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S. HRG. 112–72, Pt.1

CONFIRMATION HEARINGS ON FEDERAL APPOINTMENTS

HEARINGS

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED TWELFTH CONGRESS

FIRST SESSION

FEBRUARY 2, FEBRUARY 16, and MARCH 16, 2011

Serial No. J–112–4

PART 1

Printed for the use of the Committee on the Judiciary



CONFIRMATION HEARINGS ON FEDERAL APPOINTMENTS

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NOMINATIONS OF CAITLIN JOAN HALLIGAN, NOMINEE TO BE UNITED STATES CIRCUIT JUDGE FOR THE DISTRICT OF COLUMBIA CIRCUIT; KATHLEEN M. WILLIAMS, NOMINEE TO BE UNITED STATES DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF FLORIDA; MAE D'AGOSTINO, NOMINEE TO BE UNITED STATES DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF NEW YORK; AND, TIMOTHY J. FEIGHERY, NOMINEE TO BE CHAIRMAN OF THE FOREIGN CLAIMS SETTLEMENT COMMISSION

WEDNESDAY, FEBRUARY 2, 2011

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 2:05 p.m., Room SD–226, Dirksen Senate Office Building, Hon. Christopher Coons, presiding.

Present: Senators Schumer, Whitehouse, Klobuchar, Coons, Blumenthal, Grassley, Kyl, and Lee.

OPENING STATEMENT OF HON. CHRISTOPHER COONS, A U.S. SENATOR FROM THE STATE OF DELAWARE

Senator COONS. Good afternoon, everyone. I am pleased to call this nominations hearing of the Senate Judiciary Committee to order.

I want to specifically thank Chairman Leahy, who will be joining us momentarily, for this opportunity to chair my first Judiciary Committee hearing, which is an important one.

As we are all aware, our Federal courts face a severe crisis today due to the high number of vacancies in the Federal bench. The caseloads facing them continue to grow, and, unfortunately, so do the number of judicial vacancies.

Today, in what is close to an all-time high, more than 100 Federal judgeships sit empty. And these vacancies not only strain our overburdened district and circuit courts, but unfairly deny American citizens access to timely judicial process.

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Chief Justice Roberts himself has recently characterized these vacancies as a persistent national problem and has called upon us in the Senate to find a long-term solution.

The number of vacancies, though, tells only part of the story. In the last Congress, the Senate's average consideration of a district court judge took 104 days, the average circuit nominee, 163. This delay, as I mentioned, exacts a cost on the administration of justice and exacts a steep cost on individual nominees, and this is not, in my view, a partisan issue.

Our judiciary relies upon our ability to attract the brightest, most decent, and most qualified to serve, in particular, on the Federal bench, and we ask these qualified judicial candidates to accept detailed and lengthy public scrutiny, long delay, relatively meager pay relative to their professional qualifications and opportunities, in exchange for a career in public service.

I think we owe them a prompt public review consideration and not needless delay.

In the 112th Congress, I look forward to working together with Chairman Leahy, with Ranking Member Grassley, and with all my fellow members of the Senate Judiciary Committee to fulfill our duty to advise and consent and work through these nominees in a thorough, yet reasonably expeditious manner.

With that in mind, I'd like to welcome today each of the nominees, their families and their friends to the U.S. Senate, and congratulate them on their nomination.

I would also like to welcome those of my colleagues who are here today to introduce the nominees.

Today, we will first welcome Ms. Caitlin Halligan, nominated to be a judge on the D.C. Circuit. Ms. Halligan currently serves as general counsel for the New York County District Attorney's Office and as an adjunct faculty member at Columbia Law School. She will be introduced by her home State Senator, Senator Charles Schumer. And we also have a statement for the record from Senator Kirsten Gillibrand.

[The statement appears as a submission for the record.]

Senator COONS. We would also like to welcome Mae D'Agostino, nominated to be a judge in the Northern District of New York. If confirmed, Ms. D'Agostino will be only the second female judge ever to serve the Northern District of the State of New York, and she will also be introduced by the senior Senator from New York, Senator Schumer. And we also have a statement from Senator Gillibrand in support.

[The statement appears as a submission for the record.]

Senator COONS. We further welcome today Mr. Timothy Feighery, who has been nominated to be the Chairman of the Foreign Claims Settlement Commission. Since 2004, Mr. Feighery has served as an attorney advisor in the Office of the Legal Advisor in the State Department. He will also be introduced by Senator Schumer, the senior Senator from the State of New York.

Finally, we welcome Kathleen Williams, who has been nominated to be a judge in the Southern District of Florida. Since 1995, Ms. Williams has served the southern district as its Federal public defender. She will be introduced by her home State Senators, both

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Senator Bill Nelson and Senator Marco Rubio. And we are pleased to have both of you with us today to provide support.

I now yield to the Ranking Member to make his comments.

Senator Grassley.

STATEMENT OF HON. CHARLES E. GRASSLEY, A U.S. SENATOR FROM THE STATE OF IOWA

Senator GRASSLEY. Obviously, as you have, I welcome our nominees and our colleagues who will introduce them, and, particularly, to families who are very proud of these nominees and could be here with us today.

At last week's markup, I said I intended to work in a cooperative manner with the chairman. My approach will be to carefully review the qualifications and records of nominees referred to this committee. We can move forward with consensus nominees after that thorough review.

I want to ensure that the men and women who are appointed to a lifetime position in our Federal judiciary are qualified to serve. Factors I consider important include intellectual ability, respect for the Constitution, fidelity to the law, personal integrity, appropriate judicial temperament, and professional competence.

Above all, I believe judicial nominees need to understand the proper role of a judge and our system of checks and balances. Judges are to decide cases and controversies, not establish public policy or make law. Therefore, I will not be favorably disposed to nominees who might bring a personal agenda or political ideology to the bench.

The Foreign Claims Settlement Commission is a small, but very important entity within the Department of Justice, established in 1954. This is a quasi-judicial independent agency within that department. It adjudicates claims of U.S. nationals against foreign governments, and I'll just give you one government as an example, like Libya.

The former chairman's term of office expired nearly 1 year ago. No decisions have been made since then. As the result, there is a significant backlog that needs to be taken care of, and so it is important that we get that nominee out quickly.

The President' first nominated Mr. Feighery on November 15, 2010. I am pleased the President nominated an individual with familiarity of the office and with experience in claims administration. We will move expeditiously.

Kathleen Williams has been nominated to a seat in the Southern District of Florida. That seat became vacant nearly 2 years ago and has been declared a judicial emergency. However, we did not see the nomination until last July.

With regard to the second district judge nomination, the delay in filling the vacancy is a sad record. The vacancy for that seat was created in March 2006 when Judge Scullin took senior judge status. President Bush nominated Mary Donahue in June 2006. Her nomination languished in Committee for over 14 months and then the nomination was withdrawn.

President Bush then nominated Thomas Marcelle. That nomination was blocked by the Democrats, as well, despite the vacancy being a judicial emergency.

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We are now asked to consider the nomination of Ms. D'Agostino just 4 months after her nomination. Any impartial observer would admit a double standard with this seat.

Nevertheless, in the spirit of cooperation, I am working with the Chairman and we are moving forward. There certainly is no credible complaint about Republican delays regarding these seats.

The same is true for circuit court nominations. Nominations to the D.C. circuit are and have been political. Many view this court as second in importance only to the Supreme Court. The Court of Appeals for the D.C. Circuit hears cases affecting all Americans, is frequently the last stop for cases involving Federal statutes and regulations, and, as we all know, judges who sit on this court are frequently considered for and have been elevated to the Supreme Court.

So there is a lot at stake with nominations to this court. This seat became vacant with the elevation of John Roberts as Chief Justice of the U.S. Supreme Court in September 2005. Peter Keisler was first nominated for the seat in June of 2006. His nomination stalled in Committee in both the 109th and 110th Congresses.

Mr. Keisler was imminently qualified to serve on that court. He had a distinguished academic and professional record. His public service included serving as acting attorney general.

At the time of his hearing, Democrats objected to even holding a hearing for the nominee. One of my colleagues on this Committee summarized the threshold concerns this way. He stated, "Here are the questions that just loom out there. One, why are we proceeding so fast here? Two, is there a genuine need to fill this seat? Three, has the workload of the D.C. circuit not gone down? Four, should taxpayers be burdened with the cost of filling that seat? Five, does it not make sense, given the passion with which arguments were made only a few years ago, to examine these issues before we proceed?"

I have not heard these concerns expressed by my colleagues on the other side with respect to nominations that are before us now. These issues have not gone away. I have great concern about the need to fill existing vacancies on the D.C. circuit.

I hope that, at some point, we can spend time on carefully examining the workload of this court and the implications they may have. Not only do we need to examine the threshold issue, but we must carefully review the qualifications of nominees to this court.

This Committee has multiple precedents establishing a heightened level of scrutiny given to nominees for the Court of Appeals of the D.C. Circuit.

President Bush nominated Miguel Estrada, John Roberts, Tom Griffith, Brett Kavanaugh, Peter Keisler, and Janice Rogers Brown. All had a difficult and lengthy confirmation process. This included delays, filibusters, multiple hearings, and other forms of obstruction.

I think the record shows President Clinton's nominees fared much better. I know that Justice Kagan was not confirmed for the D.C. circuit, but she was nominated late in President Clinton's second term, and things seemed to work out for her in the long run.

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Perhaps some of President Bush's failed D.C. circuit nominees will find a similar fortune in the future.

We have much to look at with this nomination beyond the qualifications of the nominee. I hope that we will be given a fair opportunity to fully examine those issues as we move forward. The D.C. circuit vacancy is not a judicial emergency, so I trust there will be no need to rush the consideration of this potentially unnecessary seat.

Thank you, Mr. Chairman, for your courtesies, and, again, I welcome the nominees.

Senator COONS. Thank you very much, Senator Grassley.

I would like to thank all of the Senators who have come to join us today to speak on behalf of their home state nominees. I know you are very busy, but your presence and personal support speaks volumes about their qualifications and the importance of filling these vacancies.

We will first hear from the Senator from the State of New York to introduce Ms. Halligan, Ms. D'Agostino, and Mr. Feighery.

Senator SCHUMER. Mr. Chairman, I know my colleagues have an important engagement. So if I might defer and we can hear from them and then go to me, that would be OK with me.

Senator COONS. Senator Schumer, I would be happy to do so.

Senator SCHUMER. Much as I would like to answer Senator Grassley's remarks, I will defer.

Senator COONS. Before we proceed, perhaps we could allow the Senators representing the State of Florida to speak on behalf of Ms. Williams.

First, Senator Nelson, if you would.

PRESENTATION OF KATHLEEN M. WILLIAMS, NOMINEE TO BE U.S. DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF FLORIDA BY HON. BILL NELSON, A U.S. SENATOR FROM THE STATE OF FLORIDA

Senator NELSON. The usual gentlemanly Senator from New York, thank you for the courtesies extended to Senator Rubio and me, and I will be brief.

