F. Hodge O'Neal, Washington University Law School, summer 1977
Summer Associate, Winthrop, Stimson, Putnam & Roberts, summer 1976
Summer intern, Law Department, Monsanto Company, summer 1975
Summer intern, Product Acceptability Department, Monsanto Company, summer 1974
Judicial Member of Board of Directors, Association of Business Trial Lawyers (Los Angeles Chapter), 1998-2000
Judicial Member of Executive Committee, Litigation Section of the Los Angeles County Bar Association, 1999-2002
Marlborough School Parent Association, Executive Committee, Corresponding Secretary, 2001-2002

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.

Member, American Law Institute
Former member, Administrative Conference of the United States
Order of the Coif, Duke Law School
Russell M. Robinson, III Award for Outstanding Editorial Board Member, Duke Law Journal 1976-1977
Outstanding Staff Member Award, Duke Law Journal 1975-1976
Danforth Scholarship, Princeton University

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 Law Institute
Judicial Council of California Task Force on Jury Instructions, Civil Subcommittee (appointed by Chief Justice of the California Supreme Court)
Los Angeles Superior Court Supervising Judges Committee
Los Angeles Superior Court Research Attorney Committee, Chair 1999–2001
Los Angeles Superior Court Committee on Alternative Dispute Resolution
Los Angeles Superior Court Committee on Criminal Jury Instructions (CALJIC)
California Judges Association
Administrative Conference of the United States
Duke University School of Law, Member of Board of Visitors
Fellow, Private Adjudication Center
Legal Advisory Panel, Senate Judiciary Committee
Federalist Society
American Bar Association
Los Angeles County Bar Association
Litigation Section of the Los Angeles County Bar Association, Judicial Member of Executive Committee, 1999-2002
Association of Business Trial Lawyers (Los Angeles Chapter), Judicial Member of Board of Directors, 1998-2000

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 do not belong to any organizations that lobby before public bodies.

Corpus Christi School, Parish School Association
Marlborough School Parent Association, Executive Committee, Corresponding Secretary
Ketchum Downtown YMCA
City Club on Bunker Hill (The Membership Bylaws for the Club are supplied with this Questionnaire.)

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.

Supreme Court of the State of California, August 20, 1979 (membership lapsed in October 1995 when I became a member of the state judiciary)
Courts of the District of Columbia, July 1986 (inactive status)
Supreme Court of the State of Missouri, September 20, 1977 (I allowed this membership to lapse in about 1990 because I did not intend to practice in Missouri at any time in the future)
Supreme Court of the United States, August 12, 1983
U.S. Court of Appeals for the Ninth Circuit, June 24, 1982
U.S. Court of Appeals for the D.C. Circuit, March 9, 1983
U.S. Court of Appeals for the First Circuit, March 5, 1985
U.S. Court of Appeals for the Eighth Circuit, August 10, 1983
U.S. Court of Appeals for the Tenth Circuit, July 23, 1980
U.S. District Court for the Central District of California, March 18, 1983

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.

Published Material

Kuhl, "The Complex Litigation Pilot Program of the Los Angeles Superior Court: An Opportunity for Creativity and Experimentation in Case Management," L.A. COUNTY BAR LITIGATION SECTION NEWSLETTER FOR THE CIVIL TRIAL LAWYER, Vol. 17, No. 1, Winter 2001 at 6 (text provided)

Kuhl, *Introduction: Law, Economics, and Social Conservatism*, 21 Harv.J. of L.& Pub.Pol. 55 (1997)

Bloom, Swallow, Kuhl & Beaber, *The Future of Civil Punishment: Punitive Damages from Spilled Coffee to Bone Marrow Transplants*, 16 Whittier L.Rev. 971; note that the only portion of this article authored by Carolyn Kuhl is the section beginning at the bottom of page 975 through the top of page 980; see text provided for Presentation on Punitive Damages Reform Efforts as part of Health Law Symposium at Whittier Law School, April 21, 1995, from which this article

was derived; see letter of October 4, 2001 from Health Law Symposium Editor Peggy S. Onstott, noting that "[u]nfortunately all panel members were listed at the beginning of the article without proper recognition for individual contributions within the article.")

Kuhl, "Employment At The Will Of The Courts," in LAW, ECONOMICS & CIVIL JUSTICE (1994) (edited by Patrick McGuigan; published by Free Congress Foundation) (text provided)

Kuhl, "Court Remains Adrift on Punitive Damages Awards: *TXO Production Corp. v. Alliance Resources Corp.,*" L.A. DAILY JOURNAL, U.S. Supreme Court Roundup, Aug. 6, 1993 at 27 (text provided)

Kuhl, *Clinton Dithered, Reagan Didn't,* NEW YORK TIMES, June 16, 1993 at A19 (text provided)

Kuhl, Comment for BNA Special Report, in BNA SPECIAL REPORT ON AFFIRMATIVE ACTION TODAY: A LEGAL AND PRACTICAL ANALYSIS 157-159 (1986) (text provided)

Comment, *The Role of the Contract Clause in Municipalities' Relations With Creditors,* 1976 DUKE L.J. 1321 (text provided)

Note, *Protection From Government Disclosure - The Reverse-FOIA Suit,* 1976 DUKE L.J. 330 (text provided)

Speeches and Testimony

Presentation on Recent Developments Affecting the Civil Departments of the L.A. Superior Court to Chancery Club of Los Angeles, January 9, 2003 (no materials)

Presentation on L.A. Superior Court Complex Litigation Program at Complex Court Symposium sponsored by the Litigation Section of the L.A. County Bar Association, October 26, 2002 (notes for opening remarks provided)

Presentation on Employment Law Jury Instructions as part of a program entitled "The New Civil Jury Instructions – Are You Ready?" sponsored by the Consumer Attorneys of Los Angeles and the Association of Southern California Defense Counsel, October 17, 2002 (notes provided)

Presentation on "Protective Orders and Privacy Issues in Civil Discovery" to Judges of the L.A. Superior Court, February 19, 2002 (notes provided)

Presentation on "Overview of Civil Litigation and Complex Litigation in the L.A. Superior Court" to Chancery Club of Los Angeles, January 10, 2002 (notes provided)

Presentation on Civil Discovery Disputes to Judges of the L.A. Superior Court, July 17, 2001 (notes provided)

Presentations on L.A. Superior Court Complex Litigation Pilot Program at Complex Court Symposium sponsored by the Litigation Section of the L.A. County Bar Association, the Association of Business Trial Lawyers, Consumer Attorneys Association of Los Angeles and Southern California Defense Counsel, June 21 and 23, 2001 (notes provided)

Presentation on L.A. Superior Court Complex Litigation Pilot Program to Law and Justice Committee of the L.A. Chamber of Commerce, March 30, 2001 (same notes as for March 13, 2001 presentation)

Presentation on L.A. Superior Court Complex Litigation Pilot Program to the Corporate Roundtable sponsored by the Corporate Counsel Section of the L.A. County Bar Association, March 13, 2001 (notes provided)

Participation as Moot Court Judge for Hart Moot Court Competition at Duke Law School, Feb. 9, 2001 (no materials)

Taught class comparing the California Complex Litigation Pilot Program and the federal Multidistrict litigation rules as part of a course in Complex Litigation at Duke Law School, Feb. 9, 2001 (no materials)

Presentation on Integrating ADR Processes with Case Management Systems as part of a Statewide Conference on Court-Connected ADR Programs for Civil Cases, Jan. 30, 2001 (notes provided)

Presentation on Employee Privacy Rights and Privacy Limitations on Discovery in Employment Litigation as part of Rutter Group Program on Employment Law, Jan. 21, 2001, Jan. 12, 2000 and Jan. 29, 1999 (notes for all three presentations provided as a group)

Presentation on L.A. Superior Court Complex Litigation Pilot Program to the Inn of Court sponsored by the Litigation Section of the L.A. County Bar Association, Oct. 4, 2000 (notes provided)

Presentation on California Employment Law (Contract and Tort) to Judges of the L.A. Superior Court, May 10, 2000 (notes provided)

Presentation on "The Top Ten Mistakes Trial Lawyers Make in Employment Cases," L.A. County Bar Employment Law Section, Apr. 2, 2000 (notes provided)

Moderator for Panel on "Do Punitive Damages Deter Harmful Corporate Conduct?" sponsored by L.A. Lawyers Chapter of the Federalist Society, March 23, 2000 (notes provided)

Participation as Moot Court Judge in Appellate Advocacy Program sponsored by Employee Rights and Responsibilities Committee of ABA, Mar. 16, 2000 (notes provided)

Presentation on written discovery as part of a program for new lawyers on "The Nuts and Bolts of Civil Litigation" sponsored by the L.A. County Bar, the LACBA Barristers Section and the Daily Journal Corp., Mar. 7, 2000 (notes provided)

Presentation on Civility, Federal Bar Association, January 25, 2000 (no materials)

Presentation on Recent Developments in Business Litigation sponsored by the Litigation Section of the L.A. County Bar Association, Nov. 16, 1999 (no materials)

Presentation on Closing Arguments as part of "Effective Use of Themes in the Courtroom" sponsored by the Association of Business Trial Lawyers (ABTL), Oct. 31, 1999 (notes provided)

Presentation on Settlement/ADR Techniques to Consumer Attorneys of Los Angeles Annual Convention, Oct. 23, 1999 (notes provided)

Presentation on Written Discovery as part of a program for new lawyers on "The Nuts and Bolts of Civil Litigation" sponsored by the L.A. County Bar, the LACBA Barristers Section and the Daily Journal Corp., April 15, 1999 (notes provided)

Participation in L.A. County Bar Corporate Roundtable, "Meet the Judges," Feb. 16, 1999 (no materials)

Presentation on ADR in Labor and Employment Law to ABA Section on Dispute Resolution, Feb. 5, 1999 (no materials)

Presentation on Recent Developments and Trends in Business Litigation sponsored by the Litigation Section of the L.A. County Bar Association, Nov. 10, 1998 (no materials)

Mock Ninth Circuit oral argument as part of an Appellate

Practice and Advocacy Program sponsored by the Federal Bar Association, May 2, 1998 (no materials)

Presentation on "Improving Your Legal Writing" to Women Litigators' Forum sponsored by Women Lawyers Association of Los Angeles, March 14, 1998 (notes provided)

Presentation on "Handling the Difficult Case" to Association of Business Trial Lawyers, Feb. 10, 1998 (no materials)

Moderator for Panel on "Law, Economics and Social Conservatism" at 1997 Federalist Society Student Symposium hosted by Duke Law School (text of companion article from Harvard Journal of Law and Public Policy provided as noted above)

Presentation on Career Paths for Women Lawyers as part of Duke Law School's Celebration of 25 Years of Women at Duke Law School, Oct. 17, 1997 (no materials)

Presentation on "The Three Strikes Law on Its First Lap" to the L.A. Lawyers Chapter of the Federalist Society, June 19, 1997 (text of speech and article from LOS ANGELES DAILY JOURNAL provided)

Presentation to the graduating class of the UCLA Legal Interpretation and Translation Program, August 9, 1996 (text of speech provided)

Presentation on Punitive Damages Reform Efforts as part of Health Law Symposium at Whittier Law School, April 21, 1995 (text of speech provided)

Presentation on "Sticky" Professional Responsibility Problems Confronting Company Counsel as part of Institute for Corporate Counsel, March 23, 1995 (notes provided)

Presentations on Appellate Practice, Federal Bar Association Programs, March 1995, October 5, 1990 and February 25, 1989 (notes for 1995 (and possibly other years) provided)

Presentation to General Counsels' Forum on Punitive Damages Litigation, May, 1994 (notes and materials prepared for program provided)

Presentation on "Bringing Your Trial to Life Through Demonstrative Evidence," ABA Litigation Section Fall Meeting, Nov. 9, 1992 (no materials)

Presentation on Prosecuting and Defending Lawsuits Under the False Claims Act, American Bar Association Annual Meeting,

August 8, 1988 (no materials)

Address to Indiana University School of Law Federalist Society, Separation of Powers and the Qui Tam Provisions of the False Claims Act, March 26, 1988 (no materials)

Testimony before the Senate Judiciary Committee in support of the nomination of Anthony M. Kennedy to be Associate Justice of the United States Supreme Court, December 17, 1987 (no materials)

Presentation as part of Colloquium on "Improving Dispute Resolution: Options for the Federal Government," June 1, 1987 (no materials)

Testimony before the Subcommittee on Administrative Law and Governmental Relations of the House Judiciary Committee concerning HHS Policy of Acquiescence, July 25, 1985 (prepared remarks provided)

Testimony before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Judiciary Committee concerning the Reauthorization of the Equal Access to Justice Act, April 30, 1985 and March 14, 1984 (prepared remarks provided)

Testimony before the House Committee on Government Operations concerning Government Reorganization H.R. 6225 (legislative veto), September 20, 1984 (prepared remarks provided)

Testimony before the Senate Finance Committee concerning Social Security Administration's Nonacquiescence Policy, January 25, 1984 (prepared remarks provided)

Testimony before the House Committee on Veterans' Affairs concerning Judicial Review of Veterans' Claims, July 21, 1983 (prepared remarks provided)

Presentation on the Department of Justice as part of a Presidential Classroom for Young Americans, summer 1983 (no materials)

Presentation at the Aspen Institute on "Use of Alternative Dispute Resolution in Contract Disputes with the Government," program sponsored by the Center for Public Resources, June 24, 1983 (no materials)

Presentation to the Council of the Litigation Section of the American Bar Association on status of pending bankruptcy legislation, October 9, 1982 (no materials)

Address to the American Judges Association Mid-Year Conference, April 23, 1982 (no materials)

Testimony before the Subcommittee on Criminal Law of the Senate Judiciary Committee on A Bill to Eliminate the Bar of the Act of State Doctrine in Certain Cases, September 14, 1981 (prepared remarks provided)

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

My health is excellent. My last general physical examination was April 17, 2001. Subsequently I have been examined yearly by my gynecologist.

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

Judge, Superior Court of the State of California for the County of Los Angeles, appointed October 1995. The Superior Court is the trial court of general jurisdiction for the State of California. As a Superior Court Judge I have handled both criminal felony matters and civil cases.

Currently I serve as the Supervising Judge of the Civil Departments of the Los Angeles Superior Court. The Presiding Judge of the Superior Court appoints the Supervising Judge—Civil.

From January 2001 to December 2002 I was the Supervising Judge for the Complex Civil Litigation Program in the Los Angeles Superior Court. The Presiding Judge of the Los Angeles Superior Court selects the Supervising Judge for the Complex Civil Litigation Program. The Complex Civil Litigation Program is a statewide project that creates a specialized court to handle cases requiring exceptional judicial management, such as multiparty mass tort, environmental, securities, insurance coverage and construction defect cases.

15. Citations: If you are or have been a judge, provide: (1) citations for the ten most significant opinions you have written; (2) a short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court

rulings on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions.

(1) *Ten Most Significant Opinions Written*

Wolf v. Mitchell, Silberberg & Knupp, 76 Cal.App.4th 1030 (1999)
Blasiar, Inc. v. Fireman's Fund Ins. Co., 76 Cal.App.4th 748 (1999)
American Nat'l Prop. & Cas. Co. v. Julie R., 76 Cal.App.4th 134 (1999)
Iwekaogwu v. City of Los Angeles, 75 Cal.App.4th 803 (1999)
Ehret v. Congoleum Corp., 73 Cal.App.4th 1308 (1999)
Signal Treating Service, Inc. v. Lonrho, PLC, Cal.Ct.App. No. B124370, filed Aug. 5, 1999 (unpublished; opinion provided)
McColl-Frontenac, Inc. v. Adriatic Ins. Co., L.A. Superior Ct. No. BC 157394, filed Dec. 7, 2000 (unpublished; opinion provided)
State of California v. City of Los Angeles, L.A. Superior Ct. No. BC 147094, filed July 12, 2000 (unpublished; opinion provided)
People of the State of California v. State Fish Co. Inc., L.A. Superior Ct. No. BC 167831, filed Aug. 14, 1998 (unpublished; opinion provided)
City of Vernon v. Central Basin Municipal Water Dist., L.A. Superior Ct. No. BC 130693, filed Oct. 14, 1997, (unpublished; opinion provided) *aff'd* 69 Cal.App.4th 508 (1999)

(2) *Reversals and Affirmances with Criticism*

Discover Bank v. Superior Court (Boehr), __ Cal.App.4th __, 2003 Cal.App.Lexis 41 (Jan. 14, 2003)

In this case defendant sought to enforce an arbitration agreement that precluded Discover cardmembers from bringing a class action. I held that Delaware law applied, that the provision precluding class actions was enforceable under Delaware law and that Delaware law did not violate California's fundamental public policy. After a new appellate decision from the Fourth District Court of Appeal held that restrictions on class actions in arbitration clauses did violate public policy and were invalid, I granted reconsideration and reversed my prior ruling. Defendants filed a petition for writ of mandate and the Second District Court of Appeal reversed my second ruling, disagreeing with the opinion of the Fourth District and reinstating my first ruling.

Riley v. Hilton Hotels Corp., 100 Cal.App.4th 599 (2002)

Plaintiff filed a class action alleging that a Beverly Hills hotel operated a vehicle parking facility within the meaning of a local ordinance but did not provide proper notice of the fee charged for the parking service as required by that ordinance. During the pendency of the litigation, the ordinance was amended and the defendant argued that the legislative change applied retroactively. The California Court of Appeal agreed with my finding that the amendment of the ordinance was a substantive change of law, but reversed my finding that the language of the amended ordinance evidenced an intent by the City Council that the amendment be applied retroactively.

Smith v. State Farm Mutual Automobile Ins. Co., 93 Cal.App.4th 700 (2001)

Plaintiffs filed a class action alleging that defendant insurers conspired to require customers who sought liability coverage on multiple vehicles to either purchase uninsured motorist coverage for each vehicle or waive it as to all vehicles. The Court of Appeal upheld my ruling sustaining a demurrer without leave to amend as to certain insurer defendants on the ground that state law required the business policies that the plaintiffs challenged. The Court of Appeal reversed and remanded to allow the plaintiffs to amend their complaint as to certain insurers that issued separate policies covering each one of an insured's multiple vehicles.

Continental Casualty Co. v. Superior Court (Paragon Homes), 92 Cal.App.4th 430 (2001)

Paragon Homes brought suit alleging that its insurance carrier had a duty to defend it against claims brought by Paragon's joint venturer, FN Development. The Court of Appeal reversed my ruling that the insurer was required to defend Paragon Homes against a claim for declaratory relief by which FN Development sought to hold Paragon liable for construction defects in homes constructed by Paragon pursuant to the joint venture. The Court of Appeal concluded that FN's claim against Paragon did not seek to recover for property damage caused by an occurrence within the meaning of the commercial general liability insurance policy at issue.

Meringoff v. Spiegel, Cal.Ct.App. No. B140402, filed May 31, 2001 (unpublished; opinion provided)

This reversal concerned interpretation of a commercial lease agreement. The Court of Appeal held that parol evidence should have been admitted in interpreting the lease and therefore reversed the grant of summary judgment.

Sanchez-Scott v. Alza Pharmaceuticals, 86 Cal.App.4th 365 (2001)

This reversal concerned the California common law tort of invasion of privacy. The Court of Appeal held that the plaintiff had stated a claim for invasion of privacy against a doctor who had a drug company representative in an examining room during a woman's breast examination. The appellate court disagreed with my ruling that the complaint did not state a claim because the patient was in a position to make further inquiry about why the third person was present but did not do so and did not object to the third person's presence. My ruling sustaining the demurrer was on the record but not in a written opinion.

Superior National Ins. Co. v. Superior Court, Cal.Ct.App. No. B131205, filed Mar. 8, 2000; *Post Sound Corp. v. Floyd,* Cal.Ct.App. No. B125767, filed May 24, 2000 (unpublished; opinions provided)

These Court of Appeal opinions concerned a single case. In the first opinion, the Court of Appeal reviewed a ruling concerning inadvertent production of privileged documents. The Court of Appeal held that if an attorney inadvertently discloses a client's privileged documents, the documents must be returned to the holder of the privilege even if the attorney did not use due diligence in conducting a privilege review. In the second opinion, the Court of Appeal affirmed in part and reversed in part. The Court reversed my order sustaining a demurrer to a cause of action for fraud, finding that the allegations of the complaint adequately alleged active concealment.

Harrahill v. Santoro, Cal.Ct.App. No. B131441, filed Jan. 13, 2000; No. B133079, filed Mar. 20, 2000 (unpublished; opinions provided)

The Court of Appeal reversed my ruling on procedural grounds. I had issued an opinion enjoining enforcement of a municipal truancy ordinance. Before the judgment was entered, the municipality amended the ordinance and filed a motion for reconsideration. I entered judgment

based on the original opinion. The Court of Appeal held that I should have considered the new ordinance and remanded the case. The Court of Appeal later accepted the parties' stipulated reversal of an attorneys' fees award in light of the remand.

Laird v. Spelling, Cal.Ct.App. No. B115918, filed June 28, 1999 (unpublished; opinion provided)

In this case the Court of Appeal reversed on the issue of whether the factual allegations of the complaint supported an action for libel. The Court of Appeal held that the statements alleged in the complaint could be understood to mean that the plaintiff did not create the television series that she claimed to have created.

Liu v. Moore, 69 Cal.App.4th 745 (1999)

The Court of Appeal reversed on an issue of statutory construction concerning when attorneys fees may be awarded to a defendant in a SLAPP suit (a Strategic Lawsuit Against Public Participation).

People v. Canady, Cal.Ct.App. No. B109844, filed July 22, 1998 (unpublished; opinion provided)

In this criminal case the Court of Appeal reversed and remanded for a new trial only on the truth of two serious felony prior allegations (used for purposes of sentencing enhancements). The Court of Appeal held that the prosecutor's closing argument was tantamount to testimony on the meaning of prison records and required reversal.

People v. Lewis, Cal.Ct.App. No. B103754, filed May 4, 1998 (unpublished; opinion provided)

In this criminal case the conviction was affirmed but the sentence was reversed and the case remanded for resentencing. The primary sentencing issue involved whether a consecutive sentence was permitted. The Court of Appeal held that consecutive sentences were permitted but not required and remanded the case for resentencing because the record was unclear as to whether I had exercised this discretion in sentencing consecutively.

Truitt v. Superior Court, 59 Cal.App.4th 1183 (1997)

This case concerned interpretation of California Rule of Professional Conduct 2-100. The Court of Appeal

held that an attorney who is or may be adverse to a corporation in litigation may contact an employee of the corporation concerning the litigation matter unless the attorney actually knows that the corporation and its employees are represented by counsel in the matter at the time of the ex parte communication.

People v. Artola, Cal.Ct.App. No. B099782, filed Sept. 8, 1997 (unpublished; opinion provided)

In this criminal case the conviction was affirmed but the sentence was reversed and the case remanded for resentencing based on a California Supreme Court case that had issued after the trial court proceedings.

People v. Egger, Cal.Ct.App. No. B105277, filed June 3, 1997 (unpublished; opinion provided)

In this criminal case the Court of Appeal reversed in part my decision to set aside an information. The Court of Appeal held that the evidence offered at the preliminary hearing was sufficient to sustain a charge of insurance fraud but not sufficient to sustain a charge of perjury.

(3) *Opinions on State or Federal Constitutional Issues*

Batts v. Clinton, Cal.Ct.App. No. B126203, filed Aug. 5, 1999 (unpublished; opinion provided)
State of California v. City of Los Angeles, L.A. Superior Ct. No. BC 147094, filed July 12, 2000 (unpublished; opinion provided)
Songco v. Century Quality Management, L.A. Superior Ct. No. BC 118303, filed Dec. 22, 1997 (unpublished; opinion provided)
Grobeson v. City of Los Angeles, L.A. Superior Ct. Nos. BC 150151, BC 159142 and BC 043521, filed June 29, 1998 (unpublished; opinion provided)
Harrahill v. Santoro, L.A. Superior Ct. No. BC 170089, filed Jan. 27, 1999 (unpublished; opinion provided)

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

Member, Administrative Conference of the United States, 1986-1990 (appointed)
Deputy Solicitor General, U.S. Department of Justice, 1985-1986 (appointed)

Deputy Assistant Attorney General, Civil Division, U.S. Department of Justice, 1982-1985 (appointed)
Special Assistant to the Attorney General, U.S. Department of Justice, 1981–1982 (appointed)
Law Clerk, Hon. Anthony M. Kennedy, U.S. Court of Appeals for the Ninth Circuit, 1977-1978 (appointed)

I never have been a candidate for elective public office (other than judicial office).

17. Legal Career:

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

1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;

Law Clerk, Hon. Anthony M. Kennedy, U.S. Court of Appeals for the Ninth Circuit, 1977-1978

2. whether you practiced alone, and if so, the addresses and dates;

I did not have a solo practice at any time.

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;

Partner, Munger, Tolles & Olson, 1986-1995
Munger, Tolles & Olson
355 South Grand Ave.
35th floor
Los Angeles, CA 90071

Deputy Solicitor General, U.S. Department of Justice, 1985-1986
United States Department of Justice
10th Street and Constitution Avenue, N.W.
Washington, D.C. 20530

Deputy Assistant Attorney General, Civil Division, U.S. Department of Justice, 1982-1985 (address above)

Special Assistant to the Attorney General, U.S. Department of Justice, 1981-1982 (address above)

Associate, Munger, Tolles & Rickershauser, 1978–1981 (address of successor law firm, Munger, Tolles & Olson, is provided above)

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.

Private Practice 1986-1995

During this period I was a partner in the law firm of Munger, Tolles and Olson in Los Angeles, California. I had a civil business litigation practice in state and federal court including both trial and appellate work. I represented business entities in commercial or employment disputes or disputes with the government. Typical clients included Northrop Corporation, Litton Industries, Boeing, Rockwell International, Warner Bros., Shell Oil Co. and Unocal.

A significant part of my practice was appellate work. I handled matters on appeal that had been tried by others in my firm or by other law firms. I appeared before both the Ninth Circuit and the California Court of Appeal.

As a result of my appellate work, I developed expertise in punitive damages litigation. I briefed constitutional issues pertaining to punitive damages in the United States Supreme Court, handled a number of matters post-trial where large punitive damages awards were a primary concern, and spoke on the subject to lawyer groups.

I also developed expertise in state employment cases. I litigated whistleblower, wrongful discharge, race discrimination, sex discrimination and sex harassment claims.

A significant part of my federal court practice was litigation under the False Claims Act. I litigated many issues of first impression under the 1986 Amendments to the False Claims Act, which significantly expanded the ability of private citizens to bring suit on behalf of the government and to share in the recovery of damages and penalties for government contractor fraud.

Deputy Solicitor General 1985-1986

From November 1985 through July 1986 I was Deputy Solicitor General of the United States. In this capacity I was responsible for briefing and arguing cases before the United States Supreme Court. I also reviewed the work of the Assistants to the Solicitor General in various subject areas and on assignment from the Solicitor General. I recommended to the Solicitor General whether or not appeal should be taken or rehearing *en banc* or *certiorari* should be sought in all government cases in the areas for which I was responsible. I served as Acting Solicitor General when the Solicitor General was recused or absent.

Deputy Assistant Attorney General 1982-1985

From October 1982 until October 1985 I served as Deputy Assistant Attorney General in the Civil Division of the United States Department of Justice. During part of my tenure I served as the Acting Assistant Attorney General when the head of the Civil Division was absent or recused.

As Deputy Assistant Attorney General I was in charge of the Appellate Staff of the Civil Division. I supervised all appellate litigation handled by the Civil Division, personally handled cases and oversaw a staff of 40 attorneys. The Appellate Staff briefed and argued on appeal cases that were important to the government because of their potential precedential value, monetary value or programmatic significance. My role was to review and edit briefs in the most important cases, to argue significant appeals, to devise litigation strategies in emergency situations where it was necessary to seek expedited appellate relief and to work with client agencies to resolve disputes over litigation strategy.

During part of the time I served in this position I was in charge of the Federal Programs Branch of the Civil Division. The Federal Programs Branch consisted of 90 attorneys who handled the trial court aspects of affirmative and defensive litigation related to federal agency programs (including cases challenging the legality or constitutionality of agencies' actions or regulations, challenges to Executive Branch authority, discrimination claims against government agencies and Freedom of Information Act litigation). I personally handled several important matters within the ambit of the Federal Programs Branch.

Special Assistant to the Attorney General 1981-1982

From July 1981 until October 1982 I was Special Assistant to Attorney General William French Smith. In this capacity I did staff work on assignment from the Attorney General or his Counselor. I was responsible for keeping the Attorney General

abreast of important developments in several subject areas. I also made speeches and other public appearances on behalf of the Justice Department.

Private Practice 1978-1981

From 1978 until 1981 I was an associate at Munger, Tolles & Rickershauser. My practice consisted of civil business litigation. Major matters in which I was involved included antitrust counseling and litigation on behalf of several large corporations in the entertainment industry, securities litigation representing Paine Webber, and a major class action involving commodity futures trading on behalf of Great Western Sugar Company.

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

I appeared in court frequently during all periods of my practice, except during the year I served as Special Assistant to the Attorney General.

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

In private practice:
(a) federal courts - 60%
(b) state courts of record - 40%
(c) other courts - 0%

With the Department of Justice as Deputy Solicitor General and Deputy Assistant Attorney General:
(a) federal courts - 100%
(b) state courts of record - 0%
(c) other courts - 0%

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

Almost all of my litigation was civil.

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

counsel, or associate counsel.

I tried two cases to verdict, one in federal court and one in state court. In the federal court action I was associate counsel and in the state court action I was chief counsel.

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

(a) jury – 100%
(b) non-jury - 0%

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

(a) the date of representation;
(b) the name of the court and the name of the judge or judges before whom the case was litigated; and
(c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

(1) *Hyatt v. Northrop Corporation,* 80 F.3d 1425 (9th Cir. 1996)

I represented Northrop Corporation in this lawsuit (which I tried in federal district court) brought by a former employee alleging causes of action under the *qui tam* provisions of the False Claims Act and under California law for wrongful discharge in violation of public policy. In the trial court, the jury awarded damages to the plaintiff on his claim for wrongful discharge in violation of public policy. Plaintiff appealed the trial court's dismissal of his False Claims Act cause of action. I argued the case in the Ninth Circuit shortly before I was appointed to the bench. The Ninth Circuit held that the 1986 Amendments to the False Claims Act apply retroactively to suits filed before the Amendments and reinstated the plaintiff's claim, which had been dismissed based on a defense available only under the pre-1986 False Claims Act.

Trial Judge: Hon. David V. Kenyon (C.D.Cal.)
Ninth Circuit Panel: T.G. Nelson, Kleinfeld and Wilken
Co-Counsel: Brad D. Brian, Esq. and Marc A. Becker, Esq., Munger, Tolles & Olson, 355 Grand Ave., 35th Floor, Los Angeles, CA 90071 (213)683-9100
Opposing Counsel, Trial Court: Philip J. Ganz, Esq. and

Laurie Susan Gorseline, Esq., Ganz & Gorseline, 11620 Wilshire Blvd. #340, Los Angeles, CA 90025 (310)235-1700
Opposing Counsel, Court of Appeal: Philip Benson, Esq., 333 City Blvd. #1410, Orange, CA 92868 (714)634-4534

(2) *Hyatt v. Northrop Corporation,* 883 F.Supp. 484 (C.D.Cal. 1995)

I represented Northrop Corporation in this case in which plaintiff again presented claims against Northrop under the False Claims Act (this lawsuit was referred to informally as *Hyatt III).* The trial court granted Northrop's motion to dismiss, holding that the complaint revealed that Hyatt's claims were barred by the statute of limitations provisions of the False Claims Act. Interpretation of this statute of limitations presented issues of first impression. The trial court's ruling was affirmed by the Ninth Circuit on different grounds (after I was appointed to the Superior Court). 91 F.3d 1211 (9th Cir. 1996)

Trial Judge: Hon. David V. Kenyon, C.D.Cal.
Opposing Counsel: Philip Benson, Esq., 333 City Blvd. #1410, Orange, CA 92868 (714)634-4534
Opposing Counsel: David J. Wilzig, Esq., 1900 Avenue of the Stars #1900, Los Angeles 90067 (310)286-1188
Opposing Counsel: William K. Hanagami, Esq., King, Williams & Hanagami, 11377 W. Olympic Blvd. #1000, Los Angeles, CA 90064 (310)996-1101

(3) *United States ex rel. Rohan v. Litton Industries, Inc.* No. 92-55546 (Ninth Circuit)
I represented Litton Industries in this *qui tam* lawsuit brought under the False Claims Act by a former Litton employee. On appeal this case was argued at the same time as *United States ex rel. Kelly v. The Boeing Company,* 1993 U.S.App.Lexis 22521 (9th Cir. 1993) and *United States ex rel. Madden v. General Dynamics Corporation,* 4 F.3d 827 (9th Cir. 1993). I, along with defense counsel in the other two cases, argued that the *qui tam* provisions of the False Claims Act are unconstitutional on three grounds: (1) a *qui tam* plaintiff lacks the injury in fact that is constitutionally necessary for standing to sue; (2) a *qui tam* plaintiff cannot bring an enforcement action under the False Claims Act because he has not been appointed as an officer of the United States in accordance with the Appointments Clause of the Constitution, and (3) the *qui tam* provisions of the False Claims Act interfere with executive authority and violate separation of powers principles. In the two companion cases, the Ninth Circuit rejected these arguments. The case that I argued became moot after oral argument as a result of the death of the plaintiff.

Ninth Circuit Panel: Hall, Wiggins and Leavy

Co-counsel: Hon. M. Margaret McKeown (then of Perkins, Cole), U.S. Court of Appeals for the Ninth Circuit, Park Place Bldg., 1200 Sixth Ave., 21st Floor, Seattle, WA 98101 (206)553-5567 (representing Boeing)
Co-Counsel: Herbert Fenster, Esq. (formerly of McKenna & Cuneo, San Francisco; current address unknown) (representing General Dynamics)
Opposing Counsel: Linda R. MacLean, Esq. 981 Fresno St., Pismo Beach, CA 93449 (805)556-0232

(4) *Fairchild Semiconductor Corp. v. U.S. Environmental Protection Agency,* 984 F.2d 283 (9th Cir. 1993)

I handled the appeal in this environmental case on behalf of Fairchild. The case presented issues of statutory construction and subject matter jurisdiction. Fairchild had entered into a consent decree with the Environmental Protection Agency (EPA). The consent decree provided procedures for disapproval of a remedial report submitted by Fairchild. EPA approved Fairchild's remedial plan under the procedures provided in the consent decree, but later issued a ruling that changed the plan. Fairchild filed suit against EPA for breach of contract and estoppel. The primary issue on appeal was whether CERCLA's jurisdictional provisions precluded suits by private parties to enforce consent decrees with the government where the suit called into question remedial actions selected by the government. The Ninth Circuit held that Fairchild could not sue to enforce the consent decree.

Ninth Circuit Panel: Judges Pregerson, Goodwin and Farris

Opposing Counsel: J. Carol Williams, Esq., Lands and Environment Division, U.S. Department of Justice, 10th St. and Constitution Ave., N.W., Washington, D.C. 20530 (202) 514-2000

(5) *Nelson v. Shell Oil Company,* No. B067801, California Court of Appeal for the Second Appellate District (1993)

I substituted in as counsel for Shell Oil Company in this case on the third appeal to the California Court of Appeal. The issue on this appeal was the propriety of the trial judge's award of approximately $4.6 million in punitive damages against Shell. The case was an action for fraud by persons who had leased property to Shell for use as a service station. On this third appeal Shell argued that the trial court's basis for award of punitive damages was inconsistent with the second appellate decision; that the amount of the award was excessive under California law; and that attorneys fees should not be included as part of compensatory damages for purposes of calculating the ratio of punitive to compensatory damages. Shell also argued that the procedures for

award of punitive damages in California are unconstitutional under the due process clause. The Court of Appeal rejected these arguments and upheld the punitive damages award in an unpublished opinion.

California Court of Appeal Panel: Justices Spencer, Ortega and Masterson
Co-counsel: Gregory C. Horn, Esq., 5850 Canoga Ave., Woodland Hills, CA 91367 (818)710-2730
Co-counsel: Mark Schreiber, Esq., 16501 Ventura Blvd. #401, Encino, CA 91436 (818)789-2577
Opposing Counsel: G. Dana Hobart, Esq., O'Reilly & Hobart, 4720 Lincoln Blvd. #250, Marina Del Rey, CA 90292 (310) 306-0063

(6) *McGrew v. Warner Bros.* Inc., No. BC 01196, L.A. County Superior Court (1994)

I represented Warner Bros. in this case brought by a longtime Warner Bros. employee alleging sex discrimination and intentional infliction of emotional distress. The plaintiff claimed that she had been denied promotions on the basis of her sex over a period of decades and sought back pay. The case was settled on the day set for trial in February, 1994.

Trial Court Judge: Hon. David A. Workman
Opposing Counsel: Charles T. (Ted) Mathews, Esq., 501 S. Marengo Ave., Pasadena, CA 91101 (626)683-8291
Opposing Counsel: Robert F. Kull, Esq., Carlsmith Ball, 444 S. Flower St. #900, Los Angeles, CA 90071 (213)955-1200

(7) *Brodek v. Warner Bros. Inc.*, No. BC 033771, L.A. County Superior Court (1993)

I represented Warner Bros. in this case filed by a relatively high level employee of Warner Bros. alleging sex harassment and sex discrimination. Early in the litigation counsel for both parties recognized that the lawsuit was one that both parties would like to settle. On agreement of the parties, comprehensive document production requests were propounded by plaintiff and responses were served by defendant. Warner Bros. then took the plaintiff's deposition for one day and plaintiff took two one-half day depositions of Warner Bros.' key witnesses. The parties then conducted a mediation and the case settled.

Trial judge: The case was not assigned to a judge at the time it was resolved
Counsel for individual defendant: Harry B. Swerdlow, Esq., Swerdlow & Swerdlow, 345 N. Maple Dr. #376, Beverly Hills, CA 90210 (310)274-0054
Opposing Counsel: Nathan Goldberg, Esq., Allred, Maroko & Goldberg, 6300 Wilshire Blvd. #1500, Los Angeles, CA 90048

(323)653-6530
Opposing Counsel: Christine Masters, Esq., Masters & Ribakoff, 11601 Wilshire Blvd. #2440, Los Angeles, CA 90025 (310)477-7321

(8) *Murray Company v. The Ted R. Cooper Company, Inc. and Rockwell International,* No. 613 670, L.A. County Superior Court (1990)

In this construction dispute I represented Rockwell International, the owner of the building that was the subject of the dispute. Murray Company, a subcontractor on the project, sued Rockwell and the general contractor for damages for delays and inefficiencies allegedly caused by the general contractor and Rockwell. The general contractor cross-claimed against Rockwell and the architect. Virtually all discovery except depositions of expert witnesses was complete when the parties were able to settle the case.

Trial Judge: The case was not assigned to a judge at the time it was resolved.
Counsel for Murray Company: A. Robert Throckmorton, Esq., Throckmorton, Beckstrom, Oakes & Tomassian, 4675 MacArthur Ct. #710, Newport Beach, CA 92660 (949)955-2260
Counsel for The Ted R. Cooper Company: Jeffrey A. Swedo, Esq., Berger, Kahn, Shafton, Moss, 2 Park Plaza #650, Irvine, CA 92614 (949)474-1880

(9) *Smith v. Blue Cross of California,* No. 437692, L.A. County Superior Court (1988)

I represented Blue Cross of California in this case in which the plaintiff alleged a bad faith denial of insurance coverage. The case was tried to a jury. Plaintiff challenged Blue Cross' denial of coverage based on a preexisting condition limitation and alleged statutory violations in the processing of her claim. Plaintiff sought damages for emotional distress and punitive damages. The jury found that Blue Cross was correct in denying coverage but awarded plaintiff $10,000 based on statutory violations in handling her claim.

Trial judge: Hon. Edward M. Ross
Opposing Counsel: Keith E. Walden, Esq., Spray, Gould & Bowers, 17592 17th St., 3d Floor, Tustin, CA 92780 (714)544-7200

(10) *Criminal Investigation of Defense Contractor*

In approximately April of 1994, one of my defense contractor clients became aware that an employee had contacted a criminal investigative arm of the government. Subsequently the government

issued a grand jury subpoena for documents related to the employee's claims. I represented the defense contractor in conducting an internal investigation of the employee's contentions and in responding to the government. The employee claimed that co-employees had improperly favored a corporate affiliate of the employer in awarding a subcontract under a government contract and that coemployees had altered documents in the process. After conducting the internal investigation, I prepared a presentation for the U.S. Attorney's Office in Los Angeles, arguing that no violation of law had occurred. After the presentation, the U.S. Attorney's office decided to take no action on the employee's contentions. (For purposes of any communication with counsel listed below, it may be useful to identify the matter by the name of the complaining employee, Robert Caro.)

Co-counsel: Brad D. Brian, Esq., Munger, Tolles & Olson, 355 S. Grand Ave., Los Angeles, CA 90071
Counsel for the Government: Bryan D. Daly, Esq., Beck, DeCorso, Daly, 601 W. 5th St., 12th Floor, Los Angeles, CA 90071 (213)688-1198
Counsel for an Employee Potentially Implicated: Robert L. Corbin, Esq., Corbin & Fitzgerald, 601 W. 5th St., 12th Floor, Los Angeles, CA 90071 (213)612-0001
Counsel for an Employee Potentially Implicated: Ralph F. Hirschmann, Esq., 707 Wilshire Blvd. #4910, Los Angeles, CA 90017 (213)891-1700

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Santa Monica, CA 90401
(310)451-7570

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

Currently I am the Supervising Judge of the Civil Departments of the Los Angeles Superior Court. I was appointed to this position effective December 9, 2002 by the Presiding Judge of the Los Angeles Superior Court. In this position I am in charge of making recommendations to the Presiding Judge concerning administrative and policy issues for the Los Angeles Superior Court's civil departments, and I preside in the Master Calendar Department of the Los Angeles Superior Court's Central District.

From January 2001 through December 9, 2002 I served as the Supervising Judge of the Los Angeles Superior Court's Complex Litigation Program. The Complex Litigation Program began as a two-year pilot program authorized by the state legislature to find effective methods for management of complex civil cases. Complex cases are defined by California Rule of Court 1800 as cases requiring exceptional judicial management by virtue of a large number of exceptionally difficult legal issues, a large number of parties, voluminous discovery or a need for exceptional post-judgment management.

The Complex Litigation Program in Los Angeles currently has six assigned judges and has completed its two-year pilot period. The following are examples of some of the cases I handled in this Program: (1) an insurance coverage case involving coverage under over 200 separate policies with respect to over 500 environmentally affected sites owned by the plaintiff; (2) a tort action by over 100 individual plaintiffs against over 30 defendants who disposed of wastes at a site near the plaintiffs' homes; (3) an action by the State of California against the City of Los Angeles involving the proper accounting for over $50 million with respect to a trust that governs the Port of Los Angeles; (4) a securities class action brought by note purchasers against banks that acted as indenture trustees for the notes.

The judges assigned to the Complex Litigation Program have been experimenting with innovative techniques of case management with the goals of reducing time to resolution, improving the quality of decision making and reducing litigation costs. As Supervising Judge of the Complex Litigation Program I consulted with a Bar Liaison Committee set up by the Litigation Section of the L.A. County Bar to

inform the legal community of the Complex Litigation Program, to obtain feedback on the case management methods that are being employed by the Pilot Program judges and to involve the Bar in generating ideas for management of complex cases. I also made efforts on behalf of the Program to speak to various Bar groups and representatives of the academic community to inform them of the Program and to stimulate discussion of case management ideas.

I have worked with the Administrative Office of the Courts for the State of California and the National Center for State Courts to evaluate the Complex Litigation Program. I also have initiated various training programs for our judges in connection with the work of the Pilot Program.

For many years I have been interested in and involved with a variety of alternative dispute resolution (ADR) projects. While I was at the Department of Justice I often served as the government's representative at ADR programs sponsored by the Center for Public Resources. I worked with the Center for Public Resources and the private bar to organize the Justice Department's first formal ADR program, which involved government contract cases. I was a member of the Los Angeles Superior Court's ADR Committee for four years. As part of this work, I headed a subcommittee that developed a program by which commercial providers of mediation services volunteer their time to the Superior Court to conduct mediation shortly before trial in cases where previous ADR efforts have failed.

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.

I currently am a judge of the California Superior Court. I have been on the bench for 7 years. I have severed all financial ties with my former law firm and will have no future payments of any kind from my former law firm. I have various roll-over IRA's, 401(k)'s and Keogh plans, each of which is legally separate from my former law firm. All of the investments in such plans are listed on the Financial Statement supplied in response to Question 5 below. As part of my employment with the Superior Court, I also participate in various defined benefit and defined contribution pension

plans. All of the investments and interests in such plans also are listed on the Financial Statement supplied. If I leave my employment with the Superior Court, I will not receive a defined benefit pension and instead will receive the value of my contributions, a state match and investment earnings thereon to the date of my leaving the state court.

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.

In order to identify potential conflicts of interest, I will review the names of the parties and counsel in each case that comes before me. With respect to review of the identity of the parties, Federal Rule of Appellate Procedure 26.1 requires that any nongovernmental corporate party file a statement identifying all its parent corporations and listing any publicly held company that owns 10% or more of the party's stock. I would use this statement to identify potential conflicts of interest. I also will keep apprised of the personal and fiduciary financial interests of myself, my spouse and my minor children. I will recuse myself in cases in accordance with 28 USC 455.

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

No.

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 supplying the financial disclosure report required by the Ethics in Government Act of 1978.

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

The completed financial net worth statement is attached.

6. Have you ever held a position or played a role in a

political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

No.

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.

When I was in practice I represented Norma Mays in a case referred through Los Angeles Public Counsel. Ms Mays had been unlawfully deprived of legal title to her residence in a scheme by a lender who approached her when her house was in foreclosure. Through a settlement after suit was filed, *Mays v. Johnson,* C 692 956 (L.A. Superior Court), Ms. Mays recovered title to her property and was released from a $12,000 debt to the lender.

I represented Dimas and Leonor Gonzales in another case referred by Public Counsel. Mr. & Mrs. Gonzales had applied for a loan and, although no loan transaction was concluded, their names somehow were forged on a grant deed in favor of two strangers. We filed a complaint for cancellation of a written instrument. *Gonzales v. Carswell,* No. YC005243 (L.A. Superior Court). The persons named on the deed did not answer the complaint, and a default judgment declaring the forged deed null and void was entered in favor of the Gonzaleses.

As I judge I have participated in court programs to introduce youth to the court system. As a member of the Superior Court's ADR Committee, I have assisted in supervising the program by which the Superior Court provides free mediation services to the public in civil and family law cases.

As a member of the Finance Council of my church, Corpus Christi Parish, I have overseen parish charitable efforts. My family and I support the efforts of two local homeless shelters financially and with contributions of clothing and holiday baskets. My husband and I support numerous other charities financially.

2. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates -- through either formal membership

requirements or the practical implementation of membership policies? If so, list, with dates of membership. What have you done to try to change these policies?

I do not belong and never have belonged to any organization that discriminates on the basis of race, sex or religion as I understand this question. I did attend two high schools that admitted only girls. As a child I was a Brownie Girl Scout and my daughter was a member of the Brownie Girl Scouts for two years. It is my belief that the Girl Scouts do not admit boys. My daughter currently attends a school that only admits girls.

3. Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).

I am not aware of a selection commission in California that recommends candidates for nomination to the Ninth Circuit. With respect to my experience in the judicial selection process, I telephoned the Office of the Counsel to the President to indicate my interest in being considered for the Ninth Circuit. I was asked to submit a resume to that Office and I did so. I then was interviewed by the Counsel to the President and by personnel of the Office of the Counsel to the President and the Department of Justice. Thereafter I was asked to complete this form and Standard Form 86. After I submitted the completed forms and the FBI performed a background check, I was interviewed by staff of the Department of Justice and by staff of the Office of the Counsel to the President. I also was interviewed by Senator Dianne Feinstein and Senator Barbara Boxer. I answered written questions submitted to me by Senator Boxer and forwarded those written responses to Senators Feinstein and Boxer. I was told that the Counsel to the President informed staff of Senators Feinstein and Boxer of an intent to nominate me to the Court of Appeals for the Ninth Circuit, and my nomination followed.

4. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as asking how you would rule on such case, issue, or question? If so, please explain fully.

No.

5. Please discuss your views on the following criticism involving "judicial activism."

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government.

Some of the characteristics of this "judicial activism" have been said to include:

a. A tendency by the judiciary toward problem-solution rather than grievance-resolution;

b. A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;

c. A tendency by the judiciary to impose broad, affirmative duties upon governments and society;

d. A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and

e. A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

When I took the oath of office for the California Superior Court, I told those who attended the ceremony that the following quotation from Justice Felix Frankfurter describes my concept of the judicial role: "The highest exercise of judicial duty is to subordinate one's personal will and one's private views to the law." I have attempted as a trial judge to live up to that goal, even though sometimes it is not easy. If confirmed as a judge of the United States Court of Appeals for the Ninth Circuit, I would continue to be guided by Justice Frankfurter's words.

Over the entry to the United States Supreme Court are the words, "Equal Justice Under Law." Both parts of this statement are important to the proper role of a judge. A judge should administer justice equally, to rich and poor alike, without regard for the status of the litigant in

society. At the same time, the judge should take definition of the justice he or she renders from the law as embodied in the Federal Constitution and the laws passed by the legislative branch. In cases involving state law, a federal judge also should respect the definition given to state law by the state courts.

Our Constitution explicitly organizes the federal government in three Branches, according to the three principal functions of government: legislative, executive and judicial. Each branch is given specified powers. The judiciary is understood to have the power to interpret the law, as distinct from the legislative function of making the law. Limitations on the power of the judiciary are inherent in the judiciary's express power to decide cases or controversies.

Principles of justiciability are an outgrowth of the Constitution's "case or controversy" limitation. These principles include standing, ripeness, mootness and the political question doctrine. They are an important part of the definition of the federal courts' role in our system of checks and balances.

AFFIDAVIT

I, Carolyn B. Kuhl, do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

Jan. 18, 2003
(DATE)

Carolyn B. Kuhl
(NAME)

(NOTARY)

CALIFORNIA ALL-PURPOSE ACKNOWLEDGMENT

State of California
County of Los Angeles

On 1-18-03, before me, James Leck Stoltzfus Jr., Notary Public, personally appeared Carolyn B. Kuhl
~~personally known to me~~ or ✓ proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/~~are~~ subscribed to the within instrument and acknowledged to me that ~~he/she/they~~ executed the same in ~~his/her/their~~ authorized capacity(~~ies~~), and that by ~~his/her/their~~ signature(s) on the instrument the person(s) acted, executed the instrument.

WITNESS my hand and official seal

JAMES LECK STOLTZFUS JR.
Commission # 1221597
Notary Public - California
Los Angeles County
My Comm. Expires May 25, 2003

Place Notary Seal Above

signature of Notary Public

OPTIONAL

Though the information below is not required by law, it may prove valuable to persons relying on the document and could prevent fraudulent removal and reattachment of this form to another document.

Description of Attached Document

Title or Type of Document: Biographical Information (Public

Document Date: 1-18-2003 Number of Pages: 56

Signer(s) Other Than Above: None

Capacity(ies) Claimed by Signer

Signer's Name: _____
✓ Individual
__ Corporate Officer – Title(s): _____
__ Partner - __ Limited __ General
__ Attorney in Fact
__ Trustee
__ Guardian or Conservator
__ Other: _____

Signer is Representing: _____

Chairman HATCH. We will to go Senator Leahy first.

Senator LEAHY. Thank you, and I welcome you, too. I am glad your family could be here. I have thought of the thousands of judicial nomination hearings I have been at, and most of them, there have been—it actually is thousands now—most of them have had family members. I have often felt that somewhere in the archives, wherever that family is, somewhere, someday they will pull out the transcript and find who is there, and I think it is a nice thing to do. We even had one judge who had the transcript from about 35, 45 years before when his father had become a judge and he was there.

Judge Kuhl, as an aide to Attorney General William French Smith, who was Attorney General then, you were one of a small group of lawyers who pressed for what I believe is a radical change in policy to allow private nonprofit schools that discriminate based on race to receive tax-exempt status, and that was a drastic departure from the policy that had been in place.

In 1970, the Nixon administration, following the Court decision, adopted Internal Revenue Service rules denying tax exemption for schools that racially discriminate. Many of us feel that President Nixon was right in that, but the Congress, and I was not in the Congress at the time, left those rules standing.

In 1981, the U.S. Supreme Court agreed to review two decisions of the Court of Appeals for the Fourth Circuit which upheld IRS actions denying tax-exempt status to Bob Jones University and Goldsboro Christian Schools, Inc. The Reagan Justice Department prepared to and initially did defend the IRS actions and rules. In other words, the Reagan administration took the same position the Nixon administration had.

But in January 1982, the Justice Department suddenly announced a change in its position. It found the IRS had no legal authority to deny tax-exempt status and agreed to give the schools, despite their blatant policies of racial discrimination, the tax exemption, aside from any other questions of religious discrimination. This was specifically on—they did discriminate on religious, but on the racial discrimination.

Now, according to news articles and Congressional hearings, you were one of three lawyers characterized as part of the Bob Jones team who opposed the prevailing policy and pressed for the legal switch to give Bob Jones its tax exemption. In other words, you wanted to change what had been policy since 1970, and you wrote a memo along with Charles Cooper to Assistant Attorney General Brad Reynolds that was shown at the House Ways and Means Committee in which you argued that the IRS policy was simply wrong.

You wrote, "The Commissioners' ruling denying tax-exempt status to these racially discriminatory private educational institutions is supported by neither the language nor the legislative history of Section 501(c)(3)." I want to note that that point, the IRS nondiscrimination policy, had been approved by two United States Courts of Appeals in three separate appeals.

Now, Judge, at the time you authored the memo to Assistant Attorney General Reynolds urging this drastic change in policy, were

you aware that more than 200 lawyers in the Justice Department Civil Rights Division objected to that change of position?

Judge KUHL. Senator, I am glad that you have asked this question right at the outset of the hearing—

Senator LEAHY. I knew you wouldn't be surprised that I would.

Judge KUHL. —because I am grateful for an opportunity to address this issue. I regret having taken the position that I did in support of the government's change of position at that time and I would like to explain that, if I may take the time to do that.

Senator LEAHY. When you do, would you also respond to the charge of the New York Times that you and your two other coworkers were a band of "young zealots," their words, in forcing a change in policy that was so strongly opposed by many senior officials in various executive branches during a Republican administration?

Judge KUHL. Certainly. I will address that, Senator.

I do want to state at the outset, though, you had mentioned in your opening statement about some of them, I would call them abhorrent policies of Bob Jones University, and you can be sure that I had no sympathy for those policies. I share the same religion that you do, and I—

Senator LEAHY. Judge Kuhl—

Judge KUHL. Yes?

Senator LEAHY. First off, your religion, I want you to know, I have never asked, never would, and don't even know the religion of 99 percent of the people that come here. That is—we don't—none of us have religious tests here.

Judge KUHL. I appreciate that, and I think that is very appropriate, Senator, but I wanted to say that so that you would understand in response to your comment that I had absolutely no sympathy for Bob Jones, either with respect for its racially discriminatory policies or with regard to its teachings with respect to other religions.

The issue as I saw it, as it was considered during the Reagan administration, was whether the IRS was overstepping and taking an overly broad interpretation of its authority under its governing statute as it asserted that it had the authority to define public policy and to then deny tax exemptions on the basis of that public policy. That was the issue.

I told you that I regret taking the position that I did at the time, and that is the case for two reasons. First, I did not at that time understand the traditional role of the Justice Department, which is to defend the positions of the agencies as long as there is a reasonable argument that can be made in defense of those agencies, and I don't think that I—well, I didn't as a very young staffer fully understand that, and I was—I had only been in Washington for a few months when this came up and I was a young staff assistant—

Senator LEAHY. But that is almost hornbook law.

Judge KUHL. I am sorry?

Senator LEAHY. You didn't learn that in law school? I mean, I—

Chairman HATCH. Why don't you let her answer the question and maybe she will answer it.

Senator LEAHY. I am surprised what you are saying, because—

Judge KUHL. Well, I had never worked for the government before, so it wasn't apparent to me.

The second and the more important reason why I think that the decision was wrong is because it did not properly put the nondiscrimination principle that should have been primary in this decision first. I was concerned about the IRS policy giving the IRS, of all agencies, the authority to interpret public policy and enforce it, and I was particularly concerned about all-girls' schools. I had attended an all-girls' school and I did not want to see a precedent created that would have meant that tax exemptions could be taken away from all-girls' schools because they discriminated against men. But—

Senator LEAHY. Let me—

Judge KUHL. If I could just say a couple other things—

Senator LEAHY. Go ahead.

Judge KUHL. —because I do want to get to the "band of zealots" point that you asked me about.

Senator LEAHY. I am not—I realize you wouldn't filibuster on an answer, but time runs out and I want time to follow up on this, but please go ahead.

Judge KUHL. Well, perhaps if the time runs out, Senator Hatch would give you a little more time, but—as much time as you want, I should say.

Senator LEAHY. Kind of you to ask.

Judge KUHL. But I did want to finish this explanation and to say that focusing on the narrow legal issue was not the right thing to do in that situation. The nondiscrimination principle and the importance of enforcement of the civil rights laws by the executive branch should have taken sway and should have been primary in making that decision.

As to the "band of zealots" point, the Deputy Attorney General and the head of the Civil Rights Division both advised the Attorney General to change positions in the Bob Jones case. So as far as the memorandum I wrote, I am sure that the Attorney General looked at that memorandum, but there were senior officials, including also the Under Secretary of the Treasury, which I didn't know at the time, but I found out later the Under Secretary of the Treasury urged that the President take that position, as well, or that the Secretary of Treasury take that position, and, of course, it was the Attorney General's decision, and thank you, Senator, for allowing me to make that explanation.

Senator LEAHY. Because you wrote to Senator Boxer that you felt the traditional role of the Department of Justice is to defend regulations issued by executive branch agencies when the regulations are challenged in litigation. That was not the way you felt then. That is the way you feel now as you are up for—now that you are appearing for the confirmation hearing, that is your opinion today, but that was not your opinion when you were at the Justice Department.

Judge KUHL. Well, I wrote that letter to Senator Boxer 2 years ago, but I also came to the conclusion that the Bob Jones ruling or change of decision was wrong while I was at the Justice Department. I had conversations with people as I went along, and by the time I was in the Solicitor General's Office, I had reached that con-

clusion and discussed that with Solicitor General Fried, who was my boss, and he has mentioned that in an article he wrote for the New York Times a brief while ago.

Senator LEAHY. It just seems strange, of all the issues you could have taken on, you take this one, whether "band of zealots" is an adequate term or not. You chose one that seems hard to defend both legally and socially, waged a fierce campaign, 200 career lawyers saying, and these are people who came in in both Democratic and Republican administrations, saying you are wrong. It just—were there other cases during your tenure at the Justice Department in which you recommended that the U.S. confess error in the Supreme Court?

Judge KUHL. I can't think of any, Senator.

Senator LEAHY. So we just have this. I am looking at the material that was turned over to the Senate Finance Committee and the House Ways and Means Committee concerning legislation to deny Federal tax-exempt status, a number of Justice Department memoranda. At least during the Reagan administration, they could be turned over. Apparently, they are not allowed now. These were turned over 2 months after they were written.

One of the documents was a memorandum written by you on December 8, 1981, to Solicitor General Kenneth Starr noting then–President Reagan and then–Vice President Bush's campaign statements on private schools. That memo had an excerpt from President Reagan's campaign platform stating he opposes the IRS attempt to remove the tax-exempt status of private schools by administrative fiat. Did that influence you in your arguing for this change?

Judge KUHL. Senator, that didn't have any part of the memorandum that I wrote, which was a legal analysis. I did forward it to the Attorney General, because as his staff assistant, I felt that it was information that he should have.

Senator LEAHY. But you didn't include that in your argument, the political position?

Judge KUHL. No, Senator, I didn't put that in my memorandum.

Senator LEAHY. My time is up. I will have other questions, either in a follow-up or in questions for the record, and Mr. Chairman, I appreciate your courtesy in allowing me to go first.

Chairman HATCH. Happy to do it. I will also extend the same courtesy to the Senator from California, who can ask her questions now.

Senator FEINSTEIN. Thank you very much, Mr. Chairman. Judge Kuhl, good morning.

Judge KUHL. Good morning, Senator.

Senator FEINSTEIN. In 1985, you argued in the *Thornburgh* case that the Supreme Court should overturn *Roe* v. *Wade*. Your brief claimed that stare decisis is a principle of stability—I am quoting now. "A decision as flawed as we believe *Roe* v. *Wade* to be becomes a focus of instability, and thus is less aptly sheltered by that doctrine from criticism and abandonment."

In the case of *UAW* v. *Brock*, you argued that the Supreme Court should reverse a decades' old doctrine of associational standing which allows associations to represent constituent members in court in some circumstances. Specifically, you argued that, and I

quote, "At the least, absent a showing of particularized need, an organization should not be allowed to bring suit to assert the individual rights of its members."

Can you explain to me in these two cases why you thought it was appropriate to overturn Supreme Court precedent? When, in your view, should an attorney advocate for the overturning of Supreme Court precedent? Why should the Committee believe that, upon appointment to the Circuit Court, you will not again attempt to shape the law instead of just interpreting it?

Judge KUHL. Okay. I understand the importance of that question, Senator, and I am going to give a brief answer to one part and then try to explain each case.

As an attorney, I think it is appropriate to advocate to overturn Supreme Court precedent when it is in your client's interest. In other words, as attorneys, we are really not constrained in what we argue so long as it is within the bounds of ethics. We do what—we argue what is best to represent our client.

As judges, that is not what we do, and so I know how important it is to you and to other women in this country to understand that I am fully committed as a judge to following the law. Since the *Thornburgh* case, the *Casey* case has completely looked at *Roe* again and has reaffirmed the *Roe* decision, and understand that I am fully committed to fully and fairly and properly enforcing a woman's constitutional right to reproductive freedom.

Senator FEINSTEIN. Do you believe it was correctly decided?

Judge KUHL. Do I believe that *Casey* was correctly decided?

Senator FEINSTEIN. *Casey* and *Roe*.

Judge KUHL. *Casey* and *Roe*? As an advocate at the time that I wrote the *Thornburgh* brief, and maybe I should turn back to the *Thornburgh* brief now. The *Thornburgh* brief was in 1985. *Casey* was decided reaffirming *Roe* in 1993. That was a considerable period later.

In the *Thornburgh* brief, I was representing the Reagan administration. President Reagan had taken the position publicly, both before and after he was elected, that *Roe* v. *Wade* should be overruled. Also, prior to the *Thornburgh* brief, the Justice Department had filed a brief in *Akron*. *Akron* occurred before Thornburgh. And in *Akron*, the Justice Department had argued for a severe narrowing of *Roe* v. *Wade* by saying the States should have—well, there is a right to privacy, but States should have a great deal of leeway and be given deference in their interpretation of that right. In other words, the States' interpretation of the right should be looked at carefully by the Supreme Court.

That argument was very poorly received by the Supreme Court. Justice Blackmun said, if you are not asking that *Roe* v. *Wade* should be overruled, are you asking that *Marbury* v. *Madison* should be overruled? And so it seemed to me that, given the position of the President, the Justice Department should argue forthrightly what the President's position was. And at that time, there was considerable academic criticism of *Roe* v. *Wade* by Paul Freund, Archibald Cox, Alexander Bickel, and Ruth Bader Ginsburg. I am not sure whether her criticism was before or after that time, but she also criticized the reasoning of *Roe*, and I thought

those arguments should be presented as advocacy on behalf of the President.

Senator FEINSTEIN. You didn't quite answer my question. Do you believe that *Roe* was correctly decided?

Judge KUHL. Senator, I am not comfortable with giving my opinion with respect to any particular precedent as to whether it was correct or not. My job as a judge—and I am performing that job now—I take percent and apply it fully, completely, and fairly, whether or not I agree with it.

As an advocate for the President, I thought that those criticisms of *Roe* were well taken. In the passage of time between *Roe* and Casey, however, stare decisis became much more important. In other words, there continued to be cases decided under the *Roe* v. *Wade* principle, and certainly after Casey, stare decisis is paramount. That is to say that *Roe* v. *Wade* and *Casey* are some of the most fully established precedent that I can think of in our jurisprudence.

Senator FEINSTEIN. Okay. Let me go to some of the comments that Charles Fried made, and I am sure you probably know about that, made in 1985. He recalled how he made his decision as Solicitor General to file an amicus brief in *Thornburgh* v. *American College of Obstetricians and Gynecologists*. The United States, since it was not a party to the case, was not obligated to file a brief. Fried recounted how he received recommendations from the various divisions of Justice, Civil Rights, Civil and Legal Policy on how to proceed.

Let me just quote him directly. "The most aggressive memo came from my friends Richard Willard and Carolyn Kuhl in Civil, who recommended that we urge outright reversal of *Roe*." Did you, in fact, write a memo to the Solicitor General urging the outright reversal of *Roe*?

Judge KUHL. Yes, Senator, and the reasons for that are that this was not the first time that the government had entered the dialogue in the Supreme Court on abortion. In the *Akron* case, which came up before Thornburgh, the United States had already taken a position on abortion and on the right to privacy.

In the *Thornburgh* case, then, it seemed to me the issue was would we continue this argument that undercut *Roe*, or in light of the President's position, strongly held and strongly taken that *Roe* should be overruled, would we present to the Court the academic criticism that had been—that was out there. And I thought that it was important to be honest with the Court and to be forthright about what the President's position was.

Senator FEINSTEIN. Well, let me ask this question. When, generally, do you believe it is acceptable to overturn Supreme Court precedent?

Judge KUHL. Well, certainly as a Circuit Court judge, I would never do that. That would never be my job, to overturn Supreme Court precedent. For the Supreme Court, stare decisis is extremely important. Our government is a government of laws. It can't—the result in a case can't be different depending on which parties come before the Court, and so, therefore, stare decisis must be very important and overturning a precedent must be very rare because we must build on what has gone before. That is what we do as judges.

Senator FEINSTEIN. Okay. In 1989, you authored a brief on the issue of choice. By then, you had left the government and joined the private law firm of Munger, Tolles and Olson, and in your capacity as a private lawyer, you wrote a brief in the *Rust* v. *Sullivan* case on behalf of the American Academy of Medical Ethics, and at the beginning of your brief, you again criticized the Supreme Court's abortion jurisprudence by quoting a dissent from Justice O'Connor in the *Thornburgh* case, and the quote is as follows. "The Court's abortion decisions have already worked a major distortion in constitutional jurisprudence. No legal rule of doctrine is safe from ad hoc nullification by this Court when an occasion for its application arises in a case involving abortion."

Would it be fair to say that in 1989, when you drafted the American Academy brief, you were still a critic of the Supreme Court's jurisprudence on abortion?

Judge KUHL. Senator, the brief in that case was written by me on behalf of a client. The client came to me and requested that that brief be drafted, and that brief primarily addresses the First Amendment issue there, the First Amendment issue being whether the government could place restrictions on speech, if you will, in a Federal agency program.

I took on the representation because I was trying to build an appellate practice. Filing briefs in the Supreme Court is a prestigious thing to do, and the—and in First Amendment issues, they are particularly prestigious.

Justice O'Connor did make that statement in a—I can't remember, was it a concurring or a dissenting opinion, but she did make that statement. And again, her statement was pre-*Casey*. That is to say, I think there was—the terms that are coming to mind are too strong, but the Court was making its way with some difficulty pre-*Casey*, I think, in the abortion area, and it seems to me that with Casey, the Court came to rest, looked at *Roe* again, and firmly rearticulated the rights of *Roe* v. *Wade* and a woman's right to reproductive freedom, and so I think those earlier criticisms that Justice O'Connor had would not be pertinent subsequent to Casey.

Senator FEINSTEIN. Was this a pro bono client?

Judge KUHL. No, Senator.

Senator FEINSTEIN. Thank you. Would I have time for one more question, Mr. Chairman?

Chairman HATCH. Sure.

Senator FEINSTEIN. I wanted to ask you a question on the subject of sexual harassment. While you served as Deputy Solicitor General in the Reagan administration, you co-authored an amicus brief in the sexual harassment case *Meritor* Savings v. *Vinson*. The plaintiff, a bank teller, alleged that her supervisor, the branch manager, forced her to submit to unwelcome sexual advances over a 4-year period, during which time she feared she would lose her job if she refused.

Your brief on behalf of the United States and the EEOC took the side of the employer. You argued in support of the District Court's ruling that what occurred was simply a voluntary personal relationship between coworkers and that that would not be actionable under Title VII of the Civil Rights Act. Your brief ignored the power held by a supervisor over subordinate in these cir-

cumstances, as well as the EEOC's own guidelines providing that sexual harassment can be actionable as long as the advances are unwelcome.

The Supreme Court unanimously rejected your position in an opinion written by Justice Rehnquist. Were you involved in the decision to file a government brief taking the side of the employer in this case?

Judge KUHL. I was involved—

Senator FEINSTEIN. Instead of the plaintiff?

Judge KUHL. I was involved in that decision, Senator. Actually, the brief—the Supreme Court's decision in *Meritor* closely tracked the brief that we filed. The reasoning is nearly identical to what we were urging on the Court.

The only reason that the Justice Department was not—was urging a reversal had to do with the very technical interpretation of the Court's findings of fact. We were not arguing, that is, the Justice Department was not arguing that that relationship she had was voluntary. That was the finding of the trial court. The District Court had found that the relationship was voluntary. That was the fact we were given to work with.

That was a technical issue on which the Supreme Court and we disagreed. It was, in my opinion, much more significant that this was the first case in which the Justice Department had argued in the Supreme Court that sexual harassment was prohibited by Title VII, and I am proud that we took that position and I stated after the Supreme Court's decision came down, I stated publicly that the Justice Department was very happy with the decision in the *Meritor* case.

Senator FEINSTEIN. I guess I—of course, I am not an attorney, but I am puzzled by—the EEOC is charged with enforcing Title VII and, as I understand it, had guidelines in place setting the unwelcomeness standard, and yet you chose not to accept that standard.

Judge KUHL. Well, this issue of voluntariness being—the question was whether the trial court's finding of voluntariness was equivalent to a finding of unwelcomeness. The Supreme Court found that it was not equivalent to a finding of unwelcomeness and we were very happy with that position. But the District Court had found that it was a voluntary relationship, and so that is what we were working with. And as I say, we were very happy with the Supreme Court's decision and stated that—and stated that at the time.

Senator FEINSTEIN. Thank you. Mr. Chairman, I don't want to take any more time, but I have some questions. Perhaps I can send them—

Chairman HATCH. You take whatever time you would like. I am happy to wait and I will ask my questions later.

Senator FEINSTEIN. All right. If I may, I will ask another one, then.

Chairman HATCH. Sure.

Senator FEINSTEIN. Environmental groups, such as the Sierra Club and the National Resources Defense Council, have written to me to express serious concerns about your nomination. These organizations argue that you would bring, and I quote, "extreme view-

points to the Federal bench if conferred by the Senate." I would like to submit the NRDC's letter dated January 28, if I may, into the record.

Chairman HATCH. Without objection.

Senator FEINSTEIN. Thank you, Mr. Chairman.

In particular, there is concern about your legal advocacy in the Supreme Court case *UAW* v. *Brock* while an attorney at the Solicitor General's Office. In that case, you urged the Supreme Court to overturn the doctrine of associational standing, and we talked about it and know what it is.

Specifically in the case, you argued that, and I quote, "Representative standing by an association should generally not be recognized." The Supreme Court rejected your position.

According to the NRDC letter, associated standing, "serves as a basis for standing for every other environmental group that proceeds to court to protect the environment for all Americans." Can you explain your opposition to associational standing?

Judge KUHL. Senator, the position of the United States in *UAW* v. *Brock*, I believe was set before I came to the Solicitor General's Office. I argued that case. I had just recently come to the office and I argued it, but I am not on the brief. If you look at the brief in that case, I am not on the brief.

So again, I didn't have any trouble arguing the position. It was a position that—well, the government had won in the court below, so we were defending a winning argument in the court below in that case. But again, that was an argument made on behalf of a client.

I can tell you that under California law, which is what I enforce every day, we basically have no standing requirements. A person without any injury whatsoever can come into court and sue. You may be familiar with the 17–200, Business and Professions Code 17–200 cases, and those are purely private attorney general cases. There is no standing requirement whatsoever. And I enforce that law all the time. Maybe I have a—up until a few months ago, when I became supervising judge, I had a 17–200 case before me probably once a week.

And so this is an example. I don't carry the advocacy that I made in the interests of the United States. The United States often argues for narrow standing, not just in the Reagan administration, often argues for narrow standing to protect the executive branch discretion, if you will. And I don't take those arguments and carry them into my work as a judge.

As far as environmental cases generally, I have support from Mr. Tom Girardi, eminent plaintiffs' lawyer in the area who was counsel in the Erin Brokovich cases, and he had some similar cases in front of me until recently when I took over my supervisory job. So I think that the litigants who have appeared in front of me in that area are very comfortable.

Senator FEINSTEIN. Perhaps you would respond to this, in view of what you have just said. In his memoirs, *Order and the Law*, Charles Fried wrote about the active role you played in attempting to limit the doctrine of associational standing, and let me read an excerpt from his book, and I quote. "My deputy and counselor, Carolyn Kuhl, launched a frontal attack on this trend, arguing that

groups should not have standing to make claim except as they could show themselves to be representatives of classes of individuals in traditional class actions. A vast array of organizations, ranging from the Chamber of Commerce through the AMA to the NAACP, opposed our submission. It was rejected by the court with no dissent."

Now, do you still oppose the doctrine—I am asking you now for personal view—of associational standing?

Judge KUHL. Well, I really—I don't have, in a sense, personal views about cases anymore. I have no problem with what the Court did in that case. I accept the Court's rejection of what was a kind of a novel argument. I will recognize that the *UAW* v. *Brock* case was kind of a novel argument. The reason it was made was because, first of all, we were defending a ruling that had been made by the lower court. But secondly, the thought was that applying class action standards would assure that when an association came before a court, that its members actually were being represented, all of its members' interests were being represented if the organization itself was not injured.

But the Supreme Court rejected that. I have no problem with that. I would have no problem applying that standard in Federal Court, and as I say, in State Court, we have a much lesser standard. We have pretty much no standing. I mean, you don't even have to be a member—it doesn't even have to be an association filing on behalf of its members. It can just be an uninjured individual suing as a private attorney general, and I enforce that law all the time.

Senator FEINSTEIN. Okay. I would like to read you an excerpt from a letter I received from Mark Kleiman, an attorney who appeared before you in the case of *Lou* v. *Moore*. Mr. Kleiman writes, and I quote, "I represent a whistleblower named Deborah Moore. Ms. Moore worked as a medical office biller for a physician. After discovering irregularities in Medicare and other insurance billing, an outright falsification of patient charting, Ms. Moore reported what she had found to various government agencies. She was then sued by her employer's business partner. California State law includes a provision to protect whistleblowers and others who speak out to government agencies or in public fora from being subject to frivolous lawsuits. These lawsuits are commonly known as SLAPP suits, Strategic Litigation Against Public Participation. California laws give defendants who are the victims of frivolous lawsuits, such as SLAPP actions, the right to move for dismissal and to obtain attorney's fees and costs. The defense of Ms. Moore involved a significant amount of work and Ms. Moore incurred nearly $40,000 in legal fees. Then the plaintiff voluntarily dismissed his action against Ms. Moore just days before a crucial hearing. Judge Kuhl, however, refused to award Ms. Moore the attorney's fees to which she was entitled."

Mr. Kleiman goes on to say that the appellate court reversed you, holding that your decision, "constitutes a nullification of an important part of California's anti–SLAPP litigation and relieved the plaintiffs of the punishment which the anti–SLAPP statute imposes on persons who use the courts to chill others' exercise of their constitutional rights."

Could you please respond to Mr. Kleiman's and the appellate court's criticism of your decision in this case?

Judge KUHL. I would be glad to try to do that, Senator. That was an issue of first impression and Mr. Kleiman properly describes what the SLAPP statute is designed to accomplish. In that particular case, what is called a SLAPP motion was brought by this whistleblower defendant, saying that there was no basis for the litigation. Now, ordinarily, litigation can be filed and we don't test at the beginning of the litigation whether there is a basis for the lawsuit. But when it is a SLAPP lawsuit, in other words, when someone is exercising their First Amendment rights or reporting something to the government, then there is a higher standard involved.

So in this case, the defendant's motion was that the lawsuit should be dismissed because it didn't have an adequate factual basis. I never got to hear that motion because the case was dismissed by the plaintiff. No doubt seeing this motion, they thought they couldn't defend it perhaps, and they dismissed it.

The issue of first impression was what power remains to the court at that point. The statute said that when a motion is granted, when a SLAPP motion is granted, fees may be awarded. I never had a chance to decide that SLAPP motion, so could I award fees or not? And so it was an issue of statutory construction and an issue of first impression.

I struggled a good bit with the issue of, well, what is the jurisdiction of the court when the case has gone away? The court of appeal handled that, I thought, well, and not in a way that was argued to me on the trial court, and the court of appeals said the court always has authority to decide adjunct issues that remain when the case is dismissed.

As I say, it was an issue of first impression. Justice Walter Croskey wrote the decision and you have a letter from him in support of my nomination, and I thank you also for having recognized those letters in my support, Senator.

Senator FEINSTEIN. Thank you. While you were in private practice, did you participate in any litigation on a pro bono basis, and if so, could you tell us which cases and the general subject matter?

Judge KUHL. Yes, I can, Senator. I took on matters that were referred by public counsel, and these were matters—one was on behalf of Enorma Mays and one was on behalf of Leonore Gonzales. Each of these cases involved the very sad situation where people with—in lower socio-economic brackets may be preyed upon by people trying to take their home, a kind of—they would fraudulently record a deed or forge a deed, and both of those cases were variations on that situation. I filed suit on behalf—in the separate cases on behalf of each and, happily, was able to get title back in the hands of my clients and have their homes restored to them.

Senator FEINSTEIN. Any other pro bono cases?

Judge KUHL. Those would have been the ones, Senator. For the 9 years that I was in practice after I was in public service with the government, I was having my children, and they are here, and I am very proud of them. I think I have done pretty well. But I was trying to hold down a partnership in a major law firm and to raise my children. But what I am happy to say is that there came a

point when I was able to undertake public service again and to go on the bench and become a Superior Court judge.

Senator FEINSTEIN. In 1993, when you drafted a brief for Mary Baldwin College in support of the constitutionality of the exclusion of women from the Virginia Military Institute, were you working for the organization on a pro bono basis, and how did you decide to take on Mary Baldwin as a client instead of another public interest organization?

Judge KUHL. That brief actually, in the VMI case, was not a brief in support of the constitutionality of VMI. The position taken in that brief was that the court should accept the VMI case. It was a brief in support of the petition for certiorari. It was asking the Supreme Court to take that case so as to clarify that all-women's schools could—were not unconstitutional, essentially.

The brief, if you look at it, mostly is a defense of all-women's schools and the value of single-sex education for women. It does—it is in support of VMI in the sense that says, yes, Supreme Court, please take this case, but it does not offer any constitutional argument in support of what VMI was doing. So it was a narrow brief under those circumstances.

It was filed on behalf of the women's organizations. It was referred to me through counsel who was representing VMI; in other words, the VMI, perhaps, had found three colleges in Virginia who wanted to file a brief, but their brief was limited, and the major portion of it was kind of a, we call them "Brandeis briefs," in support of women's education, as women's single-sex education.

Senator FEINSTEIN. What was the group that you represented that Mary Baldwin was part of? What was the organization?

Judge KUHL. I may be wrong, but my recollection is it was just the three colleges. It wasn't a group. It was the three women's colleges in Virginia.

Senator FEINSTEIN. So you are saying the point of the brief was to sustain three women's colleges?

Judge KUHL. The point of the brief was these women's colleges said we feel that the decision of the Court of Appeal has made us uncertain about the constitutionality of what we do and maybe whether we can keep getting tax exemptions. So, please, Supreme Court, take this case and clarify that single-sex education for women is not unconstitutional.

Senator FEINSTEIN. Do you happen to recall what the three women's—these were private women's colleges?

Judge KUHL. They were private women's colleges. It was Mary Baldwin—I'm just not remembering, Senator, I'm sorry.

Senator FEINSTEIN. Perhaps you could get that to me.

Judge KUHL. Surely, I would be glad to.

Senator FEINSTEIN. I would like to read the brief.

Judge KUHL. Yes, I would be glad to get the brief to you, Senator.

Senator FEINSTEIN. Thank you very much.

I see Senator Durbin. Thank you very much, Mr. Chairman. I appreciate the time. Thank you.

Chairman HATCH. Thank you, Senator. I know you take these matters seriously, and I was glad to be able to give that time to you.

Let me take my time for questions now and just ask a few, along the same lines, if I can.

Judge Kuhl, in response to written questions from Senator Boxer, you stated that, "The Federal Government has, and should, play an aggressive, vigorous role in fighting discrimination."

You also stated, "The civil rights laws have had a major impact in changing our society for the better, including by giving the Executive Branch the power to punish unlawful discriminatory conduct in employment, housing, Government contracting and Federal programs. The Government must continue to be a force for change by rooting out discrimination under its statutory mandates and bringing actions to compensate victims of discrimination."

Now, your record and reputation as a judge supports this commitment to following our civil rights laws. Let me ask you about one specific case, and I hope I am pronouncing this correctly. It is *Frances Iwekaogwu*—is that about right?

Judge KUHL. I think that's about right, Senator, yes.

Chairman HATCH. It is close enough.—v. *City of Los Angeles*. Do you recall this case?

Judge KUHL. Yes, I do Senator.

Chairman HATCH. Can you please just tell us about it a little bit.

Judge KUHL. Yes, this was a case—and I think the pronunciation is Iwekaogwu. That's the way I pronounce it—but this was a case that came before me during about a three-month period that I sat as a pro tem justice of the California Court of Appeal, and I wrote the opinion in that case.

It was about a Nigerian-born African–American employee—engineer—who was an employee at the County of Los Angeles, who the jury found had been discriminated against and had been retaliated against for complaining about discrimination. And in that case, the jury's fact-findings were being challenged, and my opinion recites the evidence in favor of the plaintiff in order to support the position of the jury award, and it also affirmed an award, a rather substantial award, of emotional distress damages for the plaintiff.

We published the decision—my colleagues and I published the decision—because it takes some Ninth Circuit precedent speaking to the issue of what evidence may be offered in support of a race discrimination claim and takes that law into California law. So that is why we published it.

Leo James Terrell, the attorney for Mr. Iwekaogwu, has written a letter strongly supporting your nomination. In his letter he said that he is an attorney for the NAACP and a life-long Democrat. He also say that you were, "A major factor in the successful resolution of that case."

He continued on saying, "During the lengthy litigation process, I found that Judge Kuhl was fair, impartial, competent and at all times extremely professional. I, personally, have no problem with the appointment of a Republican judge to the Ninth Circuit bench as long as that judge is fair and impartial. Judge Kuhl is just that person."

"I submit that your decision regarding the appointment should be based solely on the competency of the judicial candidate, not on politics. I will do everything in my power to ensure that Judge

Kuhl receives a nomination and to see that this nomination obtains the advice and consent of the Senate, as well as the public."

I will submit that letter for the record, without objection.

Now, Judge Kuhl, I would like to ask you a few questions about your role in the Bob Jones University case, since that has come up. Let us get one thing clear at the outset, your views in 1982 on the position of the United States in the Bob Jones case were never meant to endorse racially discriminatory policies of Bob Jones University, were they?

Judge KUHL. That's correct, Senator. We were focusing on the narrow legal issue of the IRS's statutory authority.

Chairman HATCH. And you have never agreed with those discriminatory activities of Bob Jones University.

Judge KUHL. I certainly have not, Senator, and I hope that my performance as a judge shows that I value the diversity of the legal community and the community at-large in which I work and that I strive to continue to work of enforcing the civil rights laws that have been such a wonderful force for change in our society in the last 40 years.

Chairman HATCH. What was your position at the Justice Department at the time the Bob Jones case arose?

Judge KUHL. I was a special assistant to the Attorney General.

Chairman HATCH. How old were you at that time?

Judge KUHL. I was 29.

Chairman HATCH. Twenty-nine. How long had you been out of law school at that time?

Judge KUHL. I'm going to say I think it was about two-and-a-half years, perhaps closer to three.

Chairman HATCH. Did you have any decision-making authority at the Justice Department at that time in that position?

Judge KUHL. No, sir.

Chairman HATCH. In a recent Legal Times article, Charles Cooper, a highly respected Washington lawyer, who worked with you at the Justice Department, supported the fact that you were a junior lawyer at the Department at the time of the Bob Jones case. He characterized the left-wing group's description of your role in the decision-making process as "unfair," and "grossly incomplete."

Now, speaking of your role, Mr. Cooper said that Judge Kuhl, "Wasn't making policy. She was taking notes when she and I were even in the room."

Now, it is now 21 years later from when you, as a young lawyer, without any real authority, were in the Justice Department. You have been a State trial judge for 7 years, since 1995. Prior to that, you were a partner in a well-regarded Los Angeles law firm, really well-recognized all over the country. You now believe that your position on the Bob Jones case in 1982 was wrong, for a variety of reasons, and you have so stated that.

If I understand your answers correctly, you believe that it was wrong because it appeared insensitive to minorities, regardless of the nondiscriminatory motives of the persons advocating or advancing this position.

If I understand you correctly, you also believe it was wrong because, indeed, it was the duty of the Justice Department to defend Federal agencies, which it did not do here.

Now, is my understanding basically correct here?

Judge KUHL. Yes, Mr. Chairman, it is.

Chairman HATCH. I want to share the Committee an op-ed that you have mentioned, written by Harvard law professor, and former Solicitor General Charles Fried, for whom you worked several years after the Bob Jones case was decided.

Now, in that op-ed, which was published on January 17th of this year in the Los Angeles Times, Professor Fried says, "The left-wing rap against Kuhl is that more than 20 years ago, as a 29-year-old junior member of the U.S. Attorney General William French Smith's staff, she expressed a view that, however odious the practices and beliefs of Bob Jones University, it was not the job of the IRS to make social policy by deciding which nonprofits would enjoy the tax exemptions mandated by Congress."

Now, is that a fairly accurate summary of your views at that time?

Judge KUHL. Yes, Senator.

Chairman HATCH. Mr. Fried continued, "Certainly, Kuhl, a devout Roman Catholic, could have harbored no personal sympathy for the virulently anti–Catholic University. By the time Kuhl came to the Office of the Solicitor General as my deputy in 1985, I knew she had come to believe, as did I, that she had been wrong if, for no other reason, than seeming to side with Bob Jones confused the Reagan administration's message that we were strongly committed to civil rights and racial equality, while opposed to quotas."

I will submit a copy of that editorial for the record, without objection.

Now, Judge Kuhl, is Professor Fried right when he says that by the time you began working for him in 1985, you had already determined that your position on the Bob Jones case was wrong?

Judge KUHL. Mr. Chairman, yes, Professor Fried is correct in stating that.

Chairman HATCH. And it was a narrow position at that time, basically one that you did not think that the IRS should be setting policy.

Judge KUHL. That's correct, Mr. Chairman.

Chairman HATCH. Now, I think it is important to note that you have long held your belief that your original position on the Bob Jones case was wrong. Now, this is not a so-called "confirmation conversion," and anybody who tries to make it that is—to use the word again—wrong.

Now, you have carried this belief with you for 21 years. Now, it takes an honest person of great integrity to admit when she is wrong, and I commend you for it here.

Now, just to clarify. Judge Kuhl, the memo you wrote, to which Senator Leahy referred on the Bob Jones case, was not an appeal, a recommendation on appeal certiorari or amicus curiae matter or it certainly was not a recommendation in those areas, was it?

Judge KUHL. That's correct. It was a memorandum to, I believe, the assistant attorney general, and I was at that time a special assistant to the Attorney General.

Chairman HATCH. The reason I bring that up is because we get continuously this argument that the seven living former Solicitors General should be ignored in the Miguel Estrada case and that cer-

tain Democrats should be allowed to have a fishing expedition into the recommendations on appeal certiorari and amicus matters, which of course this was not; is that correct?

Judge KUHL. That's correct.

Chairman HATCH. Judge Kuhl, my time is up. I will turn to the esteemed Senator from Illinois, Senator Durbin.

Senator DURBIN. Thank you very much, Mr. Chairman.

Thank you, Judge Kuhl, for joining us.

I was out at another meeting, and I came back to hear both Senator Feinstein and Senator Hatch say that you do not hold to the position on Bob Jones University, in which you wrote in a memo 21 years ago as an employee of the Department of Justice; is that true?

Judge KUHL. That is correct, Senator Durbin, yes.

Senator DURBIN. Let me ask you if positions that you have taken relative to affirmative action, where you referred to it as "a divisive societal manipulation," have you changed your position on that?

Judge KUHL. Well, Senator, since I wrote that article, first of all, the primary thrust of that article was to state the importance of individual remedies and of putting persons who have been discriminated against back in the place where they should have been, absent that discrimination, and that was the thrust of that article.

Since I wrote that article, however, the Supreme Court—that article was written at a time when the Supreme Court was very much up in the air about race-based remedies when there had been prior discrimination. Since that time, the Supreme Court has come to rest on that issue in the *Adarand* case and has held that in appropriate circumstances, race-based remedies can be used to remedy past discrimination.

Senator DURBIN. Have you changed the position you stated in the *Thornburgh* case, in which you called on the Supreme Court to abandon *Roe* v. *Wade*?

Judge KUHL. Well, Senator, since the *Thornburgh* brief was written, the *Casey* case has been decided. *Casey* looked at *Roe* again, considered the criticisms that had been made of that decision and reaffirmed that decision. *Casey* is the law of the land. It strongly reaffirms the right, the constitutional right to women's reproductive freedom, and I would apply that precedent fully and completely. I have absolutely no trouble with that, Senator.

Senator DURBIN. So it is a basis of, I mean, do you accept the Court's premise of the privacy issue here?

Judge KUHL. Yes, certainly.

Senator DURBIN. Then, let me ask you about a specific case, which I have found to be the most troubling of anything you have been involved in, *Sanchez-Scott* v. *Alza Pharmaceuticals*.

In this case, a breast cancer patient went to her oncologist for a routine visit. During this visit, the doctor brought a man, described only as "a person who was looking at Dr. Polonsky's work" into the examination room. This man turned out to be a drug salesman for Alza Pharmaceuticals, as the patient later found out. This man, this drug salesman in the doctor's office, watched the examination, which included removal of the patient's shirt and bra. Citing an invasion of privacy, the patient sued the salesman and the pharmaceutical company.

You rejected the invasion of privacy claim by the breast cancer patient, when this drug salesman was invited into the room to watch this woman disrobe for the medical evaluation.

On appeal, the Court of Appeals unanimously found in favor of the plaintiff, reversing your decision.