The two of us sit here as representatives of a bipartisan effort to move on these vacancies. You have before the Committee Ms. Williams, that is the subject of the hearing today. You also have, in the middle district, Mr. Dalton, and we urge your speedy consideration.

We have a number of other vacancies that are just coming to the fore in Florida. And the way we do it in Florida is a tradition that was set up long ago, as evidenced by how Senator Graham and Senator Mack worked it, with a judicial nominating commission that does all of the receiving of applications, the screening, the interviewing, and the suggesting of three names to the Senators who then interview the candidates, and then let the White House know if we have an objection or if we have any particular preference, and this has worked.

It worked bipartisan with the Graham era. It worked bipartisan with Senator Martinez and me, and so, too, it is the same with Senator Rubio.

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So in other words, the candidates that we bring to you are candidates that are accepted in a bipartisan way, with broad support of the legal and nonlegal communities of Florida.

So it is in that spirit that we come on behalf of Kathleen Williams, who presently is the Federal public defender in the southern district. She began her legal career as an associate specializing in litigation in one of our large and very prestigious law firms.

She has been an assistant U.S. attorney. She worked on the operation Operation Greenback, which was a big, big money laundering case done through a task force. She has been in private practice. She has been in the public defender's office as chief assistant, until then she was made the public defender herself. And she supervises a large staff of 116 people throughout the southern district.

So we have an extraordinary candidate here. She has been all over the State of Florida. She knows it well. But the Southern District of Florida is one that is absolutely key that we have the top quality judges, because so many of the cutting edge cases are coming in front of that district.

I would just say, on a personal note, that Kathleen credits her father, William Williams, who raised her as a single parent after the death of her mother. She credits him with her success today, and I think that says a lot about the nominee in front of you, Mr. Chairman.

Thank you so much for your courtesy. And thank you, Senator Schumer, for your courtesy.

Senator COONS. Thank you Senator Nelson. Thank you both for your advocacy on behalf of the applicant, and your explanation of the bipartisan and effective judicial nomination process as it functions in Florida.

Senator Rubio.

PRESENTATION OF KATHLEEN M. WILLIAMS, NOMINEE TO BE U.S. DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF FLORIDA BY HON. MARCO RUBIO, A U.S. SENATOR FROM THE STATE OF FLORIDA

Senator RUBIO. Thank you, Senator. Thank you and the Committee and Senator Leahy for being so prompt in scheduling these hearings and for allowing us to testify here today.

I am here, of course, to introduce, as Senator Nelson has said, Kathleen Williams, who has been nominated by the President to serve as a district court judge for the Southern District of Florida.

Senator Nelson outlined many of her qualifications. Her educational background, I will focus on for a moment, because it does not fail to impress. She received her bachelor's degree from Duke University. But I think more impressive than that is her law degree from the University of Miami.

Senator COONS. Which has other distinguished graduates in the room.

Senator RUBIO. A couple here or there, yes. But Senator Nelson also outlined her role that she has played in the private sector and working in two different law firms of great repute in South Florida and all of Florida. Then, of course, she joined the Federal public defender's office as a chief assistant public defender. She rep-

resented people accused of violating Federal criminal statutes who did not have the resources to retain private counsel.

In 1995, she was elevated to the position of the Federal public defender, where she continues to serve. In carrying out her duties as a Federal public defender, she has attained the highest rating by her peers, an AV rating by the Martindale Hubbell Service.

Throughout her career, she has received various awards and recognition for her hard work and commitment to justice. She was recognized by the Department of Justice and received a Superior Performance Award in 1987. In 2001, she received the Criminal Justice Award from the Dade County Bar Association; and, additionally, in 2009, Ms. Williams was awarded the Lawyers and Leadership Award by the University of Miami Center for Ethics in Public Service.

I think these awards signify the respect she has earned from her peers in the south Florida legal community.

Ms. Williams also has a familiarity working with the people in the United States District Court for the Southern District of Florida. She has chaired the Criminal Justice Act Panel Committee of the U.S. Southern District Court since 1995, and, moreover, she has volunteered for numerous local groups and has been very active in our community in South Florida.

So I am honored to introduce her here today. She is here with her family and her former partners, and I am sure she will introduce them to the committee.

Again, thank you, Mr. Chairman, for giving this nomination the full consideration it deserves. Thank you, members.

Senator COONS. Thank you very much, Senator Rubio. Thank you very much, Senator Nelson. I know you both have pressing business of the Senate to attend to. Thank you for contributing those statements today in support of your home state nominee.

We will now turn to the senior Senator from the State of New York, who will introduce for the panel today Ms. Halligan, Ms. D'Agostino, and Mr. Feighery.

Senator Schumer.

PRESENTATION OF MAE D'AGOSTINO, NOMINEE TO BE DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF NEW YORK; TIMOTHY J. FEIGHERY, NOMINEE TO BE CHAIRMAN OF THE FOREIGN CLAIMS SETTLEMENT COMMISSION; AND CAITLIN JOAN HALLIGAN, NOMINEE TO BE U.S. CIRCUIT JUDGE FOR THE DISTRICT OF COLUMBIA CIRCUIT BY HON. CHARLES E. SCHUMER, A U.S. SENATOR FROM THE STATE OF NEW YORK

Senator SCHUMER. Well, thank you, Chairman Coons. And I want to thank you, too, all of our nominees who are here today, along with their very proud families.

I am honored to have three outstanding nominees to introduce today; one who was born, raised, educated and still lives in New York; one who came to New York as an adult from Ohio and has dedicated her career to public service in our state; and, one who was born and raised in New York and then, perhaps under duress, left.

First, going alphabetically, I have the great honor of introducing to the Committee Mae D'Agostino. She is an outstanding lawyer

from Albany, New York, whom I have had the privilege of getting to know throughout the last year before I recommended her for the bench in the Northern District of New York.

Mae has the distinction of being one of the most well respected trial attorneys in the State of New York. She has served the bar with skill and good judgment during her almost 30 years of practice.

She was born in Albany, New York; graduated summa cum laude from Siena College and then from Syracuse University School of Law.

Right from the get-go, Mae established herself in private practice as a gifted and hardworking trial lawyer, taking cases ranging from medical malpractice to negligence to labor disputes. She also demonstrated her sincere commitment to her community by undertaking an impressive array of pro bono work, including representing individual clients in Social Security benefit cases and working hard in various capacities in the New York Bar.

Mae formed her own firm, D'Agostino, Krackeler, Maguire and Cardona in 1997 and has remained at the pinnacle of the state's legal profession ever since.

Along the way, she was inducted into the prestigious American College of Trial Lawyers. She has won awards that are too numerous to list in full for her service to her alma maters, the community, and for her position as a role model for other women in the profession.

There are two aspects of her career that I would like to highlight very briefly for the Committee as important indicators of what kind of judge she will be.

First, much of Mae's career has been spent making difficult topics, like medical diagnoses, understandable to the average person, something we need more of on the bench. Second, in 1992, Mae helped to organize an experimental program in which the Albany County court instructed parties in 420 cases to reach a settlement or prepare for trial. The program resulted in 50 negotiators settling over 150 pending cases.

This is exactly the kind of dedication and creativity we need from our judges.

One last note. If she is confirmed—when she is confirmed, I would like to believe—she will be the only female judge sitting in the northern district and only the second to ever sit on that court.

I have always said that my three criteria in choosing people to recommend for judgeships are excellence, they should be legally excellent, not some political hack or something; moderation, I do not like judges too far right and I also do not like judges too far left, they tend to want to make law rather than interpret law; and, diversity. Obviously, once the other two criteria are met, to have a diverse bench is an important criteria.

Well, Mae fits all three of these to a T. I am very pleased to have recommended her to the President and I am honored to introduce her today. And I just have to say wherever you go in the Capitol region, her name is renowned, respected, and almost revered.

She is truly an outstanding figure in that community. And the whole community, when I—she was happy in her private practice when I asked her if she wanted to ascend to the bench, and she

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agreed, there was sort of revelry from one end of the Capitol district to the other among members of both parties.

Second, I am happy to introduce today Timothy Feighery and his beautiful family, which I am sure he will get to introduce later, but I had the privilege of meeting a few minutes ago. He has been nominated to be the Chairman of the Foreign Claims Settlement Commission, a little known, but extremely important commission at the Department of Justice.

The commission is currently charged with distributing money to victims of terrorism who are entitled to compensation from Libya, and many have been waiting for a long time to recover for their injuries of the death of loved ones. And I am very familiar with this because a large number of students from Syracuse University were killed in that horrible terrorist incident.

Tim was born in the Bronx; earned his undergraduate and law degrees from Fordham University, one of our outstanding New York institutions. He went on to serve as an associate with the prestigious law firm, Kaye Scholer, then returned to public service; specifically, the work of compensating all different types of victims of mass disasters as fairly and quickly as resources will allow.

He worked for the United Nations Compensation Commission and then worked for the 9/11 Victims Compensation Fund, an extremely important and difficult job and one that gave some relief to thousands of Americans whose loved ones were killed or themselves were injured in that horrible day of unparalleled horror.

The Victims Compensation Fund has been scrutinized thoroughly by just about everybody, and has done a great job. Almost nobody complains. And when you are in such a difficult position, to have such an outstanding record speaks well of Tim and his abilities.

Tim now serves the Department of State in the Office of Legal Advisor, where he supervised the department's work before the Iran-U.S. claims tribunal. His experience fits the bill for the Foreign Claims Settlement Commission.

I know that there are hundreds, if not thousands of Americans, victims of terror, who are looking forward to his getting to work, and it is a great thing when someone like Tim, who has had such experience in this area and is the best our country offers, is willing to serve publicly. And we thank you and your lovely family for that.

Finally, it is my great honor today to introduce President Obama's first nominee to the United States Court of Appeals for the District of Columbia, Caitlin Halligan.

I would just add that the court now, if you are looking at those kind of things, Senator Grassley mentioned it, is not really in balance, only three Democratic nominees and eight Republican. And to say that we do not need more people on it, well, my colleagues on the other side of the aisle voted to fill the 10th and 11th seats repeatedly when they were empty.

So to now all of a sudden say, well, we only need a few less is a little perplexing, because the workload of the court has not decreased.

Anyway, we will not get into that today. I am sure there will be time.

I would like to focus on the quality—quality—of this nominee. Caitlin Halligan was born in Ohio, I believe it was Xenia, Ohio. It is one of my favorite places, because there are very few that begin with an X.

But I think we can call her New Yorker now for her extensive service to the state. And it is her years of extraordinary public service that I want to emphasize today. Without a doubt, Caitlin has sterling academic credentials. She graduated cum laude from Princeton University and received her law degree magma cum laude from Georgetown University Law Center, where she was Order of the Coif. I did not get it, so I do not know how to say it—Order of the Coif, and managing editor of the *Georgetown Law Journal*.

After graduating, she clerked for Judge Patricia M. M. Wald of the D.C. circuit and then for Justice Stephen Breyer.