Would you like to explain your concept of privacy, as it applies to that fact situation?

Judge KUHL. Yes, Senator.

First of all, I think it's important to recognize, in that case, that the woman, I'm sure, was very upset with her doctor, and had a right to be upset with her doctor, for allowing this third person into the examining room. She did have a tort claim against the doctor that was part of the lawsuit, but was left standing by my decision, and was not interfered with at all. In other words, her claim against the doctor that he didn't get her consent to allowing this person to come in, that claim was going to go forward.

Senator DURBIN. But I take it you rejected her claim against the salesman in the room and the pharmaceutical company that he worked for.

Judge KUHL. That claim was the claim that was before me, and the Court of Appeal had I think a closer focus in that situation on the seriousness of the invasion, not just because of the presence in the room, but because of what also happened in the room, and they also—

Senator DURBIN. It is a pretty outrageous situation, is it not?

Judge KUHL. I think it is an outrageous situation.

Senator DURBIN. But you did not see it as an invasion of privacy?

Judge KUHL. Well, I was trying to interpret California law. What was being cited to me was Michigan precedent. I think that the Court of Appeal has clarified the law in this area. I am happy that it has been clarified. I have certainly no problem with what the Court of Appeal did.

And Justice Paul Turner, who wrote the decision in that case, has written in support of my nomination, and I think addresses, in some detail, this decision and states that, although he overturned it, there were strong arguments to be made in support of it.

But let me restate again, I think that the woman had very good reason to be upset, and good reason to be upset with her doctor for letting this third person in the room.

Senator DURBIN. But had no right to a claim of action against the person who was brought into the examining room, nor the company he worked for.

Judge KUHL. After looking at the law was presented to me, that was the conclusion that I reached, but the Court of Appeal has clarified that. I am very happy with the Court of Appeal's decision, and I certainly would follow that in the future.

Senator DURBIN. I would think common sense would have clarified that.

Let me ask you about an article that you wrote in the New York Times on June 16, 1993. Were you working for the Department of Justice at that time?

Judge KUHL. No, Senator, that—I'm sorry—was—

Senator DURBIN. After your—

Judge KUHL. I can see it through the paper. I think I know what you are referring to.

Senator DURBIN. "Clinton dithered, Reagan didn't."

Judge KUHL. I was in private practice at that time.

Senator DURBIN. You have got an interesting paragraph in this story, and I think the Chairman should take a look at this, as well as other members, and here is what it says, and I quote, "President Ronald Reagan knew what he was looking for and how to find what he wanted. He had a clear view of how he wanted Supreme Court jurisprudence to change and had an intelligent, discreet and trusted advisory, William French Smith, his first Attorney General, who knew how to organize the selection process." And then you go on to talk about the process followed by President Reagan in filling Supreme Court vacancies and the process followed by President Clinton.

Is it fair to conclude from that paragraph that you are saying that President Reagan—you speak in positive terms here, that he did not dither—had at least a concept of an ideology that he was seeking? And, if so, is your ideology part of the issue that we should consider here as you seek this important position?

Judge KUHL. Senator, what I was talking about in that article was the selection—President Reagan's side of it—what I was talking about was the selection of Justice Sandra Day O'Connor. And I know that President Reagan, I know that Attorney General—I certainly know that Attorney General Smith was very proud of that nomination, and I assume the President was as well.

I think it was clear that President Reagan and Attorney General Smith wanted judges who would follow the law, who would interpret, as best they could, what the legislator enacted and who would not themselves legislate, and that's what I was talking about.

Senator DURBIN. Strict constructionism?

Judge KUHL. I would reject that label, Senator. I think that I am just a constructionist, if you're applying it to me.

Senator DURBIN. I am just asking. What—

Judge KUHL. What I try to do, and maybe this can—

Senator DURBIN. Was Justice William Douglas a constructionist?

Judge KUHL. Well, maybe this can help, Senator

When I was sworn in seven-and-a-half years ago as a judge of the Los Angeles Superior Court, I quoted Justice Felix Frankfurter as the type of judge that I wanted to be. And Justice Frankfurter said that the highest duty of a judge is to put aside one's personal will and one's private views and follow the law, and that's what I believe. I said that then, seven-and-a-half-years ago, on the occasion of my swearing in as a judge of the court I am now on, and that is my model.

Senator DURBIN. I would like to submit some questions for the record, since I do not have enough time to get into them here, about your views as a constructionist. Usually, people try to say what kind of constructionist they are, but you are now in a generic category, and I assume there are strict constructionists, and flexible constructionists, and liberal constructionists, and conservative constructionists, but you are just a constructionist.

And I am going to ask some questions, if I can, to follow up in writing as to what that really means and how that might apply to a given case.

Let me just close, Mr. Chairman, with your permission, I would like to ask that a letter from Senator Boxer, as well as several organizations, relative to this nomination be made part of the record.

Chairman HATCH. Without objection.

Senator DURBIN. Thank you very much.

Thank you, Mr. Chairman.

Chairman HATCH. We will turn to Senator Sessions.

STATEMENT OF HON. JEFF SESSIONS, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator SESSIONS. Thank you, Mr. Chairman.

First, I would like to say I did not hear all of the distinguished ranking member's comments about the "blue slip" policy with regard to Circuit Court of Appeals, but it is clear that it has never been the policy of this Committee that one Senator who happened to be in the circuit could block a nominee.

In fact, I remember very distinctly, not long after I came to the Senate, that when President Clinton was President, and you were Chairman of the Committee, and that a Republican member said we should adopt such a policy, and there was a debate within the Republican Conference, and you spoke forcefully and aggressively that it was not a good policy, and there was a vote, and your position prevailed.

And it has never been the policy of this Senate that, with regard to Courts of Appeals nominees, a single blue slip is a decisive factor. In fact, the Presidents have always asserted that they have much less need, with regard to a regional appointment like a circuit judge, to seek home State approval even.

We just had one from Alabama, one from the Eleventh Circuit, and the President makes his own pick, basically, and I think that is a healthy thing. So I just would want to defend you on that.

Judge Kuhl, with regard to this matter that you were just being asked about, about the doctor and the drug company representative being in the examining room, let me just say it is amazing to me how much drug company representatives are involved in medical practice. Sometimes they know more than the doctor. Sometimes they are known to come in and give advice on operations and things of that nature. So it is an odd thing to me that that occurs, but do I understand that the doctor had approved this man coming into the room?

Judge KUHL. The doctor had brought the third person into the examining room.

Senator SESSIONS. So the doctor, who had the care of the patient under his control, invited this person to come into the room; is that correct?

Judge KUHL. That was my understanding of the facts, yes.

Senator SESSIONS. And you allowed the lawsuit to go forward against the physician, but did not allow it to go forward against the third party who the doctor had allowed to come into the room.

Judge KUHL. Yes, Senator.

Senator SESSIONS. Well, that, to me, is a close call at best. I think that is what law is all about—who is responsible for the bad act occurring. You allowed the case to go against the responsible party, it seems to me, and I am not sure that—I think a good case can be made that if he was asked into the room or allowed to come into the room by the physician that the person should not be held liable under these circumstances. I just do not know, but I do not think that is an extreme opinion at all.

Mr. Chairman, I have to go to the floor to preside, and I would yield back my time.

I would just say this nominee's record is extraordinary. She has got a tremendous background and not only has the academic background, she clerked for Justice Anthony Kennedy on the Ninth Circuit, which is the circuit you will be going on, a great justice, and in the course of that, that is the finest experience that a court judge can have, to clerk on that very same court. She finished academically with the highest honors and has had just a terrific record on the bench in California.

All of these judges writing on your behalf has got to be a source of great comfort and affirmation for you. So I congratulate you, and I think she will make an outstanding member of the bench.

Chairman HATCH. Thank you, Senator.

We will turn to Senator Kennedy.

STATEMENT OF HON. EDWARD M. KENNEDY, A U.S. SENATOR FROM THE STATE OF MASSACHUSETTS

Senator KENNEDY. Thank you very much.

Welcome, Judge.

Judge KUHL. Thank you, Senator.

Senator KENNEDY. I regret that I was not here earlier.

I took the opportunity this morning to go to the Supreme Court and to hear the University of Michigan case, and as I sat in the court, I was mindful that next year we are going to have the 50th anniversary of the *Brown* v. *Board of Education*.

And I am also very mindful that I think the issue of discrimination, and racism, and bigotry are—America will never be America until we free ourselves from it. That is why I believe that this case is so important because I believe that if it is decided in certain ways, with the Voting Rights Act coming up in another year, the extension for the Voting Rights Act, it could perhaps have profound implication on this and really be perhaps a watershed kind of decision, in terms of how this country is going to proceed with issues of discrimination in our society.

It was, obviously, extremely well-argued by both sides, but it still, I think, underlies really, at least for me, the importance of civil rights in our society. As you well understand, we wrote discrimination into the Constitution, we fought a Civil War. Dr. King led us, in a very important way, over a long period of time, but we are still wrestling with this problem, and there has been a variety of different, obviously, decisions which have had important implications in the recent times, but it is an area which I am very interested and strongly committed to.

So I hope you will just understand if you will come back and revisit at least the Bob Jones situation. I know that I listened to the

comments of our Chair and also your responses to that situation, and it was some time ago.

It is one thing to have an opinion about the Bob Jones case and have a view about it, but I am looking through your activity during this period of time as a high-level Government lawyer in the administration—the Reagan—you worked to reverse the longstanding policy granting the tax exemption of racially discriminatory private schools, and you sought to reverse the policy, over the objections of the head of the IRS, and the acting Solicitor General, and then the head of the Office of Legal Counsel, Ted Olson.

And more than 200 employees of the Civil Rights Division signed letter opposing the Reagan administration position in the Bob Jones case, as casting serious doubt upon the Division's commitment to enforce vigorously the Nation's civil rights.

I remember this case very, very clearly, and it was a major, major cause celebre, in terms of the consideration and the judgment on it.

And then the Supreme Court rejected the arguments that you had sought to put forward, to deny tax-exempt status to racially discriminatory schools. Only one justice, one justice only, Justice Rehnquist, dissented.

And then in response to the written questions from Senator Boxer, you said that you had no decision-making authority with respect to the Government's position and that the decision was made by the Attorney General.

I am sure it is correct the Attorney General made the ultimate decision, but it appears you took a prominent role. You co-authored a 40-page memoranda. The then head of the Civil Rights Division, Bradford Reynolds, arguing the IRS policy of denying tax-exempt status to racially discriminatory schools should be changed.

You wrote a memo to Ken Starr, collecting Reagan campaign material, showing that Reagan, as a candidate, had opposed IRS attempt to remove the tax-exempt status of these schools, and statements from the 1980 Republican platform, opposing the IRS's position policy.

And in a book written about the role of the Solicitor General, it is noted that the Reagan administration's interest in the case bubbled up from the middle ranks, especially from you and another attorney. You are described as a key member of the Bob Jones team, that you sought to reverse the IRS policy, circumventing the acting Solicitor General to do so.

So the issue is why you felt that you had to play such an unusually active role in getting the Government to restore the tax-exempt status to the racially discriminatory schools. I know it has been a long time, and as I believe you have answered that in terms you did not believe the IRS ought to be making that judgement. If there is anything you want to—

Can you cite a case in which you have held for civil rights' plaintiffs? Have you had any cases?

Judge KUHL. Yes, Senator, I can, and I appreciate your saying, harking back to that time of Bob Jones and saying it was such a big case. It was way over my head at the time. I really, as I have said in my answers to Senator Boxer, it was wrong because the Justice Department should have been defending the traditional po-

sition of the IRS, and it was wrong because it didn't put nondiscrimination first, and that's where the emphasis should have been, despite the concerns about what the IRS might do in the future to all-women schools or whatever, which was what was in my head.

But with respect to my current record, Senator, I'm very proud of the decision that I wrote during the time that I sat on the Court of Appeal in the case called *Iwekaogwu*, and in that case the Court of Appeal—I was writing for them—affirmed the jury verdict in favor of a civil rights plaintiff, an African-American who had been discriminated against in the workplace in county employment, and upheld a very significant emotional distress award in his favor.

In that case, we took Ninth Circuit precedent that is very strong in favor of the types of evidence that can be presented in discrimination cases in favor of the plaintiff and put into that State law.

So I'm very proud of that decision, and I'm also proud that civil rights lawyers who know my work, such as Leo Terrell, who was counsel in that case, have written on my behalf and Vilma Martinez, whom I have known for many years.

Senator KENNEDY. Well, again, that is impressive because I have very high regard for her. I know her well.

If you have other cases on this, we would welcome them.

You said, as I understand this morning, that while you are still the justice, you expressed regret to Charles Fried about the Bob Jones case. As I understand, Fried had said that you did come to him and tell him that the position you took was wrong politically because it sent the wrong message. What do you remember, when you said you took the wrong position, did you believe it politically because it was just basically wrong in terms of the underlying values of the consideration of the case. Do you remember?

Judge KUHL. There wasn't any one particular conversation that I recall, but I know that we had discussion about Bob Jones, and certainly we did say that taking that position had been really a disaster for the Reagan administration, absolute disaster.

But I also felt—I don't know whether I expressed this to Charles Fried—but I also felt that we really had had the wrong focus there for the reasons I have stated and that the policies of nondiscrimination should have come forward, and any problems we had about potential IRS overbreadth should have been taken care of through legislation or regulations, but I didn't have the breadth to see that at that time.

Senator KENNEDY. Let me just continue on this point.

This is not the only case that gives me concern. The Reagan administration actually rolled back protections for minorities in cases such as school desegregation and affirmative action.

While working in the Solicitor General's Office, you signed onto briefs that opposed remedial affirmative action in that Local 28 of the Sheet Metal Workers' case. The union in that case had egregiously violated Title VII, they administered discriminatory entrance exams, paid for cram courses for relatives of members that were unavailable to minorities, favored white applicants, while denying transfers of qualified blacks, and issued temporary work permits to white members of distant construction unions, but despite

the evidence of intentional discrimination, you opposed affirmative action programs to remedy this discrimination.

Then, in private practice, you wrote an article making plain your opposition to affirmative action. Indeed, you criticized Affirmative Action as a divisive societal manipulation.

Is there anything you want to tell us about that Sheet Metal case or your views about affirmative action. The real question I have is how can you give us assurance, based on your record, that you will be fair on civil rights cases, and you will be able to set aside your political views?

Judge KUHL. Certainly, Senator. I want to emphasize that in the article, the primary thrust of that article had to do with my feeling that there needed to be a real insistence on seriously taking individual remedies seriously; that is, sometimes in class actions, there will be an overall remedy, but the people who should have been given jobs and who lost those—didn't get those jobs because of discrimination, need to be put where they should have been, and that was the point of that article.

But with respect to my current perspectives now, I have minorities—plaintiffs—come before me all the time. I am proud that this is a record that I have, that I have the support of the bar, both sides of the bar. And more importantly, having lived in Los Angeles now for some period of time, this is a very multicultural environment that I live in and one that I'm really very proud of.

I was recounting, to some of my friends, that I had bene to a Chinese–American Bar Association event about a week-and-a-half ago, and this was on a Friday evening. It was crowded and so forth. But here at this event, Justice Carlos Moreno, a recent appointee to the California Supreme Court was there. I was sitting at the table with my former colleague, Enrique Romero, and I was sitting next to my colleague, George Wu, Karen Nobumoto, who is former president of the State bar, former president of African–American Lawyers, who was receiving an award, local political figures, local and statewide officeholders were there.

And it was just, it really made me smile because here was an example of a way to affirm cultural identity, but yet open up, in this professional context, and have all groups come together in harmony, knowing each other, respecting each other and working together. And that is the kind of society that I would hope for, Senator.

Senator KENNEDY. Well, I think I could not agree with you—I think if you look back over the history of a lot of those nominees, you would find out that a lot of them had a lot of difficulty in getting to where they are and are now serving with great distinction.

That is not, in terms of your kind of situation, but it does, I think it is important, and that is what we are attempting to achieve.

I would just ask you a global question, and it is along the lines of what I have mentioned before. We, obviously, entrust the Federal judges with protection of the highest ideals of our republic. They should actively protect the rule of law and play a special role in advancing the civil rights and civil liberties, and they should stand against discrimination in our society, and they should prevent the personal views of anyone from interfering with the rights of people.

Now, let me, if I can, make this point. You, however—and then get your reaction—appear to be an activist—I want to hear how you respond to this—an activist for your political goals. You have taken extraordinary steps, while a Government employee, to push the Government to call for overturning the *Roe* v. *Wade*. You have chosen to defend restriction on a woman's right to choose, even when those restrictions were clearly contrary to Federal law.

You have been specifically named as one of a band of the young zealots who tried to have the Federal Government weigh in on the side of racially discriminatory policies of higher education. You argue in favor of the Virginia Military Institute policy of discriminating against women. You argued that a woman who suffered humiliating sexual harassment at work was not entitled to any compensation under antidiscrimination laws. As a judge, you dismissed a case brought by a breast cancer victim after her doctor invited a drug salesman into the examination room while the doctor examined her. The two men apparently mocked the patient.

In all of these cases, the position you supported, was rejected. If you become a judge of the Ninth Circuit, how can we be sure that you will not continue this sort of lack of sensitivity on issues of civil rights and women's rights issues?

Judge KUHL. Senator, the positions that I took as an advocate, I put those aside, and I put aside my role of advocacy when I became a judge seven-and-a-half years ago. I now have a record as a bench officer that I am very proud of, in support of the rights of all people who come before me.

And as a trial judge, you know, you see these people face-to-face that come into your courtroom, and it is so apparent to me how important it is that people who come into my court not only are fairly treated, but feel fairly treated, and that is the sensibility that I bring to my job as a judge, following the law, whether or not I agree with the law, and treating everyone who comes before me fairly, without regard to their social station, without regard to their race or their ethnicity.

And I take great joy in working with our highly diverse juries that we have in Los Angeles, who come together and just do such a wonderful job putting aside who they are, what their social station is and working together to make our jury system work so well.

So those are some of the things that I am committed to, Senator. And I think that the support that I have from my colleagues, from the Court of Appeal justices who know my work and have written on my behalf, from 23 women colleagues who have written on my behalf, and from the bar, generally, including the plaintiff's bar, even though I was a defense lawyer, I think all of that speaks to my performance as a jurist and to the fairness that I bring to the job.

Senator KENNEDY. I believe my time is up.

I will yield to Mr. Chambliss, if I can do that, before Senator Hatch comes back.

[Laughter.]

Chairman HATCH. I am here, but did you have any further questions?

Senator KENNEDY. No, that is fine. Thank you.

Chairman HATCH. We will go to Senator Chambliss, then.

Senator CHAMBLISS. Thank you, Mr. Chairman.

Judge Kuhl, I notice that you are a graduate of Duke, and I will have to tell you that I am not going to let it cloud consideration of your nomination that the Duke women beat my University of Georgia women over the weekend. But it was a great ball game.

I don't want to leave hanging what Senator Durbin was talking to you about because I can see the argument on the floor right now. Somebody is going to take your comments about being a constructionist of the Constitution. I want to give you an opportunity to expand on that a little bit.

If anybody asks me, after practicing law for 26 years, what category I would fit in with respect to the Constitution, I tend to think I would be more of a strict constructionist. As I judge, I am hearing you say that maybe you are a little more moderate than that, but I don't want to put words in your mouth. I want to give you an opportunity to say what you really mean by that.

So let's start off talking about the Constitution and how you as a member of the Ninth Circuit bench would approach any case that has constitutional issues. What would be your response to any case coming before you with respect to constitutional issues and your interpretation thereof?

Judge KUHL. Well, perhaps I wasn't too clear in my response to Senator Durbin, mainly trying to avoid labels because I don't find them to be very helpful. But I think in approaching a constitutional issue, one approaches it first with the language of the Constitution, the history of the enactment in that provision in the Constitution, and importantly also the precedents that have evolved under that constitutional provision. And those, I think, have to be the foundation of where one turns for beginning a constitutional analysis.

Senator CHAMBLISS. I think you could not have been clearer in your statement about precedents, irrespective of what personal feelings you have. You obviously have a terrific reputation as a trial judge on the Los Angeles Superior Court bench and I just want to confirm the fact that, as you have already stated, whatever your personal feelings may be, you would look at what the law says, what the precedent is with respect to any issue, be it a social issue, a criminal issue, or a constitutional issue, and that is how you would interpret—or you would abide by those precedents in interpreting the set of facts that might be before you.

Judge KUHL. That is correct, Senator. That is what I have taken on as my responsibility as a judge and a responsibility I hope I have discharged well.

Senator CHAMBLISS. I don't want to go back and belabor the point again, but Mr. Durbin asked you about the case *Sanchez-Scott* v. *Alza Pharmaceuticals*, and also Senator Sessions did. There were some comments about the letter from Judge Paul Turner, who is the Presiding Justice on the California Court of Appeals. He was the author of the opinion that overturned your decision in this case.

Very honestly, he writes a pretty good opinion in this letter regarding that case and he talks about how you made a very well-reasoned decision and it was a very touch call for you to make. And his decision overturning your decision, he gives again some pretty

good rationale as to why you thought the way you thought and how your opinion was written, and also how his opinion was written.

Mr. Chairman, I would like to enter this letter in the record.

Chairman HATCH. Without objection, we will put it in the record.

Senator CHAMBLISS. I want to go to another case, Judge Kuhl. I understand that some of the opposition to your nomination stems from claims that you represented Shell Oil Company in defending the company against having to pay for clean-up of contaminated land. I understand that your role in this case did not have anything to do with whether or not Shell Oil Company was liable to the plaintiffs.

Could you please clarify what your role was in the *Nelson* v. *Shell Oil* case? When did you become involved in the case and what issues did your argument focus on?

Judge KUHL. Yes, Senator, and in *Nelson* v. *Shell Oil* I was hired, I think, after the first appellate decision had come down. In other words, there had been a trial, there had been an appeal. There was a partial reversal on the appeal, there was another opinion. This case was up on appeal on appeal about three times.

I was hired as appellate counsel on the case to address the issue of the amount of the punitive damages award, and I made arguments to the court of appeal about the amount of that award and that was arguing on behalf of the defendant that it should have been a smaller award. And that was the extent of my involvement in that particular case.

Senator CHAMBLISS. I understand in 1993 you represented three private women's colleges in an amicus curiae brief before the U.S. Supreme Court regarding the constitutionality of the exclusion of women from Virginia Military Institute.

First, can you tell me how you became involved in that case, and could you please tell me what position you took regarding the constitutionality of denying women admission to the VMI?

Judge KUHL. Yes. In the VMI brief that I wrote, I was contacted and requested to write a brief on behalf of the three women's colleges. And primarily what the women's colleges wanted to address in that brief was the importance of single-sex education for women.

I am familiar with that topic because I myself went to an all-girls school for high school and my two daughters are in all-girls—well, one is in an all-girls school now; one will be next year. So I feel pretty strongly about the helpfulness of that to women as preparation for professional lives.

But in any event, the brief primarily described the literature that supports the value of single-sex education for women and asked the Supreme Court to take the VMI case in order to clarify that whatever it said with respect to VMI, single-sex education for women would not be unconstitutional.

The women's colleges felt insecure, if you will, based on—with respect to the court of appeal opinion and if that had been left standing, they were concerned that arguments could be made that they might lose their tax exemption or that they were being discriminatory in not admitting them.

Senator CHAMBLISS. Judge Kuhl, I understand from your statement and previous statements by other folks up here that you have strong bipartisan support on your nomination, including bipartisan

support of 23 female judges on the Los Angeles Superior Court bench. Is that correct?

Judge KUHL. That is correct, Senator.

Senator CHAMBLISS. I think that is all I have, Mr. Chairman.

Chairman HATCH. Thank you.

Before I turn to Senator Schumer, let me just clarify one thing. Some of your critics certainly on the outside have tried to paint the picture that you are insensitive to civil rights. I don't think anybody here has tried to do that; at least I hope not.

Didn't you find for the plaintiff in the *Grobeson* case?

Judge KUHL. Yes, that is correct.

Chairman HATCH. Can you elaborate for the Committee on that case and explain that to us?

Judge KUHL. Yes, Senator. The *Grobeson* case was a case involving a police officer with the Los Angeles Police Department who was openly gay. And he had prior litigation with the police department, but in this particular case the issue had to do with his being disciplined for several situations, one of which was wearing a police officer uniform in a gay rights parade without the, allegedly—I mean, there was a factual dispute—without the permission of LAPD.

Another one had to do with, I believe, his attendance at a funeral for an AIDS victim in uniform. There were several incidents such as that and he had been disciplined by the department, and the issue before me in that case was the discipline that had been given to him. And I reversed the discipline on the ground that he had not been adequately given notice of the charges against him in a particular instance, and so that discipline was reversed.

Chairman HATCH. Well, I will put into the record an Associated Press article about the *Grobeson* case. The article was dated September 6, 2001. It just said, "A judge has ordered the police department to reverse a suspension of a former officer who won a landmark legal settlement that dealt with alleged discrimination and harassment toward gays within the agency. Superior Court Judge Carolyn Kuhl said Tuesday the department must provide former Sergeant Mitchell *Grobeson* with pay, plus interest, for a 195-day suspension in which he received no salary. The judge's order didn't specify the amount owed to *Grobeson*."

And it goes on to say that he wore his police uniform without permission while attending a gay pride festival, and in a magazine advertisement recruited homosexuals to the LAPD. "Police officials couldn't be reached for comment Thursday. *Grobeson* and two other officers won $770,000 in a civil suit in February 1993. As part of the damages, the department promised to improve its hiring and training of gay officers. But *Grobeson* claims the department failed to follow up with the reforms and filed another suit in January 1996. In the second suit, he also alleges that fellow officers and supervisors harassed him. The department filed misconduct charges against *Grobeson* in June 1996. He later retired on a stress disability claim and challenged the suspensions in court. In 1999, Kuhl threw out the suspensions because the department's Board of Rights modified the formal charges against *Grobeson* without giving him fair notice. Negotiations between *Grobeson* and the depart-

ment for possible settlement broke down and his attorney sought an order asking for back pay," unquote.

Is that a fairly accurate account?

Judge KUHL. As best I remember, Senator, yes, Mr. Chairman.

Chairman HATCH. Okay, thanks.

We are going to turn to Senator Schumer, and perhaps he will be our last questioner today.

STATEMENT OF HON. CHARLES E. SCHUMER, A U.S. SENATOR FROM THE STATE OF NEW YORK

Senator SCHUMER. Thank you, Mr. Chairman. I thank you for the courtesy. If I hadn't been able to make it back, you were willing to wait and I very much appreciate that.

Judge Kuhl, I want to welcome you and your family here today. I want to congratulate you on the nomination.

Judge KUHL. Thank you, Senator.

Senator SCHUMER. I am sorry that this is going to be—that it is already an adversarial and contentious process, but I am sure you appreciate the magnitude of the job you have been nominated for, obviously a lifetime appointment, and the importance of us fulfilling our constitutional duties in this process, not to ourselves but to the people I represent.

As I was reading your record this weekend, and in particular I was looking at one of the cases, the most contentious one, Azucena *Sanchez-Scott* v. *Alza Pharmaceuticals*, I began thinking about the pattern of nominees we have seen from the White House.

Anyone who thinks that the nominees are just chosen on the basis of legal excellence and don't have a view just has to look at the nominees who are before us. They are not mainstream moderate by and large. They are people any objective observer would say are way over.

The Ninth Circuit is one that I give special consideration to. I voted for Mr. Bybee to come to the Ninth Circuit because it is largely a Democratic circuit and I believe in balance. And so my inclination would be to be supportive of you, but when I had read some of these things, they cry out for explanation and that is why I have to ask you these because just because we want balance doesn't mean you give a carte blanche to everybody.

I have been thinking about the nominees that we have seen, in general. We on our side of the aisle have talked about, as I said, how many of these White House judicial nominees are out of the mainstream, in general. But when you go over the record one after the other, it becomes even clearer. And the clearer it gets, I think the more worried mainstream Americans will get.

I believe that 10 or 15 years from now, there is going to be a rebellion if the Presidents gets his way and puts every one of his nominees on the court because they are going to be doing things that most people find outrageous. And it is especially frightening when it comes to women's rights. I think it is fair to say that, viewed collectively, many of these nominees are engaged in a campaign to roll back the clock on women's rights.

Let's look at the facts. Jeffrey Sutton, a Sixth Circuit nominee, sought out the opportunity to represent an employer who had discriminated against a woman because she had become disabled by

breast cancer. The woman's name is Patricia Garret. Ms. Garret was head of the ob/gyn neonatal unit at the University of Alabama–Birmingham Hospital. She took a leave of absence. When she returned, she had been demoted. Mr. Sutton apparently believed this was the right thing to do and sought out the opportunity to fight Ms. Garret's effort to get her job back.

Priscilla Owen, a Fifth Circuit nominee who has just been, without a second hearing, renominated by this Committee after she was defeated the first time, always on a party-line vote—if the President is seeking unity, I don't think we would get so many party-line votes. Anyway, she invented additional hurdles blocking a woman's access to her constitutional right to choose. Judge Alberto Gonzales, now the White House Counsel, said that Justice Owen's opinion in that case was an instance of unconscionable judicial activism.

By the way, we did, of course, have a second hearing for Justice Owen, but renominated her. It didn't change the votes. The membership had changed.

And then we have Deborah Cook, a Sixth Circuit nominee. She ruled against a widow in a claim against Wal-Mart for the wrongful death of her husband. The widow's initial suit had been dismissed for insufficient evidence, but then it became clear that Wal-Mart had instructed employees to lie and hide the evidence. The widow won her effort to reinstate the suit based on evidence that Wal-Mart had covered up, but Justice Cook dissented, holding that the widow shouldn't be allowed.

Just last week, in addition to this confirmation hearing today, we held a confirmation hearing for James Leon Holmes. Now, he is a nominee for the district court. Usually, we give more deference to the district court, but Mr. Holmes has said that rape leads to pregnancy about as often as it snows in Miami. Is that the kind of person anyone wants on the bench? Is that the kind of person who is mainstream?

According to the best estimates out there, we have 30,000 rape- or incest-induced pregnancies each year in America. It snowed in Miami exactly once in the last century. Is that the kind of sensitivity, whatever your ideology, that someone who is being elevated to the Federal court should show? Of all the people out there, why do we have so many of these situations, not just one, but one after the other?

And if that weren't offensive enough, Mr. Holmes has also said that women are obligated to subjugate themselves to their husbands. That is the kind of 19th century thinking we are seeing from these 21st century nominees.

So, Judge Kuhl, I hope you will understand why I am concerned about the ideology and agenda that these nominees are taking with them to the Federal bench, because they get out from the Congress they are gone; they are there for life. I hope you understand why I am reviewing the records closely and fully to figure out what kind of judges they will be.

I have voted for close to 95 percent of the President's nominees, even though I don't agree with most of them on choice or on any of the other issues. But some are just too far over.

I am disappointed to say that your record gives me real cause for concern. I am deeply concerned that you not only believe *Roe* v. *Wade* is wrongly decided—it is not good enough for me to say "I will follow the law." We have had that before. We had Mr. Thomas come before this Committee and say he had never discussed *Roe* v. *Wade*, and it is clear that he has not been a down-the-middle interpreter of that.

But when you were a Government lawyer and then your job was defending the Constitution, you pushed the U.S. Government to ask the court to reverse *Roe*. Now, if you were following the law as Solicitor General, you wouldn't have done that. And just because you are here before us today under these circumstances and say you will follow the law, that is not assurance enough; it shouldn't be assurance enough.

I am going to cover the *Roe* area—my colleagues have—in a second round or in writing, but I want to take this time to ask you about Azucena *Sanchez-Scott* v. *Alza Pharmaceuticals*. I just want to review the case so it is in the record, so people know what it is.

Ms. Sanchez-Scott was a breast cancer patient. She was undergoing chemotherapy treatment. One day, she went to see her doctor for a checkup and was escorted to a private examination room to wait. When the doctor arrived, he was accompanied by another man. The doctor introduced the other man as Mr. Martinez and said that Mr. Martinez was, quote, "a person who was looking at the doctor's work," unquote.

The doctor instructed Ms. Sanchez-Scott to undress from the waist up. He had her get up on the examination table, into the examination position, and then rolled down the waistband of her skirt so he could examine her abdomen.

And now I am reading from the appellate court opinion, quote, "During the examination, Ms. Sanchez-Scott began to feel extremely hot and flushed. She carried a pocket fan with her for such occasions. She took the fan out of her purse and began to fan herself to feel cooler. At this point, the doctor took the fan from Ms. Sanchez-Scott and gave it to Mr. Martinez. Mr. Martinez was told, quote, 'it would give him something to do.' Mr. Martinez began fanning Ms. Sanchez-Scott, who became extremely"—I am quoting from the case—"who became extremely uncomfortable because the doctor and Mr. Martinez both started to laugh. The plaintiff told Mr. Martinez she would fan herself, but Mr. Martinez refused her request and continued to fan her. Mr. Martinez watched the doctor examine Ms. Sanchez-Scott's"—they are specific, but I will just say body.

"As the examination continued in Mr. Martinez' presence, Ms. Sanchez-Scott continued to become more comfortable." This is still the case. "As soon as the examination was concluded, Ms. Sanchez-Scott got up and tried to cover herself because she was embarrassed and uncomfortable."

Then the doctor told Ms. Sanchez-Scott, with Mr. Martinez still present, she would need a chest x-ray and a mammogram. When Ms. Sanchez-Scott went to the receptionist to schedule her procedures, she was asked—by the way this part, I am just summarizing the facts, when I started with "Then the doctor."

Ms. Sanchez-Scott went to the receptionist to schedule her procedures and she asked who Mr. Martinez was. The receptionist responded Mr. Martinez was a sales representative from a pharmaceutical company.

Now, I think, and I believe most Americans think, regardless of their political ideology, that this is outrageous conduct on the doctor's part. To bring a sales representative from a drug company into a private examination room, without explaining to the patient what is happening and getting her explicit permission, is unconscionable. It is not just a close question.

My God, I don't know who Judge Turner is, I don't know what his views are, but if he thinks that this is a close question—it was reversed unanimously by the court of appeals—he ought to talk to—I have asked five or six women. To a person, they are outraged, outraged. And when I told them that a letter was sent in saying it is a close question, they were amazed. They said who pulled the strings for that one?

I don't know if that is the case, but I don't think anyone thinks this is a close question. It is a gross violation of Ms. Sanchez-Scott's privacy. And God bless her. Unlike so many other women who might face this humiliation, she found herself a lawyer and she filed suit. And the case came to you and you dismissed it, at least pertaining to Mr. Martinez and the drug company.

You said, as I understand it, that because she didn't ask questions and object, Ms. Sanchez lost any right to privacy she may have had. You also agreed with the defendants that no reasonable person would have found Mr. Martinez' presence to be highly offensive, and that this was nothing more than—and these are your words—"a situation which she found socially uncomfortable," socially uncomfortable.

The appellate court that sits above you unanimously reversed you in this case, and I have to say I can see why they did. I don't think I have seen a more disturbing ruling from a judicial nominee since I have been in the Senate.

I think most Americans would be horrified to hear that your view of privacy rights, particularly in that situation, depended on someone who was scared and upset having to ask questions. And then to hear that you are being considered for a lifetime appointment on the Federal bench demands not just a letter from another judge that we don't know about saying it was a close question, even though he ruled against you. I need a lot more than that to have confidence that you will be a judge who is fair to women.

So I have to ask you this: How do you explain the ruling issued in this case, and what can you tell us to assuage so many of my colleagues' concerns that you have too narrow a view of privacy rights?

Judge KUHL. Well, Senator, first of all, with respect to the Sanchez-Scott case, I can certainly understand the upset that the woman had and her feeling of betrayal, perhaps, because of what her doctor had done. And the fact of the matter is that she had a lawsuit, a tort action, against her doctor for failure to obtain her consent to bring a third party into the examining room, and that that cause of action went forward and was left standing and was not at issue in the case.

With respect to women's rights, I—

Senator SCHUMER. Can I just ask you a few more questions? Do you stand by her words that to protect her privacy rights, she had an obligation to ask questions?

Judge KUHL. Well, Senator, it is the case that if she had given consent—and the court of appeal opinion says this—if she had given consent that there wouldn't be a privacy cause of action. But I think the important thing here was—

Senator SCHUMER. Well, wait. Had she given consent?

Judge KUHL. No, Senator, she had not given consent, and that is why I say that her claim against the doctor was really at the forefront here because he was the one who had control of the examination room and he was the one who invited this third party in. And that is why she had a tort action, a tort claim against the—

Senator SCHUMER. Do you have any evidence that the third party was coerced to come into the room?

Judge KUHL. No, I don't think that was my point, Senator.

Senator SCHUMER. Well, explain it to me. You said that the doctor invited him in.

Judge KUHL. That is right. It was the doctor's decision to bring this third party into the examination room, and therefore it was—she was very legitimate in being upset at his not having obtained her consent to bring this person into the examination room that was in his doctor's office.

Senator SCHUMER. Yes. I don't follow your—in other words, you are thinking that Mr. Martinez was blameless?

Judge KUHL. That is not my point, Senator, but I am saying that she had a claim which went forward against the doctor.

Senator SCHUMER. Right, but you were reversed. How many judges were on the appellate panel that reversed you?

Judge KUHL. There are three on our appellate court who do so, and I think in that—

Senator SCHUMER. Just let me ask you this.

Judge KUHL. Go ahead, Senator.

Senator SCHUMER. No. Please.

Judge KUHL. Well, I think that the appellate court in doing that clarified the law in what was a rather unclear area, and I welcome that and certainly would follow that law in the future.

Senator SCHUMER. And one other thing. You say it was a situation which she found socially uncomfortable. I don't even get that one.

Judge KUHL. I really don't recall that from the transcript. I would be glad to look at it, if you like. I am not saying it wasn't there, but I just don't recall those words, so I really can't comment on the context. I am sorry.

Senator SCHUMER. Well, in the defendant's motion to dismiss, that is what you said.

Judge KUHL. In the defendant's motion to dismiss.

Senator SCHUMER. You sustained the motion to dismiss.

Judge KUHL. That probably would have been a demurrer, yes, I think.

Senator SCHUMER. Do you think you made a wrong decision in this case?

Judge KUHL. Yes. I think the appellate court was correct, Senator, and I also think you have mentioned me—grouped me in with others and suggested that mainstream and moderate is something that would not apply to me. And I think that the many letters of support from people who have worked for me—

Senator SCHUMER. You know, I—

Judge KUHL. —who have reviewed—

Senator SCHUMER. Please.

Judge KUHL. —who have reviewed my decisions, people who have worked with me on a commission appointed by the chief justice to restate all of California law in easily understandable jury instructions—if ever there was an opportunity to twist the law, it would be in that committee. And six members, six of my colleagues on that Committee have written and said this is somebody who looks straight down the middle at the law.

And Justice Carlos Moreno, of the California Supreme Court, has written on my behalf. Civil rights lawyers Leo Terrell, Vilma Martinez, former head of MALDEF, have written on my behalf. And I think those who know my work have great confidence and have expressed that very clearly that I am a judge who follows the law and applies justice without reference to persons.

And certainly on women's issues, Senator, a number of women have mentioned in their letters, including the 23 women colleagues who have written on my behalf, that I am someone who mentors other women. I am proud of that. I have been lifted up by other women who have gone before me and have established the principles of equal rights for women that I enjoy the benefit of, and I hope to pass that tradition on to my daughters. And I have tried to as best I can in my professional life assist other women as they travel the path that I have traveled.

Senator SCHUMER. Do you think your own views on *Roe* v. *Wade* are right down the middle?

Judge KUHL. Well, Senator, my views on *Roe* v. *Wade* are that I would enforce the law, that I would follow the *Casey* decision—

Senator SCHUMER. Do you think your personal views, your personal views—we have learned, despite when people say they will enforce the law, personal views influence that and that is what leads to why we don't have nine-nothing decisions on the Supreme Court. That is why every analysis shows that people's philosophy and who appointed them has a huge difference in how they vote.

I think what we are trying to establish here is simply saying "I will follow the law" is not good enough because that is what people now who reportedly have strong views on things tell us and it just doesn't work that way on the bench.

Judge KUHL. I know that you—

Senator SCHUMER. Otherwise, we would have a computer that will follow the law. Individual judgments actually determine how you would follow the law. I mean, in this case clearly you did something—and I appreciate your admitting it was a mistake—that 99 out of 100 people, in my judgment, wouldn't have come up.

Judge KUHL. Senator, I appreciate your view and understand your view with respect to how judges work, but my view of how judges work is consistent with Justice Felix Frankfurter.

When I went on the bench, I took a quote from Frankfurther and I stated to the people who were there 7½ years ago that that was my judicial philosophy, and he said that the highest exercise of judicial duty is to subordinate one's personal will and one's private views to the law.

Senator SCHUMER. So why do you think that appointments by Democratic Presidents and appointments by Republican Presidents have such differences in how they decide, and there has been study after study that shows it, if we all just follow the law?

Judge KUHL. Well, going back to the article that was referred to earlier, I think that President Reagan, for example, attempted to pick judges who were committed to following the law, not legislating, trying to find out as best as they could—and this is what I try to do—what it is that the legislation means and implementing that without regard to what I think. Sometimes, you have to make a conscious choice in your mind to put something aside, and you do it and you go forward.

Senator SCHUMER. Why in the Solicitor General's office did you urge that they move to overturn *Roe* v. *Wade*, when your job as Solicitor General to follow the law and urge the Solicitor General to follow the law?

Judge KUHL. My job in the Solicitor General's office was one of several roles—one of two roles I guess I held as an advocate. And as an advocate, one certainly needs to take precedent into account, but one's primary job as an advocate is to make arguments that support the interests of one's client. And in that case, President Reagan as the President had very clearly stated his position that *Roe* v. *Wade* should be overruled. It is very different from—

Senator SCHUMER. Don't you swear to uphold and defend the Constitution in that job?

Judge KUHL. I think so.

Senator SCHUMER. I think so, too, and the law of the land was *Roe* v. *Wade*.

Judge KUHL. Well, Senator, the law of the land is also that a lawyer may ask a court to overrule a precedent. I mean, it has never been the case, or it certainly has never been my understanding that one may never ask a court to overrule a prior ruling.

Senator SCHUMER. So did you then think that *Roe* v. *Wade* wasn't the law of the land?

Judge KUHL. No, I am not saying that. I am saying—

Senator SCHUMER. Shouldn't have been the law of the land is a better way to put it.

Judge KUHL. No. What I am saying is that the advocacy there was that the President and the executive branch had a position with respect to that and we asked the Supreme Court to do so. One of the reasons why we did so—or in my mind, one of the reasons to do so was because the Government had already in the *Akron* case previously taken a position on *Roe* v. *Wade* and it was a position that said that States should be given significant deference in legislating in the abortion area.

And Justice Blackmun, sitting on the bench in that case in the Supreme Court, had asked Solicitor General Rex Lee, well, are you asking that *Roe* should be overruled? And General Lee said no. And Justice Blackmun said, well, then, should *Marbury* v. *Madison*

be overruled? And he was very concerned about the argument and I can understand that. I thought that if this was the position of the executive branch and the position of the President that it should be presented in a credible fashion forthrightly.

Senator SCHUMER. Yes, but here is the contradiction, I think, in what you are saying. If you are defending the Constitution and *Roe* v. *Wade* is constitutional law, how can you urge its reversal?

I would just make one other point here. Charles Fried was then the Acting Solicitor General and he also signed the brief, but he said that some of the—I believe this is a quote from him—"Some of the political people in the Department"—that is his quote—unquote, were to eager to do so and, quote, "the most aggressive memo came from Carolyn Kuhl in the Civil Division, who recommended that we urge outright reversal of *Roe*."

No one else, even the Solicitor General himself, I guess, went that far, and you say you were sort of on your own helping President Reagan when so many of the others in the Department higher up than you didn't think we ought to go that far?

Judge KUHL. Oh, Senator, the—

Senator SCHUMER. And it was not the law, it was not the law of the land.

Judge KUHL. Professor Fried, then–General Fried was the Acting Solicitor General. He eventually was confirmed as Solicitor General. He certainly was senior to me and it was his decision to file the brief. Richard Willard was the Assistant Attorney General. He was senior to me and it was his recommendation to file the brief.

So I am not exactly sure I am answering your question, but perhaps I don't understand it.

Senator SCHUMER. Were you one of the most aggressive in urging in the Solicitor General's office that *Roe* be overturned when you were there?

Judge KUHL. I was not in the Solicitor General's office at that time. That is Professor Fried's characterization. I did urge that the Department be forthright with the Court and, since it was the position of the President, present that view to the Supreme Court, and present to the Supreme Court the arguments of the many constitutional scholars who at that time had taken that position—Alexander Bickel and Ruth Bader Ginsburg, Harry Wellington.

Senator SCHUMER. Judge, I am not asking what other people think. I am not even asking what President Reagan thinks because the position—we are looking at you as you are coming here and saying you will uphold the law.

You also, when you had this job, said you would uphold the law. I think you are asked to do that, and back then you said—and *Roe* v. *Wade* was clearly the law of the land, and here you are not an elected President at the top of the Government, not even on the U.S. Supreme Court—

Chairman HATCH. Nor was she a judge at the time. She was an advocate for the President.

Senator SCHUMER. But, Orrin, it is the analogous position.

Chairman HATCH. But you are talking to her as a judge.

Senator SCHUMER. Well, you are being asked to and you swear an obligation to uphold the law. And I would say if you asked most people to look at your record and what you have said that at least

it is reasonable to doubt, given this and given some of the other things, that once you got on the bench, you would see upholding the law as most Americans do, which means keeping *Roe* v. *Wade*.

Judge KUHL. Well, Senator, I have already said that I see upholding the law and my job as a judge as applying *Roe* v. *Wade* and applying Casey. I just may not understand your premise about the job of the Solicitor General.

As a judge, I don't like it when people ask me questions, so I shouldn't really be asking you questions.

Senator SCHUMER. You can.

Judge KUHL. But my question would be is your premise that as a lawyer for the United States, one should never argue that precedent should be overruled, because that is not my understanding of the job of a lawyer for the Government.

Senator SCHUMER. If you think the precedent is not in consonance with the law of the land, you should argue that it be overruled. But you are saying two things that are different. One is you are saying you argued that *Roe* should be overturned, but at the same time you argued that your job there would be to—your stated your job there is to uphold the law of the land.

I think, Orrin, it is analogous to being a judge.

Chairman HATCH. Well, if you will yield, that is not what she said.

Senator SCHUMER. Well, why don't you say it again? How do you square the idea that you swore an oath to uphold the Constitution, that *Roe* v. *Wade* was the established law of the land, and you were among the most vigorous in urging that it be overturned? That is the question in a nutshell.

Judge KUHL. Well, I think, Senator, when as a lawyer one takes an oath to uphold the law of the land, what one is saying is that as an official of the Government, one is going to follow the law. In other words, if the Supreme Court interprets a statute in a particular way and you are advising an agency as to how to act, you tell that agency, you act in accordance with the law. I have never understood it to mean as an advocate that one cannot ask a court to overrule a prior precedent.

Senator SCHUMER. So you are saying you were an advocate when you were in the Solicitor General's office?

Judge KUHL. That is correct.

Senator SCHUMER. But you will not be an advocate as a judge?

Judge KUHL. That is correct.

Senator SCHUMER. Even though in each case, you were asked to swear an oath to uphold the law of the land?

Judge KUHL. I think one's duty is different in the two cases.

Senator SCHUMER. I will leave it at that.

Chairman HATCH. That is my point.

Judge KUHL. Thank you, Senator.

Chairman HATCH. Okay, thank you, Senator.

I am going to finish up with—

Senator SCHUMER. Mr. Chairman, could I just ask unanimous consent that the letter from Ms. Azucena Sanchez-Scott to Senator Leahy of March 3, 2003, be added to the record?

Chairman HATCH. Without objection.

Senator SCHUMER. Thank you, Mr. Chairman.

Chairman HATCH. We are going to wind up with you and then we will have to recess for the two district court judges until two o'clock.

As you previously noted, Judge Kuhl, there are plenty of respected legal scholars who believe that *Roe* v. *Wade* was a poorly-written opinion and as a matter of constitutional law it was wrong, some of whom are pro-choice advocates, such as Archibald Cox, John Hart Ely, and others, and you have mentioned a few.

Each of the abortion-related cases that you have been asked about were before the Supreme Court's seminal opinion in Casey. Is that correct?

Judge KUHL. That is correct, Mr. Chairman.

Chairman HATCH. That needs to be brought out. Anybody who says that once the Supreme Court rules, we just always have to follow it no matter what anybody says, just doesn't understand the law because there have been Supreme Court precedents overruled from time to time because they have been wrong.

So to just say that because the Supreme Court rules that that is within the Constitution—well, it is until it is overruled.

Judge KUHL. Well, Mr. Chairman, it just occurred to me that *Brown* v. *Board of Education* would be such a case, overruling *Plessy* v. *Ferguson*.

Chairman HATCH. Well, sure. That means that if you were up for a judge before Brown v. Board of Education, with this reasoning you would have to uphold *Plessy* v. *Ferguson*. I mean, that is crazy. That is the trouble with getting into ideology, and that is why those who come before this Committee—I expect you to uphold the law regardless of your personal views. Your personal views are irrelevant.

Now, do your personal views ever affect any litigation? I imagine every context of your life might affect a case, but that is true of every judge. Every judge has to think, but that doesn't mean that you would violate the law in your thought processes.

Now, Judge Kuhl, let me just ask you some follow-up questions about the *Sanchez-Scott* case that you decided. It is my understanding that the particular motion to dismiss that you had granted had nothing to do with the claims against the doctor and that your ruling would have allowed the claims against the doctor to go forward. Is that right?

Judge KUHL. That is correct, Mr. Chairman.

Chairman HATCH. Well, that is right. Now, please explain which claims were involved in the motion you ruled on and what your ruling meant for the ultimate disposition of the case.

Judge KUHL. The claims against the doctor were tort claims for failure to obtain consent from the woman in the examining room that was the doctor's examination room.

Chairman HATCH. Right.

Judge KUHL. And the claim against the third party who came into the room was an invasion of privacy claim.

Chairman HATCH. Well, that is right. Now, to my knowledge, the case settled before trial. Is that correct?

Judge KUHL. That is correct, the case did settle before trial.

Chairman HATCH. That is right. It is my understanding that those of us hearing about the facts of *Sanchez-Scott* case for the

first time might be troubled by the conduct of this particular doctor and the pharmaceutical representative. But I think we need to keep in mind that judges do not decide cases based on their personal responses to the behavior of the litigants, but based on the law.

Now, Judge Kuhl, I understand that you dismissed the constitutional right of privacy claim and were affirmed by the appellate court on that issue. Is that correct?

Judge KUHL. That issue actually was not appealed, was not taken up on appeal.

Chairman HATCH. Okay.

Judge KUHL. It was dropped, I think is the way of saying it.

Chairman HATCH. As I understand it, there were additional invasion of privacy claims brought under California State law.

Judge KUHL. That is right. The invasion of privacy claim that went up on appeal was State common law.

Chairman HATCH. Can you elaborate on the State law involved in the claims and how the law led you to your ruling?

Judge KUHL. Well, the common law in that case was not well-articulated by the courts of appeal and the primary case that was being cited to me was an 1881 case from Michigan. Now, the appellate court relied heavily on that case, but as I think Justice Turner indicates in his letter, my job was to follow California law. And the appellate court imported that Michigan case into California law and clarified the law in a way that I think is helpful going forward in the future.

Chairman HATCH. Now, some of my colleagues have implied, or at least have created the impression that the appellate court's reversal in that case somehow demonstrates that you are insensitive to litigants who come before you.

I just want to share with all of my colleagues and with everybody watching this and with you, Judge Kuhl, a letter that Senator Chambliss has already mentioned but which bears repeating. This letter is from Judge Paul Turner, who authored the appellate court opinion in the *Sanchez-Scott* case, for which you have been somewhat criticized here by a colleague.

Judge Turner wrote, quote, "I can tell the difference between a trial judge making a tough call in the context of competing legal interests on one hand and bias or prejudice on the other hand," unquote.

He went on to state that, quote, "A strong argument can be made that Judge Kuhl correctly assessed the competing societal interests the California Supreme Court requires all jurists in this State to weigh when determining whether the tort of intrusion has occurred," unquote.

He concluded by stating, quote, "With all respect to those who have criticized Judge Kuhl as being insensitive or biased because of my opinion in *Sanchez-Scott*, they are simply incorrect," unquote.

Now, I am going to read just a little bit more about it because I think it is quite unfair to try and imply, because you were reversed in this case, a reversal that you accept and you said probably was right, that you were insensitive or biased.

He is what he says, and this is right out of the letter which I put in the record, without objection. "First, there was no issue in

the *Sanchez-Scott* case involving the constitutional right of privacy. Footnote 1 of the opinion expressly states that there was no issue of the constitutional privacy right before our court when we considered the *Sanchez-Scott* case. Second, the plaintiff's tort claim against the doctor himself for failing to obtain his patient's fully informed consent was not at issue before Judge Kuhl and this court. Ms. *Sanchez-Scott*'s claim against the physician was to be litigated in any case, even if the drug salesperson and his employer did not remain in the case. Third, the *Sanchez-Scott* case involves some issues of first impression under California law involving the tort of intrusion, as defined in the Restatement Second of Torts, Section 652(b), which even as of this date have not been clearly defined with identifiable bright line rules by California courts."

That is what you meant when you said "I think the appellate court got it right," even though you were trying to do your best to try to define this area. Am I right?

Judge KUHL. Yes, Mr. Chairman, absolutely.

Chairman HATCH. He goes on to say, "The California Supreme Court has described the tort of intrusion as involving, quote, 'degrees and nuances to societal recognition of our expectations of privacy,' unquote, and, quote, 'relative,' unquote, concepts. Much of the analysis in our decision was premised upon the 1881 Michigan Supreme Court decision of the *DeMay* v. *Roberts* case. In ruling on the demurrer, Judge Kuhl was required to apply what the California Supreme Court has characterized as degreed and nuanced rules of law involving relative concepts. Fourth, attached to the complaint filed in Superior Court was a letter explaining why the drug salesperson was in the examining room during the breast examination. That letter explained that he was present because he was participating in an oncology mentorship program. The purpose of the program was to allow the salesperson to, quote, 'better learn how an oncologist attends to patients, manages medications, and generally oversees administrative functions of the office,' unquote."

"In other words," the judge goes on to say, "the purpose of the mentorship program was to ensure better delivery of health care services to breast cancer patients. Under California law, in evaluating whether the tort of intrusion has occurred, a court must weigh the reasons for the intrusive conduct. When Judge Kuhl concluded that the mentorship program, which was designed to improve treatment for breast cancer patients, was a sufficient justification for allowing the drug salesperson to be present during the examination, she did not demonstrate bias or insensitivity. In fact, a strong argument can be made that she correctly assessed the competing societal interests the California Supreme Court requires all jurists in this State to weigh in determining whether the tort of intrusion has occurred. Now, with all respect to those who have criticized Judge Kuhl as being insensitive or biased because of my opinion in *Sanchez-Scott*, they are simply incorrect."

That is Justice Paul Turner, the Presiding Justice, who comes down rather heavily on your side. Now, this is the second time we have put this letter in the record, so I kind of resent the misuse of this type of information to try and imply that you might have been insensitive or biased.

It is my understanding that the appellate court ruling merely held that the claims the plaintiff alleged were sufficient to state a cause of action. Am I right?

Judge KUHL. That is correct, Mr. Chairman.

Chairman HATCH. It did not make a determination about whether or not the invasion of privacy had occurred. Is that correct?

Judge KUHL. That is correct, Mr. Chairman.

Chairman HATCH. Now, Judge Kuhl, this was probably an emotionally-charged case for the plaintiff. But as we know, judges have to rule on the law, to the best of their ability.

Now, how will you in the future handle cases that involve particularly sensitive issues?

Judge KUHL. Well, in particularly sensitive issues I always try to—in all cases, I try to follow the law. That is my primary goalpost. I do it with understanding of the difficulties that may face that individual plaintiff. In the trial court, we have those people in front of us and it is important that they always be treated with dignity, with understanding, with sympathy, and then the law is applied. And the decision goes according to what the law demands, as applied to the facts.

Chairman HATCH. What more could we ask of a judge than that?

Now, Judge Kuhl, you have been asked repeatedly about briefs you wrote on behalf of your clients both as a Government lawyer and as a lawyer in private practice. Now, I want to remind my colleagues of a fundamental principle, which is that the arguments a lawyer makes on behalf of her client should not be taken as evidence of her personal views.

Lawyers have an ethical obligation to provide the best possible representation to their clients and to make all of the reasonable arguments in support of their clients' positions.

You agree with that, don't you?

Judge KUHL. Yes, Mr. Chairman.

Chairman HATCH. Now, Rule 1.2(b) of the ABA Model Rules of Professional Conduct provides, quote, "A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities," unquote. This principle is as equally applicable whether the lawyer is in private practice or is in government service.

Now, Judge, this has been a rather long hearing. It has been difficult to sit through and you have been there a long time. I have to say this, that I have not seen a better witness for any appellate court, circuit court of appeals appointment—

Judge KUHL. Thank you, Mr. Chairman.

Chairman HATCH. —in my whole 27 years in the United States Senate. I would have to say that I think Priscilla Owen and you are two of the best witnesses I have ever seen. Now, I am not just saying that. I mean, I am not trying to be kind here. I am just saying that you have handled yourself very well.

I can't for the life of me see why anybody would not want you to serve on the Ninth Circuit Court of Appeals. I personally believe, with your approach to the law, maybe that circuit will start getting it right for a change rather than being reversed almost every time the Supreme Court reviews their decisions.

So I want to compliment you. You have handled this hearing very, very well. You answered every question forthrightly. You covered the law well. You made it very clear that regardless of your personal ideologies or beliefs or anything else, you are not going to let that interfere with your obligation as a judge to provide justice and to uphold the law as it is written, regardless of how stupidly sometimes we legislators write it. I think that is a fair appraisal.

Now, I just want to say that because, for the life of me, I can't imagine why we have had to wait until now, 21 months later, to give you a hearing, and even now some of my colleagues are complaining about it. Actually, I don't like to overrule colleagues, but the fact of the matter is there is a justice in this country that ought to be followed even on this Committee, and people who are nominated by the President ought to be given a chance, to the extent the Committee can hold the hearings. And I have to say that I have always tried to do that, even though some have criticized, because I have had all kinds of problems getting colleagues to go along with me.

I think it is absolutely ridiculous to say that any case is constitutional law and can never possibly be reconsidered. Perhaps *Marbury* v. *Madison*, and I can name a number of other cases that probably should never be reconsidered, but most cases sometimes have to relooked at.

And I think we can trust you to look at your job in the light of doing it in the best possible way you can, within the law, while upholding the precedents of the Supreme Court. Now, you have said you will do that. I am counting on you doing that. I am counting on you being a great member of the Ninth Circuit Court of Appeals.

And I hope my colleagues will look at this record and look at your testimony today and quit obstructing—only a few have done this. I am hopeful that the colleagues on this Committee will not. But those who have obstructed your consideration of even having a hearing I think are so wrong that it is just pathetic.

So, with that, I want to thank you for being here. I want to thank your family. We really appreciate having all of you with us. You young daughters should be very proud of your mother. I know your father is very proud of her as his wife, and your grandfather and uncle here at very proud of her as well.

Thank you for being here. I apologize to the district court nominees, but we will recess until 2 o'clock when we will hear the testimony of the district court nominees.

With that, we will recess until 2 o'clock.

[Whereupon, at 1:12 p.m., the Committee recessed, to reconvene at 2:00 p.m., this same day.]

AFTERNOON SESSION [2:05 p.m.]

Senator SESSIONS. [Presiding.] All right, we shall begin. Senator Hatch asked me to chair the afternoon hearing, and if our nominees would come forward, we will commence.

Would you raise your right hand? Do you swear to tell the truth, the whole truth, and nothing but the truth, so help you God?

Judge ALTONAGA. I do.

Judge MINALDI. I do.

Senator SESSIONS. Please take your seats.

We are delighted that you are here today. Congratulations on going through quite a lengthy process. As you know, Senators look at nominees, and they call lawyer friends, and they check on qualifications. Then those names are floated to the Department of Justice, and they do background checks, and then the Department of Justice and the White House will look at it. The FBI is required to do a background check on you. The ABA conducts their background analysis, and they talk to lawyers you have litigated with or litigated against or who have been before you in court, and they ask how well you do, which I think is a valuable contribution to the process. And eventually this Senate takes all your paperwork and all the answers to all the questions that are submitted, and staffers pore through it all. And as you have seen from this morning, it doesn't take much to have someone find an objection if they want to find one.

So I would congratulate both of you on getting this far, number one, and number two, not having any controversies that are likely to slow down your nomination, at least none that I know of.

So we are delighted you are here. Would you like to make any opening statement or introduce any family members that are with you? Judge Altonaga?

STATEMENT OF CECILIA M. ALTONAGA, NOMINEE TO BE DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF FLORIDA

Judge ALTONAGA. Mr. Chairman, thank you. I don't have any opening statement, but I would like to introduce my husband, Attorney George Mencio.

Senator SESSIONS. We are delighted to have you. Very good.

Judge ALTONAGA. Thank you.

Senator SESSIONS. Is he in private practice?

Judge ALTONAGA. Yes, he is.

Senator SESSIONS. That is good. He can remind you what it is like to meet a payroll and have to appear before judges. Sometimes judges forget what that real-life world is like.

[The biographical information of Judge Altonaga follows:]

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

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

   Cecilia Maria Altonaga

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

   United States District Court Judge, Southern District of Florida

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

   Richard E. Gersten Building
   1351 N.W. 12 Street
   Room 624
   Miami, FL 33125
   (305) 548-5769, (305) 548-5768

4. **Birthplace**: State date and place of birth.

   December 26, 1962
   Baltimore, MD

5. **Marital Status**: (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es). Please also indicate the number of dependent children.

   George Mencio, Jr.
   Attorney
   Holland & Knight
   701 Brickell Avenue
   Miami, FL 33131

   Three dependent children.

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

   (a) Yale Law School

Attended from August 1983 to May 1986
J.D. Degree received in May 1986

(b) Florida International University
Attended from June 1979 to August 1979 (receiving ten college credits during summer term between junior and senior year of high school); and August 1980 to May 1983

B.A. in Political Science, minor in English, and a Certificate in Latin American Caribbean Studies, with Highest Honors, received in May 1983

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

(a) Appointed member of the Select Task Force on Election Procedures, Standards and Technology, December 2000

(b) Circuit Court Judge of the Eleventh Judicial Circuit of the State of Florida
Presently assigned to the Criminal Division; previously with the Juvenile Division
September 1999 to present
State of Florida, Eleventh Judicial Circuit
73 West Flagler Street
Miami, FL 33130

(c) County Court Judge of the Eleventh Judicial Circuit of the State of Florida
Assigned to the Domestic Violence, Civil and Criminal Divisions
May 1996 to September 1999
State of Florida, Eleventh Judicial Circuit
73 West Flagler Street
Miami, FL 33130

(d) Assistant County Attorney
Miami Dade County Attorney's Office
April 1988 to May 1996
111 N.W. 1 Street, Suite 2810
Miami, FL 33128

(e) Law Clerk to U.S. District Judge Edward B. Davis
United States District Court, Southern District of Florida
February 1987 to February 1988
1 S.E. 3 Avenue
Miami, FL 33131

(f) Attorney/Clerk Position
Miami Dade County Attorney's Office
September 1986 to January 1987
111 N. W. 1 Street, Suite 2810
Miami, FL 33128

(g) Summer Law Clerk
Baker & McKenzie (Washington, D.C. and Rio de Janeiro, Brazil Offices)
June 1985 to August 1985
815 Connecticut Avenue, Suite 900
Washington, D.C. 20006

(h) Summer Law Clerk
Holland & Knight Miami Office
June 1984 to August 1984
701 Brickell Avenue, 30th Floor
Miami, FL 33131

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

None

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

Faculty Scholars Scholarship, 1980-1983 (merit scholarship covered full tuition and book expenses at F.I.U., requiring student to maintain 3.5 G.P.A. or better, and to complete college studies in three years)
Faculty Scholars Merit Award
Faculty Scholars Honorary Society, 1981-83
F.I.U. Foundation Scholarship
Political Science Scholarships
Outstanding Academic Achievement Award in Political Science
Dean's List every semester at F.I.U., 1980-1983
Phi Eta Sigma

Summer Scholarship Program Sponsored by the Organization of American States at the Universidad de Belgrano, Buenos Aires, Argentina, summer of 1983
Finalist, Yale Moot Court Thurman Arnold Prize Argument, 1985
Director, Moot Court Board at Yale Law School, 1985-86
Lifetime Achievement Award, "Mujeres y Poder," 1997
Recipient, F.I.U. Alumni Award for College of Arts and Sciences , 1997

10. **Bar Associations**: List all bar associations or legal or judicial-related committees, selection panels 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.

Dade County Bar Association, member of the Schools Committee
Cuban American Bar Association
Florida Association for Women Lawyers
Eleventh Judicial Circuit Professionalism Committee
Supreme Court Committee on Standard Jury Instructions in Civil Cases, member since 2000
F.I.U. Law School Advisory Board 1999 to present; Dean's Search and Screen Committee, 2001-2002
First Family Law Inns of Court, 1997-2002
Appointed member of the Select Task Force on Election Procedures, Standards and Technology, December 2000
Legal Education Advisory Council, 1999-2000
National Advisory Committee for Cultural Considerations in Domestic Violence Cases: A National Judicial Education Curriculum, 2000-2001

11. **Bar and Court Admission**: List each state and court in which you have been admitted to practice, including dates of admission and any lapses in membership. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

Florida Bar, admitted in October 1986
United States District Court, Southern District of Florida, admitted in 1988
U.S. Court of Appeals, Eleventh Circuit, admitted in 1988

12. **Memberships**: List all memberships and offices currently and formerly held in professional, business, fraternal, scholarly, civic, charitable, or other organizations since graduation from college, other than those listed in response to Questions 10 or 11. Please indicate whether any of these organizations formerly discriminated or currently discriminates on the basis of race, sex, or religion - either through formal membership requirements or the practical implementation of membership policies. If so, describe any action you have taken to change these policies and practices.

Junior League of Miami, provisional member and member from 1996 to 1998. This charitable organization restricts its membership to women.
Appointed member of the Select Task Force on Election Procedures, Standards and Technology, December 2000
F.I.U. Law School Advisory Board, 1999 to present; Dean's Search and Screen Committee, 2001-02

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

I edited several articles for publication during my tenure as Articles Editor of the Yale Journal of International Law during law school. The edits were not substantive as related to content.

The speeches I have given are as follows:

August 2002, Faculty and Guest Speaker, Professionalism Program at F.I.U. College of Law, "Why the Emphasis on Professionalism?"

2002 and 2001, Guest Speaker at the F.I.U. Phi Sigma Alpha, Political Honor Society Induction Ceremonies at F.I.U., Miami, Fl.

July 2002, Faculty, "A View From the Bench," Auto Negligence Seminar sponsored by the Academy of Florida Trial Lawyers, Fort Lauderdale

December 2001, Commencement Speaker, D.A. Dorsey Education Center, Miami, Fl.

June 2001, Faculty "Cultural Considerations in Domestic Violence Cases," Florida Conference of Circuit Court Judges Annual Business Meeting.

October 2000, Keynote Speaker, United States Attorney's Office, Hispanic Heritage Month Celebration, "Overview of Juvenile Court."

May 1999, Guest Speaker, Florida Coalition Against Domestic Violence Clearinghouse Project

May 1999, Florida Advanced Judicial College, Orlando, Florida. Instructor and paper presented entitled "Economic Loss Rule in Florida."

1998 Spring Educational Institute, International Association of Personnel in Employment Security. Guest Speaker, "Domestic Violence and Issues in the Workplace," Deerfield Beach, Florida, April 3, 1998.

November 1997, Guest Speaker, Hialeah-Miami Lakes Bar Association Luncheon "Domestic Violence - Civil and Criminal Law Overview."

Summer 1997 Annual Business Meeting of the Florida Conference of County Court Judges. Instructor and paper presented in "Small Claims and the *Pro Se* Litigant."

May 1995, 18th Annual Local Government Law in Florida Seminar, Instructor, "Competitive Bidding and Bid Disputes in Local Government Purchases of Goods and Services."

Of the speeches I have given, which were reduced to written form, copies are attached.

14. **Congressional Testimony**: List any occasion when you have testified before a committee or subcommittee of the Congress, including the name of the committee or subcommittee, the date of the testimony and a brief description of the substance of the testimony. In addition, please supply four (4) copies of any written statement submitted as testimony and the transcript of the testimony, if in your possession.

None.

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

Excellent. The date of my last physical examination was September 19, 2002.

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

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

Photocopies of unpublished opinions are attached in response to question 13 above or are otherwise attached. Short summaries and citations are as follows:

1. *Zurich v. Weeden*, 26 Fla. L. Weekly D2714 (Fla. 4th DCA, November 14, 2001). Sitting as an Associate Judge with the Fourth District Court of Appeal, this decision interpreted a workers' compensation statute to require notice of lien before the settlement of a legal malpractice suit.

2. *Chisholm Properties South Beach, Inc., et al. v. City of Miami Beach, et al.*, 8 Fla.

L. Weekly Supp. 689 (August 9, 2001). Finding no substantial evidence to support City Commission finding of hardship necessary for the granting of a variance where the "hardship" was self-created by the hotel seeking to build an addition that conflicted with the plain limitations of applicable zoning code. Decision was affirmed on appeal.

3. *In the Interest of L.E.*, 7 Fla. L. Weekly Supp. 670 (March 22, 2000). Granting motion to suppress evidence seized following unauthorized entry by police in hotel room.

4. *Viles v. United Automobile Insurance Company*, 5 Fla. L. Weekly Supp. 170 (November 6, 1997). Granting plaintiff's motion for directed verdict based on statutory interpretation of personal injury protection statute. Affirmed and approved on appeal.

5. *Los Arboles Condominium Association, Inc. v. Solon Automated Services, Inc.*, Case No. 97-3978 CA 41 (October 22, 1997). Denying cross-motions for summary judgment, applying and interpreting state statute and contract.

6. *Safeguard Products, Inc. v. U.C. Development Corp.*, 5 Fla. L. Weekly Supp. 13 (August 7, 1997). Enforcing parties' written settlement agreement, providing for penalties to lessee upon a breach. Appeal was withdrawn.

7. *Garcia v. U.S. Security Insurance Co., Inc.*, 4 Fla. L. Weekly Supp. 869 (April 1, 1997). Interpreting coverage provided by automobile insurance agreement.

8. *Guilcapi v. United Automobile Insurance Co., Inc.*, 4 Fla. L. Weekly Supp. 788 (June 4, 1997). Finding that insurer waived its right to assert a breach of the cooperation clause of the contract as a defense to insurance coverage.

9. *State of Florida v. Lattimore*, Case No. F02-13644 (August 1, 2002). Finding that state statute allowing prosecutor to direct file criminal charges against juveniles did not constitute an unconstitutional delegation of legislative powers to the executive branch.

10. *State of Florida v. Surin*, Case No. F95-2284 (March 21, 2002). Order on admissibility of child hearsay statements in prosecution for capital sexual battery.

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

State v. Adderly, Case No. 3D01-2847 (Fla. 3d DCA 2001) (On petition for writ of certiorari, intermediate appellate court granted writ finding lower court misapplied rape shield law in allowing defense to inquire into victim's prior sexual activity to show fabrication as to the present charges. Florida Supreme Court has accepted jurisdiction and final decision is pending.)

E.F. v. State of Florida, 795 So. 2d 232 (Fla. 3d DCA 2001) (because anonymous tip was insufficient to justify an investigatory stop, order denying appellant's motion to suppress was reversed).

Frye v. State, 802 So. 2d 1223 (Fla. 3d DCA 2002) (granting defendant's motion to clarify illegal sentence; appellate court directed trial court to correct predecessor judge's sentencing order).

State of Florida v. Roque, 809 So. 2d 50 (Fla. 3d DCA 2002) (trial court order finding fingerprint evidence found on cigarette carton in burglarized home did not support probable cause to arrest defendant, and granting defense motion to suppress, reversed).

Thurman v. State, 811 So. 2d 872 (Fla. 3d DCA 2002) (reversing order denying motion for additional credit for time served as jail card and court records showed defendant was entitled to additional credit for time served in county jail).

Photocopies of the opinions are attached.

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

As to a significant opinion on federal constitutional issues, *see State v. Jones,* Case No. F02-17059 (attached) wherein defendant's motion to suppress confession and narcotics seized by U.S. Customs on the basis of a violation of her fourth and fifth amendment rights was denied.

Two significant opinions on state constitutional issues are:

Raymond v. Spears, 9 Fla. L. Weekly 4476 (May 21, 2002)(finding that state statute that precluded court from granting nonmonetary pretrial release at first appearance hearing impermissibly intruded upon supreme court's rulemaking authority in violation of separation of powers clause of the Florida Constitution). A photocopy is attached.

State of Florida v. Perez, et al., Case Nos. F99 37189, F00 23615B, and F00 17214 (February, 2001)(rejecting argument that violent felony offender statute violated single subject requirement of Florida Constitution). A photocopy is attached.

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

17. <u>Public Office, Political Activities and Affiliations</u>:

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

Appointed by Governor to the Select Task Force on Election Procedures, Standards and Technology, December 2000.

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

No.

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

(a) Describe chronologically your law practice and legal experience after graduation from law school including:

(1) whether you served as clerk to a judge, and if so, the name for the judge, the court and dates of the period you were a clerk;

I clerked for a federal district court judge from February 1987 to February 1988 in the Southern District of Florida. The judge was the Honorable Edward B. Davis, who retired and is now in private practice in the law firm of Akerman, Senterfitt in Miami.

(2) whether you practiced alone, and if so, the addresses and dates;

I never practiced alone.

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

Circuit Court Judge of the Eleventh Judicial Circuit of the State of Florida
Assigned to the Criminal Division; previously with the Juvenile Division
September 1999 to present
73 West Flagler Street
Miami, FL 33130

County Court Judge of the Eleventh Judicial Circuit of the State of Florida
Assigned over time to the Domestic Violence, Civil and Criminal Divisions
May 1996 to September 1999
73 West Flagler Street
Miami, FL 33130

Assistant County Attorney
Miami Dade County Attorney's Office
April 1988 to May 1996
111 N.W. 1st Street, Suite 2810
Miami, FL 33128

Law Clerk to U.S. District Court Judge Edward B. Davis
United States District Court, Southern District of Florida
February 1987 to February 1988
1 S.E. 3 Avenue
Miami, FL 33131

Attorney/Clerk Position
Miami Dade County Attorney's Office
September 1986 to January 1987
111 N.W. 1st Street, Suite 2810
Miami, FL 33128

Summer Law Clerk
Baker & McKenzie
Washington, D.C. and Rio de Janeiro, Brazil offices
June 1985 to August 1985
815 Connecticut Avenue, Suite 900
Washington, D.C. 20006

Summer Law Clerk
Holland & Knight Miami office
June 1984 to August 1984
701 Brickell Avenue, 30th Floor
Miami, FL 33131

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

I practiced law exclusively with the Miami Dade County Attorney's Office. My practice specialized in construction litigation, the review and drafting of construction contracts, advising staff and the County Commission in the awarding of government contracts, including bid disputes handled in administrative quasi-judicial hearings. I also handled tort suits, the defense of County ordinances and actions taken by County Commissioners in federal and state courts. Most of my practice was in the trial court, but I also wrote briefs and argued before the federal and state appellate courts. I also handled personnel hearings, defending management, and was counsel to the Dade County Construction Trades Qualifying Board.

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

Most of my clients consisted of County managers, assistant managers, and department directors. My clients also included County Commissioners and the Mayor.

(c) (1) Describe whether you appeared in court frequently, occasionally, or not at all. If the frequency of your appearances in court varied, describe each such variance, providing dates.

I appeared in court on average one or two times a week for hearings.

(3) Indicate the percentage of these appearances in

(A) federal courts -- 10%;
(B) state courts of record -- 65%;
(C) other courts -- 25% in administrative hearings.

(3) Indicate the percentage of these appearances in:

(A) civil proceedings;

100 percent.

(B) criminal proceedings.

None.

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

I tried approximately 8 cases. I was sole counsel in all but 5 cases. I tried approximately forty (40) cases before administrative bodies as sole counsel. In addition, I tried several bench trials in the traffic division.

(5) Indicate the percentage of these trials that were decided by a jury.

Three cases were decided by jury trial, one of these lasting eight weeks; the rest were bench trials.

(d) Describe your practice, if any, before the United States Supreme Court. Please supply four (4) copies of any briefs, amicus or otherwise, and, if applicable, any oral argument transcripts before the U.S. Supreme Court in connection with your practice.

None.

(e) Describe legal services that you have provided to disadvantaged persons or on a *pro bono* basis, and list specific examples of such service and the amount of time devoted to each.

I served as a Guardian Ad Litem attorney in 1995 and 1996. As such, I conducted discovery and tried a termination of parental rights case in dependency court, successfully terminating the parental rights of parents of four children who had languished in the foster care system for several years.

Through the Dade County Bar, Put Something Back Program, I counseled Spanish-speaking persons on their legal rights with small claims matters, in workshops sponsored by the Program. Also, through the sponsorship of the Dade County Bar Association, I participated in meetings with representatives of the Dade County School Board seeking to encourage the retention of legal education staff in the high schools. I also served as volunteer judge in numerous high school competitions sponsored to foster an awareness of the Constitution and the legislative process, known as "We the People."

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

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

(b) a detailed summary of the substance of each case outlining briefly the factual and

legal issues involved;

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

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

1.

1. Frank J. Rooney v. Metropolitan Dade County, Case No. 89-01137 (20). The plaintiff was represented by James Glass (1600 S.E. 17 Street, Fort Lauderdale, FL 33316-1717 (954) 761-8700) and Linda Agnant (515 N. Flagler Drive, Fl. 19, West Palm Beach, FL 33401-4321 (561) 832-5900). The third-party defendant was represented by Larry Smith (9350 S. Dixie Highway, Miami, FL 33156-2900 (305) 379-6411). My co-counsel was Assistant County Attorney Eric Gressman (111 N.W. 1st Street, Suite 2810, Miami, FL 33128 (305) 375-5151). The pretrial matters in this case were heard by Circuit Court Judge Norman Gerstein. The two-month long trial was heard by Circuit Court Judge Sam Silver, and subsequent matters at the trial level were handled by Acting Circuit Judge Jonathan Colby.

From 1989 to 1994, I was lead counsel in this construction dispute involving approximately 24 million dollars between the plaintiff's claim and the County's counterclaim. In this lawsuit, the plaintiff, a construction contractor, sued the County seeking compensation for alleged extra work and delays in the construction of the Turner Guilford Knight Correctional Institution. The County was the owner of the facility, and in turn, sued the design consultant responsible for the design and construction administration of the 40 million dollar construction project, and counterclaimed against the contractor for defective work and work not performed.

After settling with the design consultant, and for eight continuous weeks, from January through March of 1992, I was lead counsel in the jury trial. I handled the direct and cross-examination of more than half of the witnesses, including several expert witnesses, and was responsible for legal arguments and closing. The jury returned a verdict which made the County the prevailing party. Thereafter, the judge granted the plaintiff a new trial, on the basis of several arguments raised regarding errors involving jury selection, jury misconduct, and jury tampering.

The Third District Court of Appeal, in a decision reported at 627 So. 2d 1248 (Fla. 3d DCA 1993), reversed in part the order granting a new trial. On the eve of the second trial, and after a summary judgment was entered in favor of the County on a critical issue regarding the enforceability of a contract clause limiting the recovery of delay damages, the case was settled.

2. American Dog Owners Association v. Metropolitan Dade County, Case No. 89-771-CIV-HOEVELER. Steven Wisotsky (3050 Jefferson Street, Miami, FL 33133-

3818 (305) 858-2436) and Warren Burger (address and phone number unknown), represented the plaintiff. My co-counsel was Thomas Logue, Assistant County Attorney, 111 N.W. 1st Street, Suite 2810, Miami, FL. 33128 (305) 375-5151. The case was tried to U.S. District Judge William Hoeveler.

After drafting the County's "pit bull" ordinance at the request of one of the County Commissioners, I was then required to defend its constitutionality in expedited proceedings for temporary and permanent injunctive relief. Along with Mr. Logue, I tried the case in a highly publicized trial after discovery had been undertaken and completed in a number of a few weeks. The basis of the lawsuit was that the ordinance was unconstitutionally vague as written, prior to its application. We prevailed in the trial court and in the Eleventh Circuit Court of Appeals. The reported trial court decision is found at 728 F. Supp. 1533 (S.D. Fla. 1989).

The case was significant for me as a young lawyer in that it gave me trial experience before a fine and well-respected federal judge, and against experienced constitutional law scholars and litigators. I quickly learned the importance of anticipating and dealing with possible legal challenges in my later drafting of legislation for the County Commission. The experience was also significant in that, with very little time for discovery, I developed important and necessary trial preparation and litigation skills.

3. In re Young, Case No. 94-15110 Div. 01. I served as a *pro bono* Guardian *Ad Litem* attorney for the guardian of four children involved in this termination of parental rights case, wherein the Department of Children and Families alleged neglect and abuse by the incarcerated mother of the four children. The Department was represented by Maria Rodriguez (address and phone number unknown) and the children's mother was represented by Alberto Batista (3550 Biscayne Blvd., Suite 206, Miami, FL 33137-3833 (305) 576-1800). The trial was heard by Circuit Judge Steven Robinson in May of 1996 and lasted several days.

I volunteered to take on the case in early 1996, because it was set for trial but had been languishing with little to no discovery or trial preparation undertaken by the Department attorney. I proceeded as lead counsel in discovery and in trial. Numerous hearings were held at the Juvenile Justice Center and I took the depositions of many experts, the mother, and other witnesses. In a matter of a few months I prepared the case for trial, filed all necessary motions and papers, and conducted all matters necessary in the courtroom. I took a case that had been lingering for years, with children housed by the foster care system, and obtained a just and speedy resolution. The mother's parental rights were terminated and these four children were successfully placed by the Department.

4. Metropolitan Dade County v. World Electronics, Case No. 90-5867. The

appellee was represented by Ira Elegant (Bank Atlantic Building, 46 S.W. 1st Street, Fl. 4, Miami, FL 33130-1610 (305) 358-1515). I was sole counsel in the appellate proceedings; the County had been represented by Assistant County Attorney Ed Schaefer in the proceedings before the trial court.

The trial court had invalidated a County ordinance prohibiting wireless alarm systems – economic regulation -- on the basis that it violated equal protection and due process by impermissibly and without factual justification disallowing an innovative and new technology. Because I disagreed with the trial court's legal analysis, I urged the colleague who had handled the case at the trial court level to allow me to appeal the decision. I prepared and filed the appellate papers and assumed full responsibility for the oral argument. The Eleventh Circuit Court of Appeals, in a decision by Judges Fay, Johnson and Merhige, reversed, reaffirming the deference that the judiciary must extend to actions taken by the legislative branch which do not implicate a heightened standard of review.

5. PCA Health Corp. and Health Options, Inc. v. Metropolitan Dade County and Blue Cross and Blue Shield, Case No. 94-19257 CA 08. Andrew Berman (17071 W. Dixie Hwy., North Miami Beach, FL 33160-3765 (305) 945-1851), represented the plaintiffs. Brian Goodkind (2601 S. Bayshore Drive, Fl. 9, Miami, FL 33133-5412 (305) 560-7979) represented Blue Cross and Blue Shield. Assistant County Attorney Robert Cuevas (111 N.W. 1st Street, Suite 2810, Miami, FL 33128 (305) 375-5151) and I represented the County.

The lawsuit combined the various elements of my work as a local government lawyer. I was active in the review and drafting of a solicitation document for the selection by the County of health insurance coverage for County employees. Because of that involvement, I subsequently participated in County Commission deliberations for the selection of the successful proposer in this multi-million dollar contract. The County Commission originally selected PCA as the provider of service with whom the County Manager could commence contract negotiations. However, the Commission subsequently reconsidered its vote, and selected Blue Cross and Blue Shield.

PCA sued, seeking emergency injunctive relief and a writ of mandamus. Proceedings for preliminary injunctive relief were held before Circuit Judge Gisela Cardonne, and the County prevailed. PCA then sought emergency relief in the Third District Court of Appeal, and the case was then transferred to the Fourth District Court of Appeal because several of the Third District judges were insured under the County contract. I wrote a major part of the appellate brief and handled exclusively the oral argument. The reported decision, affirming the County's actions, is found at 682 So. 2d 1102 (Fla. 4th DCA 1995).

The case raises several significant legal issues. It addresses the limits of the power of a legislative body, acting in a proprietary capacity, to reconsider a vote selecting a service provider; the flexibility of the competitive selection process through which governments procure services; the issue of when does a contractual relationship arise when the legislative branch votes to select a participant in a competitive selection process. The case also served to sharpen my skills as a legislator and appellate advocate.

6. Arnold Gilbert v. Metropolitan Dade County, lower court case no. 84-4498; appellate case no. 88-2523. Lead counsel was Assistant County Attorney Kenneth Drucker (111 N.W. 1st Street, Suite 2810, Miami, FL 33128 (305) 375-5151). Counsel for the plaintiff was Anthony Scremin (37 N.E. 26 Street, Miami, FL 33137-4405 (305) 576-8880). The trial judge was Judge Leonard Rivkind. The jury trial was held in 1988. I was co-counsel at trial and sole counsel on appeal.

This was a tort claim, alleging excessive use of force by County police and it was my first jury trial. As such, it was a tremendous learning experience and Mr. Drucker an invaluable instructor. I assisted in discovery and was co-counsel at the trial. I successfully obtained dismissal of the appeal on jurisdictional grounds. It was after this case that I assumed responsibility for tort cases in the office, in addition to my commercial caseload.

7. Cuba Paquete, Inc v. Metropolitan Dade County, Case No. 93-1350-Civ-Marcus. Steven Weinger (2560 S.W. 27 Avenue, Miami, FL 33133-3003 (305) 444-0060) represented the plaintiffs. Assistant County Attorney Jay Williams (111 N.W. 1st Street, Suite 2810, Miami, FL 33128 (305) 375-5151) and I represented the County and its individual County Commissioners.

In this Section 1983 action, the plaintiffs sought injunctive relief and damages arising from alleged discriminatory enforcement of neutral zoning laws by County zoning officials acting at the behest of certain elected County officials. The plaintiffs were businesses that shipped goods to Cuba, and the County Commissioner who had given the directive to have zoning enforcement officers issue citations relating to improper zoning, improper signage, or failure to obtain certificates of use and occupancy, was of Cuban ancestry. The County official's alleged motive for the selective enforcement of neutral laws was concern over Medicaid fraud in the shipment of pharmaceuticals to non-U.S. citizens in Cuba.

In defending the lawsuit, I prepared a large number of County employees and County Commissioners for deposition, and engaged in extensive discovery and trial preparation. Several hearings were held before then-U.S. District Court Judge Stanley Marcus and Federal Magistrate William Turnoff. After meetings with the client, the case was settled. The case is significant in that I worked closely with

elected officials in assisting them in preparing for their depositions, under difficult circumstances given highly aggressive litigation tactics by our adversary and pretrial publicity. I acquired information and expertise that assisted the client in reaching an early resolution to the case, before further unnecessary funds were spent in closing a rather unpleasant chapter in a local government's foray into foreign policy.

8. Marazul Charters, Inc. v. Metropolitan Dade County, Case No. 93-1145-Civ-Davis. Ira Kurzban (2650 S.W. 27 Avenue, Miami, FL 33133-3003 (305) 444-0060) represented the plaintiffs. Assistant County Attorney Jay Williams (111 N.W. 1st Street, Suite 2810, Miami, FL 33128 (305) 375-5151) and I represented the County. This lawsuit challenged the constitutionality of a County ordinance that regulated businesses engaged in transactions with Cuba and a resolution that prohibited County contracts with companies that engaged in business transactions with Cuba. With Mr. William's participation, I prepared and successfully argued before Judge Davis that the case should be dismissed for lack of the plaintiffs' standing.

9. In re Sergeant Richard Braithwaite. Rhea Grossman (2801 Ponce de Leon Blvd., Coral Gables, FL 33134-6924 (305) 442-4800) represented the police officer challenging disciplinary action taken against him by his supervisors in this administrative hearing. The complainant police officer was represented by Rebecca Fischer (4651 Sheridan Street, Hollywood, FL 33021-3427 (954) 963-2773). I represented the County Manager in this four-day personnel hearing and was successful in having the Manager's disciplinary action sustained. I list this case because it is an example of the many such administrative hearings that I prepared and handled, defending labor decisions or decisions involving bid disputes. This one case was contentious and rather prolonged, and involved extensive testimony and the presentation of exhibits. Opposing counsel was quite experienced and this hearing, much as others like it, was a further opportunity to improve my trial advocacy skills.

10. A & A Wrecker Service, Inc. v. Metropolitan Dade County, Case No. 90-888 CIV-SPELLMAN. Charlton Stoner, Esq., (1101 Brickell Avenue, Suite 1700, Miami, Fl. 33131 (305)358-9385), represented the plaintiff towing companies. Steve Bass, Assistant County Attorney (111 N. W. 1st Street, Suite 2810, Miami, Fl. 33128 (305-375-5151), and I represented the County. The plaintiffs sought injunctive relief, and a declaration that portions of the County's ordinance regulating tow truck companies were unconstitutional as violations of due process and equal protection. The case was scheduled for an evidentiary hearing on the motion for a preliminary injunction before Magistrate William Turnoff. The County prevailed. After the Magistrate's ruling, opposing counsel, sought and obtained a "stay" from the emergency Judge. This was handled *ex-parte* and without informing the trial judge of the previous ruling. We sought and obtained an order setting aside the "stay" and sanctions against opposing counsel.

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

None.

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

See attached Financial Disclosure Report

25. **Statement of Net Worth**: Complete and attach the financial net worth statement in detail. Add schedules as called for.

See attached Net Worth Statement.

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

Yes.

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

Yes.

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

I was interviewed on two occasions by the Florida Federal Judicial Nominating Commission for vacancies in the Southern District of Florida. After the second interview, I was interviewed by White House General Counsel, the Honorable Alberto Gonzales, and the Deputy General Counsel, Tim Flanagan, and several members of their staff on two separate occasions. I have been interviewed by the Federal Bureau of Investigation and the Department of Justice subsequent to the White House interviews.

(c) Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as asking or seeking a commitment as to how you would rule on such

case, issue, or question? If so, please explain fully.

No.