She began her legal career in private practice, including at Howard, Smith & Levin in New York, and then joined the state attorney general's office. Her first job was protecting consumers against Internet-based abuses. She headed up the Internet bureau of the attorney general's office, where she litigated online trading fraud and a variety of consumer protections.

She then became the first deputy solicitor general for the State of New York, and then solicitor general. In this capacity, she was the state's lawyer in chief in the appellate courts. She formulated legal arguments to advance the State of New York's interests in cases ranging from the interstate shipment of wine to the role of dual regulation between state and local governments.

Caitlin has argued four cases in the U.S. Supreme Court, where she won two and lost two, another sign that she is very well balanced. She won the Best Brief Award.

Chuck was not listening to that. I said she was well balanced, because she won two cases and lost two cases in the Supreme Court.

Senator GRASSLEY. A lot better than the ninth circuit, for sure. [Laughter.]

Senator SCHUMER. Well, thank you, Chuck. She won the Best Brief Award from the National Association of Attorneys General for 5 consecutive years during her 8 years of service.

Most recently, Caitlin was in private practice at Weil, Gotshal & Manges in New York City, where she headed up the firm's prestigious appellate practice. She is currently the general counsel to the New York County District Attorney Cyrus Vance. In this capacity, she recently authored a brief in the U.S. Supreme Court to support New York's use of traffic stops.

The D.C. circuit has been called the second highest court in the land because of the number of cases it decides regarding the extent and limits of government power. I think that a remarkable thing about Caitlin is that she comes to a position on the D.C. circuit with a unique depth of knowledge about the practicalities of government.

I always worry about judges who have not had practical experience and seek to impose from on high some decisions that just do not work in the real world. We are not going to find that with Ms. Halligan.

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As solicitor general for the State of New York, she has had a massive client—I have never heard New York State referred as massive, but maybe so—with an extensive policy agenda and many priorities completed with very limited resources.

She defended the state, and, often successfully, up to the Supreme Court. A lawyer who is rigorous, but reasonable in representing her client is, I think, likely to be a rigorous and reasonable judge who similarly serves the rule of law.

Caitlin fits this bill and I think her experience and intelligence should recommend her highly to this committee, whatever party or ideology you come from.

I want to thank the nominees for their work and dedication.

I thank the Chairman for giving me this time today to talk about three nominees who have close connections to my home State of New York.

Senator COONS. Thank you very much, Senator Schumer, for those valuable and detailed introductory comments on the three nominees with some relationship with the State of New York. So thank you. And I know that you, too, have Senate business to which you may want to attend.

We are going to proceed now, if we could, with the first panel, which will consist solely of——

Senator Whitehouse. Mr. Chairman, with your permission, could I just add a good word, also, on behalf of Caitlin Halligan, who comes very well recommended by the leadership that I am familiar with, the law enforcement community in New York.

As the state's former solicitor general and as a real leader in the appellate practice, she is perfectly suited for this court, and has received just rave reviews from our colleagues in the New York law enforcement community, particularly the district attorney for Manhattan, District Attorney Vance.

I wanted to pass on the very, very strong comments I have received in her favor as a tough prosecutor and a brilliant lawyer and a very capable individual.

Senator COONS. Thank you, Senator Whitehouse.

If I might, I would like to invite Ms. Halligan to step forward, if you would, at this time. Ms. Halligan, if you would, remain standing, raise your right hand, and repeat after me.

[Nominee sworn.]

Senator COONS. Thank you very much. Please be seated.

Ms. Halligan, I would welcome you, at the outset, to acknowledge any family members or friends you may have with you today, and then proceed with your statement.

STATEMENT OF CAITLIN JOAN HALLIGAN, NOMINEE TO BE UNITED STATES CIRCUIT JUDGE FOR THE DISTRICT OF COLUMBIA CIRCUIT

Ms. HALLIGAN. Thank you, Senator.

I would like to introduce my daughter, Anna Falcone; my husband, Marc Falcone; my father, Jack Halligan; my mother and father-in-law, Richard and Mimi Falcone. And I also have a number of other friends who are here to be supportive today. Thank you.

Mr. Chairman, thank you and the members of the Committee for being here today. I also want to thank the President for the ex-

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traordinary privilege of nominating me to this position. And I want to thank Senator Schumer and Senator Whitehouse for their very generous comments.

Other than that, I have no statement and would be happy to answer the committee's questions.

Senator COONS. Thank you, Ms. Halligan. We will proceed then to questions, if we might. I am still expecting the Chairman to join us for an opening round of questions, but I will begin, if I might.

Ms. Halligan, if you might start by just briefly describing your judicial philosophy, that might be helpful for all of us.

Ms. HALLIGAN. Senator, I believe that the role of a judge is a limited, but important one. I think that the job is to apply the law to the facts, to do so in the context of a specific case that is presented to a court.

I believe that judges have to have a deep respect for precedent and, also, a full commitment to being fair and impartial with every case that comes before a judge.

Senator COONS. That is helpful. Thank you. And you have spent the vast majority of your legal career as an advocate. If confirmed for the D.C. Circuit Court, in your view, based on that philosophy, how would your role as a judge be different from that of an advocate?

Ms. HALLIGAN. I think the role is very different, Senator, and thank you for the opportunity to address that issue.

I believe that the role of an advocate is to make the very best arguments that you can that have a reasonable basis on behalf of your client, whether you agree or disagree with those positions.

I think that by contrast, the role of a judge is to look at every case with an open mind, to look at what the text in front of you says and the precedent, and to make the best decision that you can in accordance with the law.

Senator COONS. Thank you. In reviewing the background for this hearing today, I read, in particular, about a report that was issued by the Federal Courts Committee of the New York City Bar.

It was entitled "*The Indefinite Detention of Enemy Combatants*," and further titled, "*Balancing Due Process and National Security in the Context of the War on Terror*."

I was a little concerned about this report, in particular, to the extent that it seemed to conclude the United States lacks the authority to detain folks who are considered enemy combatants, and I know you served on that Committee at the time the report was issued.

If you could tell me something about your role in writing this report, whether you affirmed it or agree with it, and then, if possible, something about your view of the impact of terrorism on our communities and the importance of appreciating and respecting that impact, as you have conducted yourself in your recent legal roles.

Ms. HALLIGAN. Thank you, Senator. I am really grateful to have the opportunity to address that report.

I first became aware of the existence of that report this summer, when I went to the City Bar Association. In responding to this committee's questionnaire, I wanted to make sure that I had done full diligence, and I knew that I had been a member of the Committee that you referred to.

And so I went through the bar association's files and I discovered this report. I was, frankly, taken aback by it, for a couple of reasons.

First of all, the Supreme Court has clearly held that indefinite detention is authorized by the AUMF statute. And so the notion that the President lacks that authority, I think, is clearly incorrect.

I also was a little bit taken aback by the tone of the report. I think that the issues of indefinite detention and any issues in the national security realm are very serious ones, and I think that approaching those issues as respectfully as possible is the most productive way to proceed.

But the bottom line is that the report does not represent my work. It does not reflect my views.

Senator COONS. And, Ms. Halligan, have you had any personal experiences that give you some exposure to the strains or challenges in law enforcement, in the legal process, or in our community that are a result of acts or incidents of terrorism?

Ms. HALLIGAN. In several regards, Senator. You know, at a personal level, I live and work in downtown Manhattan and I worked two blocks away from the World Trade Center on September 11. And so I have a very acute awareness of how serious these issues are and how important the task of protecting our citizens is. It is something that I think you cannot live and work in New York without thinking about on a frequent basis.

And I have actually spent a fair amount of time during my time in private practice working on a pro bono basis to assist the organization that is tasked with rebuilding the 9/11 site. So I have worked very closely and, in the course of doing that, gotten an upfront understanding of just how devastating the consequences of that attack here, even 10 years down the road.

I also now work in the district attorney's office and although the work of counterterrorism is primarily work that is done by the Federal Government, we also attempt to do our part to make sure that any issues that we identify are addressed as quickly and responsibly as possible. And so I think that my work on the law enforcement side has also made me very aware of how serious the challenges are that we face.

Senator COONS. Thank you, Ms. Halligan.

I will turn to Senator Grassley for his first round.

Senator GRASSLEY. Thank you very much.

I want to ask you some questions that would try to find out whether you believe the Constitution is original intent or evolving. And since you were involved in some briefs dealing with the Eighth Amendment, do you personally believe that the meaning of the Eighth Amendment has changed over time?

Ms. HALLIGAN. Senator, I believe that the Constitution is an enduring document and I believe that the best way in which we can interpret it is to look to the text and the original intent of the framers.

Senator GRASSLEY. And, obviously, that original text, at least going back to the amendments of 1792, provide for the death penalty.

Ms. HALLIGAN. It does, Senator, and I have defended the death penalty in New York's courts under constitutional challenge.

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Senator GRASSLEY. In one of your statements, you had said something about the meaning of the Constitution depends on whether there is an enduring legislative consensus, and you quoted in one brief that 18 states expressly disallowed the death penalty for juveniles and 12 states did not permit the death penalty under any circumstances.

So it seems to me, under your reasoning, you might believe that if 30 states ban the death penalty entirely, then the punishment would be unconstitutional. In other words, the legislatures acting in one way or another kind of changes the Constitution.

Ms. HALLIGAN. Senator, that brief was filed on behalf of a client, the State of New York, and it doesn't represent my personal views. I believe the Supreme Court has been crystal clear that the death penalty is constitutional, and I would fully follow those precedents, if I were lucky enough to be confirmed to the D.C. circuit.

Senator GRASSLEY. OK. Then I am going to ask a question that comes from the same briefs and series of cases, but it does not deal with the issue of the death penalty or not, even though the cases deal with it. But it is kind of from the standpoint that you referred to the *Atkins* case, and you cited it when you filed on *Roper*, and you cited, "The United States now stands alone in the world that has turned its face against juvenile death penalty."

And the majority stated, "Within the world community, the imposition of the death penalty for mentally retarded offenders is overwhelmingly disapproved." It is not whether or not people that are mentally retarded ought to have capital punishment or juveniles.

It brings me to this point. Do you believe it is ever appropriate to rely on foreign law in deciding the meaning of the U.S. Constitution?

Ms. HALLIGAN. I do not, Senator.

Senator GRASSLEY. Well, that is pretty clear. So I will not have to follow-up with another question I had on that subject.

On the Second Amendment, in 2003, you gave a speech expressing concern about Federal legislation to limit the liability of gun manufacturers. You said, "Such an action would likely cutoff at the pass any attempt by states to find solutions through the legal system or their own legislatures that might reduce gun crime."

Many who oppose the Second Amendment rights made similar arguments against after the Supreme Court decided *Heller*. Do you personally agree that the Second Amendment protects individual rights to keep and bear arms?

Ms. HALLIGAN. The Supreme Court has been clear about that. Yes, it does protect individual rights to bear arms, Senator.

Senator GRASSLEY. And would you say that making it a fundamental right under *McDonald* was something you agree with, as well?

Ms. HALLIGAN. That is clearly what the Supreme Court held and I would follow that precedent, Senator.