9/23/2002

FINANCIAL STATEMENT

NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

					LIABILITIES				
Cash on hand and in banks	275	657	.46		Notes payable to banks-secured				
U.S. Government securities-add schedule					Notes payable to banks-unsecured				
Listed securities-add schedule	55	721	90		Notes payable to relatives				
Unlisted securities–add schedule	72	492	92		Notes payable to others				
Accounts and notes receivable:					Accounts and bills due	10	000	00	
Due from relatives and friends					Unpaid income tax				
Due from others					Other unpaid income and interest				
Doubtful					Real estate mortgages payable-add schedule	419	537	63	
Real estate owned-add schedule	992	500	00		Chattel mortgages and other liens payable				
Real estate mortgages receivable					Other debts-itemize:				
Autos and other personal property	77	000	00						
Cash value-life insurance	16	958	00						
Other assets itemize: SEE "OTHER" ASSETS	520	950	61						
					Total liabilities	429	537	63	

				Net Worth	1,	581,	743	10
Total Assets	2,	011,	280.	70	Total liabilities and net worth	2,	011,	280.	70
CONTINGENT LIABILITIES					GENERAL INFORMATION				
As endorser, comaker or guarantor		NONE			Are any assets pledged? (Add schedule)		HOME		
On leases or contracts		NONE			Are you defendant in any suits or legal actions?		No.		
Legal Claims		NONE			Have you ever taken bankruptcy?		No.		
Provision for Federal Income Tax		122,	163	00					
Other special debt		NONE							

Real Estate

Principal residence located in Coral Gables, Florida	$950,000.00
One-fourth (1/4) interest in residence located in Miami-Dade County	$ 42,500.00

Other Assets

Deferred Compensation—State of Florida T. Rowe Price	$34,078.78
Deferred Compensation – Miami Dade County	$53,817.60
Holland & Knight Profit Sharing Plan	$433,054.23

Schedule of Listed Securities

Name	Quantity	Current Value
Alcoa, Inc.	15	$ 376.35
American International Group, Inc.	37	$2,323.60
Analog Device, Inc.	20	$ 482.00
Baxter International, Inc.	20	$ 725.80
Cardinal Health, Inc.	15	$ 972.60
Charter One Financial, Inc.	20	$ 674.00

Cisco Systems, Inc.	105	$1,451.10
Citigroup, Inc.	56	$1,234.00
Coca Cola Co. Delaware	30	$1,530.00
Colgate Palmolive Co.	20	$1,091.00
CVS Corp. Delaware	35	$1,028.65
Dominion Resources, Inc.	15	$ 940.65
Entergy Corp. New	15	$ 632.85
Exxon Mobil Corp.	50	$1,772.50
Fannie Mae	15	$1,136.70
Fifth Third Bancorp	30	$2,010.60
First Data Corp.	15	$ 521.25
General Electric Co.	85	$2,562.75
Guidant Corp.	15	$ 552.00
HCA Inc.	20	$ 931.00
Ingersoll Rand Class A	20	$ 751.00
Intel Corp.	40	$ 666.80
International Business Machines	10	$ 753.80
Johnson & Johnson	30	$1,629.30
Kohls Corp.	15	$1,045.80
Kraft Foods Inc. Cl A	25	$ 994.25
Lowes Companies North Carolina	10	$ 413.80
Medtronic Inc.	35	$1,441.30
Micron Technology Inc.	25	$ 431.25
Microsoft Corp. Washington	40	$1,963.20
Morgan Stanley	25	$1,068.00
Pepsico Inc.	15	$ 593.25
Procter & Gamble Co.	15	$1,329.75
Raytheon Co. Com New	30	$1,050.00
SBC Communications Inc.	45	$1,113.30
SLM Corp.	5	$ 458.25
Starwood Hotels & Resorts	15	$ 386.70
Target Corp.	40	$1,368.00
Texas Instruments Inc.	40	$ 788.00
Transocean Inc.	35	$ 857.50
Travelers Property Casualty	4	$ 65.16
Travelers Property Casualty New	77	$1,210.44
Union Pacific Corp.	15	$ 908.25
Verizon Communications	20	$ 620.00
Viacom Inc Class B	40	$1,628.00
Wal Mart Stores Inc.	30	$1,604.40
Wyeth	20	$ 856.00

Schedule of Unlisted Securities

Van Kampen Focus Portf Unit 296 Biotech	216.613	$1,601.59
Van Kampen Focus Portf Unit 296 Internet	72	$ 571.79
Alliance Growth & Income Fund		$64,342.54

Senator SESSIONS. Judge Minaldi?

STATEMENT OF PATRICIA A. MINALDI, NOMINEE TO BE DISTRICT JUDGE FOR THE WESTERN DISTRICT OF LOUISIANA

Judge MINALDI. Mr. Chairman, I want to thank you very much for the opportunity to be here. I don't have an opening statement. I don't have any family here to introduce, although my husband and my two boys are with me in spirit.

Senator SESSIONS. Very good.

[The biographical information of Judge Minaldi follows:]

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

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

Patricia Ann Head Minaldi

Position: State the position for which you have been nominated.

United States District Court Judge for the Western District of Louisiana, Lake Charles Division

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

14th Judicial District Court
1001 Lakeshore Drive
Post Office Box 3210
Lake Charles, Louisiana 70602
337-437-3530

Birthplace: State date and place of birth.

9-12-58
Somerville, Massachusetts

Marital Status: (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es). Please also indicate the number of dependent children.

Married
Thad David Minaldi
Attorney
Jack Lawton, Inc.
101 N. Huntington Street
Sulphur, Louisiana 70663
2 Dependent Children

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

Tulane University School of Law, New Orleans, Louisiana
1980-1983, Juris Doctor, May 1983

Boston University School of Law, Boston, Massachusetts
1982, Non-Matriculating Student

Wesleyan University, Middletown, Connecticut
1976-1980, Bachelor of Arts in History, June 1980, Cum Laude

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

14th Judicial District Court
District Judge, Division E
1001 Lakeshore Drive
Post Office Box 3210
Lake Charles, Louisiana 70602

Calcasieu Parish District Attorney's Office
Felony Assistant District Attorney
1020 Ryan Street
Post Office Box 3206
Lake Charles, Louisiana 70602

Orleans Parish District Attorney's Office
Felony Assistant District Attorney
619 S. White Street
New Orleans, Louisiana 70119

Oestreicher, Whalen, and Hackett
Law Clerk
307 Exchange Alley Place
New Orleans, Louisiana 70130

Tulane University
Lifeguard
6823 St. Charles Avenue
New Orleans, Louisiana 70118

Tulane University School of Law
Law Clerk

6329 Freret Street
New Orleans, Louisiana 70118

Wesleyan University
Lifeguard/Cafeteria Worker
229 High Street
Middletown, Connecticut 06459

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

Not Applicable.

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

2002 Stennis Center for Public Service "Pacesetter" - Southern Women in Public Service
National Women's History Month - Distinguished Women, U. S. Postal Service, 1999
1998 Crimefighters of Southwest Louisiana "Court of Honor" Award
1997 Honoree - The Times of Lake Charles, "40 Under 40 - Leadership, Accomplishment Promise"
Law Enforcement Award - Optimist Club, 1995
Law Enforcement Award - VFW Post 2130, 1995
Trial Advocacy Award - The Association of Government Attorneys in Capital Litigation, 1993-94
Tulane Law Merit Award
1980, 1981, 1983
Graduated cum laude from Wesleyan University, Middletown, Connecticut, 1980

10. **Bar Associations**: List all bar associations or legal or judicial-related committees, selection panels 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.

Louisiana District Judges Association
President - Louisiana District Judges Association - 2002-Present
1st Vice President - Louisiana District Judges Association - 2001-2002
2nd Vice President - Louisiana District Judges Association - 2000-2001
Secretary - Louisiana District Judges Association - 1999-2000
Treasurer - Louisiana District Judges Association - 1998-1999
Member - Executive Committee of the Louisiana District Judges Association - 1998-Present
Chairman - Governor's Post-Conviction DNA Testing Advisory Commission -

2000-2001
Member - Case Management Docket Delay Reduction Task Force - 2002-2003
Member - Board of Governors, Louisiana Judicial College - 2000-2003
Member - Louisiana Legal Forensic Strategic Task Force - 2002-2003
Louisiana State Bar Association
Member - Mandatory Continuing Legal Education Committee - 1996-1998
Chairman - Crime Victims' Services Committee - 1989
Southwest Louisiana Bar Association
American Bar Association
Member - Prosecution Function Committee - 1986

1. **Bar and Court Admission**: List each state and court in which you have been admitted to practice, including dates of admission and any lapses in membership. Please explain the reasor for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

Louisiana - September, 1983

2. **Memberships**: List all memberships and offices currently and formerly held in professional, business, fraternal, scholarly, civic, charitable, or other organizations since graduation from college, other than those listed in response to Questions 10 or 11. Please indicate whether any of these organizations formerly discriminated or currently discriminates on the basis of race, se or religion - either through formal membership requirements or the practical implementation of membership policies. If so, describe any action you have taken to change these policies and practices.

President - Louisiana District Judges Association - 2002-Present
1st Vice President - Louisiana District Judges Association - 2001-2002
2nd Vice President - Louisiana District Judges Association - 2000-2001
Secretary - Louisiana District Judges Association - 1999-2000
Treasurer - Louisiana District Judges Association - 1998-1999
Member - Executive Committee of the Louisiana District Judges Association - 1998-Present
National District Attorneys Association (Past Member)
Louisiana District Attorneys Association (Past Member)
Barrister - Alfred J. Tate Inn of Court (Past Member)
Police Advisory Committee (Member)
Governor's Post-Conviction DNA Testing Advisory Commission - 2000-01 (Chairman)
McNeese State University, College of Nursing Advisory Committee (Member)
Calcasieu Parish Violent Crimes Task Force - Legal Advisor - (Past Member)
Community Advisory Board for the Child Advocacy Center (Chairman - Past Member)
Forensic Interview Protocol Committee for the Child Advocacy Center (Chairman - Past Member)

Interagency Protocol Committee for the Child Advocacy Center (Chairman - Past Member)
Medical Protocol Committee for the Child Advocacy Center (Chairman - Past Member)
Boy Scouts of America (Past Den Leader)
Louisiana Republican Elected Women ("LaRew")
YMCA Board of Directors (Past Member)
Junior League of Lake Charles Board of Directors (Past Member)
Crime Stoppers Board of Directors (Past Member)
Family and Youth Counseling Agency Board of Directors (Past Member)
Republican Women's Club (Member)

The Junior League does not admit men. While on the Board of Directors, I voted against this policy. I am no longer a member of that organization.

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

I have no published writings. Speeches have been given before local civic organizations. I retained no notes and to my knowledge, none were videotaped nor reduced to writing. I have no outlines.

14. **Congressional Testimony**: List any occasion when you have testified before a committee or subcommittee of the Congress, including the name of the committee or subcommittee, the date of the testimony and a brief description of the substance of the testimony. In addition, please supply four (4) copies of any written statement submitted as testimony and the transcript of the testimony, if in your possession.

I have not testified before Congress.

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

Health:	Excellent.
Date of Last Examination:	7-8-02

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

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

I am a state district court judge; my opinions are not published. I make every effort to rule from the bench, therefore, my written opinions do not accurately reflect the bulk of my work.

1. State of Louisiana vs. Woodrow Hamilton, 747 So.2d 164 (La.App. 3 Cir. 1999)

The defendant murdered his estranged wife and a sheriff's deputy responding to the scene. He then led the police on a high speed chase and barricaded himself inside his home. He had numerous weapons in his home and held the police at bay for a considerable length of time. During exchange of gunfire, a police officer was seriously injured. The defendant was charged with First Degree Murder and the State sought the death penalty.

Numerous pre-trial motions were heard involving the admissibility of statements of the defendant and other crimes evidence among others. In capital cases, all rulings, even in jury selection, are extremely important and intensely scrutinized, especially where a death penalty is obtained.

The defendant in this case was convicted of First Degree Murder, however the jury deadlocked on the penalty. The defendant was sentenced to life in prison without the benefit of probation, parole, or suspension of sentence.

2. State of Louisiana vs. Thomas Cisco, 772 So.2d 110 (La. 2000)

The defendant and an accomplice entered a convenience store where one of the defendant's friends worked. The defendant forced his friend, a co-worker, and a juvenile into the walk-in cooler at gunpoint and executed them. The store was robbed. The defendant was sentenced to death. The defendant was charged with First Degree Murder and the State sought the death penalty.

Numerous pre-trial motions were heard involving the admissibility of statements of the defendant and other crimes evidence among others. In capital cases, all rulings, even in jury selection, are extremely important and intensely scrutinized, especially where a death penalty is obtained.

The defendant in this case was convicted of First Degree Murder and the jury elected the death penalty.

3. Dwayne Lafleur, et al vs. Entergy, Inc., et al, 737 So.2d 761 (La.App. 3 Cir. 1998)

A devastating ice storm ravaged Southwest Louisiana in January of 1997. As a result, residences and businesses were without power for days in freezing weather. The plaintiffs sought to be certified as a class in an action against Entergy, Inc. Whether the class was certified as a class action or not would greatly affect the nature of the lawsuit. Class certification was denied.

4. Wendy Jones, et al vs. W. T. Henning Elementary School, #97-8545
(Not reported; no written opinion)

A mother sought permanent injunction against the School Board forcing them to reinstate her eight year old who had been suspended for wearing an earring to school. The School Board had a written policy prohibiting this behavior and in spite of repeated warnings continued to send her child to school with the prohibited adornment. The case involved First and Fourteenth Amendment issues. Oral ruling was rendered denying the injunction based on the duty of the School Board to enforce discipline and dress responsive to the local norms.

5. State of Louisiana vs. Guadalupe Salinas, #2191-97
(Not reported; no written opinion)

At arraignment, the defendant agreed to plead guilty to a charge of possession with the intent to distribute marijuana in exchange for a recommended sentence of nine years and dismissal of charges against his co-defendant, his girlfriend. The State indicated that due to the rapidity of the guilty plea, it was unable to provide a criminal history on the defendant. The defendant was placed under oath by the Court and questioned about prior convictions, which he denied. Based on the totality of the circumstances, I was uncomfortable with the arrangement and delayed sentencing to obtain more information. The defendant's criminal history revealed two prior drug convictions and that he was on probation for one of them. He also had pending perjury charges in Texas. I rejected the recommendation, sentenced him to 25 years, and had him arrested in open court for perjury. The defendant appealed his sentence. It was vacated by the Third Circuit Court of Appeal and reinstated by the Louisiana Supreme Court. The defendant was subsequently convicted of perjury based on these facts.

6. Alphonse Mancuso, et al vs. Calcasieu Parish School Board, #95-1027
(Not reported; no written opinion)

The parents of a seventeen year old girl sued the School Board after her expulsion for one year for smoking marijuana on the way to school. She and her family had numerous administrative hearings and were offered several alternatives, which they declined to pursue. The expulsion caused her to be unable to graduate with her class. The School Board's policy was challenged because it was not uniform throughout the state. The ruling held that each individual school board is empowered to add additional and more serious disciplinary measures to their individual policies.

7. Adam J. Ceasar, Sr. vs. Dr. Richard J. Barry, et al, #89-6006

This case involved the issue of the effect of a bankruptcy court's pro rata distribution of assets has on a medical malpractice settlement. The Louisiana statute governing provides that the liability of the health care provider is admitted and established when the insurer or the self-insured provider pays $100,000. When that occurs, liability is established and the Patients

Compensation Fund is liable for any damages caused by the health care provider in excess of $100,000. An agreement was reached by which the plaintiffs accepted a tender of $100,000 from the bankrupt insurer with the acknowledgement by all parties that plaintiffs would not receive $100,000 and most probably only $30,000 of that amount.

The Patients Compensation Fund opposed the settlement. The trial court ruled that since a $100,000 payment had not and would not be made that absent an admission of liability on the part of the health care provider, liability of the fund would not be triggered. Subsequently, the health care provider filed an affidavit admitting liability. The Fund contested the triggering of liability based on the fact that the full $100,000 had not been paid. The trial court ruled that an actual admission of liability coupled with the agreement to pay $100,000 is sufficient to trigger the statutory admission of liability.

8. David P. Poole, et al vs. Alfred J. Miller, et al, #95-1260

Defendants filed a motion in limine to strike expert testimony, wherein the defendant prayed for expert testimony to be striken to the extent to which it opined as to the hazards of cement dust. The expert admitted that his opinions regarding the toxicity of cement and cement dust were derived solely from the literature he researched in preparation for his testimony and on no independent research. Moreover, the court's analysis of the literature upon which the expert's opinions were based revealed that the literature not only did not support his opinion, it refuted his opinion. Therefore, the expert did not even properly regurgitate the findings of others and, thus, he stood alone in his opinion.

The trial court applied the criteria established in **Daubert vs. Merrell Dow Pharmaceuticals, Inc.**, 509 U.S. 579 (1993). The **Daubert** Court enumerated a list of factors, which are not exhaustive, that are to be considered in determining the reliability of such testimony. That four-prong inquiry is as follows: (1) Whether the theory or technique can or has been tested; (2) Whether the theory or technique has been published or subjected to peer review; (3) Whether the potential rate of error is acceptable and the existence or maintenance of standards; and (4) Whether the theory or technique is generally accepted in the scientific community. And as indicated in **Daubert vs. Merrell Dow Pharmaceuticals, Inc.**, 43 F.3d 1311, 1317 (9th Cir. 1995): (5) Whether the experts are proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation or whether they have developed their opinions expressly for purposes of testifying.

By self-admission, the expert's opinion regarding the dermatological toxicity of cement dust: (1) Was not tested (although it certainly could have been); (2) Was not published or subjected to peer review.

Due to the negative answer and the first two prongs of **Daubert**, it was unnecessary to reach the remainder. The expert also admitted that he did his "research" purely in order to form an opinion for litigation. Furthermore, considering that the list of factors in **Daubert** are non-

exhaustive, the trial court found the expert's status as a professional consultant, his lack of any experience with cement or cement dust, and his previous disqualification on similar grounds to be additional factors in its determination that his testimony was clearly unreliable.

9. Gwendolyn Guillory, et al vs. Union Pacific Corporation, et al

The plaintiffs in this litigation sought to certify as a class certain sub-classes of property owners and renters who alleged various damages to their property and person. The claims arose from a spill of a toxic substance resulting in contamination of the soil in that area, which occurred on or about April 20, 1983. The plaintiffs did not claim damages from the actual spill, but damages from the subsequent mishandling of the clean-up effort.

Louisiana law allows for class action suits to be maintained provided that certain enumerated factors are met. The plaintiffs must satisfy numerosity, commonality, typicality, adequacy, and definability requirements. The court found that the original spill and the resulting remediation were a common issue of fact in every plaintiff's theory of recovery, but that mere commonality of an issue or issues alone does not qualify claims for certification. To the contrary, those common issues must predominate. Therefore, the mere showing of a common cause or disaster does not justify class certification.

The nature of each plaintiff's claim for damages was ostensibly similar, but class certification depended on individual evidence to prove not only the similarity and the extent of damages in each case, but that liability itself exists. As such, an inquiry into that evidence was absolutely necessary. **Amchem Products, Inc. vs. Windsor**, 521 U.S. 591 (1997).

The trial court held that the plaintiffs' proof abysmally failed to show that common issues even approached predominance over individual issues. The predominance of the common over the individual is an absolute requirement for the certification of a class; the absence thereof constitutes a total flaw and an insurmountable hurdle to certification.

10. Randolph (Randy) Wallace Harper, et al vs. Falrig Offshore, Inc., et al, #98-974

Plaintiff was a welder employed by Falrig, and he was injured while aboard a jack up drilling rig owned and operated by Falrig. Plaintiff was constructing a rainshield over a doorway. While on the ladder, plaintiff requested a sledgehammer that was retrieved by his supervisor. It was alleged by plaintiff that his supervisor negligently placed the sledgehammer on the rainshield, since its placement required the plaintiff to reach out to obtain it. Thereafter, the plaintiff fell off the ladder and was injured as a result of this exchange between the parties.

It was clearly established through testimony that each hand was responsible for their own safety. Therefore, it was plaintiff's responsibility to make sure that the ladder was held. Furthermore, the plaintiff testified that he did not feel like he needed someone to hold the ladder. However, the trial court acknowledged that his supervisor put the plaintiff in an

unnecessarily unsafe position. Thus, the supervisor's poor judgment invited the plaintiff's poor judgment.

The trial court held that the cause of the accident was a result of a single incident of operational negligence. The plaintiff's negligence contributed to this accident in the amount of 75 percent, and the actions of Falrig, through the plaintiff's supervisor, contributed to this accident in the amount of 25 percent.

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

1. Pam Garza vs. International Maintenance Corporation, et al (Unpublished)

The trial court awarded attorney's fees and dismissed with prejudice Sigma's intervention for its failure to respond to a request for production and failure to appear at the hearing on the motion to compel production. The Court of Appeal reversed finding that since no court order mandating discovery had been issued, sanctions were inappropriate.

2. Dr. Norman P. Morin, M.D., et al vs. Dr. Lynn E. Foret, M.D., et al, 736 So.2d 279 (La.App. 3 Cir. 1999)

The trial court found a contract for sale of a medical practice entered into between two medical corporations to be invalid and awarded the plaintiff-in-reconvention an award that reflected amounts already paid out. The Court of Appeal found the contract to be valid.

3. Ereunao Oil & Gas, Inc. vs. Johnnie Northern, et al, 736 So.2d 893 (La.App. 3 Cir. 1999)

The trial court entered a default judgment in a case involving formation of a drilling unit based on the transfer of royalty acres from the defendants to the plaintiff. The plaintiff alleged a refund was due, sent a certified letter to the defendants' domicile. When no response was received, plaintiffs filed suit and effected domiciliary service. The defendants failed to respond or appear and a default judgment was entered, the trial court finding proper service and a prima facie case. The Court of Appeal disagreed that a prima facie case had been established.

4. Enloe L. Clark vs. Jeff R. Lavoy, M.D., et al, 757 So.2d 749 (La.App. 3 Cir. 2000)

A default judgment was rendered in a medical malpractice case. Service was attempted on the physician via the Long Arm Statute, La. R.S. 13:3204, at an address provided by the physician's counsel. The trial court found that the physician had been properly served and that the plaintiff established a prima facie case. The Court of Appeal disagreed that a prima facie case had been established.

5. Carl Harris Hesse vs. Champ Service Line, 758 So.2d 245 (La.App. 3 Cir. 2000)

The trial court granted a motion for summary judgment filed by a distributor of a portable work light which caused an electric shock to the plaintiff, a mechanic. The plaintiff failed to submit any evidence that it would carry its burden of proof on the issue of liability at trial. The Court of Appeal found that a genuine issue of material fact remained.

6. Pam Garza vs. International Maintenance Corporation, et al (Unpublished)

The plaintiff was injured on the job and sued an alleged third party tortfeasor. The employer, Sigma, intervened and asserted its subrogation rights to be reimbursed for worker's compensation benefits paid. The employer settled the worker's compensation case with the plaintiff. Both plaintiff and defendant filed a motion for summary judgment claiming the employer had waived its subrogation rights in the settlement, therefore, had no rights to assert in the tort suit. In the worker's compensation settlement, Sigma agreed to waive its rights of reimbursement of $46,243.58 of benefits sought in the intervention, and the trial court granted the motion for summary judgment. The Court of Appeal found that because there was a $1,000.00 difference in the waiver and the amount actually paid, there remained a genuine issue of material fact.

7. Randolph (Randy) Wallace Harper, etc. vs. Falrig Offshore, Inc., et al, 776 So.2d 620 (La.App. 3 Cir 2000)

Future wages damage calculation proffered by economist expert and accepted by the trial court did not calculate the gross earnings from the time of the plaintiff's injury. The case was remanded for new calculation.

8. Michael Todd Walters vs. A-Way Tank Service, Inc., 802 So.2d 1 (La.App. 3 Cir. 2000)

Portion of summary judgment which dismissed indemnitor's insurer was reversed and remanded for further review of the insurance policy.

9. William G. Corbello, et al vs. Iowa Production Company, et al, 787 So.2d 596 (La.App. 3 Cir. 2001), 806 So.2d 32 (La.App. 3 Cir. 2001)

This litigation arises out of a surface lease granted by Ferdinand Heyd on May 10, 1961, to Shell Oil. Shell had been previously granted an oil and gas mineral lease by Heyd and others in 1929. The mineral lease was operated until 1985 when Shell transferred its interest to Rosewood Resources. Pursuant to the 1961 surface lease, Shell built an oil terminal which operated until March, 1993. The day before the surface lease expired on May 10, 1991, the plaintiffs wrote Shell regarding alleged breaches of the agreement and failure to maintain the property pursuant to the lease. For several months, the parties attempted to resolve the issues

and renegotiate the lease. A jury awarded the plaintiff over $900,000.00 for trespass damages for the one year period. Shell remained on the property after the expiration of the surface lease. The trial court granted a remititur without giving the plaintiff the option to choose a new trial on the issue, and the Third Circuit Court of Appeal reversed and remanded for further proceedings. The trial court ruled that the plaintiffs were not entitled to exemplary damages, and the issue was not presented to the jury. The surface lease provided that the prevailing party in a lawsuit under the lease could recover reasonable attorney's fees. After jury trial, the trial court awarded $689,510.00 in attorney's fees. The Court of Appeal increased this to $4 million alleging that the increase was based on numerous factors including the amount of the verdict, the character of the attorneys and their work, and the fact that the trial lasted eleven days. This case is currently on appeal in the Louisiana Supreme Court.

10. Linda Kimble vs. Clark A. Gunderson, M.D. (Unpublished)

Trial court granted summary judgment in favor of physician in medical malpractice case for plaintiff's failure to establish that a genuine issue of material fact remained regarding physician's breach of the standard of care. The trial court found an affidavit submitted by the plaintiff's expert to be insufficient to carry this burden because it failed to establish the standard of care, was purely conclusory and failed to refute that the occurrence was a known complication. The Court of Appeal disagreed extracting language from a deposition by a defendant expert and from the affidavit of the plaintiff expert, which did not form the basis of the plaintiff's argument at the hearing on the motion.

11. Mary Tezeno vs. Becky Victorian, et al (Unpublished)

Motion for summary judgment was granted by the trial court on coverage because the only pertinent evidence submitted indicated that an unauthorized driver was operating the vehicle involved in a motor vehicle accident. The Court of Appeal maintained that a genuine issue of material fact remained.

12. Alicia Ann Coleman vs. Marcella Diane Miller (Unpublished)

Partial reversal involving a computation of damages.

13. Gwendolyn Guillory, et al vs. Union Pacific Corporation, et al (Unpublished)

Denial of a class certification. Reversed and remanded by the Court of Appeal.

14. Pamela D. Benoit, et al vs. D. Dale Archer, Jr., M.D., et al, 820 So.2d 1275 (La.App. 3 Cir. 2002)

The trial court maintained an exception of prescription in a medical malpractice. The malpractice complained of was the overprescribing of Xanax. Based on the totality of the

circumstances, the trial court ruled that the plaintiff knew or should have known long before th one year anniversary of the plaintiff's filing suit that malpractice had occurred. The Court of Appeal held that the date of the last visit to the alleged offending physician was controlling and prescription had not run.

15. Clarence Sanders, et ux vs. Ernest Lee Mitchell, et ux, 810 So.2d 1276 (La.App. 3 Cir. 2002)

This litigation arose over non-payment of a check. Partial reversal of a default judgment was entered on the issue of non-compliance of the plaintiff's demand letter with the provisions La. R.S. 9:2782(C)(1), which reduced the amount of the award and attorney's fees only.

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

1. State of Louisiana vs. Thomas Cisco, 772 So.2d 110 (La. 2000)

The defendant and an accomplice entered a convenience store where one of the defendant's friends worked. The defendant forced his friend, a co-worker, and a juvenile into the walk-in cooler at gunpoint and executed them. The store was robbed. The defendant was sentenced to death.

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

7. **Public Office, Political Activities and Affiliations**:

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

Not Applicable.

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

Yes. Candidate: Patricia H. Minaldi

14th Judicial District Court
Judge, Division E
1001 Lakeshore Drive
Post Office Box 3210
Lake Charles, Louisiana, 70602
Campaign, 1996

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

(a) Describe chronologically your law practice and legal experience after graduation from law school including:

(1) whether you served as clerk to a judge, and if so, the name for the judge, the court and dates of the period you were a clerk;

Not Applicable.

(2) whether you practiced alone, and if so, the addresses and dates;

Not Applicable.

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

Oestreicher, Whalen, and Hackett
Law Clerk
307 Exchange Alley

New Orleans, Louisiana 70130
May 1982 - September 1982

Orleans Parish District Attorney's Office
Felony Assistant District Attorney
619 S. White Street
New Orleans, Louisiana 70119
September 1983 - January 1986

Calcasieu Parish District Attorney's Office
Felony Assistant District Attorney
1020 Ryan Street
Post Office Box 3206
Lake Charles, Louisiana 70602

February 1986 - December 1996

14th Judicial District Court
District Judge, Division E
1001 Lakeshore Drive
Post Office Box 3210
Lake Charles, Louisiana 70602
January 1997 - Present

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

State prosecutor for 13 years. State district court judge for 6 years, beginning January, 1997.

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

The people of the State of Louisiana; criminal law.

(c) (1) Describe whether you appeared in court frequently, occasionally, or not at all. If the frequency of your appearances in court varied, describe each such variance, providing dates.

I appeared in court almost on a daily basis during my career as a prosecutor and almost as frequently since I have been a judge.

(2) Indicate the percentage of these appearances in

(A) federal courts; 0%
(B) state courts of record; 100%
(C) other courts. Handled very few cases in Administrative Law Court (e.g. Worker's Compensation Court).

(3) Indicate the percentage of these appearances in:

(A) civil proceedings; 1% as an attorney; 60% as a judge.
(B) criminal proceedings. 99% as an attorney; 40% as a judge.

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

As a prosecutor, I would estimate that I tried more than 150 cases to verdict; on more than 70% of those, I was sole or chief counsel. It would be impossible to calculate the number of cases I have handled, but I feel safe in saying it would be in the tens of thousands.

(5) Indicate the percentage of these trials that were decided by a jury.

90%

(d) be your practice, if any, before the United States Supreme Court. Please supply four (4) copies of any briefs, amicus or otherwise, and, if applicable, any oral argument transcripts before the U.S. Supreme Court in connection with your practice.
I have not appeared before the United States Supreme Court.

(e) Describe legal services that you have provided to disadvantaged persons or on a *pro bono* basis, and list specific examples of such service and the amount of time devoted to each.

I was not allowed a pro bono practice as a state employee. However, many victims whom I served were indigent.

While an attorney, I did volunteer in several areas in which my legal training was utilized. I volunteered to be the Legal Advisor to the Violent Crimes Task Force, which was a multi-disciplinary, elite homicide investigation team. I was on-call 24 hours a day for approximately two years and responded to every homicide investigation in the parish, which were numerous. These most often occurred in the middle of the night or on weekends and required my presence and involvement for many hours and often under dangerous circumstances.

I also volunteered to chair every committee formed to establish and run the area's Child Advocacy Center. The committees were charged with establishing multi-disciplinary protocols and procedures for the center which has multifaceted forensic interface. At the time we established the center, it was only the second in the entire state.

As is indicated on my resume', I have consistently volunteered to present continuing legal education programs as an attorney and a judge throughout my career. This requires not only presentation time, but extensive preparation.

I also serve or have served on volunteer committees such as the Docket Delay Reduction Task Force and the Governor's Task Force on Post-Conviction DNA Testing, the Mandatory Continuing Legal Education Committee, and the Board of Governors of the Judicial College among others. These bodies are dedicated to improving the judicial system and the administration of justice.

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

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

(b) a detailed summary of the substance of each case outlining briefly the factual and legal issues involved;

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

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

In all of the cases where co-counsel is listed, I was responsible for at least 50% of the preparation and presentation of the case.

1. State of Louisiana vs. Reginald and Thomas Alford, 521 So.2d 456 (La.App. 4 Cir. 1988)
Judge Patrick G. Quinlan
Orleans Criminal District Court
Section B (#309-489)
2700 Tulane Avenue
New Orleans, Louisiana 70119

Date of Trial:	10-22-85
Co-Counsel:	Raymond C. Bigelow Orleans Criminal District Court Section I 2700 Tulane Avenue New Orleans, Louisiana 70119 504-827-3480
Defense Counsel:	Barbara Cruthirds 2700 Tulane Avenue New Orleans, Louisiana 70119 504-827-3476

Two 14 year old girls were kidnapped from a bus stop in mid-town New Orleans by three men. They were driven to City Park where they were gang raped and robbed at gunpoint.

Both defendants were found guilty of Aggravated Rape, Aggravated Kidnapping, Armed Robbery, and Aggravated Crime Against Nature and were sentenced to life without benefit of probation, parole, or suspension of sentence.

I prosecuted the case.

2. State of Louisiana vs. Virgil Ellis, 529 So.2d 122 (La.App. 4 Cir. 1988)
Judge Patrick G. Quinlan
Criminal District Court
Section B (#308-337)
2700 Tulane Avenue
New Orleans, Louisiana 70119

Date of Trial:	10-10-85
Co-Counsel:	Joe Iuzzolino
Defense Counsel:	Numa Bertel 2700 Tulane Avenue, Room 105A New Orleans, Louisiana 70119 504-821-8101

A physician and two respiratory technicians from Touro Infirmary were abducted at gunpoint by the defendant and an accomplice and forced into the physician's car. They were terrorized and forced to a secluded location where one of the victims was raped. The victims were taken to an ATM and forced to withdraw cash at gunpoint.

The defendant was convicted of Armed Robbery and Aggravated Rape and sentenced to life without benefit of probation, parole, or suspension of sentence.

I prosecuted the case.

3. State of Louisiana vs. Gregory Landor, 505 So.2d 280 (La.App. 4 Cir. 1987)
Judge Jerome Winsberg (Retired)
Criminal District Court
Section C (#301-392)
2700 Tulane Avenue
New Orleans, Louisiana 70119

Date of Trial:	8-23-84
Co-Counsel:	Melinda Tucker Attorney General's Office State of Louisiana 301 Main Street, 7th Floor Baton Rouge, Louisiana 70804

225-342-7552
Defense Counsel: Frank Larre
3017 20th Street
Metairie, Louisiana 70002
504-831-0106

The defendant entered the home of an acquaintance while armed and masked. He terrorized the victim and burglarized the home. The victim identified the defendant by voice and used her nickname. This case helped to establish the validity of one-on-one voice identification.

The defendant was convicted of Aggravated Burglary.

I prosecuted the case.

4. State of Louisiana vs. Donald Ray Robertson, 516 So.2d 180 (La.App. 4 Cir. 1987)
Judge Jerome Winsberg (Retired)
Criminal District Court
Section C (#308-027)
2700 Tulane Avenue
New Orleans, Louisiana 70119

Date of Trial: 1-14-86
Co-Counsel: Dale Atkins
Orleans Parish Civil District Court
421 Loyola Street
New Orleans, Louisiana 70112
504-592-9100
Defense Counsel: Jasper Pharr
4620 San Marco Road
New Orleans, Louisiana 70129
504-255-0693

The defendant ordered two fellow gang members to execute rival drug dealers. The victims were kidnapped, blindfolded, and each shot once in the head at contact range. Case proven through circumstantial evidence.

The defendant was convicted of two counts of First Degree Murder and sentenced to life without benefit of probation, parole, or suspension of sentence.

I prosecuted the case.

5. State of Louisiana vs. Gerald Jerrell, 475 So.2d 772 (La. 1985)

Judge Jerome Winsberg (Retired)
Criminal District Court
Section C (#308-027)
2700 Tulane Avenue
New Orleans, Louisiana 70119

Date of Trial:	11-6-85
Co-Counsel:	Bruce Whittaker Orleans Indigent Defender Program 2700 Tulane Avenue, Room 105A New Orleans, Louisiana 70119 504-821-8101
Defense Counsel:	Leon Cannizarro 4th Circuit Court of Appeal 1515 Poydras Street, 7th Floor 504-568-4700 New Orleans, Louisiana 70112

Same facts as above. Jerrell was gang member who was involved in the executions. The cases were severed for trial.

6. State vs. Keith Thompson, 661 So.2d 479 (La. 1985)
Judge Dennis J. Waldron
Criminal District Court
Section F (#304-916)
2700 Tulane Avenue
New Orleans, Louisiana 70119

Date of Trial:	1-28-85
Co-Counsel:	Raymond Bigelow Orleans Criminal District Court Section I 2700 Tulane Avenue New Orleans, Louisiana 70119 504-827-3480
Defense Counsel:	Charles Swanson Unable to Locate Address

The defendant entered an administrative office at the New Orleans Fairgrounds Race Track and held four women hostage at gunpoint. One of the women was in advanced stages of pregnancy. The defendant robbed the women and fled. A shootout with the police ensued.

The defendant was convicted of Armed Robbery.

I prosecuted the case.

7. State vs. Eugene Davis, Jr., 562 So.2d 1173 (La.App. 4 Cir. 1990)
Judge Patrick G. Quinlan
Criminal District Court
Section B (#306-272)
2700 Tulane Avenue
New Orleans, Louisiana 70119

Date of Trial:	8-13-85
Co-Counsel:	Dale Atkins Orleans Parish Civil District Court 421 Loyola Street New Orleans, Louisiana 70112 504-592-9100
Defense Counsel:	Wayne Mumphrey 9061 W. Judge Perez Drive Chalmette, Louisiana 70043 504-277-8989

A seven month old baby was killed by his caregiver. The case was a circumstantial one largely based on the child's injuries and the improbability of the defendant's explanation therefor.

The defendant had been charged with Manslaughter and was so convicted.
I prosecuted the case.

8. State of Louisiana vs. Ricky Joseph Langley, 813 So.2d 356 (La. 2002)
Fred R. Godwin (Retired)
14th Judicial District Court
Division D (#3057-92)
1001 Lakeshore Drive

Post Office Box 3210
Lake Charles, Louisiana 70602

Date of Trial:	6-27-94
Co-Counsel:	Rick Bryant Calcasieu Parish District Attorney 1020 Ryan Street Lake Charles, Louisiana 70601

337-437-3400
Defense Counsel: Clive Stafford-Smith
636 Baronne Street
New Orleans, Louisiana 70113
504-558-9867

Defendant kidnapped, tortured, and killed a six year old boy. Child was missing for days while extensive searches were conducted adjacent to the defendant's home. The child was ultimately found in the defendant's closet. The defendant was a convicted child molester. The defendant was convicted of First Degree Murder. The jury unanimously recommended the death penalty.

I prosecuted the case.

9. State of Louisiana vs. Leslie Dale Martin, 645 So.2d 190 (La. 1994)
Judge Charley Quienalty (Retired)
14th Judicial District Court
Division G (#9459-91)
1001 Lakeshore Drive
Post Office Box 3210
Lake Charles, Louisiana 70602

Date of Trial: 5-11-94
Co-Counsel: Rick Bryant
Calcasieu Parish District Attorney
1020 Ryan Street
Lake Charles, Louisiana 70601
337-437-3400
Defense Counsel: David Williams
827 Pujo Street
Lake Charles, Louisiana 70601
337-494-1023

The defendant took the victim from a Lake Charles night club to a secluded area where he raped and killed her. Her body was discovered sometime later, badly decomposed, in a pump shed in Iowa, Louisiana. Evidence of the rape was circumstantial. The defendant was convicted of First Degree Murder and sentenced to death. The case established a new "corpus delecti" rule in Louisiana.

I prosecuted the case.

10. State of Louisiana vs. Tommy Howard, 520 So.2d 1150 (La.App. 3 Cir. 1987)
Judge Ellis Bond (Deceased)

14th Judicial District Court
Division B (#8770-85)
1001 Lakeshore Drive
Post Office Box 3210
Lake Charles, Louisiana 70602

Date of Trial: 2-24-87
Defense Counsel: Glen D. Vamvoras
1111 Ryan Street
Lake Charles, Louisiana 70601
337-433-1621

The defendant repeatedly raped his daughter until she reported the crimes at the age of ten. A grown daughter was located and she testified that she suffered the same treatment when she was the instant victim's age. The crimes against the first daughter had occurred approximately 20 years before and were never reported. The defendant was convicted of Aggravated Rape and sentenced to life without benefit.

In all of the above cases, I represented the State of Louisiana, the cases were tried to a jury, and the defendants found guilty as charged.

20. **Criminal History**: State whether you have ever been convicted of a crime, within ten years of your nomination, other than a minor traffic violation, that is reflected in a record available to the public, and if so, provide the relevant dates of arrest, charge and disposition and describe the particulars of the offense.

I have not been convicted of a crime.

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

None.

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

My previous positions make the prospect of conflict a remote one. Cases and controversies involving the Calcasieu Parish District Attorney's Office during my tenure there might pose a possibility of a conflict. My husband's law practice is very limited, and he does no work in Federal Court. I would immediately recuse myself from any cases involving him, his employer or the District Attorney's Office during my tenure. I believe these would be few. My decisions would be governed by the Code of Judicial Conduct.

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

No.

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

See Attached Financial Disclosure Report.

25. **Statement of Net Worth**: Complete and attach the financial net worth statement in detail. Add schedules as called for.

See Attached Statement of Net Worth.

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

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

Yes.

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

I contacted each of the members on the statewide nomination committee in an attempt to arrange interviews with them and obtained interviews with all but one of the members. I was interviewed by Assistant White House Counsel, the Federal Bureau of Investigation, and representatives of the Department of Justice.

(c) Has anyone involved in the process of selecting you as a judicial nominee discussed

with you any specific case, legal issue or question in a manner that could reasonably be interpreted as asking or seeking a commitment as to how you would rule on such case, issue, or question? If so, please explain fully.

No.

FINANCIAL STATEMENT

NET WORTH

PATRICIA H: MINALDI

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS		LIABILITIES	
Cash on hand and in banks	38,000.00	Notes payable to banks-secured	0.00
U.S. Government securities-add schedule *	2,675.00	Notes payable to banks-unsecured	0.00
Listed securities-add schedule		Notes payable to relatives	0.00
Unlisted securities--add schedule		Notes payable to others	0.00
Accounts and notes receivable:		Accounts and bills due	4,000.00
Due from relatives and friends		Unpaid income tax	0.00
Due from others		Other unpaid income and interest	0.00
Doubtful		Real estate mortgages payable-add schedule *	260802.41
eal estate owned-add schedule *	365500.00	Chattel mortgages and other liens payable	0.00
eal estate mortgages receivable		Other debts-itemize:	0.00
utos and other personal property	110000.00		
sh value-life insurance	31291.00		
her assets itemize:			
Mutual Funds	38586.52		
		Total liabilities	264,802.41
		Net Worth	321,250.11
al Assets	586052.52	Total liabilities and net worth	586052.52
CONTINGENT LIABILITIES		GENERAL INFORMATION	
endorser, comaker or guarantor	0.00	Are any assets pledged? (Add schedule)	no
leases or contracts	0.00	Are you defendant in any suits or legal actions?	no
al Claims	0.00	Have you ever taken bankruptcy?	no
ision for Federal Income Tax	0.00		
r special debt	0.00		

ATTACHMENT TO FINANCIAL STATEMENT
NET WORTH OF PATRICIA H. MINALDI
12/31/03

GOVERNMENT SECURITIES

("EE" – Series EE United States Savings Bonds)

a. EE, 12/90, $500, D15488088EE;
b. EE, 12/90, $200, R46719841EE;
c. EE, 3/91, $1000, M40028292EE;
d. EE, 8/91, $50, L478184496EE;
e. EE, 12/91, $50, L480049342EE;
f. EE, 8/92, $50, L501417374EE;
g. EE, 10/92, $75, K96521989EE;
h. EE, 2/93, $100, C394483261EE;
i. EE, 8/93, $50, L514263817EE;
j. EE, 12/93, $50, L518636737EE;
k. EE, 9/94, $50, L524073822EE;
l. EE, 12/94, $50, L531078212EE
m. EE, 8/93, $50, L511214070EE;
n. EE, 9/93, $100, C437423632EE;
o. EE, 9/93, $100, C428198558EE;
p. EE, 12/93, $50, L518636738EE;
q. EE, 12/94, $50, L531078213EE;
r. EE, 6/94, $50, L519475377EE;
s. EE, 6/95, $50, L535888438EE.

ATTACHMENT TO FINANCIAL STATEMENT
NET WORTH OF PATRICIA H. MINALDI
12/31/03

ASSETS

1. Real Estate Owned:

a. Residence - - -	$360,500.00
b. Undivided interest in approx. 16 acres (undeveloped) at Amelia, Louisiana - - -	$ 5,000.00±
	$365,500.00

2. Other Assets:

Legg Mason Mutual Funds - - -	$ 38,586.52

ATTACHMENT TO FINANCIAL STATEMENT
NET WORTH OF PATRICIA H. MINALDI
12/31/03

LIABILITIES

1. Residential Mortgage, Hibernia National Bank New Orleans, La - - -	$196,231.41
2. Residential Mortgage, Hibernia National Bank New Orleans, La - - -	$ 64,571.00
	$260,802.41

AO-10
Rev. 1/2001

FINANCIAL DISCLOSURE REPORT
FOR NOMINEES

Report Required by the Ethics in Government Act of 1978, (5 U.S.C. App., §§101-111)

1. Person Reporting *(Last name, first, middle initial)*	2. Court or Organization	3. Date of Report
Minaldi, Patricia H.	District Court, Western District of Louisiana	January 16, 2003
4. Title *(Article III judges indicate active or senior status; magistrate judges indicate full- or part-time)*	**5. ReportType (check appropriate type)**	**6. Reporting Period**
U.S. District Judge (Nominee)	X Nomination, Date ____ ___ Initial ___ Annual ___ Final	January 1, 2001 to December 31, 2002
7. Chambers or Office Address	**8. On the basis of the information contained in this Report and any modifications pertaining thereto, it is, in my opinion, in compliance with applicable laws and regulations.**	
1001 Lakeshore Drive Lake Charles, LA 70601	Reviewing Officer ____ Date ____	

IMPORTANT NOTE: When you complete this form you must follow: Complete all parts checking the NONE box for each part where you have no reportable information. Sign on last page.

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

	POSITION	NAME OF ORGANIZATION/ENTITY
☐	NONE (No reportable positions.)	
1	State District Court Judge	14th Judicial District Court, Louisiana
2	Manager (Spouse is other Manager.)	Minerex, LLC (family-owned company)
3	President	Louisiana District Judges Association

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

	DATE	PARTIES AND TERMS
☐	NONE (No reportable agreements.)	
1	2002	La. State Employee Retirement System (pension upon retirement)
2	2002	La. Deferred Compensation Plan (upon retirement or separation)
3		

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

	DATE	SOURCE AND TYPE	GROSS INCOME (yours, not spouse's)
☐	NONE (No reportable non-investment income.)		
1	2001	Judicial Branch Of La.	$ 95,597
2	2001	Jack Lawton, Inc.	$
3	2001	La. Health Services Indemnity Co.	$
	2001	Southern National Life Ins. Company	$
	2002	Judicial Branch Of La.	$ 98,645

FINANCIAL DISCLOSURE REPORT

Name of Person Reporting: Patricia H. Minaldi

Date of Report: January 16, 2003

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

(Includes those to spouse and dependent children. See pp. 25-27 of Instructions.)

	SOURCE	DESCRIPTION
	NONE (No such reportable reimbursements.)	
1		EXEMPT
2		
3		
4		
5		
6		
7		

V. GIFTS. *(Includes those to spouse and dependent children. See pp. 28-31 of Instructions.)*

	SOURCE	DESCRIPTION	VALUE
	NONE (No such reportable gifts.)		
		EXEMPT	$
			$
			$
			$

I. LIABILITIES. *(Includes those of spouse and dependent children See pp. 32-33 of Instructions.)*

	CREDITOR	DESCRIPTION	VALUE CODE*
X	NONE (No reportable liabilities.)		

[redacted]

FINANCIAL DISCLOSURE REPORT

Name of Person Reporting	Date of Report
Patricia H. Minaldi	January 16, 2003

VII. Page 1 INVESTMENTS and TRUSTS -- income, value, transactions *(Includes those of spouse and dependent children. See pp. 34-57 of Instructions.)*

(1) Description of Assets (Including trust assets)	(2) Income during reporting period		(3) Gross value at end of reporting period			(4) Transactions during reporting period			
	(a) Amount Code 1 (A-H)	(b) Type Code 2	(c) Value Code 3 (J-P)	(d) Value Method Code 4 (Q-W)	(e) Type of investment, if exempt	(f) Date Month - Day	(g) Value Code 3 (J-P)	(h) Type Code 4	(i) Identity of other party to transaction
☐ NONE (No reportable income, assets,									
Minerex, LLC (family-owned oil & gas invest. co.)		None	J	W	EXEMPT				
Hibernia Nat. Bank (bank accounts)	A	Int.	K	T	EXEMPT				
Northwest Mutual Ins. Co. (escrow account)	A	Int.	J	T	EXEMPT				
Legg Mason Cash Reserve Trust	A	Div.	K	T	EXEMPT				
Legg Mason Special Invest. Trust	C	Gain	J	T	EXEMPT				
Legg Mason Cash Reserve Trust	A	Div.	J	T	EXEMPT				
Legg Mason Opportunity Trust	A	Gain	J	T	EXEMPT				
Legg Mason Cash Reserve Trust	A	Div.	J	T	EXEMPT				
Legg Mason Opportunity Trust	A	Gain	J	T	EXEMPT				
La. Deferred Compensation Plan									
Maxim Stock Index Portfolio		None	J	T	EXEMPT				
American Century Ultra Fund		None	J	T	EXEMPT				
Maxim INVESCO Small Cap Growth Portfolio		None	J	T	EXEMPT				
Other Property - St. Mary Parish (undivided interest)		None	J	W	EXEMPT				
EE United States Savings Bonds		None	J	W	EXEMPT				

Income Code: A=$1,000 or less B=$1,001-$2,500 C=$2,501-$5,000 D=$5,001-$15,000 E=$15,001-$50,000 F=$50,001-$100,000 G=$100,001-$1,000,000 H=More than $1,000,000

Value Code: J=$15,000 or less K=$15,001-$50,000 L=$50,001-$100,000 M=$100,001-$250,000 N=$250,001-$500,000 O=$500,001-$1,000,000 P=More than $1,000,000

Value Method Code: Q=Appraisal R=Cost (Real Estate Only) S=Assessment T=Cash Market U=Book Value V=Other W=Estimate

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Patricia H. Minaldi	January 16, 2003

VIII. ADDITIONAL INFORMATION OR EXPLANATIONS (Indicate part of Report.)

III. Non-Investment Income (continued)

6. 2002 Jack Lawton, Inc.
7. 2002 La. Health Services Indemnity Co.
8. 2002 Southern National Life Ins. Company

X. CERTIFICATION.

I certify that all information given above (including information pertaining to my spouse and minor or dependent children, if any) is curate, true, and complete to the best of my knowledge and belief, and that any information not reported was withheld because it met plicable statutory provisions permitting non-disclosure.

I further certify that earned income from outside employment and honoraria and the acceptance of gifts which have been reported are in mpliance with the provisions of 5 U.S.C. app., § 501 et seq., 5 U.S.C. § 7353 and Judicial Conference regulations.

gnature Patricia H. Minaldi Date 1/16/03

TE: ANY INDIVIDUAL WHO KNOWINGLY AND WILFULLY FALSIFIES OR FAILS TO FILE THIS REPORT MAY BE BJECT TO CIVIL AND CRIMINAL SANCTIONS (5 U.S.C. App., § 104.)

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Senator SESSIONS. Judge Altonaga, I was impressed with your background and going to Florida International with highest honors, Yale Law School, and law clerk to Judge Edward B. Davis in the Southern District of Florida. That is a good experience for a would-be Federal judge, and, of course, you have served as a judge now for a number of years.

And, Judge Minaldi, likewise, you went to Wesleyan University and graduated with honors and Tulane Law School, a fine law school, and have been a district attorney and a prosecutor and a judge now since 1997. Is that right?

Judge MINALDI. That's correct, Mr. Chairman.

Senator SESSIONS. Both of you, I think, have excellent backgrounds for the position that you would be seeking.

We always ask some questions relating to what has come to be known around here as judicial activism. I think that is a legitimate series of questions on inquiry to be made of nominees because this is the last political accountability you have. After confirmation, then if you do not have a proper respect for the legislative branch, the branch that is asked to confirm your nomination, or the executive branch that nominates you, then the system is not working correctly. So we need to know fundamentally: Do you respect the separation of powers? Do you understand the role that courts have in interpreting the law? Do you understand that you have not been politically empowered by the voters, which is traditionally the source of power in a democracy, but have been given a lifetime appointment, unaccountable to voters; and, therefore, if you do not show personal restraint and, by nature, you don't understand the role of the judiciary, then that is an upsetting thing, that can cause serious trouble.

And we have had on the bench and still have on the bench judges who just seem to enjoy causing turmoil, reinterpreting the meaning of the Constitution, it seems to me, to declare statutes unconstitutional or to take other actions that are dubious under traditional interpretations of the law.

So I guess I would ask both of you: Have you thought about that? Do you understand that if you want to be in politics now is your last chance to get out of the judicial branch and go into that? And are you willing to follow the law even if you don't like it, to enforce those statutes and the constitutional requirements even if they are not the best? I will start with you, Judge Altonaga.

Judge ALTONAGA. Thank you, Mr. Chairman. I would say that my primary obligation as a trial court judge is to interpret and study the law and to apply it, and whenever I am called upon to review an act of our legislature, begin the endeavor with a presumption of constitutionality.

I might add that my background as a litigator was to serve as an assistant county attorney representing local government, and I represented local leaders of our government, the commissioners and the mayor, and we assisted them in drafting local legislation, ever mindful that it could be subject to scrutiny by the courts and would very frequently be called upon to go into court to urge that the ordinance in question be deemed constitutional, reminding the courts that it was the commissioners and the mayor that made policy and that the courts were there to review the constitutionality

of the particular legislation but not the wisdom or the efficacy necessarily of the ordinance.

So I'm very mindful of what the role is, especially of a trial court judge. My role is not to make law. I am certainly not elected or placed into this position that I currently have. And if I am confirmed, that would not be my role or the mandate that I would have.

Thank you.

Senator SESSIONS. Judge Minaldi?

Judge MINALDI. Mr. Chairman, I actually welcome the opportunity to get out of politics and have nothing to do with politics anymore. I am a firm believer in the concept of separation of powers. I think it is a fundamental concept in our society and to be absolutely respected by judges.

I have absolutely no intention of doing anything other than applying the law as it exists, as legislated by Congress and as interpreted on those occasions by the Supreme Court. I don't have any desire to be a judicial activist. I think when I made my transition from being an advocate to being a judge on the State court, I knew what my responsibilities were in that regard, and I put those—the robes of advocacy aside and put on the robes that were appropriate for the bench; and that once you take your responsibility seriously, I think that's—it can be very easy for people who take that responsibility seriously to do.

Senator SESSIONS. And how long were you a prosecutor?

Judge MINALDI. Thirteen years, sir.

Senator SESSIONS. And were you a prosecutor, Judge Altonaga?

Judge ALTONAGA. I was a local government lawyer. My practice was civil.

Senator SESSIONS. I want to ask you this as a person who has spent the better part of a professional career as a prosecutor, Federal and State. I know you are committed to giving the defendant a fair trial, and, in fact, the appellate courts look over your shoulders to make sure you do give them a fair trial and will reverse a trial court if they make an error. But, really, it needs to be in your heart to give the defendant a fair trial.

But, also, I would ask you to think about this and ask you whether or not you will commit to give the prosecution a fair trial, because a prosecutor cannot appeal many of the rulings, most of the rulings that a trial judge makes. And there have been judges, when faced with questions, maybe they don't want to take time to research the law or they are not real sure what the law is and they just sort of routinely rule for the defendant on the theory that if they rule for the prosecutor they might get reversed or the case would have to be tried again.

I believe a prosecutor, if they have evidence that is worthy of being admitted in the court, ought to be able to have it admitted, and the judge shouldn't be erring, trying to level the playing field or be afraid to so rule.

Would you give the prosecutor a fair chance, Judge Altonaga?

Judge ALTONAGA. Mr. Chairman, I give both sides—it is my goal and it's my wish that in every case I give both sides a fair chance. And just by way of example, motions to suppress are routinely heard prior to trial, and the defense clearly has the right to seek

appellate review of an adverse ruling after the conclusion of the case, but the prosecution does not.

It is my practice in my courtroom to require that motions to suppress be heard before trial to give the prosecution, if it's my intention to suppress any evidence, time to consult and to file and seek extraordinary relief with the appellate court. So I am ever mindful that both sides are entitled to a fair trial, and I strive to do that in every case.

Senator SESSIONS. Well, I have been before great judges that consistently have adhered to that ruling, but I have seen judges who rule during trial, making it impossible to appeal. And sometimes I have thought or heard others talk about other judges who believed that the judge did that deliberately. So that would be wrong, I think.

Judge Minaldi, would you comment on that?

Judge MINALDI. Yes, Mr. Chairman. As you said, as a prosecutor for 13 years, I saw those kinds of judges, too. So I am very familiar with that, and I think it is an unfortunate thing.

I think we all have to be mindful of the awesome power that a prosecutor's office has, the ability to obtain arrest warrants, indictments and charging by bills of information, and it's an awesome power and can affect people's lives. I took that seriously when I was a prosecutor, but I take equally as seriously as a judge the awesome power and responsibility that a judge has in making sure that there is a level playing field for—that the State gets a fair trial, that the defendant gets a fair trial, and that the appropriate burdens of proof are applied in an appropriate manner.

Senator SESSIONS. I think you stated that very well, and as a young prosecutor, some of the Federal judges taught me a lot of lessons in court and made me better at my work because they didn't allow prosecutors to get away with anything, and I think that is certainly important.

But as you know, Judge Minaldi, when the government rests, an unelected Federal judge with a lifetime appointment can dismiss the case, grant a judgment of acquittal, and there is no appeal whatsoever and the defendant is released forever on that charge. So it is an august responsibility.

Judge MINALDI. It most definitely is, and one that I would take very seriously, Mr. Chairman.

Senator SESSIONS. Case management is something that I believe is important in a Federal judge, and maybe you can share some of your ideas about that. And, additionally, I would just ask for your commitment to work hard to manage the cases that will come before you. If there ever was a time when being a Federal judge was a pretty easy job, that is no longer the case. There are constant demands, cases are increasing in numbers, and for the most part, our judges are doing a good job of handling more cases and disposing of more cases.

So are you committed to managing your docket? And do you have any ideas about what you would like to do to improve case management?

Judge ALTONAGA. Mr. Chairman, I've been on the bench almost 7 years now, and during the course of that time, I have served in different divisions within our circuit, both in the county, at the

county level and at the circuit level. And every time one enters a new division, you learn about different ways of case management because the caseload is different depending on the division that you're in and the way of getting a case to final conclusion varies depending on the nature of the case.

So every time I've entered a new division, I've learned about ways to effectively case manage and move cases along so that they're not delayed, and that there's final resolution to the case in a timely manner.

In the criminal division where I currently am assigned, my last count was that I was the second lowest judge in terms of caseload. I effectively manage my cases by, number one, working very hard, by not simply setting the cases out in a long time period so I don't see the litigants or hear about the case until it gets called, but by bringing them in to check on the status, have the attorneys report to me what it is they are doing to make sure we are going to meet the anticipated date of trial, and work with the lawyers, if we're going to reset a trial, how much work is left to be done, how much time do you need to do it in, and to get some commitments. I think effective case management means that the judge needs to have a hands-on role with the lawyers and with the litigants and letting the lawyers know I know about what's happening in this case and I expect you to tell me if you're encountering some delay.

Senator SESSIONS. Judge Minaldi?

Judge MINALDI. Mr. Chairman, I'm currently on the court of—excuse me, the Docket Management, Case Delay Reduction Task Force that is a statewide task force throughout the State of Louisiana, and we are attempting to come up with some new and innovative methods for helping to decrease what is a widespread problem in most of the courts across the State and one that the public complains, I think, the most about, the delay that it takes in coming to a final conclusion in court.

I would like to stress, though, that no matter what we find or what we do, I don't think there's any magic formula for making cases go quickly because any solution that we find requires the hard work and tenacity of judges in making sure that they are available to do the work, that they pay close attention to their caseloads, and that they do everything they can to move those cases forward.

Unfortunately, I don't think that always happens, and I do commit to you that that is the type of judge I am right now, and if I'm lucky enough to be confirmed in this position, that is the kind of judge I will continue to be.

Senator SESSIONS. Well, you are right on there. We certainly need to emphasize case management.

Are you aware that in the Federal court the Congress has established very tight sentencing guidelines? I remember being at one Eleventh Circuit conference when I was United States Attorney, and one of the senior judges said, "The truth is, gentlemen, Congress does not trust you to sentence."

There was a real serious debate in America in the last 1970's about the efficacy of incarceration, even, and we went through a big, tough debate over that, and the Congress concluded and the American people concluded that punishment does make a dif-

ference. And I have no doubt in my mind that one of the great causes of the reduction in crime is the fact that we are identifying repeat offenders and they are serving longer time.

I guess my question to you, though, is this: Having had your own standards of sentencing, being used to evaluating cases in State systems according to your own subjective analysis about what sentence ought to be imposed, which I am sure has validity, I ask you to recall that the Congress has narrowed your discretion dramatically. A tough sentence in a big drug case may be, if you like the defendant and feel sorry for them, 25 years; if you don't like them and you want to give them a heavy sentence, it is 28 or 29, and that is about all the range you have got.

And so there have been some judges that are so personally committed one way or the other about the sentence that they attempt to manipulate the guidelines, to twist them in a way that allows them to more nearly effect the sentence they think is appropriate.

So, again, you still have a chance to get out of this job. Are you willing to follow the guidelines that the Congress put forward even if you think they are stupid?

Judge ALTONAGA. Senator, first of all, I would certainly follow the law in all respects, and that would include the guidelines. In my current position, although I do have certain discretion in sentencing a certain category of defendants, my discretion has also been taken away by the Florida Legislature in many respects. We have minimum mandatories. We have mandatory sentencing in many areas. For those who have prior convictions and have a criminal record, sometimes we have absolutely no discretion.

So I am right now in the position of having both areas where I do exercise discretion and areas where I do not. I am comfortable in adhering to the laws that I apply now as a State judge, and if I am lucky enough to be confirmed, I am comfortable that I will similarly follow the guidelines and mandatory sentencing as established by Congress.

Judge MINALDI. Mr. Chairman, I am sure I would never think that the sentencing guidelines were stupid, but I will tell you that although there is probably a little bit more discretion in the Louisiana State courts that there are in the Florida State courts, we do have certain crimes for which there are mandatory minimums. We do have certain laws regarding repeat offenders which prescribe mandatory minimums as well. So I'm not unused to that system.

We did at one point have sentencing guidelines. They were later repealed. However, I don't—I'd have to say that I think one of the most onerous duties a judge has is to attempt to effect an appropriate sentence for any defendant, and in Louisiana, we are told that we must absolutely individualize and particularize those sentences to the defendant and the facts of the crime.

So it will be different, but I don't think I will have any trouble whatsoever applying the sentencing guidelines as Congress has felt appropriate to hand down.

Senator SESSIONS. In many ways, it is a freeing thing. If somebody comes before you and you can give them 20 years or probation in a State court system, here the Congress objectively, before this case ever came before you, set out the factors that would narrow

that range, and I guess in some ways it can free your conscience rather than burden your conscience. But I have seen judges make their lives miserable by feeling that if they were writing the guidelines, it wouldn't have been the same. And I think you have just got to follow them because if judges don't, then the system begins to break down. And if the U.S. Attorneys don't believe you are going to follow them, then they don't follow them, and the whole thing begins to collapse.

Before the guidelines, we had tremendous diversity in sentencing. So that was why Senator Thurmond and Senator Kennedy came together and passed the guidelines. It provides uniformity of sentences based on objective factors that treat the poor, the rich, the black, the white, the same.

Well, this has been an interesting discussion. I know that you will do well on the bench. Your records certainly indicate that. I believe and I hope that your nominations would move forward in an expeditious way, that you won't be left in limbo for too long. If there is anything we can do here on this Committee to answer any questions, I hope that you will ask them. And if you become a judge and you think there is something wrong with the guidelines, write me. Don't violate them, would be my suggestion. In fact, I have offered legislation with Senator Hatch to narrow what we think is an extreme difference between crack and powder cocaine. I think if the Congress is going to take over sentencing, we ought to constantly monitor it to make sure that it is making sense in the real world and not ask judges to enforce rules that sounded good 15 years ago but, as history has disclosed, may be not quite so healthy.

Anything else that you have before the Committee?

Judge MINALDI. No. Thank you.

Judge ALTONAGA. Thank you, Mr. Chairman.

Senator SESSIONS. Thank you. Congratulations on getting this far.

We are adjourned, and we will note the record will remain open until Tuesday, April 8th at 5:00 p.m. for follow-up questions. We are adjourned.

[Whereupon, at 2:27 p.m., the Committee was adjourned.]

[Questions and answers and submissions for the record follow.]

QUESTIONS AND ANSWERS

Responses of Judge Carolyn Kuhl to Follow-up Questions From Senator Biden

Unenumerated Rights

From 1982 to 1985, you were Deputy Assistant Attorney General for the Civil Division. During your tenure in that position, the Supreme Court agreed to hear *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986), a challenge to several Pennsylvania abortion restrictions.

The Reagan administration filed a brief in *Thornburgh* that not only supported the Pennsylvania restrictions, but also called for an outright reversal of *Roe v. Wade*. The Acting Solicitor General at the time the *Thornburgh* brief was filed, Charles Fried, wrote, in his book, *Order and Law*, that when he was considering what position to take in the case, "[t]he most aggressive memo came from my friends Richard Willard and Carolyn Kuhl in Civil, who recommended that we urge outright reversal of *Roe*."

Q. In light of your prior position that *Roe* should be overturned, do you believe that the Constitution includes unenumerated rights? If not, why not? What unenumerated rights are included in the Constitution? Is a right to privacy among those rights? Would you distinguish between the right to an abortion and other privacy rights?

Response:

The Supreme Court has recognized certain rights as inherent in the Constitution. These rights, grouped together, often are referred to as unenumerated rights. One of these rights is the fundamental right to travel, described by the Supreme Court in *Shapiro v. Thompson*, 394 U.S. 618 (1969). The fundamental right to vote also is described as an unenumerated right, because restrictions on voting have been held unconstitutional unless they satisfy the requirements of strict scrutiny, even though such restrictions may not violate a specific constitutional provision. (See, e.g., *Kramer v. Union Free School District*, 395 U.S. 622 (1969).) The fundamental right to privacy has been defined to include a number of specific rights, including the right to marry (*Loving v. Virginia*, 388 U.S. 1 (1967)), the right to educate one's children as one chooses (*Pierce v. Society of Sisters*, 268 U.S. 510 (1925)), the right to procreate (*Skinner v. Oklahoma*, 316 U.S. 535 (1942)), the right to use contraceptives (*Eisenstadt v. Baird*, 405 U.S. 438 (1972)), the right to abortion and to reproductive freedom (*Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992)) and the right to refuse unwanted medical treatment (*Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261 (1990)).

The right to have an abortion was defined as a privacy right in *Roe v. Wade*, 410 U.S. 113 (1973). The constitutional underpinnings of the right to an abortion were firmly rooted in the due process clause by the Supreme Court's decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), when the Supreme Court reconsidered and strongly reaffirmed *Roe v. Wade*.

As I stated in my confirmation hearing, I am fully committed to following these precedents and to applying the law established in *Roe* and in *Casey*. After the *Casey* decision, a woman's constitutional right to privacy in reproductive decisionmaking is as well-settled as any constitutional precedent.

It is important to distinguish the role of an advocate from that of a judge. The brief in the *Thornburgh* case was filed in 1985, seven years before the precedent of *Roe v. Wade* was firmly reestablished in *Casey*. At that time I was a lawyer in the Department of Justice and it was my job to represent the views of the government and of the President. President Reagan had stated publicly that *Roe v. Wade* was wrongly decided and should be overruled.

A judge of an inferior court, such as the United States Court of Appeals for the Ninth Circuit, must follow every precedent of the United States Supreme Court. As a judge, my job is not to question Supreme Court precedent, but to follow it.

Stare Decisis

Q. What is your approach to *stare decisis* in judicial decision-making – how powerful is an existing court decision in influencing your decision?

Response:

It is never appropriate for an inferior court (such as the Ninth Circuit) to overrule the precedent of the Supreme Court. A judge of an inferior court has authority only to follow Supreme Court precedent, not to question it.

The Supreme Court has used various formulations to describe when it will overrule its own precedents. One such formulation is stated in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). The *Casey* Court stated that the Supreme Court will consider whether the precedent's "central rule has been found unworkable;" whether the rule "could be removed without serious inequity to those who have relied upon it or significant damage to the stability of the society governed by it; whether the law's growth in the intervening years has left . . . [the] rule a doctrinal anachronism discounted by society; and whether [the precedent's] premises of fact have so far changed" since the precedent was decided "as to render its central holding somehow irrelevant or unjustifiable in dealing with the issue it addressed." (*Casey*, 505 U.S. at 855.)

Question:

At the time that you were in the Justice Department, you advocated the outright reversal of *Roe v. Wade*. In a brief to the Supreme Court, the Justice Department stated that "[a] decision as flawed as . . . *Roe v. Wade* . . . is less aptly sheltered by th[e] doctrine [of *stare decisis*] from criticism and abandonment".

Q. As a circuit court judge, would your approach to Supreme Court decisions differ from the position summarized in that quotation? Would you look at the question of whether a Supreme Court decision is flawed in its reasoning in determining what weight to grant it in your consideration? Would it receive less weight than another decision similarly on point that is not so flawed? What other factors would you look to in determining whether to apply an existing decision of the Supreme Court to the case before you?

Response:

As stated above, a judge of an inferior court never may overrule or fail to apply the precedent of the Supreme Court. Even when it would be entirely appropriate for a lawyer to argue on behalf of a private client or the government that Supreme Court precedent should be overruled, a judge of an inferior court must faithfully follow and apply that precedent.

The quotation referred to above was written as an advocate. Lawyers should make legal arguments for the fullest benefit of their client's cause. According to Rule 3.1 of the ABA's Model Rules of Professional conduct, a lawyer may make an argument if "there is a basis for doing so that is not frivolous, which includes a good faith argument

for an extension, modification or reversal of existing law." It is appropriate for a government lawyer, as an advocate, to ask the Supreme Court to reconsider a precedent when that serves the interest of the government as determined by the President and when a reasonable argument can be made in favor of overruling the precedent.

Again, it is important to emphasize that the role of an advocate is quite different from the role of a judge. As a judge, my job is not to question Supreme Court precedent, but to apply it.

Sexual Harassment

During your service as Deputy Solicitor General, you signed an amicus brief in *Meritor Savings Bank v. Vinson*, the landmark case in which the Supreme Court first ruled that sexual harassment in the workplace violates Title VII of the Civil Rights Act of 1964. The plaintiff, a bank teller, had alleged that her supervisor, the branch manager, had forced her to submit to his unwelcome sexual advances over a four-year period, during which she feared she would lose her job if she refused.

Your brief, on behalf of the United States and the EEOC, took the side of the employer. You argued in support of the district court's ruling that what occurred was simply a voluntary personal relationship between co-workers, and that this is not actionable under Title VII.

Your brief disregarded the power held by a supervisor over a subordinate in these circumstances, as well as the EEOC's own guidelines providing that sexual harassment can be actionable as long as the advances are "unwelcome." The Supreme Court unanimously rejected your position in an opinion written by Justice Rehnquist.

Q. Given that the EEOC is charged with enforcing Title VII, and at the time had guidelines in place setting forth the "unwelcomeness" standard, why didn't your brief support the plaintiff and the EEOC's interpretation (a stronger sexual harassment standard)?

Response:

The brief filed on behalf of the United States and the EEOC in the *Meritor* case did not advocate a voluntariness standard. Rather, the brief in fact argued for a standard based on whether sexual advances made in the workplace were "unwelcome." Indeed, the first heading in the "Discussion" section of the brief stated: "Unwelcome Sexual Advances That Create A Hostile Working Environment Violate Title VII." (Brief for the United States at 7.)

The brief stated that "[s]exual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality." (Brief for the United States at 12, quoting *Henson v. City of Dundee*, 682 F.2d 897, 902 (11th Cir. 1982).) The standard urged in the brief was the standard set forth in regulations of the EEOC: "Because of the important interests at stake in defining the boundaries of unlawful sexual harassment, the EEOC, the courts, and the commentators have correctly emphasized several principles to guide the disposition of such charges. *The gravamen of any hostile environment claim must be that the alleged sexual advances are 'unwelcome'* (29 C.F.R/ 1704.11(a))." (Brief for the United States at 13 (emphasis added).) The Supreme Court accepted the United States' argument that the appropriate standard was whether the advances were unwelcome.

The district court in the *Meritor* case (the finder of fact) had found that the plaintiff "was not the victim of sexual harassment." (Brief for the United States at 3;

Meritor Savings Bank v. Vinson, 477 U.S. 57, 60.) The brief for the United States argued that the trial court's findings taken as a whole supported the conclusion that the supervisor's sexual advances "were not unwelcome." (Brief for the United States at 17.) However the Supreme Court concluded that the district court's finding that the alleged sexual conduct was "voluntary" meant that the trial court's ultimate conclusion must have been based on the erroneous "voluntariness" standard rather than on the "unwelcomeness" test. (*Meritor*, 477 U.S. at 68.) Thus the United States and the Supreme Court disagreed about how to interpret the trial court's specific findings in an individual case – not about the legal standard to be applied.

The important development in *Meritor* for the law and for the rights of women was that the Supreme Court accepted the United States' argument and for the first time held that sex harassment is a violation of Title VII, and moreover, agreed with the position of the United States and the EEOC that unwelcome sexual advances violate Title VII when they create a hostile work environment. I stated publicly after the Supreme Court's decision that the government was very happy with the Court's ruling.

Q. If the argument in your brief had prevailed, a woman whose supervisor used the power of his position to induce her to engage in unwelcome sex acts with him would have been left with no sexual harassment claim under Title VII unless, perhaps, she could show that she was physically forced to submit to him against her will. Did you believe then that was the correct interpretation of Title VII? Do you believe it now?

Response:

As set forth in response to the prior question, the brief for the United States did urge the stronger standard of the unwelcomeness test rather than a test based on "voluntariness." The brief relied on EEOC regulations in arguing that "[t]he gravamen of any hostile environment claim must be that the alleged sexual advances are 'unwelcome.'"

The Supreme Court accepted the government's argument and adopted the unwelcomeness standard as the test for determining when an employee has been subjected to sexual harassment. Thus the Supreme Court not only held for the first time that sex harassment is a violation of Title VII, but also agreed with the position of the United States and the EEOC that unwelcome sexual advances violate Title VII when they create a hostile work environment.

Q. In your *Meritor* brief, you argued that courts could consider a woman's clothing and/or speech in deciding whether or not she had been subject to sexual harassment. Do you agree that it is valid for courts to do that? How is it relevant? Do you believe that the way a woman dresses suggests that she is "asking" for sexual advances?

Response:

The government's brief in *Meritor* did not argue that a woman's clothing or speech always is admissible in a sex harassment case. Rather, the brief expressed the EEOC's position that evidence of a plaintiff's sexually provocative speech or dress was

not "irrelevant as a matter of law" in determining whether sexual advances complained of are unwelcome. The brief relied on EEOC guidelines and precedent, stating:

> The EEOC guidelines emphasize that the trier of fact must determine the existence of sexual harassment "on a case by case basis," viewing "the record as a whole" and "the totality of the circumstances" (29 C.F.R. 1604.11(b)). The Commission in its decisions has held that an individual's "participating in sexual conduct in the workplace," e.g., by "using dirty remarks and telling dirty jokes," may indicate that the sexual advances complained of are not "unwelcome." E.g., 2 Empl.Prac.Guide (CCH P6839, at 7014 (Nov. 28, 1983)). The courts have likewise held that a complainant's sexual aggressiveness and sexually explicit conversations may be relevant in assessing a charge of harassment. E.g., *Gan v. Kepro Circuit Systems*, 28 Fair Empl. Prac. Cas. (BNA) at 640. While evidence of this sort must obviously be used with care, there is no basis for creating a per se rule against its admissibility.

(Brief for the United States and the Equal Employment Opportunity Commission.)

The Supreme Court's opinion in *Meritor* adopted these EEOC guidelines and approved of the position taken in the government's brief. The Court stated:

> [It is not the case that] a complainant's sexually provocative speech or dress is irrelevant as a matter of law in determining whether he or she found particular sexual advances unwelcome. To the contrary, such evidence is obviously relevant. The EEOC Guidelines emphasize that the trier of fact must determine the existence of sexual harassment in light of "the record as a whole" and "the totality of circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred." 29 C.F.R. section 1604.11(b) (1985). Respondent's claim that any marginal relevance of the evidence in question was outweighed by the potential for unfair prejudice is the sort of argument properly addressed to the District Court. . . . While the District Court must carefully weigh the applicable considerations in deciding whether to admit evidence of this kind, there is no per se rule against its admissibility.

Meritor Savings Bank v. Vinson, 477 U.S. 57, 69 (1986).

Both the government's brief in *Meritor* and the Supreme Court's decision emphasized that care must be taken in determining the admissibility of evidence of the words and actions of the plaintiff in a sex harassment case.

The Federal Rules of Evidence limit when evidence of a plaintiff's conduct can be offered in sex harassment cases. Federal Rule of Evidence 412 states that "evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim [of sexual misconduct] is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. Evidence of an alleged victim's reputation is admissible only if it has been placed in controversy by the alleged victim." The Rule also requires a party intending to offer such evidence to file a written motion in a confidential proceeding so that the trial court can carefully determine whether the probative value of the evidence substantially outweighs the danger of harm to the victim if the evidence is received.

These evidentiary rules are important and must be carefully and sensitively applied to ensure that the victim is not "blamed" for the conduct of the perpetrator.

April 29, 2003

Responses of Judge Carolyn Kuhl to Follow-Up Questions from Senator Durbin

1. During the 2000 presidential campaign, President Bush pledged that he would appoint "strict constructionists" to the federal judiciary, in the mold of Supreme Court Justices Clarence Thomas and Antonin Scalia. At your hearing, you described yourself as merely a "constructionist."

A. Please describe what you meant by calling yourself a "constructionist," and how the term differs, in your mind, from "strict constructionist."

Response:

I approach the task of interpreting the law without reference to any personal desire as to the outcome of the particular case. If there is precedent on the point of law from an appellate court, I follow that precedent. I approach problems of statutory construction with due regard for the intent of the legislature in enacting the legislation. I look first and primarily at the language of the statute itself and the text of the particular provision of the statute at issue in the context of the remainder of the legislation and legislation on related topics. Legislative history also can be important. Even when an issue is one of first impression, often there are case precedents that are instructive. For example, there may be precedents interpreting other portions of the statue at issue, interpreting related statutes, or construing specific terms used in the statute. I consider such precedents in deciding the legal issue at hand.

I believe that the term "constructionist" captures this description.

B. Do you think that the Supreme Court's decisions in *Brown v. Board of Education, Miranda v. Arizona,* and *Roe v. Wade* are consistent with "contructionism"? Why or why not? Are they consistent with "strict constructionism"? Why or why not?

Response:

As a lower court judge, in applying the approach to judging outlined in response to the previous question, I would not criticize these precedents, but rather would apply them. A judge of an inferior court (such as the Ninth Circuit) may not overrule any precedent of the United States Supreme Court. As a judge, my job is not to question Supreme Court precedent, but to apply it.

The particular precedents mentioned in this question have been reaffirmed by subsequent courts. *Brown v. Board of Education*, by denouncing the doctrine of "separate but equal," set the stage for the enactment of the Civil Rights laws and is a landmark decision of the Supreme Court. *Miranda v. Arizona*, recently was reaffirmed by the Supreme Court in the case of *Dickerson v. United States*, 530 U.S. 428 (2000). *Roe v. Wade* was reaffirmed by the Supreme Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

2. In a recent article published in the Sunday *New York Times* magazine, Judge Luttig of the 4th

Circuit discussed the politics of judicial appointments. He said: "Judges are told, 'You're appointed to do these things.' So then judges start thinking, Well, how do I interpret the law to get the result that the people who pushed for me to be here want me to get? I believe that there's a natural temptation to line up as political partisans that is reinforced by the political process."

A. You wrote a 1993 article about the judicial selection process. Do you agree with this analysis by Judge Luttig?

Response:

I think history demonstrates that federal judges, who have life tenure under our Constitution, generally have not been political partisans for the Presidents who appointed them.

B. In your 1993 article, you criticized the Clinton Administration for its judicial selection process. Please explain the basis of your criticism and whether you continue to hold those views.

Response:

My criticism of President Clinton's judicial selection procedure for Supreme Court nominees was process-oriented. The point of the article was to suggest that a process which allowed names of candidates under consideration to become public, apparently to gauge public reaction, could be unfair and embarrassing to candidates who are so publicly vetted, as was the case with Judge (now Justice) Breyer.

I continue to believe that the criticisms stated in the article were well-taken.

3. Other than the *Plessy* and *Dred Scott* decisions, please list three U.S. Supreme Court cases with which you disagree, and explain why.

Response:

There are several Supreme Court decisions that are widely viewed as erroneous and since have been overturned or limited. They include *Korematsu v. United States*, 323 U.S. 214, which excluded persons of Japanese ancestry from particular areas during World War II, and thereby allowed American citizens to be removed from their homes and placed in internment camps. In the 1990's Congress passed a law recognizing that "a grave injustice was done to both citizens and permanent resident aliens of Japanese ancestry by the evacuation, relocation, and internment of civilians during World War II." (Pub.L. 100-383, section 2(a), 102 Stat. 903.)

The Supreme Court's decision in *Lochner v. New York*, 198 U.S. 45 (1905), has been soundly rejected by subsequent Supreme Court decisions. That case struck down a New York state law placing a sixty-hour limit on a bakery employee's work week. The Supreme Court engaged in an aggressive second-guessing of the legislature's goals and motives, narrowly interpreted the scope of the state's police power, and struck down the statute under the Due Process Clause of the Fourteenth Amendment on the ground that it interfered with freedom of contract.

Similarly, in *Adair v. United States*, 208 U.S. 161 (1908), the Supreme Court struck down legislation forbidding an interstate railroad to discharge an employee for union membership. The

Court's reasoning essentially enshrined the doctrine of employment at will as a constitutional guaranty for the benefit of employers. This case and its reasoning were overruled in *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941).

4. At your hearing, you stated that Justice Felix Frankfurter is the type of judge whom you would try to emulate. One commentator, Melvin Urofsky, wrote a law review article in which he wrote: "For all his constant reference to Holmes and Brandeis, Frankfurter could never separate his judicial from his private views as they did." Ms. Kuhl, do you agree with that analysis of Frankfurter? Why or why not?

Response:

I admire Justice Frankfurter for the judicial philosophy he articulated. I have been, in my career, a practicing lawyer and a trial judge. I have not studied Justice Frankfurter's entire body of work as a judge, and thus I cannot offer an opinion on whether or to what extent Justice Frankfurter's decisions strayed from his articulated judicial philosophy.

5. In terms of judicial philosophy, please name several Supreme Court Justices, in addition to Felix Frankfurter, whom you admire and would like to emulate on the bench.

Response:

I certainly admire the wisdom and foresight of Chief Justice John Marshall. His insight into the role of the judicial branch under the Constitution created the fundamental outline for all subsequent constitutional jurisprudence. His analysis was brilliant, and he wrote clearly. I admire Justice Black for his commitment to taking seriously the text of the Constitution. I admire the second Justice Harlan for his intellectual honesty, rigor and unwillingness to try to shape the law to conform to his own views.

6. As a lawyer in private practice, you represented Philip Morris in the case *State of Minnesota v. Philip Morris* (1995) in which the State of Minnesota and Blue Cross alleged that tobacco companies are responsible for smoking-related diseases. In this litigation, a document entitled "Top Secret Operation Rainmaker" was discovered, allegedly detailing a plan by Philip Morris to purchase a major media outlet in order to influence public information about tobacco products. What was your involvement in the production of this document and, more generally, in this litigation?

Response:

Philip Morris was a client that was brought into my firm by other lawyers in the firm. I was asked to work on the *State of Minnesota* case by them and did so out of loyalty to my partners during about one year prior to my taking the bench.

My name appears on three briefs filed in this case. One was a brief in which Phillip Morris sought to dismiss Blue Cross and Blue Shield of Minnesota from the case on the ground that Blue Cross and Blue Shield had not sustained injury. The brief argued that only the subscribers of Blue Cross and Blue Shield could have been injured by the actions of the tobacco company, not the insurance association itself.

In the second brief, Philip Morris sought to protect from discovery databases that had been prepared as part of the client's litigation efforts. The third brief argued that other litigants should be allowed access to the documents produced in the Minnesota litigation on a case-by-case basis rather than by way of a blanket order.

I do not recall being involved in the review of any Philip Morris documents for production in litigation. I do not recall a document entitled "Top Secret Operation Rainmaker," allegedly detailing a plan by Philip Morris to purchase a major media outlet in order to influence public information about tobacco products.

7. In another case, you represented tobacco distributor Kennedy Wholesale in its attempt to avoid paying a tax required under California's Tobacco Tax and Health Protection Act of 1988, which had been enacted by voter referendum. Your client had paid the tax under protest and then sued, challenging the Act's constitutionality under the state Constitution, which provides that all taxes enacted by the legislature must be passed by a two-thirds vote. You argued that, by allocating some tax revenues to health care, the Act violated California's "Single-subject Rule" for referenda. The California Supreme Court rejected your arguments, holding that the public had the right to pass such laws and that the different provisions were sufficiently germane to a single subject to render the statute viable. Do you believe that the California Supreme Court made a mistake in its ruling? Do you believe, more generally, that courts have been too generous to plaintiffs in tobacco litigation lawsuits?

Response:

Lead counsel for Kennedy Wholesale in this case was my partner Ronald L. Olson. The legal arguments to which this question refers were made while I was serving as an advocate for a client, not as a judge. Lawyers should make legal arguments for the fullest benefit of their client's cause. According to Rule 3.1 of the ABA's Model Rules of Professional Conduct, a lawyer may make an argument if "there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law."

It is important to distinguish the role of an advocate from that of a judge. As a judge, my job is to apply the precedent established by the courts to which my court is inferior, not to question those precedents. I have no problem with applying the precedent established by the California Supreme Court in *Kennedy Wholesale, Inc. v. State Board of Equalization*, 53 Cal.3d 245 (1991), and would do so fairly and properly.

Regarding whether courts have been "too generous to plaintiffs" in tobacco litigation, my experience as a trial judge is that juries generally have remarkable wisdom. My observation has led me to conclude that jurors take the obligations of their office very seriously. Individual jurors work extremely hard to put aside their prejudices and preconceptions, to objectively judge the facts, and to apply the law to the best of their ability. When these individuals work together to decide a case, the wisdom of the group is greater than the wisdom of any individual. Like all human institutions, juries fail sometimes. But it is my belief that they "get it right" more often than most human institutions. I have no reason to believe that the jury system operates less well in adjudicating the cases of plaintiffs in tobacco litigation than in adjudicating other types of cases.

8. You are a member of the Federalist Society. Why do you belong to this organization?

Response:

I have attended speeches and debates sponsored by the Federalist Society and have spoken or served as a moderator for a panel at Federalist Society events on a few occasions. I have participated in these activities because I believe that the Federalist Society's primary goal of ensuring that law students and lawyers have an opportunity to hear a diversity of viewpoints is a worthy purpose. Law professors of all viewpoints, including Erwin Chemerinsky, Walter Dellinger, and Akil Amar, have participated in Federalist Society events and have valued these programs as a forum for debate.

9. 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. While some members of the academic community have dissented from these views, by and large they are taught simultaneously with (and indeed as if they were) the law. The Federalist Society for Law and Public Policy Studies is a group of conservatives and libertarians interested in the current state of the legal order."

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?

Response:

I am not and never have been a law professor. I have only an impressionistic view of the extent of the varieties of legal theories taught at these legal institutions. Nevertheless I have the impression that in the late 1970's, when the Federalist Society was founded, some law schools did have faculties that generally advocated an activist role for the courts. I have the impression that more recently there has been a broader range of views of the law and the role of the courts represented on many law school faculties. I served for a number of years in the 1990's on the Board of Visitors of Duke Law School. My sense is that the faculty of that school does represent a range of views, and I know that there is an admirable atmosphere of toleration among faculty members there.

10. 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 need to be reordered? If so, which ones? On which traditional values should there be a premium, and why?

Response:

I did not participate in writing the mission statement that you have quoted and have not discussed it with any officer or director of the organization. Therefore I am not able to opine as to what specifically the statement means by "traditional values." I certainly think that the legal

system should place a premium on individual liberty and the rule of law. As I trial judge I often urge members of the Bar, and the Bar as an institution, to adopt the values of candor, civility, ethical conduct, hard work and preparation. I think of these as traditional values, and ones that need to be promoted consistently. I also think that judges should place a premium in their own work on the traditional judicial role of interpreting the law rather than legislating from the bench.

11. Please describe the *pro bono* work you performed during your ten years in private practice.

Response:

When I was in practice I represented Norma Mays in a case referred through Los Angeles Public Counsel. Ms. Mays had been unlawfully deprived of legal title to her residence in a scheme by a lender who approached her when her house was in foreclosure. Through a settlement after suit was filed, *Mays v. Johnson,* C 692 956 (L.A. Superior Court), Ms. Mays recovered title to her property and was released from a $12,000 debt to the lender.

I represented Dimas and Leonor Gonzales in another case referred by Public Counsel. Mr. and Mrs. Gonzales had applied for a loan and, although no loan transaction was concluded, their names somehow were forged on a grant deed in favor of two strangers. I filed on their behalf a complaint for cancellation of a written instrument. *Gonzales v. Carswell,* No. YC005243 (L.A. Superior Court). The persons named on the deed did not answer the complaint, and a default judgment declaring the forged deed null and void was entered in favor of the Gonzaleses.

During the time I was in private practice after I left government service, I had two children and maintained a partnership at a major Los Angeles law firm. I tried to spend as much time as I could with my daughters in their most formative years. I am very glad that I now have the opportunity to serve as a trial judge in our state courts and thus to return full time to public service.

April 29, 2003

Responses of Judge Carolyn Kuhl to Follow-up Questions from Senator Edwards

Question #1

In your 1994 article, Employment at the Will of the Courts," (*Law, Economics & Civil Justice*, Free Congress Foundation), you claimed that Title VII and other federal laws against job discrimination, contractual rights of union members, and state laws protecting workers from unfair treatment, taken together, unduly inhibit employers from firing workers with whom they are dissatisfied, and you emphasized the costs to society of tying employers' hands in this way.

A. Why did you choose to write an article focusing on the costs to employers and society of the laws against unfair treatment of workers, as opposed to the costs to workers and society of discrimination on the basis of race, sex, or other arbitrary factors or other forms of unfair treatment of workers?

Response:

I respectfully disagree with the question's characterization of the article. The article points out that the civil rights laws can be justified based not only on concepts of morality (which alone would fully justify the statutes) but also on concepts of economic efficiency. The article states: "Title VII of the Civil Rights Act of 1964 outlawed employment decisions based on the patently irrational considerations of race, sex, national origin and religion. These civil rights laws were promoted based not only on arguments of morality but also on concepts of economic rationality. That is, because race and these other personal characteristics are unrelated to job performance, taking them into account would be economically inefficient." (Employment at the Will of the Courts, p. 186.)

Indeed a principal goal of the article is to point out the irony that those who were most deserving of protection in the workplace, persons who were subject to adverse job action based on the "patently irrational considerations of race, sex, national origin and religion," had less generous remedies under the federal civil rights laws that the expansive remedies many state courts had created for white, male, non-union employees. As the article states: "Thus because the court system has reached out to create remedies [including tort damages and punitive damages] for those employees who have been largely or entirely omitted from the protections of unionization and federal statute, these employees – the white, male, middle- and upper-middle class – ironically have sometimes obtained more generous protections. The civil rights statutes of the 60s and 70s provide no damages for emotional distress and no punitive damages. With the exception of the age discrimination act, these statutes do not provide for a jury trial. Similarly union contracts provide for remedies limited to reinstatement and back pay with an adjudication by an arbitrator who has virtually unreviewable discretion." (*Id.*, p. 188.)

B. Have you ever written any brief or article about the cost to workers and society of discrimination on the basis of race, sex, or other arbitrary factors or other forms of unfair treatment of workers?

Response:

I have written opinions about unfair treatment of workers. I wrote the appellate decision in *Iwekaogwu v. City of Los Angeles*, 75 Cal.App.4th 803 (1999), during the three months I sat as a Justice Pro Tempore of the California Court of Appeal. In this case I upheld a jury award of $500,000 to an African-American employee of the City of Los Angeles who had brought suit for discriminatory treatment on the basis of race and national origin and for retaliation. The defense argued that the evidence offered by the plaintiff at trial was insufficient to support the jury's verdict that Mr. Iwekaogwu had been retaliated against for complaining that he had been discriminated against on the basis of race. This argument required a careful review of the entire trial record to determine (1) whether the adverse employment decisions occurred after Mr. Iwekaogwu had complained about discrimination and whether the persons who made the decisions knew about Mr. Iwekaogwu's complaints, and (2) whether a large verdict for emotional distress damages alone (over $450,000) could be upheld in the absence of any evidence that plaintiff had sought psychiatric or psychological counseling.

My review of the record demonstrated that after Mr. Iwekaogwu had complained about being discriminated against, he had been denied two promotions and had been subject to a discriminatory denial of the opportunity to receive overtime pay. The defense argued that there was not sufficient evidence that the relevant decision makers knew of Mr. Iwekaogwu's discrimination complaint and acted in retaliation. I rejected such a "narrow . . . view of the type of evidence that may be offered to show that an employer's nonretaliatory explanation for its actions is pretextual," and relied on Ninth Circuit precedent for a broader standard more favorable to the plaintiff. (*Id.* at 816.) I also rejected the notion that individual employment decisions should be analyzed apart from discriminatory statements made in the course of other employment decisions. (*Id.* at 817.) I also rejected the defense argument that the jury could not consider plaintiff's circumstantial proof to support a finding that the persons who denied promotions to Mr. Iwekaogwu knew about his complaints of discrimination. Finally, I rejected the defense claim that the amount of emotional distress damages was excessive. Even though no doctor testified concerning his emotional distress, I held that the jury could rely on his own and his family's statements about the stress and changes in Mr. Iwekaogwu's personal relationships because of the retaliation at work, and his fear of physical harm from coworkers. Therefore I upheld the entire $500,000 damages award.

In a case involving the rights of an openly gay police officer, *Grobeson v. City of Los Angeles*, Case No. BC 150151, I overturned discipline of that officer for having worn a police department uniform in a gay rights parade and for having conducted recruitment activities aimed at the gay and lesbian community. I wrote that "California law is clear that a person facing an administrative hearing that could affect his fundamental rights must have clear notice of the charges against him." (Opinion at 15.) Because the Police Department had violated Sergeant Grobeson's due process rights, by failing to give him proper notice of the charges against him, I overturned the Police Department's discipline

of Sergeant Grobeson in its entirety. (*Id.* at 18-19.)

Question #2

In your article, you criticize laws prohibiting employment discrimination, such as Title VII of the Civil Rights Act, on the ground that they "left a minority of the populace – white, male and non-union – with no legal protections in their employment status."

A. Please explain why you believe that laws intended to protect one class of people necessarily harm another group.

B. Why do you think Title VII strips these particular individuals - "white, male and non-union" - of their legal rights?

Response:

Again, I respectfully disagree with the characterization of the article. The article does not criticize the civil rights laws. Rather, the article praises the civil rights laws because they outlawed workplace decisions based on "the patently irrational considerations of race, sex, national origin and religion." (Employment at the Will of the Courts at p. 186.) The article notes that the civil rights laws are justifiable "based not only on arguments of morality but also on concepts of economic rationality," noting that "because race and these other personal characteristics are unrelated to job performance, taking them into account would be economically inefficient." (*Id.*)

The article does not suggest that the civil rights laws were wrong in not providing legal protections for white, male and non-union employees. The article suggests that state court judges stepped in to protect this latter group, thereby undermining the doctrine of employment at will, in part because "within this class are persons with whom state court judges can most readily identify." (*Id.* at 187.)

Indeed, a principal goal of the article is to point out the irony that those who were most deserving of protection in the workplace, persons who were subject to adverse job action based on the "patently irrational considerations of race, sex, national origin and religion," had less generous remedies under the federal civil rights laws than the expansive remedies many state courts had created for white, male, non-union employees. As the article states: "Thus because the court system has reached out to create remedies [including tort damages and punitive damages] for those employees who have been largely or entirely omitted from the protections of unionization and federal statute, these employees – the white, male, middle- and upper-middle class – ironically have sometimes obtained more generous protections. The civil rights statutes of the 60s and 70s provide no damages for emotional distress and no punitive damages. With the exception of the age discrimination act, these statutes do not provide for a jury trial. Similarly union contracts provide for remedies limited to reinstatement and back pay with an adjudication by an arbitrator who has virtually unreviewable discretion." (*Id.* at 188.)

Question #3

In this article, you state that Title VII and other similar civil rights laws prohibiting employment discrimination based upon race, gender, national origin and religion "were promoted based not only on arguments of morality but also on concepts of economic rationality." You added that federal statutes prohibiting discrimination based upon age and handicap "also were enacted partly as a result of arguments that age cannot predict job performance and therefore is an economically irrational consideration." You failed to mention that the primary purpose of these laws was to enforce the Fourteenth Amendment, which was enacted because African Americans were systematically denied equal protection. Please explain why, while criticizing the 1964 Civil Rights Act and other similar laws, your article does not once refer to the Fourteenth Amendment upon which they were based, but instead suggests that these laws were mere economic or moral concepts without any constitutional foundation?

Response:

As explained above, the article certainly does not criticize the 1964 Civil Rights Act and similar legislation outlawing invidious discrimination. The article praises the civil rights laws and points out the irony that those who were most deserving of protection in the workplace, persons who were subject to adverse job action based on the "patently irrational considerations of race, sex, national origin and religion," had less generous remedies under the federal civil rights laws than the expansive remedies many state courts had created for white, male, non-union employees.

The purpose of the article was not to explain the constitutional basis for the civil rights laws, and thus it did not mention the Fourteenth Amendment. The article assumes that the reader understands the constitutional basis for these important protections of equal rights.

Question #4

You seem to be very worried that civil rights laws favor the rights of certain minorities at the expense of white, non-union men. For example, in your Free Congress Foundation article, you wrote that "employees who are of a minority race or ethnicity, who are women, who are over 40 years of age, or who are handicapped have federal statutory protection when they are treated 'unfairly' by their employer because disparate treatment creates an inference that the employer's job action is based on forbidden criteria. These protections, statutory and by union contract, leave a minority of the populace without a legal remedy when disciplined or fired. This 'minority' group is by definition, white, male, and non-union."

A. Do you still believe that our nation's civil rights laws give unfair advantage to women, ethnic minorities, the handicapped, and people over 40?

B. Given your view that federal labor statutes and federal anti-discrimination laws such as Title VII "left a minority of the populace – white, male and non-union – with no legal protections in their employment status," how can we be certain that you will be neutral in applying Title VII and similar legislation in cases that come before you?

Response:

Again, I respectfully disagree with the characterization of the article. The article does not suggest that the civil rights laws were wrong in not providing legal protections for white, male and non-union employees. The article suggests that state court judges stepped in to protect this latter group, thereby undermining the doctrine of employment at will, in part because "within this class are persons with whom state court judges can most readily identify." (*Id.* at 187.)

Indeed, a principal goal of the article is to point out the irony that those who were most deserving of protection in the workplace, persons who were subject to adverse job action based on the "patently irrational considerations of race, sex, national origin and religion," had less generous remedies under the federal civil rights laws than the expansive remedies many state courts had created for white, male, non-union employees. As the article states: "Thus because the court system has reached out to create remedies [including tort damages and punitive damages] for those employees who have been largely or entirely omitted from the protections of unionization and federal statute, these employees – the white, male, middle- and upper-middle class – ironically have sometimes obtained more generous protections. The civil rights statutes of the 60s and 70s provide no damages for emotional distress and no punitive damages. With the exception of the age discrimination act, these statutes do not provide for a jury trial. Similarly union contracts provide for remedies limited to reinstatement and back pay with an adjudication by an arbitrator who has virtually unreviewable discretion." (*Id.* at 188.)

I can assure you that I would neutrally apply any law that might come before me. Specifically, with regard to anti-discrimination statutes, I have done my best to fairly and properly enforce California state law, which often provides victims of discrimination with greater remedies than those available under Title VII. The civil rights laws have been one of the greatest forces for positive social change in this country in my lifetime. As discussed in response to the previous question, my appellate decision in *Iwekaogwu v. City of Los Angeles*, 75 Cal.App.4th 803 (1999), includes a strong statement in favor of plaintiffs' ability to use a variety of kinds of circumstantial and direct evidence in proving discrimination claims. Moreover, I have the strong support of civil rights lawyers such as Vilma Martinez, former President of MALDEF, and Leo James Terrell, an attorney for the NAACP and a national radio and television commentator, as well as the backing of numerous lawyers and judges in the Los Angeles legal community who are members of minority groups.

Question #5

Your concern that white men are disadvantaged by our civil rights laws as expressed in your article is also reflected in your advocacy for the rights of non-minorities in the affirmative action context. However, your record does not seem to reflect the same commitment to preventing unfair discrimination against minorities or women.

For example, you were a signatory to a brief opposing affirmative action in *Local 28 of the Sheet Metal Workers' International Association v. EEOC*. In your brief to the Supreme Court, you advocated for a "meticulous searching out of past victims" in order to only award "individualized remedies for past discrimination." You suggested that, even where there are systemic practices that, as in the case of *Local 28*, discriminated against black and Hispanic workers in recruitment, selection, training, admission to the union and job placement, courts should not order race conscious affirmative action measures because they will have the effect of disadvantaging white males.

In a 1986 BNA article entitled "Affirmative Action Today: A Legal and Practical Analysis," you argued, as in the brief you signed in *Local 28*, that it is necessary to require a "meticulous searching out of past victims" and award "individualized remedies for past discrimination" in order to prevent the unfair discrimination against non-minorities that you believe would otherwise occur under an affirmative action plan.

Your repeated protestations about the impact civil rights laws and remedies have on white males, in conjunction with your apparent marked silence about the harms that discrimination has on minorities and women, raises serious questions about your commitment to fairly apply civil rights laws.

During your confirmation hearing, you noted that you are proud to have written the opinion in Iwekaogwu v. City of Los Angeles, in which the California Court of Appeal upheld a jury verdict in favor of a plaintiff in a state civil rights case. Other than Iwekaogwu, which did not address any statutory or constitutional civil rights issues, have you been involved in any cases that demonstrate your commitment to defending constitutional rights and statutory protections that are of fundamental importance to women and people of color?

Response:

I respectfully disagree with the characterization of the article. The article does not express concern that "white men are disadvantaged by our civil rights laws." Rather, the article offers a possible explanation for why some state courts acted to undermine the doctrine of employment at will. The article also points out the irony that those who were most deserving of protection in the workplace, persons who were subject to adverse job action based on the "patently irrational considerations of race, sex, national origin and

religion," had less generous remedies under the federal civil rights laws than the expansive remedies many state courts had created for white, male, non-union employees. The article criticizes this disparity.

The brief filed on behalf of the government in *Local 28 of the Sheet Metal Workers' International Association v. Equal Employment Opportunity Commission*, 478 U.S. 421 (1986), and the 1986 BNA article were written before the Supreme Court settled the issue of when race-based remedies are appropriate to remedy past discrimination. That issue was settled in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), when the Supreme Court held that race-based remedies can be used to remedy past discrimination under the test set forth in that case. *Adarand* states existing law, which I would apply without reservation.

Moreover, the primary focus of the BNA article was to emphasize the importance of identifying victims of discrimination and putting those victims in the jobs they would have been in absent the discrimination. The article recognizes the difficulty this individualized identification poses for "[c]ounsel for a plaintiff class who may be strapped for litigation resources." Nevertheless the article urges "a form of justice that recognizes individual dignity by restoring to a person what is rightfully his. A direct remedial approach would emphasize identification and elimination of employment practices that are barriers to hiring minority-group members and women, and restoring victims of those discriminatory practices to the place they would have been, absent discrimination."

Regarding the opinion I wrote in *Iwekaogwu v. City of Los Angeles*, 75 Cal.App.4th 803 (1999), this case relies on Ninth Circuit precedent in adopting a broad definition of the type of evidence a victim of discrimination may offer to prove that adverse employment decisions were based on race. The case holds: "A plaintiff is not limited to a direct attack on the employer's explanation [for the adverse employment decision]. At least three types of evidence can be used to show pretext: (1) direct evidence of retaliation, such as statements or admissions, (2) comparative evidence, and (3) statistics. (*Penk v. Oregon State Bd. Of Higher Educ.* (9th Cir. 1987) 816 F.2d 458, 462 [considering sex discrimination claim].) . . . Direct evidence of retaliation may consist of remarks made by decisionmakers displaying a retaliatory motive. (See *Lindahl v. Air France* (9th Cir. 1991) 930 F2d 1434 [sexist comments in sex discrimination case].)" (*Iwekaogwu*, 75 Cal.App.4th at 816.)

Not all decisions of the California appellate courts are published. *Iwekaogwu* was published because it was the first case to reject a "narrow . . . view of the type of evidence that may be offered to show that an employer's nonretaliatory explanation for its actions is pretextual" (*id.*), in favor of the Ninth Circuit approach. This case was one of first impression because it applied the Ninth Circuit precedent cited above to state law claims for discrimination and retaliation. By adopting federal law, this opinion provided a broad standard favorable to plaintiffs concerning the types of evidence that may be offered to show that an employer's proffered explanation of adverse employment action is pretextual.

Another case in which I wrote an opinion defending the rights of a member of a minority group is *Grobeson v. City of Los Angeles*, Case No. BC 150151. In that case I overturned discipline of an openly gay police officer for having worn a police department

uniform in a gay rights parade and for having conducted recruitment activities aimed at the gay and lesbian community. I wrote that, "California law is clear that a person facing an administrative hearing that could affect his fundamental rights must have clear notice of the charges against him." (Opinion at 15.) Because the Police Department had violated Sergeant Grobeson's due process rights, by failing to give him proper notice of the charges against him, I overturned the Police Department's discipline of Sergeant Grobeson in its entirety. (*Id.* at 18-19.)

In these cases and in many cases I handled in the trial court that did not require written opinions, I have done my best to fairly and properly enforce the laws against discrimination on the basis of race, sex, ethnicity, and sexual orientation and the laws against sex harassment. In recognition of this, I have the strong support of civil rights lawyers such as Vilma Martinez, former President of MALDEF, and Leo James Terrell, an attorney for the NAACP and a national radio and television commentator, as well as the backing of numerous lawyers and judges in the Los Angeles legal community who are members of minority groups, including California Supreme Court Justice Carlos Moreno.

April 29, 2003

Responses of Judge Carlyn Kuhl to Follow-up Questions from Senator Feinstein

Question 1. Thornburgh v. American College of Obstetricians and Gynecologists

In 1985, you reportedly wrote one of the most aggressive memos to Solicitor General Charles Fried on the *Thornburgh* case, calling not only for the United States to file an amicus brief, but also to seek the outright reversal of *Roe v. Wade*. When the Solicitor General ultimately chose to intervene in the case, you helped write the government's brief. Your brief called for the reversal of *Roe*, stating that *"the textual, doctrinal and historical basis for Roe v. Wade is so far flawed, and as these cases illustrate is a source of such instability in the law that this Court should reconsider that decision and on reconsideration abandon it."*

During the hearing, you explained that you argued for the Supreme Court to overturn *Roe v. Wade* because President Reagan had taken a public stand in opposition to *Roe*. You further stated, "as an attorney, I think it is appropriate to advocate to overturn Supreme Court precedent when it is in your client's interest. In other words, as attorneys, we are really not constrained in what we argue so long as it is within the bounds of ethics."

> **Question 1(a):** At the time you signed onto the government's brief in *Thornburgh*, did you personally believe that the "textual, doctrinal, and historical basis for *Roe v. Wade* is so far flawed, and as these cases illustrate is a source of such instability in the law that this Court should reconsider that decision and on reconsideration abandon it?"

Response:

In 1992, *Planned Parenthood v. Casey* strongly reaffirmed the continuing validity of *Roe v. Wade* and a woman's constitutional right to make choices regarding reproductive freedom. As I stated in my confirmation hearing, I am fully committed to following these precedents and to applying the law established by those cases. As I also stated, after the *Casey* decision, a woman's constitutional right to privacy in reproductive decisionmaking is as well-settled as any constitutional precedent.

It is important to distinguish the role of an advocate from that of a judge. A judge of an inferior court, such as the United States Court of Appeals for the Ninth Circuit, must follow every precedent of the United States Supreme Court. As a judge, my job is not to question Supreme Court precedent, but to follow it.

The brief in the *Thornburgh* case was filed in 1985, seven years before the precedent of *Roe v. Wade* was firmly reestablished in *Casey*. When I was a lawyer in the Department of Justice, it was my job to represent the views of the government and of the President. President Reagan had stated publicly both before and after his election that *Roe v. Wade* was wrongly decided and should be overruled. There were sound legal arguments that could be made in support of that view, as articulated by respected academics. At the time of the *Thornburgh* brief, numerous constitutional scholars had written criticizing *Roe v. Wade* and its reasoning. Among those scholars were Alexander Bickel, Archibald Cox, John Hart Ely, Paul Freund, Gerard Gunther, Harry Wellington and Ruth Bader Ginsburg. In 1985, as an advocate and not as a judge, I believed that many of those criticisms were sound and should be presented to the Supreme Court in support of the position taken by my client, the President.

Question 1(b): If you were working for a hypothetical President who had sought to reverse *Brown v. Board of Education*, which ended segregated racial education in schools, would it be appropriate for you to seek a reversal of the decision? Is there any circumstance where it would not be appropriate for a government lawyer to seek reversal of a Supreme Court decision?

Response:

The Department of Justice always should take special care to preserve its credibility in the arguments that it makes in the courts. The Department of Justice should not seek reversal of a Supreme Court decision when there is no reasonable argument that can be made for such reversal. I know of no credible scholarly criticism of *Brown v. Board of Education*. *Brown* was a unanimous decision articulating and applying the core principles of equality. I do not think that there is any sound basis for urging reversal of that case.

Question 1(c): At the time the Supreme Court ruled in the *Akron* case, President Reagan had a stated policy of opposition to *Roe*. Yet, the Solicitor General's office did not seek reversal of *Roe* at that time. Isn't it true that you could have represented your clients interests without seeking the reversal of *Roe*? Or had the Solicitor General's office erred in its representation of the Administration in *Akron*?

Response:

At the time the *Thornburgh* brief was under consideration, the United States already had filed a brief criticizing *Roe v. Wade* in *Akron*. In the *Akron* case, the Solicitor General had argued that, in ruling on the constitutionality of state statutes regulating abortion, the Supreme Court should interpret *Roe* very narrowly and should give "heavy deference" to the political and legislative judgments made by the states concerning abortion. This argument was inconsistent with *Roe* without quite saying so. At oral argument in the *Akron* case, Justice Blackmun asked whether the United States was arguing that *Roe v. Wade* should be overruled. When the Solicitor General answered in the negative, Justice Blackmun made clear that the position of the United States was in fact inconsistent with *Roe*.

In my view, the Justice Department's argument in *Akron* made it appear that the United States was not being completely forthcoming with the Supreme Court. It was my view that the Department of Justice and the Solicitor General should be honest with the Supreme Court and should forthrightly present the view of the President regarding *Roe v. Wade*.

Question 1(d): Given that the United States was not a litigating party, why was it necessary for the United States to file an amicus brief in the case and call for the overturning of *Roe*?

Response:

There was no legal requirement that the United States file an amicus brief in *Thornburgh*. However, the United States already had filed an amicus brief in the *Akron* case, as described above. The Justice Department presented the views of the President to the Supreme Court in the *Thornburgh* amicus brief, just as the Department of Justice presented the views of the President concerning abortion and *Roe v. Wade* to the Supreme Court during the administration of

President Clinton.

2. **Meritor v. Vinson**

As Deputy Solicitor General, you signed a brief in *Meritor Savings Bank v. Vinson*, the landmark case in which the Supreme Court first ruled that sexual harassment in the workplace violates Title VII of the Civil Rights Act of 1964. You testified at the hearing, in response to my question, that you participated in the decision to file a brief on behalf of the defendant employer, that the Supreme Court tracked your brief, and that you were happy with the Court's decision.

I am puzzled by your response. Your brief, filed on the behalf of the defendant bank argued in support of the District Court's decision to deny any relief to the plaintiff, who had alleged sexual harassment. Yet the Supreme Court ruled the opposite way – it affirmed the Court of Appeals decision rejecting the District Court's ruling and allowing the plaintiff's claim to go forward. Your brief did argue – and the Supreme Court agreed – that sexual harassment creating a "hostile working environment" can violate Title VII. But your brief argued that the plaintiff, Mechelle Vinson, should be denied relief because the sexual relationship with her supervisor was found by the District Court to be "consensual" or "voluntary". The Court unanimously held that "voluntariness" is not a defense to a sexual harassment suit brought under Title VII, citing the EEOC's guidelines.

The Court explictly said that *"the fact that sex-related conduct was 'voluntary' in the sense that the complainant was not forced to participate against her will, is not a defense to a sexual harassment suit brought under Title VII. The gravaman of any sexual harassment claim is that the alleged sexual advances were 'unwelcome.'*

> **Question 2(a)** : The position advanced in your brief - the "voluntariness" standard– would have made it more difficult for a woman to recover for sexual harassment in the workplace. In fact, if the arguments in your brief had prevailed, a woman whose supervisor used the power of his position to induce participation in unwelcome sexual acts with him would have no cause of action unless, perhaps, she could show that she was physically forced to engage in these acts. Would you still describe – as you did in the hearing – the Supreme Court's rejection of the "voluntariness" standard as a *"technical issue on which the Supreme Court and we disagreed?"*

Response:

The brief filed on behalf of the United States and the EEOC in the *Meritor* case did not advocate a voluntariness standard. Rather, the brief in fact argued for a standard based on whether sexual advances made in the workplace were "unwelcome." Indeed, the first heading in the "Discussion" section of the brief stated: "Unwelcome Sexual Advances That Create A Hostile Working Environment Violate Title VII." (Brief for the United State at 7.)

The brief stated that "[s]exual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality." (Brief for the United States at 12, quoting

Henson v. City of Dundee, 682 F.2d 897, 902 (11th Cir. 1982).) The standard urged in the brief was the standard set forth in regulations of the EEOC: "Because of the important interests at stake in defining the boundaries of unlawful sexual harassment, the EEOC, the courts, and the commentators have correctly emphasized several principles to guide the disposition of such charges. *The gravamen of any hostile environment claim must be that the alleged sexual advances are 'unwelcome'* (29 C.F.R. 1604.11(a))." (Brief for the United States at 13 (emphasis added).) The Supreme Court accepted the United States' argument that the appropriate standard was whether the advances were unwelcome.

The district court in the *Meritor* case (the finder of fact) had found that the plaintiff "was not the victim of sexual harassment." (Brief for the United States at 3; *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 60.) The brief for the United States argued that the trial court's findings taken as a whole supported the conclusion that the supervisor's sexual advances "were not unwelcome." (Brief for the United States at 17.) However the Supreme Court concluded that the district court's finding that the alleged sexual conduct was "voluntary" meant that the trial court's ultimate conclusion must have been based on the erroneous "voluntariness" standard rather than on the "unwelcomeness" test. (*Meritor*, 477 U.S. at 68.) Thus the United States and the Supreme Court disagreed about how to interpret the trial court's specific findings in an individual case – not about the legal standard to be applied..

The important development in *Meritor* for the law and for the rights of women was that the Supreme Court accepted the United States' argument and for the first time held that sex harassment is a violation of Title VII, and, moreover, agreed with the position of the United States and the EEOC that unwelcome sexual advances violate Title VII when they create a hostile work environment. I stated publicly after the Supreme Court's decision that the government was very happy with the Court's ruling.

> **Question 2(b):** Since, as you testified, you were involved in the decision to file this brief, please explain why the Solicitor General's office decided to argue in favor of the "voluntariness" test of liability, instead of the stronger standard in the EEOC's guidelines (the unwelcomeness test).

Response:

As set forth in response to the prior question, the brief for the United States did urge the stronger standard of the unwelcomeness test rather than a test based on "voluntariness."

> **Question 2(c):** Did you believe the "voluntariness" standard was a more appropriate standard, and, if so, why?

Response:

The brief for the United States urged that the standard for finding sexual harassment should be based on whether the conduct was "unwelcome" to the victim.

Responses of Judge Carolyn Kuhl to Follow-up Questions from Senator Grassley

Question 1:

What are your views regarding the constitutionality of the qui tam provisions of the False Claims Act ("FCA")?

Response:

The qui tam provisions of the FCA were held to be constitutional a decade ago in *United States ex rel. Kelly v. The Boeing Company*, 9 F.3d 743 (9th Cir. 1993). If confirmed as a judge of the United States Court of Appeals for the Ninth Circuit I would be bound by this precedent, I would have no difficulty in following it, and I would enforce the FCA according to its terms. The Fifth, Sixth and Tenth Circuits also have held that the FCA is constitutional (see *United States ex rel. Stone v. Rockwell*, 282 F.3d 787 (10th Cir. 2002); *Riley v. St. Luke's Episcopal Hospital*, 252 F.3d 749 (5th Cir. 2001); *United States ex rel. Taxpayers Against Fraud v. General Electric Corp.*, 41 F.3d 1032 (6th Cir. 1994)), and the United States Supreme Court has held that qui tam plaintiffs (relators) have standing to sue on behalf of the government (*Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000)).

It is my understanding that the FCA has been very effective in increasing the federal government's recoveries for fraud, waste and abuse by government contractors and others, such as medical organizations, that submit false claims.

As a judge of the Superior Court of the State of California I decided at least one case involving a state qui tam statute that is closely modeled on the federal FCA. (Cal. Ins. Code section 1871.7.) Although I am restricted in discussing that case because it is still pending, I can provide basic facts about the procedures of the court. (California Code of Judicial Ethics Canon 3B(9).) In that qui tam case, I granted summary judgment in favor of the qui tam plaintiff against a defendant in the amount of approximately $2.7 million. The qui tam plaintiff in that case also recovered more than $10 million in settlements and default judgments. *(People of the State of California ex rel. Interinsurance Exchange of the Automobile Club of Southern California v. Mirsky*, Los Angeles Superior Court Case No. BC 211613.)

Question 2:

What briefs or other documents have you prepared or assisted in the preparation of challenging the constitutionality of any aspect of the FCA?

Response:

At the time I was in private practice and prior to the Ninth Circuit's decision in *United States ex rel. Kelly v. The Boeing Company*, 9 F.3d 743 (9th Cir. 1993), lawyers who represented clients that were sued in qui tam cases routinely argued that the statute was unconstitutional. For example, Margaret McKeown, who now sits as a judge of the Ninth Circuit, argued the *Kelly* case and filed a brief on behalf of Boeing challenging the constitutionality of the qui tam provisions of the FCA.

In representing clients who were sued in qui tam cases, I prepared briefs that challenged the constitutionality of the qui tam provisions of the FCA in *United States ex rel. Rohan v. Newbert*, No. 92-55546 (a case in the Ninth Circuit that was argued as a companion case with *Kelly* but became moot before the decision issued); *Hyatt v. Northrop Corp.*, 1989 U.S. Dist. LEXIS 18940 (C.D.Cal.); and *United States ex re. Truong v. Northrop Corp.*, 728 F.Supp. 615 (C.D.Cal. 1989). I represented three defense industry clients in filing an amicus curiae brief challenging the constitutionality of the qui tam provisions of the FCA in *United States ex rel. Madden v. General Dynamics Corp.*, 4 F.3d 827 (9th Cir. 1993) (argued as a companion case with *Kelly* and *Rohan*).

This list is based on my recollection and on computer research. I may have repeated the argument in briefs for other clients, but whatever files remain regarding such cases are kept by my former law firm.

Question 3:

While you were an employee at the Department of Justice, did you ever urge the Department of Justice to adopt the position that FCA qui tam litigation is unconstitutional or attempt to influence the Department of Justice's position regarding the constitutionality of qui tam in any way?

Response:

No. I only made arguments that the qui tam provisions of the FCA were unconstitutional when I was in private practice and those arguments were made on behalf of clients.

Question 4:

What contact did you have with the Department of Justice regarding a memorandum authored by William P. Barr in his capacity as Assistant Attorney General for the Office of Legal Counsel arguing the FCA's qui tam provisions are unconstitutional ("Barr Memorandum")? What other contact did you have with the Department of Justice concerning the constitutionality of the FCA?

Response:

The primary contact I had with the Department of Justice concerning the constitutionality of the FCA was a meeting I and numerous other lawyers representing defense contractor clients had with the Solicitor General to urge that the Department of Justice file a brief arguing that the qui tam provisions of the False Claims Act were unconstitutional. It is not unusual for the Solicitor General to meet with private litigants who are urging that the government file an *amicus curiae* brief in litigation involving a federal statute. Representatives of the Civil Division and the Office of Legal Counsel also attended this meeting. Prior to and after this meeting I also may have had contact with lawyers in the Civil Division concerning the constitutionality of the FCA. I believe that this meeting took place sometime in 1989 or shortly thereafter.

My best recollection is that I had no knowledge of the Barr Memorandum until the meeting with the Solicitor General, and that the memorandum was discussed by others at the meeting.

During the time when William P. Barr was Attorney General, I made a courtesy call on him because we knew each other, having met in the early 1980's. During our conversation we briefly discussed the continuing litigation over the constitutionality of the federal qui tam statute. I do not recall whether or not we discussed publication of the Barr Memorandum.

Question 5:

Did you urge the publication of the Barr Memorandum by the Department of Justice? Did the Barr Memorandum accurately set out the Department of Justice's position on the constitutionality of the False Claims Act?

Response:

As discussed in the previous response, I do not recall whether or not I urged publication of the Barr Memorandum. I understand that it was published first as a preliminary print and later in a bound volume with numerous other opinions of the Office of Legal Counsel.

The Barr Memorandum itself discloses that various offices within the Justice Department disagreed on whether the qui tam statute was constitutional. (Barr Memorandum at p. 2.) The Memorandum on its face purports to present the views of the Office of Legal Counsel and urges then-Attorney General Thornburgh to authorize the Civil Division "to enter an appropriate case and present the Executive Branch's arguments against the constitutionality of qui tam." (*Id.* at p. 38.)

Question 6:

Did you submit, arrange to submit, or involve yourself in any way in the submittal of the Barr Memorandum to the Court of Appeals for the Ninth Circuit in the case of United States, ex rel. Madden, et al. v. General Dynamics Corporation, No. 92-56042? To any other court in any other case?

Response:

My research indicates that I filed an *amicus curiae* brief on behalf of three clients in *United States ex rel. Madden v. General Dynamics*. I have not been able to locate a copy of that brief and thus am not able to address whether that brief includes a reference to the Barr Memorandum.

United States ex rel. Madden v. General Dynamics was argued in the Ninth Circuit at the same time as *United States ex rel. Kelly v. The Boeing Company*, 9 F.3d 743 (9th Cir. 1993), and *United States ex rel. Rohan v. Newbert*, No. 92-55546. I was counsel for the defense in the *Rohan* case. The brief in that case (filed on behalf of Litton Systems, Inc.) attaches the Barr Memorandum as an appendix. The brief quotes the Barr Memorandum as stating that "[t]he Office of Legal Counsel believes that the qui tam

provisions of the False Claims Act" are unconstitutional. (Brief for the Appellees at pages 44-45.)

I do not recall whether or not I filed any other briefs on behalf of clients that cited the Barr Memorandum.

Question 7:

Other than what is discussed above, have you taken any actions to challenge the constitutionality of the False Claims Act's qui tam provisions? (For example, did you lobby any members of Congress?)

Response:

I do not recall any actions other than those mentioned above. I certainly did not lobby any member of Congress concerning the constitutionality of the FCA.

Question 8:

Will you commit to me that you will respect and follow the precedent of the United States Supreme Court and the Ninth Circuit Court of Appeals' ruling in U.S. ex rel. Kelly v. Boeing Co. that the qui tam statute is constitutional?

Response:

I will respect and follow the precedents of the United States Supreme Court and the Ninth Circuit if I am confirmed as a judge of the United States Court of Appeals for the Ninth Circuit, including the Ninth Circuit's decision in *United States ex rel. Kelly v. The Boeing Company*, and its holding that the qui tam provisions of the False Claims Act are constitutional. I have no reservations in making this commitment.

As discussed above, as a state court judge I heard and decided a case under a state law qui tam statute. I granted summary judgment in favor of the qui tam plaintiff as to one defendant, and the qui tam plaintiff recovered more than $12 million in settlements and judgments overall.

Responses of Judge Carolyn Kuhl to Follow-up Questions from Senator Kennedy

Question #1

You signed on to a brief opposing affirmative action in Local 28 of the Sheet Metal Workers' International Association v. EEOC. In that case, the Supreme Court ultimately disagreed with you and upheld affirmative action as appropriate remedial relief because the union had systemically discriminated against African American and Hispanic workers. The Union in that case had egregious violations of Title VII: they administered discriminatory entrance exams, paid for cram courses for relatives of members that were unavailable to minorities; favored white applicants while denying transfers from qualified blacks; and issued temporary work permits to white members of distant construction unions.

In addition, while in private practice, you wrote in a 1986 BNA article entitled "Affirmative Action Today: A Legal and Practical Analysis" that "[i]n my view, the generalized preferences based on race and sex that are commonly termed "affirmative action" are not a desirable remedy for discrimination." In your BNA article and Local 28 brief, you suggest that the only remedy a court should order for discrimination is a direct remedy to the victim of discrimination. You suggest that even where there are systemic discriminatory practices in recruitment, selection, training, admission to the union and job placement, courts should not order race conscious affirmative action measures because they will have the effect of disadvantaging white males.

A. In Local 28, the Supreme Court wrote that petitioners' violations "clearly establish[] a compelling governmental interest sufficient to justify the imposition of a racially classified remedy ... [because] it is doubtful, given petitioners' history of discrimination, that any other effective remedy was available." Do you agree or disagree with the Court's ruling – that is, in your view, may a court order affirmative action remedies when the record establishes that it is doubtful that any other remedies will be effective? What was the basis for your belief in the BNA article that a Court should not order affirmative action as a remedy for systemic discrimination?

Response:

The brief filed on behalf of the government in *Local 28 of the Sheet Metal Workers' International Association v. Equal Employment Opportunity Commission*, 478 U.S. 421 (1986) and the 1986 BNA article were written before the Supreme Court settled the issue of when race-based remedies are appropriate to remedy past discrimination. That issue was settled in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), when the Supreme Court held that race-based remedies can be used to remedy past discrimination under the test set forth in that case. *Adarand* states existing law, which I would apply without reservation.

The primary focus of the BNA article was to emphasize the importance of identifying victims of discrimination and putting those victims in the jobs they would have been in absent the discrimination. The article recognizes the difficulty this individualized identification poses for "[c]ounsel for a plaintiff class who may be strapped for litigation resources." Nevertheless the article urges "a form of justice that recognizes individual dignity by restoring to a person what is rightfully his. A direct remedial approach would emphasize identification and elimination of employment practices that are barriers to hiring minority-group members and women, and restoring victims of those discriminatory practices to the place they would have been, absent discrimination."

B. The brief in Local 28 stated that "we do not favor discrimination against innocent members of some racial and ethnic groups for the purpose of ending discrimination against others." What remedies do you believe are available to remedy systemic discrimination pursuant to Title VII? In your view, were the African American and Hispanic individuals who had been denied jobs, training and admittance to the unions also innocent victims of discrimination?

Response:

As stated by Justice Brennan in his opinion in *Local 28*: "In the majority of Title VII cases, the court will not have to impose affirmative action as a remedy for past discrimination, but need only order the employer or union to cease engaging in discriminatory practices and award make-whole relief to the individuals victimized by those practices." (478 U.S. at 475-476.) However, in some instances affirmative action will be necessary to remedy past discrimination. Such race-based classifications "are constitutional only if they are narrowly tailored measures that further compelling governmental interests." *Adarand*

Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995).

In *Local 28* the African American and Hispanic persons who had been denied jobs, training and admittance to the unions certainly were innocent victims of discrimination. They were entitled to all constitutionally available remedies. Indeed, the BNA article notes: "In the controversy over affirmative action, actual victims of discrimination often have been ignored. Discrimination is not victimless. Real people are denied jobs, refused promotions, fired or constructively discharged." (BNA article at p. 158.) The article emphasized the importance of identifying victims of discrimination and making them whole by putting them in the jobs they would have been in absent discrimination.

C. Please explain the basis of your belief that affirmative action is "a divisive societal manipulation" as you wrote in your BNA Article. Does that continue to be your belief today? Why or why not?

Response:

In *Adarand* the Supreme Court explained some of the problems of governmental race-based decisions:

> "Racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification."
>
> * * * * *
>
> Even though it is not the actual predicate for this legislation, a statute of this kind inevitably is perceived by many as resting on an assumption that those who are granted this special preference are less qualified in some respect that is identified purely by their race. Because that perception – especially when fostered by the Congress of the United States – can only exacerbate rather than reduce racial prejudice, it will delay the time when race will become a truly irrelevant, or at least insignificant, factor."

Adarand, 515 U.S. at 229, quoting *Fullilove v. Klutznick,* 448 U.S. 448, 537, 545 (1980)(dissenting opinion of Stevens, J.)

As the BNA article states, quoting Justice Powell, and as I still believe: "'It is to be hoped that the day will soon come when race and ancestry are factors no longer taken into account in either private or governmental decision-making.'"

Question #2

In 1993, you wrote an *amicus* brief on behalf of Mary Baldwin College and two other private, all-women's colleges, in support of VMI's petition for certiorari and urged the Supreme Court to uphold the constitutionality of the exclusion of women from Virginia Military Institute (VMI). In this case, the Supreme Court ultimately held that VMI's exclusion of women was unconstitutional under the Equal Protection Clause.

Your brief expressed concern that a ruling against VMI could jeopardize the existence of private women's colleges. But this brief seems to be inconsistent with the views expressed by other women's colleges. When the case reached the Supreme Court in 1996, 26 private women's colleges filed a brief urging the Court to hold VMI's exclusion of women unconstitutional, arguing that such a ruling would not undermine or threaten the existence of private women's colleges. Indeed, the director of the Women's College Coalition was quoted in the press saying that of all the attorneys she consulted, "not one of them shared the perspective advanced by VMI attorneys that [the lower court ruling against VMI] was an opinion that put women's colleges in jeopardy." Roanoke Times & World News, Apr. 11, 1993 ("VMI Case Makes Odd Bedfellows; Women's Colleges Allies"). The Supreme Court, while finding that VMI's exclusion of women was based on impermissible sexual stereotypes, distinguished single-sex education that seeks to "dissipate, rather than perpetuate traditional gender classifications" and cited the brief of the 26 women's colleges. United States v. Virginia, 518 U.S. 515, 533 n. 7 (1996).

A. How did you come to the conclusion that a ruling against VMI would harm single-sex colleges?

Response:

The brief I filed on behalf of three women's colleges urged that the Supreme Court grant the petition for certiorari in the VMI case in order to "uphold the constitutionality of single-sex education for women . . . ." (Brief at 2.) The brief did not express a view as to how the Supreme Court should rule with respect to the constitutionality of VMI's program. Most of the brief (pages 2 through 15) discussed the sociological literature addressing how single-sex education assists

girls and young women in learning and in high achievement, especially in traditionally male dominated fields.

The brief did not express the view that a ruling against VMI necessarily would make single-sex education for women unconstitutional. Rather, the brief argued that the then-current "state of the law, including the opinion of the Fourth Circuit in [its first VMI decision], cast[ ] doubt on the constitutional validity of single-sex education for women." (Brief at 2.) Therefore, the brief argued, the Supreme Court should "grant the petition for writ of *certiorari* in this case and uphold the constitutionality of single-sex education for women before the current legal uncertainty becomes a tool to eliminate institutions such as the *amici*." (*Id.*)

The brief described many reasons why the then-current state of the law made the constitutionality of all-women's educational institutions uncertain. It cited a lawsuit brought by state tax assessors against Smith College, challenging the college's tax exemption on the ground that the college "engaged in sex discrimination in violation of Federal and State law." (Brief at 18-19, citing *Trustees of Smith College v. Bd. of Assessors,* 385 Mass. 767, 768, 434 N.E.2d 182 (1982).) The Massachusetts Supreme Judicial Court had not reached the merits of the tax assessors' argument, because the Court held that the tax assessors were not vested with authority to raise the constitutional challenge. (*Id.* at 19, n. 17.) The brief also cited several law review articles that suggested the possibility that tax exemptions could be denied to all-women's schools because they discriminated against men in admissions. (Brief at 18, citing Dubnoff, *Does Gender Equality Always Imply Gender Blindness? The Status of Single-Sex Education For Women,* 86 W.Va.L.Rev. 295, 310 (1984); Miller, *The Future of Private Women's Colleges,* 7 Harv.Women's L.J. 153, 163-165 (1984).)

The brief cited several commentators who had concluded that courts probably "'will reach the conclusion that government may not provide direct financial support to institutions which practice discrimination prohibited to government by constitutional standards of equality.'" (Brief at 17, quoting Gallagher, *Desegregation: The Effect Of The Proposed Equal Rights Amendment On Single-Sex Colleges,* 18 St.Louis U.L.J. 41, 67 (1973), and citing Feldblum, Krent & Watkin, *Legal Challenges To All-Female Organizations,* 21 Harv.C.R.-C.L. L.Rev. 171, 196 (1986).) As discussed in the brief, the Supreme Court's decision in *Misissippi University for Women v. Hogan,* 458 U.S. 718 (1982), also left uncertain whether the Court was willing to consider the benefits of single-sex education for women in its constitutional analysis. (Brief at 16-17, citing Rhode, *Association and Assimilation,* 81 Nw.U.L.Rev. 106, 140 (1986).)

B. Do you believe that there is a difference between the constitutional justification for private all-female education - as a remedy for discrimination against women - and the exclusion of women from VMI, a public institution, based on out-moded sexual stereotypes?

Response:

The Supreme Court decision in the VMI case noted the distinction between single-sex schools that seek "to dissipate, rather than perpetuate, traditional gender classifications" and VMI, which provided a "unique" opportunity available only to males. (*United States v. Virginia,* 518 U.S. 515, 533, n.7.) The Court stated: "We do not question the Commonwealth's prerogative evenhandedly to support diverse educational opportunities." (*Id.*) Nevertheless, the Court did not clearly define the circumstances under which public, single-sex education for women would be permissible.

C. Do you continue to adhere to the position that you took in your brief? Why or why not?

Response:

As stated above, the major portion of the brief I filed on behalf of the three women's colleges discussed the literature suggesting that women's single-sex education is effective in promoting leadership and learning, especially in areas in which women have traditionally been underrepresented.

Regarding the degree of uncertainty concerning the constitutionality of single-sex education for women, the Supreme Court's decision in *United States v. Virginia* suggests that single-sex schools for women which seek to dissipate traditional gender classifications are constitutionally distinguishable from the all-male institution declared unconstitutional in that case. However, the Court has not clearly defined the circumstances under which public, single-sex education for women would be permissible.

D. You were appointed to the Superior Court in October 1995. In December 1995, Richard Willard--your co-counsel on the 1993 brief-submitted an *amicus* brief to the Supreme Court on behalf of Mary Baldwin college urging that VMI's discriminatory policy be upheld. Did you play any role in

drafting, preparing or reviewing this brief? Please explain.

Response:

No, I did not play any role in drafting, preparing or reviewing the brief filed by Mr. Willard in 1995.

Question #3

In response to written questions from Senator Boxer in June 2001, you stated that one reason you advocated for tax-exempt status for Bob Jones University despite its racially discriminatory policies, was that you were "concerned that the IRS might deny tax-exempt status to all-girls' or all-womens' school on the grounds that they discriminated on the basis of sex."

A. Do you believe that all-women's colleges are in an equivalent position to an institution like Bob Jones University that practiced invidious discrimination on the basis of race? Why or why not?

Response:

The IRS took the position that because an organization was required to serve a "charitable" function in order to qualify for a tax exemption, the tax exemption could be withdrawn if the organization violated "public policy" as defined by the IRS. The constitution outlaws discrimination on the basis of sex as well as discrimination on the basis of race. Single-sex schools, including women's schools, do discriminate on the basis of sex insofar as they deny admission on the basis of sex. It seemed to me at the time (in 1981) that the IRS could conclude that single-sex schools (including women's schools) violated public policy by discriminating on the basis of sex in admissions.

B. Do you know whether the Supreme Court's decision regarding the tax-exempt status of Bob Jones University has led to challenges against the tax-exempt status of private universities?

Response:

Although I have not researched this issue since I wrote the brief on behalf of the three women's colleges in the VMI case, there is at least one instance in which the tax exemption of a private women's college was challenged. A lawsuit was

brought by state tax assessors against Smith College, challenging the college's tax exemption on the ground that the college "engaged in sex discrimination in violation of Federal and State law." (*Trustees of Smith College v. Bd. of Assessors,* 385 Mass. 767, 768, 434 N.E.2d 182 (1982).) The Massachusetts Supreme Judicial Court did not reached the merits of the tax assessors' argument, because the Court held that the tax assessors were not vested with authority to raise the constitutional challenge.

Several law review articles also discuss the possibility that tax exemptions could be denied to all-women's schools because they discriminate against men in admissions. (See Dubnoff, *Does Gender Equality Always Imply Gender Blindness? The Status of Single-Sex Education For Women,* 86 W.Va.L.Rev. 295, 310 (1984); Miller, *The Future of Private Women's Colleges,* 7 Harv.Women's L.J. 153, 163-165 (1984).)

C. When you were at the Department of Justice, did you record your concerns about how a ruling in the Bob Jones case might affect private women's colleges? Please provide any relevant documents.

Response:

I do not recall that I recorded in a document my concerns that the IRS could find that all-girls' or all-womens' schools violated public policy by excluding males in their admissions policies. These concerns were discussed either informally or at a meeting.

April 29, 2003

Responses of Judge Carolyn Kuhl to Follow-up Questions from Senator Leahy

1. At your hearing, Senator Durbin asked you about an op-ed you wrote in the New York Times on June 16, 1993. In this article you criticized President Clinton for having too open, and presumably non-ideological, a process for selecting judges. Meanwhile, you praised President Reagan for knowing "what he was looking for" in selecting judges. You wrote, "He [President Reagan] had a clear view of how he wanted Supreme Court jurisprudence to change and had an intelligent, discreet and trusted advisor – William French Smith, his first Attorney General, who knew how to organize a selection process." For example, you state that President Reagan "knew Judge Robert Bork's background and what he stood for, and appointed him because of this record."

    a. The current President has stated numerous times that he wants to confirm judges in the mold of Justices Scalia and Thomas. Do you approve of this President's ideological selection process as much as you approved of President Reagan's?

Response:

The point of my op-ed article was not to criticize President Clinton for having a "non-ideological" process of selecting judges, but rather to suggest that a process which allowed names of candidates under consideration to become public, apparently to gauge public reaction, could be unfair and embarrassing to candidates who are so publicly vetted, as was the case with Judge (now Justice) Breyer.

My understanding of President Reagan's philosophy for selection of judges is that he wanted judges who would follow the law and would not legislate from the bench. It is my belief that the current President shares this philosophy.

    b. As you wrote about President Reagan, it appears that this President has a "clear view" of how he wants Supreme Court jurisprudence to change. Do you agree? If so, why? If not, why not?

Response:

A judge of an inferior court (such as the Ninth Circuit) may not overrule any precedent of the United States Supreme Court. As a judge, my job is not to question Supreme Court precedent, but to apply it.

I am not aware of President Bush's views on Supreme Court jurisprudence apart from public statements he has made regarding the judiciary.

    c. Given this, why do you think the President nominated you to the Ninth Circuit? What does he know about you and what do you think he was "looking for" when he selected you for this important lifetime position?

Response:

Nothing in my selection process suggested that the President was looking for anything other than a judge who is experienced, respected and will follow the law and precedent. My record for seven and one-half years as a judge of the California Superior Court, and the reputation I have established for fairness to all parties who come before me (as testified to in letters you have received in support of my nomination from people who know my work), demonstrate that I am a judge who follows the law. Justice Norman L. Epstein, with whom I served as a Justice pro tempore on the California Court of Appeal, wrote: "[Judge Kuhl] will reason to a conclusion based on our Constitution, statute, and established precedent, rather than reason backward from some predetermined result."

d. During your hearing, you said that you would follow the example of Supreme Court Justice Felix Frankfurter and that, when you were sworn in to the state court bench, you quoted him as stating that "the highest example of judicial duty is to subordinate one's personal will and one's private views to the law." Isn't this statement inconsistent with your praise of President Reagan's ideological selection process? If not, is it because "the subordination of one's personal views" is different from ideology? If so, why? If not, why not? Do you think it is possible to subordinate one's personal will and private views but still come to the bench with a certain ideological view or judicial philosophy different from other judges who are also subordinating their personal views?

Response:

I think that Justice Frankfurter's statement is consistent with President Reagan's stated desire to appoint judges who would follow the law rather than legislate from the bench. I adhere to the judicial philosophy expressed in the quotation from Justice Frankfurter, to which I committed at the outset of my judicial career. I do not think that this judicial philosophy is properly characterized as an "ideology."

2. For years I have been questioning nominees on the subject of stare decisis, asking them how strongly they think judges should bind themselves to the doctrine, whether the commitment to stare decisis varies depending on the court, and whether they would follow the doctrine if confirmed. It would appear that the answer to these questions is easy, and fairly straightforward B it is a bedrock principle of our legal system that a lower court must follow the rulings of higher courts.

   But, as Senator Feinstein asked you at your hearing, you seem to have dismissed this important principle on a few occasions. For example, the brief that you worked on while at the Justice Department in the case of Thornburgh v. American College of Obstetricians and Gynecologists, asserted that the principle of stare decisis should not stop the Court from overturning Roe v. Wade. The brief said, "[s]tare decisis is a principle of stability. A decision as flawed as we believe Roe

v. Wade to be becomes a focus of instability, and thus is less aptly sheltered by that doctrine from criticism and abandonment." In another case – one in which you argued before the Supreme Court, International Union v. Brock, 477 U.S. 274 (1986), you urged the Court to eliminate the doctrine of representative standing stating that the Supreme Court should "reconsider the doctrine in light of the practical and analytical difficulties it presents" and noting that the doctrine was not of that "longstanding effect." In yet another case, in arguing for the Reagan Administration to reverse its position and withdraw its support for the IRS policy of denying tax exempt status to racially discriminatory private schools, you wrote a memo to Assistant Attorney General Bradford Reynolds arguing that the IRS policy was not supported by legislative test or history, and apparently ignored the decisions of two United States Courts of Appeals in three separate lawsuits and minimized Supreme Court precedent.

In all three cases, the Supreme Court clearly rejected your arguments and upheld its precedent. In the Brock case, for example, the Court concluded that the government's presentation "has fallen far short of meeting the heavy burden of persuading us to abandon settled principles of associational standing." *Id.* at 290.

a. Under what situations do you think it is appropriate for a court to overrule precedent?

Response:

It is never appropriate for an inferior court (such as the Ninth Circuit) to overrule the precedent of the Supreme Court. A judge of an inferior court has authority only to follow Supreme Court precedent, not to question it.

Moreover, in all of the cases mentioned above, I was serving as an advocate for a client, not as a judge. Lawyers should make legal arguments for the fullest benefit of their client's cause. According to Rule 3.1 of the ABA's Model Rules of Professional Conduct, a lawyer may make an argument if "there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." The Executive Branch as a client similarly is entitled to vigorous representation, consistent with the obligation of the Department of Justice to preserve its credibility in the arguments that it makes in the courts.

It is important to distinguish the role of an advocate from that of a judge. As stated above, a judge of an inferior court never may overrule or fail to apply the precedent of the Supreme Court. Even when it would be entirely appropriate for a lawyer to argue on behalf of a private client or the government that Supreme Court precedent should be overruled, a judge of an inferior court must faithfully follow and apply that precedent.

The Supreme Court has used various formulations to describe when it will overrule its own precedents. One such formulation is stated in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). The *Casey* Court stated that the Supreme Court will consider whether the precedent's "central rule has been found unworkable;" whether the rule "could be removed without serious inequity to those who have relied upon it or significant damage to the stability of the society governed by it;

whether the law's growth in the intervening years has left . . . [the] rule a doctrinal anachronism discounted by society; and whether [the precedent's] premises of fact have so far changed" since the precedent was decided "as to render its central holding somehow irrelevant or unjustifiable in dealing with the issue it addressed." (*Casey*, 505 U.S. at 855.)

b. Given the arguments you made in the past, what assurances can you give the Committee that you will uphold and apply the Constitution and the law as the Supreme Court interprets it?

Response:

I have served as a judge for the last seven and one-half years. I apply statutes and precedents fairly to all who come before me as a judge. Nearly one hundred of my fellow judges have written in support of my nomination and in their letter noted: "We have worked side by side with Judge Kuhl, have attended her judicial education presentations, talked with her about the law, and received reports from litigants who have appeared before her. We know she is a professional who administers justice without favor, without bias, and with an even hand."

In addition, 23 of my women colleagues have written in support that, "Judge Kuhl is seen by us and by the members of the Bar who appear before her as a fair, careful and thoughtful judge who applies the law without bias. She is respected by prosecutors, public defenders, and members of the plaintiffs' and defense bar. She is conscientious, scholarly, courteous and willing to listen with an open mind to the arguments of counsel. Judge Kuhl approaches her job with respect for the law and not a political 'agenda.'"

More than a dozen Justices of the California Court of Appeal and California Supreme Court Justice Carlos Moreno have written to affirm that I am a judge who approaches cases with the goal of following the law. Justice Moreno wrote: "I had the pleasure of serving on the Los Angeles Superior Court with Judge Kuhl. She was widely respected among her fellow colleagues and lawyers for her dedication, scholarship, fairness, and adherence to the law. I have never discerned in her any ideological predisposition to decide a legal or factual issue in a predetermined manner. To the contrary, her reputation and practice is to decide matters with an open mind as to all issues."

Although I represented primarily defendants in private practice, distinguished members of the plaintiffs' bar in Los Angeles, such as Tom Girardi, Bruce Broillet, Gretchen Nelson and civil rights lawyer Leo Terrell have written in support of my confirmation.

In addition, I have applied California law in areas where that law is plainly contrary to positions I have taken as an advocate. Although I argued for a restricted view of associational standing on behalf of the government in *International Union v. Brock*, I frequently decide cases under laws of the state of California that permit suit even though the plaintiff would not have standing under federal law. For example, California Business and Professions Code section 17200 allows an individual to sue as a private attorney general to challenge a business practice even though the individual was not the victim of the business practice and has not been injured by that practice. (See *Stop Youth*

Addiction, Inc. v. Lucky Stores, Inc., 17 Cal.4th 553 (1998) (holding that under California Business and Professions Code section 17200 any individual or organization, acting on behalf of the general public, may bring suit to challenge a defendant's unfair business practices).) California law is different from federal law with respect to standing, and I apply California law without reservation in cases where a private attorney general plaintiff brings suit under California law.

c. Another nominee to appear before this Committee, John Rogers, advocated a theory that a lower court, when faced with case law it thinks a higher court would overturn were it to consider the case, should take that responsibility upon itself and go ahead and reverse the precedent of the higher court on its own. Do you agree with this theory? Or do you believe that lower courts may never overturn precedents of higher courts?

Response:

It is my view that lower courts may never overturn precedents of higher courts. I am not familiar with Judge Rogers' views in this area and therefore I am unable to comment further on them.

d. As a federal court of appeals judge, you will be called upon to not only interpret case law as it applies to the cases before you, but also to rule on issues that are of first impression for your circuit. How do you approach cases of first impression?

Response:

Cases of first impression often involve construction and application of a new statute or a portion of a statute that has not been interpreted before. I would approach such cases of first impression with due regard for the intent of Congress in enacting the legislation. Courts routinely look first and primarily at the language of the statute itself and the text of the particular provision of the statute at issue in the context of the remainder of the legislation and legislation on related topics. Legislative history also can be important. Even though an issue is one of first impression, often there are case precedents that can guide the court. For example, there may be precedents interpreting other portions of the statute at issue, interpreting related statutes or construing specific terms used in the statute. I would be guided by such precedents in deciding the new issue presented.

3. In the case of International Union v. Brock, 477 U.S. 274 (1986), the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) challenged the Secretary of Labor's interpretation of certain provisions of the Trade Act which would have deprived the union members of certain benefits available to assist workers who are laid off because of competition from imports. The issue on appeal to the U.S. Supreme Court was whether the UAW had standing to sue in federal court on behalf of its affected members.

You testified at your hearing, in response to questions by Senator Feinstein, that you were not on the brief. You said, "I am not on the brief. If you look at the brief in that case, I am not on the brief." Well, I did look at the brief and you are the third of five high level officials on the brief. Also, as you noted at your hearing, you did argue the case before the Supreme Court in March 1986, nearly five years after joining the Department of Justice and more than half-way into your term as Deputy Solicitor General.

So, I would like to ask you about the arguments you made as Deputy Solicitor General in this brief. You argued for the Court to "reconsider the doctrine of representative standing" and stated that "an organization does not have standing to sue based on the rights of its members; instead, an action seeking the collective adjudication of the members' rights should be brought pursuant to Rule 23," or the class actions provisions of the federal rules of civil procedure. A significant part of the brief was devoted to arguing why the doctrine of representative standing should "not be recognized" and why the class action provisions should be applied instead. You argued that an association would be an inadequate representative of its members' legal interests for a number of reasons, including that it might bring lawsuits without authorization from its membership and that the litigation strategy selected by the association might reflect the views of only a bare majority of the full membership. The brief also argued that the class action approach "offers advantages over representative standing" including the fairness of the process to absent third parties and the efficient resolution of legal questions common to third parties.

You orally argued this case before the Supreme Court in 1986. The Supreme Court rejected your arguments and held that UAW did have standing to litigate the action. The Court affirmed the principles of associational standing and specifically rejected your arguments. In fact, the Court noted that you failed to recognize the special features "advantageous both to the individuals represented and to the judicial system as a whole," that distinguish suits by associations on behalf of their members from class actions. The Court said, "While a class action creates an ad hoc union of injured plaintiffs who may be linked only by their common claims, an association suing to vindicate the interests of its members can draw upon a pre-existing reservoir of expertise and capital. . . . In addition, the doctrine of associational standing recognizes that the primary reason people join an organization is often to create an effective vehicle for vindicating interest that they share with others." *Id.* at 289-190. The associational standing doctrine remains to this day.

In answer to Senator Feinstein's questions at your hearing, you stated that "the government had won in the court below," and you were just "defending a winning argument." However, while the U.S. Court of Appeals for the D.C. Circuit held that the Union had no standing to represent its members on the facts pleaded in the particular case, that court never suggested that the doctrine of associational

standing be rejected and in fact fully accepted the concept of associational standing, in sharp contrast to the position you argued.

a. Do you agree that, in its opinion, the D.C. Circuit never held that the doctrine of associational be rejected and, in fact, accepted the concept?

Response:

In *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. Donovan*, 746 F.2d 839 (D.C. Cir. 1984), the Court of Appeals accepted the doctrine of associational standing as articulated by *Warth v. Seldin*, 433 U.S. 490 (1975), but stated that the doctrine did not provide standing when a plaintiff association sought prospective relief on behalf of its members and held that the "relief requested [in *International Union*] was in no sense prospective . . . ." (*International Union*, 746 F.2d at p. 842.) The Court of Appeals therefore held that the UAW could not obtain relief on behalf of its members.

b. If the lower court never so ruled, why did you state at the hearing that your argument to eliminate associational standing was just "defending a ruling that had been made by the lower court"? Do you want to correct that statement now?

Response:

The Solicitor General did not seek to have the Supreme Court review the *International Union v. Brock* case. Rather, the Supreme Court granted *certiorari* over the opposition of the United States. The United States therefore sought to preserve the Secretary of Labor's victory in the court below by defending the ruling of the D. C. Circuit that the plaintiff association lacked standing. The Solicitor General was in a somewhat unusual position in defending the Court of Appeals' favorable ruling, because the D.C. Circuit's opinion did not discuss the most current Supreme Court case on the issue of representative standing, *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977).

The brief on the merits filed on behalf of the Secretary of Labor argued that the plaintiff association lacked standing under the three-part test set forth in *Hunt*. In the alternative, the brief argued that "the Court should reconsider the doctrine of representative standing in light of general standing principles and the class action provisions of Fed. R. Civ. P. 23." Both of these arguments defended the ruling of the court below that the UAW lacked standing to obtain relief on behalf of its members in that case.

As stated in Rule 3.1 of the ABA's Model Rules of Professional Conduct, a lawyer may make an argument if "there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." In defending the favorable ruling of the court below, and in vigorously representing his client, the Secretary of Labor, the Solicitor General chose to argue forthrightly for a modification of existing law. It is common for the United States to argue for a restrictive approach to standing.

I do want to clarify my role in preparing the government's arguments in *International Union v. Brock*. My name was not on the Opposition to the Petition for Writ of Certiorari in that case. My name was on the United States' brief on the merits, and I did participate in drafting that brief. During the hearing, in response to one question, I confused *International Union v. Brock* with *Equal Employment Opportunity Commission v. Federal Labor Relations Authority*, 476 U.S. 19 (1986), which I argued but did not participate in briefing.

c. You told Senator Feinstein that you would apply the Supreme Court precedent in this case. Please describe for me your understanding of the doctrine of representational standing.

Response:

The doctrine of representational standing under federal law is defined in *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977). In that case the Supreme Court stated: "[An] association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." (*Id.* at 343.) These criteria for representational standing were reaffirmed by *International Union v. Brock*. I believe that these principles still apply in federal court litigation, but I have not had occasion to thoroughly research that issue because for the past seven and one-half years I have applied California rules governing standing in my work as a state court judge.

d. Do you still ascribe to the theory that an association would be an inadequate representative of its members' legal interests? If so, why? If not, why not and when did you change your mind?

Response:

I respectfully disagree with the premise of the question. As ABA Model Rule 1.2(b) recognizes, it cannot be presumed that an advocate for a client always agrees with the arguments he or she makes on behalf of the client, and that the advocate, by making the argument, is asserting that he or she would rule in accordance with that argument if he or she were then judging the case. The Los Angeles County Bar Association, representing over 20,000 members, in its letter to the members of the Senate Judiciary Committee, put the matter this way: "As lawyers it is our role to be advocates. It is through the adversary system that we as a people and a country have determined that justice is best obtained for all litigants. In vigorously presenting our clients' views, lawyers are professionally bound, subject only to ethical limits, to explore and present all arguments that may advance our clients' cause. Our system of justice will not survive if these underlying principles are undermined. It is for these reasons that the courts and bar associations, when prescribing rules of conduct for lawyers, have repeatedly stressed the importance of having lawyers advocate with zeal and vigor the positions of their clients."

As a lawyer for the government, when I argued the *International Union v. Brock* case, I believed that the arguments presented on behalf of the Secretary of Labor were well taken and should be presented to the Supreme Court. After the Supreme Court ruled in that case, the United States, and I as its advocate, accepted the Supreme Court's ruling. The Supreme Court held that satisfaction of the three part test set forth in *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977), is sufficient to ensure that an association is an adequate representative of its members' legal interests. If confirmed as a judge of the Ninth Circuit, I certainly would have no difficulty in following the Supreme Court's representational standing precedents and would do so without reservation.

e. Do you still think that the class action approach "offers advantages over representative standing"? If so, why? If not, why not and when did you change your mind?

Response:

Again, I respectfully disagree with the premise of this question for the reasons stated in my response to the previous question. As the ABA Model Rules and the above-cited letter from the L.A. County Bar Association make clear, it cannot be presumed that an advocate for a client always agrees with the arguments he or she makes on behalf of the client, and that the advocate, by making the argument, is asserting that he or she would rule in accordance with that argument if he or she were then judging that case.

As a lawyer for the government, when I argued the *International Union v. Brock* case, I believed that the arguments presented on behalf of the Secretary of Labor were well taken and should be presented to the Supreme Court. After the Supreme Court ruled in that case, the United States, and I as its advocate, accepted the Supreme Court's ruling. The Supreme Court stated that "[t]he very forces that cause individuals to band together in an association will thus provide some guarantee that the association will work to promote their interests." (*International Union v. Brock*, 477 U.S. at 290.) If confirmed as a judge of the Ninth Circuit, I certainly would have no difficulty in following the Supreme Court's representational standing precedents and would do so without reservation.

f. When federal rights laws are violated in the United States, individuals who have experienced discrimination or injustice look to our federal courts for remedies. Often, these are ordinary working men and women who do not have resources to bring complex and protracted litigation on their own and turn to civil rights organizations to assist them. These groups have the resources, legal ability and institutional support to bring litigation on behalf of their members who would otherwise be left with no redress. Historically, representational standing has been a critical tool in remedying discrimination and racial injustice.

If a court were to accept your arguments and reject the doctrine of "representational standing," do you think individual plaintiffs, such as

workers laid off from their jobs, would be able to bring such litigation on their own? Or would individual plaintiffs who lack the resources to bring complex litigation be essentially unable to protect their civil rights?

Under your theory, how would you ensure that ordinary working men and women whose federal rights have been violated, and who do not have the resources to bring complex and protracted litigation on their own, would be able to bring litigation to protect their rights and prevent injustice?

What assurances can you give this Committee that you would not let your extreme view of associational standing influence you if you were confirmed to the federal bench?

Response:

Again, as the ABA Model Rules and the letter from the L.A. County Bar Association make clear, it cannot be presumed that an advocate for a client always agrees with the arguments he or she makes on behalf of the client, and that the advocate, by making the argument, is asserting that he or she would rule in accordance with that argument if he or she were then judging that case.

However, to respond to the hypothetical posed in your question, it is my understanding that many plaintiffs whose civil rights have been violated would be able to bring suit regardless of their personal means because the federal civil rights laws provide for an award of attorneys fees to plaintiffs who prevail in such litigation. Even in complex cases, the potential for a fee award often is sufficient to allow a person whose federal rights have been violated to engage an attorney on a contingency fee basis. When a group of individual plaintiffs can satisfy the commonality and other requirements of Rule 23, class counsel has an enhanced opportunity to recover fees based on his or her success in representing the entire class. Moreover, an association certainly could hire counsel to represent its individual members as a group in their own names. No doubt the Supreme Court's representational standing jurisprudence provides additional options for persons who are members of associations, however.

Regarding my willingness to apply Supreme Court precedent in the area of associational standing, I will apply the law fully and fairly in this area as in all others. As a judge of the California Superior Court, I routinely apply California state law in this area, which allows plaintiffs to sue even when they could not meet the federal law requirements for standing. For example, under California Business and Professions Code section 17200, a plaintiff (either an individual or an association) can bring suit to challenge a defendant's unfair business practice whether or not the plaintiff (or the plaintiff's members) has been injured by the business practice. Associations cannot satisfy the requirements for representational standing under federal law unless the "members would otherwise have standing to sue in their own right . . . ." (See *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977).) Nevertheless in my court such plaintiffs are allowed to bring suit under state law. (See *Stop Youth*

Addiction, Inc. v. Lucky Stores, Inc., 17 Cal.4th 553 (1998) (holding that under California Business and Professions Code section 17200 any individual or organization, acting on behalf of the general public, may bring suit to challenge a defendant's unfair business practices).) Certainly there is no basis to question my willingness to apply federal standing law as established in *Hunt* and *International Union v. Brock*.

4. Many Americans would not be comfortable with a judge whose intelligence and reason were not tempered by experience and compassion. Judges must understand and have a feel for the human situations which underlay the disputes that come before the courts. The quality of justice rendered by judges depends upon their capacity to grasp both the human and legal elements in the cases before them. Do you have that capacity?

   Can you please give us an example of a situation in which you displayed, as a lawyer, understanding for the human situation, such as the sting felt by women or minorities victimized by discrimination?

Response:

Yes, I do have the capacity to grasp the human elements in cases before me. I have presided over criminal cases where victims of sexual attacks have testified and have tried to ease the difficulty of testifying for those victims. I have presided over trials where child victims of sexual abuse have testified, in one case a victim the same age as my own daughter. I have listened at a sentencing hearing while a relative of a child victim spoke for the first time of her own sexual abuse occurring at an earlier time in the same family. In civil cases I have listened to the testimony of victims of sexual harassment, both female and male. In conducting these trials I have made sure that these plaintiffs have had a full and fair opportunity to present their case to the jury.

As a trial court judge, I have rendered a decision in favor of an openly gay police sergeant who was disciplined for wearing his uniform in a gay rights parade and for attempting to recruit gay and lesbian persons for the police force. I reversed the department's disciplinary ruling on the ground that the sergeant was denied due process in the police department disciplinary hearing. As an appellate justice I have carefully reviewed the record of a trial involving race discrimination and have affirmed the jury's substantial verdict in favor of that victim who was denied promotions for complaining about race discrimination in the workplace.

5. In an article you wrote while in private practice, you argued that the federal laws against job discrimination, contractual rights of union members, and state laws protecting workers from unfair treatment, taken together, unduly inhibit employers from firing workers with whom they are dissatisfied, and you emphasized the costs to society of tying employers' hands in this way. [Carolyn Kuhl, "Employment at the Will of the Courts," *Law, Economics & Civil Justice*, Free Congress Foundation, 1994.]

a. Why did you choose to write an article focusing on the costs to employers and society of the laws against unfair treatment of workers, as opposed to the costs to workers and society of discrimination on the basis of race, sex, or other arbitrary factors or other forms of unfair treatment of workers? Have you ever written any brief or article about the latter?

Response:

I respectfully disagree with the question's characterization of the article. The article points out that the civil rights laws can be justified based not only on concepts of morality (which alone would fully justify the statutes) but also on concepts of economic efficiency. The article states: "Title VII of the Civil Rights Act of 1964 outlawed employment decisions based on the patently irrational considerations of race, sex, national origin and religion. These civil rights laws were promoted based not only on arguments of morality but also on concepts of economic rationality. That is, because race and these other personal characteristics are unrelated to job performance, taking them into account would be economically inefficient." (Employment at the Will of the Courts, p. 186.)

Indeed a principal goal of the article was to point out the irony that those who were most deserving of protection in the workplace, persons who were subject to adverse job action based on the "patently irrational considerations of race, sex, national origin and religion," had less generous remedies under the federal civil rights laws that the expansive remedies many state courts had created for white, male, non-union employees. As the article states: "Thus because the court system has reached out to create remedies [including tort damages and punitive damages] for those employees who have been largely or entirely omitted from the protections of unionization and federal statute, these employees – the white, male, middle- and upper-middle class – ironically have sometimes obtained more generous protections. The civil rights statutes of the 60s and 70s provide no damages for emotional distress and no punitive damages. With the exception of the age discrimination act, these statutes do not provide for a jury trial. Similarly union contracts provide for remedies limited to reinstatement and back pay with an adjudication by an arbitrator who has virtually unreviewable discretion." (*Id.*, p. 188.)

I have written opinions that addressed unfair treatment of workers. I wrote the appellate decision in *Iwekaogwu v. City of Los Angeles*, 75 Cal.App.4th 803 (1999), during the three months I sat as a Justice Pro Tempore of the California Court of Appeal. In this case I upheld a jury award of $500,000 to an African-American employee of the City of Los Angeles who had brought suit for discriminatory treatment on the basis of race and national origin and for retaliation. The defense argued that the evidence offered by the plaintiff at trial was insufficient to support the jury's verdict that Mr. Iwekaogwu had been retaliated against for complaining that he had been discriminated against on the basis of race. This argument required a careful review of the entire trial record to determine (1) whether the adverse employment decisions occurred after Mr. Iwekaogwu had complained about discrimination and whether the persons who made the decisions knew about Mr. Iwekaogwu's complaints, and (2) whether a large verdict for emotional distress damages alone (over $450,000) could be upheld in the absence of any evidence

that plaintiff had sought psychiatric or psychological counseling.

My review of the record demonstrated that after Mr. Iwekaogwu had complained about being discriminated against, he had been denied two promotions and had been subject to a discriminatory denial of the opportunity to receive overtime pay. The defense argued that there was not sufficient evidence that the relevant decision makers knew of Mr. Iwekaogwu's discrimination complaint and acted in retaliation. I rejected such a "narrow . . . view of the type of evidence that may be offered to show that an employer's nonretaliatory explanation for its actions is pretextual," and relied on Ninth Circuit precedent for a broader standard more favorable to the plaintiff. (*Id.* at 816.) I also rejected the notion that individual employment decisions should be analyzed apart from discriminatory statements made in the course of other employment decisions. (*Id.* at 817.) I also rejected the defense argument that the jury could not consider plaintiff's circumstantial proof to support a finding that the persons who denied promotions to Mr. Iwekaogwu knew about his complaints of discrimination. Finally, I rejected the defense claim that the amount of emotional distress damages was excessive. Even though no doctor testified concerning his emotional distress, I held that the jury could rely on his own and his family's statements about the stress and changes in Mr. Iwekaogwu's personal relationships because of the retaliation at work, and his fear of physical harm from coworkers. Therefore I upheld the entire $500,000 damages award.

In a case involving the rights of an openly gay police officer, *Grobeson v. City of Los Angeles*, Case No. BC 150151, I overturned discipline of that officer for having worn a police department uniform in a gay rights parade and for having conducted recruitment activities aimed at the gay and lesbian community. I wrote that "California law is clear that a person facing an administrative hearing that could affect his fundamental rights must have clear notice of the charges against him." (Opinion at 15.) Because the Police Department had violated Sergeant Grobeson's due process rights, by failing to give him proper notice of the charges against him, I overturned the Police Department's discipline of Sergeant Grobeson in its entirety. (*Id.* at 18-19.)

b. In this article, you also criticize laws aimed to prohibit employment discrimination, such as Title VII of the Civil Rights Act, on the ground that they "left a minority of the populace – white, male and non-union – with no legal protections in their employment status." Please explain why you think a law intended to protect one class necessarily harms another group of people. The way I read Title VII is that it enhances the legal protections for every individual regardless of their race, gender, or ethnicity – why do you think that it strips certain individuals of their legal rights? How can we be certain that you will be neutral in applying Title VII in cases that come before you?

Response:

Again, I respectfully disagree with the characterization of the article. The article does not criticize the civil rights laws. Rather, the article praises the civil rights laws because they outlawed workplace decisions based on "the patently irrational

considerations of race, sex, national origin and religion." (Employment at the Will of the Courts at p. 186.) The article notes that the civil rights laws are justifiable "based not only on arguments of morality but also on concepts of economic rationality," noting that "because race and these other personal characteristics are unrelated to job performance, taking them into account would be economically inefficient." (*Id.*)

The article does not suggest that the civil rights laws were wrong in not providing legal protections for white, male and non-union employees. The article suggests that state court judges stepped in to protect this latter group, thereby undermining the doctrine of employment at will, in part because "within this class are persons with whom state court judges can most readily identify." (*Id.* at 187.)

Indeed, a principal goal of the article is to point out the irony that those who were most deserving of protection in the workplace, persons who were subject to adverse job action based on the "patently irrational considerations of race, sex, national origin and religion," had less generous remedies under the federal civil rights laws that the expansive remedies many state courts had created for white, male, non-union employees. As the article states: "Thus because the court system has reached out to create remedies [including tort damages and punitive damages] for those employees who have been largely or entirely omitted from the protections of unionization and federal statute, these employees – the white, male, middle- and upper-middle class – ironically have sometimes obtained more generous protections. The civil rights statutes of the 60s and 70s provide no damages for emotional distress and no punitive damages. With the exception of the age discrimination act, these statutes do not provide for a jury trial. Similarly union contracts provide for remedies limited to reinstatement and back pay with an adjudication by an arbitrator who has virtually unreviewable discretion." (*Id.* at 188.)

You can be certain that I will be "neutral in applying Title VII in cases that come before [me]" because I have fairly and properly enforced California state law which often provides victims of discrimination with greater remedies than those available under Title VII. The civil rights laws have been one of the greatest forces for positive social change in this country in my lifetime. As discussed in response to the previous question, my appellate decision in *Iwekaogwu v. City of Los Angeles*, 75 Cal.App.4th 803, includes a strong statement in favor of plaintiffs' ability to use a variety of kinds of circumstantial and direct evidence in proving discrimination claims. Moreover, I have the strong support of civil rights lawyers such as Vilma Martinez, former President of MALDEF, and Leo James Terrell, an attorney for the NAACP and a national radio and television commentator, as well as the backing of numerous lawyers and judges in the Los Angeles legal community who are members of minority groups.

April 29, 2003

Responses of Judge Carolyn Kuhl to Follow-up Questions from Senator Schumer

Question 1:

As a Department of Justice lawyer you swore to uphold and defend the Constitution. You then authored a memo encouraging the Department to urge the Supreme Court to reverse Roe v. Wade. Given that you were upholding the Constitution and urging Roe's reversal, you must have believed that Roe was unconstitutional. Is this the case or not? If so, please explain why you believed Roe was unconstitutional. If not, please explain why, having taken an oath to uphold the Constitution, you urged the reversal of a case you believed to be constitutional.

Response:

The memorandum and brief to which this question refers pertained to the case of *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986). The brief on behalf of the United States in the *Thornburgh* case was filed in 1985. In 1992 the United States Supreme Court reconsidered its decision in *Roe v. Wade* and strongly reaffirmed that decision. (*Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).) *Roe v. Wade* and *Casey* are firmly established Supreme Court precedent and articulate a constitutional right to privacy that protects a woman's choices regarding reproductive freedom. In my current position as a state court judge and as a judge of the Ninth Circuit, should I be confirmed, I do and would follow all precedents of the United States Supreme Court, including *Roe* and *Casey*. As a judge of the Ninth Circuit I would have no authority whatsoever to overturn Supreme Court precedent.

When I was a lawyer in the Department of Justice, it was my job to represent the United States and the President. President Reagan had stated publicly that *Roe v. Wade* was wrongly decided and should be overruled. There were sound legal arguments that could be made in support of that view, as articulated by respected academics. At the time of the *Thornburgh* brief, numerous constitutional scholars had criticized *Roe v. Wade* and its reasoning. Among those scholars were Alexander Bickel, Archibald Cox, John Hart Ely, Paul Freund, Gerard Gunther, Harry Wellington, and Ruth Bader Ginsburg. In 1985, as an advocate and not as a judge, I believed that those criticisms should be presented to the Supreme Court in support of the position taken by my client, the President.

At the time the *Thornburgh* brief was under consideration, the United States already had filed a brief criticizing *Roe v. Wade* in a case involving abortion regulations, *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983). In the *Akron* case, the Solicitor General had argued that, in ruling on the constitutionality of state statutes regulating abortion, the Supreme Court should interpret *Roe* very narrowly and should give "heavy deference" to the political and legislative judgments made by the states concerning abortion. This position arguably was inconsistent with *Roe* without quite saying so. At oral argument in the *Akron* case, Justice Blackmun asked whether the United States was arguing that *Roe v. Wade* should be overruled. When the Solicitor

General answered in the negative, Justice Blackmun made clear that the position of the United States was in fact inconsistent with *Roe*.

The Justice Department's argument in *Akron* made it appear that the United States was not being completely forthcoming with the Supreme Court. I believed that the Department of Justice and the Solicitor General should be honest with the Supreme Court and should forthrightly present the views of the President regarding *Roe v. Wade*.

More broadly, this question appears to raise an issue as to whether a lawyer for the government ever can ask a court to overrule existing constitutional precedent. The answer clearly is yes. Indeed, the Office of the Solicitor General has made such requests of the Supreme Court in both Democratic and Republican administrations.

For example, during the administration of President Clinton, in *United States v. Hatter*, 532 U.S. 557 (2001), Solicitor General Waxman asked the Supreme Court to overrule *Evans v. Gore*, 253 U.S. 245 (1920), and to hold that the Compensation Clause of the Constitution does not forbid Congress from enacting a nondiscriminatory tax on judges. Acting Solicitor General Walter Dellinger filed a brief in the case of *Agostini v. Felton*, 521 U.S. 203 (1997), asking the Supreme Court to overrule *Aguilar v. Felton*, 473 U.S. 402 (1985), a case interpreting the Establishment Clause, so as to permit remedial educational instruction by government employees to disadvantaged children on a neutral basis even though the instruction is given on the premises of a sectarian school. These are just some recent examples. In these cases Solicitor General Waxman and Acting Solicitor General Dellinger adhered to their oaths while also asking the Supreme Court to reconsider its precedent.

Lawyers should make legal arguments for the fullest benefit of their client's cause. According to Rule 3.1 of the ABA's Model Rules of Professional Conduct, a lawyer may make an argument if "there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." The Executive Branch as a client similarly is entitled to vigorous representation, consistent with the obligation of the Department of Justice to preserve its credibility in the arguments that it makes in the courts.

It is important to distinguish the role of an advocate from that of a judge. A judge of an inferior court, such as the United States Court of Appeals for the Ninth Circuit, may not overrule any precedent of the United States Supreme Court. Even when it would be entirely appropriate for a lawyer to argue on behalf of a private client or the government that Supreme Court precedent should be overruled, a judge of an inferior court must faithfully follow and apply that precedent. As a judge, my job is not to question Supreme Court precedent, but to apply it.

Question 2:

If you did believe Roe was unconstitutional when you were a DOJ lawyer, do you still believe Roe is unconstitutional and should be reversed? If so, why? If not, why not?

Response:

The constitutional right of a woman to make her own choices regarding personal medical issues, including choices regarding issues of reproductive freedom, has been clearly articulated in *Casey* and *Roe v. Wade*. The precedent established by these two

cases is firmly settled. I am fully committed to following these precedents and would fairly and properly apply the law established by those cases.

Question 3:

In your colloquy with Chairman Hatch after my round of questions, you stated that there are instances where a DOJ lawyer, acting in accord with her duty to uphold and defend the Constitution, could argue that settled Supreme Court law should be reversed. Brown v. Board of Education was cited as one example where it was appropriate to encourage setting aside unconstitutional law in favor of a more enlightened Constitutional interpretation. I agree with that assertion wholeheartedly and, in my questions, did not intend to imply that a government lawyer could not urge the reversal of decisions that are contrary to the Constitution.

That said, I also believe Roe v. Wade is not comparable in any way to Plessy v. Ferguson, the case Brown overturned. Did you view the two as comparable cases when you wrote the memo urging the Department to seek Roe's reversal? If so, why? If not, why not? Do you view the two as comparable cases now? If so, why? If not, why not?

Response:

In my colloquy with Chairman Hatch, I mentioned *Brown v. Board of Education* as an example of a case in which it would be appropriate for a government lawyer to argue for the overruling of prior precedent (in that case, the overruling of *Plessy v. Ferguson*). It well illustrates the point that a Department of Justice lawyer does not violate his or her oath by arguing that a precedent should be reconsidered. At the hearing your questions left me with the impression you took the position it never was appropriate for a government lawyer to argue that Supreme Court precedent on a point of constitutional law should be reconsidered.

I did not view *Plessy v. Ferguson* as comparable to *Roe v. Wade* at the time the *Thornburgh* brief was under consideration at the Justice Department, nor do I now believe that they are comparable. I mentioned *Brown v. Board of Education* only to illustrate the point that a Department of Justice lawyer does not violate his or her oath by arguing that a prior constitutional precedent should be reconsidered.

Question 4:

What standards should a Department of Justice lawyer use when deciding whether to encourage the reversal of Supreme Court precedent?

Response:

In a letter to the Senate Judiciary Committee dated March 28, 2003, the Los Angeles County Bar Association wrote:

> As lawyers it is our role to be advocates. It is through the adversary system that we as a people and a country have determined that justice is best obtained for all litigants. In vigorously presenting out client's views, lawyers are professionally bound, subject only to ethical limits, to explore and present all arguments that

> may advance our clients' cause. Our system of justice will not survive if these underlying principles are undermined. It is for these reasons that the courts and bar associations, when prescribing rules of conduct for lawyers, have repeatedly stressed the importance of having lawyers advocate with zeal and vigor the positions of their clients. [Footnote omitted.]

As discussed above, lawyers ethically may argue for reversal of existing law, and the Solicitor General's Office often has argued for reversal of constitutional precedents.

The United States Supreme Court does not overturn its own precedents often and it does so reluctantly, because precedent is one of the foundations of our legal system. However, there are times when the Supreme Court does reconsider and reverse constitutional precedents.

For example, the Supreme Court reversed the "separate but equal" doctrine of *Plessy v. Ferguson* in *Brown v. Board of Education*. In *United States v. Hatter*, 532 U.S. 557 (2001), the Supreme Court overruled *Evans v. Gore*, 253 U.S. 245 (1920), and held that the Compensation Clause of the Constitution does not forbid Congress from enacting a nondiscriminatory tax on judges, because there is almost no likelihood that a nondiscriminatory tax could be a disguised legislative effort to influence the judiciary. The Supreme Court overruled *Aguilar v. Felton*, 473 U.S. 402 (1985), a case interpreting the Establishment Clause, in *Agostini v. Felton*, 521 U.S. 203 (1997), thereby permitting remedial educational instruction by government employees to disadvantaged children on a neutral basis even though the instruction is given on the premises of a sectarian school.

In each of these cases reversing prior constitutional precedent, the Solicitor General's office asked the Supreme Court to overrule the earlier Supreme Court case. I am not aware of any set standard that the Solicitor General's Office uses to decide whether or not to argue that a Supreme Court case should be overruled. Some of the considerations mentioned by the Solicitor General in the briefs filed in *Hatter* and *Agostini* include whether the doctrinal basis of the Court's prior precedent has been demonstrated to be unsound (Brief for the United States in *Hatter* at 15), whether the prior precedent is inconsistent with the policies underlying the constitutional provision at issue (*id.* at 16), whether subsequent decisions of the Court have undermined the original precedent (*id.* at 17), whether the precedent has been criticized by other courts or in academic commentary (*id.* at 19), and whether the prior precedent was in conformance with the general thrust of the Court's jurisprudence in the same area (Reply Brief for the Secretary of Education in *Agostini*).

It is appropriate for a government lawyer as an advocate to ask the Supreme Court to reconsider a precedent when that serves the interest of the government as determined by the President and when a reasonable argument can be made in favor of overruling the precedent.

Question 5:

What standards did you use when you urged the Department of Justice to seek Roe's reversal?

Response:

At the time the *Thornburgh* brief was under consideration, President Reagan had stated that *Roe v. Wade* should be overruled. The many and substantial scholarly criticisms of *Roe*'s reasoning provided a sound basis for advancing the President's position and asking the Supreme Court to overrule *Roe*.

Question 6:

Do you believe that you employed the proper standards when you urged Roe's reversal while you were at the Department of Justice? If so, why? If not, why not?

Response:

My responsibility as a lawyer for the government was to present the views of the government as determined by the President to the Supreme Court so long as a reasonable argument could be made for that position. At the time that the *Thornburgh* brief was under consideration (prior to the Supreme Court's decision in *Casey* which reconsidered and reaffirmed *Roe v. Wade*), a defensible legal argument could be made in support of then-President Reagan's view that *Roe v. Wade* should be overruled.

Again, however, it is important to emphasize that the role of an advocate is quite different from the role of a judge. A judge of an inferior court may not overrule any precedent of the United States Supreme Court. Even when it would be entirely appropriate for a lawyer to argue on behalf of a private client or the government that Supreme Court precedent should be overruled, a judge of an inferior court must faithfully follow and apply that precedent. As a judge, my job is not to question Supreme Court precedent, but to apply it.

Responses of Judge Carolyn Kuhl to Follow-up Questions from Senator Schumer (Second Set)

Question:
I want to follow-up on Senator Grassley's questions regarding your advocacy on the *qui tam* provisions of the False Claims Act.

In 1993, you filed a brief in *United States ex rel. Rohan v. Newbert*. On page 46 of that brief, you wrote:

"The Justice Department recently released for publication a July 18, 1989 Memorandum of the Department's Office of Legal Counsel (OLC), opining that the qui tam provisions of the False Claims Act are unconstitutional.... [We] respectfully refer the Court to that Memorandum.... The OLC Memorandum concludes: 'The Office of Legal Counsel believes the qui tam provisions of the False Claims Act are patently unconstitutional. In our view, this is not even a close question.' (emphasis in brief)."

You included a footnote that said, "Such memoranda periodically are published as Opinions of the Office of Legal Counsel. This memorandum is not yet printed in a bound volume." You attached the memorandum to your brief for the court's consideration.

The memorandum on which you were asking the court to rely was published in the first year of the first Bush Administration. During the remaining three-and-a-half years of the Bush Administration, the opinion advanced in that memorandum (namely, that the *qui tam* provisions of the False Claims Act are unconstitutional) was never adopted by the Department of Justice. In January of 1993, just days before you filed your brief, President Clinton assumed office. His Department of Justice, as would be expected given President Clinton's support for whistleblower protections, also did not adopt the opinion advanced in the 1989 memorandum.

Nowhere in your brief did you advise the court that the OLC memorandum on which you were relying had never been adopted as the official position of the United States government.

After you filed your brief, the Department of Justice took the unusual step of submitting a letter to the court clarifying the government's position. The letter reads in part:

"It has come to our attention that some of the litigants in these cases have relied in their briefs on a memorandum dated July 18, 1989, from then-Assistant Attorney General William P. Barr to then-Attorney General Dick Thornburgh, addressing the constitutionality of these provisions of the False Claims Act. **I am writing**

now to make clear to the Court, in light of that reliance, that the Memorandum from Assistant Attorney General Barr was never adopted by the Attorney General, and does not represent the position of the United States." (emphasis added)

a. Why did you rely on the OLC memorandum without advising the court that it did not represent the official position of the Department of Justice?