Senator GRASSLEY. Thank you. Do you believe it is proper for a judge, consistent with governing precedent, to strike down an act of Congress that is deemed unconstitutional and what might be those circumstances?

Ms. HALLIGAN. Senator, thank you for the opportunity to address that. I think that the job of a judge is to examine the constitu-

tionality of a statute when a constitutional challenge is presented, but I think that that authority has to be exercised very sparingly and very carefully.

I think particularly my experience defending a state government against a wide range of constitutional challenges on different issues has taught me just how serious an act it is for a judge to strike down a statute and, therefore, set aside the will of the people that are acting through their representatives.

Senator GRASSLEY. I think you are giving great deference in your response to legislatures deciding public policy as opposed to judges.

Ms. HALLIGAN. I believe that is absolutely the province of the elected branches, Senator, yes.

Senator GRASSLEY. Then let me ask you to comment on a speech in 2005 that Justice Scalia said this, "Every time the Supreme Court defines another right in the Constitution, it reduces the scope of democratic debate."

So do you think that Justice Scalia might be saying something you would agree with?

Ms. HALLIGAN. I think that courts should be very careful about striking down any statute that is enacted by a legislature.

Senator GRASSLEY. It sounds to me like you believe that the Federal Government is one of limited enumerated powers, but I would like to have that clearly stated.

Ms. HALLIGAN. Thank you, Senator. Yes. The Supreme Court has been clear about that point in *Lopez* and *Morrison*, and the Constitution indicates that, as well, I believe.

Senator GRASSLEY. Let me ask two short questions, please.

Senator COONS. Certainly.

Senator GRASSLEY. My time is up, I see.

Senator COONS. Certainly.

Senator GRASSLEY. Do you believe that all powers not specifically delegated in the Federal Government are reserved to the states, according to the Tenth Amendment?

Ms. HALLIGAN. Yes, Your Honor, that is what the text—sorry—Senator, that is what the text says.

Senator GRASSLEY. Now, just as an opportunity to have you think about, if we are a government based on enumerated limited powers and the Federal Government is limited by the Tenth Amendment, could you give me an example of an activity that the Federal Government does not have the authority to regulate?

Ms. HALLIGAN. Well, I think the Supreme Court addressed that in *Lopez*, for example, when it said that Congress could not regulate, I believe—it has been a while since I read the decision, but I believe it was the possession of guns in school zones, and that was an example of where, in the court's opinion, Congress had transgressed its authority.

Senator GRASSLEY. And you know that is probably about the only commerce clause case where the courts have restricted the Federal Government under the commerce clause, as well. I hope there are more of them. But you at least see that as one of those. OK.

Senator COONS. Thank you, Senator Grassley.

We now turn to Senator Blumenthal. Senator?

Senator BLUMENTHAL. Thank you, Senator Coons. And welcome to you and your family. And I would like to say how impressed I

am not only with your experience in public service and your experience in litigation, but, also, in the appellate practice, which is a somewhat specialized area; obviously, very germane and relevant to the position that you have been nominated to fill.

Just to follow-up on some of Senator Grassley's very excellent questions. In your representation of the State of New York and now the district attorney's office, very often, you are in the position of either defending or advocating positions that are those of your client, and I assume that your views are separate and distinct from whatever positions have to be taken——

Ms. HALLIGAN. Thank you.

Senator BLUMENTHAL. [continuing]. To advocate the positions of those clients.

Ms. HALLIGAN. Thank you for your kind remarks, Senator. Yes, that is correct. My work on behalf of the State Government of New York, as well as in the district attorney's office, as well as my work on behalf of clients in the private sector, represents the work of an advocate, to make the best arguments possible, and not my personal views at all.

Senator BLUMENTHAL. And I might actually note, on a personal level, that as attorney general, I was on the opposite side of a case that reached the court of appeals in New York challenging the constitutionality of the New York commuter tax, and your office, under your leadership, was very vigorous and excellent in its advocacy, fortunately, on the losing side of that case.

[Laughter.]

Senator BLUMENTHAL. But I know that in that instance and others, your personal views may have differed from the State of New York, but you were very zealous and vigorous in advocating it. And I assume that now that you would be assuming a judicial position, your goal would be to follow the law, not necessarily your own personal beliefs.

Ms. HALLIGAN. That is correct, Senator. I have great respect for the rule of law and I think my experiences as an advocate have taught me that it is really important that every judge leave their personal views at the door when they come into the courtroom. So I would strive my best to do that.

Senator BLUMENTHAL. Thank you very much.

Thank you, Mr. Chairman.

Senator COONS. Thank you, Senator Blumenthal.

We now turn to Senator Kyl. Senator?

Senator KYL. My colleague, Senator Lee, was here before I was, but you are going to by seniority rather than presence.

Senator COONS. That is my understanding, yes.

Senator KYL. Then if my colleague does not mind, thank you. Thank you.

Could I, first of all, ask you, when you talked about the New York City Bar report, you said, "It does not reflect my views." Was that just with respect to the indefinite detention of enemy combatants issue or other aspects of that report?

Ms. HALLIGAN. Senator, the issues that that report touched on are not ones that I have studied closely. What was clear to me is that that point, in particular, was flatly contradicted by the Supreme Court.

I must say I do not really have clear views about a range of the other issues raised in the report, but I certainly do not agree with them and it does not reflect my work or my views.

Senator KYL. But you were a signatory to the report; is that correct?

Ms. HALLIGAN. Senator, I was a member of the committee. I have no recollection of being apprised of the fact that the report was being drafted, and I clearly should have paid more attention to that and would not agree to serve on a Committee like that in the future unless I could be full apprised of the work that it was conducting. But I learned about it for the first time this summer.

Senator KYL. Well, is your signature affixed to it or your name listed as an approver of the report in any way?

Ms. HALLIGAN. When I identified the report this summer, the report indicates that it comes from the Federal Courts Committee. There is a list of names at the end and mine is one them, which reflects my membership on the committee.

Senator KYL. Do you remember participating in any of the deliberations of the committee?

Ms. HALLIGAN. Not with regard to this report. I did not even recall that it had been written. I was very surprised when I saw it.

Senator KYL. So it is accurate to summarize that you do not remember participating in any of the deliberations of that Committee relative to the report that we are talking about of 2004.

Ms. HALLIGAN. That is correct, Senator.

Senator KYL. And let me just ask you if, prior to this hearing, you took the opportunity to make that point or to criticize any aspect of the report.

Ms. HALLIGAN. No, Senator.

Senator KYL. Let me ask you about another matter that is covered by the report that has to do with the military commissions, because you have expressed opinions about military commissions.

One is the report's conclusion that it is illegal or it should be illegal for the use of military commissions to try alien terrorists for violations of the laws of war. In fact, the report talks about—it says it seems self-evident that the constitutional protections afforded ordinary criminals should presumptively extend to these terrorists.

Do you agree with that conclusion or is that part of the language you said that you wanted to distance yourself from?

Ms. HALLIGAN. Senator, my understanding—again, I am not well versed in this area, but my understanding is that the Supreme Court said in *Hamdan* simply that the military commission procedures that were set up by President Bush shortly after 9/11 were simply inconsistent with Federal statute, not that they were unconstitutional. I believe——

Senator KYL. That is correct. So the question then is with regard to the report's conclusion that it would be unconstitutional to have military commissions, per se, trying these terrorists for violations of laws of war, my question is whether you disagree with that conclusion, as well.

Ms. HALLIGAN. Senator, my understanding is that the current law, enacted in 2009, provides for review of actions by military commissions by the D.C. circuit. So I think it would be inappro-

priate to comment on that precise question, but I would take my guidance from the Supreme Court's precedent in *Hamdan* and any other cases which it decided that were relevant to this point, if I were confirmed.

Senator KYL. When you were practicing, you coauthored an amicus brief in the *al-Marri* case, and it argued that the use of military force authorization that Congress passed did not authorize the seizure and indefinite military detention of a lawful permanent resident alien who was alleged to have conspired with al-Qaeda to execute terrorist attacks on the United States.

Is that a personal view of yours?

Ms. HALLIGAN. No, Senator. That was a brief that—I was not the primary author of the brief, but it was filed on behalf of a client. It does not represent my personal views.

Senator KYL. All right. Do you have a personal view on that issue?

Ms. HALLIGAN. I do not, Senator.

Senator KYL. Understanding that some of the 9/11 hijackers came to the United States under legal visas, do you think that a credible argument can be made for the proposition that an authorization of the use of military force would not include the ability to seize and to hold such terrorists indefinitely?

Ms. HALLIGAN. As a citizen, Senator, that seems like that might be difficult. If I were a judge sitting on a court considering that question, I would have to put that personal sensibility to the side and look at the law.

Senator KYL. Since my time is up, let me just make a point. Obviously, we have 5 minutes, we are trying to get right to the point on something. But for those in the audience, there is a clear possibility that people who appear before the Committee express views that they believe the Committee want to hear rather than necessarily what their own attitudes toward judging would be.

We have seen that happen in the past, and that is why we try to delve into questions that might reflect on your ability to decide cases before you objectively as opposed to from the position of preconceived notions. I am sure you can appreciate that is the reason for some of the questions that you see asked today, and that is the foundation for my questions.

Ms. HALLIGAN. Senator, thank you. I appreciate that, and I do believe that I have had the opportunity to consider a wide range of cases on different issues and I think that whatever my personal views are, I would need to leave those to the side, if I were confirmed.

Senator KYL. Incidentally, just as a matter of clarity, you are not required to argue an amicus brief position. That is something you voluntarily agree to do. Is that not correct?

Ms. HALLIGAN. That was a decision that was made by the attorney general and any work I did on those briefs was under his direction, Senator.

Senator KYL. I see. Thank you very much.

Ms. HALLIGAN. Thank you, Senator.

Senator KYL. Thank you, Mr. Chairman.

Senator COONS. Thank you, Senator Kyl.

Senator Lee.

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Senator LEE. Thank you. I wanted to open just by responding to something made by my colleague from New York a few minutes ago with respect to the caseload within the D.C. circuit.

It is my understanding, based on data I have, that if anything, the caseload of the D.C. circuit has decreased rather than increased over the last few years since 2006.

Nonetheless, we are here to discuss this nominee and will proceed right to that.

Thank you very much for joining us. I wanted to open our discussion by just talking about the importance of dispositive motions. As an attorney, I have sometimes had a frustration or a few that there might be some tendency among judges to want to deny dispositive motions instinctively.

I have wondered whether you could almost call this a form of defensive jurisprudence.

As a judge, after all, it is easier to deny a motion for summary judgment or a motion to dismiss than it is to grant it. If you grant it, you are normally going to throw in an opinion. That opinion might be immediately appealable. You might get overturned. Whereas, if you deny the same motion, then the parties might settle on their own and it results in a form of trial by attrition.

Is this a practice that you may have seen as an attorney from time to time? Is it one that is troubling to you?

Ms. HALLIGAN. As a litigant, I can empathize with that sense of frustration. I think that those are issues that are generally confronted in the first instance by the district courts. And if I were confirmed to an appellate court, I would apply the standard for reviewing any such decisions that was set forth in precedent.

Senator LEE. And I guess that feeds into my next question, which is you, as an appellate judge, would have the opportunity to review these and to scour the records to see where that would happen. I would assume you would be on the lookout for such instances so that you could discourage that from happening.

Ms. HALLIGAN. Yes, Senator.

Senator LEE. I would like to talk to you briefly about a statement made by Alexander Hamilton in *Federalist No. 78* that relates to the role that you would be playing, should you be confirmed to this judgeship.

In *No. 78*, he said, "The courts must declare the sense of the law and if they should disposed to exercise will instead of judgment, the consequence would be equally the substitution of their pleasure to that of the legislative body." In other words, he is drawing this dichotomy between something he calls "will," the prerogative of the legislature, to judgment, the prerogative of the courts.

What do you think he is talking about there? What is "will" and what is "judgment?"

Ms. HALLIGAN. It has been a little while since I have read *Federalist 78*, but from your comments, what I believe that he is talking about is the importance of judges confining themselves to deciding cases on the facts and leaving policymaking for the branches that are constitutionally authorized and, also, best equipped for doing so, which is the legislature and the executive branch.

Senator LEE. Thank you. I wanted to follow-up on Senator Grassley's question from a few minutes ago about providing examples re-

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vealing the fact that the Federal Government is one of limited enumerated powers.

I assume you would agree that the Federal Government was designed to be one with few and defined powers, whereas the states were intended to retain powers that were broader and without comparable limitations.

Ms. HALLIGAN. The Constitution says that it is a government of limited powers.

Senator LEE. In light of that, Senator Grassley asked you a question of whether you could provide an example or a few examples of things that government might want to do, but that shouldn't be done and can't be done at the Federal level consistent with that enumerated powers concept. You mentioned *Lopez*.

Outside of the context of *Lopez* and *Morrison*, which, as far as I am aware, are the only two instances in the last 75 years where the court has invalidated something Congress has done under the commerce clause, any examples, hypothetical or otherwise, that you can point to of where Congress might step out of its limited role?

Ms. HALLIGAN. I think that is hard to say, Senator—thank you for the question—especially without the benefit of some further facts or some area in which Congress might legislate.

Senator LEE. Could Congress legislate that I need to eat four servings of green, leafy vegetables in one day?

Ms. HALLIGAN. Sometimes I think I should do that in my own house, Senator.

Senator LEE. Would it be appropriate legislation for your children, I should ask?

Ms. HALLIGAN. It might be. I think that if Congress were to enact a statute like that, a court would properly look at the Supreme Court's decisions in *Lopez* and *Morrison* and look at the reasons that Congress had enacted the statute and decide, as best it could, whether or not it had transgressed its powers.

Senator LEE. Can you tell me anything about what your instinct would be on that? Does that strike you as economic activity or noneconomic activity? Let us assume that Congress made findings of fact showing that Americans were more likely to consume more health care, health care that might have to be provided by the Federal Government, if they did not eat green, leafy vegetables four times a day.

Ms. HALLIGAN. Senator, I think, in the abstract, it is hard to say. I think that that is the sort of question that would be best resolved with the benefit of a statute and briefing and argument.

Senator LEE. So you see no glaring problem with that that strikes out at you off the page. You would have to examine it in context.

Ms. HALLIGAN. I think as with any statute, you would need to look at it in context.

Senator LEE. Understood.

Ms. HALLIGAN. Thank you, Senator.

Senator LEE. Thank you.

Thank you, Mr. Chairman.

Senator COONS. Thank you, Senator.

We now begin the second round of questions, Ms. Halligan. The concept of federalism holds that Federal legislation is entitled to

supremacy, to follow-up on the conversation you were just having, whereas the Federal Government is empowered to act and state authority is supreme in other areas.

In areas where both levels of government are empowered to act, courts are often called upon to resolve whether Federal action preempts related state law, and that is an area of law in which you have practiced fairly extensively.

If faced with a similar question of Federal preemption, how would you go about deciding whether state law should be enforced, should you be confirmed to the D.C. circuit?

Ms. HALLIGAN. Thank you, Senator. I think with any preemption case, the touchstone is what did Congress intend. If Congress intended to preempt state law, then the state law has to be set aside. And so I would look at the Federal statute and I would look at, as the precedent directs, the purposes that it was intended to achieve, and I would follow the Supreme Court's precedent in that area.

Senator COONS. There was a conversation previously. I asked in the first round about the Federal Courts Committee of the New York City Bar. Just to be clear, how many members were there of that committee? Do you have a sense?

Ms. HALLIGAN. I believe there were about 45, give or take a few. I would want to check to give you a precise number, Senator.

Senator COONS. And last, what are the most important lessons you have learned? As other Senators have commented, you have got a broad and long experience in public service in the law. What are the lessons you have learned in those respective positions and how would you apply those lessons as a Federal circuit court judge?

Ms. HALLIGAN. Thank you, Senator. I think that from my experience in private practice, as well as my experience in public service, I have had the opportunity to litigate a lot of cases on a lot of different issues, and what that has taught me is, first of all, that it is critical that judges come to cases with an open mind, that they be fair and that they be impartial, and, also, that they be respectful to the litigants that are before them.

It has also led me to believe that it is very important for judges to decide cases narrowly on the facts before them and to give guidance that is as clear as possible so that parties can plan their conduct going forward accordingly.

Senator COONS. Thank you. As I believe Senator Schumer and others have referenced earlier, I think one of the reasons that you are particularly well qualified for the D.C. circuit is the hands-on and practical experience you have had representing the State of New York and in other roles and sort of understanding the practical consequences of judicial decisions.

Could you just, in the last, if you would, explain for me the difference between the role of legal advocates and the role you perceive as a judge and exactly how you would rely on precedent in making decisions on the Federal circuit court?

Ms. HALLIGAN. Thank you, Senator. I think as an advocate, you look to precedent to see what reasonable arguments you can make on your behalf, whether those are winning arguments at the end of the day or not. And as part of that, I believe that you are pressing the position of your client to the very best of your abilities, whether that is a winning position or a losing position.

I think, by contrast, as a judge, you need to come to it without any agenda, without any interests, your clients or you own, at the table, and look to precedent to guide you to what the correct answer under the law is. And I think in most cases, there is a correct answer that the precedent directs you toward.

Senator COONS. Thank you, Ms. Halligan.

Senator Grassley.

Senator GRASSLEY. A couple of short questions in the follow-up on something you had a discussion on. I kind of tried to get your views on whether or not you believe the Constitution interpretation of original intent or—I used the word "evolving," and you said that the Constitution is an enduring document.

What do you mean by the word "enduring" as opposed to—well, I should not say as opposed to anything else, because you used it.

Ms. HALLIGAN. What I mean by that, Senator—thank you for the opportunity to clarify that. What I mean by that is that we have a document that was written more than 200 years ago and it is those words in that document that endure today and that guide the decisions that judges must make when confronted with a constitutional question.

Senator GRASSLEY. My next question I think maybe you just answered, but I am going to ask it anyway. Do you believe that the Constitution is also an evolving document?

Ms. HALLIGAN. I am not sure what evolving means, Senator. I think that if faced with a constitutional question, a judge has to look to the text and attempt to understand the original intent behind those words.

Senator GRASSLEY. Thank you.

Senator COONS. Thank you, Senator Grassley.

Senator Blumenthal, any further questions?

Senator BLUMENTHAL. Thank you, Mr. Chairman. Just a couple of quick questions to follow-up on a point that was raised earlier by Senator Kyl concerning the amicus briefs that may have borne your name over the years.

My recollection is that you served as solicitor general for the attorney general's office in New York between the years 2001 to 2007; is that correct?

Ms. HALLIGAN. Yes, Senator.

Senator BLUMENTHAL. And that would cover the terms of Attorney General Spitzer and partly Attorney General Cuomo.

Ms. HALLIGAN. A short period of time in Attorney General Cuomo's administration, yes, Senator.

Senator BLUMENTHAL. And I served as attorney general of Connecticut during those years. My recollection is that they were very active and interested in whatever the subject matter was that could concern those amicus curiae briefs and that their say was not only final, but very often their initiative was what resulted in the New York State attorney general's office and the State of New York becoming an amicus in those cases; is that correct?

Ms. HALLIGAN. Yes. Those briefs were written and filed at the direction of the attorney general himself. That is correct.

Senator BLUMENTHAL. And just to follow-up on Senator Lee's excellent point about the workload, my recollection is, correct me if I am wrong, that the D.C. Court of Appeals actually was reduced

in the number of judges by one in response to decreases in workload; is that correct?

Ms. HALLIGAN. Thank you, Senator. I do not really know about the workload statistics of the change in the number of judges on the D.C. circuit.

Senator BLUMENTHAL. I think that in 2008, the number of judges was reduced by one on that court and there are now vacancies for two, and you would be filling one of them. So that may respond, at least in part, to the point raised by—very legitimate point raised by Senator Lee as to trying to allocate judges to respond to workload shifts and changes.

Thank you.

Senator COONS. Thank you, Senator Blumenthal.

Senator Lee, do you have any remaining questions?

Senator LEE. Yes. Just a couple of quick follow-up points.

We were talking earlier about the need to look at Congress' limited power. In your opinion, as one who might be joining the D.C. circuit here shortly, is it worse to uphold the law passed in excess of Congress' power or would it be worse to invalidate a valid law? Is either one of those worse than the other?

Ms. HALLIGAN. Thank you, Senator. It is not a question I have really thought about, to be honest with you. I believe that a judge confronted with a question about whether a law exceeds Congress' commerce clause powers would really just need to look at the precedent and evaluate that particular statute as best as they could.

Senator LEE. Sometimes in criticizing a ruling invalidating a piece of legislation, people will say that is an act of activism. I guess my question is designed to get at are activism and passivism both ultimately a question of good judgment or bad judgment.

If you are invalidating something that is bad, you are just doing your job. If you are upholding something that is within Congress' power, you are also just doing your job. So I assume you would not disagree with that point.

Ms. HALLIGAN. No, Senator. I believe that one of the jobs that judges are confronted with is to police the boundaries that the Constitution sets forth, and they need to do that.

Senator LEE. So invalidating a piece of legislation would not necessarily make you a bad activist judge. It might just mean that you are doing your job.

Ms. HALLIGAN. Absolutely, Senator, yes. Thank you.

Senator LEE. I wanted to ask you very briefly about a speech you gave on May 5, 2003 in White Plains, and you made a statement during that speech to the effect that courts are the special friend of liberty. Time and time again, we have seen how the dynamics of our rule of law enables enviable social progress and mobility.

I was wondering if you could just share with us, with the committee, what you might have meant in suggesting that the law and perhaps the courts, in particular, can be used as a tool of social progress and how such a view might influence your role as a judge and how you might approach your job, if you were confirmed?