Response:

The brief represented the memorandum stating the position of the Office of Legal Counsel to be just that: the position of the Office of Legal Counsel. The brief quotes the OLC memorandum as stating that "'[t]he *Office of Legal Counsel* believes that the qui tam provisions of the False Claims Act'" are unconstitutional. (Brief for the Appellees at p. 45, quoting OLC memorandum at p. 3 (emphasis added).) The court was advised that the OLC memorandum did not represent the views of the Attorney General, because the OLC memorandum itself discloses that various offices within the Justice Department disagreed on whether the qui tam statute was constitutional. (OLC Memorandum at p. 2.) The memorandum on its face purports to present the views of the Office of Legal Counsel and urges then-Attorney General Thornburgh to authorize the Civil Division "to enter an appropriate case and present the Executive Branch's arguments against the constitutionality of qui tam." (*Id.* at p. 38.)

Between the date of the OLC Memorandum and the date of the brief in *Rohan*, the Department of Justice had not taken a position in litigation concerning the constitutionality of the qui tam statute. Indeed, even the letter of March 31, 1993 from the Acting Assistant Attorney General of the Civil Division did not take a position on the constitutionality of the qui tam statute. That letter only advised the court that the OLC memorandum did not represent the views of the Attorney General, which was evident from the face of the memorandum itself.

A change of administrations sometimes, but certainly not always, leads to a change of legal positions taken by the Justice Department or by an office within the Justice Department. With respect to the constitutionality of the qui tam statute, it was not until May 7, 1996 that the Office of Legal Counsel issued a formal opinion contradicting the OLC memorandum referred to in this question.

b. Under the rules of professional conduct in California at the time you filed the brief (and now), "[a]n attorney has an unqualified duty to refrain from acts which mislead the court." Especially given that the United States Department of Justice saw your reliance on the OLC memorandum as sufficiently misleading that it sent a highly unusual letter correcting the record, do you believe that in relying on the memorandum in that manner you fulfilled your obligation to be candid with the court?

Response:

I do not believe that reference to the position of the Office of Legal Counsel in the brief was misleading to the court. As discussed in response to the previous question, the

OLC memorandum itself stated that various offices within the Justice Department disagreed on whether the qui tam statute was constitutional. The reason why the letter from the Acting Assistant Attorney General of the Civil Division was unusual is because it is unusual for disagreements among offices within the Justice Department to be aired publicly, as they were in the OLC memorandum.

It should be noted that the amicus curiae brief filed by Mr. John Phillips on behalf of Taxpayers against Fraud in the *Rohan* case does not suggest that citation to the OLC memorandum was improper. Mr. Phillips' brief notes that the OLC memorandum itself "does not purport to represent the official views of the Department of Justice . . . ; indeed, [the Assistant Attorney General who wrote the memorandum] adverts to a sharp disagreement among ranking officials within the Department." (Brief of Taxpayers Against Fraud at p. 9, n. 3.)

April 29, 2003

SUBMISSIONS FOR THE RECORD

ALDER
L A W

February 4, 2003

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 200510

Re: Support for Judge Caroline Kuhl for Ninth Circuit Appellate Justice

Dear Senator Hatch:

I am a lawyer in Los Angeles. In my experience with Judge Kuhl, I have found her to be fair and compassionate towards my clients. I think Judge Kuhl would make an excellent appellate judge, even though I may not agree with some of her views.

I urge you to bring Judge Kuhl's appointment up for a vote in the Judiciary Committee.

Very truly yours,

LAW OFFICES OF C. MICHAEL ALDER, P.C.

BY: _____
C. MICHAEL ALDER

CMA:ch

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Alliance for Justice Report
In Opposition to the Nomination of Judge Carolyn Kuhl
To the U.S. Court of Appeals for the Ninth Circuit

Introduction

California Superior Court Judge Carolyn B. Kuhl, nominated by President Bush to a seat on the U.S. Court of Appeals for the Ninth Circuit, has demonstrated hostility toward civil and constitutional claims by women and minorities as deep-seated as that of any of this president's appellate court nominees to date. As a Reagan Justice Department lawyer, Kuhl spearheaded the effort to persuade the administration to reinstate tax-exempt status for schools that discriminate on the basis of race. She also aggressively pushed the Justice Department to argue for a reversal of *Roe v. Wade* in a case in which a woman's fundamental right to choose was not at issue, and sought to limit the scope of sexual harassment suits. As a private attorney and judge, Kuhl continued to take positions, and issue rulings, against legal protections for women.

Kuhl's career has also been marked by repeated efforts to restrict plaintiffs' ability to obtain justice through the courts. At the Justice Department, she fought to limit associational standing and to weaken the Equal Access to Justice Act. As a litigator in private practice, she worked to immunize corporations that defraud the government from claims by whistleblowers and argued that the courts should strictly limit punitive damages for corporate misconduct. And as a judge, she has been reversed repeatedly for rulings that favor corporate defendants and other wrongdoers over injured plaintiffs.

Judge Kuhl lacks the open-mindedness and fairness that are basic prerequisites for any federal judge, especially one who would sit on a court one step below the Supreme Court. Throughout her career as a lawyer, she aggressively promoted positions outside the mainstream on such issues as reproductive freedom and civil rights, going far beyond the zealous advocacy that lawyers owe their clients. Her record contains no evidence that her zeal on behalf of extremist views has abated. The Alliance for Justice strongly urges the Senate to reject her nomination.

Basic Biography

Born in 1952 in St. Louis, Missouri, Carolyn Kuhl received her B.A., *cum laude*, from Princeton in 1974 and her J.D. in 1977 from Duke. Following law school, she clerked for then-Judge Anthony Kennedy of the Ninth Circuit and then spent three years as an associate at the law firm of Munger, Tolles & Olson. From 1981 to 1986, Kuhl worked in the U.S. Department of Justice in the Reagan Administration. She was Special Assistant to Attorney General William French Smith for the first two years, after which she was promoted to Deputy Assistant Attorney General in the Civil Division, and then to Deputy Solicitor General in 1985.

Kuhl returned to Munger, Tolles & Olson, where she became a partner and primarily represented corporate interests including gas and tobacco companies. In 1995, she was appointed by California Governor Pete Wilson to the Los Angeles County Superior Court, where she remains a judge today. Judge Kuhl is a member of the Los Angeles Chapters of both the Association of

Business Trial Lawyers and the Federalist Society[1] and lives in Los Angeles with her husband, fellow Los Angeles County Superior Court Judge William Foster Highberger.

Kuhl's Record

I. Carolyn Kuhl has Exhibited Hostility to the Civil Rights of Racial and Ethnic Minorities

A. Bob Jones University

As a lawyer in the Reagan Justice Department, Kuhl aggressively pushed the Attorney General to reverse the Internal Revenue Service's policy and reinstate the tax-exempt status of Bob Jones University[2] and other schools that discriminated on the basis of race.[3] For eleven years, the I.R.S. had denied Bob Jones and other racially discriminatory schools[4] tax-exempt status, a position the Reagan administration initially defended in a brief it filed before the Supreme Court in late 1981. However, after internal arguments by Kuhl and others, as well as pressure from members of Congress, including Trent Lott, the administration reversed its position and announced its withdrawal of support for the I.R.S. This prompted confusion within the Justice Department about who would argue the government's position before the Supreme Court.[5] The Court appointed William Coleman as special counsel to represent the I.R.S.'s position since the Solicitor General would no longer do it.

The Reagan Administration decided to reverse its position "despite arguments by some Justice and Treasury Department lawyers that the step might be illegal and might be seen as a political sop to racists."[6] More than two hundred staffers in the Justice Department's Civil Rights Division signed a letter expressing their concerns. Indeed, even Ted Olson, who is now the Bush Administration's Solicitor General and was then head of the Office of Legal Counsel, opposed the change of position. The decision also provoked a public outcry that the administration was condoning civil rights violations, with numerous senators and congressmen on both sides of the aisle speaking out against it. Senator Daniel Patrick Moynihan (D-NY) said that the decision was "surely immoral and, in my mind, illegal as well.... The great civil rights advances of our times began with the banning of racial discrimination in the schools.... A great retreat could well now have begun by the lifting of that ban." Senator Charles McC. Mathias (R-MD) called the decision "outrageous," and Rep. Jack Kemp (R-NY) said: "If it takes tax policy to change discrimination or to protect civil rights for all, then it should be used."[7]

Kuhl argued that the I.R.S. was acting beyond its authority in denying tax exempt status to Bob Jones University. The Supreme Court soundly rejected this argument by an 8-1 vote. As *New*

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[1] Judge Kuhl has been an active participant in both organizations, giving three presentations at the Association of Business Trial Lawyers and three others before the Los Angeles and Indiana University School of Law chapters of the Federalist Society.

[2] Stuart Taylor, "200 in Agency Criticize Decision on Tax Exemptions," *New York Times*, February 3, 1982.

[3] The I.R.S. had refused to grant tax exempt status for Bob Jones University and Goldsboro Christian Schools in North Carolina, both of which defended their racially discriminatory practices on religious grounds. Kevin Costelloe, "Supreme Court Asked to Decide Tax Exemption Issue," *Associated Press*, February 26, 1982.

[4] Bob Jones University, which then prohibited inter-racial dating as contrary to God's intent, now allows it, but only with written parental consent. "Race Dating Plan Needs Parents' OK," *Associated Press*, Greenville, S.C., March 7, 2000. Goldsboro categorically refused to enroll black students. Kevin Costelloe, *supra* note 3.

[5] Indeed, Lawrence Wallace, a deputy to Solicitor General Rex Lee, who signed the brief, wrote in a footnote that he "'fully subscribes' only to the views expressed about the policy's constitutionality." Kevin Costelloe, *supra* note 3.

[6] Stuart Taylor, *supra* note 2.

[7] "Democrats Plan to Roll Back Discrimination Stand," *Associated Press*, January 9, 1982.

York Times columnist Anthony Lewis commented at the time, the Supreme Court decision was a serious rebuke to the Justice Department:

> It is a long time since an Administration has suffered such a defeat in the Supreme Court. The 8-to-1 decision that racist private schools are ineligible for tax exemptions was worse than an embarrassment for President Reagan and his lawyers. It was a humiliation. The opinion of the Court was by Chief Justice Warren Burger, Mr. Reagan's exemplar of a conservative jurist. It was joined by the one Reagan appointee on the Court, Justice Sandra O'Connor. And the opinion demolished the legal arguments made by the Reagan lawyers. How could any President be given such incompetent legal advice?[8]

Some of Kuhl's current supporters, including Catholic University Dean Douglas Kmiec, who also worked at the Justice Department, defend her position in the *Bob Jones* case as purely a legal one.[9] If that is the case, however, the strong dissent within the Justice Department and the ultimate 8-1 rejection of the government's position by the Supreme Court raise serious questions about Kuhl's legal judgment.

Moreover, in defending her position in the case, Kuhl and her supporters have been somewhat less than candid. She has cited a 1984 letter by Harvard Law School Professor Laurence Tribe as supportive of her position. In fact, as Professor Tribe explained in a recent letter to Senators Boxer and Leahy, his 1984 letter agreed with only one minor proposition that was tangential to the substance of Kuhl's argument: that Congress's silence on a given issue should not be interpreted as its agreement. On the merits, Tribe emphasized, he strongly disagreed, both then and now, with Kuhl's position, one he described as "quite extreme" and "legally dubious."[10]

Professor Tribe's letter also commented on Kuhl's recent responses to written questions from Senator Boxer concerning the *Bob Jones* case, in which Kuhl stated that she now believes that the government's decision to change its position was a bad one, "in part because it appeared insensitive to minorities," and also because the IRS "had a defensible legal position," which she now believes the Justice Department had an obligation to defend. Tribe noted that Kuhl's statements "fall surprisingly short of a straightforward endorsement of the legal correctness of the IRS policy that the Supreme Court upheld."[11]

B. Affirmative Action

In 1986, Kuhl wrote an article highlighting her personal support for a key part of the Reagan administration's political agenda: opposition to affirmative action.[12] In the article, Kuhl criticized

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[8] Anthony Lewis, "Abroad at Home, the Court Says No," *New York Times*, May 26, 1983.
[9] David Houston, "Judge's Past May Prove Prologue: 'Bob Jones' Case Preceded Career As Noted Jurist, Law Firm Partner," *L.A. Daily Journal*, May 24, 2001.
[10] January 16, 2003 Letter from Professor Laurence Tribe to Senator Barbara Boxer.
[11] *Id.* In two other cases she litigated as a government attorney, Kuhl also took anti-civil rights positions, both of which were ultimately adopted by a sharply divided Supreme Court. In these cases, Kuhl successfully limited the ability of attorneys to obtain compensation for their work on behalf of civil rights plaintiffs, *North Carolina Department of Transportation v. Crest Street Community Council*, 479 U.S. 6 (1986); and exempted airlines from compliance with Section 504 of the 1973 Rehabilitation Act, which prohibits federal funds recipients from discriminating on the basis of disability, *U.S. Department of Transportation v. Paralyzed Veterans of America*, 477 U.S. 597 (1986).
[12] Carolyn B. Kuhl, "Affirmative Action Today: A Legal and Practical Analysis," *Bureau of National Affairs Special Report*, pp.157-9, 1996.

Supreme Court decisions upholding programs intended to remedy past discrimination and establish a more level playing field, arguing that only narrow programs intended to assist individual victims of specific incidents of discrimination were defensible.[13] In discussing Supreme Court doctrine holding that discrimination on the basis of race is illegal but that remedial racial preferences are permissible in some employment and other contexts, Kuhl concluded that "[t]hese two principles cannot be reconciled; they can only be compromised." She wrote:

> Discrimination is not victimless. Real people are denied jobs, refused promotions, fired, or constructively discharged.... A direct remedial approach would emphasize identification and elimination of employment practices that are barriers to hiring minority-group members and women, and on restoring victims of those discriminatory practices to the place they would have been, absent discrimination. Instead of insisting on such an approach to individual justice, however, courts and litigants have placed primary remedial emphasis on affirmative action, a divisive societal manipulation.

In considering the constitutionality of affirmative action programs, Kuhl emphasized the harm to non-minorities who are denied jobs, implicitly dismissing the far more pervasive and intractable harm to generations of racial minorities. Kuhl's evident hostility toward affirmative action programs and her opposition to Supreme Court precedent upholding them raise serious concerns about her ability to fairly adjudicate the constitutionality of such programs.[14]

II. Throughout her Legal Career, Carolyn Kuhl has Worked to Undermine or Eviscerate Rights and Protections for Women

Kuhl was a true believer in the war waged by the Reagan administration on women's rights, advocating during her tenure as a government attorney to overturn *Roe v. Wade*, limit teens' access to contraceptives, and restrict legal protections against sexual harassment in the workplace. She then brought this ideology into her career as a private attorney, where she continued to work to limit abortion rights and defended all-male public institutions. Finally, as a judge, Kuhl has ruled against women's attempts to protect their privacy and safety.

A. Reproductive Rights

In *Thornburgh v. American College of Obstetricians and Gynecologists*,[15] Kuhl co-authored an *amicus* brief for the government in which she criticized two lower courts for striking down state laws regulating abortion.[16] The brief charged the courts with putting too much emphasis on a

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[13] One of the cases Kuhl criticized was *Local 28, Sheet Metal Workers International v. EEOC*, 478 U.S. 421 (1986), in which, as Deputy Solicitor General, she had co-authored a brief for the EEOC that was rejected by the Supreme Court 5-4. Kuhl argued in the brief that a district court had no authority to order a union with a history of race discrimination to enroll as members a set number of minorities, who were not themselves the actual victims.

[14] In a later article Kuhl wrote about the employment-at-will doctrine, she suggested that civil rights statutes were partly to blame for what she perceived as the erosion of that doctrine and again noted the "disadvantage" at which white men had been placed in the employment context: "Federal labor statutes and federal anti-discrimination laws passed in the 60s and 70s left a minority of the populace – white, male and non-union – with no legal protections in their employment status. State law, and in particular state courts, have moved to fill the 'gap' by creating protections for this politically powerful 'minority' group." Carolyn Kuhl, "Employment at the Will of the Court," *Law, Economics & Civil Justice* (Free Congress Foundation) (1994).

[15] 476 U.S. 747 (1986).

[16] Among the state statutes struck down were Pennsylvania laws mandating that:

- a second physician attend *all* abortions performed after the fetus is viable;
- the method most likely to produce a live birth be used in *all* post-viability abortions unless it would cause

woman's right to have an abortion and giving too little credit to "legislative attempts to balance [other] interests," such as protecting "unborn and future life."[17] It cited for support of its position Chief Justice Burger's "understanding" that "'[t]he Court's holdings in *Roe v. Wade*... and *Doe v. Bolton*... simply require that a State not create an absolute barrier to a woman's decision to have an abortion,'"[18] a position that, if adopted, would allow for virtually unchecked restrictions on abortion.

Most disturbing, however, is the brief's wholesale attack on *Roe* itself and its request that the Supreme Court allow states to ban all abortions: "The textual history and doctrinal basis of [*Roe*] is so far flawed . . . that this Court should overrule it and return the law to the condition in which it was before that case was decided."[19] Former Solicitor General Charles Fried states in his memoirs that it was Kuhl who urged the government to advance this argument, calling her memo "the most aggressive" he received urging the government to argue for the reversal of *Roe*.[20]

The Supreme Court rejected Kuhl's arguments, stating that several laws – among them the informed consent provision, the mandate of a particular standard of care for viable fetuses, and the requirement that a second physician be in attendance – unconstitutionally infringed on a woman's right to privacy as expressed in *Roe*.[21]

The Court took particular issue with one law's reporting requirements, which granted public access to the doctor's name as well as information about the pregnant woman, including her age, residence, marital status, and the number of prior abortions she had had. The Court recognized that, although the law did not explicitly call for publicly naming women who had abortions, "[i]dentification is the obvious purpose of these extreme reporting requirements."[22]

> The scope of the information required and its availability to the public belie any assertions by the Commonwealth that it is advancing any legitimate interest.... A woman and her physician will necessarily be more reluctant to choose an abortion if there exists a possibility that her decision and her identity will become known publicly. Although the statute does not specifically require the reporting of the woman's name, the amount of information about her and the circumstances under which she had an abortion are so detailed that identification is likely.[23]

Earlier, as Deputy Assistant Attorney General, Kuhl had also argued unsuccessfully before the D.C. Circuit in support of a Reagan administration interpretation of Title X that would have

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"significantly greater" risk to the mother;

- pamphlets be published stating that the state "strongly urges you to contact [these public and private agencies] before making a final decision about abortion" to be handed out to all women seeking abortions;
- the woman's age, residence, marital status, and number of prior abortions be made available to the public;
- *only* the doctor (not any assistants) may provide information proving "voluntary consent", the information must include "the relative risks, both physical and psychological, of abortion and childbirth," and the information must inform the woman of assistance available if she chooses to give birth; and

an Illinois law that, prior to a partial repeal, described a fetus as "a human being from fertilization until birth."

[17] Brief for the United States as Amicus Curiae, *Thornburgh v. American College*, July 15, 1985.

[18] *Id.*, quoting *Maher v. Roe*, 432 U.S. 464, 481 (Burger, C.J., concurring).

[19] *Id.*

[20] Charles Fried, *Order and Law: Arguing the Reagan Revolution – A Firsthand Account* 33 (1991).

[21] 476 U.S. 747 (1986).

[22] *Id.* at 767.

[23] *Id.*

required federally-funded family planning providers to notify parents within ten days that they had prescribed contraceptives to the parents' minor children and would have used the parents' income to assess whether or not minors qualified for free or subsidized services.[24] Kuhl argued that the new regulations were consistent with Title X's language and intent, and that they did not violate the Fifth Amendment's Due Process Clause.[25] In reviewing the history of Title X, however, the court found an inherent conflict between the government's position and the intent of the legislators who authored and revised the statute:

> In light of the breadth of the statutory language and clear congressional intent that *all* persons receive such services, Title X grantees have served the teenage population from the inception of the program. Following enactment of Title X, however, Congress frequently expressed its increasing concern about the still unmet family planning needs of sexually active teenagers in this country.... Ultimately, Congress in 1978 amended the statute itself to require that Title X projects offer "a broad range of acceptable and effective family planning methods and services (*including...services for adolescents*)." While this amendment simply codified accepted past practice, the added language clearly reflected Congress' intent to place "a special emphasis on preventing unwanted pregnancies among sexually active adolescents."[26]

The court affirmed the district court's decision to strike down the regulations, noting that they were "fundamentally inconsistent with Congress' intent and purpose in enacting Title X and are therefore beyond the limits of the Secretary's delegated authority."[27] Representative Henry Waxman (D-CA), who lauded the decision, accused the government of "deliberately misread[ing] the statute to carry on its long war on family planning." He noted that while "health and medical groups warned that this was bad policy," he was "pleased that the court of appeals has recognized that the administration's action is also illegal."[28]

Kuhl's assault on women's reproductive rights did not end when she left the Reagan administration; she continued her efforts to restrict abortion rights in private practice. In 1990, she wrote an *amicus* brief for the Supreme Court[29] in the case of *Rust v. Sullivan*[30] on behalf of the American Academy of Medical Ethics, an organization that represents more than 20,000 doctors who oppose abortion and "adhere[] to the Hippocratic Oath in opposing abortion except to save the life of the mother."[31] Kuhl argued that regulations barring doctors who received federal funding from discussing abortion with their patients did not violate the First Amendment's protection of freedom of speech. She also asserted that the regulations do not impermissibly express an "anti-

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[24] *Planned Parenthood v. Heckler, Sec'y of Health and Human Services*, 712 F.2d 650 (D.C. Cir. 1983).

[25] During oral arguments, Kuhl stated that "[I]t's entirely legitimate for parents to be involved in family planning decisions of an adolescent child." Judge Edwards interrupted to state that her assertion was "a moral question, an ethical question, not a statutory issue." Robert Pear, "Administration Presses Court on Teen-Age Contraceptive Rule," *New York Times*, May 10, 1983.

[26] 712 F.2d. at 652 (emphases in the original, citations omitted).

[27] *Id.* at 651.

[28] Robert Pear, *supra* note 24.

[29] In her written responses to questions from Senator Boxer about her extensive involvement in anti-choice cases, Judge Kuhl said that she was merely "attempting to develop an appellate practice specialization as part of my work at my private law firm," and that the potential to work on a First Amendment issue before the Supreme Court was particularly interesting. Carolyn Kuhl's responses to Senator Boxer's questions, June 1, 2001.

[30] 500 U.S. 173 (1991).

[31] Brief of Amicus Curiae American Academy of Medical Ethics, *Rust v. Sullivan*, September 7, 1990.

abortion ideology,"[32] in spite of a provision advising a doctor who is asked by his patient for an abortion referral to respond that, "the project does not consider abortion an appropriate method of family planning and therefore does not counsel or refer for abortion."[33]

The Supreme Court sided with Kuhl 5-4, holding that the regulations were a legitimate construction of Title X that did not violate the First or Fifth Amendments. In a dissent joined in different parts by Justices Marshall, Stevens, and O'Connor, Justice Blackmun accused the majority of allowing the curtailment of free speech only because the topic was abortion:

> [T]he Court, for the first time, upholds viewpoint-based suppression of speech solely because it is imposed on those dependent upon the Government for economic support. Under essentially the same rationale, the majority upholds direct regulation of dialogue between a pregnant woman and her physician when that regulation has both the purpose and the effect of manipulating her decision as to the continuance of her pregnancy.[34]

B. Sexual Harassment

While serving as Deputy Solicitor General, Kuhl also actively participated in the Reagan Administration's efforts to limit the scope of sexual harassment suits. She co-authored the government's *amicus* brief in support of defendant Meritor Savings Bank in a Title VII sex discrimination case – a pivotal case in the development of the law of sexual harassment.[35] Plaintiff Mechelle Vinson testified that, under pressure from her supervisor to have sex with him, and fearing that she would lose her job if she refused, she began a sexual relationship with him. The district court dismissed her claim, reasoning that, because the relationship was unrelated to respondent's ability to obtain promotions, it was "voluntary."[36] The D.C. Circuit reversed, holding that, even if not "forced," unwelcome sexual advances constitute a hostile working environment in violation of Title VII.[37]

On appeal to the Supreme Court, Kuhl took the district court's position that, because the alleged relationship was "voluntary," the bank was not liable under Title VII, and that, in the alternative, it could not automatically be held liable for a supervisor's actions in a case involving a hostile environment claim. Kuhl also argued that the Court could consider Vinson's actions— such as suggestive clothing and speech—as evidence of voluntariness on her part, stating that "the district court's findings show appropriate sensitivity to the need to ensure that sexual harassment charges do not become a tool by which one party to a consensual sexual relationship may punish the other."[38]

The Supreme Court disagreed with Kuhl, affirming the D.C. Circuit in a unanimous opinion written by now-Chief Justice Rehnquist, and remanded the case for further fact-finding. The Court noted that, under EEOC guidelines, unwelcome sexual harassment causing non-economic injury can

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[32] *Id.*

[33] 42 C.F.R. § 59.8(b)(5). Kuhl asserted that the provision was not biased, noting that this specific wording is not required "but is merely an illustration of a permissible response."

[34] 500 U.S. at 204.

[35] *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986).

[36] *Vinson v. Taylor*, 23 FEP Cases 37 (D.C. 1980).

[37] *Vinson v. Meritor Savings Bank*, 243 U.S. App. D.C 323 (1985).

[38] Brief for Amicus Curiae United States and Equal Employment Opportunity Commission, *Meritor Savings Bank v. Vinson*, December 11, 1985.

create a hostile work environment in violation of Title VII, regardless of whether a *quid pro quo* is involved.[39] The Court did agree with Kuhl that an employer is not automatically responsible for a supervisor's actions in the hostile environment context, but may escape liability only if it has taken steps to prevent sexual harassment in the workplace and is unaware of its occurrence. In light of the bank's poor sexual harassment policy, which required a victim of harassment to begin the reporting process with her supervisor, the Court did not find the bank to be immune from liability in this case.

Four Justices—Justices Stevens, Marshall, Brennan and Blackmun—concurred in the decision for Vinson, but asserted that an employer should be *strictly* liable for sexual harassment by a supervisor, since the supervisor is an "agent" of the employer for Title VII purposes. They criticized the stance taken in Kuhl's brief:

> The Solicitor General concedes that sexual harassment that affects tangible job benefits is an exercise of authority delegated to the supervisor by the employer, and thus gives rise to employer liability. But, departing from the EEOC guidelines, he argues that the case of a supervisor merely creating a discriminatory work environment is different because the supervisor "is not exercising, or threatening to exercise, actual or apparent authority to make personnel decisions affecting the victim."... In the latter situation, he concludes, some further notice requirement should therefore be necessary. The Solicitor General's position is untenable...it is precisely because the supervisor is clothed with the employer's authority that he is able to impose unwelcome sexual advances on subordinates.[40]

C. All-Male Schools

While in private practice, Kuhl wrote an *amicus* brief for several private women's colleges in support of Virginia Military Institute's (VMI) fight to remain all-male.[41] The Fourth Circuit had ruled that, unless Virginia could find another way to comply with the Equal Protection Clause, VMI—as a public institution—would have to relinquish its all-male status.[42] In an apparent attempt to persuade schools that would not otherwise have supported VMI's position to do so, Kuhl asserted that the decision could apply to private women's colleges as well: "Although *amici* all are private women's colleges, the uncertain constitutional status of single-sex education threatens these institutions."[43] Several of the colleges that were solicited declined to sign on to the brief. Some suspected the brief's authors (Kuhl and fellow attorney Andrea Gauthier) of trying to manipulate them into signing on despite the lack of a real threat to their own interests:

> Some say the colleges have been duped, persuaded unjustifiably by VMI of a threat to private single-sex institutions...Jadwiga Sebrechts, Executive Director for the Women's College Coalition in Washington, said that...,"VMI lawyers came here and tried to argue quite vehemently that women's colleges should join this petition to the Supreme Court. [But] not one of [the attorneys we asked] shared the perspective

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[39] 477 U.S. at 64 (1986).
[40] *Id.* at 76-77.
[41] Brief of Mary Baldwin College, Saint Mary's College, and Southern Virginia College for Women as Amici Curiae in Support of Petitioners, *VMI v. United States*, March 24, 1993.
[42] *United States v. Commonwealth of Virginia*, 976 F.2d 890 (4th Cir. 1993).
[43] *VMI Amicus* brief, *supra* note 41, at 16-17.

> advanced by VMI attorneys that the current opinion of the Fourth Circuit... put women's colleges in jeopardy."[44]

D. Women's Privacy and Safety

Since taking the bench, Judge Kuhl has issued a number of rulings that weakened legal protections for women. In one infamous decision that was reversed by the appellate court, Judge Kuhl dismissed a claim by a breast cancer patient who sued after her doctor allowed a drug salesman to observe her breast exam.[45] According to the appellate court, Azucena Sanchez-Scott claimed that when she went to see her oncologist, Dr. Polonsky, for a scheduled appointment, he "entered the room with an unidentified man, who appeared to be a professional."[46] The unidentified man, who she later learned was Robert Martinez, was "introduced [only] as 'a person . . . who was looking at Dr. Polonsky's work.'"[47]

When Ms. Sanchez-Scott grew hot and flushed and tried to fan herself with a pocket fan she had brought, "Dr. Polonsky took the fan from plaintiff and gave it to Mr. Martinez" to fan her. She "became extremely uncomfortable because Dr. Polonsky and Mr. Martinez both started to laugh" but they would not return the fan to her. Dr. Polonsky then told Ms. Sanchez-Scott to remove her blouse and bra for a breast examination, which he performed in Mr. Martinez' presence. After the exam, when Ms. Sanchez-Scott asked the receptionist who the other man was and learned that he was a "drug salesman," she began to "cry from shame and anger."[48]

Ms. Sanchez-Scott sued for invasion of privacy. Kuhl dismissed the suit, holding that, even if her allegations were true, the facts did not amount to an illegal invasion of privacy. She held that plaintiff bore the burden of asking who the man was and found unpersuasive counsel's statement that:

> You have a lady who's just finished her chemotherapy. She was there for the first... three-month exam. And literally she's frightened to death. She's waiting to see did the lump come back. So she's not in a position to really say anything. She is in the room, and in comes the doctor with another gentleman and says "This is someone observing my work." She's thinking. "My God. What's he going to tell me? Is it life or death?" She's not into "Who is this person who's wearing a tie and looks like a doctor?"[49]

Kuhl rejected the attorney's argument, stating, "The patient has control over the room to exclude strangers.... Now, who's in the best position to determine offensiveness to her? She is."[50]

The appeals court reversed and remanded, reasoning that, if the facts were as plaintiff alleged, she had been subjected to a clear and illegal invasion of her privacy. It compared this case to one decided many years ago in which a doctor invited his "friend" to take part in the delivery of a

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[44] Madelyn Rosenberg and Leslie Taylor, "VMI Case Makes Odd Bedfellows; Women's Colleges Allies," *Roanoke Times & World News*, April 11, 1993.
[45] *Sanchez-Scott v. Alza Pharmaceuticals*, 86 Cal.App.4th 365 (2001).
[46] *Id.* at 412.
[47] *Id.* at 413.
[48] *Id.*
[49] *Sanchez Scott v. Alza Pharmaceuticals*, Los Angeles County Superior Court, Reporter's Transcript, October 12, 1999, at p.5.
[50] *Id.* at 6.

baby without informing the patient or her husband of the friend's identity, and agreed with the earlier court: "'It would be shocking to our sense of right, justice, and propriety to doubt even but that for such an act the law would afford an ample remedy.'"[51]

In another case, Kuhl, sitting by designation on the appeals court, was accused by the dissent of misrepresenting precedent in order to relieve an insurance company of liability in a claim brought by a rape victim.[52] California courts had consistently interpreted the state's uninsured motorist provision expansively to cover injuries resulting from the use of a motor vehicle, even when the vehicle's use was not the proximate cause.[53] Julie R. was raped by her date after he pulled his car over against a guardrail to lock her in and pushed her seat back to prevent her from kicking through the window. Kuhl nonetheless ruled that Julie R. could not recover under her insurance policy. Portraying the car in this case as simply the means of transportation to the site of the crime, Kuhl compared this case to one in which the court refused coverage when a truck was used to transport cardboard boxes that were later used to commit arson.[54] She stated that the "use of the interior of the vehicle as a confining circumstance during the rape does not rise to the level of a substantial factor in the injury."[55]

In a strongly worded dissent, Judge Epstein accused Kuhl of intentionally misapplying prior caselaw in order to deny relief to the plaintiff. "The majority cite authority to the effect that the mere circumstance that a vehicle is used to transport someone to the site where an injury occurs... is not enough for coverage, and I agree. But that is hardly our case."[56] Epstein asserted that the question was: "[I]n employing the car as a cage to imprison the woman, was the attacker using it in such a way that the victim's injuries arose out of the 'use of a motor vehicle'? To ask that question is to answer it. The answer is 'yes.'"[57]

III. Carolyn Kuhl has Sought Repeatedly to Restrict Plaintiffs' Access to Justice Through the Courts

Throughout her legal career, Carolyn Kuhl has worked to make it more difficult for plaintiffs to obtain justice through the courts. She has attempted to restrict the ability of associations to represent their members in court, to invalidate private actions for fraud against the government, to limit the claims that courts may hear, and to impede plaintiffs' counsel from effectively representing their clients. She has also sought repeatedly to limit the scope and availability of punitive damages for corporate wrongdoing. In all of these ways her actions have undermined the core principle of our legal system: equal justice for all.

A. Standing

In order to bring a lawsuit, a plaintiff must have "standing," an interest in the matter that will be affected by the suit. Plaintiffs who cannot establish that they have "standing" will lose their suit even before a court will consider the merits. Indeed, conservative judges have increasingly invoked

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[51] 86 Cal.App.4th at 375, referring to *De May v. Roberts* (1881), 46 Mich. 160.
[52] *American National Property and Casualty Co. v. Julie R.*, 76 Cal. App. 4th 134 (1999).
[53] Coverage was granted, for example, in cases in which a person was: bitten by a dog trying to exit the car, *Hartford Accident & Indemn. Co. v. Civil Service Employees Ins. Co.* (1973) 33 Cal. App. 3d 26; and injured by a gun that discharged when the driver drove onto an unpaved road, *State Farm Mut. Auto. Ins. Co. v. Partridge* (1973) 10 Cal. 3d 94.
[54] *Truck Ins. Exch. v. Webb* (1967) 256 Cal. App. 2d 140.
[55] 76 Cal. App. 4th at 142.
[56] *Id.* at 147-8.
[57] *Id.* at 145.

lack of standing to deny litigants their day in court, to the benefit of corporations and other powerful institutional defendants.

Our courts have long recognized that associations – *e.g.*, public interest organizations, unions, business associations – have standing to represent the interests of their members in court.[58] Nevertheless, in one brief she co-authored as Deputy Solicitor General, Kuhl "launched" what then-Solicitor General Charles Fried described as "a frontal assault" on the doctrine of associational standing.[59] Kuhl argued that a labor union had no "associational standing" to challenge the Department of Labor's interpretation of a regulation that prevented the union's members from obtaining certain benefits.[60] A split D.C. Circuit panel had reversed a ruling in favor of the United Auto Workers (UAW) and sided with the government, holding that the UAW had no associational standing to bring the suit.[61] The union then appealed to the Supreme Court.

Kuhl argued, first, that the UAW could not bring suit, because its individual union members lacked standing. She then went further, arguing that "[e]ven if individual union members could have brought this suit, the Union did not have representative [i.e. associational] standing to sue on their behalf." Finally, Kuhl asked the Court to review and limit its position on associational standing, stating: "This case provides the Court an opportunity to reconsider the doctrine of representative standing and to harmonize that doctrine with general principles of standing" and class action requirements.[62]

Kuhl's attempt to undermine the doctrine of associational standing was so extreme that it was opposed by numerous *amici* from both the left and the right. The Alliance for Justice organized a joint *amicus* brief in support of the UAW on behalf of eight organizations, including not only the AFL-CIO, the NAACP, and the Sierra Club, but also the U.S. Chamber of Commerce, the National Association of Manufacturers, the American Medical Association, and the Chemical Manufacturers' Association.[63]

The Supreme Court rejected Kuhl's arguments, holding 5-4 that the UAW did have associational standing: plaintiffs had a "live interest in challenging" the Labor Department's view of the law, and the union's interest in representing plaintiffs was legitimate.[64] Regarding the argument that the court should limit associational standing, the Court wrote that the government's brief:

> fails to recognize the special features, advantageous to both the individuals represented and to the judicial system as a whole, that distinguish suits by associations on behalf of their members from class actions. While a class action creates an ad hoc union of injured plaintiffs who may be linked only by their common claims, an association suing to vindicate the interests of its members can draw upon a pre-existing reservoir of expertise and capital.... These resources can

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[58] *See Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977) ("An association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.").

[59] Charles Fried, *supra* note 20 at pp. 16-17 and n.5.

[60] *United Automobile Workers v. Brock*, 477 U.S. 274 (1986).

[61] *United Automobile Workers v. Donovan*, 746 F.2d 839 (D.C. Cir. 1984).

[62] Brief for the Respondent, *United Automobile Workers v. Brock*, February 10, 1986.

[63] Brief of *Amici Curiae* Chamber of Commerce of the United States, *et al.*, in support of Petitioners.

[64] 477 U.S. at 284.

> assist both courts and plaintiffs....[the Secretary's] presentation has fallen far short of meeting the heavy burden of persuading us to abandoned settled principles of associational standing.[65]

B.* Qui Tam *Actions

In private practice, Kuhl has argued repeatedly on behalf of corporate clients that the *qui tam* provision of the federal False Claims Act – which allows private individuals to sue on the government's behalf for alleged acts of fraud committed against it – is unconstitutional. In one case, a group of former General Dynamics employees sued under the Act, seeking to recover for misrepresentations they claimed General Dynamics had made to the U.S. Navy regarding missile defense systems. The company responded with counterclaims – including breach of duty of loyalty and of fair dealing. The district court dismissed the counterclaims as contrary to the Act's intent, because they discouraged plaintiffs from coming forward to report fraud.[66] General Dynamics appealed to the Ninth Circuit, asserting that the False Claims Act was unconstitutional and that it had a right to file counterclaims.

In her *amicus* brief on behalf of the Electronic Industries Association (EIA), Kuhl argued that the *qui tam* provision was unconstitutional, because it did not require plaintiffs to prove the injury-in-fact that is necessary to show standing and violated the Appointments Clause and the separation of powers doctrine. She said that it "allow[s] private citizens, lured by the promise of financial reward, to bring civil enforcement actions for the government,"[67] deflecting attention from the provision's real purpose of encouraging and protecting whistleblowers. A three-judge panel of the Ninth Circuit unanimously rejected Kuhl's arguments and affirmed the lower court.[68]

Kuhl filed similar *amicus* briefs before the Ninth Circuit on behalf of EIA, Rockwell International Corp., and Textron Inc.,[69] and on behalf of Litton Industries in a related case,[70] arguing in both that the *qui tam* provision was unconstitutional. And, in a 1996 case Kuhl lists in her questionnaire as one of the ten most significant she litigated, she represented Northrop Corporation in a *qui tam* suit brought by a former employee and argued against the retroactivity of a provision of the Act.[71]

C. Restricting Access to the Courts

On a number of occasions Kuhl has expressed her opposition to efforts to expand opportunities for injured persons to vindicate their rights in court. While in the Department of

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[65] *Id.* at 289-290. That same year, Kuhl successfully argued in the Ninth Circuit that a congressman and two private citizens had no standing to compel the Attorney General to comply with the Ethics in Government Act, *Dellums v. Smith*, 797 F.2d 817 (9th Cir. 1986). All three plaintiffs – a member of the House Armed Services Committee, a U.S. citizen and Nicaraguan resident kidnapped and raped by U.S.-supported paramilitaries, and a Floridian who lived near a training base for paramilitary forces – alleged violations of the Neutrality Act, which prohibits the mounting of military expeditions against nations with whom the United States is at peace. 18 U.S.C. § 960 (1982). Three district courts had held that the Ethics in Government Act imposed mandatory duties on the Attorney General that he had failed to fulfill and had issued injunctions ordering him to investigate the plaintiffs' allegations. The Ninth Circuit reversed, holding that, although the Act imposed duties on the Attorney General, it did not grant private citizens a right of action.

[66] *United States ex rel. Madden v. General Dynamics Corp.*, 1992 U.S. Dist. LEXIS 21417 (C. Dist. Cal.).

[67] Brief of Amici Curiae Electronic Industries Association, Rockwell International Corporation and Textron Incorporated, *United States ex rel. Madden v. General Dynamics*, October 22, 1992, at p.1.

[68] *United States ex re. Madden v. General Dynamics*, 4 F.3d 827, 9th Cir. (1993).

[69] Brief of Amici Curiae, *United States ex rel. Kelly v. The Boeing Company*, December 23, 1992.

[70] *United States ex rel. Rohan v. Litton Industries, Inc.*, No.92-55546 (9th Cir.).

[71] *Hyatt v. Northrop Corporation*, 80 F.3d 1425 (9th Cir. 1996).

Justice, Kuhl testified before Congress in opposition to a proposal to allow judicial review of veterans' claims. She asserted that such a change would not be in the best interests of veterans, since the existing policy, which allowed for only administrative review, gave them full rights and allowed them all the remedies they needed.[72] She also testified in opposition to a bill that would have expanded the authority of U.S. courts to use international law in rendering decisions, citing a situation in which foreign aliens could sue for human rights violations of international, but not U.S. law.[73]

While in private practice, Kuhl wrote an article published by the Free Congress Foundation, in which she lamented the recent erosion of the common law doctrine of employment-at-will. She asserted that the result has been a flood of litigation forcing the employer to prove his "fair" treatment of his employees, even though "[w]hat is fair to an employee may or may not be economically rational": "The practical effect of this jurisprudence and of the destruction of the doctrine of employment at will is to inhibit employer action ...."[74] Thus, Kuhl would presumably seek to undo such judicially-created exceptions to employment-at-will, which protect employees from egregious employer misconduct.

At least one of Kuhl's rulings as a California Superior Court judge likewise suggests an unwillingness to implement a newly created remedy against corporate wrongdoing. *Liu v. Moore*[75] involved the application of California's "SLAPP-back" statute. Strategic Lawsuits Against Public Participation (SLAPP suits) are generally brought by businesses in order to intimidate individuals who speak out about pollution, fraud, and other corporate wrongdoing. In order to "encourage continued participation in matters of public importance," California passed a law providing that:

> A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.[76]

The law also required SLAPP suit plaintiffs to pay defendants' attorneys' fees if the motion to strike was granted. In *Liu v. Moore*, however, Judge Kuhl held that Deborah Moore could not recover from Liu the attorneys' fees allowed under the law. Moore, a former employee in the office where Hong Liu worked, had reported Liu for practicing medicine without a license. Liu filed a suit against Moore, apparently in retaliation for blowing the whistle on him. Liu's suit gave every appearance of being a SLAPP suit, and Moore moved to strike. Kuhl, however, allowed Liu to voluntarily dismiss his claim against Moore without ruling on the motion to strike and then held that, absent a ruling on that motion, Moore could not recover for her costs as a defendant.[77]

In its unanimous decision reversing Kuhl, the State Court of Appeals called her ruling "a nullification of an important part of California's anti-SLAPP legislation,"[78] remanded to determine

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[72] Statement of Carolyn B. Kuhl Concerning Judicial Review of Veterans' Claims, July 21, 1983.
[73] Testimony on a Bill to Eliminate the Bar of the Act of State Doctrine in Certain Cases, Sep. 14, 1981.
[74] Carolyn Kuhl, *supra* note 14.
[75] 69 Cal. App. 4th 745 (1999).
[76] *California Code of Civil Procedure* section 425.16 (a) and (b)(1).
[77] She did this over counsel's objection that, "The fact of the matter is that [Liu] took action only at the last possible moment to avoid a collision with the law, and that is not behavior which I believe ought to be rewarded by the court."
[78] 69 Cal. App. 4th at 748.

whether attorney's fees were due, and awarded costs of appeal to Moore. Moore's attorney, Allen Kleiman, wrote a letter to Senators Boxer and Feinstein on July 6, 2001, urging them to oppose Kuhl's nomination and asserting that, after developing an animus toward the False Claims Act as a government lawyer, Kuhl "carried [it] with her to the bench where it extended to outright hostility to the First Amendment rights of whistleblowers." Kleiman added that he is "fearful that she would use her life appointment to the nation's largest appellate court to undermine this law at every turn."[79]

D. Inhibiting Plaintiffs' Counsel

Kuhl has taken a number of actions to make it more difficult for plaintiffs' attorneys to most effectively represent their clients' interests. While in the Reagan Administration, she testified before Congress in favor of weakening the Equal Access to Justice Act. She asserted that the multipliers used by some courts to determine attorneys' fees under the act were excessive. She suggested that Congress amend the act to require a court to "deny all fees if it finds the initial amount sought to be unreasonably high."[80]

Similarly, one decision Kuhl rendered as a judge would have made it significantly more difficult for plaintiffs' attorneys to gather evidence against corporate wrongdoing, had it not been reversed by the court of appeals. Lawrence Truitt, an Atchison, Topeka & Santa Fe Railroad Company (AT&SF) employee, was injured on the job by Slowe, a fellow employee. After communicating extensively with AT&SF, including serving it with notice of the suit, Truitt's attorney, Feldman, took Slowe's deposition. AT&SF moved to quash the deposition as an *ex parte* communication barred by the California Rules of Professional Conduct, but Feldman argued that he should be allowed to use it at trial, since only actual knowledge that Slowe was represented by counsel would have violated the rules, and he understood that neither AT&SF's in-house counsel nor any other lawyer had been assigned to the case at that time: "Every corporation the size of Santa Fe Railway has in-house counsel. And the rule isn't just because you have an in-house counsel someplace that you are entitled to prevent a plaintiff from taking statements of people."[81] Kuhl insisted, however, despite the lack of any evidence, that Feldman *did* know that Slowe was represented by counsel when he deposed him, and she quashed the deposition, depriving plaintiff of the use of a critical piece of trial evidence.

The court of appeals unanimously reversed and vacated the decision, finding no proof that any illegal communication took place, or even that AT&SF had counsel at all, and criticized Kuhl's ruling as dangerous:

> A bright line rule is absolutely necessary in this case.... Lawyers should not be at risk of disciplinary action for violating rule 2-100 because they "should have known" that an opposing party was represented or would be represented at some time in the future.... We find it interesting that AT&SF provided no information concerning the representation "trail" in this matter....[it] did not even establish that it was actually

[79] He also wrote that, in another case in which he was representing "a child who had received profoundly disabling injuries at a local hospital," Kuhl had denied him a needed continuance, despite his documentation of the reasons for his request, and despite the support of defense counsel for the motion.
[80] Statement Concerning the Reauthorization of the Equal Access to Justice Act, March 14, 1984, at p.3.
[81] *Truitt v. AT&SR Co.*, Los Angeles County Superior Court, Reporter's Transcript, July 10, 1997 at p.9.

represented by a lawyer at the time of the communication, much less that Truitt's lawyer had knowledge of any such actual representation.[82]

E. Punitive Damages

Kuhl has long sought to reduce or eliminate punitive damages against corporate wrongdoers. She has litigated against punitive damage awards in a number of cases. Kuhl represented Shell Oil Company in a 1993 fraud case, arguing that the trial court's award of punitive damages was excessive and that California's process for awarding punitive damages was unconstitutional.[83] The court of appeals rejected both arguments, summarily affirming the award without publishing an opinion.

That same year, Kuhl represented the Washington Legal Foundation, a conservative, property-rights organization, in a separate suit, argued to the Supreme Court in an *amicus* brief that a different punitive damages award violated the Fourteenth Amendment's Due Process Clause.[84] Alliance Resources Corp. had sued TXO Corp., alleging that TXO's unsupported claim to a deed for Alliance's valuable oil property constituted slander of title. Based on TXO's lack of any basis for its claim, the land's potentially high worth, and the fact that TXO had committed similar acts in the past, the jury awarded $10 million in punitive damages against TXO. On appeal to the Supreme Court, Kuhl argued that courts must limit punitive damages and that, "[i]n this case the punitive damages award... left 'too much to be decided' by the jury and reviewing court, and thus was more a product of whim than of objective and clear rules."[85] She asserted, specifically, that allowing the jury to consider the wealth of TXO's parent corporations without finding them responsible violated due process.

The Supreme Court rejected Kuhl's argument, holding that, while "reasonableness" should be considered vis-à-vis punitive damages, there is no test for it. It found the award reasonable in light of the facts[86] and held that the jury instructions had not violated procedural due process.

Kuhl later wrote an article criticizing the decision, stating that the Supreme Court had "regressed in its attempt to articulate the basis on which the due process clause of the United States Constitution regulated the award of punitive damages." She cited with approval the Court's earlier statement in *Pacific Mutual Life v. Haslip*, 111 S.Ct. 1032 (1991), that plaintiffs should not "enjoy a windfall because they have the good fortune to have a defendant with a deep pocket."[87] Kuhl also co-authored an article on the need for legislatures to address the issue of punitive damages, writing that, "most punitive damage awards are motivated by passion and prejudice."[88] In the article, she urged the adoption of legislation severely limiting punitive damages, using as an example the tort reform bill that Republicans proposed as part of the Contract with America. She also argued,

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[82] *Truitt v. Superior Court of Los Angeles County*, 59 Cal. App. 4th 1183, 1188-1190 (1997).
[83] *Nelson v. Shell Oil Comp.*, No. B067801, Cal. Ct. App. 2nd (1993).
[84] *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993).
[85] Brief of Amicus Curiae Washington Legal Foundation, *TXO Production v. Alliance Resources Corp.*, 1992 U.S. Brief 479, January 22, 1993, citing a law review article by Justice Scalia, "The Rule of Law As a Law of Rules," *56 U.Chi.L.Rev. 1175, 1176* (1989).
[86] "While petitioner stresses the shocking disparity between the punitive award and the compensatory award, that shock dissipates when one considers the potential loss to respondents, in terms of reduced or eliminated royalties payments, had petitioner succeeded in its illicit scheme." 509 U.S. at 462.
[87] U.S. Supreme Court Roundup, *Daily Journal*, August 6, 1993.
[88] Alan Bloom, Lyle Swallow, Carolyn Kuhl, Rex Julian Beaber, "The Future of Civil Punishment: Punitive Damages from Spilled Coffee to Bone Marrow Transplants," *16 Whittier L. Rev. 971* (1995).

however, for even more restrictive measures and for excluding evidence of defendant's financial condition. The legislation she proposed would have been a boon for corporate wrongdoers by limiting punitive damages to the lesser of three times economic loss or $250,000; assigning to the judge, rather than the jury, the role of setting damages; and eliminating damages altogether for some types of injuries.[89]

On the bench, Judge Kuhl has continued her efforts to limit punitive damages, even in cases of egregious corporate wrongdoing. In one case, she slashed a $4.5 million punitive damages award against Century Quality Management.[90] The company had fired its auditor after the auditor asserted his intent to investigate tax irregularities within the company. In spite of clear evidence that defendant employer committed perjury at trial, showed no remorse for its multiple acts of tax evasion, had fired an employee in violation of public policy, and had a net worth of over $60 million, Kuhl held that, "defendants did not have 'fair notice' of the potential for a $4.5 million award of punitive damages"[91] and reduced the award to $245,000, an amount she said comported with defendant's due process rights.

IV. In Private Practice, Carolyn Kuhl Worked to Protect Oil and Tobacco Companies from Financial Responsibility for their Actions

During her years in private practice, Kuhl represented a number of oil and tobacco companies and attempted to shield them from financial responsibility for the environmental and health consequences of their actions. Kuhl represented Shell Oil in its efforts to avoid paying clean-up costs in a case in which it and several other oil companies had collectively arranged for the disposal of toxic acid sludge, resulting in the contamination of the property.[92] The district court ruled in favor of property owner Western Properties Services Corp., finding that it was an "innocent" non-polluter under the Comprehensive Environmental Response Compensation and Liability Act (CERCLA) and holding Shell and other companies liable for the pollution.

Tobacco companies were also among Kuhl's private practice clients. In one case, Kuhl was part of a team of attorneys defending Philip Morris against claims brought by the state of Minnesota and Blue Cross and Blue Shield of Minnesota, which alleged that tobacco companies were responsible for smoking-related diseases and sought compensation for costs they had accrued as a result. The case was ultimately settled by the tobacco industry for $6.6 million after Kuhl's appointment to the Los Angeles Superior Court.

In another case, Kuhl represented tobacco distributor Kennedy Wholesale in its attempt to avoid paying a tax required under California's Tobacco Tax and Health Protection Act of 1988, which had been enacted by voter referendum. Kennedy had paid the tax under protest and then sued, challenging the Act's constitutionality under Article XIIIA, § 3 of the state Constitution, which provides that all taxes enacted by the legislature must be passed by a two-thirds vote. Kuhl also argued that, by allocating some tax revenues to health care, the Act violated California's "Single-subject Rule" for referenda. The California Supreme Court rejected both arguments,

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[89] Kuhl gave a presentation on "Punitive Damages Reform Efforts" at a 1995 Whittier Law School Health Law Symposium, and she also moderated a March 23, 2003 panel discussion, "Do Punitive Damages Deter Harmful Conduct," which was sponsored by the Los Angeles Chapter of the Federalist Society.
[90] *Songco v. Century Quality Management*, L.A. Superior Ct. No. BC 118303 (1997).
[91] *Id.* at 23.
[92] *Western Properties Service Corp. v. Shell Oil Comp.*, 2001 U.S. Dist. LEXIS 5046 (C.D. Cal.)

holding that the public had reserved the right to pass such laws and that the different provisions were sufficiently germane to a single subject to render the statute viable.[93]

Conclusion

Carolyn Kuhl has compiled a record as a lawyer and as a state trial court judge evincing hostility toward the rights of women and minorities, a restrictive view of standing and the role of the courts in dispensing justice, and opposition to punishing corporate wrongdoing. She has advocated positions on critical issues that are far out of the mainstream, and she has issued decisions leaving injured individuals with no remedy. As a lawyer in the Reagan administration, she successfully pushed on her own initiative for the government to take extreme positions beyond those advocated by other lawyers. Many of her published writings and legal arguments suggest a hard-line conservatism that is inconsistent with the open-mindedness and independence that should be absolute prerequisites for a federal judge.

As further evidence, Kuhl wrote a 1997 Op-Ed for the *New York Times* praising the Reagan administration for selecting judicial nominees who shared its ideology. In criticizing President Clinton for being too open (and, presumably, non-ideological) in his process of selecting judges, Kuhl lauded her former boss's very different method: "President Ronald Reagan knew what he was looking for and how to find what he wanted. He had a clear view of how he wanted Supreme Court jurisprudence to change and had an intelligent, discreet and trusted adviser—William French Smith, his first Attorney General—who knew how to organize a selection process."[94]

Although Kuhl and her supporters argue that, as a government and private practice attorney, she was merely engaging in zealous representation of her clients, her record indicates otherwise. As noted above, Kuhl's boss and mentor, then-Solicitor General Charles Fried, gives Kuhl "credit" for persuading the government to argue that the Supreme Court should reverse *Roe* in a case in which the fundamental right to choose was not at issue. Fried similarly credited Kuhl with aggressively pushing the government to argue that the Court should change the rules to limit associational standing, which is a critical means for groups of injured plaintiffs to obtain relief. And many commentators have ascribed the Reagan administration's about-face on tax-exempt status for Bob Jones University to intense lobbying efforts by Kuhl and two colleagues. Moreover, as noted throughout this report, many of her rulings as a judge mirror the extreme positions she advocated as an attorney.

All of these factors have provoked a wide range of national organizations to join the Alliance for Justice in opposing Kuhl.[95] Justice for All, an umbrella group of over twenty California and national organizations, also wrote to the Senate Judiciary Committee to express serious concerns about her record.[96] The Alliance for Justice urges the Senate to reject Judge Kuhl's nomination to a lifetime seat on the Ninth Circuit.

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[93] *Kennedy Wholesale, Inc. v. State Board of Equalization*, 53 Cal. 3d 245 (1991).
[94] Carolyn B. Kuhl, "Clinton Dithered. Reagan Didn't," *New York Times*, June 16, 1993.
[95] These groups include women's rights groups such as NARAL Pro-Choice America, the National Abortion Federation, the National Council of Jewish Women, and the Center for Reproductive Law and Policy; major environmental groups, including the Natural Resources Defense Council and the Sierra Club; and the Leadership Conference on Civil Rights.
[96] Letter from Justice for All Project to Senators Boxer, Feinstein, and Leahy, July 23, 2001.

KEVIN S. ALLRED
1056 CARRARA PLACE
LOS ANGELES, CA 90049-1300
(310) 440-9131

February 21, 2003

The Honorable Patrick J. Leahy
Ranking Minority Member
Committee on the Judiciary
United States Senate
433 Russell Senate Office Building
Washington, D.C. 20510

Re: Judge Carolyn Kuhl

Dear Senator Leahy:

I am writing to urge you to allow the nomination of Judge Carolyn Kuhl to the Ninth Circuit Court of Appeals to be brought to a vote, and to support her confirmation for that position. This is not an ideological appeal – I am a lifelong registered Democrat – but rather, an appeal for the quality for our federal judiciary.

I am a lawyer, and have been litigating cases here in California for approximately 15 years. Both as a citizen and as a practicing lawyer, I care about the quality of our federal bench. Adding Judge Kuhl to that bench will, without question, strengthen its quality. I know Judge Kuhl both professionally and personally, and one could not possibly ask for a more qualified lawyer or judge. She is brilliant, intellectually energetic, honest and conscientious, and she has the perfect temperament for a judge.

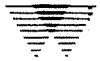
I also know, to an absolute moral certainty, that Judge Kuhl is not the right wing zealot that certain of her opponents have attempted to paint her as. She cares deeply about the law, and will decide the cases before her based upon the law, to the best of her very-ample abilities. It is not reasonable to expect that President Bush will appoint liberal federal judges; given his appointment prerogative and ideological views, his appointments will inevitably be somewhat conservative. However, given that starting point, even a liberal Democrat could not ask for a better choice than Judge Kuhl. Moreover, there is more to evaluating a judge than their liberalism or

conservatism – in the vast majority of cases before the courts, a judge's intellect, conscientiousness, and temperament will be far more important for the quality of justice dispensed by our federal courts. I am confident that Judge Kuhl has the edge in these categories on anyone else conceivably up for consideration.

I urge you to take the steps necessary to make Judge Kuhl a member of the Ninth Circuit Court of Appeals. She will greatly enrich the quality of that Court.

Sincerely,

Kevin S. Allred



AMERICAN
ASSOCIATION OF
UNIVERSITY
WOMEN

April 4, 2003

The Honorable Orrin Hatch, Chair
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Hatch:

On behalf of the more than 100,000 bipartisan members of the American Association of University Women (AAUW), we write to express our opposition to the nomination of Los Angeles County Superior Court Judge Carolyn Kuhl to the U.S. Court of Appeals for the Ninth Circuit. AAUW opposes Judge Kuhl's nomination because of her documented history of hostility towards civil and reproductive rights—issues that AAUW members hold dear.

After careful consideration of her record as well as her verbal responses at her April 1 hearing, we believe Judge Kuhl's personal political ideology has tainted her ability to impartially and independently apply established legal precedent—especially in the areas of reproductive choice, sexual harassment protections, and equal education opportunities for women.

As a result, AAUW has serious doubts about whether Judge Kuhl should be given the enormous honor and responsibility of a lifetime appointment to one of this nation's federal circuit courts of appeals. We believe the country as a whole would be far better served by the nomination and confirmation of mainstream, moderate judges. If ultra-conservative ideologues are confirmed to the circuit courts of appeals, they will have the power to alter legal precedents such as those that protect a woman's constitutional right to an abortion, as well as other civil and constitutional rights including individual liberties, privacy, health and safety, and issues related to the environment.

These issues affect millions of Americans, yet the majority of cases never reach the U.S. Supreme Court. As a result, AAUW believes the application of current legal precedent at the federal circuit court level is of critical importance in preserving these rights. Unfortunately, Judge Kuhl's interpretation of the law suggests she may find it difficult to enforce critical constitutional and statutory rights in the areas of civil rights, women's rights, and consumer rights.

AAUW regrets your decision to move forward with Judge Kuhl's nomination despite the absence of blue slips signed by both her state's senators. Over the years, fair and consistent application of the rules has been an important part of Senate efforts to preserve collegiality and civility. Your changing interpretation of the committee rules has intensified the bitter partisanship that has marked the judicial confirmation process thus far in the 108th Congress, and presents another hurdle to the Senate's ability to

move forward. AAUW believes the integrity of the process should not be hastened or tainted by the agenda of either political party. We urge you to exercise your Constitutional obligations deliberatively and fairly, as the advise and consent responsibility dictates.

AAUW urges you and the rest of the Judiciary Committee to oppose the nomination of Judge Carolyn Kuhl. If you have any questions, please contact Lisa Maatz, Director of Public Policy and Government Relations, at 202/785-7793, or Jamie Fasteau, Government Relations Manager, at 202/785-7730.

Sincerely,

Nancy Rustad
President

Jacqueline E. Woods
Executive Director

cc: Senate Judiciary Committee

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June 15, 2001

Senator Patrick Leahy
U.S. Senate
Washington, D.C.

Dear Senator Leahy,

I am against the appointment of Carolyn B. Kuhl to the US Court of Appeals for the Ninth Circuit. Take a look at her record. Anti-choice, right wing etremist, condoning racism, restricting our ability to protect our individual rights in court. You know the right thing to do here.

Sincerely,

Penny Antine

STATE OF CALIFORNIA
Court of Appeal
SECOND APPELLATE DISTRICT
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LOS ANGELES, CALIFORNIA 90013

JUDITH ASHMANN-GERST
ASSOCIATE JUSTICE

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March 7, 2003

The Honorable Orrin Hatch
Chairman
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, D.C. 20510

Re: Judicial Candidate Carolyn B. Kuhl

Dear Senator Hatch:

It is with great pleasure that I recommend Judge Carolyn B. Kuhl for appointment to the United States Court of Appeals for the Ninth Circuit. I have known Judge Kuhl for four years, as a colleague and as a friend. We worked together in the Central District of the Los Angeles Superior Court, and had frequent contact. She currently is the supervising judge of the civil departments for the superior court, a position that recognizes her administrative and legal skills.

Judge Kuhl is an outstanding trial judge, and has a strong background in both civil and criminal matters. She has a reputation for being fair, temperate, and extremely bright. She is held in the highest regard by lawyers, as well as other judges. Judge Kuhl is not a judge who injects her personal social or political views into the decision-making process. Indeed, she has demonstrated a firm commitment to intellectual honesty, an independent judiciary, and the access to justice for the citizens of this county.

I am convinced that Judge Kuhl would be an outstanding addition to the Ninth Circuit. Her experience in the federal and state courts, her personal and professional reputation, and her dedication to the improvement of the justice system make her an ideal candidate.

Sincerely,

Judith Ashmann-Gerst
Associate Justice

JAG/ww

cc: The Honorable Patrick J. Leahy
The Honorable Dianne Feinstein
The Honorable Barbara Boxer

NWPC-CA

NATIONAL WOMEN'S POLITICAL CAUCUS OF CALIFORNIA

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July 8, 2001

Honorable Senator Patrick Leahy <<via fax >>
433 Senate Russell Building
Washington, DC 20510

Dear Senator Leahy:

I am deeply troubled by President Bush's recent nomination of Los Angeles Superior Court Judge Carolyn Kuhl to a seat on the United States Court of Appeals for the Ninth Circuit.

Throughout her career as a government lawyer, private practitioner and judge, Ms. Kuhl has demonstrated an astounding disregard for our precious constitutional rights and liberties -- including racial equality, choice, the First Amendment's free speech and establishment clauses, and basic personal privacy protection. I urge you to vigorously oppose this ultra-conservative nominee to this critically important appellate court position.

According to the New York Times, as a special assistant to then-Attorney General William French Smith in the Reagan Justice Department, Ms. Kuhl was one of three Justice Department officials who persuaded the Attorney General to reverse an 11-year-old Internal Revenue Service policy and reinstate the tax-exempt status of Bob Jones University and other racially discriminatory schools. Ms. Kuhl's conduct was not that of a young employee acting at the behest of her boss. According to the Times, she affirmatively undertook to change the position of Attorney General Smith, and she did so in defiance of contrary views held by both the head of the IRS and by the Treasury Department's general counsel. At the time of this action, more than 200 lawyers in the Justice Department's Civil Rights Division signed a letter expressing their concerns about this reversal of long-standing DoJ policy. Indeed, even current Solicitor General Theodore Olson, who then headed the Justice Department's Office of Legal Counsel, opposed Ms. Kuhl's position on this issue.

Also while at Justice, Ms. Kuhl worked on several high-profile reproductive rights cases, including one in which the Department argued to the United States Supreme Court in favor of overturning the landmark 1973 Roe v. Wade decision that established the legality of abortion. In an amicus curiae brief for the United States in Thornburgh v. American College of Obstetricians and Gynecologists, co-authored by Ms. Kuhl, the Government argued unsuccessfully that "the textual, historical and doctrinal basis of [Roe v. Wade] is so far flawed . . . that this Court should overrule it and return the law to the condition in which it was before that case was decided." Had the Supreme Court adopted this argument, individual states would have been allowed to ban all abortions.

Finally, while still at Justice, Ms. Kuhl also unsuccessfully argued in support of a Reagan Administration rule requiring federally-funded family planning providers to notify parents within 10 days of prescribing contraceptives to minors.

As an attorney in private practice, Ms. Kuhl continued her anti-choice crusade. She represented a group of doctors opposed to abortion in an amicus curiae brief to the United States Supreme Court in Rust v. Sullivan. In her brief, Ms. Kuhl supported federal regulations which prohibit doctors and other health care professionals working at family planning clinics that receive government funds from counseling women regarding abortion or even informing them that abortion is a legal

option. Tragically, by a 5-4 vote, the Supreme Court held that these "gag rule" restrictions do not violate the First Amendment.

As a judge, Ms. Kuhl has also failed to protect fundamental personal privacy rights. In Sanchez-Scott v. Alza Pharmaceuticals, the California Court of Appeal overturned Judge Kuhl's ruling dismissing the claim of a woman cancer patient who alleged that her privacy had been invaded by the presence of a drug company salesman during a breast examination conducted by her oncologist. The appellate court, relying upon an unbroken line of cases dating back to 1881, held that the presence of a nonprofessional male during the medical exam of an unrelated woman who removes her blouse and bra constitutes an actionable invasion of privacy.

These are just some of the issues on which Ms. Kuhl has taken highly problematic and controversial positions. Please do not let any semblance of bipartisan support for her nomination divert your attention from a careful and critical review of her career that will surely show how she has actively and consistently followed an ultra right wing judicial philosophy. I urge you to consider the totality of Ms. Kuhl's record in performing your constitutionally mandated "advice and consent" role. When you do so, I am confident that you will understand how important it is that you aggressively oppose this extremist nominee.

Sincerely,

Sharon A. Ball, President
NWPC-CA

9949 Robbins Drive #C
Beverly Hills CA 90212
(310) 556 3160

July 18, 2001

Senator Patrick Leahy
U.S. Senate
Washington, D.C. 20510

Dear Senator,

I am very against the nomination of Caroline B. Kuhl as judge on the U.S. Court of Appeals for the Ninth Circuit. Her record indicates that she is a right wing extremist. My feeling is that we should have open-minded judges, not anti-choice ideologues who keep us from protecting our individual rights in the courts.

Americans need to be educated to the importance of an independent and open-minded federal judiciary. I am deeply concerned about the threat posed by the Extreme Right's concerted effort to take over the federal courts.

Sincerely yours,

Norma Barzman

Judge Kuhl

The Superior Court
LOS ANGELES, CALIFORNIA 90012
CHAMBERS OF
JAMES A. BASCUE
PRESIDING JUDGE

TELEPHONE
(213) 974-5600

May 10, 2001

Honorable Dianne Feinstein
331 Hart Senate Office Building
Washington, D.C. 20510

Re: Judge Carolyn B. Kuhl

Dear Senator Feinstein:

I wanted to share with you my views regarding Judge Carolyn B. Kuhl of our Court as I understand that she is presently being considered for nomination to the United States Court of Appeals for the Ninth Circuit.

I have had a chance to personally supervise Judge Kuhl since she first joined our Court in 1995 and was assigned to the downtown Los Angeles Criminal Courts Building, wh re I was then the Supervising Judge. Even though she was new to the bench, she excelled in handling a demanding felony calendar/trial docket and earned the respect of prosecutors, public defenders and other defense counsel for her fair-minded and evenhanded management of trials and pre-trial matters. Given the nature of the docket in such a court, she had to dispense justice fairly to a wide array of defendants, and she did so by showing respect and patience with all the defendants who came before her, regardless of the charges or past criminal history.

Based on her excellent performance in her criminal assignment, I supported her transfer to the main civil courthouse in downtown Los Angeles where she handled unlimited jurisdiction civil matters, i.e., the most contested and visible civil disputes in the Central District of our Court. Because of my own election in the interim to be Assistant Presiding Judge, I was then responsible for directly supervising her and the other 60+ bench officers working at our headquarters location.

Again, she performed admirably in that assignment, demonstrating a strong work ethic, solid legal reasoning and courtesy to all counsel and parties. Just as importantly, she recognized the special challenges presented to our bench officers by the multiplicity and diversity of the cultures, languages and socioeconomic backgrounds of the parties and attorneys who bring their disputes to this courthouse. This district is without a doubt one of the two or three most divers communities in the state, and Judg Kuhl was sensitive and respectful of th different perspectives which th parties brought with them as th ir disputes were resolved in her courtroom.

When our Court was given the resources to start an experimental Complex Litigation Program in March 2000, Judge Kuhl was one of only six judges selected by me to staff that program, and after only six months in the new position, she excelled so much in solving complicated legal disputes by working constructively with the lawyers and parties who came before her that I selected her to be the Supervising Judge of the Program. As Supervising Judge, she has been an excellent leader and spokesman for our Court to the community.

As I trust you can see by my above comments, she is one of the true "stars" of our Court, which is quite an honor since we have more than 500 judges and more than 200 commissioners. She is fair, open-minded and committed to providing equal justice under th law. Just as importantly, she is a very decent, kind and honest human being.

It will be our substantial loss to have Judge Kuhl nominated and confirmed to the federal Court of Appeals, but it will be a true gain for all citizens of California (as well as th rest of the Circuit) for this to happen. Accordingly, I hope that you will view her candidacy favorably and provide whatever support is appropriate as our Senator.

Sincerely,

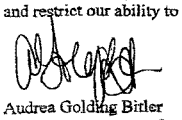
JAMES A. BASCUE
Presiding Judge

JAB:wp

U.S. Senator Patrick Leahy
Fax: 1 202 224 3479

Dear Senator,

I understand that Carolyn B. Kuhl is being considered by the Bush administration for appointment as a judge on the US Court of Appeals for the Ninth Circuit. I am writing to let you know that I oppose her potential appointment. Carolyn B. Kuhl is not the type of judge who should be appointed to the federal Circuit Courts of Appeal. Her record shows that she is wedded to an extremist right wing philosophy that is far removed from the beliefs of ordinary Americans. We need open-minded judges, not anti-choice ideologues who condone racism and restrict our ability to protect our individual rights in the courts.



Audrea Golding Bitler
2129 Ocean Avenue, Santa Monica, CA 90405

Ina Nuell Bliss
Attorney at Law
8535 West Knoll Drive, #302
West Hollywood, CA 90069-4166

(310) 854-1047 • FAX (310) 659-0726

June 18, 2001

Senator Patrick Leahy
United States Senate
Washington, DC 20510

Re: Proposed appointment of Carolyn Kuhl to 9th District Apppeals Court

Dear Senator Leahy:

Please vote against this proposed appointment. I believe her arch-conservative background and opinions are known to you. I would not like to see the fine work of our excellent 9th District Court of Appeals turned into fractionated political scrambling.

Thank you for your attention.

Sincerely,

Ina Nuell Bliss

INB:hs

Court of Appeal
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
300 SOUTH SPRING STREET
LOS ANGELES, CA 90013

May 17, 2001

Honorable Dianne Feinstein
United States Senator
331 Hart Senate Office Building
Washington, D.C. 20510

Re: Nomination of Judge Carolyn Kuhl for
Ninth Circuit Court of Appeal

Dear Senator Feinstein:

I am writing to encourage your support for my colleague, Judge Carolyn Kuhl, who is being considered for a position on the Ninth Circuit Court of Appeal. I would like to stress her impeccable qualifications and, at the same time, dispel any concerns about issues of judicial philosophy or political ideology.

Judge Kuhl and I came to the Superior Court bench from significantly different professional backgrounds. Governor Pete Wilson appointed her to the Superior Court bench following an impressive career in government service and private law practice. Governor Edmund Brown, Jr., appointed me 20 years ago after a career as a legal services attorney and law school professor and dean. Judge Kuhl is a Republican; I am a Democrat.

During her tenure on the Superior Court bench, Judge Kuhl has impressed both colleagues and litigants with her extensive knowledge of substantive and procedural law, her capacity to quickly grasp difficult legal concepts, her skillful management of large criminal and civil caseloads, and her unfailing courtesy to counsel, parties, witnesses and jurors.

Judge Kuhl is widely regarded as one of the most dedicated, knowledgeable, skillful and thoughtful judges sitting on the Los Angeles Superior Court. In criminal and civil judicial assignments, she has distinguished herself as a judge who is highly intelligent, renders balanced, reasoned decisions, is intellectually honest, and is even-handed and fair. In criminal cases, prosecutors and criminal defense lawyers alike single her out for praise. In civil matters, the plaintiffs' bar and the defense bar universally respect her.

During our years of service together on the Superior Court, I never heard any criminal or civil lawyer express the view that Judge Kuhl issued a ruling or rendered decisions that were in any way influenced by a particular judicial philosophy or political ideology, or were motivated by a judicial or political agenda. As a member of the Superior Court, she has consistently strived to make decisions that are legally correct and devoid of bias.

As Supervising Judge of the Complex Civil Litigation Court, Judge Kuhl has been an outstanding judicial administrator. The policies, procedures and practices that she has implemented have ensured that litigants in complex civil cases–which by their nature are difficult, complicated and protracted–have their matters handled fairly, efficiently and competently. Neither Judge Kuhl's handling of her own caseload of complex civil matter nor her administration of those important courts has suggested anything other than a fair, even-handed approach to handling complex civil caseload.

In court committee assignments, Judge Kuhl has demonstrated uncommon diligence, competence and even-handedness in addressing a series of difficult court administration matters. Whether dealing with personnel issues or budgetary concerns, she has never demonstrated anything other than a total commitment to the fair administration of justice.

Beyond her abundant judicial and administrative skills, Judge Kuhl is an extraordinary judicial colleague. She extends to her colleagues the same fairness and courteousness that is evident in all facets of her professional relationships. In scores of dealings with her regarding legal issues and administrative matters, there has never there been the slightest indication that her positions were motivated by any consideration other than the best interests of the court, the litigants, and the public.

Judge Kuhl's distinguished tenure on the Superior Court bench persuades me, beyond any doubt, that she will be a skillful appellate jurist and thoroughly even-handed in the administration of justice in that position. I commend her to you with enthusiasm and without reservation.

Thank you very much for considering my views regarding this extraordinary applicant.

Sincerely,

Paul Boland

PB/cef

THE NOMINATION OF JUDGE CAROLYN B. KUHL
TO THE NINTH CIRCUIT COURT OF APPEALS

After careful review of Judge Kuhl's record, I have concluded that she is out of the mainstream and not representative of the values shared by most Californians on such matters as a privacy, civil rights, women's rights, access to the courts, whistle-blower protections, legal intimidation, the disabled, and the environment.

Judge Kuhl has been aggressively anti-choice, coauthoring briefs and memos that argue for an outright reversal of *Roe v. Wade*. In her writing, she has also supported a gag rule prohibiting abortion counseling in federally-funded family planning services.

Judge Kuhl has been aggressively anti-civil rights as well. In 1970, the Nixon Administration adopted Internal Revenue Service rules denying tax-exempt status to schools that racially discriminate. When the issue was taken to the Supreme Court by Bob Jones University a decade later, the Justice Department prepared to defend the rules. Then, in January 1982, the Administration suddenly changed its position, agreeing to give Bob Jones University the tax exemption. More than 200 lawyers in the Justice Department's civil rights division objected to the change of position in a letter to the head of the civil rights division. Kuhl was one of three characterized by Anthony Lewis in *The New York Times* as one of "a band of young zealots" who opposed the overwhelming sentiment and urged support for the exemption.

On the issue of privacy, there were two particularly egregious cases in which her controversial decisions were unanimously reversed by the State Court of Appeals. In *Sanchez-Scott v. Alza Pharmaceuticals*, a breast cancer patient went to her oncologist for a routine visit. During this visit, the doctor brought a male pharmaceutical representative into the exam room without identifying him, and the man watched this very embarrassing examination. Citing an invasion of privacy, the patient sued–but Judge Kuhl dismissed the case. The Court of Appeals later reversed Judge Kuhl's decision, and unanimously found in favor of the plaintiff.

As far as access to the courts, her position is clear– limited. In *Moore v. Hong Liu* a California appellate court unanimously reversed another of her decisions as a judge. California anti-SLAPP (Strategic Lawsuit Against Public Participation) law was written to assist in preventing lawsuits filed purposely to chill valid free speech rights. In this case the California Court of Appeals found that Judge Kuhl's decision would have nullified an important part of the anti-SLAPP legislation. Judge Kuhl had refused to hear the merits of a motion filed by a whistle-blower alleging fraud and falsification and destruction of patients' medical records.

In short, Judge Kuhl's record raises deep concerns for me. When President Bush was elected, he clearly stated that he would govern from the center. In the case of judges, he has fulfilled that commitment on the District Court level in California through the bipartisan committee selection process. This nominee however is clearly outside of the mainstream of American values.

The Constitution demands that the Senate have an "advice and consent" role on judges, a

provision that I take very seriously. I was disappointed that the White House did not engage in a meaningful "consultation" process with me on Judge Kuhl's nomination. More accurately, I would describe what occurred as a "notification" process. It is true that the White House did call my office to inform me that the President was considering nominating Judge Kuhl to the Ninth Circuit Court of Appeals. However, it was clear that the phone call was made solely because the Administration knew that the press was already aware of Judge Kuhl's nomination and felt compelled only for that reason to call me. Indeed, about five minutes after the phone call, I was contacted by a California newspaper for comment on the nomination. That is not meaningful consultation.

Furthermore, after I informed the White House that I could not support this nomination, the Administration asked for and received my suggestions for three qualified centrist Republican candidates for the Ninth Circuit. Yet, to date, no action has been taken on these recommendations. Instead, Judge Kuhl was nominated again. That is dismissive of the "advice and consent" role of the United States Senate.

I have supported the overwhelming majority of President Bush's judicial nominations. My refusal to return the blue slip on Judge Kuhl--the only time that I have failed to return a blue slip--is based on crucial reasons that go directly to my role as a United States Senator.

After careful examination of Judge Kuhl's record, I have concluded that I cannot support her nomination. I do not believe that her values and the positions she advocates are consistent with those of the people of California.

BARBARA BOXER
CALIFORNIA

COMMITTEES:
COMMERCE, SCIENCE, AND TRANSPORTATION
ENVIRONMENT AND PUBLIC WORKS
FOREIGN RELATIONS

United States Senate
HART SENATE OFFICE BUILDING
SUITE 112
WASHINGTON, DC 20510-0505
(202) 224-3553
http://boxer.senate.gov/contact

January 31, 2003

Dear Colleague:

President Bush recently renominated Carolyn Kuhl to a position on the Ninth Circuit Court of Appeals. I am writing to urge you to oppose this nomination based on her record.

Judge Kuhl's record as a Justice Department lawyer, practicing attorney, and Los Angeles Superior Court judge raises numerous concerns--on civil rights, women's rights, privacy rights, whistleblower protections, consumer rights, and health protections.

Particularly troubling due to recent events, is **her major role in gaining tax-exempt status for Bob Jones University**.

For much of its history, Bob Jones University refused to admit African Americans. Even after the school was desegregated, it continued to bar admission to anyone who was known to advocate interracial marriage or dating. It wasn't until the year 2000 that Bob Jones University allowed interracial dating by its students--and even now, it requires permission in writing from a parent.

Because of its discriminatory policies, Bob Jones University was denied tax-exempt status under a federal policy established in 1970. In early 1982, after the Supreme Court agreed to hear a suit brought by Bob Jones University, President Reagan announced that the federal government would reverse its position. It would not defend the IRS policy and would support giving Bob Jones University the tax exemption it wanted. More than 200 lawyers in the civil rights division of the Justice Department signed a letter objecting to the change in position.

However, a handful of lawyers--including Carolyn Kuhl--supported the change. At the time, Kuhl was described by Anthony Lewis in the *New York Times* as one of "a band of young zealots" who urged the switch in position.

When it comes to civil rights, Judge Kuhl was not only on the wrong side of history, but she took a leadership role in supporting a hurtful and destructive policy.

This is just one example of many that clearly place her outside of the mainstream. For that reason, I urge you to oppose Judge Kuhl's nomination to the Ninth Circuit Court of Appeals. It is very important to the country.

Sincerely,

Barbara Boxer
United States Senator

1700 MONTGOMERY STREET
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SAN FRANCISCO, CA 94111
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BARBARA BOXER
CALIFORNIA

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April 1, 2003

The Honorable Orrin Hatch
Chairman
Senate Judiciary Committee
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

I am deeply distressed that the Judiciary Committee is moving forward with a hearing on the Kuhl nomination, even though I have not returned the blue slip on this nominee.

When you were Chairman of the Judiciary Committee during the Clinton Administration, you added the following sentence to the blue slips: "No further proceedings on this nominee will be scheduled until both blue slips have been returned by the nominee's home state senators." Yet, here you are now moving forward with the nomination of Judge Carolyn Kuhl when I have not returned her blue slip in two consecutive Congresses.

I have supported the overwhelming majority of President Bush's judicial nominations. My refusal to return the blue slip on Judge Kuhl--the only time that I have failed to return a blue slip--is based on crucial reasons that go directly to my role as a United States Senator.

This nomination goes against the President's pledge to govern from the center. In addition, the Administration was quite aware of my deep concerns. Upon learning of those concerns, the White House asked me to provide the names of qualified centrist Republicans that I could support for the Ninth Circuit Court of Appeals. I was glad to provide a list of three such candidates, including a Hispanic woman. Yet, to date, no action has been taken on these recommendations; instead, Judge Kuhl was re-nominated. This is dismissive of the advice and consent role of United States Senators.

I am extremely disappointed that you would disregard my prerogatives as one of the home-state Senators--and overturn your own policy--by moving forward on this nominee. Your blue slip policy is apparently guided more by who is in the White House rather than by the powers given to us as U.S. Senators by one of the greatest documents in the world--the U.S. Constitution.

This decision to move forward without both home-state Senators' approval will have ramifications for years to come. I hope you will reconsider this ill-advised policy.

Sincerely,

Barbara Boxer
United States Senator

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PRINTED ON RECYCLED PAPER

Santa Monica, 7/30/01

Dear Senator Leahy

I am writing to you today, to strongly oppose the nomination of Carolyn B. Kuhl as a judge on the US Court of Appeals for the Ninth Circuit. Carolyn Kuhl is not the type of judge who should be appointed to this position. Her record shows that she has an extremist right wing philosophy that is far removed from the beliefs of ordinary Americans. We need open minded judges, not anti-choice ideologues, who condone racism and restrict our ability to protect our rights in the courts

Sincerely
Sally Breiter

GREENE, BROILLET, TAYLOR, WHEELER & PANISH LLP

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May 14, 2001

Honorable Barbara Boxer
U.S. SENATOR
Hart Senate Office Building
Suite 112
Washington, D.C. 20510-0505

Dear Senator Boxer:

I am writing this letter to recommend to you the Honorable Carolyn Kuhl who is being considered for a possible Federal Court appointment.

I had the pleasure of trying a case before Judge Kuhl in the Los Angeles Superior Court last year. I can tell you that she was an outstanding trial judge of the highest intellect and integrity. Moreover, she clearly enjoyed serving as a Judge, a trait which I believe to be essential for anyone serving in a judicial position.

In another case which I handled to the point of settlement before her, she was even-handed and understanding of the difficulties which both sides faced due to the numerous depositions and document productions which occurred in New York. I believe that my opponents in both of the cases which I have had before her would have the same glowing remarks about Carolyn Kuhl that I give to you in this letter.

Moreover, I can confirm to you that she has received excellent reviews from other fellow plaintiffs' attorneys who have handled cases before her. In my own experience, her rulings were balanced and well reasoned and her temperament was conducive of a fair and equitable trial. I have heard the same sentiments about her from other lawyers.

I would be happy to answer any questions you may have about Judge Kuhl.

Very truly yours,

GREENE, BROILLET, TAYLOR,
WHEELER & PANISH LLP

B.A. Broillet

Bruce A. Broillet

6/22/01

Hon. P. Leahy,

Dear Hon. Leahy

I'm writing to oppose Ms. Clark to the 9th Circuit Court. Her lack of openness on political issues is well documented and I'm sure you are aware of this. If ~~she~~ you do not actively oppose her appointment, this will reflect on your own political position. I am not in favor of personal association, but you must know of the efforts of the Federalist Society & the need to counter their efforts.

Sincerely,
Helen Brown
1516 Poppy Peak
Pasadena, CA 91105

February 5, 2003

The Honorable Diane Feinstein
Via fax (202) 228-3954

RE: Carolyn Kuhl – Opposition

Dear Senator Feinstein:

The California National Organization for Women (CA NOW) opposes the re-nomination of Justice Carolyn Kuhl to the U.S. Court of Appeals for the Ninth Circuit. She is currently a Los Angeles Superior Court Judge.

As an attorney with the Reagan Justice Department she filed a government brief before the U.S. Supreme Court arguing that the decision in Roe v. Wade was incorrect. In her argument she stated that the basis for the decision in Roe v. Wade was flawed and that the U.S. Supreme Court should over turn the decision and return the law to the condition in which it was before that case was decided. Kuhl has urged the U.S. Supreme Court to overturn Roe v. Wade. She also persuaded the attorney general to take a position supporting the Bob Jones University fight to regain its tax exempt status (Bob Jones University had racially discriminatory policies against its students).

She ruled that a female breast cancer patient's privacy was not violated when a male drug company salesman accompanied her doctor when he performed a breast exam, while on the Los Angeles state court bench. She is also very hostile towards whistle blowers.

We encourage you to oppose the re-nomination of Carolyn Kuhl. If we could be of any further assistance please do not hesitate to contact our office at 916-442-3414.

Sincerely,

Helen Grieco
Executive Director

Board of Governors

Officers
President
Carol C. Copsey
San Francisco

President-Elect
Belynda B. Rock
Los Angeles

First Vice President
Marguerite D. Downing
Los Angeles

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Dist 2-Sacramento

Hon. Brenda Harbin-Forte
Judicial Liaison
Alameda County

Leslie G. Landau
Dist 3-Walnut Creek

Karen L. Lynch
Dist 5-Fresno

Pearl G. Mann
Dist 8-Orange County

Melissa Hathaway McKeith
Dist 7-Los Angeles

Sydney Minnerly
Dist 6-Santa Barbara

Janet Vining Mitchell
WL Santa Barbara

Geraldine Rosen-Park
SFWLA-San Francisco

DeAnn Salcido
Lawyers Club San Diego

Joanne Schulman
Dist 4-San Francisco

Pamela B. Schwab
Dist 7-Long Beach

Sandra L. Schweitzer
Dist 1-Chico

Dominique R. Shelton
Dist 7-Los Angeles

Judith L. Soicy
WL Fresno County

Paula B.E. Stas
WL-Long Beach

Joan Stone
WL-Sacramento

Jean M. Sproul
WL Kern County

Mary Sullivan
WL Ventura County

Diane M.L. Tan
APAWL Los Angeles

From the office of:
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Berman & Berkley, LLP
601 Montgomery Street, Suite 325
San Francisco, CA 94111
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CWL
CALIFORNIA
WOMEN
LAWYERS

Executive Office
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July 16, 2001

Senator Dianne Feinstein
United States Senate
331 Hart Senate Office Building
Washington D.C. 20510

Dear Senator Feinstein:

I am writing on behalf of California Women Lawyers (CWL) to inform you of CWL's opposition to the confirmation of the nomination of Los Angeles Superior Court Judge Carolyn Kuhl to the Ninth Circuit Court of Appeals. As you may know, CWL is a statewide organization of women attorneys dedicated to advancing the interests of women, both in the legal profession and in society, through education, legislation and advocacy. CWL supports a fair and balanced judicial nominating process and opposes an extreme right-wing federal bench engaged in ultra-conservative judicial activism.

CWL supports the appointment of federal judges who are open-minded, view the constitution as a living document and who are committed to the role of federal courts in protecting civil rights and individual liberties, and in guaranteeing due process, equal protection of the laws, the right of privacy and access to justice. We believe that Judge Kuhl's record indicates she is unsuited for a position on the Ninth Circuit bench.

Judge Kuhl is a longtime member of The Federalist Society and adheres to the ultraconservative philosophy espoused by that group. While working at the Department of Justice, Ms. Kuhl vigorously supported tax-exempt status for Bob Jones University, despite its history of racial discrimination. Ms. Kuhl has also argued in favor of overturning *Roe v. Wade*, as well as onerous regulations burdening abortion rights. While on the Superior Court bench, her decisions have been reversed by the California Courts of Appeal for restricting the rights of individuals to sue to protect their privacy and to protect themselves from harassment suits under California law, decisions which she based on her narrow interpretation of statutes which clearly favor such individual rights.

Ms. Kuhl's record reveals that she is wedded to an extremist philosophy that is far removed from the beliefs of most Americans. Our nation deserves a federal court pledged to upholding constitutional rights secured through Supreme Court precedents and embodied in civil rights statutes. CWL therefore urges you to not support Ms. Kuhl's nomination.

Sincerely,

Carol C. Copsey
CWL President

Affiliates: Asian Pacific American Women Lawyers Alliance; Black Women Lawyers Association of Los Angeles; Contra Costa County Bar Association -Women Section; Fresno County Women Lawyers; Kern County Women Lawyers; Lawyers Club of San Diego; Monterey County Women Lawyers; Napa County Women Lawyers; Orange County Women Lawyers; Queen's Bench; San Francisco Women Lawyers Alliance; Santa Barbara Women Lawyers; Santa Clara County Bar Association Women Lawyers Committee; Solano County Women in the Law; Women Lawyers Association of Los Angeles; Women Lawyers' Association of San Luis Obispo County; Women Lawyers of Alameda County; Women Lawyers Section of San Mateo County Bar Association; Women Lawyers of Long Beach; Women Lawyers of Sacramento; Women Lawyers of Santa Cruz County; Women Lawyers of Ventura County

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Diane M. L. Tin

From the office of:

CWL
CALIFORNIA
WOMEN
LAWYERS

Executive Office
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Sacramento, CA 95825
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March 26, 2003

Senator Barbara Boxer
United States Senate
112 Hart Senate Office Building
Washington D.C. 20510-0504

FAX (415) 956-6701

Dear Senator Boxer:

RE: Opposition – Carolyn Kuhl Appointment

I am writing on behalf of California Women Lawyers (CWL) to inform you of CWL's opposition to the confirmation of the nomination of Los Angeles Superior Court Judge Carolyn Kuhl to the Ninth Circuit Court of Appeals. As you may know, CWL is a statewide organization of women attorneys dedicated to advancing the interests of women, both in the legal professi n and in society, through education, legislation and advocacy. CWL supports a fair and balanced judicial nominating process and opposes an extreme right-wing federal bench engaged in ultra-conservative judicial activism.