Ms. HALLIGAN. Senator, that was a speech—thank you. That was a speech that was given in the attorney general's stead. I do not recall, candidly, what was in my head when I made that particular

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remark, and I do not see any way in which it would affect my role as a judge one way or the other, were I lucky enough to be confirmed.

Senator LEE. Understood. Thank you.

Ms. HALLIGAN. Thank you, Senator.

Senator LEE. Thank you, Mr. Chairman.

Senator COONS. Thank you, Senator Lee.

Are there any members who have further questions?

Senator GRASSLEY. I presume I will submit some for writing.

Senator COONS. Seeing none, if there are no further questions, we will hold the record open for a week, if there are any members of this Committee who wish to submit further questions.

Again, I want to very much thank you, Ms. Halligan, for being here today, congratulate you on your nomination and your willingness to continue in a long and dedicated career of public service.

As Ms. Halligan and her friends and family are departing, we may take a brief 2-minute recess before the second panel.

[The biographical information follows.]

UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY

QUESTIONNAIRE FOR JUDICIAL NOMINEES

PUBLIC

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

   Caitlin Joan Halligan

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

   United States Circuit Judge for the District of Columbia Circuit

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

   New York County District Attorney's Office
   One Hogan Place
   New York, New York 10013

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

   1966; Xenia, Ohio

5. **Education**: List in reverse chronological order each college, law school, or any other institution of higher education attended and indicate for each the dates of attendance, whether a degree was received, and the date each degree was received.

   1992 – 1995, Georgetown University Law Center; J.D. (*magna cum laude*), 1995

   1984 – 1988, Princeton University; A.B. (*cum laude*), 1988

6. **Employment Record**: List in reverse chronological order all governmental agencies, business or professional corporations, companies, firms, or other enterprises, partnerships, institutions or 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 description.

   January 2010 – present
   New York County District Attorney's Office
   One Hogan Place
   New York, New York 10013
   General Counsel

67905.001

2005 – Present
Columbia University School of Law
435 West 116th Street
New York, New York 10027
Lecturer-in-Law

2007 – 2009
Weil, Gotshal and Manges, LLP
767 Fifth Avenue
New York, New York 10153
Partner

1999 – 2007
Office of the New York State Attorney General
120 Broadway
New York, New York 10271
Solicitor General (2001 – 2007)
First Deputy Solicitor General (2001)
Chief, Internet Bureau (1999 – 2000)

1998 – 1999
Howard, Smith & Levin LLP (since merged with Covington & Burling)
1330 Avenue of the Americas
New York, New York 10019
Associate

1997 – 1998
Supreme Court of the United States
Washington, D.C. 20543
Law Clerk to Justice Stephen G. Breyer

Spring 1997
Georgetown University Law Center
600 New Jersey Avenue, N.W.
Washington, D.C. 20001
Adjunct Faculty

1996 – 1997
Wiley, Rein, and Fielding
1776 K Street, N.W.
Washington, D.C. 20006
Associate

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1995 – 1996
United States Court of Appeals for the District of Columbia Circuit
333 Constitution Avenue, N.W.
Washington, D.C. 20001
Law Clerk to Judge Patricia M. Wald

Summer 1995
Jenner and Block
1099 New York Avenue, N.W.
Washington, D.C. 20001
Summer Associate

Summer 1994
Bredhoff and Kaiser
805 15th Street, N.W.
Washington, D.C. 20005
Summer Associate

Summer 1994
Arnold and Porter
555 12th Street, N.W.
Washington, D.C. 20004
Summer Associate

1992 – 1994
Georgetown University Law Center
600 New Jersey Avenue, N.W.
Washington, D.C. 20001
Research Assistant to Professor Michael Gottesman (1993-1994)
Research Assistant to Professor Peter Edelman (1992-1993)

1993
United States Department of Health and Human Services
200 Independence Avenue, S.W.
Washington, D.C. 20201
Summer Assistant to Peter Edelman, Counselor to the Secretary

1992
Georgians For Children
Atlanta, Georgia
Policy Associate

1989 – 1991
United States House of Representatives
Washington, D.C. 20515
Legislative Aide to Representative William V. Alexander

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1988 – 1989
Wuhan Institute of Technology
Wuhan, People's Republic of China
Princeton University Teaching Fellow

Summer 1988
South Carolina Governor's School
College of Charleston
66 George Street
Charleston, South Carolina 29424
Counselor

Other Affiliations (uncompensated)

2009
National Center for Law and Economic Justice
275 Seventh Avenue
New York, New York 10001
Director

2009
Gull Pond Property Owners Association
20 Gull Pond Road
Piercefield, NY 12973
Director

2007 – 2009
Fund for Modern Courts
351 West 54th Street
New York, New York 10019
Director

7. **Military Service and Draft Status**: Identify any service in the U.S. Military, including dates of service, branch of service, rank or rate, serial number (if different from social security number) and type of discharge received, and whether you have registered for selective service.

I have not served in the military. I have not registered for selective service.

8. **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.

Best Brief Awards, Nat'l Assoc. of Attorneys General (2001, 2002, 2003, 2004, 2005)
Milton A. Kaufmann Prize, Georgetown Law School (1995)
Managing Editor, Georgetown Law Journal (1994 – 1995)

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John M. Olin Law and Economics Fellowship (1994 – 1995)
Georgetown Public Interest Law Scholar (1992 – 1995)
Order of the Coif (1995)

9. **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.

New York City Bar
Federal Courts Committee (2003 – 2006)
Information Technology Committee (no record of dates)

New York State Bar Association
Special Committee on the Civil Rights Agenda (2006 to approx. 2008)

New York State Judicial Screening Committees
State Committee and First Department Committee (2007 – 2009)

In preparing this questionnaire, I found Internet reference to my participation on the Chicago-Kent College of Law Working Group on Consumer Protection in 1999. Although I have no recollection of this organization, I am listing it in an abundance of caution.

10. **Bar and Court Admission**:

a. List the date(s) you were admitted to the bar of any state and any lapses in membership. Please explain the reason for any lapse in membership.

Maryland, 1995
New York, 2001

There has been no lapse in membership.

b. List all courts in which you have been admitted to practice, including dates of admission and any lapses in membership. Please explain the reason for any lapse in membership. Give the same information for administrative bodies that require special admission to practice.

Supreme Court of the United States, 2001
United States Court of Appeals for the First Circuit, 2004
United States Court of Appeals for the Second Circuit, 2002
United States Court of Appeals for the Fourth Circuit, 2007
United States Court of Appeals for the Fifth Circuit, 2007
United States Court of Appeals for the Sixth Circuit, 2008
United States Court of Appeals for the Federal Circuit, 2009
United States District Court for the Southern District of New York, 2001

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United States District Court for the Eastern District of New York, 2009

There have been no lapses in membership.

11. **Memberships**:

a. List all professional, business, fraternal, scholarly, civic, charitable, or other organizations, other than those listed in response to Questions 9 or 10 to which you belong, or to which you have belonged, since graduation from law school. Provide dates of membership or participation, and indicate any office you held. Include clubs, working groups, advisory or editorial boards, panels, committees, conferences, or publications.

Fund for Modern Courts
Board of Directors (2007 – 2009)
Gull Pond Property Owners Association (approximately 2006 – Present)
Board of Directors (2009)
Historical Society of the Courts of the State of New York (2007 – Present)
National Center for Law and Economic Justice
Board of Directors (2009)
New York Law Journal, Board of Editors (2007 – Present)
New York City Road Runners (various years)
Princeton Alumni Association (1988 – Present)

In December 2009, the American Constitution Society Board of Directors elected me to serve a board term beginning in 2010. I informed the organization prior to January 1, 2010, that I would not be able to serve as a director because I had accepted a position with the New York County District Attorney's Office that would preclude such participation.

I have made financial contributions, both individually and with my spouse, to a number of charitable organizations over the years, including various cultural, environmental, neighborhood, and other types of organizations. I have not included in the list above any organizations to which I only have given funds and where I have not participated in programmatic activities, although the organizations' development protocols may deem me a "member." Although there may be others I have not found in my records, these organizations include: Adirondack Mountain Club, Avon Foundation, Brearley School, Carnegie Hall, Citizens Union, Classic Stage Company, Columbia Law School Public Interest Law Foundation, City Parks Foundation, Equal Justice Works, Film Forum, First Presbyterian Church Nursery School, Friends of Grace Church School, Friends of Outdoor Action (Princeton University), Grand Street Settlement, Honorable Howard A. Levine Fellowship in Juvenile Justice at Albany Law School, Innocence Project, Legal Information for Families Today, Metropolitan Museum of Art, Museum of Modern Art, National Center for Youth Law, New Israel Fund, New York Women's Foundation, New York University Brennan Center, Office of

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the Appellate Defender of New York, Princeton-in-Asia, Princeton University, St. Margaret Mary School, Sisters of Mercy of the Americas, Thirteen Associates (WNET New York), Union Settlement Association, University of Arizona College of Science, Urban Justice Center, Wild Center Tupper Lake, Windows of Hope Family Relief Foundation, WNYC, YMCA of Greater New York, and Yivo Institute for Jewish Research.

b. 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, or national origin. Indicate whether any of these organizations listed in response to 11a above currently discriminate or formerly discriminated on the basis of race, sex, religion or national origin 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.

None of these organizations has discriminated during my membership and I am not aware of any former discrimination by them.

12. **Published Writings and Public Statements**:

a. List the titles, publishers, and dates of books, articles, reports, letters to the editor, editorial pieces, or other published material you have written or edited, including material published only on the Internet. Supply four (4) copies of all published material to the Committee.

This list represents the published material I have identified through searches of my files and Internet databases. I have tried my best to list all of them here, although there may be some that I have not been able to identify or locate.

Note, "'Just What the Doctor Ordered': Oregon's Medicaid Rationing Process and Public Participation In Risk Regulation," 83 Geo. L. J. 2697 (1995). Copy supplied.

"Supreme Court Watch: *Caperton v. A.T. Massey Coal Co., Inc.*," Metropolitan Corporate Counsel, June 30, 2009. Copy supplied.

As head of the Appellate Practice at Weil, Gotshal and Manges, LLP, I reviewed and occasionally drafted summaries of decisions handed down by the Supreme Court of the United States. Those summaries are available at www.weil.com/supreme-court-watch-archive/. The decisions for which summaries are posted include the following: *Department of Revenue of Kentucky v. Davis*, *CBOCS West, Inc. v. Humphries*, *Allison Engine Co. v. United States*, *Quanta Computer, Inc. v. LG Electronics, Inc.*, *Florida Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, *Meacham v. Knolls Atomic Power Laboratory*, *Chamber of Commerce v. Brown*, *Exxon Shipping Co. v. Baker*, *Altria Group, Inc.*

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v. Good, Crawford v. Metropolitan Gov't of Nashville and Davidson County, Tenn., United States v. Eurodif and *USEC v. Eurodif, Pacific Bell Telephone Co. v. linkLine Communications, Inc., Summers v. Earth Island Institute, Wyeth v. Levine, Vaden v. Discover Bank, Philip Morris USA v. Williams, 14 Penn Plaza LLS v. Pyett, FCC v. Fox Television Stations, Inc., Arthur Andersen LLP, et al. v. Carlisle, et al., Burlington Northern and Santa Fe Railway Co. v. U.S., Shell Oil Co. v. U.S., Carlsbad Technology, Inc. v. HIF Bio, Inc., Boyle v. United States, Caperton v. A.T. Massey Coal Co., Inc.*, and *Gross v. FBL Financial Services, Inc.*

b. Supply four (4) copies of any reports, memoranda or policy statements you prepared or contributed in the preparation of on behalf of any bar association, committee, conference, or organization of which you were or are a member. If you do not have a copy of a report, memorandum or policy statement, give the name and address of the organization that issued it, the date of the document, and a summary of its subject matter.