CWL supports the appointment of federal judges who are open-minded, view the constitution as a living document and who are committed to the role of federal courts in protecting civil rights and individual liberties, and in guaranteeing due process, equal protection of the laws, the right of privacy and access to justice. We believe that Judge Kuhl's record indicates she is unsuited for a position on the Ninth Circuit bench.

Judge Kuhl is a longtime member of The Federalist Society and adheres to the ultraconservative philosophy espoused by that group. While working at the Department of Justice, Ms. Kuhl vigorously supported tax-exempt status for Bob Jones University, despite its history of racial discrimination. Ms. Kuhl has also argued in favor of overturning *Roe v. Wade*, as well as onerous regulations burdening abortion rights. While on the Superior Court bench, her decisions have been reversed by the California Courts of Appeal for restricting the rights of individuals to sue to protect their privacy and to protect themselves from harassment suits under California law, decisions which she based on her narrow interpretation of statutes which clearly favor such individual rights.

Ms. Kuhl's record reveals that she is wedded to an extremist philosophy that is far removed from the beliefs of most Americans. Our nation deserves a federal court pledged to upholding constitutional rights secured through Supreme Court precedents and embodied in civil rights statutes. CWL therefore urges you to not support Ms. Kuhl's nomination.

Sincerely,

Andrea Carlise
CWL President

C · R · L · P

THE CENTER FOR REPRODUCTIVE LAW AND POLICY

120 WALL STREET
NEW YORK
NEW YORK 10005
USA
917/637-3600
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1146 19TH STREET, NW
WASHINGTON, DC 20036
USA
202/530-2975
202/530-2976 *fax*

HTTP://WWW.CRLP.ORG

June 22, 2001

The Honorable Patrick Leahy
United States Senate
Washington, DC 20510

Dear Senator Leahy:

We write to ask that you **oppose the confirmation of Judge Carolyn Kuhl** of Los Angeles County Superior Court to the United States Ninth Circuit Court of Appeals.

The Center for Reproductive Law and Policy (CRLP) is a legal advocacy organization dedicated to protecting and defending women's reproductive rights. Judge Kuhl's record on reproductive rights compels us to urge you vote against confirming her for life tenure on the federal judicial bench.

In 1983, as Deputy Assistant Attorney General, Judge Kuhl argued for the appellants in *Planned Parenthood Federation of America v. Heckler* that the Secretary of Health and Human Services had the right to implement certain regulations of family planning providers receiving funds under Title X. These regulations included a provision requiring parental notification after prescribing contraceptives to minors, as well as a provision that would force providers to consider minors who wished to receive services based on their families' financial resources instead of their own. These regulations would have severely impeded minors' access to reproductive health services and violated basic principles of doctor/patient confidentiality. The Circuit Court for the District of Columbia prohibited the enforcement of the regulations and declared the regulations to be "fundamentally inconsistent" with Congress' intent and purpose in enacting Title X.

Also during her tenure as United States Deputy Assistant Attorney General, Judge Kuhl filed an amicus brief for the United States supporting the appellants in their appeal to the United States Supreme Court in *Thornburgh v. American College of Obstetricians and Gynecologists* (1986). In this case, the Supreme Court found several parts of a Pennsylvania statute to be unconstitutional. This statute imposed particularly onerous restrictions on women seeking to obtain abortions. The brief co-authored by Judge Kuhl, however, indicated not only their support for the constitutionality of the Pennsylvania act, but also their desire that *Roe v. Wade* itself be overturned. The brief states, in part, that "[t]he textual, doctrinal and historical basis for *Roe v. Wade* is so far flawed and...is a source of such

instability in the law that this Court should reconsider that decision and on reconsideration abandon it."

After playing an important role in these two cases, Ms. Kuhl gained a well-earned reputation for her opposition to reproductive rights. In 1990, when she had returned to private practice, she authored the amicus brief for the American Academy of Medical Ethics (AAME) in support of the respondent in *Rust v. Sullivan*. The AAME describes itself as an "educational and lobbying organization" that "opposes abortion except to save the life of the mother." The brief filed by Ms. Kuhl indicated the AAME's support for the limitation of Title X funds from going towards projects that include counseling, referrals or other activities related to abortion. These limitations, although upheld by the Supreme Court, continue to burden women seeking information about the full range of reproductive health options by limiting the funding of those who would inform of all their choices.

The history of Judge Kuhl's involvement in anti-choice litigation gives us critical pause at CRLP. We hope that you will consider this history and oppose her confirmation. We continue to urge you to support only those judicial nominees who affirm their commitment to the rights articulated in *Roe v. Wade*.

Sincerely,

Janet Benshoof
President

Rosemary Dempsey
Director, Washington Office

815 3rd St #K
Santa Monica, CA 90403
July 21, 2001

Senator Patrick Leahy,
U.S. Senate
Washington, DC 20510

Dear Senator

I strongly oppose the nomination of Carolyn Kuhl as Judge on the Circuit Court of Appeals. The record shows that she is of the extreme right philosophy. We need open minded judges not ones that condone racism + personal rights.

Sincerely
Marcia J. Cestero

The Superior Court
LOS ANGELES, CALIFORNIA 90012
CHAMBERS OF
VICTOR E. CHÁVEZ, JUDGE

May 14, 2001

TELEPHONE
(213) 974-1234

Hon. Dianne Feinstein
Hart Senate Office Building, Suite 331
Washington, D. C. 20510

In Re the Application of the Honorable Carolyn Kuhl
for a position on the Ninth Circuit

Dear Senator Feinstein:

It has been my pleasure to know Judge Kuhl since she first joined our Court in October of 1995. For the four years that I served as both the Assistant Presiding Judge and Presiding Judge of this Court, it was a pleasure to work with her. She accepted her assignments without question and performed her duties expertly. She is well received by her colleagues and more importantly by the public and the attorneys who appear before her. Judge Kuhl has always accepted additional responsibilities and performed superbly in the extracurricular committee work that is so important to a court. She has always been generous with her time and her skill.

Recognizing her outstanding abilities, when the opportunity arose for us to enter the Complex Litigation Pilot Program, she was one of the first persons selected because of her wide range of talent, dedication and ability. In just a few months, she so distinguished herself as to become the first supervising judge of the Complex Litigation Pilot Program, and from all reports, she is performing admirably.

This is a judge who knows the law, and who follows the law while being warm and personable to those who appear before her. I know and respect her husband, and I have met her children, and she seems to be doing an admirable job as a mother and wife. I can think f no candidate more deserving of appointment to the Ninth Circuit than Judge Kuhl. Should you have any questions, please do not hesitate to contact me.

Sincerely,

Victor E. Chávez



SENT BY FACSIMILE AND U.S. MAIL

August 30, 2001

Senator Patrick Leahy
Chair, Senate Judiciary Committee
433 Russell Senate Office Building
United States Senate
Washington, DC 20510

RE: Opposition to Nomination of Judge Carolyn Kuhl for Ninth Circuit Court of Appeals

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Diane T. Chin
Executive Director

Dear Senator Leahy:

Chinese for Affirmative Action (CAA) strongly urges you to oppose the nomination of Carolyn Kuhl for the Ninth Circuit Court of Appeals. As an attorney and conservative activist, Judge Kuhl advocated for positions contrary to established law in order to advance right-wing ideological goals. She has staked out policy positions that condone racially discriminatory policies, endorse deeply flawed school voucher programs, promise to roll back achievements in gender equality, and challenge privacy and free speech protections.

CAA is a 32-year-old, membership supported, civil rights organization based in San Francisco that advocates on a wide range of civil rights issues affecting Asian Americans. CAA's programs also aim to empower the Asian American community through increased political and civic participation while advancing multiracial collaboration and dialogue with other communities.

As you know, federal judicial appointments carry life tenure. President Bush has indicated his intention to fill vacancies on the federal courts with judges in the mold of ultra-conservative Supreme Court Justices Scalia and Thomas. Such an ominous course could fundamentally alter the landscape of United States civil rights, social policy and race relations for decades to come.

For your consideration, we detail just a few troubling examples of Judge Kuhl's positions on various civil and constitutional rights protections.

- ***Carolyn Kuhl condoned racially discriminatory policies when serving with the Department of Justice.*** As a special assistant to former Attorney General William French Smith during the Reagan administration, she and two other Justice Department officials successfully advocated for reversal of an 11 year-old IRS policy that prohibited racially discriminatory institutions, including Bob Jones University, from claiming tax-exempt status. *Los Angeles Daily Journal*, May 27, 2001. Kuhl's position was opposed by the Department of the Treasury's general counsel, the head of the IRS, and more than 200

The Kuo Building 17 Walter U. Lum Place San Francisco, California 94108 • (415)274-6750 fax (415)397-8770
The Village (415)587-5779 • www.caasf.org

lawyers in the Justice Department's Civil Rights Division who signed a letter opposing the reversal. By an 8-1 vote, the Supreme Court rejected Kuhl's theory that formed the basis for the Reagan administration's approach. *Bob Jones University v. U.S.*, 461 U.S. 574 (1983).

- ***Carolyn Kuhl has supported school vouchers and "free market principles" to address educational inequality.*** In introducing a panel on Law, Economics and Social Conservatism at a Federalist Society Symposium in 1997, Kuhl stated that school vouchers "maximize individual liberty" and "illustrate how the pursuit of free market principles serves the larger ends of political and individual freedom." Carolyn B. Kuhl, *Introduction: Law, Economics and Social Conservatism*, panel at Sixteenth Annual National Student Federalist Symposium on Law and Public Policy, 1997, 21 Harv. J. Law and Public Policy 55. Public educators, including the NEA, civil rights organizations, and many social justice groups widely acknowledge that school vouchers work to bankrupt public school systems, largely populated by low-income students of color, by diverting tax dollars to private and religious schools.

- ***Carolyn Kuhl has been an active member of the Federalist Society.*** Founded some twenty years ago, the Federalist Society has worked diligently over the last two decades to shift American law and public policy to the far right. Leaders in the Federalist Society have worked to dismantle affirmative action, to block efforts to diversify long-segregated electoral districts in the South, and to promote flawed school voucher programs as a false remedy to ailing inner-city schools, among other issues.

Carolyn Kuhl's regressive positions on various civil and constitutional rights protections and willingness to advocate for positions contrary to clearly established legal precedent, make questionable her respect for the rule of law. Her appointment to the Ninth Circuit would present a lifetime threat to hard-fought gains achieved in the protection of equal opportunity and protection for all, regardless of race, ethnicity, gender, and class.

Your leadership in opposing John Ashcroft as Attorney General exemplifies the important role of the Senate in confirming federal executive and judicial appointments. We have long appreciated your commitment to fairness. Please oppose the nomination of Judge Kuhl and help ensure that she is not confirmed for an appointment on the federal bench.

I would welcome an opportunity to discuss this nomination with you or a member of your staff. Please feel free to contact me or CAA's Policy Advocate, Vik Malhotra, at 415/274-6750.

Very truly yours,

Diane T. Chin
Executive Director

The Superior Court
LOS ANGELES, CALIFORNIA 90012
CHAMBERS OF
DZINTRA I. JANAVS, JUDGE

TELEPHONE
(213) 974-1234

February 22, 2002

The Hon. Patrick Leahy
Chairman, Senate Judiciary Committee
433 Russell Senate Office Building
Washington, DC 20510

The Hon. Orrin G. Hatch
Ranking Minority Member, Senate Judiciary Committee
104 Hart Senate Office Building
Washington, DC 20510

The Hon. Dianne Feinstein
331 Hart Senate Office Building
Washington, DC 20510

The Hon. Barbara Boxer
112 Hart Senate Office Building
Washington, DC 20510

Re: Nomination of Judge Carolyn B. Kuhl to U.S. Court of Appeals for the 9th Circuit

Dear Senators:

We are all colleagues of Judge Carolyn B. Kuhl on the Superior Court of the State of California for Los Angeles County. We write in support of her being given a prompt and fair hearing on her nomination to be a Judge of the United States Court of Appeals for the Ninth Circuit. We have served with her variously in the criminal felony courts, the general jurisdiction civil courts, the pilot program for complex litigation, and on committees and special projects.

Judge Kuhl is seen by us and by the members of the Bar who appear before her as a fair, careful and thoughtful judge who applies the law without bias. She is respected by prosecutors, public defenders, and members of the plaintiffs' and defense bar. She is conscientious, scholarly, courteous and willing to listen with an open mind to the arguments of counsel. Judge Kuhl approaches her job with respect for the law and not a political "agenda."

Judge Kuhl has been a mentor to new women judges who join our Court to help them navigate the unfamiliar waters of judicial service. She has helped promote the judicial careers of women, both Republican and Democrat. She supported the Hon. Margaret Morrow when Judge Morrow was awaiting a hearing before the Senate Judiciary Committee on her nomination by President Clinton to the United States District Court in Los Angeles. She also wrote in support of President Clinton's nomination of the Hon. Richard Paez to the Ninth Circuit when he likewise awaited his confirmation after his nomination by President Clinton. This shows both Judge Kuhl's open-mindedness and the continuing importance of affording all Presidents' judicial nominees a hearing. We would hope that equal consideration would now be given to allowing Judge Kuhl to have a timely hearing and vote.

As you know, the evaluation of Judge Kuhl, her professional work, credentials and competence by the American Bar Association's Standing Committee On The Federal Judiciary was completed last August. We understand that Judge Kuhl was rated Well Qualified by a substantial majority of that Committee and rated Qualified by the other members of that Committee. This high rating of Judge Kuhl for such an important appellate position is entirely consistent with our observations and her well deserved, excellent reputation among her colleagues and the bar. She is also a very decent, caring, honest and patient human being who is a delight to have as a professional colleague and friend.

As sitting Judges, we more than anyone appreciate the importance of an independent, fair-minded and principled judiciary. We believe that Carolyn Kuhl represents the best values of such a judiciary. Under the Constitution it is ultimately for each member of your Committee and eventually each member of the Senate to determine whether or not to confirm Judge Kuhl, but we urge you to deal with the question on the merits and not by denying her a hearing.

Sincerely yours,

The Hon. Dzintra Janavs

The Hon. Mary Ann Murphy

The Hon. Emilie H. Elias

The Hon. Judith C. Chirlin

The Hon. Ann Kough

The Hon. Victoria Chaney

The Hon. Ann I. Jones

The Hon. Helen I. Bendix

The Hon. Linda K. Lefkowitz

The Hon. Lorna Parnell

The Hon. Patricia L. Collins

The Hon. Elizabeth A. Grimes

The Hon. Rita Miller

The Hon. Lee Edmon

The Hon. Fumiko H. Wasserman

The Hon. Mary Thornton House

The Hon. Ruth Ann Kwan

The Hon. Kathleen Kennedy-Powell

The Hon. Tricia Ann Bigelow

The Hon. Judith L. Champagne

The Hon. Maureen Duffy-Lewis

The Hon. Jacqueline Connor

The Hon. Marsha N. Revel

Committee for Judicial Independence

1900 N. Beverly Glen Blvd.
Los Angeles, CA 90077
Phone: (310)474-5149
Fax: (310)474-2162

Email: judicial.indepen@ix.netcom.com

June 22, 2001

Via Fax (202/224-3479)

Senator Patrick Leahy
433 Senate Russell Office Building
Washington, DC 20510

Dear Senator Leahy,

The Committee for Judicial Independence is a newly formed organization dedicated to educating and activating Americans to the importance of an independent and open-minded federal judiciary and to the threat posed by the Extreme Right's concerted effort to take over the federal courts. We oppose the nomination of Carolyn B. Kuhl, who currently sits as a judge on the Los Angeles Superior Court, to the Ninth Circuit Court of Appeals bench

Having read press reports that Ms. Kuhl was under consideration, we have tried to find out as much as we could about Judge Kuhl. We have carefully reviewed her record, such writings by her and about her as we have been able to obtain, and have spoken to attorneys who have appeared before her and some who know her personally. By all reports, she is intelligent, professionally competent and hard working. But the Committee for Judicial Independence believes that simply evaluating a judicial nominee on his or her degree of professional competence is only a part of the assessment necessary for the Senate to properly perform its obligation to "advise and consent."

Taken as a whole, Judge Kuhl's record raises significant questions as to whether she should serve on Ninth Circuit bench. The burden is appropriately on Ms. Kuhl to show that she has the necessary qualifications of excellence, open-mindedness, and moderation to receive a lifetime appointment as a federal judge.

In examining the totality of Judge Kuhl's record, we have been struck by the fact that the actions she has taken which have garnered criticism or a reversal by an appellate court all appear to reflect an adherence to a well-defined school of ultra-conservative activist judicial ideology which is out of step not only with the beliefs of the majority of Americans but the mainstream of legal thought.

While at the Department of Justice, Ms. Kuhl was reportedly instrumental in persuading the Reagan administration to adopt two widely criticized positions. Arguing for the application of a position regarding separation of powers espoused by The Federalist Society, the New York Times has reported that she persuaded the attorney general to support

a policy that would have allowed Bob Jones University to regain the tax-exempt status that it had lost because of its racially discriminatory practices against students. Ultimately, the U.S. Supreme Court, 8-1, rejected the separation of powers argument she championed. It is, however, an argument which is increasingly advanced before the courts by those who seek to significantly curtail the ability of federal regulatory agencies to take effective regulatory actions (*See, e.g., American Trucking Associations v. U.S. E.P.A.*, 175 F.3rd 1027, 1033 (D.C.Cir. 1999).

Former Solicitor General Charles Fried, in his book *Order and Law, Arguing the Reagan Revolution*, writes that Ms. Kuhl was deeply involved in the process by which the Justice Department decided to file a friend of the court brief in an abortion rights case, *Thornburgh v. American College of Obstetricians and Gynecologists*. Fried identifies Carolyn Kuhl as the co-author of the "most aggressive memo" that he received, which recommended that the Justice Department argue the "outright reversal of *Roe [v.Wade]*." Kuhl's position was, again, adopted by the Justice Department. She was a co-author of the government's brief ultimately filed before the U.S. Supreme Court in *Thornburgh* in which the outright reversal of *Roe v. Wade* is urged. Reversal of *Roe* would permit states to ban all abortions. Again, the Supreme Court rejected Ms. Kuhl's arguments.

Ms. Kuhl is described by those who know her in Los Angeles as strongly anti-choice. Certainly, the cases she has chosen to be actively involved in and the positions argued in those cases appear to reflect that stance. In *Thornburgh*, Ms. Kuhl argued not only that *Roe v. Wade* should be overturned, but also that restrictions on abortion rights, such as making personal information about women who received abortions publicly available and requiring that doctors must give anti-choice materials to women seeking abortions, are legal. In a friend of the court brief filed before the Supreme Court in *Rust v. Sullivan*, Ms. Kuhl argued, while in private practice, in support of a "gag" rule. The "gag rule" at issue barred doctors and other health workers in family planning clinics that receive federal funds from counseling women regarding abortions, or even telling them that abortion is a legal option.

The *Thornburgh* brief contains an argument that is deeply troubling and, we believe, important in evaluating Ms. Kuhl's fitness to serve on the Federal bench. The *Thornburgh* brief states: "A decision as flawed as we believe *Roe v. Wade* to be becomes a focus of instability, and thus is less aptly sheltered by that doctrine [of *stare decisis*] from criticism and abandonment." In other words, disagreeing with the basis on which *Roe* is decided means that the *Roe* decision is not to be regarded as normally binding on later cases. If named to the Ninth Circuit bench, will Ms. Kuhl then feel free to readily criticize and abandon (i.e., not be bound by) decisions that she thinks are flawed in their logic? Or is her willingness to abandon precedent limited simply to cases involving abortion? These questions must be answered in any assessment of Ms. Kuhl's fitness to serve on the Ninth Circuit.

Ms. Kuhl's rulings while on the Los Angeles Superior Court restricting the rights of individuals to sue to protect their privacy and to protect themselves from harassment suits have been reversed by the California Court of Appeals. These rulings are troubling as well, as they indicate willingness to craft new and narrow interpretations of statutes that clearly favor individual rights and so avoid such rights. This type of narrow construction of statutes protecting privacy, individual and civil rights, and using standing and pleading requirements to restrict access to the courts to vindicate those rights, is a strategy advocated by ultra-conservatives and increasingly accepted by ultra-conservative judicial activists (*See, e.g., Alexander v. Sandoval*, U.S. Supreme Court 2001).

Ignoring fundamental personal privacy rights, in *Sanchez-Scott v. Alza Pharmaceuticals*, 103 Cal. Rptr. 2d 410 (2nd Dist. 2001), Ms. Kuhl threw out the claim of a woman cancer patient who alleged invasion of privacy based on the presence of a drug salesmen during a breast examination conducted by her oncologist ignored fundamental personal privacy rights. The appellate court reversed Ms. Kuhl's dismissal, relying on an unbroken line of cases since 1881 holding that the presence of a nonprofessional male during the medical exam of an unrelated woman constitutes invasion of privacy.

A similar willingness to restrict a litigant's ability to vindicate protected individual rights can be seen in Ms. Kuhl's ruling denying a claim for attorneys' fees and costs under the California SLAPP (Strategic Lawsuit Against Public Participation) statute in *Moore v. Liu*, 81Cal. Rptr. 2d 807 (1999). Ms. Kuhl was instructed in the appellate decision overturning her ruling that a recent amendment of the SLAPP statute "mandates a *broad construction*" of the SLAPP law's provision of fees and costs, rather than the narrow construction given by Kuhl *[emphasis in original]*.

Ms. Kuhl, in a law review article she co-authored supporting limits on punitive damage awards, refers to support for punitive damages as "ultimately, a surrender ...to the vindication of impotence." Alan Bloom, Lyle Swallow, Carolyn Kuhl and Rex Julian Beaber, "The Future of Civil Punishment: Punitive Damages from Spilled Coffee to Bone Marrow Transplants", 16 Whittier LR 971, 980 (1995). The article contrasts "the vindication of impotence that *little people* feel with regards to large corporations and tortfeasors," with "the vindication of impotence that *ordinary citizens* feel with regard to those who perpetrate violent and lethal acts against them."[Emphasis added]" The attitude reflected in the law review article, not merely in the quoted portion, which seems to be skeptical of individual rights, is most troubling in the context of Kuhl's rulings in the *Sanchez-Scott* and *Moore* cases, which appear to favor curtailing remedies available to "little people."

In sum, we believe that Ms. Kuhl's record shows the consistent application of an extremist legal philosophy that does not belong on the Ninth Circuit Court of Appeals. We urge you to thoroughly and vigorously examine Ms. Kuhl's record. Once you have done so, we are confident that you will oppose her nomination to the Ninth Circuit in order to protect Americans' liberties and the advances which have been made in protecting those liberties.

Respectfully yours,



Chair
Committee for Judicial independence.

COMMUNITY RIGHTS COUNSEL ♦ DEFENDERS OF WILDLIFE
EARTHJUSTICE ♦ ENDANGERED SPECIES COALITION
FRIENDS OF THE EARTH ♦ MINERAL POLICY CENTER
OCEANA ♦ PHYSICIANS FOR SOCIAL RESPONSIBILITY

March 31, 2003

The Honorable Barbara Boxer
United States Senate
112 Hart Office Building
Washington, D.C. 20510

The Honorable Dianne Feinstein
United States Senate
331 Hart Office Building
Washington, D.C. 20510

The Honorable Orrin Hatch
Chairman, Committee on the Judiciary
United States Senate
104 Hart Office Building
Washington, D.C. 20510

The Honorable Patrick Leahy
Ranking Member, Committee on the Judiciary
United States Senate
224 Dirksen Office Building
Washington, D.C. 20510

Re: Serious Concerns with the Lifetime Ninth Circuit Nomination of Judge Carolyn Kuhl

Dear Senators:

We are writing to express our very serious concerns with California state trial Judge Carolyn B. Kuhl's nomination to a lifetime position on the United States Court of Appeals for the Ninth Circuit, which decides the fate of federal environmental and other safeguards in nine Western and Pacific states. Based upon her record, we are concerned that, if confirmed by the Senate, she would unjustifiably seek to limit citizen access to the courts and bring extreme, anti-environmental viewpoints to this vital court.

In briefing and arguing *UAW v. Brock*, 477 U.S. 274 (1986), for the Reagan Administration, Ms. Kuhl specifically urged the Supreme Court to overrule its prior

decisions that established the doctrine of associational or representative standing. This doctrine is the legal basis that allows environmental groups to represent the interests of their members who are injured by illegal pollution, or who wish to help defend basic safeguards against challenges by big business. Associational standing allows access to courts by environmental and other groups. This enables them to help uphold and enforce laws that protect the health and safety and other rights of all Americans, including a wide range of environmental safeguards for clean air, clean water, wetlands, and endangered species.

In *Order and Law*, a book recounting his tenure as President Reagan's Solicitor General, Charles Fried attacked procedural rules that "allow for the role of progressive-minded lawyers and legal organizations as the moving parties of ... radical social changes" and recalled, "my Deputy and Counselor, Carolyn Kuhl, launched a frontal attack on this trend. . . ." Charles Fried, *Order and Law: Arguing the Reagan Revolution -- A Firsthand Account* 17-18 & n.5. Fortunately, as Fried also notes, Ms. Kuhl's argument for overruling established Supreme Court precedent that provided for associational standing was opposed by "a vast array of organizations," including the Chamber of Commerce, and "rejected by the Court with no dissent." In particular, Ms. Kuhl argued that "representative standing by an association should generally not be recognized," and urged the Court to adopt a radical new rule that groups could only sue under the class-action rules. Brief for Respondent at § I.B (Feb. 10, 1986). Because it is difficult, expensive, and time-consuming to comply with class-action requirements, far fewer public interest lawsuits would be possible if the Court had accepted Ms. Kuhl's arguments. The apparent intent, and certainly the result, of her arguments would have been to chill a wide range of vital public interest litigation.

The Supreme Court soundly rejected Ms. Kuhl's standing arguments because they fell "far short of meeting the heavy burden of persuading [the Court] to abandon settled principles of associational standing." 477 U.S. at 290. No Justice endorsed her radical and unsupported arguments. Of course, if Judge Kuhl were confirmed to the Ninth Circuit, she would be in a position not only to argue for severely limiting public access to the courts, but to impose extreme limitations.

Ms. Kuhl continued her attack on public access to the courts as a private sector advocate. In *United States ex rel. Madden v. General Dynamics Corp.*, 4 F.3d 827 (9th Cir. 1993), Ms. Kuhl challenged the constitutionality of the False Claims Act's *qui tam* provisions, which allow private parties to sue to enforce federal law against corporate wrongdoers. Brief of Amici Electronic Indus. Ass'n et al. (Oct. 22, 1992). Kuhl's position in the *Madden* brief that *qui tam* plaintiffs lack Article III standing has been resoundingly rejected by the courts. In *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 120 S. Ct. 1858 (2000), Justice Scalia, the Court's most extreme advocate of limiting standing, detailed the extensive history of *qui tam* suits dating back to 13th century England. This long tradition of *qui tam* actions, he wrote "leaves no room for doubt" that a qui tam plaintiff has Article III standing. Ms. Kuhl's position would have eliminated the ability of private citizens to bring these important "whistleblower lawsuits" before the courts.

Ms. Kuhl also specifically promoted extreme anti-environmental protection arguments in a number of other cases. One example is *Fairchild Semiconductor Corp. v. U.S. EPA*, 984 F.2d 283 (9th Cir. 1993), where she challenged the constitutionality of EPA's imposition of cleanup standards under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).

As a judge, Ms. Kuhl's record reveals other reasons to believe that she would use her position as a Ninth Circuit judge to restrict citizen access to the courts, as she has continued to take extreme positions that are friendly to corporate defendants and hostile to citizen litigants and whistleblowers. For instance, a serious obstacle to enforcing environmental laws is the possibility that a polluter will retaliate against a citizen by filing a strategic lawsuit against public participation ("SLAPP"). Like standing rules, anti-SLAPP laws are critical to the enforcement of environmental, civil rights, and other fundamental constitutional and legal safeguards. In *Moore v. Liu*, 69 Cal.App.4th 745 (1999), a California appeals court unanimously reversed a decision by Judge Kuhl that would have made it easier for corporations to attack citizens who attempt to hold them accountable. Industry SLAPP lawsuits are designed, as the appeals court recognized, to intimidate individuals who speak out about pollution and other issues, "chill[ing] the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." The appeals court found that Judge Kuhl's decision "constitute[d] a nullification of an important part of California's anti-SLAPP legislation;" and ruled that Judge Kuhl's decision "would prolong both the [SLAPP] defendant's predicament and the plaintiff's outrageous behavior." *Id.* at 750.

Ms. Kuhl's attack on the doctrine of associational standing, her judicial ruling that would have nullified an important part of California's anti-SLAPP legislation, and her public advocacy, are at odds with the vital public interest served by citizen environmental enforcement. Because she appears to hold extreme views on critically important issues, we have very serious concerns with her nomination to the United States Court of Appeals for the Ninth Circuit. We urge you to scrutinize her nomination with exceedingly great care.

Thank you considering these important environmental concerns with Judge Kuhl's record and for taking seriously your Constitutional advise and consent responsibility.

Sincerely,

Doug Kendall
Executive Director
Community Rights Counsel

William J. Snape III
Vice President and Chief Counsel
Defenders of Wildlife

Vawter Parker
Executive Director
Earthjustice

Brock Evans
Executive Director
Endangered Species Coalition

Sara Zdeb
Legislative Director
Friends of the Earth

Lexi Shultz
Legislative Director
Mineral Policy Center

William Butler
General Counsel
Oceana

Brian Baenig
Legislative Director
Environment and Health Program
Physicians for Social Responsibility

CC: Members, Senate Committee on the Judiciary

Manuel S. Costales
1444 N. Kathleen Ln.
Orange CA 92867-4457

July 11, 2001

Senator Patrick Leahy
US Senate
Washington DC 20510

Dear Senator Leahy:

It is critical that we watch Bush's appointees to the Federal Circuit Court of Appeals. Based on the number of cases heard at the Circuit Courts, these appointees have a greater influence than the appointees to the US Supreme Court.

I strongly oppose the nomination of Carolyn B. Kuhl as a judge on the US Court of Appeals. She is wedded to the extreme right philosophy that is not in touch with ordinary Americans.

We need moderate judges, not one with either a far right of left agenda.

Sincerely,

Manuel S. Costales

Court of Appeal
SECOND APPELLATE DISTRICT
300 SOUTH SPRING STREET
LOS ANGELES, CALIFORNIA 90013

H. WALTER CROSKEY
ASSOCIATE JUSTICE

TELEPHONE
(213) 830-7483
FAX
(213) 897-7933
E-MAIL
justice.hwaltercroskey@jud.ca.gov

July 20, 2001

PERSONAL

Hon. Barbara Boxer
United States Senator
Hart Senate Office Building
Suite 112
Washington, D.C. 20510-0505

Re: Hon. Carolyn B. Kuhl

Dear Senator Boxer:

I am writing to urge your support of Judge Carolyn B. Kuhl's recent nomination by the President for a seat on the United States Court of Appeals for the Ninth Circuit. I have known Judge Kuhl for over five years and I have great regard for her repeatedly demonstrated judicial skills and abilities. My views are widely shared in the southern California legal community. She is uniformly praised by her fellow judges as well as the attorneys who appear before her. She will make a great addition to the appellate bench.

You may recall that in April of 1997, I expressed, in a letter to Senator Hatch, similar views of support for your recommendation of Margaret Morrow for an appointment to the United States District Court here in Los Angeles. I spoke out at that time for the same reason that I do now. Judge Morrow was an outstanding candidate for appointment to the federal court, as her stellar performance as a judge has since amply demonstrated. The same can be said of Judge Kuhl. I know you are familiar with her background and have doubtlessly looked closely at her very impressive resume; I therefore have no need to repeat any of those matters here. It is sufficient to say that she has demonstrated, by her performance on the Los Angeles Superior Court, as well as in the impressive legal career that preceded her appointment to that court, the qualities of character, integrity and industry needed to make an outstanding federal appellate judge.

I urge you to give her your support in the pending confirmation process. I have no doubt that Judge Kuhl's performance on the Ninth Circuit, should she be confirmed will fully vindicate that support.

Sincerely,

H. Walter Croskey

cc: Hon. Dianne Feinstein

TOTAL P.04

STATE OF CALIFORNIA
Court of Appeal
SECOND APPELLATE DISTRICT
300 SOUTH SPRING STREET
LOS ANGELES, CALIFORNIA 90013

H. WALTER CROSKEY
ASSOCIATE JUSTICE

TELEPHONE
(213) 830-7483
FAX
(213) 897-7933
E-MAIL
justice.hwaltercroskey@jud.ca.gov

March 26, 2003

Hon. Orrin Hatch
Chairman
S nate Judiciary Committee
224 Dickson Senate Office Building
Washington, D.C. 20512

Re: Hon. Carolyn B. Kuhl

Dear Senator Hatch:

I am pleased to write to you on behalf of my good friend and California judicial colleague, Judge Carolyn Kuhl. I believe that she will make an outstanding appellate judge and I wholeheartedly endorse her nomination for an appointment as a Circuit Judge for the Ninth Circuit Court of Appeals.

Shortly after she was nominated by President Bush, I wrote a letter on her behalf to Senator Barbara Boxer. A copy of that letter, dated July 20, 2001, is attached for your reference. There is no need for me to restate here the views expressed in that letter.

I have also had an opportunity to review a schedule of appellate activity on cases decided by Judge Kuhl in her capacity as a judge of the Los Angeles Superior Court. I understand that schedule has been submitted to your office as further documentary support for favorable Senate action on her nomination. It includes several cases in which I sat as one of the reviewing appellate justices and demonstrates a solid record of performance by Judge Kuhl. As you will note, she was reversed by the appellate court in less than 8% of the cases that she decided as a trial judge. When it is also remembered that many of the cases that she tried were complex, and often involved novel or cutting edge issues, her record is quite remarkable.

The people of the United States, and particularly those in the Ninth Circuit, will be well served by her appointment. I urge the Senate to promptly confirm her.

Yours truly,

H. Walter Croskey

Encl.

cc: Hon. Dianne Feinstein
Hon. Barbara Boxer
Hon. Patrick Leahy

STATE OF CALIFORNIA
Court of Appeal
SECOND APPELLATE DISTRICT
300 SOUTH SPRING STREET
LOS ANGELES, CALIFORNIA 90013

February 13, 2003

DANIEL A. CURRY
ASSOCIATE JUSTICE

TELEPHONE
(213) 830-7443
FAX
(213) 897-7933

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Hatch:

It is my understanding that the subject of the President's nomination of Judge Carolyn B. Kuhl to the United States Court of Appeals for the Ninth Circuit is again being considered by the United States Senate.

I have known Judge Kuhl throughout her tenure as a Judge of the Superior Court, first as a colleague on that court, then later when she joined my division of the California Court of Appeal as a justice pro tempore.

She is highly respected by trial and appellate judges and by lawyers alike. She has been assigned to several demanding assignments by at least four presiding judges. She has performed superbly.

She is professionally and personally qualified in every respect for the position she seeks. She possesses the necessary training, experience and judicial temperament. It would be difficult to think of another candidate as qualified.

I am aware of the opposition, which has been voiced. Judge Kuhl has no apparent political or social agenda, which would interfere with service on the court.

I strongly recommend this distinguished California judge for appointment to the United States Court of Appeals for the Ninth Circuit.

Sincerely,

Daniel A. Curry

DAC:dh
cc: The Honorable Patrick J. Leahy
The Honorable Barbara Boxer

July 2, 2001

Dear Senator Leahy

I understand that Carolyn Kull is being considered for an appointment as a judge on the US Court of Appeals for the Ni nth Circuit Court of appeals. Her record has shown that she is wedded to an extremist right wing philosophy that is contrary to the beliefs of most of the country. We need judges that decide cases on their merits, not judges who use the bench to further their own political agenda. Please oppose her nomination.

Thank you;

Eileen Davis

Eileen Davis
11743 Darlington Ave. #1
Los Angeles, CA 90049

June 25, 2001

By fax to 202-224-3954

Senator Dianne Feinstein
United States Senate
Washington, DC 20510

Dear Senator Feinstein:

We understand that Carolyn B. Kuhl is being considered by the Bush administration for appointment as a judge on the US Court of Appeals for the Ninth Circuit. I am writing to let you know that I oppose her potential appointment.

Carolyn B. Kuhl is not the type of judge who should be appointed to the federal Circuit Courts of Appeal. Her record shows that she is wedded to an extremist right wing philosophy that is far removed from the beliefs of ordinary Americans.

We need open-minded judges, not anti-choice ideologues who condone racism and restrict our ability to protect our individual rights in the courts.

Sincerely,

James R. Dawson & Warren Friedman

2721 West 182nd Street
Torrance, CA 90504-5228

Phone: 310-217-9202
E-mail: dawson2721@aol.com

cc: Senator Patrick Leahy - By fax to 202-224-3479

ROBERT L. DELL ANGELO
355 SOUTH GRAND AVENUE
THIRTY-FIFTH FLOOR
LOS ANGELES, CALIFORNIA 90071-1560
(213) 683-9540

February 3, 2003

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Patrick J. Leahy
Ranking Minority Member
Committee on the Judiciary
United States Senate
433 Russell Senate Office Building
Washington, D.C. 20510

The Honorable Dianne Feinstein
331 Hart Senate Office Building
Washington, D.C. 20510

The Honorable Barbara Boxer
112 Hart Senate Office Building
Washington, D.C. 20510

Re: Judge Carolyn Kuhl – Nominee for the 9th Circuit

Ladies and Gentlemen:

I am writing in support of Judge Carolyn Kuhl for a position on the U.S. Court of Appeals for the Ninth Circuit.

I am a pro-choice physician. I also am a former colleague of Judge Kuhl at the law firm of Munger, Tolles & Olson LLP. I have known Judge Kuhl for over a decade. She is compassionate. She has the highest integrity, and she is blessed with a gifted mind. These traits have made her an outstanding Judge on the Los Angeles Superior Court – indeed, her reputation is second to none – and they will serve her well on the Ninth Circuit.

There have been a number of rumors, attributing various extreme positions to Judge Kuhl based upon her legal work while at Munger, Tolles & Olson and during her period of public service in the Reagan Administration. Of course, that a lawyer advances an available argument on behalf of a client, or even represents a particular client, means only that the lawyer is fulfilling her professional obligations, precisely what one would expect from a nominee for the federal bench. It would be tragic if Judge Kuhl's nomination were to fail as a result of this pernicious attempt by those

who might wish to block her nomination to turn her into something that she is not.

In short, I urge you to support Judge Kuhl's nomination. I can think of no candidate better qualified for a position on the Ninth Circuit, or any court.

Sincerely,

Robert L. Dell Angelo

890933.1

Dear Sen. Leahy,

I very strongly oppose the nomination of Carolyn Kuhl for appointment as a judge on the US Court of Appeals. We need open-minded judges, not anti choice, racist ideologues.

Alice Dworkin
1238 E Wilson #206
Glendale, CA
91206
(Alice Dworkin)

MARC T.G. DWORSKY
355 SOUTH GRAND AVENUE
THIRTY-FIFTH FLOOR
LOS ANGELES, CALIFORNIA 90071-1560
(213) 683-9256

January 27, 2003

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Patrick J. Leahy
Ranking Minority Member
Committee on the Judiciary
United States Senate
433 Russell Senate Office Building
Washington, D.C. 20510

The Honorable Dianne Feinstein
331 Hart Senate Office Building
Washington, D.C. 20510

The Honorable Barbara Boxer
112 Hart Senate Office Building
Washington, D.C. 20510

Re: Judge Carolyn Kuhl – Nominee for the 9th Circuit

Ladies and Gentlemen:

I write to urge you to take all responsible steps to further the speedy confirmation of Judge Carolyn Kuhl for a well-deserved post on the U.S. Court of Appeals for the Ninth Circuit.

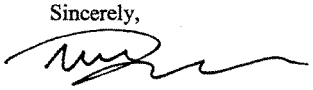
I am a former partner of Judge Kuhl at the law firm of Munger, Tolles & Olson LLP, a member of the Executive Committee of the Litigation Section of the Los Angeles County Bar Association, a business litigator, and a life-long liberal on civil rights issues.

I am not much of a fan of politics, of any stripe, and am not given to letters such as this. Yet, in this case, I am prompted to write for two reasons. First, I am deeply offended by the efforts that have been taken to tar Judge Kuhl by unfairly equating her own personal values with positions she in the past has advanced as an employee of the Reagan Administration and later, as a lawyer in private practice. As you know all too well, persuasive advocacy as a lawyer is the touchstone of professionalism, not remotely a measure of the advocate's morality. As someone who has known Judge Kuhl,

professionally and personally, for over a decade, I know to a moral certainty that the current campaign against Judge Kuhl is irresponsible and pernicious. Judge Kuhl's views may differ from mine on a variety of topics, but she is anything but the right-wing extremist that is her newfound caricature.

This brings me to my second point. As a practicing litigator, I am appalled at our court system that, on the one hand, has far too many judges qualified only by ideology at the expense of legal acumen and integrity and, on the other, is grotesquely understaffed, overworked and unable to do justice – to the judges themselves, the litigants before them, and the public at large – because the politicians are too busy dancing with themselves. Judge Kuhl has a brilliant mind and an exemplary judicial temperament. She is balanced, even-handed, and capable of doing and willing to do the very hard work that makes for good judging. If Judge Kuhl's nomination were to fail as a result of reflexive politicking, all of us – on the left, right and in between – would be the worse off for it.

Sincerely,



Marc T.G. Dworsky

www.scmv.com
619.685.3003
619.685.3100 FAX

2100 SYMPHONY TOWERS
750 B STREET
SAN DIEGO, CALIFORNIA 9210

SELTZER | CAPLAN | McMAHON | VITEK

A LAW CORPORATION

August 21, 2001

Hon. Dianne Feinstein
U.S. Senate
Washington, D.C. 20510

Re: Nomination of California Superior Court Judge Carolyn Kuhl to the United States Court of Appeals for the Ninth Circuit

Dear Senator Feinstein:

I am writing in strong support of the nomination of California Superior Court Judge Carolyn Kuhl to the United States Court of Appeals for the Ninth Circuit.

I first met Judge Kuhl in 1987 when I was a second year law student at Harvard interviewing for a summer associate position at the Los Angeles law firm where she was a partner, Munger Tolles & Olson. I later worked with her that summer when I accepted a summer associate position there.

I vividly recall one particular lunch another summer associate and I had with Carolyn and another partner Peter Taft where we discussed a wide range of legal matters. I found her comments very thoughtful. She did not analyze the many different legal issues raised at the lunch with anything approaching a rigid ideological agenda. As an African-American, I was sensitive to that.

Judge Kuhl is exceptionally well-qualified for the Ninth Circuit by experience and by temperament. She has demonstrated excellence as an advocate in both the U.S. Solicitor General's office and at Munger Tolles & Olson. She has demonstrated her abilities and evenhandedness as a Superior Court judge in both criminal and civil matters and currently oversees complex civil matters.

As a former president of the Earl B. Gilliam Bar Association in San Diego, the local organization of African-American attorneys, I believe it is important to attract to the federal judiciary the finest and fairest minds to what is, for virtually all federal litigants in California, the court of last resort. Judge Carolyn Kuhl would be an excellent addition to the critically important Ninth Circuit bench. I urge you to support her nomination.

Sincerely,

Daniel E. Eaton, Esq.

July 9. 2001
286 Oak Leaf Dr #15
Thousand Oaks, CA
91360

Senator Patrick J. Leahy
Chair, Judiciary Committee
433 Russell Senate Office Bldg
Washington, D. C. 20510

Dear Sir:

I'm writing today to ask you to oppose the nominations of Carolyn B. Kuhl as judge for the 9th Circuit Court, and Michael McConnell as judge for the 10th Circuit Court of Appeals.

Both of these candidates have espoused a philosophy that runs counter to the belief held by most citizens of the U.S. We need to have "fair" minded judges sitting on all of the Federal benches!

Please, do what you can to derail the further nomination of like-minded judges!!

Sincerely,
Margaretta Jo K. Eggleston

ANNE H. EGERTON
455 NORTH LAS PALMAS AVENUE
LOS ANGELES, CALIFORNIA 90004-1015
(323) 936-1804

March 17, 2002

The Honorable Barbara Boxer
United States Senate
112 Hart Senate Office Building
Washington, D.C. 20510

Re: **Nomination of Judge Carolyn B. Kuhl to the United States Court of Appeals for the Ninth Circuit**

Dear Senator Boxer,

I write in support of the nomination of Los Angeles Superior Court Judge Carolyn B. Kuhl to the United States Court of Appeals for the Ninth Circuit. I am a Democrat who has been a strong supporter of gender equality and reproductive freedom all my life. In my view, Judge Kuhl is a fair, smart, hardworking judge who is truly committed to the rule of law and who would do a fine job as a federal appellate judge.

I first met Carolyn Kuhl when we were law partners at the Los Angeles firm of Munger, Tolles & Olson in the 1980's. Carolyn was well regarded by her fellow partners as well as by clients, associates, and staff at the firm. Carolyn served as a mentor to me in those years. Having her guidance and support made a real difference to a young woman learning to navigate the world of male-dominated major corporate firms. At Munger Tolles, Carolyn also helped to organize and actively participated in lunches and other activities of the women attorneys at the firm. We joined together from time to time to discuss issues of common concern to us as lawyers, mothers, and colleagues. Those gatherings built solidarity and helped to further gender equality at the firm.

Carolyn and I now are fellow judges. During my application process for the bench, Carolyn again took the time to answer my questions and to act

as a mentor. As someone who has practiced law in Los Angeles for nearly twenty years and now as a fellow bench officer, I can tell you that Judge Carolyn Kuhl is highly respected by other judges as well as by lawyers who appear before her. She is recognized as a very able and fair judge, with an excellent temperament for judging and with no personal agenda. Her colleagues' regard for her abilities – analytical and managerial – and her work ethic shows in the presiding judges' assignment of Judge Kuhl to supervise the complex litigation court, which handles the largest and most complicated civil cases in Los Angeles County.

I understand that some have raised concerns about Judge Kuhl's commitment to gender equality and reproductive rights. I do not share those concerns. I have been active in feminist and pro-choice organizations since I first joined the nascent Arizona Women's Political Caucus in 1971. While I was an associate at Wilmer, Cutler & Pickering in Washington, D.C. in 1982, I co-authored a brief filed in the United States Supreme Court in *City of Akron v. Akron Center for Reproductive Health, Inc.* on behalf of amici the American College of Obstetricians and Gynecologists, the American Medical Association, and the American Academy of Pediatrics. The *Akron* decision – in which the Court cited our amicus brief – helped to expand access to safe and legal abortion. While I was at Munger, Tolles & Olson, I provided legal services on a *pro bono publico* basis for Planned Parenthood Los Angeles, serving as their outside general counsel for about two years in the late 1980s. While at Munger and later, I also was active in the Women Lawyers Association of Los Angeles Prochoice and Reproductive Rights Committee, and I co-chaired the committee for two years in the early 1990s. (I write this letter on a personal basis and of course do not purport to speak for any of these organizations.) I have spoken on a number of occasions in support of reproductive freedom and abortion rights. I have been a registered Democrat for thirty years, and I have supported – financially and otherwise – you, Senator Feinstein, and other Democratic legislators and candidates.

I have no reservations in recommending Judge Carolyn Kuhl to you for appointment to the Ninth Circuit Court of Appeals. I know Judge Kuhl to be committed to the rule of law and to the application of governing precedent. In the area of reproductive freedom, that precedent of course includes *Roe v. Wade* and the many cases such as *Akron* that have applied its landmark holding. Some people talk about mentoring and supporting women: Carolyn Kuhl is someone who does it, generously and consistently.

Judge Kuhl has the analytical ability, the personal integrity, the demeanor, and the commitment to justice and the rule of law to distinguish herself on the Ninth Circuit. I urge you to support her nomination.

Sincerely yours,

Anne Egerton

Anne H. Egerton

cc: The Honorable Patrick Leahy
The Honorable Orrin G. Hatch

7129 Coldwater Cyn.
Apt. 6
North Hollywood,
CA 91605

The Honorable Patrick Leahy
United States Senate
Washington, D.C. 20510

Dear Senator Leahy:

Our household (2 voters) is opposed to the nomination of Carolyn B. Kuhl for a seat on the Ninth Circuit of the United States Court of Appeals.

Ms. Kuhl has a dismal record in the areas of civil rights, reproductive choice, and privacy.

Very truly yours,
Grace Ehlmann
GRACE EHLMANN

STATE OF CALIFORNIA
Court of Appeal
SECOND APPELLATE DISTRICT
300 SOUTH SPRING STREET
LOS ANGELES, CALIFORNIA 90013

NORMAN L. EPSTEIN
ASSOCIATE JUSTICE

TELEPHONE
(213) 830-7438

May 24, 2001

The Honorable Barbara Boxer
United States Senate
112 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator Boxer:

I am writing to support the candidacy of Judge Carolyn Kuhl for the United States Court of Appeals for the Ninth Circuit. I hope the President will soon nominate Judge Kuhl to the Senate for confirmation to that position.

Judge Kuhl served as a justice pro tempore on the appellate panel on which I serve, Division Four of the Second District Court of Appeal. It was during that service that I came to know her and her work. She is a solid and independent judge who is dedicated to and follows the law. She also is a very intelligent and hardworking judge, and a gifted writer. If confirmed, her opinions will, I am confident, present thoughtful, well written, and convincing analyses. She will reason to a conclusion based on our C nstitution, statute, and established precedent, rather than reason backward from some predetermined result. Judge Kuhl also is personable, understands the principle of collegiality, and is able to work well and effectively with colleagues on panels of judges.

These qualities have earned her the admiration of all members of our court, as they have of her colleagues on the Los Angeles Superior Court, on which she now sits, and of members of the Bar.

I hope that she will have your support for the nomination and confirmation. If I can provide any further information or amplification to you or members of your staff, please do not hesitate to let me know; I will be pleased to respond.

Sincerely,

Norman L. Epstein

NLE:bw

California State Senate

SENATOR
MARTHA M. ESCUTIA
THIRTIETH SENATORIAL DISTRICT

CHAIR
SENATE JUDICIARY COMMITTEE

February 12, 2003

The Honorable Diane Feinstein
United States Senate
Senate Hart Office Building, Room 331
Washington, DC 20510
Telefax: (202) 228-3954

Dear Senator Feinstein:

I write to urge you to oppose the nomination of Judge Carolyn Kuhl to the Ninth Circuit Court of Appeal.

Judge Kuhl's nomination is opposed by more than 40 organizations representing civil rights, religious, environmental, reproductive rights and labor organizations, including the Sierra Club, National Organization for Women, California Abortion Rights Action League, National Women's Law Center, People for the American Way, and the Alliance for Justice, among others. These groups have correctly observed that Judge Kuhl's record as an attorney and state judge indicates that as a federal appellate judge she would threaten laws protecting the civil rights of Californians and California's environment.

For example, an examination of Judge Kuhl's record shows that she:

- argued that Roe v. Wade should be overturned during her tenure with the Justice Department under the Reagan administration;
- attempted to overturn the right of organizations to file suit on behalf of their members, which would have severely impacted environmental groups' access to court;
- argued as a private attorney in support of regulations prohibiting doctors and health care professionals at federally funded clinics from counseling women about abortion, or even informing them that abortion was a legal medical option;
- successfully argued that the Attorney General should reinstate the tax exempt status for the segregationist Bob Jones University;

- as a state judge, dismissed a breast cancer patient's claim of invasion of privacy after her doctor brought a drug company representative into the room during a breast exam. This ruling was reversed on appeal;

I agree with those who argue that placing Judge Kuhl on the Ninth Circuit Court of Appeals would be a grave error that would threaten California's ability to protect the rights of its citizens. I hope you will oppose her nomination as forcefully as possible.

Sincerely,

MARTHA M. ESCUTIA
Senator, 30th District

June 16, 2001

Dear Senator,

It is so seldom that there is an opportunity to input on Judicial appointments, and we appreciate this chance.

We understand that Carolyn B. Kuhl is being considered by President Bush for appointment to the US Court of Appeals Ninth Circuit. We are writing you to let you know we STRONGLY oppose this appointment. Her personal philosophy and her record show extreme right wing positions.

Please provide open minded judges who will protect civil rights in the courts.

Thank you,
Sheila and Arlen Field
901 5th St. L
Santa Monica, Ca. 90403
310-3950835

Law Offices of
Michael S. Fields,
Incorporated

msfLAW@michaelsfieldslaw.com

MICHAEL S. FIELDS
ATTORNEY AT LAW

ANA R. PARRA
Legal Assistant

BRENDA FIELDS
Secretary

February 11, 2003

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Re: Senate Hearing for Judge Carolyn Kuhl, Nomination to the Ninth Circuit Court of Appeal

Dear Senator Hatch:

Judge Carolyn Kuhl of the Los Angeles Superior Court is a highly respected and qualified jurist in our community. Those who respect her judicial abilities, fairness and temperament include attorneys on either side of an issue.

I am president of the Consumer Attorneys Association of Los Angeles, and our board of governors recently voted to encourage our individual members to support a hearing for Judge Kuhl before the Senate of the United States regarding her nomination to be a judge on the Ninth Circuit Court of Appeal.

Just as Judge Kuhl has always provided a fair hearing of issues before her, I request that Judge Kuhl be provided a fair hearing before your austere body.

Thank you for considering my letter.

Sincerely,

MICHAEL S. FIELDS

MSF/arp

cc: The Honorable Carolyn Kuhl

C:\My Documents\FIELDS-MISC\SenatorHatch0211-arp.L2003.wpd

ARTESIA CERRITOS • 11746 EAST 183rd STREET • ARTESIA, CA 90701-5606 • Telephone (562) 860-6601 Facsimile (562) 865-2595

DANIEL N. FOX
Attorney at law
Main-Mission Building
477 South Main Street
Pomona, California, 91766-1604
California State Bar No. 28662
(909) 629-7560
E-mail: dfox@tstonramp.com

June 15, 2001

Senator Barbara Boxer
fax: 202/228-1338

Senator Dianne Feinstein
fax: 202/228-3954

Senator Patrick Leahy
fax: 202/224-3479

Dear Senator,

I understand that Carolyn B. Kuhl is being considered by the Bush administration for appointment as a judge on the US Court of Appeals for the Ninth Circuit. I am writing to let you know that I oppose her potential appointment. Carolyn B. Kuhl is not the type of judge who should be appointed to the federal Circuit Courts of Appeal. Her record shows that she is wedded to an extremist right wing philosophy that is far removed from the beliefs of ordinary Americans. We need open-minded judges, not anti-choice ideologues who condone racism and restrict our ability to protect our individual rights in the courts.

Sincerely:



Daniel N. Fox

Sidney Fox

June 23, 2001

Hon. Senator Patrick Leahy
433 Senate Russell Offic Bldg.
Washington, DC.
20510.

Dear Senator Leahy,

I write to urge you to oppose the nomination of Judge Carolyn B. Kuhl on the Ninth Circuit Court of Appeals.

I also wish to remind you that we should not forget what the Republicans did with President Clinton's nominations.

Judge Kuhl is an extremist, an ultra-conservative, and holds views contrary to the majority of Americans.

This is a critically important Appellate court and her nomination should be refused.

Respectfully,

Jean Fox

205 Third Ave (3H)
New York, N.Y.
10003-2508

JUVENILE DIVISION
The Superior Court
201 CENTRE PLAZA DRIVE, SUITE 3
MONTEREY PARK, CALIFORNIA 91754-2138

TELEPHONE
(323) 526-6277

CHAMBERS OF
TERRY B. FRIEDMAN
PRESIDING JUDGE

May 3, 2001

The Honorable Dianne Feinstein
United States Senate
Washington, DC

Re: Judge Carolyn Kuhl

Dear Dianne:

I am writing to support the nomination of Los Angeles Superior Court Judge Carolyn Kuhl to the United States Court of Appeals, Ninth Circuit. I have known Judge Kuhl since her appointment to the Superior Court and, based on this experience, share the widespread view of my colleagues that she is one of the finest members of our bench.

Judge Kuhl is exceptionally intelligent and capable of presiding over the most complex cases in any court. That is why she has been assigned to the Los Angeles Superior Court Complex Litigation Program for the past year. Judge Kuhl's outstanding performance in this important assignment earned her appointment as Supervising Judge of the Program beginning January 2001. It is remarkable that a relatively new judge would rise so quickly to assume one of the most critical leadership positions on the Superior Court. But it is no surprise in Judge Kuhl's case, considering her extraordinarily impressive legal career.

On numerous occasions Judge Kuhl and I have discussed various legal issues that arise in our courts. In these conversations Judge Kuhl demonstrated thorough knowledge of a wide array of matters. Additionally, she expressed a balanced and carefully nuanced perspective, particularly on some very controversial issues, such as the Rampart police investigation.

Nominations to the federal appellate court are one of the most important powers of the President of the United States. It is my hope that the United States Senate will carefully review the President's nominations to assure that each one meets the standard of high intelligence, absolute integrity, commitment to fairness and philosophical balance. I believe that Judge Carolyn Kuhl clearly meets this standard and is highly qualified to serve on the Ninth Circuit Court of Appeal.

Thank you for your consideration of this [illegible]

Sincerely,

Terry Friedman

Marina Gagliardi, M.A., MFCC
Psychotherapy / Consultation

July 17, 2001

Dear Senator,

I am writing to voice my opposition to the nomination of Carolyn B. Kuhl as judge on the U.S Court of Appeals for the ninth circuit. Carolyn B. Kuhl's extremist right wing philosophy has been revealed in her position on the reproductive rights of women and the limitations placed on the recourse of the ordinary citizen in the face of corporate power. I believe fimly in the need for fair, open minded judges who will protect our individual rights in the courts.

Sincerely,

Marina Gagliardi

11850 Wilshire Boulevard, Suite 200A
Los Angeles, CA 90025
License # MFCC 30536
Telephone 310-282-8012

 # 1 View e:\emailobj\200106\628202043.txt

From: eljens - LMi <eljens@LMi.net>
Date: 6/28/01 8:16:41 PM
To: senator@feinstein.senate.gov
Subject: Carolyn Kuhl nomination - June 28

I urge you NOT to support the nomination of Carolyn Kuhl to the 9th circuit district court. Her stance on abortion rights - or lack of them - is contrary to the wishes and opinions of most California women. It's critical not to allow new judicial appointees to undo Roe v Wade, or in any way compromise women's right over their own uteruses.

Your choice now determines whether California women continue to enjoy reproductive choice in the forseeable future.

Sincerely - Jennifer Cross Gans

5215 Sepulveda Blvd. #7A
Culver City, CA 90230
June 18, 2001

Senator Patric Leahy
FAX (202) 224-3479

I understand that Carolyn B. Kuhl is being considered by the Bush administration for appointment as a judge on the US Court of Appeals for the Ninth Circuit. I am writing to let you know that I oppose her potential appointment. Carolyn B. Kuhl is not the type of judge who should be appointed to the federal Circuit Courts of Appeal. Her record shows that she is wedded to an extremist right wing philosophy that is far removed from the beliefs of ordinary Americans. We need open-minded judges, not anti-choice ideologues who condone racism and restrict our ability to protect our individual rights in the courts.

Sincerely,

ALLAN GARTENBERG

Joy A. Gault
5337 W. El Segundo Blvd.
Hawthorne, CA., 90250
17 July 2001

Senator PatrickLeahy
U. S. Senate
Washington, D.C.. 20510

Dear Senator Leahy,

I am opposed to the appointment of Carolyn B. Kuhl as a judge on the US Court of Appeals for the Ninth Circuit. Her record shows that she is wedded to an extremist right wing philosophy that is far removed from the beliefs of ordinary Americans. We need open minded judges, not anti choice ideologues.

Sincerely,

Joy A. Gault

Sylvia Gavurin
3995 Overland Ave. # 203
Culver City, CA 90232-3722

Senator Patrick Leahy 7/27/01
U.S. Senate
Washington, DC
Re: Carolyn B. Kuhl

Dear Senator Leahy:

I vigorously oppose the nomination of Carolyn B. Kuhl as a judge for the U.S. Court of appeals, the Ninth Circuit Court.

As an extreme record for the right wing, she is not for the most americans. We need judges, but judges who have some understanding of people's ideas and feelings for individual rights in the court.

Please work on another selection.

Very truly yours
Sylvia Gavurin

GJAG

GENDER JUSTICE
ACTION GROUP

At the Unitarian Universalist
Community Church
70 Sycamore Drive
Park Forest, IL 60466
708/481-5339
fax: 708/481-1716
Email: uuccpfil@aol.com

WOMEN'S COORDINATOR
Pam Godbout
708/481-9019
abercat@earthlink.net

MEN'S COORDINATOR
Dave Matteson
708/672-8807
d-matteson@govst.edu

GLBT COORDINATOR
Heather Godbout
708/757-3954
teachped5@aol.com

August 8, 2001

Senator Patrick Leahy, Chair
Senate Judiciary Committee
433 Russell Senate Office Building
Washington, DC 20510

Dear Senator Leahy:

We are writing to you to urge you to vigorously oppose the nomination of judges to the federal courts of appeal who would work to weaken or even eliminate basic rights of women, African Americans and homosexuals.

Fully half of the 18 nominees Governor Bush has announced have records that clearly indicate their disdain for women's right and for civil rights. We urge you to fight for the principles and values we share as progressives. Please help defeat the nominations of the judges listed below (attached is a brief record of each nominee):

- Terrence Boyle
- Patricia Cook
- Carolyn B. Kuhl
- Michael W. McConnell
- Pricilla Owen
- John G. Roberts
- Lavenski R. Smith
- Jeffrey S. Sutton
- Timothy M. Tymkovich

Thank you for your tireless efforts to oppose the radically conservative Bush agenda. Please help keep the courts a place where the wealthy and privileged can be held accountable for their exploitations. Defeat these nominees!

Thank you,

Pam Godbout
Women's Coordinator
and members of the
Gender Justice Action Group

Heath M. Godbout
Patricia C. Segner
Valerie Dirk
Beverly A. Feldt

Terrence Boyle, 4th Judicial District (North Carolina)

- Ruled against African American and for whites in 2 voting rights cases. Both cases were reversed on appeal
- Ruled against women in a Title VII sex discrimination case. This case was also reversed on appeal

Patricia Cook, 6th Judicial District (Ohio)

- Was endorsed by the Ohio Right to Life organization in her last election
- Voted against equalizing funding for Ohio public schools

Carolyn B. Kuhl, 9th Judicial District (California)

- Signed on to a brief urging the overrule of *Roe v. Wade*
- Argued in favor of a domestic gag rule
- Supported tax exempt status for Bob Jones University

Michael W. McConnell, 10th Judicial District (Utah)

- Signed statement called for overrule of *Roe v. Wade*
- Represented the Boy Scouts in their effort to remove a gay scout master

Pricilla Owen, 5th Judicial District (Texas)

- Voted to narrow and eliminate buffer zones around a group of Texas abortion clinics
- Has consistently voted against minors trying to use the judicial bypass provision of Texas' parental notification requirement

John G. Roberts, DC Judicial District (Washington, DC)

- Signed a brief urging that *Roe v. Wade* be overturned
- Argued against affirmative action for federal contractors
- Argued that abortion providers were not protected by civil rights law

Lavenski R. Smith, 8th Judicial District (Arkansas)

- Argued against Arkansas public hospitals providing abortions
- Accepted money from anti-abortion PAC

Jeffrey S. Sutton, 6th Judicial District (Ohio)

- Argued against the Americans with Disabilities Act applying to states
- Argued against the ADEA applying to states
- Argued against provision of the Violence Against Women Act that allowed women to sue their attackers in federal court
- Argued against private right of action for civil rights laws

Timothy M. Tymkovich, 10th Judicial District (Colorado)

- If favor of Amendment 2 to the Colorado Constitution which would ban local laws prohibiting discrimination against homosexuals

G | K GIRARDI | KEESE
LAWYERS

January 28, 2003

Via Federal Express

The Honorable Patrick J. Leahy
Ranking Minority Member
Committee on the Judiciary
United States Senate
433 Russell Senate Office Building
Washington, D.C. 20510

Dear Senator Leahy:

I am a plaintiff's lawyer in California and have previously had the opportunity to thank you for the great job you do on the Judiciary Committee.

Carolyn Kuhl is before your Committee. She is a woman of great legal insight, great judicial temperament and fair to everyone who comes before her. She would be looked upon favorably by the Trial Bar in California.

With kind regards,

THOMAS V. GIRARDI

TVG:sf

cc: Senator John Edwards

F:\admin\tvg\pers\03Senator Patrick Leahy.J28

1126 WILSHIRE BOULEVARD • LOS ANGELES, CALIFORNIA • 90017-1904
TELEPHONE: 213-977-0211 • FACSIMILE: 213-481-1554

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LOS ANGELES, CALIFORNIA 90067-5010
(310) 553-3000
FAX (310) 556-2920

DIRECT DIAL NUMBER
(310) 282-6217

August 30, 2001

VIA U.S. MAIL

The Honorable Dianne Feinstein
525 Market Street
Suite 3670
San Francisco, California 94105

Dear Senator Feinstein:

I write this letter in support of Judge Carolyn Kuhl's appointment to the United States Court of Appeals for the Ninth Circuit. As you probably know, Judge Kuhl is the supervising judge in Los Angeles Superior Court for Complex Litigation. Members of my law firm have appeared in her court room and have found her to be incredibly bright, well prepared, and clearly someone who has done her homework and is conversant with the issues at hand. To the extent that anyone has suggested that she is any sort of "right wing zealot," "unable or unwilling to follow the law", let me assure you that those accusations are ridiculous and find no support in either my experience or the experiences of others in my law firm. Judge Kuhl is a real credit to the State judiciary and my only reluctance in recommending her to the Ninth Circuit is that the State judiciary system will suffer a significant loss. I unqualifiedly recommend Judge Kuhl for the Ninth Circuit position.

Very truly yours,

Patricia L. Glaser
of CHRISTENSEN, MILLER, FINK, JACOBS,
GLASER, WEIL & SHAPIRO, LLP

PLG:pjs

237459.1

1303

July 17, 2001

Senator Patrick Leahy
U.S. Senate
Washington, D.C. 90510

Dear Senator Leahy,

During the recent presidential election, many of my friends and colleagues spoke strongly about the issue regarding Supreme Court appointees. It has recently come to my attention that the Appellate Courts may have as much, or even more, impact on all of our lives.

This is why I write today. You must know that Carolyn B. Kuhl has clearly demonstrated an extremist right wing philosophy and must not be appointed to the 9th Circuit Court of appeal. Your responsibility as a U.S. Senator is to support judges who will firmly protect civil rights, individual liberties, and the environment. We count on you to oppose the nomination of Carolyn B. Kuhl.

Sincerely,

Carolina Goodman

Carolina Goodman
13938 Cumpston St.
Sherman Oaks, CA 91401

JAN GOODMAN
LAWYER

939 SAN VICENTE BLVD.
SANTA MONICA, CA 90402
TELEPHONE: (310) 458-7213
FAX: (310) 458-7214

June 16, 2001

VIA U.S. MAIL AND FACSIMILE: 202-224-3479

Sen. Patrick Leahy
United States Senate
Washington, D.C. 20510

Dear Sen. Leahy:

I am writing to express my opposition to the proposed appointment of Carolyn B. Kruhl to the federal bench.

I would urge opposition to her appointment based on her history as an ultraconservative member of The Federalist Society, whose philosophy is out of step with the American people. Carolyn Kruhl should not be appointed to the federal bench, and I urge your opposition.

Thank you for your courtesies.

Yours truly,

Jan Goodman

JG:jh

c:\wp51\doc\340 kruhl6.ltr

The Superior Court
LOS ANGELES, CALIFORNIA 90012
CHAMBERS OF
ELIZABETH A. GRIMES, JUDGE

TELEPHONE
(213) 974-1234

February 28, 2003

The Hon. Orrin G. Hatch
Chairman, Senate Judiciary Committee
104 Hart Senate Office Building
Washington, DC 20510

The Hon. Patrick J. Leahy
Ranking Minority Member, Senate Judiciary Committee
433 Russell Senate Office Building
Washington, DC 20510

The Hon. Dianne Feinstein
331 Hart Senate Office Building
Washington, DC 20510

The Hon. Barbara Boxer
112 Hart Senate Office Building
Washington, DC 20510

Re: Nomination of Judge Carolyn B. Kuhl to U.S. Court of Appeals for the 9th Circuit

Dear Senators:

We are all colleagues of Judge Carolyn B. Kuhl on the Superior Court of the State of California for Los Angeles County. We enthusiastically endorse her for appointment to the United States Court of Appeals for the Ninth Circuit. We are Republicans, Democrats, and Independents and have all had the opportunity to observe the leadership and demeanor of Judge Kuhl.

We have worked side by side with Judge Kuhl, have attended her judicial education presentations, talked with her about the law, and received reports from litigants who have appeared before her. We know she is a professional who administers justice without favor, without bias, and with an even hand. We believe her elevation to the Ninth Circuit Court of Appeals will bring credit to all of us and to the Senate that confirms her. As an appellate judge, she will serve the people of our country with distinction, as she has done as a trial judge.

We urge the 108th Congress to proceed promptly to take all necessary steps to confirm Judge Kuhl as a Circuit Court Judge. Thank you for your consideration of this letter.

Sincerely yours,

Elizabeth A. Grimes

Elizabeth A. Grimes

Listed below are the names of the Superior Court Judges who join in sending this letter. The original signature pages are included with the letter addressed to the Honorable Orrin G. Hatch.

Hon. Haley J. Fromholz

Hon. Warren L. Ettinger

Hon. Wendell Mortimer, Jr.

Hon. Roy L. Paul

Hon. Thomas L. Willhite, Jr.

Hon. Morris B. Jones

Hon. Rodney E. Nelson

Hon. H. Ronald Hauptman

Hon. Paul Gutman

Hon. Emilie H. Elias

Hon. James R. Dunn

Hon. Susan Bryant-Deason

Hon. James C. Chalfant

Hon. Richard E. Denner

Hon. Helen I. Bendix

Hon. Fumiko Hachiya Wasserman

Hon. Dzintra Janavs

Hon. Ronald M. Sohigian

Hon. David P. Yaffe

Hon. Lawrence W. Crispo

Hon. Hugh C. Gardner III

Hon. David L. Minning

Hon. Malcolm Mackey

Hon. Victor Person

Hon. Rolf Treu

Hon. George H. Wu

Hon. Alexander Williams III

Hon. William Fahey

Hon. Terry A. Green

Hon. Curtis B. Rappe

Hon. George G. Lomeli

Hon. Maureen Duffy-Lewis

Hon. Larry Paul Fidler

Hon. Judith L. Champagne

Hon. David Mintz

Hon. William R. Chidsey, Jr.

Hon. Maral Injejikian

Hon. Alice E. Altoon

Hon. Michael Kellogg

Hon. Lorna Parnell

Hon. Valerie Baker

Hon. Richard Neidorf

Hon. Jacqueline Connor

Hon. Bernard Kamins

Hon. Craig Karlan

Hon. Gerald Rosenberg

Hon. Paul G. Flynn

Hon. John H. Reid

Hon. Mary Ann Murphy

Hon. Gregory C. O'Brien, Jr.

Hon. Joseph Kalin

Hon. Gregory Alarcon

Hon. Elihu M. Berle

Hon. Robert L. Hess

Hon. Charles W. McCoy

Hon. Peter D. Lichtman

Hon. Judith C. Chirlin

Hon. S. James Otero

Hon. William A. MacLaughlin

Hon. Robert A. Dukes

Hon. Rita Miller

Hon. William R. Pounders

Hon. Tricia Bigelow

Hon. David S. Wesley

Hon. Marsha N. Revel

Hon. Teri Schwartz

Hon. Joseph F. DeVanon

Hon. Janice Claire Croft

Hon. Phillip J. Argento

Hon. Teresa Sanchez-Gordon

Hon. Marilyn L. Hoffman

Hon. Victor E. Chavez

Hon. Marion J. Johnson

Hon. Alan G. Buckner

Hon. Robert H. O'Brien

Hon. Andria K. Richey

Hon. Terry B. Friedman

Hon. James A. Bascue

Hon. Ralph W. Dau

Hon. Linda K. Lefkowitz

Hon. Michael M. Johnson

Hon. Alice C. Hill

Hon. Victoria G. Chaney

Hon. Anthony J. Mohr

Hon. Carl J. West

Hon. Arthur M. Lew

Hon. Mary Thornton House

Hon. Meredith C. Taylor

Hon. Rose Hom

Hon. Margaret M. Hay

Hon. Marvin M. Lager

Hon. Soussan G. Brugera

Hon. Charles F. Palmer

Hon. Kathleen Kennedy-Powell

Hon. John W. Ouderkirk

Hon. Alan B. Haber

June 23, 2001

Dear Senator Patrick Leahy:

I am writing to strongly urge you to oppose the nomination of Carolyn B. Kuhl to the Ninth Circuit Court of Appeals.
Carolyn Kuhl is out of line with the pro-choice majority in California. If she is appointed to the Ninth Circuit Court of Appeals, the reproductive freedom of Californian women will be in serious jeopardy. Kuhl has demonstrated a severe anti-choice stance, even supporting the reversal of *Roe v. Wade*. As a pro-choice voter and a member of CARAL, I am adamantly opposed to the nomination of Carolyn Kuhl and all anti-choice judicial nominees. I urge you to vote NO on Carolyn Kuhl and on all judicial nominees who support reversing or restricting our reproductive rights.

Sincerely,

Yong Han
1049 Market Street #404
San Francisco CA 94103

STATE OF CALIFORNIA
Court of Appeal
SECOND APPELLATE DISTRICT
DIVISION FOUR
300 SOUTH SPRING STREET
LOS ANGELES, CALIFORNIA 90013

J. GARY HASTINGS
ASSOCIATE JUSTICE

February 13, 2003

Hon. Orrin Hatch
Chairman
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, D.C. 20510

Re: Judicial Candidate Carolyn Kuhl

Dear Senator Hatch:

It is with pleasure that I write to commend Judge Carolyn Kuhl to you and the members of the Senate Judiciary Committee as an exceptionally well qualified candidate for the United States District Court. I first met Judge Kuhl when she served for three months as a justice pro tem with our panel during which she wrote and participated on numerous cases. I have also reviewed a number of her cases on appeal from the trial court. She is bright, hard-working, extremely collegial, a good writer and researcher, and she applies the law even-handedly.

Through the press, I am aware of the dispute surrounding her nomination. Judges are human and all have personal beliefs and biases that could potentially conflict with issues in a case before them. It is the strength of our judicial system that the vast majority of judges have the integrity to put aside their personal beliefs and biases and decide issues based on the law, whether they personally agree with the outcome or not. Carolyn is just such a person. In the cases she worked on with our panel, and in the cases of hers that I have reviewed, I have seen no evidence that Carolyn has allowed her personal beliefs or biases to affect the result. I highly recommend her to you as a candidate of honesty, integrity and ability.

Sincerely,

J. Gary Hastings

cc: Hon. Patrick Leahy
Hon. Dianne Feinstein
Hon. Barbara Boxer

News Release
JUDICIARY COMMITTEE
United States Senate • Senator Orrin Hatch, Chairman

April 1, 2003 Contact: Margarita Tapia, 202/224-5225

Statement of Chairman Orrin G. Hatch
Before the United States Senate Committee on the Judiciary
Hearing on

The Nomination of Carolyn Kuhl for the United States Court of Appeals for the Ninth Circuit

It is my pleasure to welcome before the Committee this morning three exceptional nominees for the federal bench.

Our circuit nominee is Carolyn Kuhl, who has been nominated to fill a judicial emergency on the Ninth Circuit, which is the most notoriously liberal federal court in the United States. This is the court that gave us the infamous Pledge of Allegiance case, which held that the Pledge of Allegiance is unconstitutional because it contains the word "God." As a result, public schoolchildren in the nine western states and two territories that constitute the Ninth Circuit are forbidden from pledging allegiance to the flag of the United States, even as their mothers and fathers, uncles and aunts, other relatives and friends are fighting in Iraq to preserve our national security and the ideals that we most treasure in our nation. As my esteemed colleague Senator Schumer put it, this case is "way out of the mainstream on the left side."

Unfortunately, the Pledge of Allegiance case is not an anomaly. Just last month, the Ninth Circuit decided to ignore and distort controlling Supreme Court precedent in order to skew the playing field in favor of criminal defendants. The court concluded that a key law prohibiting child pornography was unconstitutional as applied to certain criminal defendants. Amazingly, the panel handed down this ruling to a defendant who had knowingly and voluntarily pled guilty to violating the child pornography law with materials that had traveled across state lines. As a result, child pornographers can flock to the Ninth Circuit to practice their trade unfettered by federal criminal law. As the author of the PROTECT Act and the Comprehensive Child Protection Act of 2003 -- bills that will toughen the laws against child pornography, child abuse, and child victimization -- I shudder for the welfare of the millions of children who live in the Ninth Circuit. Decisions like are the perfect examples for why our country needs good, constitutionalist judges on the federal bench.

The Ninth Circuit has also held in recent years that California's so-called three strikes law, which imposes life sentences on career criminals, was unconstitutional. It held that a prisoner who was convicted of making terroristic threats had a right to procreate through artificial insemination. This case, which became known as the ***procreation by FedEx*** case, was later reversed by an en banc panel of the Ninth Circuit, but just barely. Yet another gem from

the Ninth Circuit held that prisoners have a constitutional right to pornography, which had been banned because inmates had used it to harass women guards. Fortunately, saner heads prevailed, and this case was reversed en banc.

Plenty of Ninth Circuit decisions, however, are not corrected en banc, which has led to the Ninth Circuit holding the dubious distinction of having the highest and widest Supreme Court reversal rate in the country among the federal courts of appeals. Over the past seven years, the Supreme Court has reversed an average of ***80 to 90%*** of the Ninth Circuit cases it hears. Just last term, the Supreme Court reversed the Ninth Circuit in 15 of 19 cases, 8 times unanimously. And so far in the current term, the Ninth Circuit has been reversed in 8 of 11 cases. Three of these were unanimous summary reversals, which means that the Court simply reversed on the basis of the petition for certiorari, without asking for briefs or oral arguments.

This pattern of decisions, some of which can only be described as downright wacky, and its high reversal rate has led to the perennial introduction of legislation seeking to split the Ninth Circuit, given that so many of its states seek to disassociate themselves from such inherently illogical rulings.

I have taken the time to recite the state of affairs on the Ninth Circuit because I think that it will benefit from the confirmation of such an esteemed and experienced jurist as Carolyn Kuhl, whose record demonstrates her commitment to following precedent and steering clear of judicial activism. At the same time, I want to make clear that I, for one, do not believe that the ideological composition of a court should have any determination on whether an otherwise qualified nominee should be confirmed. As I have said before on numerous occasions, I do not believe that ideology has any role, constitutional or otherwise, in the advice and consent process.

I recognize, however, that some of my Democratic colleagues disagree with me. They place great importance on achieving what they refer to as the appropriate ***balance*** on a court in determining whether to vote to confirm a judicial nominee. So I know that they will find it interesting that of the 25 active judges on the Ninth Circuit, 17 of them were appointed by Democratic presidents, and 14 of them were appointed by President Clinton alone. In fact, 4 Clinton nominees to the Ninth Circuit were confirmed in 2000, a presidential election year. Despite this record, only ***one*** of President Bush's three nominees to the Ninth Circuit was confirmed in the last Congress. So much for achieving any so-called balance. And while we just confirmed Jay Bybee to the Ninth Circuit last month, it is high time that Carolyn Kuhl was afforded a hearing before this Committee.

Judge Kuhl has an exemplary record that includes service as both a committed advocate and an impartial jurist. The American Bar Association has rated her "Well Qualified" for this position. Although the ABA rating used to be the ***gold standard*** as far as my Democratic colleagues were concerned, I am only half joking when I say that an ABA rating of Well Qualified seems to have become the kiss of death for President Bush's judicial nominees. The two nominees blocked in Committee last year, Charles Pickering and Priscilla Owen, both received Well Qualified ratings, as did Miguel Estrada, whose nomination has now been

filibustered on the Senate floor for nearly two months. Carolyn Kuhl deserves to fare better, and I certainly hope she does.

I expect that we will hear a great deal about Judge Kuhl's qualifications during our next panel of witnesses, so I want to focus on the widespread support for her nomination, because the ABA is not alone in its judgment that she is well qualified for the Ninth Circuit.

Since 1995 Judge Kuhl has served as a judge on the Los Angeles County Superior Court. ***Nearly 100*** of her fellow judges on that court have written to the Committee to voice their ardent support for her nomination. Here's what they have to say: "We are Republicans, Democrats, and Independents and have all had the opportunity to observe the leadership and demeanor of Judge Kuhl. . . . We know she is a professional who administers justice without favor, without bias, and with an even hand. We believe her elevation to the Ninth Circuit Court of Appeals will bring credit to all of us and to the Senate that confirms her. As an appellate judge, she will serve the people of our country with distinction, as she has done as a trial judge."

Another letter came from the officers of the Litigation Section of the Los Angeles County Bar Association. With more than 3,000 members, this is the largest voluntary bar association in the United States. They write, "By reputation and our personal experience, Judge Kuhl is extremely intelligent, hard working and thoughtful. She gained the prestigious appointment as Supervising Judge of the Complex Courts after only a few years on the bench because of those traits. In addition, she has a well-deserved reputation as being a fairminded judge who follows legal precedent. . . . On a personal level, we have come to know her as a warm, witty and deeply caring person. We could not recommend her more highly for nomination to the Ninth Circuit Court of Appeals."

I will submit copies of these letters for the record, along with copies of other letters of support we have received for Judge Kuhl's nomination.

Unfortunately, no judicial nominee these days seems to escape criticism by the left-wing special interest groups. Judge Kuhl is no exception. I expect that we will hear attacks on her record as an attorney for the Justice Department during the Reagan Administration, when she was doing her duty to represent the position of the United States. We will probably hear attacks on her record in private practice stemming from the types of clients she represented and the positions she took on their behalf. And I expect that we will hear some unfounded criticism of decisions she has made as a California state court judge.

These types of attacks on President Bush's judicial nominees have become so commonplace, and often bear so little relationship to the nominees' actual records, that they bring to mind the children's story of the boy who cried wolf. After two years of smear campaigns, with each consecutive nominee being declared more anti-this and pro-that than the former, these groups have simply lost credibility, especially when you consider their poor track record in predicting what kind of judges nominees will turn out to be.

Two cases in point are Supreme Court Justices David Souter and John Paul Stevens. The left wing groups predicted that both of these nominees would roll back decades of protections for women, minorities, and the general population. Of course, the test of time has told a different story: Justice Souter and Justice Stevens are considered stalwart votes on the Court's liberal wing. We should keep this in mind as we consider the claims of the left-wing groups who oppose Judge Kuhl and other Bush nominees.

In addition to Judge Kuhl, we will hear from two nominees for the federal district court bench: Cecilia Altonaga, who has been nominated for the Southern District of Florida, and Patricia Minaldi, who has been nominated for the Western District of Louisiana. I will reserve my remarks on these nominees until after Judge Kuhl's testimony. I look forward to hearing from all of our nominees on today's agenda, and I commend President Bush for nominating each of them.

###

Agnes F. Henry
28833 Conejo View Dr.
Agoura Hills, CA 91301

July 8, 01

Dear Mr. Chairman of the Judiciary Committee,

I am writing to ask you to oppose the nomination of Carolyn B. Kuhl as a judge on the US Court of Appeals for the ninth circuit.

I am currently studying 20th Century US history and realize that for the first time in over 200 years our constitutional rights may be taken from us due to the life-time court appointments of far right extremist judges.

Please oppose this nomination. You and all the Democrats need to stand strong against the Federalist Society and its agenda.

Thank you,

Sincerely + respectfully yours,
Agnes F. Henry

The Superior Court
900 THIRD STREET
SAN FERNANDO, CALIFORNIA 91340

TELEPHONE
(818) 898-2618

CHAMBERS OF
ALICE C. HILL
SUPERVISING JUDGE

February 4, 2003

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Re: Judge Carolyn Kuhl

Dear Senator Hatch:

I am writing in support of the confirmation of Los Angeles Superior Court Judge Carolyn Kuhl to the United States Ninth Circuit Court of Appeal. As a life-long Democrat, I believe that she will prove an outstanding appellate jurist who unfailingly follows the laws.

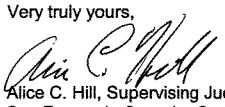
I met Judge Kuhl approximately seven years ago when we were both newly appointed judges attending "Judicial College" for California bench officers. Even at our first meeting, it was immediately apparent that Judge Kuhl possesses both exceptional intelligence and extraordinary judgment. Over the years, I have closely watched her ascension through the ranks of the Los Angeles Superior Court, a court with close to 600 judicial officers and over 5400 employees. Los Angeles Superior Court has repeatedly looked to her to assume a leadership role in its operations. Shortly after joining the bench, the court tapped her to head its Complex Litigation Section. In that capacity, she handled some of the largest and most heavily litigated cases. Through her efforts, our court garnered a national reputation for its ability to process the most difficult of civil cases.

More recently, in recognition of her many skills, the Presiding Judge of the Los Angeles Superior Court chose her to supervisor all civil operations. As Supervising Judge of Civil, she oversees all judicial officers handling civil litigation. She is responsible for making sure that cases are processed on a timely basis, that the court addresses the bar's many concerns, and that judges and commissioners receive proper continuing education. By all accounts, she has done a superb job.

Within our court, Judge Kuhl enjoys an outstanding reputation for fairness, common sense, and legal ability. She is viewed as a "superstar" who will handle any case or task expeditiously, competently and with the utmost care. If confirmed to the Ninth Circuit, I think she will prove one of the outstanding jurists of that court. Based on my personal conversations with her, I know that she and I share the same judicial philosophy, namely that, as jurists, our duty is to follow the law. I have no doubt that once serving on the Ninth Circuit, Judge Kuhl will continue to adhere strictly to that philosophy just as she has done while serving on the Los Angeles Superior Court.

In short, I believe that Judge Kuhl has demonstrated the merit, talent and disposition to be confirmed to the Ninth Circuit. If you have any questions, please do not hesitate to contact me.

Very truly yours,



Alice C. Hill, Supervising Judge
San Fernando Superior Court

ACH:mim

Dear Senators:

I am hereby voicing my opposition to the nomination of Carolyn B. Kuhl to the U.S. Court of Appeals for the Ninth Circuit.

Her record as a state judge in California clearly proclaims her to be both racist, as in her support of Bob Jones University, and misogynist, as in her outspoken support for the overturning of the landmark Roe v Wade decision which allows women to make their own private decisions regarding their own bodies.

In recent days we have heard much in the media about the appropriateness of applying the death penalty to persons of diminished mental capacity. The argument against state laws, as in Texas where Governor Rick Perry has vetoed a measure that would outlaw such executions, runs that juries made up of ordinary citizens should be granted respect for their ability to appropriately apply sentences in capital cases. Yet women, who are also ordinary citizens, aren't they? would not, under Judge Kuhl's ruling, be granted the same autonomy over their own bodies and lives, as if they are also as a class suffering from diminished capacity and must have their decisions made for them and then forced upon them by others.

Judge Kuhl has made it very clear that she would "legislate from the bench." She has pronounced an agenda that goes beyond upholding the law to changing it. Such an agenda has no place on the federal bench.

By rejecting this nomination, I believe you will demonstrate your respect for all human life, including -- but not limited to -- the lives of women and girls in this country who deserve to be masters of their own fates.

Sincerely,

Linda Ann Wheeler Hilton

Linda Ann Wheeler Hilton

1127 Las Pulgas Pl
Pacific Palisades, CA 90272

Dear Senator Leahy,

I would like you to know that filling positions in the federal judiciary is a matter of great concern to me . The extremist right-wing judicial agenda will undermine all our best legislation if we allow the judicial positions to be filled with right-wing extremists .

I urge you to consider the ideology of nominees. Their ideology will shape their decisions, and their decisions will shape law and government for many years to come. Holding the line against all extremist nominees will be an example not partisanship but of courage and integrity .

Please do not support the nomination of Carolyn Kuhl. She is anti-choice and took a position at the Justice Department that led to the U.S. government arguing that Roe V. Wade was not valid precedent. She persuaded the Reagan administration to support the tax-exempt status of Bob Jones University, which discriminates racially against its students. These and other extremist positions should eliminate her from consideration. If she is effective and persuasive, that will only enhance her ability to spread her radical ideology.

In the past few years the right wing has blocked many judicial nominations. Filling these positions is important, but not important enough to pack the lifetime positions of the Judiciary with right wing extremists.

The extremists make a lot of noise, but we moderates are more numerous and we are committed to a government that works. The extremists are committed to disabling government. Please don't let them do it.

Sincerely,

Jane Hirsch

Jane Hirsch

HARRY E. HULL, JR.
ASSOCIATE JUSTICE

STATE OF CALIFORNIA
Court of Appeal
THIRD APPELLATE DISTRICT
STATE LIBRARY AND COURTS BLDG.
914 CAPITOL MALL
SACRAMENTO, CA 95814

(916) 654-0228
E-MAIL: harry_hull@jud.ca.gov

February 19, 2003

Hon. Orrin Hatch
Chairman
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, D.C. 20510

Re: *Honorable Carolyn B. Kuhl*

Dear Senator Hatch;

I have served on the Civil Subcommittee of California's Judicial Council Task Force on Jury Instructions since the committee's first meeting in late 1997. The Judicial Council of California charged the committee with writing original civil jury instructions for the state courts that are both accurate statements of the law and understandable to lay jurors. The committee has twenty members that include trial and appellate judges, senior practitioners and one lay member. Judge Kuhl was appointed to the committee in 2001 to replace a member who was no longer able to serve.

The committee has met and continues to meet for two days every other month to discuss, revise, and finalize proposed jury instructions. Our work encompasses essentially all areas of California civil law. The members of the committee are expected to review the proposed instructions prior to the meetings, to discuss the law relating to the instructions under consideration, and to offer suggestions for improving the manner in which the instructions are written. Importantly, the effectiveness of the committee, given its size and make up, depends on the diplomacy of its members and their personal skills in working within a large committee that is often engaged in frank and vigorous discussion of the law itself and the wording of the law to be set forth in the instructions.

Judge Kuhl is an important member of the committee. She is always prepared, she is intelligent and thoughtful on the law, and she listens carefully to others on the subjects we discuss. She makes her suggestions to the committee with tact and discretion and her contributions are substantial.

Having practiced in the Ninth Circuit Court of Appeals as an assistant United States Attorney and given the work that I do now, I believe I have a good understanding of the necessary qualities of a successful appellate court judge. Based on my knowledge of Judge Kuhl through our work on the committee, I am confident that she would be a studious, objective, and effective appellate judge and I recommend her confirmation to the Court of Appeals.

Very truly yours,

Harry E. Hull, Jr.

nicole
hunter

4478 mission stre t
san francisco 94112
415.333.4225

July 23, 2001

Senator Patrick Leahy
United States Senate
Russell Senate Building, Suite 433
Washington, DC 20510

I am writing to strongly urge you to oppose the nomination of Carolyn B. Kuhl to the Ninth Circuit Court of Appeals.

Carolyn Kuhl is out of line with the pro-choice majority in California. If she is appointed to the Ninth Circuit Court of Appeals, the reproductive freedom of Californian women will be in serious jeopardy. Kuhl has demonstrated a severe anti-choice stance, even supporting the reversal of *Roe v. Wade*. As a pro-choice voter, I am adamantly opposed to the nomination of Carolyn Kuhl and all anti-choice judicial nominees. I urge you to vote NO on Carolyn Kuhl and on all judicial nominees who support reversing or restricting our reproductive rights.

Sincerely,

Nicole Hunter

Nicole Hunter
4478 Mission Street
San Francisco, CA 94112

JAPANESE AMERICAN CITIZENS LEAGUE JACL
CHICAGO • FRESNO • LOS ANGELES • SAN FRANCISCO • SEATTLE WASHINGTON D.C.

National Headquarters
San Francisco, CA

Pacific Southwest District Office
244 So. San Pedro Street, Suite 406
Los Angeles, CA 90012-3832
(213) 626-4471
FAX (213) 626-4282

Senator Patrick Leahy
U.S. Senate, SR-433
Washington, DC 20510
June 14, 2001

Dear Senator Leahy,

The Pacific Southwest District of the JACL is comprised of over 6,000 members in 32 chapters throughout Southern California, Southern Nevada and Arizona. We have been active within the community since 1929. JACL was instrumental and successful in lobbying for the passage of the Civil Liberties Act of 1988, which granted surviving Japanese American internees $20,000 in redress payments and include a presidential apology for being wrongly interned during World War II.

As the nation's oldest and largest Asian Pacific American civil and human rights organization, the Pacific Southwest District of the JACL understands that Carolyn B. Kuhl is being considered by the Bush administration for appointment as a judge on the US Court of Appeals for the Ninth Circuit.

We are writing to let you know that we oppose her potential appointment. Carolyn B. Kuhl is not the type of judge who should be appointed to the federal Circuit Courts of Appeal. Her record shows that she is wedded to an extremist right wing philosophy that is far removed from the beliefs of ordinary Americans. We need open-minded judges, not anti-choice ideologues who condone racism and restrict our ability to protect our individual rights in the courts.

Thank you for your consideration.

Sincerely,

Beth A. Au
Regional Director
Pacific Southwest District
JACL

The Honorable Patrick Leahy
The United States Senate
Washington, DC 20510

July 18, 2001

Dear Chairman Leahy:

As a California resident, I have significant concerns about the nomination of Carolyn B. Kuhl for a seat on the United States Court of Appeals for the Ninth Circuit. Based upon her legal and judicial record, I do not believe Carolyn B. Kuhl is committed to the role of the federal courts in protecting civil rights, individual liberties and the environment, and in guaranteeing due process, equal protection of the laws, the right of privacy and access to justice. This belief of mine was developed after discovering that Ms. Kuhl has not protected nor has she supported the civil rights, privacy rights and reproductive rights of individuals.

One of her decisions on civil rights that disturbs me occurred when she served as a Justice Department official and undertook to have the tax exempt status of racially discriminatory schools (such as Bob Jones University) reinstated. Her position was defeated 8 to 1 before the United States Supreme Court. One of her disturbing privacy rights decisions was Sanchez-Scott v. Alza Pharmaceuticals, 103 Cal. Rptr. 2d 410, 412 (Ct. App., 2d Dist. 2001) when she dismissed a patient's claim alleging that her physician had allowed non-medical personnel to be present for a breast exam (in this case, a pharmaceutical representative) without the patient's express permission. This case dismissal was ultimately overruled by the appellate court.

One of her many decisions on reproductive rights that disturbs me occurred in her position as United States Deputy Assistant Attorney General, in her amicus brief for the United States in Thornburg v. American College of Obstetricians and Gynecologists which states, in part, that "the textual, doctrinal and historical basis for Roe v. Wade is so far flawed and . . . is a source of such instability in the law that the Court should reconsider that decision and on reconsideration abandon it." Her use of her legal position to not only try to strip away individual reproductive rights but also to advocate the loss of reproductive rights for all strikes a chilling blow.

Ms. Kuhl's voice on the Ninth Circuit Court will not protect civil rights, individual liberties and the environment, nor will it guarantee due process, equal protection of the laws, the rights of privacy nor access to justice. I urge you to carefully consider her record as you review the hearing schedule for the judicial nominees for the federal courts.

Sincerely,

Debra Judelson MD

Debra R Judelson MD
139 N. Carson Road
Beverly Hills, CA 90211-2110
310-278-3400
pol@ajdj.com

JUSTICE FOR ALL PROJECT

July 23, 2001

The Honorable Patrick Leahy
Senate Judiciary Committee
The United States Senate
Washington, DC 20510

Dear Chairman Leahy:

We are writing, as members of the Justice For All Project, to express our grave concerns over the nomination of Carolyn B. Kuhl for a seat on the United States Court of Appeals for the Ninth Circuit.

The Justice For All Project supports a fair and balanced judicial nominating process and opposes an extreme right-wing federal bench engaged in ultra-conservative judicial activism. The Justice For All Project supports the appointment of federal judges who are open-minded, who view the Constitution as a living document, and are committed to the role of the federal courts in protecting civil rights, individual liberties and the environment, and in guaranteeing due process, equal protection of the laws, the right of privacy and access to justice.

Given the information available on the legal and judicial record of Ms. Kuhl, we do not believe that she meets the above criteria. For example:

- Civil Rights: During the Reagan Administration, as a Justice Department official, Ms. Kuhl undertook an effort to have the tax exempt status of Bob Jones University and other racially discriminatory schools reinstated. Her position was ultimately defeated 8-1 before the U.S. Supreme Court.
- Reproductive Rights: As a U.S. Deputy Assistant Attorney General in 1986, Ms. Kuhl filed an amicus brief for the United States in *Thornburg v. American College of Obstetricians and Gynecologists* which states, in part, that "the textual, doctrinal and historical basis for *Roe v. Wade* is so far flawed and . . . is a source of such instability in the law that the Court should reconsider that decision and on reconsideration abandon it." This is just one of several examples of Kuhl's involvement in anti-choice litigation.
- Privacy Rights: As a California Superior Court Judge, in a decision ultimately overruled by the appellate court, Judge Kuhl dismissed a claim by a female patient suing because her doctor had allegedly allowed a drug company representative to be present while he performed a breast exam on the patient. *Sanchez-Scott v. Alza Pharmaceuticals,* 103 Cal. Rptr. 2d 410, 412 (Ct. App., 2d Dist. 2001)

We consider Ms. Kuhl's legal and judicial record to be highly problematic, and urge you to carefully consider her record as you contemplate the hearing schedule for the various judicial nominees for the federal courts.

Sincerely,

Justice For All Project

Members of the Justice for All Project include:

Americans United for Separation of Church and State - Southern California Chapter
Americans United for Separation of Church and State - San Fernando Valley Chapter
CARAL - California Abortion & Reproductive Rights Action League
Committee for Judicial Independence
Democrats.com
Feminist Majority
National Council of Jewish Women/California
National Council of Jewish Women/Los Angeles
National Women's Political Caucus - Los Angeles Metro
Oral Majority
Pacific Institute for Women's Health
Planned Parenthood Advocacy Project Los Angeles County
Planned Parenthood of Orange and San Bernardino Counties
Progressive Jewish Alliance
Project Islamic HOPE
Reproductive Rights Coalition of Los Angeles
Stonewall Democratic Club
The Women's Political Committee
The Workmen's Circle/ Arbiter Ring - Southern California District
Trust the People - California Democrats
Unitarian Universalist Project Freedom of Religion
Voters For Choice
Women's Reproductive Rights Assistance Project

Stephen L. Kanne and Claudia A. Kanne

2664 Cordelia Road
Los Angeles, CA 90049

Phone: (310) 476-8259
Fax: (310) 476-8259
caslk@aol.com

June 16, 2001

Senator Patrick Leahy
U.S. Senate
Washington, DC 20510

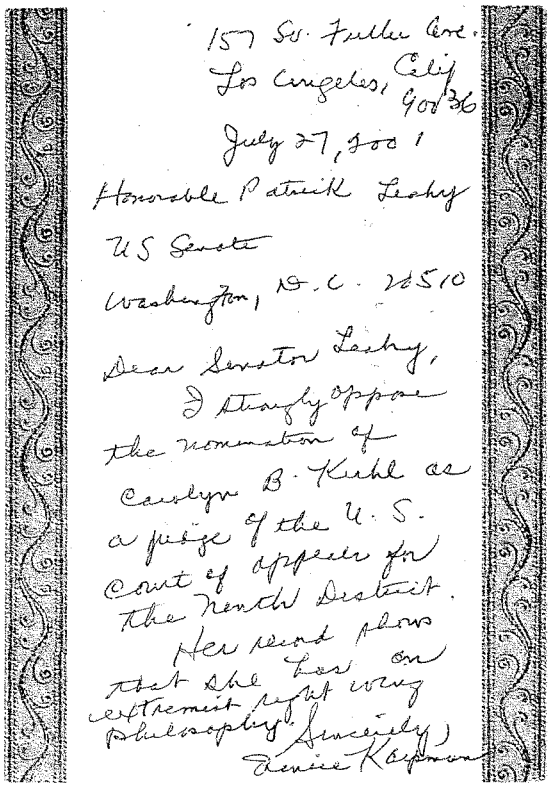
Dear Senator:

I understand that Carolyn B. Kuhl is being considered by the Bush administration for appointment as a judge on the US Court of Appeals for the Ninth Circuit.

I am writing to let you know that I strongly oppose her potential appointment. Carolyn B. Kuhl is not the type of judge who should be appointed to the federal Circuit Courts of Appeal. Her record shows that she has adopted an extremist right wing philosophy that is far removed from the beliefs of ordinary Americans. We need open-minded judges, not persons whose agenda appears to be that of restricting individual rights in the courts.

Very truly yours,

Stephen L. Kanne and Claudia A. Kanne



157 So. Fuller Ave.
Los Angeles, Calif
90036

July 27, 2001

Honorable Patrick Leahy
US Senate
Washington, D.C. 20510

Dear Senator Leahy,
I strongly oppose
the nomination of
Carolyn B. Kuhl as
a judge of the U.S.
Court of appeals for
the Ninth District.
Her record shows
that she has an
extremist right wing
philosophy. Sincerely,
Denise Kaufman

6-26-01

Dear Sen Leahy—

I am writing to express my strong opinion that the nomination of Judge Caroline Kuhl should be opposed.

While I have no doubt that she is intellectually qualified to be appointed to the 9th Circuit Court of Appeals, her record as a right-wing extremist shows her to be emotionally unfit for a position which calls for someone who is open-minded.

I urge you to vote AGAINST her nomination.

Sincerely, Eleanor Eastman

Colleen O. Kelly

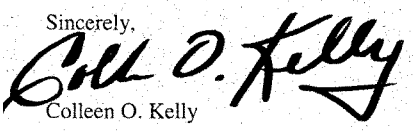
Senator Patrick Leahy
United States Senate
Russell Senate Building, Suite 433
Washington, DC 20510

Dear Senator Leahy:

I am writing to strongly urge you to oppose the nomination of Carolyn B. Kuhl to the Ninth Circuit Court of Appeals.

Carolyn Kuhl is out of line with the pro-choice majority in California. If she is appointed to the Ninth Circuit Court of Appeals, the reproductive freedom of Californian women will be in serious jeopardy. Kuhl has demonstrated a severe anti-choice stance, even supporting the reversal of *Roe v. Wade*. As a pro-choice voter and a member of CARAL, I am adamantly opposed to the nomination of Carolyn Kuhl and all anti-choice judicial nominees. I urge you to vote NO on Carolyn Kuhl and on all judicial nominees who support reversing or restricting our reproductive rights.

Sincerely,



Colleen O. Kelly

2556 Belmont Canyon Road
Belmont, CA 94002
(415) 593-6156
E-mail: colleen_kelly@hp.com

June 16 2001

VIA FACSIMILE

Dear Senator,

I understand that Carolyn B. Kuhl is being considered by the Bush administration for appointment as a judge on the US Court of Appeals for the Ninth Circuit. I am writing to let you know that I oppose her potential appointment. Carolyn B. Kuhl is not the type of judge who should be appointed to the federal Circuit Courts of Appeal. Her record shows that she is wedded to an extremist right wing philosophy that is far removed from the beliefs of ordinary Americans. We need open-minded judges, not anti-choice ideologues who condone racism and restrict our ability to protect our individual rights in the courts.

Sincerely,

Pamela Kightlinger
5050 Strohm Avenue
North Hollywood CA 91601
818/980-1687

STATE OF CALIFORNIA
Court of Appeal
SECOND APPELLATE DISTRICT
DIVISION THREE
300 SOUTH SPRING STREET
LOS ANGELES, CALIFORNIA 90013

JOAN DEMPSEY KLEIN
PRESIDING JUSTICE

COPY

April 12, 2001

Senator Dianne Feinstein
The United States Senate
331 Hart Senate Building
Washington, D.C. 20510-0504

Re: Hon. Carolyn B. Kuhl

Dear Senator Feinstein:

A new season of federal judicial appointments fast approaches and potential nominees are testing the water, hence, this letter.

As the attached Times article indicates, Judge Kuhl is one of those potentials, and she is an extraordinary candidate! If we could be assured that all President Bush's judicial picks would be of this high caliber, those of us with major concerns in this area could rest easy.

Presently serving on the Los Angeles Superior Court, Judge Kuhl was selected by her peers to be the Supervising Judge of the Court's Complex Litigation Pilot Program, attesting to their respect for her legal acumen and management skills.

The justices with whom Judge Kuhl recently served on assignment to the State Court of Appeal all report her comprehension, writing skills, production and collegiality were outstanding, all skills necessary for the Ninth Circuit.

Judge Kuhl has had additional extensive appellate experience in private practice as a partner at Munger, Tolles & Olson, and when she was a Deputy Assistant Attorney General with the United States Department of Justice. She also served as a law clerk to the Hon. Anthony M. Kennedy when he was on the Ninth Circuit.

She is a member of the prestigious American Law Institute, a huge honor and recognition by the intellectual elite of our profession.

As you might expect, Judge Kuhl academic background prepared her well for subsequent successes in the practice of law and service on the bench. She was Order of the Coif at Duke University School of Law, and Cum Laude, in chemistry yet, from Princeton.

Other significant attributes are: she is married (to a judge), the mother of two children, a warm and decent human being with a sense of humor and perspective, and helpful to her friends. She wrote letters of support on behalf of Judges Margaret Morrow and Richard Paez. You would like her.

I recommend her for your due consideration, unqualifiedly, should she be nominated.

Cordially,

Joan Dempsey Klein
Presiding Justice

JDK:mc

Enclosure

STATE OF CALIFORNIA
Court of Appeal
SECOND APPELLATE DISTRICT
DIVISION THREE
300 SOUTH SPRING STREET
LOS ANGELES, CALIFORNIA 90013

JOAN DEMPSEY KLEIN
PRESIDING JUSTICE

April 25, 2001

Senator Barbara Boxer
Hart Senate Office Building, Suite 112
Washington, D.C. 20510-0505

Re: Potential judicial nominee, Hon. Carolyn B. Kuhl

Dear Senator Boxer:

We are now all aware that the new administration is floating names for the federal judiciary. As the attached Times article indicates, Judge Kuhl is one of the potential candidates, hence, this letter.

As a member of Senator Feinstein's committee to assist her in review of judicial hopefuls during the Clinton presidency, it seems to me any *relevant* input on Bush nominees would be equally well received by you two California senators.

If we could be assured that all President Bush's judicial picks would be of Judge Kuhl's high caliber in all respects, those of us with major concerns in this area could feel more secure.

Presently serving on the Los Angeles Superior Court, Judge Kuhl was selected by her peers to be the Supervising Judge of the Court's Complex Litigation Pilot Program, attesting to their respect for her legal acumen and management skills.

The justices with whom Judge Kuhl recently served on assignment to the State Court of Appeal all report her comprehension, writing skills, production and collegiality were outstanding, all skills necessary for the Ninth Circuit.

Judge Kuhl has had additional extensive appellate experience in private practice as a partner at Munger, Tolles & Olson, and when she was a Deputy Assistant Attorney General with the United States Department of Justice. She also served as a law clerk to the Hon. Anthony M. Kennedy when he was on the Ninth Circuit.

She is a member of the prestigious American Law Institute, a huge honor and recognition by the intellectual elite of our profession.

As you might expect, Judge Kuhl's academic background prepared her well for subsequent successes in the practice of law and service on the bench. She was Order of the Coif at Duke University School of Law, and Cum Laude, in chemistry yet, from Princeton.

Other significant attributes are: she is married (to a judge), the mother of two children, a warm and decent human being with a sense of humor and perspective, and helpful to her friends. She wrote letters of support on behalf of Judges Margaret Morrow and Richard Paez. You would like her.

I recommend her for your due consideration, unqualifiedly, should she be nominated.

Cordially,

Joan Dempsey Klein
Presiding Justice

JDK:mc

Enclosure

The Honorable Patrick Leahy
The United States Senate
Washington, DC 20510

Dear Chairman Leahy:

We are writing, as members of The Justice For All Project, to express our grave concerns over the nomination of Carolyn B. Kuhl for a seat on the United States Court of Appeals for the Ninth Circuit.

The Justice For All Project supports a fair and balanced judicial nominating process and opposes an extreme right-wing federal bench engaged in ultra-conservative judicial activism. The Justice For All Project supports the appointment of federal judges who are open-minded, who view the Constitution as a living document, and are committed to the role of the federal courts in protecting civil rights, individual liberties and the environment, and in guaranteeing due process, equal protection of the laws, the right of privacy and access to justice.

Given the information available on the legal and judicial record of Ms. Kuhl, we do not believe that she meets the above criterion. For example:

* Civil Rights: During the Reagan Administration, as a Justice Department official, Ms. Kuhl undertook an effort to have the tax exempt status of Bob Jones University and other racially discriminatory schools reinstated. Her position was ultimately defeated 8-1 before the U.S. Supreme Court.

* Reproductive Rights: As a U.S. Deputy Assistant Attorney General in 1986, Ms. Kuhl filed an amicus brief for the United States in Thornburg v. American College of Obstetricians and Gynecologists which states, in part, that "the textual, doctrinal and historical basis for Roe v. Wade is so far flawed and . . . is a source of such instability in the law that the Court should reconsider that decision and on reconsideration abandon it." This is just one of several examples of Kuhl's involvement in anti-choice litigation.

* Privacy Rights: As a California Superior Court Judge, in a decision ultimately overruled by the appellate court, Judge Kuhl dismissed a claim by a female patient suing because the doctor had allegedly allowed a drug company representative to be present while he performed a breast exam on the patient. Sanchez-Scott v. Alza Pharmaceuticals, 103 Cal. Rptr. 2d 410, 412 (Ct. App., 2d Dist. 2001)

We consider Ms. Kuhl's legal and judicial record to be highly problematic, and urge you to carefully consider her record as you contemplate the hearing schedule for the various judicial nominees for the federal courts.

Sincerely,

Richard Kolber

STATE OF CALIFORNIA
Court of Appeal
THIRD APPELLATE DISTRICT
STATE LIBRARY AND COURTS BUILDING
914 CAPITOL MALL
SACRAMENTO 95814
(PERSONAL)

DANIEL M. KOLKEY
ASSOCIATE JUSTICE

(916) 653-1199

February 19, 2003

The Honorable Orrin Hatch
Chairman
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, D.C. 20510

Re: Nomination of Judge Carolyn Kuhl

Dear Senator Hatch:

I write in support of the nomination of Judge Carolyn Kuhl to the Ninth Circuit Court of Appeals.

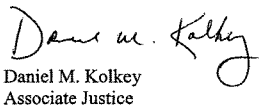
I have known Judge Kuhl for over 15 years. Throughout this period, I have been impressed with her brilliant intellect, her conscientious approach to her work, her principled approach to the law, and her excellent writing skills. In short, she is exceptionally well qualified to serve on the Ninth Circuit.

While I am aware that she has been criticized for certain positions that she took nearly twenty years ago while serving in the U.S. Department of Justice, I am confident that Judge Kuhl has the integrity and commitment to the rule of law to put aside any personal or political views that she may have when deciding cases. She is mindful of the limited role of the judiciary in our system of government; she would carefully adhere to Supreme Court precedent; and she would be faithful to the intent of the written instrument in issue (whether contract, statute, or Constitution). Indeed, I have heard that both the plaintiff and defense bar highly regard her for her fairness and open-mindedness.

In short, she subscribes to Chief Justice John Marshall's precept that "[j]udicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the legislature; or in other words, to the will of the law."

If confirmed by the Senate, she will serve with great distinction.

Very truly yours,



Daniel M. Kolkey
Associate Justice

cc: Hon. Patrick Leahy
Hon. Dianne Feinstein
Hon. Barbara Boxer

Ilene Kouzel
2506 Singing Vista Way, El Cajon, CA 92019 619.579.5157

June 18, 2001

Senator Patrick Leahy
U.S. Senate
Washington, DC 20510
fax: 202/224-3479

Dear Senator Leahy,

It is my understanding that Carolyn B. Kuhl is being considered by the Bush administration for appointment as a judge on the US Court of Appeals for the Ninth Circuit. I am writing to let you know that I oppose her potential appointment. Carolyn B. Kuhl is not the type of judge, in my opinion, who should be appointed to the Federal Circuit Courts of Appeal. Her record demonstrates an extreme right wing philosophy that is far removed from the beliefs of average, ordinary Americans.

We need open-minded, fair judges, not opinionated, politically driven judges who are anti-choice, condone racism and restrict our ability to protect our individual rights in the courts.

Sincerely,

Ilene Kouzel

Ilene Kouzel

14 Hawkside Court
Markleeville, CA 96120
Ph. 530-694-2990 * FAX 530-694-2460
Email irykrauss@gbis.com

July 19, 2001

The Honorable Patrick Leahy
The United States Senate
Washington, DC 20510

Re: Oppose Appointment of Judge Carolyn Kuhl

Dear Senator Leahy:

As Chair of the Senate Judiciary Committee you will be reviewing the appointment of Judge Carolyn Kuhl to the United States Court of Appeals for the Ninth Circuit. It is clear from Ms. Kuhl's record that she is not committed to the protection of civil rights, individual liberties, and equal protection of the laws.

As a Justice Department official in the Reagan Administration she sought to reinstate the tax-exempt status of Bob Jones University and other racially discriminatory schools. She has been involved in anti-choice litigation and is apparently disdainful of privacy rights (Sanchez-Scott v. Alza Pharmaceuticals).

I feel that her ultra-conservative judicial activism makes her unfit for appointment to the United States Court of Appeals.

Sincerely,

Irving Krauss
Secretary, Alpine County
Democratic Central Committee

CAPITOL OFFICE
STATE CAPITOL, ROOM 4032
SACRAMENTO, CA 95814
TEL (916) 445-1353
FAX (916) 324-4823

DISTRICT OFFICE
10951 WEST PICO BLVD., SUITE 202
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California State Senate

SENATOR
SHEILA JAMES KUEHL
TWENTY-THIRD SENATORIAL DISTRICT
CHAIR
NATURAL RESOURCES AND WILDLIFE COMMITTEE

COMMITTEES:
AGRICULTURE AND WATER RESOURCES
BUDGET AND FISCAL REVIEW
ENVIRONMENTAL QUALITY
HEALTH AND HUMAN SERVICES
JUDICIARY
LABOR AND INDUSTRIAL RELATIONS

June 20, 2001

Senator Patrick Leahy
US Senate
Washington DC 20510

Dear Senator Patrick Leahy:

I understand that Carolyn B. Kuhl is begin considered by the Bush administration for an appointment as judge on the US Court of Appeals for the Ninth Circuit. I am writing to let you know that I strongly oppose this appointment. I am certain that you have received a number of letters from our mutual constituents detailing the many reasons she is unsuitable. Her record reveals a person wedded to an extremist right wing philosophy, far removed from the beliefs of ordinary Americans.

In the past, Judge Kuhl has supported tax exempt status for Bob Jones University, a university that racially discriminates against students; worked to reverse *Roe v. Wade*; and supported school vouchers. We need open-minded judges, not anti-choice ideologues who condone racism and restrict our ability to protect our individual rights in the courts. Please oppose her appointment.

Sincerely,

Sheila James Kuehl
Senator
23rd District

July 21, 2001

Senator Patrick Leahy
U.S. Senate
Washington, DC 20510

TO the Honorable Senator Leahy:

As the leader of the Judiciary Committee, I urge you to stand firm and refuse to confirm any judicial nominee who is not independent and open minded and reject all nominees who are not committed to ~~a~~ ~~[redacted]~~ choice and pro-environmental ideology.

In that same vein, I oppose the nomination of Carolyn B. Kuhl to the 9th circuit because she is the antithesis of progressive or moderate views. I am a resident of Los Angeles and am familiar with her extremist philosophy and I maintain that Ms. Kuhl is out of sync with what we expect from Judges on a federal appeals court.

Thank you for your diligent work in the Senate.

Ardi D. Luesig

SENATOR LANDRIEU'S STATEMENT ON BEHALF OF PATRICIA H. MINALDI TO BE DISTRICT COURT JUDGE FOR THE WESTERN DISTRICT OF LOUISIANA

Mr. Chairman. I have had the pleasure of coming before this Committee on behalf of some highly capable nominees to the Federal bench from my home state of Louisiana. Each of these nominees has had excellent credentials and stellar legal careers. Most importantly, all of them have had strong ties to their communities and an even deeper understanding of the people in those communities. These strong community ties will inform the deliberations of these nominees as they move on to positions on the federal bench.

Today, I am pleased to add my support to the nomination of Patricia H. Minaldi of Lake Charles, Louisiana to serve as District Court Judge for the Western District of Louisiana. Patricia Minaldi – known to her friends as Patty – comes before the Committee with an exceptional legal background as a criminal prosecutor and state judge.

She began her career working as an Assistant District Attorney for Orleans Parish for three years, followed by 11 years as an Assistant DA in Calcasieu Parish. Patty was an extraordinary prosecuting attorney, handling the toughest cases, rape and child abuse cases in Orleans Parish and capital murder cases in Calcasieu Parish. She was in court every working day and in that time Patty earned a reputation that I believe every prosecutor would like to have: she is tough but fair – and I think her fellow prosecutors, defense counsel, and the judges she appeared before would all agree with that assessment.

Patty did not go into criminal prosecution out of a desire to put bad guys behind bars. She saw criminal prosecution as an opportunity to make life better for the people of Orleans Parish and Calcasieu Parish. At times, too much of the focus in criminal cases is on the accused. Patty worked to help victims of crime, especially criminally abused children. As a prosecutor in Calcasieu, Patty worked to establish a Child Advocacy Center as part of the Family and Youth Counseling Agency to help children who have been victimized by crime. Patty recognized that the legal system can be a traumatic experience to a child victim of crime. The Child Advocacy Center provides these criminally abused children with counseling. They videotape interviews with the child that can be used to bring indictments at trial. All of this is done in a child-friendly environment, rather than at a police station.

Here, as in so many other areas of her life, Patty's ties to the community inspired her work for the Child Advocacy Center. She was on the board of the Family and Youth Counseling Agency and saw how Calcasieu Parish needed these services for young victims of crime. She even got the District Attorney's office to pay for the Child Advocacy Center. The Calcasieu Parish Center was only the second of its kind in the state. Today we have centers like this throughout Louisiana.

Mr. Chairman, Patricia Minaldi has a vision of what the law can do to help those who have suffered the most in our society. Today she uses that vision in her role as a state judge for the 14th Judicial Court in Lake Charles. She was the first woman to hold this office and she has been nothing except tough and fair in her seven years on the state bench. She knows the issues,

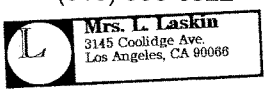
the people, and the legal community of the Western District of Louisiana. This knowledge will make her an excellent Federal District Court judge.

She did not get to this position alone. Throughout her career, Patty has had the loving support of her husband Thad and their two boys, John Anthony and Michael Patrick. I know that they are proud of her today and she has the strong support of many people in Louisiana.

Mr. Chairman, I give my full support to Patricia Minaldi's nomination to the Western District of Louisiana. I urge my colleagues to support her nomination.

I thank the Chair.

Herbert & Lillian Laskin
3145 Coolidge Ave
Tel Fax (310) 398-7732
(310) 398-6522



July 24, 2001

The Honorable Patrick Leahy
The United States Senate
Washington, DC 20510

Dear Senator Leahy,

I am writing to express concern over the nomination of Carolyn B. Kuhl for a seat on the United States Court of Appeals for the Ninth Circuit.

I believe in a fair and balanced judicial nominating process and oppose a right-wing federal bench engaged in ultra-conservative judicial activism. I support the appointment of federal judges who are open-minded, who view the Constitution as a living document, and are committed to the role of the federal courts in protecting civil rights, individual liberties and the environment, and in guaranteeing due process, equal protection of the laws, the right of privacy and access to justice.

Given the information available on the legal and judicial record of Ms. Kuhl, I do not believe that she meets the above criterion. For example:

* Civil Rights: During the Reagan Administration, as a Justice Department official, Ms. Kuhl undertook an effort to have the tax

exempt status of Bob Jones University and other racially discriminatory schools reinstated. Her position was ultimately defeated 8-1 before the U.S. Supreme Court.

* Reproductive Rights: As a U.S. Deputy Assistant Attorney General in 1986, Ms. Kuhl filed an amicus brief for the United States in Thornburg v. American College of Obstetricians and Gynecologists which states, in part, that "the textual, doctrinal and historical basis for Roe v. Wade is so far flawed and . . . is a source of such instability in the law that the Court should reconsider that decision and on reconsideration abandon it." This is just one of several examples of Kuhl's involvement in anti-choice litigation.

* Privacy Rights: As a California Superior Court Judge, in a decision ultimately overruled by the appellate court, Judge Kuhl dismissed a claim by a female patient suing because the doctor had allegedly allowed a drug company representative to be present while he performed a breast exam on the patient. Sanchez-Scott v. Alza Pharmaceuticals, 103 Cal. Rptr. 2d 410, 412 (Ct. App., 2d Dist. 2001)

I consider Ms. Kuhl's legal and judicial record to be highly problematic, and urge you to carefully consider her record as you contemplate the hearing schedule for the various judicial nominees for the federal courts.

Sincerely,

Lillian Laskin

Lillian Laskin

Senator Patrick Leahy,

I strongly oppose the nomination of Carolyn B. Kuhl as judge on the US Court of Appeals for the Ninth Circuit.

Sincerely,
Barbara Laval

Dear Senator Leahy,

I oppose the nomination of Carolyn B. Kuhl as a judge on the US Court of Appeals for the Ninth Circuit. Her record shows that she is wedded in the extremist right wing philosophy and I believe we need open-minded judges.

Sincerely
Nina T. Laval

LCCR

Leadership Conference on Civil

1629 K Street, NW
10th Floor
Washington, D.C. 20006

Phone: 202-466-3311
Fax: 202-466-3435
www.civilrights.org

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COMPLIANCE/ENFORCEMENT COMMITTEE
Karen Narasaki, *Chairperson*
National Asian Pacific American Legal Consortium

STAFF
EXECUTIVE DIRECTOR
Wade Henderson

(*Deceased)

March 31, 2003

The Honorable Orrin G. Hatch
Chair
Senate Judiciary Committee
104 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator Hatch:

On behalf of the Leadership Conference on Civil Rights (LCCR), the nation's oldest, largest, and most diverse civil and human rights coalition, we write to express our opposition to the confirmation of Carolyn Kuhl to the United States Court of Appeals for the Ninth Circuit. Our review of Judge Kuhl's record indicates that her positions, opinions, and legal activities in the areas of civil rights and equal opportunity, and the rights of women, workers, and consumers, are troublesome and raise serious questions about her commitment to equal justice and civil rights for all Americans.

First, we are very concerned about Judge Kuhl's record on civil rights and equal opportunity, particularly on the issue of whether the federal government should subsidize institutions that practice racial discrimination. Judge Kuhl was one of three Reagan Justice Department officials who persuaded the attorney general to reverse prior policy and support the granting of tax-exempt status to Bob Jones University, despite its racially discriminatory policies, in its brief in *Bob Jones University v. United States*, 461 U.S. 574 (1983). More than 200 Justice Department lawyers, the solicitor general, and the Treasury Department general counsel objected to the change of position that Kuhl advocated. According to the *New York Times* (May 1983), Kuhl was one of three characterized as a "band of young zealots" who urged the change in policy. By an 8-1 vote, the Supreme Court rejected Kuhl's position and upheld the IRS denial of tax exempt status to Bob Jones University.

In addition, we are troubled by Judge Kuhl's work urging the Supreme Court to overrule its precedent on "associational standing." In *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. Brock*, 477 U.S. 274 (1986), Kuhl not only argued that the requirement for associational standing had not been met in the particular case, but went on to urge the Supreme Court to overturn the doctrine of associational standing altogether, except in the most extraordinary circumstances. This view, if adopted, would have had a catastrophic effect on the ability of civil rights and other groups to file lawsuits on behalf of their members in order to vindicate their legal rights.

While at the Justice Department, Kuhl was also involved in a troubling effort to limit the reach of sexual harassment doctrine. As deputy solicitor general, she co-authored an *amicus curiae* brief in the landmark sexual harassment case of *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), asserting a position on sexual harassment

which, had it been adopted, would have made it more difficult for women to prove sexual harassment in the workplace. In a unanimous opinion authored by then-Justice William Rehnquist, the Court rejected as incorrect the focus in Kuhl's brief on the "voluntariness" of the alleged sexual conduct, instead making clear that the test is whether the sexual conduct was "unwelcome." Kuhl was also part of the Reagan Administration's effort to restrict the remedies that courts can order in the case of employment-related discrimination in violation of Title VII. In *Local 28 of the Sheet Metal Workers' International Ass'n v. EEOC*, 478 U.S. 421 (1986), Kuhl co-authored a brief on behalf of the EEOC advocating the extreme theory that relief in Title VII cases can be granted only to identifiable victims of discrimination. This theory, rejected by the Supreme Court, would have significantly limited the ability of the courts to provide effective remedies for past and persistent discrimination.

Kuhl's record also reveals a troubling tendency to favor corporate interests, at the expense of workers and consumers. As a lawyer in private practice, Kuhl argued on behalf of two major defense contractors that the *qui tam* provision of the False Claims Act, which allows private individuals to sue corporations that committed fraud against federal government programs, was unconstitutional. *See United States ex rel. Rohan v. Litton Industries, Inc.*, No. 92-55546 (9th Cir.). As a judge, she dismissed a case brought under a California law enacted to prevent suits against whistleblowers and others acting in the public interest. The California appellate court reversed Kuhl's decision in unusually strong terms, calling it "a nullification of an important part of California's anti-[abusive lawsuit] legislation." *Liu v. Moore*, 69 Cal. App. 4th 745, 748 (1999). Kuhl also dismissed a claim brought by a breast cancer patient whose privacy was invaded when a drug salesman who misrepresented his identity participated in her doctor's examination of her breasts. On appeal, the Court of Appeals unanimously found in favor of the plaintiff, reversing Kuhl's decision. *See Sanchez-Scott v. Alza Pharmaceuticals*, 86 Cal. App. 4th 365 (2001).

In sum, Judge Carolyn Kuhl's views on important civil rights issues, particularly with regard to equal opportunity and the rights of workers and consumers, are outside the mainstream. Her work as a Justice Department official, in private practice, and as a California judge reflects a lack of commitment to core constitutional values and to upholding equal rights for all Americans. Therefore, we urge the Judiciary Committee to reject the confirmation of Carolyn Kuhl to the Ninth Circuit Court of Appeals. If you have any questions or need further information, please contact Nancy Zirkin, LCCR Deputy Director/Director of Public Policy at (202) 263-2880, or Julie Fernandes, LCCR Senior Policy Analyst, at (202) 263-2856.

Sincerely,

Wade Henderson

Dr. Dorothy I. Height

cc: Members of the Senate Judiciary Committee

U S SENATOR PATRICK LEAHY

CONTACT: David Carle, 202-224-3693 VERMONT

Opening Statement of Senator Patrick Leahy
Judiciary Committee
Judicial Nominations Hearing
April 1, 2003

Today we meet to consider the nomination of California Judge Carolyn Kuhl to the United States Court of Appeals for the Ninth Circuit, Florida Judge Cecilia Altonaga to the United States District Court for the Southern District of Florida, and Louisiana Judge Patricia Minaldi to the United States District Court for the Eastern District of Louisiana. The District Court nominees have the support of their home-state Senators, although, as I will discuss in a moment, Senators Graham and Nelson have had a most difficult time getting the White House to agree to continue the tradition of the Florida bipartisan selection commission, and have only recently come to a meeting of the minds with the White House.

The Circuit Court nominee before us today, Judge Carolyn Kuhl, however, is not supported by both of her home-state Senators. Her appearance before this Committee, despite that clearly stated opposition, is the latest in a string of transparently partisan actions taken by the Senate's new majority since the beginning of this Congress. In each of these actions – each of them unprecedented -- Republicans have done something they never did while in the majority from 1995 to 2001. Each provocative step, taken in tandem with the White House, has broken new ground in politicizing the federal judiciary. The Republican majority has shown a corrosive and raw-edged willingness to change, bend and even break the rules that they themselves followed before when the judicial nominees involved were a Democratic president's choices, instead of a Republican president's choices. Lest some observers wrongly conclude that this sudden and orchestrated series of rules changes is just 'politics as usual,' it most certainly is not.

First, in January, one hearing was held for three controversial Circuit Court nominees, scheduled to take place in the course of a very busy day in the Senate. There was no precedent for this in the years that Republicans served in the majority and a Democrat was in the White House. In six years during the Clinton Administration, never once were three Circuit Court nominees, let alone three very controversial ones, before this body in a single hearing. But in this session, it is the very first hearing that was scheduled. Why the change in practice? The only conceivable difference is that now there is a Republican in the White House.

When there was a Democratic president in the White House, circuit nominees were delayed and deferred, and vacancies on the Courts of Appeals more than doubled under Republican leadership, from 16 in January 1995, to 33 when the Democratic majority took over partway through 2001.

senator_leahy@leahy.senate.gov
http://leahy.senate.gov/

Under Democratic leadership we held hearings on 20 Circuit Court nominees in 17 months. Indeed, while Republicans averaged 7 confirmations to the Circuit Courts every 12 months, the Senate under Democratic leadership confirmed 17 in its 17 months in the majority – and we did so with a White House that was uncooperative in a magnitude of historic proportions.

This year with a Republican in the White House, the Republican majority has gone from idling -- the restrained pace it had said was required for Clinton nominees -- to overdrive for the most controversial of President Bush's nominees.

But that dramatic change in pace is not the only politicized action taken by the Senate's new majority this year. Next, the Republican majority supported and facilitated the re-nomination of Priscilla Owen to a seat on the U.S. Court of Appeals for the Fifth Circuit, for which she already had been rejected by this Committee. Then they brought her back for a hearing during which no new facts of any significance were introduced, but during which many leading questions were asked and accusations of unfairness made. This is a nomination that never should have been re-sent to the Senate, and which, if it succeeds, will only be because of a display of raw politics.

Now the Republican majority has scheduled this hearing for a nominee who does not have blue slips returned from both of her home-state Senators – that is, a nominee for whom only one of her home-state Senators has indicated she agrees that a hearing should be held. Now, we will surely hear today, in defense of this hearing, a long recitation of the history of the blue slip. We will hear how it was used unfairly during the unfortunate past of the Committee, to keep the federal bench from being integrated. We will hear how other Chairmen, Senators Kennedy and Biden, modified their policies to allow for more fairness in the consideration of a more diverse federal bench. And, we will hear how the Chairman's real objection during the Clinton Administration was the so-called "lack of consultation" with Republican Senators, and how fairly and successfully President Bush's White House has consulted with obstreperous Democrats. The Chairman will tell us that he considers himself the heir to Democratic traditions, that he has always followed those policies and is only now acting consistent with his own past practice.

What I doubt we will hear from the other side of the aisle is the plain and simple truth of the two distinct practices the majority has followed. While it is true that various Chairmen of the Judiciary Committee have used the blue-slip in different ways, some to maintain unfairness, and others to attempt to remedy it, it is also true that each of those Chairmen was consistent in his application of his own policy -- that is, until now. Today is the first time that this Chairman will ever have convened a hearing for a judicial nominee who did not have two positive blue slips returned to the Committee. The first time, ever. Despite protestations that this has been the Chairman's consistent policy over time, the facts show exactly the opposite.

Without going through a dissertation-length statement on each blue slip and the policies they articulated, let me just show you examples of two different ones. These pieces of blue paper are what the Chairman uses to solicit the opinion of home-state Senators about the President's nominees. When President Clinton was in office, this was the blue slip sent to Senators, asking their consent. On the face of the form is written the following:

> Please return this form as soon as possible to the nominations office. No further proceedings on this nominee will be scheduled until both blue slips have been returned by the nominee's home state senators.

When President Bush began his term, and Senator Hatch took over the Chairmanship at the start of the 107th Congress in late January, 2001, the blue slip sent out to Senators changed, and today says simply:

> Please complete the attached blue slip form and return it as soon as possible to the Committee office.

The blue slip practice is an enforcement mechanism for consultation by the White House with Senators about nominees to their home states. This new blue slip contains no requirement that the President may have to engage in sufficiently meaningful consultation with home-state Senators in order to gain their consent, no rule that one Senator's agreement is enough to move a nominee, no distinction between District and Circuit Court nominees. All it contains is a simple, unsubtle, 180-degree turn in the direction of the policy, now that the person nominating the judges is a Republican.

I know my colleagues on the other side do not want to be reminded of what happened to so many of President Clinton's nominees, but I cannot entirely leave that part of this story out. The blue slip policy that was in effect and that was strictly enforced by the Chairman during the Clinton Administration operated as an absolute bar to the consideration of any nominee to any court unless both home-state Senators had returned positive blue slips. No time limit was set, no reason had to be articulated. Remember, before the Senate's change to Democratic majority in July of 2001, all of these decisions were being made in secret. Blue slips were not public, and they were allowed to function as an anonymous hold on otherwise qualified nominees.

A few examples of the operation of the blue slip and how it was scrupulously honored by the Committee during the Clinton Presidency are worth remembering. Remember, in the 106th Congress alone, more than half of President Clinton's Circuit Court nominees in the 106th Congress were defeated through the operation of the blue slip or other such partisan obstruction. Perhaps the most vivid is the story of the United States Court of Appeals for the Fourth Circuit, where Senator Helms was permitted by this Committee to resist President Clinton's nominees for six years. James Beaty was first nominated to the Fourth Circuit from North Carolina by President Clinton in 1995, but no further action was taken on his nomination in 1995, 1996, 1997, or 1998. Another Fourth Circuit nominee from North Carolina, Rich Leonard, was nominated in 1995, but no further action was taken on his nomination either in 1995 or 1996. James Wynn, again a North Carolina nominee to the Fourth Circuit, sent to the Senate by President Clinton in 1999, sat without action in 1999, 2000, and early 2001, until President Bush withdrew his nomination.

Why? Because one senator from the nominees' home state objected to their moving forward. Was this right or wrong? That is a question for another day and another history lesson. But it was done by a Republican Senate to the nominee of a Democratic President, and done by the

same Chairman who today sees fit to ignore the protests, for very real and substantive reasons, of a Democratic Senator to the nominee of a Republican President.

As for the red herring of consultation, again the facts speak for themselves. No doubt we will hear today that during the Clinton Administration blue slip objections had to be honored because of what will now be called, in a bit of revisionism fit for study by Sovietologists, insufficient consultation with home-state Senators. But those of us who were here then know differently. We know that the Clinton White House bent over backwards to work with Republican Senators and seek their advice on appointments to both Circuit and District Court vacancies. There were many times when the White House made nominations at the direct suggestion of Republican Senators, and there are judges sitting today on the Ninth Circuit and the Fourth Circuit, in the District Courts in Arizona, Utah, Mississippi, and many other places only because the voices of Senators in the opposite party were heeded.

In contrast, since the beginning of its time in the White House, this Bush Administration has sought to overturn traditions of bipartisan nominating commissions and to run roughshod over the advice of Democratic Senators. They changed the systems in Wisconsin, Washington, and Florida that had worked so well for so many years. They ignored the protests of Senators like Barbara Boxer and John Edwards who not only objected to the nominee proposed by the White House, but who, in attempts to reach a true compromise, also suggested their own Republican alternatives. But those overtures were flatly rejected, and today what we see is just another facet of that unfortunate policy.

Ignoring bipartisan judicial nominating commissions is just another step in the march to entirely politicizing the federal judiciary, and that is exactly what the Bush White House did to the State of Florida. Last year Senators Graham and Nelson were compelled to write in protest to the White House Counsel's flaunting of the time-honored procedures for choosing qualified candidates for the bench. A process that had worked to fill 29 District Court vacancies over ten years was bypassed by this President. I am pleased that the White House has finally agreed to the Florida Senators' proposals so that we can get on with processing the nomination of Cecilia Altonaga. I hope the White House will move to cooperate with other Democratic Senators and increase the almost non-existent level of consultation. We look forward to hearing from Judge Altonaga and Judge Minaldi today, and we welcome and congratulate them and their families.

And, although I object to this hearing being held, I will participate in the questioning of Judge Kuhl, whose nomination rightly raises concerns. Her past advocacy for aiding educational institutions which discriminate on the basis of race, as well as her work on cases involving fundamental constitutional rights, including the right to privacy, give me great concern about her willingness to follow the law, and about the extremism that is evident in her record. I look forward to hearing her answers today.

# # # # #

March 12, 2003

ORRIN G. HATCH
CHAIRMAN, SENATE JUDICIARY COMMITTEE
104 HART SENATE OFFICE BUILDING
WASHINGTON, DC 20510

PATRICK LEAHY
RANKING MINORITY MEMBER, SENATE JUDICIARY COMMITTEE
433 RUSSELL SENATE OFFICE BUILDING
WASHINGTON, DC 20510

THE HON. BARBARA BOXER
112 HART SENATE OFFICE BUILDING
WASHINGTON, DC 20510

THE HON. DIANNE FEINSTEIN
331 HART SENATE OFFICE BUILDING
WASHINGTON, DC 20510

Dear Senators:

We are legal academics teaching in law schools across the United States. We enthusiastically support the nomination of Carolyn B. Kuhl to the United States Court of Appeals for the Ninth Circuit.

Judge Kuhl is a well-respected judge with a distinguished record as a lawyer and public official. She has worked in the United States Department of Justice and currently serves as Supervising Judge of the Civil Division of the Los Angeles Superior Court. The ABA has ranked her "well qualified" (the highest ranking possible) and she has received enthusiastic endorsements from judges and practitioners of all political stripes. Judge Kuhl's colleagues on the Superior Court describe her as a "professional who administers justice without favor, without bias, and with an even hand" and that her appointment to the Ninth Circuit "will bring credit to all of us and to the Senate."

Judge Kuhl's legal experience in both the private and public sectors uniquely qualify her for service on the federal bench. As legal academics we are deeply troubled by efforts to disqualify nominees on the basis of positions they advanced when representing a client. To use zealous representation as an impediment to public office seriously conflicts with the ethical obligations of an attorney. The criticism in Judge Kuhl's case is especially unwarranted. The positions she advocated on behalf of her clients have either been adopted by the Supreme Court, or have been acknowledged as legitimate positions by leading liberal academics. For example, opposition to the IRS's denial of tax exempt status to Bob Jones University was shared by the late Yale Law Professor Robert Cover. Harvard University law professor Laurence Tribe described the government's brief in the Bob Jones case as "well considered and principled." Similarly, the briefs co-authored by Judge Kuhl in cases like Thornburgh v. American College of Obstetricians contained arguments voiced by many well respected mainstream legal scholars.

It should not be the case that work for a particular client or administration disqualifies someone from appointment to the federal bench. Judge Kuhl's work reflects a commitment to the highest standards of our profession and the positions she advanced are well within the mainstream of legal thought. Most of all, serving clients well, be they private parties or the United States government, should never be an impediment to public office.

We urge the Senate to promptly consider and confirm Judge Kuhl's nomination to the Ninth Circuit Court of Appeals.

Sincerely,

John S. Baker, Jr.
Dale E. Bennett Professor of Law
LSU Paul M. Herbert Law Center

Sara Sun Beale
Charles L.B. Lowndes Professor
Duke University School of Law

Lillian R. BeVier
John S. Shannon Distinguished Professor
University of Virginia School of Law

Kingsley R. Browne
Wayne State University Law School
471 W. Palmer Avenue
Detroit, MI 48202

Steven G. Calebresi
Professor of Law
Northwestern University School of Law

George C. Christie
James B. Duke Professor of Law
Duke University School of Law

Teresa S. Collett
Professor of Law
South Texas College of Law

George W. Dent, Jr.
Schott-van den Eynden Professor of Law
Case Western Reserve University Law School

John C. Eastman
Professor of Law
Chapman University School of Law

Charles Fried
Beneficial Professor
Harvard University Law School

Nicole Stelle Garnett
Notre Dame Law School
P.O. Box R
Notre Dame, IN 46556

Richard W. Garnett
Associate Professor of Law
Notre Dame Law School

Lino A. Graglia
A. Dalton Cross Professor in Law
University of Texas School of Law

Marci A. Hamilton
Paul R. Verkuil Chair in Public Law
Benjamin N. Cardozo School of Law, Yeshiva University

Douglas W. Kmiec
Dean & St. Thomas More Professor
The Catholic University of America School of Law

Michael I. Krauss
Professor of Law
George Mason University School of Law

Kurt T. Lash
Professor and W. Joseph Ford Fellow
Loyola Law School, Los Angeles

Gary S. Lawson
Professor & Abraham & Lillian Benton Scholar
Boston University School of Law

John O. McGinnis
Professor of Law
Northwestern University School of Law

Phillip L. McIntosh
Associate Dean & Professor of Law
Mississippi College School of Law

Thomas W. Merrill,
John Paul Stevens Professor of Law,
Northwestern University

Geoffrey P. Miller
Max E. Greenberg Professor of Law
New York University School of Law

Grant S. Nelson
Professor of Law
University of California, Los Angeles School of Law

Philip D. Oliver
Ben J. Altheimer Distinguished Professor of Law
University of Arkansas at Little Rock
William H. Bowen School of Law

Stephen B. Presser
Raoul Berger Professor of Legal History
Northwestern University School of Law
357 E. Chicago Ave.
Chicago, IL. 60611

Paul E. Salamanca
James & Mary Lassiter Associate Professor of Law
University of Kentucky College of Law

Patrick J. Schiltz
Associate Dean and St. Thomas More Chair in Law
University of St. Thomas School of Law

Gregory C. Sisk
Richard M. & Anita Calkins Distinguished Professor
Drake University Law School

Stephen F. Smith
Associate Professor of Law
University of Virginia School of Law

Robert F. Turner
Professor and Associate Director
Center for National Security Law
University of Virginia School of Law

Eugene Volokh
Professor of Law
University of California, Los Angeles School of Law

6/28/01

TO:
SENATOR BARBARA BOXER
FAX 202/228-1338

TO:
SENATOR DIANE FEINSTEIN
FAX 202/228-3954

SENATOR PATRICK LEAHY
FAX 202/224-3479

Dear Senator:

Please use your best efforts to BLOCK THE APPOINTMENT OF CAROLYN B. KUHL as a judge on the U.S. Court of Appeals for the Ninth Circuit.

She is anti-choice and is an ultra right-wing conservative.

Thank you,
Stella Levich

Stella Levich
11911 Lindblade St
Culver City, CA 90230-5836

204 North Glenroy Place
Los Angeles, California 90049
Phone: (310) 471-0282
Fax (310) 471-0382

Bonnie Levin

Fax

To: Senator Patrick Leahy	From: BONNIE AARON LEVIN
Fax: 202-224-3479	Pages: 1
Phone:	Date: 6.15.01
Re: Nomination of Carolyn Kuhl	CC:

☐ Urgent ☒ For Review ☐ Please Comment ☐ Please Reply ☐ Please Recycle

Comments:

Dear Senator Leahy,

I am writing to urge you to oppose the possible nomination of Carolyn Kuhl to the 9th Circuit Court of Appeals. Her record shows her to have an extremist right wing philosophy, far removed from my own beliefs and those of most Americans.

I feel that Kuhl's hostility to established reproductive rights makes her unsuitable for this position. She has argued to overturn Roe v. Wade and has supported the domestic gag rule.

I urge you to take a leadership role on this issue.

My heartfelt thanks,

Bonnie Levin

BONNIE LEVIN

145 Casitas Avenue
San Francisco, CA 94127

July 30, 2001

Senator Patrick Leahy
United States Senate
Russell Senate Building, Suite 433
Washington, DC 20510

Dear Senator Leahy:

I urge you to oppose the nomination of Carolyn Kuhl to the Ninth Circuit Court of Appeals.

Clearly, the majority of Americans support a woman's right to reproductive freedom. Ms. Kuhl has been an outspoken critic of choice. She also supports reversal of Roe v. Wade. Thus, the appointment of Ms. Kuhl would put reproductive rights in jeopardy.

As a pro-choice voter and member of NWPC and several other organizations pursuing full equality for women, I vehemently oppose Ms. Kuhl's nomination. Please vote NO on Kuhl and all other nominees who wish to roll back the clock on women's reproductive freedom.

Sincerely,

Joan Libman

PROMOTING JUSTICE
THROUGH SERVICE TO OUR
COMMUNITY

Los Angeles County Bar Association

STREET ADDRESS:
261 S Figueroa St Suite 300
Los Angeles CA 90012-2503

MAILING ADDRESS:
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Los Angeles CA 90055-2020

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WRITER'S DIRECT LINE:

March 28, 2003

Senate Judiciary Committee
Hon. Orrin G. Hatch, Chairman, Senate Judiciary Committee
Patrick J. Leahy, Ranking Democratic Member

Charles E. Grassley	Edward M. Kennedy
Arlen Specter	Joseph R. Biden, Jr.
Jon Kyl	Herbert Kohl
Mike DeWine	Dianne Feinstein
Jeff Sessions	Russell D. Feingold
Lindsey Graham	Charles E. Schumer
Larry Craig	Richard J. Durbin
Saxby Chambliss	John Edwards
John Cornyn	

RE: Federal Judicial Nominations

Dear Senators:

With more than 20,000 members, the Los Angeles County Bar Association is the largest metropolitan voluntary bar organization in the United States. One of the primary purposes of the Association is to further the administration of justice and to apply the knowledge and experience of our members to the promotion of the public good. In furtherance of these objectives, the Association traditionally has been actively involved in supporting a qualified and competent judiciary. That is why we have established, among other things, committees to review applications of judicial nominees to the California state Superior and Appellate Courts.

Within the last decade, under both Democratic and Republican administrations, the issue of federal judicial nominations has become increasingly divisive with often regrettable and unfounded attacks by organizations that, however well-meaning they may be, often have little knowledge or understanding of the nominees' judicial abilities. Our Association has become quite familiar with the fact that certain nominees to the Federal bench have faced largely based on positions that the nominees have articulated as lawyers representing clients. Frequently these attacks are predicated not upon a nominee's judicial qualifications or personal views on issues, but rather on positions set forth in legal briefs drafted or co-authored by the nominees while acting as an advocate for a client.

As lawyers it is our role to be advocates. It is through the adversary system that we as a people and a country have determined that justice is best obtained for all litigants. In vigorously presenting our clients' views, lawyers are professionally bound, subject only to ethical limits, to explore and present all arguments that may advance our clients' cause. Our system of justice will not survive if these underlying principles are undermined. It is for these reasons that the courts and bar associations, when prescribing

rules of conduct for lawyers, have repeatedly stressed the importance of having lawyers advocate with zeal and vigor the positions of their clients.[1]

The recent trend in attacking the qualifications of judicial candidates on the basis of positions advocated on behalf of clients is misguided for a variety of reasons.

First, neither the identity of a lawyer's clients nor the zealous advocacy of their causes necessarily provides any insight into the lawyer's personal beliefs, nor do they necessarily provide any indication of how a nominee may view a particular case presented to him or her as a judge. Indeed, representing clients whose views we may disagree with comes with the territory for many attorneys.

Second, these types of attacks will tend to discourage candidates from pursing judicial nominations. Lawyers who are well qualified may decline to submit their names for judicial consideration preferring not to subject themselves or their families to the protracted and often discouraging process that many nominees have experienced.

Finally, assessing a judicial nominee on the basis of client positions advocated may adversely impact the quality and availability of representation of unpopular or controversial clients and causes. Lawyers who may be inclined to pursue a judicial career will have to think twice about accepting the representation of clients whose positions may be politically controversial or, even more disturbing, they may decide against presenting a politically controversial legal argument on behalf of a client.

In sum, we urge that the Judiciary Committee give due consideration to those issues that are critical to assessing a nominees' qualifications -- the nominees' professional abilities, intelligence, integrity, experience and judicial temperament -- and not to those positions taken by nominees on behalf of their clients. Please feel free to contact me if our Association can be of any further assistance in regard to the critically important endeavor of ensuring a qualified and committed federal judiciary.

Very truly yours,

Miriam Aroni Krinsky

Miriam Aroni Krinsky
President

cc: Senator Barbara Boxer

---

[1] See Gagnon v. Scarpelli, 411 U.S. 778, 787, 93 S.Ct. 1765, 36 L.Ed.2d 656, 665 (1973) ("lawyers, by training and disposition, are advocates and bound by professional duty to present all available evidence and arguments in support of their clients' positions and to contest with vigor all adverse evidence and views"); Hoefferle Truck Sales, Inc. v. Divco-Wayne Corp., 523 F.2d 543 (7th Cir. 1975) ("zeal and perseverance are the nuts and bolts of our adversary system and we encourage the members of the bar to fully explore every legitimate claim in a case"); People v. McKenzie, 34 Cal.3d 616, 631, 194 Cal.Rptr. 462, 471-472 (1983) ("the duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law"); Hawk v. Sup.Ct. (People), 42 Cal.App.3d 108, 126, 116 Cal.Rptr. 713, 725 (1974). See also preamble to ABA Model Rules ¶2; ABA Model Rule 3.1, Comment (1)]; ABA Model Code, Canon 7; EC 7-1; DR 7-101 (a lawyer shall not "intentionally . . . (f)ail to seek the lawful objectives of . . . (the) client through reasonably available means permitted by law and the Disciplinary Rules"; ABA Model Rule 1.2, Comment (1)--"A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf").

Los Angeles County Bar Association

Litigation Section

Mailing address: P.O. Box 55020, Los Angeles, CA 90055-2020 (213) 627-2727 / Fax (213) 623-4336

May 18, 2001

The Honorable Dianne Feinstein
331 Hart Senate Office Building
Washington, D.C. 20510

Re: The Honorable Carolyn Kuhl

Dear Senator Feinstein:

We are the officers of the Litigation Section of the Los Angeles County Bar Association which, with over 3,000 members, is the largest voluntary Bar association in the United States. We understand that you will be meeting with Judge Carolyn Kuhl of the Los Angeles Superior Court on Tuesday, May 22, 2001. Given the shortness of time before your meeting, we have been unable to contact a quorum of our Executive Committee for a vote of that body and therefore write this letter in our individual capacities. We are confident, however, that it accurately reflects the feelings of most, if not all, of our Section members.

Collectively, we have known Judge Kuhl during her entire career in Los Angeles and, indeed, Alan Steinbrecher was her law school classmate at Duke. She presently serves with us on the Executive Committee of the Litigation Section. She is also the Supervising Judge of the pilot Complex Courts program that was implemented in 2000. By reputation and our personal experience, Judge Kuhl is extremely intelligent, hard working and thoughtful. She gained the prestigious appointment as Supervising Judge of the Complex Courts after only a few years on the bench because of those traits. In addition, she has a well-deserved reputation as being a fair minded judge who follows legal precedent. Her legal acumen is well-demonstrated by the scope of her career, including the fact that she has argued on multiple occasions before the United States Supreme Court. On a personal level, we have come to know her as a warm, witty and deeply caring person. We could not recommend her more highly for nomination to the Ninth Circuit Court of Appeals.

We know that you will be as impressed with Judge Kuhl as we are, and we urge that you support her nomination to the Court. Thank you in advance for your attention to her candidacy.

Very truly yours,

Alan K. Steinbrecher,
Chair, Litigation Section

Dean Ziehl,
Chair-Elect Litigation Section

Gretchen Nelson,
Treasurer

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7-20-01

Dear Senator Leahy,

I am concerned that the federal courts are more and more being packed with right-wing and closed-minded ideologues.

I am hoping that you will refuse to confirm any such nomination (including Carolyn B. Kuhl) and will fight to maintain a fair and open-minded judiciary.

Sincerely,

Miriam Ludwig
829 Hill # F
Santa Monica, CA 90405

June 26, 2001

Senator Patrick Leahy
United States Senate
Russell Senate Building, Suite 433
Washington, DC 20510
Fax: (202) 224-3479

Dear Senator Leahy:

I am writing to ask you to **OPPOSE** the nomination of Judge Carolyn Kuhl to the U. S. 9th Circuit Count of Appeal.

Seating her would not be in the best interests of Californians, particularly women.

Thank you,



Laura Luster
3390 Victor Avenue
Oakland, CA 94602

The Superior Court
LOS ANGELES, CALIFORNIA 90012
CHAMBERS OF
MALCOLM H. MACKEY, JUDGE

TELEPHONE
(213) 974-1234

July 9, 2001

The Honorable Patrick J. Leahy
Chairman of Senate Judiciary Committee
433 Russell Senate Office Building
Washington, D.C. 20510

Re: Judge Carolyn Kuhl

Dear Senator Leahy:

I have the pleasure of sending my unsolicited letter of recommendation on behalf of Carolyn Kuhl whom I have known for the last four years.

Her years of outstanding work in the legal field alone qualifies her to the appointment to the Ninth Circuit Court. I can categorically state that Carolyn Kuhl would be an asset to the judiciary.

I am an active Democrat and former Vice Chairman of the Los Angeles County Democratic Committee, member of CDC, and former delegate to the National Democratic Convention and I wholeheartedly state that she is a moderate Republican and well regarded jurist. She is presently in charge of our complex litigation courts and has done an outstanding job in supervising these complex cases.

Her appointment would be applauded by the legal community in that she is a hard working jurist who is non-partisan in her outlook. She is hardworking, knows the law and has the temperament, personality, ethics and demeanor to make an outstanding Ninth Circuit Court justice.

If you have any further questions, please do not hesitate to contact me.

Very truly yours,

Malcolm H. Mackey

MHM:mm

Lesley Mahaffey
1013 N. Mountain View Place
Fullerton, CA 92831

August 6, 2001

Dear Senator Leahy,

I am extremely concerned about the right wing's continuing concerted attempt to take over the federal courts. Almost all of the judges nominated by President Bush so far are right wing ideologues, chosen because they follow the same extreme ideology as Justices Scalia and Thomas. The Republicans recognize how important the federal courts are. The Republicans in the Senate repeatedly try to use bullying tactics and threats of preventing the Senate from conducting its business to force the confirmation of ultra-conservative judicial nominees. No other issue is the focus of such an aggressive and concerted effort by the Republicans.

It is urgent that you and the other Democrats on the Judiciary Committee stand firm and refuse to confirm any judicial nominee who is not independent and open-minded, and reject all nominees who are committed to an anti-choice, anti-civil rights, and anti-environment judicial ideology. I oppose the nomination of Carolyn B. Kuhl to the Ninth Circuit Court because she is just such a nominee-wedded to an extremist philosophy that is out of step with the outlook Americans expect from judges on a federal appeals court

Sincerely,

Lesley Mahaffey

Ken Maloney
Julie Ford-Maloney
16222 Monterey Lane, #223
Huntington Beach, CA 92649
714 840-0273
jford29105@aol.com

July 18, 2001

Senator Patrick Leahy
United States Senate
Washington, DC 20510

Re: Nomination of Carolyn B. Kuhl for US Court of Appeals

Dear Senator Leahy:

We hope that you will closely scrutinize the record of Carolyn Kuhl, nominee for the US Court of Appeals for the Ninth Circuit. In our view, that record will not support her fitness to serve in that capacity. Our citizenry is entitled to be served by judges who are open minded and not ideologues. It seems to us that Ms. Kuhl is neither since she has

- Attempted to have the tax-exempt status of Bob Jones University and other discriminatory schools reinstated. Fortunately, she did not prevail,
- Suggested that Roe vs. Wade be abandoned,
- Dismissed a claim by a female patient that a doctor had allowed her breast exam to be watched by a drug company representative. An appellate court, we understand, overruled her decision.

Please oppose her nomination to this sensitive post.

Sincerely,

Ken Maloney and Julie Ford-Maloney

LAW OFFICE OF LIEBER & MANFRA
400 West Tenth Street
Suite 201
Santa Ana, California 92701
Tel: (714) 541-0500
Fax: (714) 541-9300

February 18, 2002

Hon. Senator Patrick Leahy
U.S. Senate
Washington, D.C. 20510

VIA FAX & U.S. MAIL
(202) 224-3479

Dear Senator Leahy:

I am extremely concerned about the right wing's continuing concerted attempt to take over the federal courts. Almost all of the judges nominated by President Bush so far are right wing ideologues, chosen because they follow the same extreme ideology as Justices Scalia and Thomas. The Republicans recognize how important the federal courts are. In this time of tension and fear for our country, the Republicans in the Senate are willing to destroy bipartisan cooperation and use bullying tactics and threats of preventing the Senate from conducting its business to force the confirmation of ultra-conservative judicial nominees. No other issue is the focus of such an aggressive and concerted effort by the Republicans.

It is urgent that you and the other Democrats on the Judiciary Committee stand firm and refuse to confirm any judicial nominee who is not independent and open-minded, and reject all nominees who are committed to an anti-choice, anti-civil rights, and anti-environment judicial ideology. I oppose the nomination of Carolyn B. Kuhl to the Ninth Circuit because she is just such a nominee glued to an extremist philosophy that is out of step with the outlook Americans expect from judges on a federal appeals court

Sincerely,

Lorie Manfra

LAW OFFICES OF
MANDEL & MANPEARL
STUART R. MANDEL*
GERALD T. MANPEARL
JAN GOODMAN, OF COUNSEL
*PROFESSIONAL LAW CORPORATION

1800 AVENUE OF THE STARS
SUITE 1000
LOS ANGELES, CA 90067
TELEPHONE: (310) 277-1313
FAX: (310) 398-9817

June 16, 2001

VIA U.S. MAIL AND FACSIMILE: 202-224-3479

Sen. Patrick Leahy
United States Senate
Washington, D.C. 20510

Dear Sen. Leahy:

Thank you for your courageous opposition to the Bush administration's proposed nominees to the federal court. I also understand that Carolyn B. Kruhl is now being considered.

I would like to urge opposition to her appointment based on her record while working in the Reagan Justice Department and on the Los Angeles Superior Court bench. As a member of The Federalist Society, she has consistently favored her ultraconservative philosophy, including a narrow interpretation of issues involving privacy and individual rights and abortion rights. While at the Department of Justice, she vigorously supported exempt status for the Bob Jones University, although it racially discriminates against some of its students.

Carolyn Kruhl is not the type of person who should be appointed to the federal bench, she is far removed from the beliefs of ordinary Americans, and must be opposed.

Thank you for your courtesies.

Yours truly,

Jerry Manpearl

JM:jh

c:\wp51\doc\340 kruhl3.ltr

VIA FACSIMILE

February 7, 2003

Dear Senator Boxer:

I write to urge that you protect the rights of every American by rejecting the Bush court-packing plan and refusing to confirm Carolyn Kuhl for the Ninth Circuit Court of Appeal.

I am the executive director of the Pacific Institute for Women's Health, a non-profit organization dedicated to improving the reproductive and sexual health of women in California and internationally by providing resources, funding, and assistance to local organizations that offer direct services to women. One of our missions is to ensure that all women, regardless of race or socio-economic status, have access to the full range of options concerning their reproductive health.

This nominee has supported radical judicial and legal philosophies that could seriously damage civil rights, privacy rights, reproductive freedom, and more. As a Superior Court judge, Kuhl has worked aggressively to severely limit protections against discrimination and injury based on disability, race, age, sex, and religion. One of her decisions prompted a California court of appeals judgeto write, in reversing the decision, that her action would "nullify" a whistleblower statute at issue in the case. While working at the Justice Department, she advocated vigorously for the reversal of Roe v. Wade.

As part of the Bush administration's court-packing plan, she represents a major threat to the rights and liberties of all Americans and an assault on the last 70 years of social justice progress. I strongly urge you to reject efforts to use the Senate as a rubber-stamp and to filibuster if necessary to prevent her confirmation.

Sincerely,

Magaly Marques
Executive Director, Pacific Institute for Women's Health

VILMA S. MARTINEZ
355 SOUTH GRAND AVENUE
THIRTY-FIFTH FLOOR
LOS ANGELES, CALIFORNIA 90071-1560
(213) 683-9167

March 31, 2003

VIA FACSIMILE

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Re: Carolyn B. Kuhl

Dear Chairman Hatch:

As a member of Senator Barbara Boxer's judicial screening committee during the Clinton Administration, I was proud to recommend Judge Richard Paez for the Ninth Circuit Court of Appeals. President Clinton nominated Judge Paez, but his nomination languished for four years and he was subjected to a campaign of half-truths and cruel caricatures. California Superior Court Judge Carolyn Kuhl, characteristic of her sense of fairness and respect for an independent judiciary, stepped up to the plate; she wrote letters, made phone calls, and exhorted her fellow Republicans to confirm Judge Paez and other Clinton judicial nominees.

Now that President Bush has nominated Judge Kuhl to the Ninth Circuit, many of the groups that supported Judge Paez, ironically, have turned their fire on Judge Kuhl apparently to exact payback against Senate Republicans. This turn-about is not fair play. It is the continuation of a vicious cycle that punishes worthy judicial candidates in a misguided effort to use the judiciary to further narrow political ends.

I generally identify myself as a Democrat, am a veteran of civil rights battles and testified against Judge Robert Bork's nomination to the United States Supreme Court (on the basis of Judge Bork's inadequate judicial temperament for service on that Court). Like others dedicated to the independence of our judiciary, I certainly do not want ideologues serving as judges on our federal courts. That is why I think Judge Kuhl would make a great addition to the Ninth circuit.

Judge Kuhl has served for seven years in the California Superior Court, the trial court of general jurisdiction in Los Angeles. Before that, she and I were law partners for nine years. Judge Kuhl is what I think of as an "old fashioned" judge. She cares about due process for everyone. During her service on the California Superior Court, she has shown that she is careful to hear both sides. She does not try to influence the outcome of a case to favor one side or the other. She is serious about her oath to follow the law, whatever the result. Judge Kuhl takes as her guide the words of Justice Felix Frankfurter that the highest calling of a judge is to subordinate one's personal views to the law.

Judge Kuhl can hardly be described as being on "the fringe" of the Los Angeles legal community. She is the first woman to serve as a Supervising Judge of the Civil Departments of the Los Angeles Superior Court, a court system that is larger than the entire federal trial court nationwide. She served as the Supervising Judge of that court's very successful Complex Litigation Program in its experimental phase.

Judge Kuhl is actively supported by both the plaintiffs' and defense bars in Los Angeles (even though she primarily represented defendants when she practiced law). Over a dozen Justices of the California Court of Appeal and over 70 Judges of the California Superior Court (including over 25 women) have signed letters in support of Judge Kuhl. Many of these supporters are active Democrats. They know Judge Kuhl and, like me, they know that she has not been, and would not be, a result-oriented judge.

I call on fellow Democrats and our elected leaders to step up to the plate to support Judge Kuhl, just like she went to bat for Judge Paez and other Clinton nominees. It is shameful that her generosity and dedication to an independent judiciary are being repaid by subjecting her to the same sort of calumny that Judge Paez suffered. Until the politicians decide to play fair with judicial candidates, our system of justice will suffer.

Sincerely,

Vilma S. Martinez

cc: The Honorable Barbara Boxer
The Honorable Dianne Feinstein
The Honorable Patrick J. Leahy

Carol M. McOwen
111 South Orange Grove, #310
Pasadena, California 91105

June 24, 2001

Honorable Patrick Leahy,

I am writing you to urge you to defeat the nomination of Carolyn B. Kuhl as judge on the U.S. Court of Appeals for the Ninth Circuit.

We need fair-minded judges who understand why the IRS Bob Jones University should NOT have tax exemption when it discriminates against its students. We need fair-minded judges who believe women should be allowed to have legal and safe abortions. We need fair-minded judges who are not believers in corrupting our form of government.

Sincerely,
Carol M. McOwen
111 S. Orange Grove #310
Pasadena, CA 91105

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DANIEL STERN
JUAN VARGAS
CINDY MONTANEZ

Assembly
California Legislature

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SACRAMENTO, CA 94249-0001
(916) 319-2334

ASSEMBLY COMMITTEE ON JUDICIARY
ELLEN M. CORBETT, CHAIR

February 11, 2003

The Honorable Diane Feinstein
United States Senate
Senate Hart Office Building, Room 331
Washington, DC 20510
Telefax: (202) 228 3954

RE: OPPOSE THE NOMINATION OF CAROLYN KUHL TO THE NINTH CIRCUIT COURT OF APPEALS

Dear Senator Feinstein:

We are writing as members of the Judiciary Committee of the California Assembly to urge you to oppose the nomination of Judge Carolyn Kuhl to serve on the Ninth Circuit Court of Appeals. We believe that Judge Kuhl's record indicates that her opinions would potentially threaten laws protecting California's environment and civil rights, and the rights of our citizens to privacy and reproductive choice. As part of President Bush's effort to nominate numerous ultra conservative judges to lifetime positions on the federal bench, this nomination represents an unacceptable risk to our state and the nation.

Judge Kuhl's nomination is opposed by more than 40 organizations representing civil rights, religious, environmental, reproductive rights and labor organizations, including the Sierra Club, National Organization for Women, California Abortion Rights Action League, National Women's Law Center, People for the American Way, and the Alliance for Justice among others. Their concerns run the gamut from Judge Kuhl attempting to close off access to the courts by overturning the doctrine of associational standing (the right of organizations to file suit on behalf of their members), to convincing the Reagan administration during her tenure with the Justice Department to attempt overturning Roe v. Wade. As a private attorney she argued in support of regulations prohibiting doctors and health care professionals at federally-funded clinics from counseling women about abortion, or even informing them that abortion was a legal medical option

Still other of Judge Kuhl's positions show just how far she is from the mainstream of legal thought on issues of concern to most Californians. For example, Judge Kuhl was one of two Justice Department officials who convinced the Attorney General to reinstate the tax exempt status for the segregationist Bob Jones University. This position was opposed – in writing – by more than 200 lawyers in the Justice Department's civil rights division, and was even opposed by President Reagan's Solicitor General, Ted Olson

As a California state trial court judge, Judge Kuhl has not generally written published decisions. However, several published cases cause us concern about her willingness to protect the basic rights of individuals. For example, in one case Judge Kuhl dismissed a breast cancer patient's claim of invasion of privacy after her doctor brought a drug company representative into the room during a breast exam. This ruling was reversed on appeal. In still another controversial decision, Judge Kuhl dismissed a case brought under California law enacted to prevent suits against whistleblowers and others acting in the public interest. The California appellate court again reversed Judge Kuhl's decision calling it "a nullification of an important part of California's anti (abusive lawsuit) legislation."

Finally, in her career Judge Kuhl has been aligned with some of the most ideologically intransigent and far-right elements of the Republican Party. She is a member of the Federalist Society, which seeks to establish an ultra-conservative federal bench. We believe that placing Judge Kuhl on the Ninth Circuit Court of Appeals would be a grave error that would threaten California law and place a relatively young and ultra-conservative jurist in a lifetime position on one of the most important courts (after the Supreme Court) for our state. We urge you to oppose her nomination as forcefully as possible.

Thank you for considering our views.

Sincerely yours,

Ellen M. Corbett
Loni Hancock
Joe Nielsen
Sally Lieber
John Vasconcellos
Sheila Kuehl
Hannah-Beth Jackson

cc: The Honorable Barbara Boxer

FAX # (202) 224-3479

Sender's Phone Number (310) 443-6376

OPC Fax Number: (310) 443-6661

DATE 06/25/2001

NO. OF PAGES 0 **+ COVER PAGE**

TO: SENATOR PATRICK LEAHY
U. S. SENATE
WASHINGTON, D.C.

FROM: Linda Messner
4156 Higuera St.
Culver City, CA 90232

PRIORITY: X **URGENT (notify addressee immediately)**

___ **ROUTINE**

NOTE: **If you do not receive all pages or experience problems, call back at the above number.**

COMMENTS:

Dear Senator,

I understand that Carolyn B. Kuhl is being considered by the Bush administration for appointment as a judge on the US Court of Appeals for the Ninth Circuit. I am writing to let you know that I oppose her potential appointment. Carolyn B. Kuhl is not the type of judge who should be appointed to the federal Circuit Courts of Appeal. Her record shows that she is wedded to an extremist right wing philosophy that is far removed from the beliefs of ordinary Americans. We need open-minded judges, not anti-choice ideologues who condone racism and restrict our ability to protect our individual rights in the courts.

Patrick J. Leahy
433 Russell Senate Ofc. Bldg
Washington D.C. 20510

Dear Senator Leahy,

I strongly oppose the nomination of Carolyn B Kuhl as a judge on the US Court of Appeals for the Ninth Circuit. Carolyn B Kuhl is not the type of judge who should be appointed to the federal Circuit Courts of Appeal. Her record shows that she is wedded to an extremist right wing philosophy that is far removed from the beliefs of ordinary Americans, such as myself. We need open minded judges, not antichoice ideologues who condone racism and restrict our ability to protect our unburdened rights in courts.

Sincerely,

Dolores Mieva
1727 Sandal Wood Pl
Thousand Oaks, CA 91362

July 7, 2001

TO: Senator Patrick Leahy
Fax 202-224-3479

FROM: Parviz and Linda Minoo
3619 Patrick Henry Place
Agoura Hills, CA 91301

Dear Senator,

I understand that Carolyn B. Kuhl is being considered by the Bush administration for appointment as a judge on the US Court of Appeals for the Ninth Circuit. I am writing to let you know that I oppose her potential appointment. Carolyn B. Kuhl is not the type of judge who should be appointed to the federal Circuit Courts of Appeal. Her record shows that she is wedded to an extremist right wing philosophy that is far removed from the beliefs of ordinary Americans. We need open-minded judges, not anti-choice ideologues who condone racism and restrict our ability to protect our individual rights in the courts.

Thank you,

Parviz and Linda Minoo

JUL 07 01 10:13a Minoo (818) 879-0540 P.1

South Coast Audubon

7-24-01

DEAR SENATOR LEAHY,

I STRONGLY URGE YOU TO OPPOSE THE NOMINATION OF CAROLYN KUHL AS A JUDGE ON THE U.S. COURT OF APPEALS.

AS PRESIDENT OF SO. COAST AUDUBON BASED IN SO. ORANGE COUNTY, CA I AM CONCERNED ABOUT ANY DECISIONS SHE WOULD MAKE IN REGARDS TO CLEAN AIR AND WATER.

HER PHILOSOPHY IS NOT WHAT I AS AN ORDINARY AMERICAN, WOULD LIKE TO SEE IN AN APPEALS COURT JUDGE. THANK YOU FOR YOUR CONSIDERATION.

SINCERELY,

Paul Moreno
28872 ESCALONA DR.
MISSION VIEJO, CA 92692

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RICHARD M. MOSK
ATTORNEY AT LAW
1901 AVENUE OF THE STARS, SUITE 700
LOS ANGELES, CALIFORNIA 90067-6078

Telephone: (310) 552-8184
Facsimile: (310) 734-6299

May 25, 2001

Senator Barbara Boxer
SH-112 Hart Senate Office Building
Washington, DC 20510-0504

Dear Senator Boxer:

I write to support Judge Carolyn Kuhl for the Ninth Circuit Court of Appeals. I met Judge Kuhl some years ago when I was about to argue a case before th United States Supreme Court. I inquired about who in this area had experien in arguing U.S. Supreme Court cases, and I was uniformly directed to Judge Kuhl, who had been at the Solicitor General's office and was a successful practitioner at a major Los Angeles law firm. She proved very accessible and was most helpful to me.

Judge Kuhl has an excellent reputation as a lawyer and a person. Indeed, colleagues of mine who have appeared before her have all praised her performance. Although she may have political views that differ from mine, I have great confidence in her ability and willingness to determine matters in accordance with the law and fairly.

Sincerely,

Richard M. Mosk

RMM/loj
cc: Mr. Mark Kaddish (By Facsimile)

STATE OF CALIFORNIA
Court of Appeal
SECOND APPELLATE DISTRICT
300 SOUTH SPRING STREET
LOS ANGELES, CALIFORNIA 90013

RICHARD M. MOSK
ASSOCIATE JUSTICE

TELEPHONE
(213) 830-7333
FAX
(213) 897-5990
E-MAIL
richard.m.mosk@jud.ca.gov

February 13, 2003

The Honorable Dianne Feinstein
331 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator Feinstein:

I write to recommend Judge Carolyn Kuhl for the Ninth Circuit Court of Appeals. I have known her for many years. She was kind enough to help me when I had a case before the United States Supreme Court. She has an excellent reputation among the judicial and legal community in Los Angeles. Thus, as indicated by the American Bar Association, Judge Kuhl is well qualified for the position.

Generally, the clients a lawyer represents or the legal positions a lawyer takes on behalf of a client—whether in private practice or with the Government—should not be considered in determining whether a person is fit for office. As long as the lawyer acts within the applicable rules and laws, he or she should be able to advise clients and represent them vigorously without fear of future condemnation. If lawyers were expected to represent only clients deemed socially acceptable, many persons and entities would go unrepresented.

Realistically, young lawyers in the Government or in law firms do not generally have the luxury of refusing to work on matters. Even if one takes a different view, surely Judge Kuhl is entitled to redemption based on her exemplary legal and judicial career over a lengthy period of time.

To deny Judge Kuhl confirmation based on the reasons given, simply invites the same criteria when others are nominated who have had clients that offend those with a different viewpoint.

I am sure you will give the matter careful consideration. As one of your constituents I have appreciated receiving copies of your speeches and position papers.

With best regards, I am

Sincerely,

Richard M. Mosk

cc: Hon. Orrin G. Hatch

not printed at public expense

WASHINGTON BUREAU
NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE
1025 VERMONT AVENUE, N.W. • SUITE 1120 • WASHINGTON, D.C. 20005
(202) 638-2269 FAX (202) 638-5936

March 4, 2003

The Honorable Orrin G. Hatch
Chair
Senate Judiciary Committee
244 Dirksen Senate Office Building
Washington, DC 20510

RE: Federal Judiciary Nominees

Dear Chairman Hatch;

Enclosed are copies of action items recently passed by the national NAACP Board of Directors at our annual meeting on February 15, 2003, in New York City. As you can see, these action items express the opposition of the NAACP to the confirmations of Terrence W. Boyle to serve on the 4th Circuit Court of Appeals; Carolyn Kuhl to serve on the Ninth Circuit court of Appeals; Charles W. Pickering, Sr., to serve on the fifth circuit Court of Appeals; and Jeffrey Sutton to serve on the sixth Circuit Court of Appeals.

Each of the enclosed action items shows the reasons behind our opposition. I hope that you will take the time to review these documents and share them with your colleagues on the committee. I further hope that you will take our organization's concerns into consideration when you are deliberating these four nominations.

Thank you for your attention to this matter; I look forward to working with you to see that qualified individuals who are genuinely concerned about the protection of Americans' civil liberties and civil rights are nominated and confirmed to serve on the federal bench. Should you have any questions, I hope that you will feel free to contact me at (202) 638-2269.

Sincerely,

Hilary O. Shelton
Director

Enclosures (4)

ACTION ITEM IN OPPOSITION TO THE CONFIRMATION OF CAROLYN KUHL TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

February 14, 2002

WHEREAS, on June 22, 2001, President George Bush nominated Carolyn Kuhl, Superior Court Judge for Los Angeles County, to the United States Court of Appeals for the Ninth Circuit; and

WHEREAS, the jurisdictional boundaries of the Ninth Circuit encompass Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington, Guam and the Northern Mariana Islands and is located in San Francisco, California; and

WHEREAS, as a member of the Reagan Administration, Judge Kuhl was one of two Justice Department officials who persuaded the Attorney General to reverse an 11-year Internal Revenue Service policy and reinstate the tax-exempt status of Bob Jones University and other racially discriminatory schools. (*See* Charles Fried, Order and Law: Arguing the Reagan Revolution—a Firsthand Account, 33 (1991)). The Supreme Court ultimately disagreed with the position advocated by Judge Kuhl and, by an 8-1 vote, denied Bob Jones and other racially segregated schools tax exempt status; and

WHEREAS, as a California state trial court judge, Judge Kuhl has not generally written published opinions but she has been overturned on appeal in cases concerning her unwillingness to protect individual basic rights; and

WHEREAS, the California Court of Appeals reversed Judge Kuhl's dismissal of a claim of invasion of privacy brought by a breast cancer patient who sued the doctor who brought a drug company representative into the room during a breast examination. Reversing Judge Kuhl's decision, the appellate court found that the doctor's behavior was a serious invasion of the patient's privacy. *Sanchez-Scott v. Alza Pharmaceuticals*, Cal. Rptr. 2d 410, 412 (Ct. App., 2d Dist. 2001); and

WHEREAS, Judge Kuhl dismissed a case brought under a California law enacted to prevent suits against whisteblowers and others acting in the public interest. The California appellate court reversed Judge Kuhl's decision in unusually strong-worded terms, calling her decision "a nullification of an important part of California's anti-[abusive lawsuit] legislation." *Liu v. Moore,* Cal. Rptr. 2d 807 (Cal. App. 2d Dist., 3rd Div. 1999); and

WHEREAS, Judge Kuhl, as a high-level federal official and as a state court judge, has demonstrated a reckless disregard for the injustices experienced by African Americans, other racial and ethnic minorities and women; and

WHEREAS, during the confirmation process, Members of the U.S. Senate should consider whether a nominee has demonstrated an open mind and informed process in decision-making, judicial temperament and a record of commitment to the progress made on civil rights, women's rights and individual liberties.

THEREFORE, BE IT RESOLVED, the National Association of Colored People (NAACP) opposes the confirmation of Carolyn Kuhl believes that if she were confirmed her views would jeopardize the civil rights and liberties of African Americans and other racial and ethnic minorities, particularly since the federal courts of appeal are the courts of last resort in virtually all federal cases; and

BE IT FURTHER RESOLVED, the NAACP finds that Carolyn Kuhl does not meet critical criteria and judicial temperament necessary for a lifetime appointment to the federal court of appeals, the second highest court in the country, and that the Senate Judiciary Committee should reject his confirmation; and

BE IT FINALLY RESOLVED, that the NAACP urges President Bush in the strongest possible terms to nominate mainstream candidates that will garner the trust and respect of all of the people in the Ninth Circuit.



March 27, 2003

Dear Senator:

I am writing on behalf of the National Family Planning and Reproductive Health Association (NFPRHA), a membership organization dedicated to improving access to reproductive health care for all women, to urge you to oppose the nomination of Los Angeles Superior Court Judge Carolyn Kuhl to the U.S. Court of Appeals to the Ninth Circuit. NFPRHA opposes Judge Kuhl's nomination because of her vocal opposition reproductive rights, specifically her attacks on family planning and attempts to prohibit low-income women from receiving information about all legal health options.

Kuhl has been a tireless legal activist, who has worked for radical changes in the law both in private practice and during her tenure in the Reagan Department of Justice. In 1985, she convinced the Reagan Justice Department to argue for the outright reversal of *Roe v. Wade* in *Thornburgh v. American College of Obstetricians and Gynecologists*, a case addressing a host of restrictions enacted by Pennsylvania. Earlier, in 1983, as Deputy Solicitor General, Kuhl unsuccessfully argued before the DC Circuit Court of Appeals in *Planned Parenthood Federation of America, Inc. v. Heckler* in support of the Reagan Administration's imposition of the "squeal rule," which would have disregarded patient confidentiality and required Title X clinics to notify the parents of teens seeking contraception.

Kuhl continued her legal attacks on reproductive rights after leaving the federal government. In 1991, in private practice, she filed an amicus brief to the Supreme Court in *Rust v. Sullivan* on behalf of an anti-choice physicians group, the American Academy of Medical Ethics, and argued in support of the domestic gag rule, arguing in support of regulations denying low-income pregnant women information about all their legal health options by prohibiting Title X family planning clinics from giving abortion referrals to or even discussing abortion with women who asked for such information. The domestic gag rule was effectively repealed by President Clinton. NFPRHA, then as now, was actively engaged in efforts to ensure that women seeking services at publicly funded family planning clinics remained entitled to information about all of their medical options.

Given Judge Kuhl's far-reaching record opposing family planning and the right to abortion information and services, a lifetime appointment to the federal bench would be detrimental to the health of women living in the nine states of the Ninth Circuit. The Senate Judiciary Committee can and must protect women's health and reject the nomination of Carolyn Kuhl.

Sincerely,

Judith M. DeSarno

Judith M. DeSarno
President/CEO

1627 K St. N.W. ♦ 12th Floor ♦ Washington, D.C. 20006-1702 ♦ Tel:202-293-3114 ♦ Fax: 202-293-1990 ♦ www.nfprha.org

News Room

NATIONAL WOMEN'S LAW CENTER
Thirty years of EXPANDING THE POSSIBILITIES

For Immediate Release: March 31, 2003
Contact: Camden Richards or Margot Friedman at 202-588-5180

NWLC Opposes the Nomination of Carolyn Kuhl to the Ninth Circuit

NWLC Report Shows Nominee's Hostility to Women's Rights

(Washington, D.C.) The National Women's Law Center (NWLC) today announced its opposition to the nomination of Los Angeles Superior Court Judge Carolyn B. Kuhl to the U.S. Court of Appeals for the Ninth Circuit. Based on her record of hostility to fundamental constitutional and civil rights for women and minorities, NWLC urges the U.S. Senate to reject this nomination.