This list represents the reports, memoranda and policy statements I have identified through searches of my files and Internet databases. I have tried my best to list all such documents to which I contributed, although there may be some that I have not been able to identify or locate.

Fund for Modern Courts

During my service on the Board of Directors of the Fund for Modern Courts, the organization issued, submitted, or joined a handful of amicus briefs and issue reports. Except as indicated, I did not personally contribute or participate in these reports other than as a member of the Board of Directors, which approved them.

Caperton v. A.T. Massey Coal Co., No. 08-22 (S. Ct.) (amicus brief in support of petitioners). Copy supplied.

Kaye v. Silver, No. 400763/08 (N.Y. Sup. Ct.) (amicus brief in support of plaintiffs; I was also counsel of record). Copy supplied.

"White Paper on Improving Help Centers in New York State Family Court," Report of the Family Court Task Force (Nov. 2009). Copy supplied.

"A Call to Action: The Crisis in Family Court," Report to the Chief Judge of the State of New York of the Family Court Task Force (Feb. 2009). Copy supplied.

"Enhancing the Fair Administration of Justice in New York's Towns and Villages through Court Consolidation," Report of the Town and Village Justice Courts Task Force (Feb. 2008). Copy supplied.

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New York City Bar Association
(Formerly Association of the Bar of the City of New York)

During my service on the Federal Courts Committee of the New York City Bar, the Committee issued various reports and public statements. I do not recall personally contributing or participating in these reports other than as a member of the Committee approving them.

Committee on Federal Courts of the Association of the Bar of the City of New York, "Guide to Mediation in the Southern & Eastern Districts of New York" (Mar. 2006). Copy supplied.

Letter to Hon. Peter G. McCabe, Secretary of the Committee on Rules of Practice and Procedure, Administrative Office of the United States Courts re: Federal Rule of Civil Procedure 30(b)(6) (Mar. 24, 2006). Copy supplied.

Letter to Hon. Peter G. McCabe, Secretary of the Committee on Rules of Practice and Procedure, Administrative Office of the United States Courts re: Proposed Electronic Discovery Amendments to the Federal Rules of Civil Procedure (Feb. 15, 2005). Copy supplied.

Letter to Hon. William H. Frist, Majority Leader, United States Senate re: Lawsuit Abuse Reduction Act of 2004 (Nov. 23, 2004). Copy supplied.

Committee on Federal Courts of the Association of the Bar of the City of New York, "The Surge of Immigration Appeals and its Impact on the Second Circuit Court of Appeals" (Aug. 2004). Copy supplied.

Committee on Federal Courts of the Association of the Bar of the City of New York, "Court-Annexed Mediation Programs in the Southern and Eastern Districts of New York: The Judges' Perspective" (Aug. 2004). Copy supplied.

Committee on Federal Courts of the Association of the Bar of the City of New York, "Tiering and the Foreign Sovereign Immunities Act after *Dole*" (July 2004). Copy supplied.

Letter to Hon. Russell D. Feingold, United States Senate re: S.1023, a Bill to Increase the Annual Salaries of Justices and Judges of the United States (approximately 2004). Copy supplied.

Letter to Hon. Peter G. McCabe, Secretary of the Committee on Rules of Practice and Procedure, Administrative Office of the United States Courts re: Proposed Amendment to the Federal Rules of Appellate Procedure Concerning the Citation of Unpublished Opinions (Feb. 12, 2004). Copy supplied.

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Committee on Federal Courts of the Association of the Bar of the City of New York, "The Indefinite Detention of 'Enemy Combatants': Balancing Due Process and National Security in the Context of the War on Terror (Feb. 2004), reprinted in *The Imperial Presidency and the Consequences of 9/11* (James R. Silkenat & Mark R. Shulman, eds.) (2007). Copy supplied.

Although I have not identified any other reports in which I was involved or to which I contributed, the New York City Bar issues many reports on which chairs of its committees, including the committees on which I served, may have been consulted with varying levels of formality.

New York State Bar Association

In 2008, the New York State Bar Association's Special Committee on the Civil Rights Agenda issued a report entitled "Steps Towards a More Inclusive New York and America." I briefly reviewed the report in draft version, and do not recall whether I provided any input to the committee. Copy supplied.

c. Supply four (4) copies of any testimony, official statements or other communications relating, in whole or in part, to matters of public policy or legal interpretation, that you have issued or provided or that others presented on your behalf to public bodies or public officials.

This list represents the testimony, official statements, and other communications relating to matters of public policy or legal interpretation that I have identified through searches of my files and Internet databases. I have tried my best to list all such documents to which I contributed, although there may be some that I have not been able to identify or locate.

August 5, 2009 – Signatory to letter submitted to U.S. Senate Committee on the Judiciary in support of Justice Sonia Sotomayor's nomination as Associate Justice of the Supreme Court of the United States. Copy supplied.

September 19, 2000 – Participation in panel discussion entitled "Implications for Fair Information Practice Principles," Online Privacy Technologies Workshop and Technology Fair, held by National Telecommunications and Information Administration, Department of Commerce, Washington, D.C. I have no notes, transcript, or recording.

November 22, 1999 – "From Wall Street to Web Street: A Report on the Problems and Promise of the Online Brokerage Industry" (issued by the Internet and Investor Protections and Securities Bureaus of the New York State Attorney General's Office). Copy supplied.

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June 11, 1999 – Letter to Donald S. Clark, Secretary, Federal Trade Commission, re: Children's Online Privacy Protection Rule (Comment P994504) (submitted on behalf of 17 state Attorneys General). Copy supplied.

April 30, 1999 – Letter to Donald S. Clark, Secretary, Federal Trade Commission, re: U.S. Perspectives on Consumer Protection in the Global Electronic Marketplace (Comment P994312) (submitted on behalf of 30 state Attorneys General). Copy supplied.

At some point in 1999 or 2000, I testified before a New York State Senate or Assembly committee on issues of internet privacy and internet commerce. I do not have a record of the date or committee, but retained a copy of my written testimony. Copy supplied.

During my tenure as Solicitor General of the State of New York, the office issued numerous opinions regarding matters of state law to local government entities in New York State, as well as to state agencies. Ordinarily, these were signed by the Attorney General or, in the case of informal opinions, by the Assistant Solicitor General who had authored the opinion. I reviewed and contributed to many of these opinions from 2001 to 2007. The opinions are available on Westlaw under the database name NY-AG.

A single opinion was issued in my name, concluding that as a matter of statutory interpretation, the New York Domestic Relations Law did not authorize same-sex marriage. The opinion was No. 2004-1 (Mar. 3, 2004). Copy supplied. I had supervisory responsibility but was not counsel of record in a subsequent lawsuit that arose regarding this issue.

d. Supply four (4) copies, transcripts or recordings of all speeches or talks delivered by you, including commencement speeches, remarks, lectures, panel discussions, conferences, political speeches, and question-and-answer sessions. Include the date and place where they were delivered, and readily available press reports about the speech or talk. If you do not have a copy of the speech or a transcript or recording of your remarks, give the name and address of the group before whom the speech was given, the date of the speech, and a summary of its subject matter. If you did not speak from a prepared text, furnish a copy of any outline or notes from which you spoke.

The following is a list of speeches and panel discussions of which I have a record. To create this list, I searched my personal files, Weil Gotshal time sheets, and the Internet. I have, however, spoken frequently at informal events, particularly during my tenure in the New York State Attorney General's Office, and did not generally retain a record of those appearances. I did not generally prepare written versions of my remarks, or retain notes from which I spoke.

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I also spoke publicly at times as a surrogate for the Attorney General regarding legal matters of interest to the office. None of these remarks reflected views that were personal to me, as opposed to the Attorney General's Office. I have included in the list below all such events I have been able to identify.

Notwithstanding my best efforts to create a list responding to this question that is as complete as possible, there may be other presentations I have given that I have been unable to identify or remember.

March 4, 2009 - Panel discussion on Appellate Strategies: Insights on the Many Strategic Issues Facing an Appellate Advocate before Putting Pen to Paper, at the National Association of Attorneys General Appellate Practice Conference. I have no notes, transcript or recording. The address of the organization is: 2030 M Street, N.W., 8th Floor, Washington, D.C. 20036.

February 6-7, 2009 – Participated in a symposium entitled "The Supreme Court at Mid-Term," at Stanford Law School, in Stanford, California. I have no notes, transcript or recording.

January 22, 2009 – Panel discussion for clients regarding legal developments at the Supreme Court of the United States. I have no notes, transcript or recording. The address of the organization is: Weil, Gotshal & Manges, LLP, 1300 I Street, N.W., Washington, D.C. 20005.

December 17, 2008 – Moderated panel discussion conducted by attorneys from Legal Momentum on the U.S. Supreme Court's docket for October Term 2008. I have no notes, transcript or recording. The address of the organization is: Weil, Gotshal & Manges, LLP, 767 Fifth Avenue, New York, New York 10153.

October 6, 2008 – Participated as judge at "First Monday in October" program held by New York Appellate Defender's Office at New York University Law School. I have no notes, transcript or recording. The address of the organization is: 40 Washington Square South, New York, New York 10012.

May 7, 2008 – Presentation on Supreme Court's October Term 2007 for legal staff at American Airlines. I have no notes, transcript or recording. The address of the organization is: American Airlines, Dallas, Texas.

April 14, 2008 – Guest lecturer for Professor Albert Rosenblatt's class. My presentation concerned litigating appeals in the New York state courts and the duties of the New York State Solicitor General. I have no notes, transcript or recording. The address of the organization is: 40 Washington Square South, New York, New York 10012. (I made a similar presentation to Professor Rosenblatt's class on another date, but do not have any specific records of the date of this presentation, or any notes, transcript or recording.)

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March 5, 2008 – Panel discussion on Appellate Strategies: Insights on the Many Strategic Issues Facing an Appellate Advocate before Putting Pen to Paper, at the National Association of Attorneys General Appellate Practice Conference. I have no notes, transcript or recording. The address of the organization is: 2030 M Street, N.W., 8th Floor, Washington, D.C. 20036.

January 1, 2008 – Panel discussion on class actions at ALI Consumer Finance Conference in New York City. I have no notes, transcript or recording.