In a report released today, NWLC analyzes Judge Kuhl's record on a number of issues critical to women, including the right to privacy and reproductive rights, sexual harassment and other employment discrimination issues, and equal opportunity in education. NWLC concludes, on the basis of this analysis, that Judge Kuhl's record demonstrates she lacks the commitment to legal rights and principles of central importance to women that is necessary for confirmation to a federal appellate court seat.

"Judge Kuhl's record paints a clear picture of someone who has been driven by her own ideology – an ideology that is antagonistic to women's reproductive rights and other core legal principles that are of central importance to women," said Marcia D. Greenberger, NWLC Co-President. "When so many court decisions depend on only one vote, there is a serious risk that the rights of women will be placed in jeopardy if she is confirmed to the federal bench."

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As detailed in NWLC's report, Judge Kuhl, who held a series of political appointments in the U.S. Department of Justice in the 1980's, has been identified as one of the ideological "zealots" in the Reagan Administration who pressed the Justice Department to argue that Bob Jones University should retain tax-exempt status despite its racially discriminatory policies, and who aggressively urged the Solicitor General to ask the Supreme Court to overturn *Roe v. Wade*. While in government, she also argued in favor of weakening sexual harassment protections and affirmative action remedies for discrimination. Several of the controversial positions Judge Kuhl signed on to in government briefs have been repeated or echoed in her own subsequent writings. While in private practice, she also wrote a brief urging the Supreme Court to uphold the constitutionality of the exclusion of women from the Virginia Military Institute (VMI), a position resoundingly rejected by the Court when it held that a public institution cannot deny equal opportunity for women based on damaging and outmoded gender stereotypes and generalizations about women's inability to learn in a VMI-type setting.

A major focus of NWLC's concern, set forth in the report, is Judge Kuhl's history of consistent opposition to women's reproductive rights and the right to privacy. As noted, Judge Kuhl was reportedly instrumental in the decision of the Department of Justice to urge the Supreme Court to overturn *Roe v. Wade*. She also argued in support of the Title X "squeal rule," which would have required clinics receiving federal family planning funds to notify the parents of adolescents seeking contraceptives. This position was condemned by medical and public health organizations, women's and youth-serving groups, 40 states, and many others, and was rejected by two U.S. District Courts that enjoined the regulations and two U.S. Courts of Appeals. As a private practitioner, Kuhl wrote a brief in support of the Title X "gag rule," which prohibits health care professionals at family planning clinics from using Title X funds for counseling women regarding abortion or even informing them that abortion is a legal option. As a judge, Kuhl dismissed an invasion of privacy claim by a breast cancer survivor whose doctor permitted a drug salesman to observe a breast examination without her permission – a ruling that was reversed by a unanimous appellate court.

"Lifetime appointments to the federal Courts of Appeals will have an enormous impact on the legal rights

of all Americans – and most especially women – for decades to come," said Greenberger. "The Senate must carry out its constitutional duty to make sure each nominee is committed to the laws and principles that guarantee the right of privacy and equal opportunity for all our citizens. Carolyn Kuhl's record shows that she does not meet this test."

For more information, please see the report entitled Carolyn Kuhl's Problematic Record on Reproductive Choice and Other Women's Issues in the Judges, Courts and Women's Rights section.

###

National Women's Law Center | 11 Dupont Circle NW, Suite 800 | Washington, DC 20036 | Tel: 202.588.5180 | Fax: 202.588.5185

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NATURAL RESOURCES DEFENSE COUNCIL

January 28, 2003

The Honorable Barbara Boxer
United States Senate
112 Hart Office Building
Washington, D.C. 20510

The Honorable Dianne Feinstein
United States Senate
331 Hart Office Building
Washington, D.C. 20510

The Honorable Orrin Hatch
Chairman, Committee on the Judiciary
United States Senate
104 Hart Office Building
Washington, D.C. 20510

The Honorable Patrick Leahy
Ranking Member, Committee on the Judiciary
United States Senate
224 Dirksen Office Building
Washington, D.C. 20510

Dear Senators:

On behalf of the Natural Resources Defense Council's more than 500,000 members, over 100,000 of whom live in the state of California, I am writing to register our opposition to Judge Carolyn B. Kuhl's nomination to a lifetime seat on the United States Court of Appeals for the Ninth Circuit. We have reviewed her record, and we are concerned that she would bring extreme viewpoints to the federal bench if confirmed by the Senate.

The most troubling example we have seen from Judge Kuhl's record is that, in briefing and arguing *UAW v. Brock*, 477 U.S. 274 (1986), for the Reagan Administration, she directly urged the Supreme Court to overrule the doctrine of associational standing. This doctrine is the legal basis that allows a group such as NRDC to represent the interests of its members who are injured by a defendant's action. For example, when NRDC sues to stop toxic water pollution by a company, NRDC can do so because of the doctrine of associational standing. The same doctrine serves as the basis for standing for every other environmental group that proceeds to court to protect the environment for all Americans, as well other public interest groups that hold private industry and the government to their legal duties.

In his memoirs, then-Solicitor General Charles Fried noted that "my Deputy and Counselor, Carolyn Kuhl, launched a frontal attack" on established standing law in *UAW v. Brock*. Charles Fried, Order and Law: Arguing the Reagan Revolution -- A Firsthand Account 16-17 & n.5

www.nrdc.org 1200 New York Avenue, NW, Suite 400
Washington, DC 20005
TEL 202 289-6868 FAX 202 289-1060

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(1991). Judge Kuhl argued that "representative standing by an association should generally not be recognized," and she urged the Supreme Court to adopt a radical new rule that groups that have brought lawsuits for years under the doctrine of associational standing could only sue under class-action rules. Brief for Respondent in *UAW v. Brock* at § I.B (Feb. 10, 1986). Because it is difficult, expensive, and time-consuming to comply with class-action requirements, many fewer public interest lawsuits would be possible if Judge Kuhl's arguments had been accepted by the Court. It is hard not to read an agenda of discouraging public interest litigation into these arguments.

Fortunately, the Supreme Court soundly rejected Judge Kuhl's standing arguments, because they fell "far short of meeting the heavy burden of persuading us to abandon settled principles of associational standing." 477 U.S. at 290. No justice endorsed her radical and unsupported arguments. Of course, if Judge Kuhl were confirmed to a position on the Ninth Circuit, she would be in a position not just to make such arguments but to adopt them into law.

Environmentalists have other reasons to worry that Judge Kuhl will use her position to restrict their access to the courts, as she has taken a number of positions friendly to corporate defendants and hostile to citizen litigants and whistleblowers. For instance, a serious obstacle to enforcing environmental laws is the possibility that a polluter will retaliate against a citizen suit by filing a strategic lawsuit against public participation ("SLAPP"). However, in *Liu v. Moore*, 69 Cal.App.4th 745, 748 (1999), a California appeals court unanimously reversed a decision by Judge Kuhl that "constitut[ed] a nullification of an important part of California's anti-SLAPP legislation." The court concluded that her decision "would prolong both the [SLAPP] defendant's predicament and the plaintiff's outrageous behavior." *Id.* at 750. In the same vein, in *United States ex rel. Madden v. General Dynamics Corp.*, 4 F.3d 827 (9th Cir. 1993), Judge Kuhl challenged the constitutionality of the provisions of the False Claims Act allowing private parties to sue to enforce federal law against corporate wrongdoers. Brief of Amici Electronic Indus. Ass'n et. al (Oct. 22, 1992).

Finally, Judge Kuhl specifically has sided against environmental protection in a number of cases. One example is *Fairchild Semiconductor Corp. v. U.S. EPA*, 984 F.2d 283 (9th Cir. 1993), where she challenged the constitutionality of EPA's imposition of cleanup standards under the Comprehensive Environmental Response, Compensation, and Liability Act.

Judge Kuhl's attack on the doctrine of associational standing, as well as her other public advocacy, is at odds with citizen environmental enforcement. Because we believe that she holds extreme views, we oppose her nomination to the United States Court of Appeals for the Ninth Circuit. We urge you to scrutinize her nomination with exceedingly great care, and we hope you will take a strong position against her nomination.

Sincerely,



John Adams
President

GRETCHEN M. NELSON
ATTORNEY AT LAW
707 WILSHIRE BOULEVARD, SUITE 5000
LOS ANGELES, CALIFORNIA 90017

TELEPHONE: (213) 623-6469
TELECOPIER: (213) 622-6019
E-mail: gnelson@gmnlaw.com

May 17, 2001

By Telecopier and U.S. Mail

The Honorable
Barbara Boxer
United States Senate
112 Hart Senate Office Building
Washington, DC 20510

The Honorable
Dianne Feinstein
United States Senate
331 Hart Senate Office Building
Washington, D.C. 20510

RE: Honorable Carolyn Kuhl

Dear Senators Boxer and Feinstein:

I write to express my very strong support for the nomination of the Honorable Carolyn Kuhl to the Ninth Circuit Court of Appeals. I first came to know Judge Kuhl when she stepped in at the last minute for a colleague who was scheduled to speak at a legal conference sponsored by the Litigation Section of the Los Angeles County Bar Association. I was extremely impressed by her grasp of some very difficult legal issues on very short notice. Since that time, I have worked with her on the Litigation Section on a variety of issues including her work on the development and implementation of the Los Angeles Superior Court complex courts panel. She has continued to impress me with her keen insight on legal issues as well as her common sense and practical approach to many of the problems that confront the legal system today. She is well-deserving of appointment to the Ninth Circuit and we will all benefit from having her on the Court.

I am a Democrat and I have been one all of my life. I have and will continue to support both of you for as long as you wish to remain in the Senate or in any other elected office that you may wish to pursue. California has greatly benefitted from your hard work and your devotion to California and its many complex issues. Throughout your tenures, you have consistently nominated extraordinarily fine candidates to the Ninth Circuit and to the United States District Courts in California. The courts, litigants and lawyers have and will continue to benefit from the fair, impartial and dedicated jurists who now sit on those courts as result of your efforts.

I watched with grave concern the unjustified and unfair Republican partisanship that infected the Senate and the Judiciary Committee during the years that William Jefferson Clinton was President. I despaired over unwarranted delays in confirmation hearings for many judicial

nominees who were undeserving of such treatment. I applauded long and hard when you successfully prevailed over partisan politics in obtaining the confirmation of your candidates. And, I now strongly disapprove of those on the Judiciary Committee who believe that the recent change in administration justifies any departure in the manner in which the Committee and the Senate consider judicial nominations, other than a departure that would do away with Republican partisanship.

Notwithstanding, I submit, without reservation, no matter what her politics or the politics of those who support her candidacy, Judge Kuhl deserves to be appointed to the Ninth Circuit. Indeed, my only regret in having her elevated to the Ninth Circuit is that we will loose one of the best judges currently sitting on Los Angeles Superior Court. However, what we will loose by not having her good offices on the Superior Court, we will certainly gain by having her on the Ninth Circuit.

I most respectfully urge that you nominate Judge Kuhl to the Ninth Circuit.

Sincerely yours,

Gretchen M. Nelson

GMN:km

Boxer-Feinstein.wpd

GRETCHEN M. NELSON
ATTORNEY AT LAW
707 WILSHIRE BOULEVARD, SUITE 5000
LOS ANGELES, CALIFORNIA 90017

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E-mail: gnelson@gmnlaw.com

February 14, 2003

By Telecopier &
U.S. Mail

The Honorable
Patrick J. Leahy
United States Senate
433 Russell Senate Office Building
Washington, D.C. 20510

RE: Honorable Carolyn Kuhl

Dear Senator Leahy:

I am writing to urge that you support the appointment of Judge Carolyn Kuhl to the Ninth Circuit Court of Appeals.

Judge Kuhl served on the Executive Committee of the Litigation Section of the Los Angeles County Bar Association from 1999 to 2002, and during her tenure she participated in a number of legal programs sponsored by the Section. I have been a member of the Litigation Section's Executive Committee for many years and this year I am the Chair of that Section. I am also a member of the Board of Governors for the Consumer Attorneys of Los Angeles. Although I have never appeared before Judge Kuhl in a case, I have had extensive dealings with her in the context of my work for the foregoing legal organizations. In addition, I have been in contact with a number of my colleagues who have litigated and tried cases before Judge Kuhl. From all of my experiences with her, as well as from the information that I have obtained from my colleagues, there is absolutely no question that she is extremely intelligent, very hard working, thoughtful and an excellent judge.

I have previously written to various members of the Judiciary Committee urging her appointment to the Ninth Circuit. However, I believe that it is imperative that I write to you and to the other Democratic members of the Committee to voice my views as an attorney and member of the legal community where Judge Kuhl has spent most of her career.

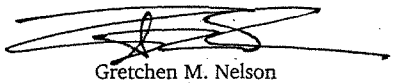
I have read numerous articles and editorials published in recent weeks regarding Judge Kuhl's nomination. I have also read statements by various organizations who seek to block her appointment. In addition, I have read the various legal briefs filed with the U.S. Supreme Court during the period that she worked for the Office of the Solicitor General and which largely form the basis for the attacks against her appointment. After a thorough review of the foregoing documents, it is my opinion that there is no sound basis for opposing her appointment based upon the work that she performed as a lawyer and an advocate for her clients.

Moreover, I am particularly disturbed by efforts to block any judicial nomination based upon positions that the candidate advocated on behalf of a client. As lawyers, we are bound professionally to explore and present all appropriate arguments to advance our clients' causes. It is for these reasons that the courts and bar associations in prescribing rules of conduct for lawyers have repeatedly stressed the importance of having lawyers advocate with zeal and vigor the client's position. Our system of justice will not survive if these underlying principles are undermined. To allow the appointment of judicial candidates to continually be blocked based on positions that they advocated as an attorney will ultimately lead to no good. Among other things, those lawyers who are interested in pursuing a judicial career may think twice about representing a client whose positions may be politically controversial or, even more disturbing, they may decide against presenting a politically controversial legal argument on behalf of a client. In addition, lawyers who are well-qualified to sit on the bench may decline to submit their names for consideration preferring not to be subjected to attack because of the work that they performed as a lawyer.

I am a life-long Democrat. I am also a plaintiffs' attorney. My political views are and have always been liberal. I have actively supported the principles and ideals that shape the Democratic party and I will continue to do so. I firmly agree with the U.S. Supreme Court's opinion in Roe v. Wade, 410 U.S. 113 (1973), and I trust that the decision will remain viable. I am opposed to the appointment of any judicial nominee who is incapable of ruling based upon a considered and impartial analysis of all of the facts and legal issues presented in any matter. Judge Kuhl is not such a nominee and she is well-deserving of appointment to the Ninth Circuit.

If you have any questions, I am happy to discuss this further with you. I thank for your consideration of my views.

Sincerely yours,



Gretchen M. Nelson

gmn:adc

Bill Nelson

Statement of Senator Bill Nelson
Senate Judiciary Committee
Nomination Hearing for Cecilia Altonaga
April 1, 2003

Mr. Chairman, I'm pleased to be here today to support Cecilia Altonaga – nominee to serve on Florida's Southern District Bench.

I would also like to welcome her husband George Menci[illegible]o, Jr. who is here to support Cecilia on this important day.

I feel strongly that federal judges must be impartial, even tempered and have a well-defined sense of justice, compassion and fair play.

After meeting with Ms. Altonaga --- and hearing from those who know her best --- I believe she possesses these important personal characteristics and has the knowledge and professional experience necessary to succeed and excel as a federal judge.

She has a proven record of excellence as both a lawyer and a state judge in south Florida. I am confident she will also be an outstanding federal judge.

A graduate of Yale Law School, she currently serves as a judge in the Criminal Division of Florida's Eleventh Judicial Circuit. During her tenure on the bench she developed an exemplary reputation as an intelligent and dedicated jurist.

Prior to serving on the state bench, Ms. Altonaga stood-out as an Assistant County Attorney in the Miami Dade County Attorney's Office.

Based on her success in these important positions of responsibility, and her strong personal character, I believe Ms. Altonaga will excel on the federal bench and will continue to be an exemplary member of Florida's legal community.

I appreciate this opportunity to endorse Ms. Altonaga and I'm looking forward to working with your Committee to secure her confirmation.

NWPC-CA

NATIONAL WOMEN'S POLITICAL CAUCUS OF CALIFORNIA

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Abrams5@aol.com

June 17, 2001

Sen. Patrick Leahy
U.S. Senate
Washington D.C. 20510

Dear Senator Leahy,

I understand that Carolyn B. Kuhl is being considered by the Bush administration for appointment as a judge on the US Court of Appeals for the Ninth Circuit. I am writing to let you know that I oppose her potential appointment.

Carolyn B. Kuhl is not the type of judge who should be appointed to the federal Circuit Courts of Appeal. Her record shows that she is wedded to an extremist right wing philosophy that is far removed from the beliefs of ordinary Americans. We need open-minded judges, not anti-choice ideologues who condone racism and restrict our ability to protect our individual rights in the courts.

Sincerely,

Nancy Nieman, Ph.D.
Southern Director

3927 Lamarr Avenue
Culver City, CA 90232

June 19, 2001

Senator Patrick Leahy
U.S. Senate
Washington, DC 20510

Dear Senator,

I understand that Carolyn B. Kuhl is being considered by the Bush administration for appointment as a judge on the US Court of Appeals for the Ninth Circuit. I am writing to let you know that I oppose her potential appointment. Carolyn B. Kuhl is not the type of judge who should be appointed to the federal Circuit Courts of Appeal. Her record shows that she is wedded to an extremist right wing philosophy that is far removed from the beliefs of ordinary Americans. We need open-minded judges, not anti-choice ideologues who condone racism and restrict our ability to protect our individual rights in the courts.

Thank you for all your continued hard work.

Sincerely,

Peggy Okuneff

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TELEPHONE (415) 512-4000
FACSIMILE (415) 512-4077

April 23, 2001

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olsenrl@mto.com

The Honorable Barbara Boxer
United States Senate
Washington, DC 20510-0504

Re: Possible Ninth Circuit Judgeship – Carolyn B. Kuhl

Dear Senator Boxer:

I am advised that the Honorable Carolyn B. Kuhl is under consideration for nomination to the United States Court of Appeals for Ninth Circuit. Given the likelihood of your involvement in her potential nomination, I thought you might appreciate the view of a good Democrat who knows her well.

Carolyn started with our law firm in 1978. Justice Anthony Kennedy, then Judge Kennedy and one of her mentors, promised us that she would be outstanding. She lived up to that promise during the 11 years that she was with us (2 years before she went to Washington, DC, and 9 years thereafter as a partner).

In sum, Carolyn is balanced, bright and hard-working. During her time with us, she handled some of the most challenging litigation that we had. I personally worked alongside her in connection with several cases, including government antitrust cases against 3 television networks and several appellate matters involving Shell Oil Company. In those situations, I was able to observe her outstanding analytical and writing skills, her oral advocacy, her collegiality, and her dedication to her clients. She impressed me on all scores.

Our law firm includes individuals who range along the political spectrum from conservative to liberal and everything in-between. Carolyn communicated with and earned the respect of all of us, and never let personal political views interfere with her client judgments or her partnership responsibilities. In this firm, we depend heavily on each other as we share work and make compensation judgments. Carolyn was a good teammate and a generous, fair-minded partner.

In addition to her work with us, she also had an important role at the United States Department of Justice. And when she returned, it was obvious that she had learned from her experience and was able to reflect that experience in the judgments that she made. I am confident that her current role as a Superior Court judge has been an important learning experience and will add immeasurably to her judgmental base. I am told by a number of Superior Court judges that Carolyn has become one of the true leaders of the Court, mentoring other women, including a recent Democratic appointment who you at one time or another considered for appointment to the federal District Court bench. She is also an intellectual leader, as is evidenced by those colleagues on the bench who seek her judgment regarding the most difficult problems.

Finally, I want to note that these professional accomplishments have not compromised her family life. She is a wonderful mother and has, from all outward appearances, a balanced and rewarding relationship with her husband. Carolyn has the ability to laugh at herself and with her colleagues.

If I can be of any further assistance in assessing Carolyn, please let me know. Best wishes.

Sincerely yours,



Ronald L. Olson

RLO:des

The Superior Court
OF THE
State of California
SAN DIEGO

Chambers of
MICHAEL B. ORFIELD
Judge of the Superior Court

Mailing Address
Post Office Box 122724
San Diego, California 92112-2724

February 21, 2003

The Honorable Patrick J. Leahy
Ranking Minority Member
Committee on the Judiciary
United States Senate
433 Russell Senate Office Building
Washington, D.C. 20510

Re: Letter of Recommendation for Appointment of Judge Carolyn Kuhl to the United States Ninth Circuit Court of Appeals

Dear Senator Leahy:

It has been my pleasure to make several recommendations for judgeships during the last 14 years that I have served on the California bench, but it is truly a privilege to recommend to you Judge Carolyn Kuhl for appointment to the United States Ninth Circuit Court of Appeals.

While my acquaintance with past nominees has always been material, it usually involves individuals who have appeared in front of me, or with whom I have litigated cases as a former attorney. In this instance, my contact with Judge Kuhl has been substantial, as I have had the privilege of working with her on one of the most important committees authorized by the Judicial Council of California, the Jury Instruction Task Force. A relatively small group of judges, attorneys, professors and members of the public have undertaken the task of writing new civil and criminal jury instructions for the State of California. From beginning to end, this effort will have taken five years, and Judge Kuhl and I have worked together on the civil jury instructions for a significant portion of that time period. I have been able to see Judge Kuhl work through complex legal issues as well as deal with the various personalities that make up the Jury Instruction Task Force.

Time and time again, Judge Kuhl has demonstrated an ability to cut to the heart of any legal issue placed before her and, at the same time, maintain a composure and dignity about her presentation that very often carried her arguments to success. Over the last five years, I can only count two people on the Task Force who have mastered both the ability to analyze complex areas of the law and to discuss the issues with clarity, professionalism and courtesy. California Court of Appeal Justice Harry Hull is one, and Judge Carolyn Kuhl is the other.

Because of its importance to Judge Kuhl's appointment to the United States Court of Appeals, I assure you that Judge Kuhl's analysis at all times emphasizes the law which supports the proposed jury instruction. With Judge Kuhl, what you see is what you get. There is no hidden agenda or hidden thought process. There is no effort to draft instructions to fit a peculiar interpretation of the law or to make new law. Our task has been to write instructions in everyday English, while not deviating from the law on any subject. Judge Kuhl's approach has at all times taken the high road, analyzing the issue, listening to the comments of her fellow Task Force members and then articulating a position that combines both clarity and legal precision. I know beyond any doubt that she would bring those considerable skills to the federal appellate court bench, and that the law and the citizens of this country would be well served by Judge Kuhl's appointment to this position.

I cannot end my letter of recommendation without commenting on the time I have spent with Judge Kuhl in a pure social setting, which typically follows a long day of debate by the Task Force. Given her considerable talents, she remains one of the most levelheaded, unassuming and gracious individuals that you will have the pleasure of meeting. However heated the discussions have become, Judge Kuhl is able to put all acrimony from the day's debate behind and bring people together who might otherwise continue to feel the tensions of the day. I believe that this is an extremely important attribute for an appellate justice who must reach consensus with other justices before a decision can be made. I respectfully suggest that it is rarely helpful to put a great legal mind on the appellate court, yet one who lacks the personality and professionalism to work through a problem and to arrive at a conclusion among his or her colleagues. Judge Carolyn Kuhl clearly represents a person who could address any legal issue placed before her and who could thereafter provide a tremendous environment for discussion and resolution. These two aspects of Judge Kuhl's credentials make her the ideal candidate for appointment to the United States Court of Appeals.

Perhaps it goes without saying, but I am available to discuss Judge Carolyn Kuhl's appointment with anyone at anytime. My private phone number in chambers is 760-806-6329.

Very truly yours,

MICHAEL B. ORFIELD
Judge of the Superior Court

MBO/ss

PACIFIC INSTITUTE FOR WOMEN'S HEALTH

Honorable Patrick Leahy
United States Senate
433 Russell Senate Office Building
Washington, DC 20510-4502

July 12, 2001

Dear Senator Leahy:

The Pacific Institute for Women's Health is a health and human rights organization based in California. Our organization is dedicated to improving the reproductive and sexual health of women and girls. The Pacific Institute sees access to high quality information, education and health care services as fundamental to women's and girls' health and empowerment. The Institute considers abortion to be a health and human rights issue: abortion must be safe and legal in order to protect a woman's right to decide whether and when to have children without perilous consequences for her health and life. This being our area of expertise and concern, we wish to register our emphatic opposition to the proposed nomination of Carolyn Kuhl to the 9th Circuit Federal Court of Appeals.

Judge Kuhl has proved her professional ability in the rise to her current position as judge of the Los Angeles Superior Court; however, throughout her career, Kuhl's partisan arguments have cast doubt on her ability to be moderate and open-minded in the manner expected of lifetime appointed federal judges. Judge Kuhl is aggressively anti-choice and has demonstrated an unacceptable hostility to women's reproductive rights. Most troublesome is her co-authorship of a brief urging the U.S. Supreme Court to overturn the monumental decision of Roe v. Wade and "return the law to the condition in which it was before that case was decided."[1]

We cannot afford to have in our judiciary an individual who is so set on promoting her personal beliefs as to manipulate the law and Constitutional interpretation to advance them. Her stalwart beliefs often fly in the face of medical modernity and social reality. To be sure, the effect of successful anti-choice activism is often just an increase in the performance of unsafe "underground" abortions, which we, as health professionals, cannot tolerate.

Judge Kuhl's legal career has been extremely politically charged. For example, while in private practice, she argued for Title X-funded family planning clinics to be prohibited from counseling women about abortion *or even informing them that abortion is a legal option*.[2] Where a "guardian of the law" can be cited as having promoted legal ignorance, we have good cause to be apprehensive of promoting her to a position of heightened power.

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[1] Brief for the United States as Amicus Curiae in Support of Appellants, *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 474 (1986) (Nos. 84-495, 84-1379).
[2] Brief of the American Academy of Medical Ethics as Amicus Curiae in Support of Respondent, *Rust v. Sullivan*, 500 U.S. 173 (1991) (Nos. 89-1391, 89-1392).

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PACIFIC INSTITUTE FOR WOMEN'S HEALTH

In reviewing her fitness for this judicial position, we are shocked by her repeated attacks on women's privacy. Kuhl has argued for the legality of restrictions requiring reproductive health clinics with Title X funding to notify the parents of young women and men seeking contraception, which is an infringement of patient confidentiality.[3] Furthermore, she has argued for the legal appropriateness of making personal information about women who receive abortions publicly available and of requiring doctors to dispense anti-choice materials to women seeking abortions.[4] These forms of pressuring women to make a particular health choice are unacceptable advocacy from anyone, much less a judicial figure. While it will be pointed out that these positions were promoted under a cloak of legal advocacy for a client, the truth is that her willingness to be actively involved in these attempts at promoting a conservative, extremist legal philosophy demonstrate an inability to separate her personal convictions from her legal considerations.

We are confident that a thorough review of Judge Kuhl's history will encourage you to oppose her nomination to the Ninth Circuit. We urge your vote against the nomination of Carolyn Kuhl in order to protect women's rights and the legal progress which has secured those liberties over the years.

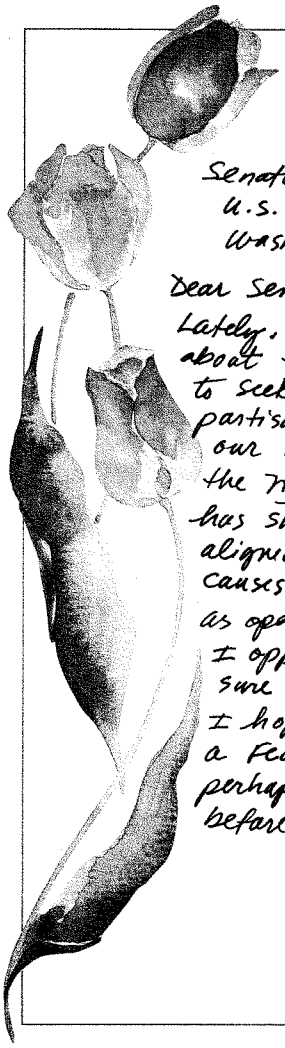
Respectfully Yours,

Lovisa Stannow, Executive Director
Pacific Institute for Women's Health
2999 Overland Ave., Suite 111
Los Angeles, CA 90064
(310) 842-6828 tel.
(310) 280-0600 fax.

[3] *Planned Parenthood Federation of America, Inc. v. Heckler*, 712 F.2d 650 (D.C. Circ. 1983); Barbara Rosenwicz, "A Federal Appeals Court Is Being Asked to Choose Between Keeping Teenagers' Requests for Birth Control Aids Confidential or Exposing Them to Their Parents," *UPI*, May 10, 1983.

[4] Alan Bloom, Lyle Swallow, Carolyn Kuhl and Rex Julian Benber, "The Future of Civil Punishment: Punitive Damages from Spilled Coffee to Bone Marrow Transplants", 16 Wittier LR 971 (1995).

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e-mail piwh@piwh.org



Donna Palafoutas
11172 Hunting Horn
Santa Ana, CA. 92705

July 10, 2001

Senator Patrick Leahy
U.S. Senate
Washington DC. 20510

Dear Senator Leahy:

Lately, I have become concerned about the rights of ordinary citizens to seek fair, non-biased and non-partisan opinions from members of our Federal Courts. A nominee for the Ninth Circuit Court, Carolyn B. Kuhl, has shown by her record to be aligned to extreme right wing causes, even as she represents herself as open-minded and even-handed. I oppose her nomination and I am sure many Californians agree with me. I hope never to have to go before a federal judge with the fear that perhaps my case has been prejudiced before it has been heard.

Sincerely,

Donna Palafoutas

STATE OF CALIFORNIA
Court of Appeal
SECOND APPELLATE DISTRICT
DIVISION SEVEN
300 SOUTH SPRING STREET
LOS ANGELES, CALIFORNIA 90013

DENNIS M. PERLUSS
ASSOCIATE JUSTICE

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dennis.m.perluss@jud.ca.gov

January 31, 2003

The Honorable Dianne Feinstein
331 Hart Senate Office Building
Washington, D.C. 20510

Re: Hon. Carolyn B. Kuhl

Dear Senator Feinstein:

I am writing to express my strong support for the President's nomination of Judge Carolyn B. Kuhl to the United States Court of Appeals for the Ninth Circuit.

As someone who was an active Democrat prior to my appointment to the bench by Governor Gray Davis, I have no desire to see our federal courts filled with conservative ideologues who inject personal social and political agendas into the judicial process. Judge Kuhl is not such a person. During her tenure on the Los Angeles Superior Court, Judge Kuhl has demonstrated a commitment to intellectual honesty and independent and impartial decision making, as well as an active concern for ensuring a fair and accessible legal system. Judge Kuhl is highly respected by her colleagues on the trial court, Democrats and Republicans alike, as well as by those of us who serve on the appellate court and who review her decisions on a regular basis.

I strongly recommend Judge Kuhl's appointment to the Ninth Circuit. I am confident that, if confirmed, she will distinguish herself as a thoughtful and dedicated appellate judge.

Cordially,

Dennis M. Perluss

cc: The Honorable Orrin G. Hatch
The Honorable Patrick J. Leahy

424 Sharon Road
Arcadia, CA 91007
June 24, 2001

Honorable Patrick Leahy
433 Senate Russell Office Bldg.
Washington DC 20510

Dear Honorable Leahy,

Please excuse the printed letter. Handwriting is difficult for me, and hard for others to read. I feel very strongly about this subject, and want my words to be legible.

Please do all you can to oppose the appointment of Carolyn Kuhl as a judge on the Ninth Circuit of the U.S. Court of Appeals. We need judges who will approach cases in an unbiased and open-minded manner, heeding our California laws as they are now written to protect our rights and freedoms as individuals.

Extremism in all forms frightens me. Judges, of all people, should hold to the middle ground, being neither extremely conservative nor extremely liberal. Their judgments from the bench could not help but be influenced by their own extremist views!

I'm a senior citizen who is not worried for myself, but for my children and grandchildren, and all other citizens of this wonderful country who may find someday soon that their rights have been taken away bit by bit without a vote and without their knowledge. Judges have awesome power!

Thank you for giving this important matter your consideration.

Sincerely yours,

Ann L. Petersen

Ann L. Petersen

Planned Parenthood®
Federation of America, Inc.

Planned Parenthood Federation of America Statement Regarding the Nomination of Carolyn Kuhl to the Ninth Circuit Court of Appeals

The Planned Parenthood Federation of America (PPFA), the world's largest and most trusted voluntary family planning organization, has a long-standing history of working to ensure the protection of reproductive rights as well as working to advance the social, economic, and political rights of women. Because lower federal courts exercise enormous power in deciding cases involving women's rights, the right to privacy, reproductive freedoms, and other basic civil rights, PPFA believes that judges appointed to these courts must demonstrate a commitment to safeguarding these fundamental rights. PPFA will oppose confirmation of nominees who fail to do so.

We believe that California Superior Court Judge Carolyn Kuhl's record demonstrates that she is not committed to protecting these rights. Therefore, PPFA opposes her nomination to the United States Court of Appeals for the Ninth Circuit.

Judge Kuhl held various positions in the U.S. Department of Justice during the Reagan administration. From 1982 to 1985, Kuhl held the appointment of Deputy Assistant Attorney General for the Civil Division. During her tenure in that position, the Supreme Court agreed to hear *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986), a challenge to several Pennsylvania abortion restrictions. The Reagan administration filed a brief in *Thornburgh* that not only supported the Pennsylvania restrictions, but also called for an outright reversal of *Roe v. Wade:*

> Indeed, the textual, doctrinal and historical basis for *Roe v. Wade* is so far flawed, and . . . is a source of such instability in the law that this Court should reconsider that decision and on reconsideration abandon it.[1]

The Acting Solicitor General at the time the *Thornburgh* brief was filed, Charles Fried, wrote, in his book, *Order and Law*, that when he was considering what position to take in the case, "[t]he most aggressive memo came from my friends Richard Willard and Carolyn Kuhl in Civil, who recommended that we urge outright reversal of *Roe*."[2]

In addition, when in private practice, Kuhl chose to serve as counsel for the American Academy of Medical Ethics in *Rust v. Sullivan*, 500 U.S. 173 (1991), the case challenging the "gag rule" – federal regulations promulgated by the Bush I administration that prohibited health care professionals at family planning clinics that receive funding from the Title X program from counseling women about abortion – or even providing non-directive counseling that informed

[1] Brief for the United States as Amicus Curiae in Support of Appellants, *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 474 (1986) (Nos. 84-495, 84-1379).

[2] Charles Fried, *Order and Law: Arguing the Reagan Revolution – A Firsthand Account* 33 (1991).

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www.plannedparenthood.org
www.teenwire.com

them of abortion as an option. Kuhl's brief argued that this prohibition did not violate the rights of the health care providers and their patients.[3]

Given Kuhl's record demonstrating animosity towards reproductive rights, PPFA joins other organizations concerned with women's rights and civil rights in opposing her nomination to the Ninth Circuit Court of Appeals.

[3] Brief for the American Academy of Medical Ethics as Amicus Curiae in Support of Respondent, *Rust v. Sullivan*, 550 U.S. 173 (1991) (Nos. 89-1391, 89-1392). The Supreme Court upheld the gag rule in a 5-4 decision.

STUART R. POLLAK
ASSOCIATE JUSTICE

STATE OF CALIFORNIA
Court of Appeal
FIRST APPELLATE DISTRICT
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justice.pollak@jud.ca.gov

February 5, 2003

Hon. Orrin Hatch
Chairman, Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, D.C. 20510

Re: Judge Carolyn Kuhl

Dear Senator Hatch,

In connection with your consideration of the nomination of Judge Carolyn Kuhl to sit upon the federal Court of Appeals for the Ninth Circuit, I would like to offer certain observations based upon my experience in working with Judge Kuhl.

For approximately the past two years, Judge Kuhl and I have served together as members of a task force of the California Judicial Council which is rewriting the standard jury instructions for use in the trial courts of this State. Judge Kuhl and I are members of the subcommittee rewriting the instructions for all civil litigation. In connection with this work, we have spent many hours together in the process of analyzing and revising the instructions to state clearly, fairly and in accordance with governing law the rules and principles that should guide juries in deciding civil cases of all types.

Throughout this process, Judge Kuhl has consistently displayed not only a keen intellect, but an objective and open-minded approach to her work. To me, it has been apparent that she has endeavored to state the law as written by the Legislature and interpreted by prior judicial decisions, not skewed by her own preferences or predilections. I cannot speak to her views on controversial issues that have been discussed in the media, but I can say that I would have complete confidence in the manner in which she would approach any of these issues were they to come before her on the federal bench. I have no doubt that she would faithfully adhere to the decisions of the Supreme Court, that she would interpret federal statutes as well as the constitution reasonably and without a preconceived agenda, and that her decisions would be balanced and far from any political or ideological extremes.

I believe that Judge Kuhl is a thoughtful and compassionate person who well deserves, and would not abuse, the trust that would accompany her confirmation to the Ninth Circuit.

Very truly yours,

Stuart Pollak
Associate Justice

Dear Senator Leahy,

Please reject president Bush's nomination of Carolyn Kuhl as a US. District Court judge. She has a track record of supporting racially discriminatory policies and arguing before the Supreme Court to overturn Roe vs. Wade. We need judges committed to upholding civil and reproductive rights.

Sincerely,

Ann Porter
4840 Ellenwood Dr.
Los Angeles, CA 90041

PROJECT FREEDOM OF RELIGION

an educational project of the Unitarian Universalist Service Committee and the Pacific Southwest District of the Unitarian Universalist Association

mail: Throop Memorial Church
300 S Los Robles Ave
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voice: 818-771-7787
project-for@eudoramail.com

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UU Fellowship of Kern Co., Bakersfield
Emerson UU Church, Canoga Park
Coronado UU Church
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UU Fellowship of Hemet and San Jacinto Valley
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UU Church of Santa Paula
UU Fellowship of Leisure World, Seal Beach
UU Fellowship of San Dieguito, Solana Beach
UU Church of Studio City
UU Fellowship of the Conejo Valley, Thousand Oaks
UU Church of Ventura
Palomar UU Fellowship, Vista
UU Congregation of Whittier

March 28, 2003

Senator Dianne Feinstein

United States Senate
Washington DC 20510

Dear Senator Feinstein

We believe the most crucial and far reaching issue today is the not the war in Iraq, but in the administration's effort to pack our federal courts with extremists. Long after this war has been resolved, Americans will be suffering the effects of court decisions from Bush's appointees.

Currently Bush has again nominated Carolyn Kuhl to the Ninth Circuit Court of Appeals. Another jurist who, by her own record, is clearly anti-choice, supports "school choice" and prayer in the schools. She is a Federalist Society member and far right idealogue who should not be placed on a court that has traditionally been a court upholding Democratic ideals.

This nomination must be stopped in order to preserve the integrity of the 9th Circuit Court.

Please let me know how you voted on this matter.

Sincerely,

William R. Lakin

William R. Lakin
Executive Committe

7-08-01

Dear Senator Leahy

I'm not a constituent, but please know that I am concerned about the nomination of Carolyn Kuhl for the Federal Circuit Court. We need moderate, open minded judges –

Thanks,

Nancy Renbarger
NANCY RENBARGER
4000 YANKEE DR
AGOURA HILLS CA 91301
NRenbarger@aol.com



The Foundation
for a Smokefree America

June 22, 2001

Senator Barbara Boxer
Senator Dianne Feinstein
Senator Patrick Leahy
US Senate
Washington, DC 20510

Dear Senators Boxer, Feinstein and Leahy,

I have just learned, much to my dismay, that Carolyn B. Kuhl has been nominated by the Bush Administration for appointment as a judge on the US Court of Appeals for the Ninth Circuit. I strongly oppose this appointment.

Ms. Kuhl's past record on the bench proves that she is locked in to an extremist right wing philosophy. Carolyn B. Kuhl is therefore not the type of judge who should be appointed to the federal Circuit Courts of Appeals. We need open-minded judges, not anti-choice idealogues who would restrict our ability to protect our individual rights in the courts.

In short, I believe Ms Kuhl will help move the Ninth Circuit Court of Appeals closer to the extreme Right. We do not need this in our court system at such a high level – or for that matter, at any level. She is not representative of the views of ordinary Americans.

President Bush has used his power thus far to pursue an uncompromising right wing agenda, that is an insult to the bipartisanship he has falsely claimed to embrace. Both his actions as President and his nominations to the courts have turned our nation hard – I repeat, hard -- to the right.

At this time, we need moderate, reasonable candidates for our court system, not right wing idealogues like Ms Kuhl. Otherwise our nation will slide into a darker age of ever-greater corporate power, a weak, complicit government, intolerance. and an acceleration of the already fast widening gap between our haves and have-nots. Please do not confirm Bush's nominee, Carolyn B. Kuhl.

Very truly yours,

Patrick Reynolds, President

P.O. Box 492028 • Los Angeles CA 90049-8028
Tel (310) 471-0303 • Fax (310) 471-0335
www.tobaccofree.org

Susan Reynolds and Associates
Leadership and Management Consultants

Susan F. Reynolds, M.D., Ph.D.
Managing Partner

April 30, 2001

PERSONAL AND CONFIDENTIAL

Senator Dianne Feinstein
331 Senate Hart, 3rd Floor
Washington, DC 20510

Dear Dianne:

Recently the *Los Angeles Times* reported that the Honorable Carolyn Kuhl is under consideration to be nominated as a judge of the federal appellate court for the Ninth Circuit. I am writing to let you know that I support Carolyn's candidacy for that position. I have known Carolyn for over 20 years because she is married to my first cousin, the Honorable William Highberger. Our children were born within a month of each other, and we have shared the experience of motherhood together as well as many family occasions, both happy and sad.

Carolyn's law practice put her in the top ranks of the local legal profession, and I understand from friends, who are lawyers, that she is very well respected as a Superior Court judge. I am sure that you have the basics of her educational background and know that she was in one of the very first classes at Princeton that admitted women. Perhaps what I can best add to what you already know about Carolyn from the paper record is that she has always seemed to me to be an open-minded and tolerant person. In our circle of friends she is one of the few Republicans, but in discussions of issues of the day she is respectful of the views of others and never comes across as doctrinaire. In fact, it is noteworthy that during the fall 2000 election campaign, Carolyn's teenage daughter declared herself a Democrat and volunteered to work at Democratic headquarters in Pacific Palisades. I know Carolyn thought this would be good experience for her, thereby demonstrating that she is tolerant of other people's views. I understand that on the Ninth Circuit, the judges must interact with each other to reach agreed decisions. I think that Carolyn would work well in that environment.

Carolyn is a person of good character and the utmost integrity. I believe she would be a fair judge and would follow the law whether she agrees with it or not. I hope that these views from the perspective of a non-legal professional are useful to you in considering Carolyn's candidacy. If I can answer any questions or provide any additional information, please call me. I can be reached at (310) 454-4933

Best regards,

Susan F. Reynolds, M.D., Ph.D.
Managing Partner

SFR:tsb

100 Wilshire Blvd., Santa Monica, CA 90401
Tel: (310) 656-7308 Fax: (310) 394-7660 E-mail: sfreynolds@earthlink.net

July 8, 2001

Dear Senator Leahy,

I am against the nomination of Carolyn Kuhl to be judge of the U.S. Court of Appeals. Her record shows me that she has very definite ideas on matters that are very extreme.

I would like a candidate that is more moderate in all areas.

Sincerely,

Phoebe J Rivera

Ms. Phoebe Rivera
501 Dorado Ct.
Oak Park, CA 91377

HONORABLE
ENRIQUE ROMERO
SUPERIOR COURT JUDGE
(RET.)

February 25, 2003

Via Fax Only

Hon. Patrick Leahy
U.S. Senator (Vermont)
202.224.3479

Re: Hon. Carolyn B. Kuhl, Nominee to the 9th Circuit Court of Appeals

Dear Senator Leahy:

I am writing this letter of support for the confirmation of Judge Kuhl on my own and not at the request of Judge Kuhl. I am a retired Los Angeles County Superior Court Judge who served with Judge Kuhl for a number of years before my retirement. As a lawyer, I was a Special Assistant to the Hon. Drew S. Days III when he was the Assistant Attorney General for the Civil Rights Division in the United States Department of Justice under Attorney General Ben Civiletti. I am also a former federal prosecutor in the U.S. Attorney's Office for the Central District of California.

I have personally worked with Judge Kuhl in a number of civil cases while we were both on the bench, have discussed Judge Kuhl's abilities as a fair and impartial judge with a number of lawyers, both consumer trial lawyers, civil rights lawyers and lawyers on the opposite side of counsel table and can report to you that the concensus is unanimous amongst these lawyers that Judge Kuhl is on the top ten of the list of these lawyers of judges that they would pick to preside over any of their trials. I have also spoken to many of my colleagues on the bench and their consensus is that Judge Kuhl is one of our top notch judges in the LA County Superior Court.

As an American of Mexican ancestry and a long supporter of civil rights, I am personally offended when I hear reports in the media about bias on the part of Judge Kuhl because of my personal dealings with her and based on the above.

I would hope that you will support her confirmation and would hope that you can convince your colleagues to do the same. She will be a valuable asset to the much overworked 9th Circuit.

Very truly yours,

Judge Enrique Romero (Ret.)

485 Columbia Circle • Pasadena, CA 91105-3306 • (626) 403-3563 • Fax: (626) 403-6476

DUKE LAW

DUKE UNIVERSITY SCHOOL OF LAW
Box 90360 (mail) • Science Dr. at Towerview (express)
DURHAM, NORTH CAROLINA 27708-0360

THOMAS D. ROWE, JR.
ELVIN R. LATTY PROFESSOR OF LAW

PHONE 919/613-7099
FAX 919/613-7231
E-MAIL TROWE@LAW.DUKE.EDU

FEBRUARY 19, 2003

Hon. Orrin G. Hatch, Chairman
U.S. Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Senator Hatch:

I have known Judge Carolyn Kuhl since she was a student at Duke Law School in my early years on the faculty here. She was an excellent student throughout her time with us, and she did very well indeed in the one of my courses that she took. She has gone on to fulfill amply her early promise, displaying especially high legal capability and professionalism in all the connections in which I have known her. Those have been several--as an active and supportive Duke alumna, as a colleague during a period I spent on leave working at the Los Angeles firm where she was then a partner, and as a friend whom I have seen socially. She has always struck me as combining a keenly analytical mind with a reflective bent and deep professional commitment. In addition, of course, she has a rich variety of legal experience that combines with her talents to make her a highly qualified nominee.

Along with these qualities of mind and attainment she has in my acquaintance with her invariably been especially personable and gracious, making her a pleasure to work with. I am aware of political issues that for some may bear on the appropriateness of her confirmation to the federal appellate bench. I don't see it as my role to address those, except to say that I regard her as a person with the integrity to follow and apply the law as she understands it to be regardless of any personal views about what it should be, and with the vital ability to maintain the most cordial of personal and working relationships across political divides. What I can speak to are the qualities of ability, professionalism, character, and personality that I have known in her. I am happy to attest that on all these measures, she is in my estimation truly outstanding.

Sincerely yours,

Tom Rowe

Thomas D. Rowe, Jr.

UNIVERSITY OF NEVADA RENO

Department of Political Science/302
Reno, Nevada 89557-0060
(775) 784-4601

14 Hawkside Court
Markleevile, CA 96120
Ph. 530-694-2990 * FAX 530-694-2460
Email wilmarule@gbis.com

July 22, 2001

Honorable Senator Patrick Leahy
433 Russell Senate Office Building
Washington, DC 20510

Dear Senator Leahy:

As Chair of the Senate Judiciary Committee you will be considering the nomination of Judge Carolyn Kuhl to the United States Court of Appeals for the Ninth Circuit. It is clear from Judge Kuhl's record that she is not committed to the protection of civil rights, individual liberties, and equal protection of the laws.

As a Justice Department official in the Reagan Administration she sought to reinstate the tax-exempt status of Bob Jones University and other racially discriminatory schools. She has been involved in anti-choice legislation and is apparently disdainful of privacy rights (Sanchez-Scott v. Alza Pharmaceuticals).

I feel that her ultra-conservative judicial activism makes her unfit for appointment to the United States Court of Appeals.

Sincerely,

Wilma Rule
Adjunct Professor

GERALD M. SALLUS
ATTORNEY AT LAW
5004 RAINBOWS END
CULVER CITY, CALIFORNIA 90230
(310) 559-2536

June 15, 2001

SENATOR DIANE FEINSTEIN
SENATE HART OFF BLD. 331
SECOND & C NE
WASHINGTON DC 20510

Dear Senator,

I understand that Carolyn B. Kuhl is being considered by the Bush administration for appointment as a judge on the US Court of Appeals for the Ninth Circuit. I am writing to let you know that I oppose her potential appointment. Carolyn B. Kuhl is not the type of judge who should be appointed to the federal Circuit Courts of Appeal. Her record shows that she is wedded to an extremist right wing philosophy that is far removed from the beliefs of ordinary Americans. We need open-minded judges, not anti-choice ideologues who condone racism and restrict our ability to protect our individual rights in the courts. She is also in favor of churches receiving vouchers from the government without any civil rights protocol being followed. In essence she is opposed to the Jeffersonian principal of separation of Church and State.

We failed by allowing Ashcroft to choose the Bush nominees for the federal judiciary. We must now be more diligent in reviewing nominees so that the courts do not continue their drift to the far right.

Sincerely,

GERALD M. SALLUS, ESQ.

GMS/bs
cc: Sen. P. Leahy

February 6, 2003

VIA FACSIMILE: (415) 956-6701

Honorable Barbara Boxer
United States Senate
Hart Building #112
Washington D.C. 20510

Dear Senator Boxer:

I am writing to express my concern over the re-nomination of Carolyn Kuhl to the United States 9th Circuit Court of Appeals. I feel that Kuhl's hostility to established reproductive rights makes her unsuited for this position. Kuhl has argued for the overturn of Roe v. Wade and supported the domestic gag rule, which as you know prohibited clinics receiving federal funds from providing women with full information about their reproductive health options.

With a woman's right to choose in peril, we cannot afford to have another extremist, anti-choice judge sitting on the federal bench. Our nation deserves a federal court pledged to upholding the hard fought constitutional rights secured through Supreme Court precedents such as Roe v. Wade.

Please stop this nomination from going any further.

Thank you,

Mark Salo
President and CEO

March 3, 2003

Senator Patrick Leahy, Ranking Member
Senate Judiciary Committee
U. S. Senate
Washington, D. C. 20510

Dear Senator Leahy:

My name is Azucena Sanchez-Scott. In 1999, my case against my former oncologist went before Superior Court Judge Carolyn B. Kuhl of Los Angeles, California. During a chemotherapy follow-up exam, my oncologist brought an unfamiliar person into the exam room without disclosing who he was or what he was doing there.

After the examination, I asked the receptionist, who then told me who he was. I was shocked and dismayed to learn that the person was not a doctor or medical technician, but a sales representative from a drug company. I felt violated because I had disrobed for my examination. I wondered how many times this had occurred with other patients in my situation who were also fighting cancer and the emotional pain of disfigurement. People having this devastating disease are often entirely focused on their diagnosis and treatment and may not ask about the stranger in their exam room. As a cancer survivor, I trusted that my doctor would make decisions in my best interest.

Judge Carolyn B. Kuhl, heard my case and found no fault in the doctor's actions. I was again shocked and dismayed that Judge Kuhl determined that I, not the doctor, had the obligation to protect my privacy in his exam room. Judge Kuhl denied my request to allow a jury to determine if the intrusion was highly offensive to a reasonable person. I am glad to say that Judge Kuhl's decision was later reversed when I appealed.

I am therefore, very opposed to any effort to promote Judge Kuhl to a higher court.

Respectfully yours,

Azucena Sanchez-Scott

Azucena Sanchez-Scott

June 14, 2001

Dear Senator Leahy,

NO ON Carolyn B. Kuhl for the 9th circuit. I have dedicated the last 20 years of my life for women and their reproductive rights. This woman, with her extremist right wing views, cannot be allowed to set the country on a backward slide.

Please block her possible nomination!

Thank you,

Joyce Schorr
3613 Meadville Drive
Sherman Oaks, CA 91403



March 17, 2003

The Honorable Orrin G. Hatch
Chairman
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Patrick Leahy
Ranking Member
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, D.C. 20510

RE: Nomination of Carolyn Kuhl to the U.S. Court of Appeals for the Ninth Circuit

Dear Senators Hatch and Leahy:

On behalf of the 1.5 million working people represented by SEIU, I am writing to express our serious concern over the nomination of Carolyn Kuhl to the United States Court of Appeals for the Ninth Circuit. In Judge Kuhl, the Senate Judiciary Committee has been presented with a nominee whose extreme conservative views and record suggest a hostility to the interests of the working men and women we represent.

As the highest-ranking woman in our union (a union with more than 800,000 female members), I am particularly alarmed by Judge Kuhl's record on issues of concern to women. Judge Kuhl's ruling in a recent privacy case involving a breast cancer patient, her authorship of a Supreme Court brief on behalf of an employer charged with sexual harassment, and her advocacy for major restrictions on women's reproductive freedoms all raise major concerns about whether she would bring an appropriate respect for women's rights to the federal bench.

In addition to her troubling record on issues affecting women, Judge Kuhl also has exhibited an unacceptable hostility to civil rights, a disturbing willingness to close the courthouse doors on plaintiffs seeking to vindicate their legitimate legal rights, and a bias in favor of managerial prerogatives over the workplace rights of employees. Attached to this letter is a fact sheet prepared by my staff which elaborates on each of these points in thoughtful detail.

ANDREW L. STERN
International President

ANNA BURGER
International Secretary-Treasurer

PATRICIA ANN FORD
Executive Vice President

ELISEO MEDINA
Executive Vice President

TOM WOODRUFF
Executive Vice President

SERVICE EMPLOYEES
INTERNATIONAL UNION
AFL-CIO, CLC

1313 L Street, N.W.
Washington, D.C. 20005

202.898.3200
TDD: 202.898.3481
www.SEIU.org

81-05-1000

SEIU is committed to a federal judiciary that protects the civil, constitutional, and workplace rights of all Americans. Carolyn Kuhl's record strongly suggests that she would not bring an appropriate respect for these rights to the bench.

Thank you for considering our views.

Sincerely,

Anna Burger
International Secretary-Treasurer

AB:la
opeiu #2
afl-cio

Enclosure

FACT SHEET ON CAROLYN KUHL

Medical Privacy

In Sanchez-Scott v. Alza Pharmaceuticals, when a breast cancer patient went for a routine examination with her oncologist, the doctor invited an unidentified man into the examination room, and conducted the breast exam (which included the removal of the patient's blouse and bra). Unbeknownst to the patient, the unidentified man was not a doctor, nurse, or medical professional, but a salesman for a pharmaceutical company. When the patient discovered this fact, she sued the pharmaceutical company for invasion of privacy. In Judge Kuhl's court, the pharmaceutical company made the astounding argument that the salesman's presence during the breast exam was not highly offensive but merely "a situation which [the patient] found socially uncomfortable." Judge Kuhl ruled in favor of the pharmaceutical company and dismissed the case – not even permitting the patient to bring her claim to a jury. Judge Kuhl's decision was reversed unanimously by the Court of Appeals. Sanchez-Scott v. Alza Pharmaceuticals, 86 Cal.App.4th 365 (2001).

Sexual Harassment

As Deputy Solicitor General, Kuhl co-authored an amicus brief in the Meritor Savings Bank case (on the side of an employer charged with sexual harassment) defending the trial court's determination that if an employee "voluntarily" engages in sexual conduct with her supervisor, the employee is barred from bringing a sexual harassment claim based on that sexual conduct. Kuhl's brief expressed a concern that the broader standard adopted by the court of appeals – which held that "voluntary" sexual conduct can still constitute harassment – would "unfairly subject employers to liability." The Supreme Court, in an opinion authored by Justice Rehnquist, rejected the trial court decision that Kuhl's brief defended. See Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986).

Reproductive Freedom

Kuhl has been a leading advocate for the elimination of a woman's right to choose. In the 1985 Supreme Court case of Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986), Kuhl coauthored an amicus brief which argued explicitly that the Court should overrule Roe v. Wade. As the brief contended, "the textual, doctrinal and historical basis for Roe v. Wade is so far flawed, and . . . is a source of such instability in the law that this Court should reconsider that decision and on reconsideration abandon it." It is also worth noting that Charles Fried, who was Solicitor General during Kuhl's tenure at the Justice Department, has commented on Kuhl's extreme advocacy on the abortion question. In his book Order and Law, Fried describes Kuhl's involvement in the Thornburgh case this way: "Right after I

became Acting Solicitor General, the Supreme Court agreed to hear Thornburgh . . . . The divisions which would be heard on such issues . . . all wrote recommendations in ordinary course. The most aggressive memo came from my friends Richard Willard and Carolyn Kuhl in Civil, who recommended outright reversal of Roe."

Civil Rights

In the area of civil rights, Judge Kuhl played a central role in an ugly chapter of our nation's struggle against racial prejudice. Throughout the 1970s, the IRS denied tax-exempt status to schools that discriminated on the basis of race. Bob Jones University, a fundamentalist Christian school in South Carolina, challenged this rule in the Supreme Court in 1981. Judge Kuhl was then an attorney with the Department of Justice and urged the Reagan administration to argue against the rule and in favor of a decision permitting racially discriminatory institutions to receive the benefits of tax-exemption. A *New York Times* piece described Kuhl as one of "a band of young zealots in the department [who] pressed for the legal switch." The same column described the legal conclusion reached by Kuhl as "incompetent," and asked "[h]ow could lawyers for the U.S. government stray so far from the mainstream of the country's understanding on the racial issue?"

Closing the Courthouse Doors

Kuhl has argued in a number of different contexts for closing the courthouse doors on plaintiffs seeking to vindicate their rights. In this respect, Judge Kuhl is part of a disturbing pattern among President Bush's judicial nominees, many of whom have made great efforts to keep Americans from seeking a judicial remedy when their rights are violated. Judge Kuhl, for example, authored an amicus brief in the U.S. Court of Appeals for the Ninth Circuit, see United States v. General Dynamics Corp., 4 F.3d 827 (9th Cir. 1993), in which she argued that the Constitution does not permit individuals to sue on behalf of the government when the government is defrauded. Kuhl made this argument despite the fact that Congress specifically allowed such lawsuits when it amended the False Claims Act in 1986. In International Union, UAW v. Brock, 477 U.S. 274 (1986), a Supreme Court case of particular interest to unions and their members, moreover, Kuhl argued that a union could not bring a lawsuit on behalf of its members who had illegally been denied unemployment benefits. The Supreme Court rejected this unduly cramped interpretation of the principles of standing.

Managerial Prerogative

Judge Kuhl expressed a bias toward managerial prerogative in a 1994 article she titled "Employment at the Will of the Courts" (which was included in Law, Economics & Civil Justice, published by the Free Congress Foundation). In this article, Kuhl argued that the combination of federal anti-discrimination laws, collective bargaining

agreements, and state law causes of action for unjust discharge have had the unfortunate effect of "inhibit[ing] employer action." Kuhl, in her article, stresses what she sees as the "costs to society" from such restrictions on employer action, restrictions that arise from laws which protect employees' rights at work. The article suggests Kuhl's willingness to shape legal arguments to conform with her clearly one-sided understanding of economic theory.

SOUTHWESTERN
UNIVERSITY
SCHOOL OF LAW

June 19, 2001

Senator Patrick Leahy
U.S. Senate
Washington, DC 20510

Via facsimile
202/224-3479

Dear Senator Leahy:

I understand that Carolyn B. Kuhl is being considered by the Bush administration for appointment as a judge on the US Court of Appeals for the Ninth Circuit. I am writing to let you know that I oppose her potential appointment. Carolyn B. Kuhl is not the type of judge who should be appointed to the federal Circuit Courts of Appeal. Her record—from her early involvement in the Reagan about-face on Bob Jones University's tax exemption to her current support of reactionary and regressive positions—shows that she is wedded to an extremist right wing philosophy that is far removed from the beliefs of ordinary Americans. We need open-minded judges, not anti-choice ideologues who condone racism and restrict our ability to protect our individual rights in the courts.

Sincerely,

Katherine C. Sheehan
Professor of Law

675 South Westmoreland Avenue Los Angeles, California 90005-3992 (213) 738-6700

June 1, 2001

The Honorable Barbara Boxer
United States Senator
112 Hart Senate Office Building
Washington, DC 20510

RE: Nomination of Judge Carolyn Kuhl to US Court of Appeals, Ninth Circuit

Dear Senator Boxer:

I am writing in support of the nomination of Judge Carolyn Kuhl of the Los Angeles Superior Court to be a judge of the US Court of Appeals for the Ninth Circuit. Although I have since retired to my home state of Kansas, you may remember me as a gay and AIDS activist and Boxer supporter from the Bay Area. I supported you personally in both the primary and general elections in 1992, and also supported you through my leadership positions in the Human Rights Campaign and the Bay Area Non-Partisan Alliance. I am also a long-time California attorney, with more than twenty years of active practice and continuing membership in the State Bar of California. You may also recall that I was a candidate for a position on the US District Court for the Northern District of California in 1993. I was treated with great fairness in that process by your Northern District Judicial Advisory Committee, chaired by Cris Arguedas, and I know you will bring that same fairness to the process of considering current judicial nominees.

I understand and agree with the desire of Democratic Senators to scrutinize carefully the Bush administration's nominees for the federal courts. I also understand the procedural issues between the two caucuses in the Senate. When these issues are resolved and the new Senate majority is ready to act on the administration's judicial nominees, I urge you to allow Judge Kuhl's name to go forward, either with your support or your neutrality. While I wanted a Democratic President who would have nominated different judges than the present administration will nominate, Judge Kuhl is an open-minded, fair person, who is exceptionally well-qualified to serve on the Ninth Circuit.

I first met Judge Kuhl when she came to Los Angeles in the late 1970s. She eventually married my good friend and law partner at Gibson, Dunn & Crutcher, Bill Highberger. I knew Carolyn quite well in the years when I practiced in Los Angeles. I moved to Northern California while she was in Washington serving in the Justice Department, but I continued to have close contacts with her and Bill when they returned from Washington in 1986. To be sure, Carolyn had political views in the early 1980s which I did not share, and not surprisingly, she sometimes took positions as a young lawyer that supported the policies of those who were senior to her in the Justice Department. When she returned from Washington, however, it seemed to me that she was much less political and much less definite in her political views than she had been when she left for her government service. She became more sensitive to nuances and

more open to opposing viewpoints, an awareness which will serve her well if she becomes a federal judge. I truly believe she will decide cases on their individual merits and based upon the law as established by Congress and the Supreme Court. I think this is all we can ask of a judge, whatever her personal political opinions may be.

Since most of Judge Kuhl's service as a Superior Court Judge has occurred since I left California in August of 1997, others are more qualified to speak about her service as a judge. I understand, however, that she has developed a reputation for hard work, creativity, intelligence, and fairness to all, regardless of background. That approach is exactly what I would have expected, based on my personal knowledge of her character and abilities. Her service on the Superior Court is the best indication we have of how she would conduct herself as a federal judge, and based on that service, she will perform admirably if she is confirmed for the Ninth Circuit.

I would be happy to speak to anyone on your staff about Judge Kuhl, if that would be helpful. I will be teaching out of the country from June 9 to June 30, but otherwise will be available to provide further information. I want to do anything that might be helpful in persuading you to allow Judge Kuhl's nomination to go forward.

Sincerely,

Donald E. Sloan
2204 Princeton Boulevard
Lawrence, Kansas 66049
785/832-1085

cc. Mr. Samuel Chapman,
Office of Senator Boxer

CHRISTOPHER COREY SMITH

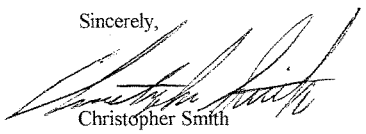
July 18, 2001

The Honorable Patrick Leahy
The United States Senate
Washington, DC 20510

Dear Senator Leahy,

I am writing to you to let you know that I oppose the potential appointment of Carolyn B. Kuhl as judge for the U.S. Court of Appeals, Ninth Circuit. Ms. Kuhl, with her extremist, restrictive record and philosophies is not the type of judge who should hold so high a position. We need open minded judges, not anti-choice ideologues who would restrict our ability to protect individual rights in the courts.

Sincerely,



Christopher Smith

4181 LINCOLN AVENUE, CULVER CITY CA 90232
310/839-7938 310/435-3661
sunsetsmith@msn.com

July 21, 2003

Senator Patrick Leahy
U S Senate
Washington D.C. 20510

Dear Senator,

I strongly oppose nomination of Carolyn Kuhl as a judge on U S Circuit Court of Appeals. Her record shows she is wedded to an extremist right wing philosophy that is far removed from beliefs of ordinary Americans, like myself.

Sincerely yours,
Blanche Spindel
5118 De Longpre Ave.
Los Angeles, Ca. 90027

7-7-01

Sen. Patrick J. Leahy
Chair, Judiciary Committee
433 Russell Senate Office Bldg.
Washington, DC 20510

Dear Senator Leahy,

I am writing to ask you to use your leadership to oppose Caroline Kuhl's nomination to the 9th Circuit Court of Appeals. And also to oppose any & all, if necessary, Governor Bush's nominees to the Federal Judiciary.

The advances that have been made in civil rights, the environment etc. all stand in jeopardy. Extreme right wing ideologues threaten our democracy by undoing, from the bench, what has been legislated to preserve & protect our Society.

The remainder of the Bush-Cheney term will, no doubt, continue to seek the advancement of their & their cronies special interests. We look to you to obstruct them, even if it means no new judges are appointed for the entirety of that term.

Thank you for your good work.

Sincerely,

Shoma Suarez
217 Dewalk Pl.
Newbury Pk, CA 91320

TAF
TAXPAYERS AGAINST FRAUD
THE FALSE CLAIMS ACT LEGAL CENTER

July 17, 2001

Chairman Patrick Leahy
Committee on the Judiciary
United States Senate
224 Hart Senate Office Building
Washington, D.C. 20510
Fax: 202-224-9516

Re: The Nomination of Carolyn Kuhl to the Court of Appeals for the Ninth Circuit

Dear Chairman Leahy:

Taxpayers Against Fraud is an organization dedicated to the support of the False Claims Act, 31 U.S.C. Sec. 3729 et seq. The False Claims Act is the leading instrument for the suppression of fraud against the federal government. One of the reasons the Act has been so successful is the role played by whistleblowers, working with government investigators and prosecutors to combat fraud.

Unhappily, Judge Carolyn Kuhl, recently nominated for a judgeship on the Court of Appeals for the Ninth Circuit, is hostile to the False Claims Act and to the rights of whistleblowers to bring lawsuits under the Act. For that reason Taxpayers Against Fraud opposes the nomination of Ms. Kuhl and requests that you take all appropriate actions to prevent her confirmation.

Sincerely yours,

James W. Moorman
President

Cc: Attn: Bruce Cohen

1220 19th Street, NW Suite 501 Washington, DC 20036 phone (202) 296-4826 fax (202) 296-4838
internet: http://www.taf.org or taf-info@taf.org

TAF
TAXPAYERS AGAINST FRAUD
THE FALSE CLAIMS ACT LEGAL CENTER

April 3, 2003

Chairman Orrin G. Hatch
Committee on the Judiciary United States Senate
SD-152 Dirksen Senate Office Building
Washington, DC 20510-6275
Facsimile: 202-224-9102

Senator Patrick J. Leahy
Committee on the Judiciary United States Senate
SD-224 Dirksen Senate Office Building
Washington, DC 20510-6275
Facsimile: 202-224-9516

Re: Judge Carolyn Kuhl

Dear Chairman Hatch and Senator Leahy:

Taxpayers Against Fraud, the False Claims Act Legal Center ("TAF"), opposes the appointment of Judge Carolyn Kuhl to a position on the United States Court of Appeals for the Ninth Circuit. TAF's opposition is based on Judge Kuhl's apparent effort to deceive the Ninth Circuit in *U.S. ex rel. Rohan v. Newbert* (No. 92-55546). Judge Kuhl in effect represented to the Court that the Justice Department had questioned the constitutionality of the whistleblower ("*qui tam*") provisions of the False Claims Act ("FCA"), when in fact this was untrue.

In 1989, a memorandum was prepared in the Office of Legal Counsel of the Department of Justice questioning the constitutionality of the FCA. However, the views set forth in that memorandum ("OLC Memo") were not adopted by the Department or advanced by the Department in FCA cases.

Despite the fact that the OLC Memo did not represent the views of the Justice Department, Kuhl, in her capacity as counsel for Litton Systems, Inc., submitted it to the Ninth Circuit, citing it in support of her arguments that the *qui tam* provisions of the FCA are unconstitutional and implied that the OLC Memo set forth the views of the Justice Department. The Department was not a party in the case, but learned of the misrepresentation of its views and submitted a letter to the Clerk of the Ninth Circuit setting the record straight (attached).

We at TAF are deeply disturbed that Judge Kuhl would attempt to mislead the Ninth Ciruit, the court to which she now aspires, about the views of the Department of Justice regarding the constitutionality of an act of Congress. TAF believes her stunning lack of candor disqualifies her from service on that court.

Taxpayers Against Fraud

James W. Moorman
President

Attachment

U.S. Department of Justice

Civil Division

Office of the Assistant Attorney General

Washington, D.C. 20530

March 31, 1993

VIA EXPRESS MAIL

RECEIVED
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS
APR 1 1993
FILED
DOCKETED 4-2
DATE
INITIAL

Ms. Cathy Catterson
Clerk, United States Court of Appeals
for the Ninth Circuit
P.O. Box 193939
San Francisco, CA 94119-3939

Re: United States ex rel. Kelly v. Boeing Co., No. 92-36660; United States ex rel. Madden v. General Dynamics Corp., No. 92-56042; United States ex rel. Rohan v. Newbert, No. 92-55546

Dear Ms. Catterson:

We understand that the above-referenced cases are scheduled to be argued before the same panel of this Court on April 7, 1993. In all three cases the defendants have attacked the constitutionality of the so-called "qui tam" provisions of the False Claims Act (31 U.S.C. 3730). It has come to our attention that some of the litigants in these cases have relied in their briefs on a memorandum dated July 18, 1989, from then-Assistant Attorney General William P. Barr to then-Attorney General Dick Thornburgh, addressing the constitutionality of these provisions of the False Claims Act. I am writing now to make clear to the Court, in light of that reliance, that the memorandum from Assistant Attorney General Barr was never adopted by the Attorney General, and does not represent the position of the United States.

I request that you bring this letter to the attention of the judges who are assigned to these cases. Thank you for your assistance.

Sincerely,

Stuart E. Schiffer
Acting Assistant Attorney General

April 5, 2002

U.S. Senator Barbara Boxer
1700 Montgomery Street #3670
San Francisco, Ca. 94111

Re: Hon. Carolyn B. Kuhl
Judge of the Superior Court of California
County of Los Angeles

Dear Barbara:

I understand that Carolyn Kuhl had been nominated for an appointment to the Federal District Court. She has been serving with me on the Judicial Council Civil Jury Instruction Task Force for the past few years. The Task Force was appointed by Chief Justice George to write new jury instructions for the state that will be user friendly for juries. The committee includes trial and appellate court judges, lawyers and lay persons. Our process is to review case law, statutes, other state's instructions and draft new instructions that will be universally understood and are legally correct.

In drafting the instructions, Carolyn is scrupulous in assuring that we follow the law. She is brilliant and has excellent analytical skills. We've had some rather heated discussions from time to time on this committee. Carolyn always makes her points in a calm and deliberate manner. Her integrity is impeccable. If she makes a commitment, she keeps it. She has a commonsense approach to resolving issues and a great sense of humor. She is admired and respected by everyone on our committee.

I hope you will carefully consider her nomination. She is an outstanding judge and will serve our country well.

Sincerely,

Lynn O'Malley Taylor
Presiding Judge

Law Offices

LEO JAMES TERRELL

8383 WILSHIRE BLVD., SUITE 920 • BEVERLY HILLS, CA 90211 • TEL: (323) 655-6805 • FAX: (323) 655-5104

May 23,2001

Senator Dianne Feinstein
Hart Senate Building, Ste. 331
Washington, D.C. 20510

By FAX (202) 228-3954
and U.S. Mail

Re: Judicial Appointment of Judge Carolyn B. Kuhl
to the 9th Circuit Court of Appeals

Honorable Senator Feinstein,

I am writing this letter to voice my support for the judicial appointment of Judge Carolyn B. Kuhl to the United States Court of Appeals for the 9th Circuit.

I have been a lawyer in California for over 13 years. My office is located in Beverly Hills, California. My practice specializes in Civil Rights litigation and Employment Law, particularly discrimination and sexual harassment in the workplace. I also specialize in Police Misconduct litigation.

I am an attorney for the NAACP. I have a weekly radio program in Los Angeles, California. I also do local and national TV and Radio commentary on various social, civil and political issues.

I am a lifelong Democrat. I have contributed to your Senate campaigns and the Senate campaigns of Senator Boxer as well.

I vigorously recommend the appointment of Judge Carolyn B. Kuhl to the United States Court of Appeals for the 9th Circuit.

I became aware of Judge Kuhl through my law practice, and have always found her to be a fair and competent Judge. I litigated a case before Judge Kuhl entitled Francis Iwekaogwu vs. City of Los Angeles (1999) 75 Cal. App. 4th 803, 89 Cal. Rptr. 2d 505 in which Judge Kuhl was a major factor in the successful resolution of that case.

The Iwekaogwu case was an employment discrimination and retaliation case, where my client was discriminated because of his race (African-American) and ethnic background (Nigerian). During the lengthy litigation process I found that Judge Kuhl was fair, impartial, competent and at all times, extremely professional.

I personally have no problem with the appointment of a Republican Judge to the 9th Circuit bench, as long as that Judge is fair and impartial. Judge Kuhl is just that person.

If asked, I would be willing to speak on behalf of Judge Kuhl before any Congressional or Judiciary hearings.

I submit that your decision regarding the appointment should be based solely on the competency of the judicial candidate, not on politics. I will do everything in my power to ensure that Judge Kuhl receives the nomination, and to see that this nomination obtains the advice and consent of the Senate, as well as the public.

If you have any questions or require more information, please do not hesitate to contact me at your convenience.

Thank you for your consideration.

Very truly yours,

Leo James Terrell
Attorney at Law

LJT/mr

cc: Honorable Carolyn B. Kuhl
Los Angeles Superior Court

Dear Senator Leahy:

As a pro-choice voter and supporter of CARAL, I am writing to express my strong opposition to the appointment of Carolyn B. Kuhl for the U.S. Ninth Circuit Court of Appeals.

Carolyn Kuhl is out of line with America's pro-choice majority. If she is appointed to the U.S. Ninth Circuit Court of Appeals, the reproductive freedom of Californian women will be in serious jeopardy. In her many years as a judge, Kuhl has demonstrated a staunch anti-choice stance, including supporting the reversal of *Roe v. Wade*. I am adamantly opposed to and all anti-choice judicial nominees and I urge you to vote **NO** on the nomination of Carolyn B. Kuhl.

Sincerely, Cynthia Travis

Zip Code: 94117

PAUL TURNER
PRESIDING JUSTICE

STATE OF CALIFORNIA
Court of Appeal
SECOND APPELLATE DISTRICT
DIVISION FIVE
RONALD REAGAN BUILDING
300 SOUTH SPRING STREET
LOS ANGELES, CALIFORNIA 90013

TELEPHONE
(213) 830-7343
FACSIMILE
(213) 897-5990
E-MAIL
justicepaulturner@jud.ca.gov

SENIOR JUDICIAL ATTORNEYS
LELA J. HUCKABEE
KAREN T. GREY
CAROL A. GREENWALD

JUDICIAL ASSISTANT
TERRI MEADOWS

March 17, 2003

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Re: Nomination of Judge Carolyn Kuhl to serve on the Ninth Circuit Court of Appeals

Dear Mr. Chairman:

The Senate Committee on Judiciary has pending before it the nomination by President George W. Bush of Los Angeles Superior Court Judge Carolyn Kuhl to serve on the Ninth Circuit Court of Appeals. As you may know, she has been criticized by certain advocacy groups because an order she entered was reversed by the California Court of Appeal in the case of *Sanchez-Scott v. Alza Pharmaceuticals* (2001) 86 Cal.App.4th 365. That case involved the question of whether tort liability could arise because a drug salesperson was being trained by a physician during the breast examination of a cancer patient. Judge Kuhl's critics have asserted that the reversal of her order sustaining the demurrer without leave to amend is evidence of her bias and prejudice against women.

On appeal, I was the author of the *Sanchez-Scott* opinion. I have been a member of the California judiciary since 1983 and a Court of Appeal Justice since November, 1989. I can tell the difference between a trial judge making a tough call in the context of competing legal interests, on one hand, and bias or prejudice, on the other hand. Judge Kuhl's order sustaining the demurrer without leave to amend was not an act of bias or insensitivity. Several points warrant comment.

First, there was no issue in the *Sanchez-Scott* case involving the constitutional right of privacy. Footnote 1 of the opinion expressly states that there was no issue of the constitutional privacy right before our court when we considered the *Sanchez-Scott* case.

Second, the plaintiff's tort claim against the doctor himself for failing to obtain his patient's fully informed consent was not at issue before Judge Kuhl and this court. Ms. Sanchez-Scott's claim against the physician was to be litigated in any case even if the drug salesperson and his employer did not remain in the case.

Third, the *Sanchez-Scott* case involved some issues of first impression under California law involving the tort of intrusion as defined in the Restatement Second of Torts, section 652B which even as of this date have not been clearly defined with identifiable bright line rules by California courts. The California Supreme Court has described the tort of intrusion as involving "degrees and nuances to societal recognition of our expectations of privacy" and "relative" concepts. Much of the analysis in our decision was premised upon the 1881 Michigan Supreme Court decision of the *DeMay v. Roberts* (1881) 46 Mich. 160. In ruling on the demurrer, Judge Kuhl was required to apply what the California Supreme Court has characterized as degreed and nuanced rules of law involving relative concepts.

Fourth, attached to complaint filed in superior court was a letter explaining why the drug salesperson was in the examining room during the breast examination. That letter explained that he was present because he was participating in an oncology mentorship program. The purpose of the program was to allow the salesperson to "better learn how an oncologist attends to patients, manages medications, and generally oversees administrative functions of the office." In other words, the purpose of the mentorship program was to ensure better delivery of health care services to breast cancer patients. Under California law, in evaluating whether the tort of intrusion has occurred, a court must weigh the reasons for the intrusive conduct. When Judge Kuhl concluded that the mentorship program, which was designed to improve treatment for breast cancer patients, was a sufficient justification for allowing the drug salesperson to be present during the examination, she did not demonstrate bias or insensitivity. In fact, a strong argument can be made that she correctly assessed the competing societal interests the California

Supreme Court requires all jurists in this state to weigh in determining whether the tort of intrusion has occurred.

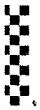
With all respect to those who have criticized Judge Kuhl as being insensitive or biased because of my opinion in *Sanchez-Scott*, they are simply incorrect.

If either you or staff member have any questions, please do not hesitate to contact me. If you wish to have a copy of the *Sanchez-Scott* opinion sent to you or a staff member, please let my office know and I will insure that one is e-mailed or faxed to you immediately.

Very truly yours,

Paul Turner
Presiding Justice

PT:tm



June 15, 2001

Dear Senator Leahy,

I understand that Carolyn B. Kuhl is being considered by the Bush administration for appointment as a judge on the US Court of Appeals for the Ninth Circuit. I am writing to let you know that I oppose her potential appointment. Carolyn B. Kuhl is not the type of judge who should be appointed to the federal Circuit Courts of Appeal. Her record shows that she is wedded to an extremist right wing philosophy that is far removed from the beliefs of ordinary Americans. We need open-minded judges, not anti-choice ideologues who condone racism and restrict our ability to protect our individual rights in the courts.

Sincerely,

Cheryl Walker
217 6th Ave.
Venice, CA 90291-2601

June 19, 2001

Doris Wallace
P.O. Box 3045
Rancho Cucamonga, Ca 91730

Senator Patrick Leahy
U.S. Senate
Washington, D.C. 20510

Dear Senator,

I understand that Carolyn B. Kuhl is being considered by the Bush administration for appointment as a judge on the US court of Appeals for the ninth circuit. I am writing to let you know that I oppose her potential appointment.

Carolyn B. kuhl is not the type of judge who should be to the federal circuit courts of appeal. Her record shows that she is wedded to an extremist right wing philosophy that is far removed from the beliefs of ordinary americans. We need open-minded judges, not anti-choice ideologues who condone racism and restrict our ability to protect our individual righ in the court.

Sincerely Yours
Doris Wallace
Doris Wallace

** TOTAL PAGE.02 **

Court of Appeal
FOURTH DISTRICT, DIVISION TWO
3389 TWELFTH STREET
RIVERSIDE, CALIFORNIA 92501

CHAMBERS OF
JAMES D. WARD
ASSOCIATE JUSTICE

(909) 248-0325

January 29, 2003

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Re: Nomination of Judge Carolyn Kuhl to the Ninth Circuit Court of Appeals

Dear Senator Hatch:

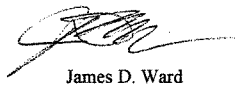
I am writing in support of the appointment of Judge Kuhl to the Ninth Circuit Court of Appeals.

Judge Kuhl is a member of a task force appointed by our Chief Justice which is writing new jury instructions for the State of California. In my position as chair of the group writing the civil instructions, I have had the opportunity to observe her for the past three years. The task force members meet on a monthly basis, often in two day meetings. I have had, therefore, a great deal of contact with her.

She has been one of the most valuable members our group because of her intellect and her collegiality, the two most important characteristics for the appellate court. We have written instructions on literally every area of the civil law in California. Judge Kuhl has proven knowledgeable in many of those areas. In the areas where she lacks expertise, she has shown the attributes of a quick study and the ability to discern the fundamental issues. I have been truly amazed at her intellect.

More importantly, she has shown an ability to adjust to the decision making of our 20-plus member commission. I am appalled at published reports that suggest that she is dogmatic or something of an ideologue. Nothing could be further from the truth. This is a judge who has an open mind on the legal issues of the day and one who applies the law fairly and evenly. Having watched her in action during intense intellectual discussions, I am convinced that she would be an excellent appellate court judge.

I heartily recommend Judge Carolyn Kuhl as a judge on the Ninth Circuit.



James D. Ward
Associate Justice

To: Senator Patrick Leahy
U.S. Senate
Washington D.C. 20510
FAX (202) ~~228~~ 224 3479

6/18/01

From: Patricia Wells
414 N. Park Ave
Fresno, CA 93701

Dear Senator Leahy

I understand that Carolyn B. Kuhl is being considered by the Bush administration for appointment as a judge on the US Court of Appeals for the Ninth circuit. I am writing to let you know that I oppose her potential appointment. Carolyn B. Kuhl is not the type of judge who should be appointed to the federal Circuit courts of appeal. Her record shows that she is wedded to an extremist right wing philosophy that is far removed from the beliefs of ordinary Americans. We need open-minded judges, not anti-choice ideologues who condone racism and restrict our ability to protect our individual rights in the courts. Thank you for your time.

Sincerely,

Patricia Wells

3167 N. Saddleback Ct
Thousand Oaks, Ca
91360

July 8, 2001

Dear Senator Leahy,

I strongly oppose the nomination of Carolyn B. Kuhl as a judge on the U.S. Court of Appeals for the Ninth Circuit. Carolyn B. Kuhl is not the type of judge who should be appointed to the Federal Circuit Courts of Appeal. Her record shows that she is wedded to an extremist right wing philosophy that is far removed from the beliefs of ordinary Americans. We need open-minded judges, not anti-choice ideologues who condone racism and restrict our ability to protect our individual rights in the courts.

Sincerely
Thelma Williams

Friday, June 15, 2001

Senator Barbara Boxer
fax: 202/228-1338

Senator Dianne Feinstein
fax: 202/224-3954

Senator Patrick Leahy
fax: 202/224-3479

Re: Oppose Carolyn B. Kuhl's appointment

Dear Senators,

I am deeply concerned that Carolyn B. Kuhl is being considered by the Bush administration for appointment as a judge on the US Court of Appeals for the Ninth Circuit.

I oppose her potential appointment. Ms. Kuhl is not the type of judge who should be appointed to the Federal Circuit Courts of Appeal. Her record shows that she is strongly linked to an right wing extremists that are far removed from the beliefs of ordinary Americans. We need open-minded judges, not anti-choice ideologues who condone racism and restrict our ability to protect our individual rights in the courts.

Please stop this appointment before it goes one step further.

Sincerely,

Jan Williamson
1531 Penmar Ave. #2
Venice, CA 90291

JUN-15-2001 FRI 07:15 PM 18TH ST ARTS COMPLEX FAX NO. 310 453 4347 P. 01/01

March 31, 2003

Dear Senator:

We, the undersigned women's and reproductive rights organizations, write to express our strong opposition to the confirmation of Carolyn Kuhl to the U.S. Court of Appeals for the Ninth Circuit. Carolyn Kuhl's record demonstrates that she has been driven by an ideology that is hostile to women's reproductive rights as well as other legal rights and principles that are critical to women.

Her fervent opposition to abortion includes advocating the disregard of *stare decisis* to overrule *Roe v. Wade*. She has also argued in favor of weakening the protection of women from sexual harassment on the job and upholding the constitutionality of excluding women from equal educational opportunities.

President Bush appears "poised to transform the federal judiciary . . . into an overwhelmingly conservative bench," as the *New York Times* put it. At least 10 of President Bush's 36 nominees to the courts of appeals have clear anti-choice records, while not a single one has publicly expressed support for the constitutional right to choose. Pro-choice Senators must stand up to stop President Bush from stacking the courts with anti-choice activists.

Court decisions at every level and relentless attack from anti-choice legislatures have seriously eroded a woman's right to choose. **If this erosion continues, the right to choose will become illusory for all but the most privileged women.** Since 1995, states have enacted 335 anti-choice measures, 34 last year alone. The federal courts of appeal uphold restrictions on the right to choose about half the time, and have upheld increasingly burdensome restrictions. Permitting anti-choice nominees like Carolyn Kuhl to assume life-time appointments to the bench will allow still further evisceration of the fundamental right to choose.

Carolyn Kuhl's anti-choice record is not that of an attorney simply representing her client's wishes. Her anti-choice work is that of an energetic and creative legal activist, who has worked for radical changes in the law to implement an extreme right-wing agenda. In fact, it appears that she was instrumental in advancing the anti-choice agenda at the Reagan Department of Justice. In 1985, she convinced the Reagan Justice Department to bypass the doctrine of *stare decisis* and argue for the outright reversal of *Roe v. Wade* in *Thornburgh v. American College of Obstetricians and Gynecologists*. As Solicitor General Charles Fried recounts in his memoirs of that time, the "most aggressive memo came from my friends Richard Willard and Carolyn Kuhl in Civil [Division of DOJ], who recommended that we urge outright reversal of *Roe*."

The resulting brief was a polemic against the constitutional right of privacy. Kuhl and her colleagues wrote:

> The textual, doctrinal and historical basis of that decision is so far flawed that this court should overrule it and return the law to the condition in which it was before that case was decided. . . .
>
> *Stare decisis* is a principle of stability. A decision as flawed as we believe *Roe v. Wade* to be becomes a focus of instability, and thus is less aptly sheltered by that doctrine from criticism and abandonment.

This was not a case of an attorney simply arguing her client's position. Indeed, the decision to urge reversal of *Roe* was even criticized by President Reagan's own former Solicitor General, Rex Lee, as quoted by Lincoln Caplan in *The Tenth Justice*:

> No lawyer worth his salt would think of going before the Supreme Court, or any appellate tribunal, and telling its members point blank that they were wrong on some case they decided just several years before, even if the lawyer strongly believes that they were . . . . It would therefore be both a tactical mistake and a professional violation of the lawyer's ethical duty to advance his client's cause.

But to a legal activist like Carolyn Kuhl, urging the reversal of *Roe* was simply her way of following the law.

Kuhl continued her anti-choice work in private practice. In 1991, she represented an anti-choice physicians group, the American Academy of Medical Ethics, and argued in support of the domestic gag rule, regulations that prohibited health care clinics receiving Title X funds from providing women with full information about their reproductive health options.

Of particular concern in the reproductive rights arena is the fact that federal judges are routinely employing personal judgment and discretion in order to apply the Supreme Court's "undue burden" standard, articulated by the plurality opinion in *Planned Parenthood v. Casey*. At least half of all appeals court decisions applying this standard are decided by divided panels. That is, judges who are following "settled law" often reach different conclusions applying that law to exact same set of facts.

We are convinced that Carolyn Kuhl's extreme record of hostility to the constitutional right to choose will lead her to apply the "undue burden" test in a way that will eviscerate that right.

The threat to women's rights from Kuhl's legal activism extends beyond reproductive choice. She has argued for weakened protections from sexual harassment. She has repeatedly criticized affirmative action. She argued to allow the Virginia Military Institute (VMI) to continue its exclusion of women. As a California superior court judge, she was unanimously reversed when she dismissed a breast cancer patient's invasion of privacy claim.

Simply put, Kuhl's ideology is one of strictly limiting legal protection and access to justice on a host of issues, and she appears more than willing to allow this ideology to trump clear precedent.

Several of our organizations have prepared reports that more fully document the troubling record of Carolyn Kuhl, and we are available to discuss these issues with you and your staff.

We cannot afford to gamble with our hard-won fundamental rights or to turn back women's progress towards equality. We urge you to use every tool at your disposal to prevent the confirmation of Carolyn Kuhl.

Sincerely,

Amy Isaacs
National Director
Americans for Democratic Action

Eleanor Smeal
President
Feminist Majority

Kate Michelman
President
NARAL Pro-Choice America

Vicki Saporta
President/CEO
National Abortion Federation

Marsha Atkind
President
National Council of Jewish Women

Judith M. DeSarno
President/CEO
National Family Planning and Reproductive Health Association

Kim Gandy
President
National Organization for Women

Judith L. Lichtman
President
National Partnership for Women and Families

Marcia Greenberger
Co-President
National Women's Law Center

Kathy Rodgers
President
NOW Legal Defense and Education Fund

Ralph G. Neas
President
People For the American Way

Gloria Feldt
President
Planned Parenthood Federation of America

June 23, 2001

Dear Senator Patrick Leahy:

I am writing to strongly urge you to oppose the nomination of Carolyn B. Kuhl to the Ninth Circuit Court of Appeals.
Carolyn Kuhl is out of line with the pro-choice majority in California. If she is appointed to the Ninth Circuit Court of Appeals, the reproductive freedom of Californian women will be in serious jeopardy. Kuhl has demonstrated a severe anti-choice stance, even supporting the reversal of *Roe v. Wade*. As a pro-choice voter and a member of CARAL, I am adamantly opposed to the nomination of Carolyn Kuhl and all anti-choice judicial nominees. I urge you to vote NO on Carolyn Kuhl and on all judicial nominees who support reversing or restricting our reproductive rights.

Sincerely,
Jolanta Zandecki
1720 Hearst Ave #F
Berkeley CA 94703