In 2008, I participated as a guest lecturer for a course on appellate advocacy taught by then-Judge Sonia Sotomayor. I have no record of the specific date, or notes, transcript or recording.

November 28, 2007 – Panel discussion on Petitions and Oppositions to Certiorari, at the National Association of Attorneys General Annual Supreme Court Advocacy Seminar. I have no notes, transcript, or recording. The address of the organization is: 2030 M Street, N.W., 8th Floor, Washington, D.C. 20036.

November 15, 2007 – Panel discussion entitled "Are New York Judicial Elections in Crisis?," held at New York University Law School. I have no notes, transcript or recording. Coverage of the event in the NYU Alumni Almanac (Autumn 2008) is supplied. The address of the organization is: 40 Washington Square South, New York, New York 10012.

August 2, 2007 – Panel discussion for clients entitled "Practical Implications of the Supreme Court's Resale Price Maintenance Decision" (*Leegin Creative Leather Products, Inc. v. PSKS, Inc.*). I have no notes, transcript or recording. The address of the organization is: Weil, Gotshal & Manges, LLP, 767 Fifth Avenue, New York, New York 10153.

June 19, 2007 – Remarks at American Constitution Society membership event at the Harvard Club of New York. I discussed opportunities for state law enforcement initiatives in the context of a federal system. I have no notes, transcript, or recording. The address of the organization is: 1333 H Street, N.W., 11th Floor, Washington, D.C. 20005.

December 5, 2006 – Panel discussion on Petitions and Oppositions to Certiorari, at the National Association of Attorneys General Annual Supreme Court Advocacy Seminar. I have no notes, transcript, or recording. The address of the organization is: 2030 M Street, N.W., 8th Floor, Washington, D.C. 20036.

July 13, 2006 – Panel discussion on the Supreme Court's October Term 2006, at an in-house continuing legal education program for legal staff at the New York State Attorney General's Office. I have no notes, transcript or recording. The address of the organization is: New York State Attorney General's Office, 120 Broadway, New York, New York 10271.

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June 29, 2006 – I moderated a roundtable discussion on Important Legal Issues State Appellate Lawyers are Facing and the Various Legal Arguments They Can Advance in Civil Appeals, at the National Association of Attorneys General State Solicitors & Appellate Chiefs Conference. I have no notes, transcript, or recording. The address of the organization is: 2030 M Street, N.W., 8th Floor, Washington, D.C. 20036.

May 22, 2006 – Participation as judge in moot court argument entitled "The Scales of Justice – A Reargument of *Palsgraf v. Long Island R.R. Company*." I have no notes, transcript or recording. The event was held by the Historical Society of the Courts of the State of New York. The address of the organization is: 140 Grand Street, White Plains, New York 10601.

2006 (approx.) – Discussion regarding the scope of a "reporter's privilege," at a lunch event sponsored by the Communications and Media Law Committee of the NYC Bar Association. I have no notes, transcript or recording of my presentation. The address of the organization is: 42 West 44th Street, New York, New York 10036.

December 7, 2005 – Remarks at meeting of New York State Bar Association's Media Law Committee in New York City. I have no notes, transcript or recording. The address of the organization is: One Elk Street, Albany, New York 12207.

December 1, 2005 – Panel discussion at New York State Bar Association seminar on New York Appellate Practice. I have no notes, transcript or recording. The address of the organization is: One Elk Street, Albany, New York 12207.

October 11, 2005 – Panel discussion entitled "Making a Living in Social Change: Scholarship, Service and Action." Princeton University Career Services Office. I have no notes, transcript or recording. The address of the organization is: 36 University Place, Suite 200, Princeton, New Jersey 08544.

July 30, 2005 – Panel discussion entitled "The New Takings Jurisprudence," American Constitution Society National Convention, in Washington, D.C. Audio recording supplied.

July 25, 2005 – Panel discussion on the Supreme Court's October Term 2005, at an in-house continuing legal education program for legal staff at the New York State Attorney General's Office. I have no notes, transcript or recording. The address of the organization is: New York State Attorney General's Office, 120 Broadway, New York, New York 10271. The same program was conducted for legal staff in the Albany, New York office of the New York State Attorney General on July 28, 2005.

June 22, 2005 – I moderated a panel entitled "A View from the Bench: Insights on

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Appellate Advocacy from our federal and state judges who formerly served in state Attorney General offices," at the National Association of Attorneys General State Solicitors and Appellate Chiefs Conference. Participants were Justice Jeffrey Amestoy, Justice Brian Morris, Judge Jeffrey Sutton, and Peter Verniero. I have no notes, transcript or recording. The address of the organization is: 2030 M Street, N.W., 8th Floor, Washington, D.C. 20036.

July 12, 2004 – Panel discussion on the Supreme Court's October Term 2004, at an in-house continuing legal education program for legal staff at the New York State Attorney General's Office. I have no notes, transcript or recording. The address of the organization is: New York State Attorney General's Office, 120 Broadway, New York, New York 10271. The same program was conducted for legal staff in the Albany, New York office of the New York State Attorney General on July 13, 2004.

June 30, 2004 – Panel discussion entitled "Marriage for Same-Sex Partners: Where Do We Stand Now?," held by the New York County Lawyers' Association in New York City. I have no notes, transcript or recording. The address of the organization is: 14 Vesey Street, New York, New York 10007.

June 17, 2004 – I moderated a roundtable discussion on Emerging Legal Issues in Civil Appeals, at the National Association of Attorneys General State Solicitors & Appellate Chiefs Conference. I have no notes, transcript, or recording. The address of the organization is: 2030 M Street, N.W., 8th Floor, Washington, D.C. 20036.

November 6, 2003 – Panel discussion on the Supreme Court's docket for October Term 2003, at an in-house continuing legal education program for legal staff at the New York State Attorney General's Office. I have no notes, transcript or recording. The address of the organization is: New York State Attorney General's Office, 120 Broadway, New York, New York 10271.

May 5, 2003 – Remarks at Law Day 2003, held at New York State Judicial Institute. Text of remarks and press report supplied.

April 2, 2002 – Panel discussion entitled "Fair Trials/Free Press," held at Columbia University Law School. I have no notes, transcript or recording. The address of the organization is: 435 West 116th Street, New York, New York 10027.

October 1, 2001 – Discussion in class entitled "Women at the Top," led by Professor Rita Maldonado-Bear at New York University Stern School of Business. I have no notes, transcript or recording. The address of the organization is: 25 West 4th Street, New York, New York 10012.

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July 10, 2001 – Panel discussion regarding Markle Foundation study entitled "Toward a Framework for Internet Accountability." I have no notes, transcript or recording. Video is available at http://www.stateofthe.net/framework.shtml. Press report supplied.

November 14, 2000 – Panel discussion entitled "Caught in the Web: Privacy Concerns in Cyberspace," held at New York University Law School. I have no notes, transcript or recording. The address of the organization is: 40 Washington Square South, New York, New York 10012.

November 7, 2000 – Panel discussion entitled "Litigating Copyright, Trademark, and Unfair Competition Cases," at a continuing legal education program held by the Practicing Law Institute in New York City. I have no notes, transcript or recording. The address of the organization is: New York Conference Center, 810 Seventh Avenue, New York, New York 10019.

September 19, 2000 – Panel discussion entitled "Implications for Fair Information Practice Principles," at a Privacy Workshop, National Telecommunications and Information Administration, U.S. Department of Commerce. Transcript supplied.

July 7, 2000 – Panel discussion on "Privacy and the Internet," held by National Association of Women Lawyers in New York City. I have no notes, transcript or recording. The address of the organization is: 321 North Clark Street, Chicago, Illinois 60654.

June 30, 2000 – Panel discussion on "E-Commerce Crime," National White Collar Crime Center and National Coalition for Prevention of Economic Crime. I have no notes, transcript or recording. The address of the organization is: 10900 Nuckols Road, Glen Allen, Virginia 23060.

June 27, 2000 - Panel discussion at a continuing legal education program on "Internet law" held by the Practicing Law Institute in New York City. I have no notes, transcript or recording. The address of the organization is: New York Conference Center, 810 Seventh Avenue, New York, New York 10019.

June 18, 2000 – Panel discussion entitled "Cybersafety: Issues and Challenges Online," at meeting on "Partnering for Safe Neighborhoods" held by the New York State Attorney General's Office. I have no notes, transcript or recording. The address of the organization is: New York State Attorney General's Office, 120 Broadway, New York, New York 10271.

June, 2000 – Panel discussion at Internet and Society Conference, held by Berkman Center for Internet and Society, Harvard Law School. I have no notes, transcript or recording. The address of the organization is: 23 Everett Street, Cambridge, Massachusetts 02138.

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May 7, 2000 – Economic Crime Summit, Austin, TX. I have no notes, transcript or recording. Press report supplied.

April 5, 2000 – American Advertising Federation Conference, Washington, D.C. I have no notes, transcript or recording. Press report supplied.

March 27, 2000 – Panel discussion entitled "Privacy Requirements and the Limits on Cross-Marketing," at a conference held by the Practicing Law Institute in New York City. I have no notes, transcript or recording. The address of the organization is: New York Conference Center, 810 Seventh Avenue, New York, New York 10019.

January, 2000 – Panel discussion entitled "Impact of the Internet on the Mission of the Attorneys General," at conference held by National Association of Attorneys General. I have no notes, transcript or recording. The address of the organization is: 2030 M Street, N.W., Washington, D.C. 20036.

November, 1999 – Panel discussion entitled "Litigating Copyright, Trademark and Unfair Competitions Cases for the Experienced Practitioner," at a continuing legal education program held by the Practicing Law Institute in New York City. I have no notes, transcript or recording. The address of the organization is: New York Conference Center, 810 Seventh Avenue, New York, New York 10019.

October 8, 1999 – Panel discussion entitled "Get Wired: Practicing Law in the Internet Age; Internet and the Public Interest," at a continuing legal education program held by the Association of the Bar of the City of New York. I have no notes, transcript or recording. The address of the organization is: 42 West 44th Street, New York, New York 10036.

June 16, 1999 – Presentation to inaugural meeting of E-Commerce Committee, The Business Council of New York State. I have no notes, transcript or recording. The address of the organization is: 152 Washington Avenue, Albany, New York 12210. Press report supplied.

June 9, 1999 – Panel discussion entitled "Jurisdiction and Choice of Law for Consumer Protection in eCommerce: U.S. Perspectives," at Federal Trade Commission Public Workshop on "U.S. Perspectives on Consumer Protection in the Global Electronic Marketplace." I have no notes, transcript or recording.

June 8, 1999 – Panel discussion entitled "Core Protections for eConsumers," at Federal Trade Commission Public Workshop on "U.S. Perspectives on Consumer Protection in the Global Electronic Marketplace." I have no notes, transcript or recording.

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I have conducted internal trainings and made ceremonial presentations at in-house events not open to the public, such as new attorney welcomes and performance award presentations, during my time at the New York County District Attorney's Office, at Weil Gotshal, and at the New York Attorney General's Office. I am not aware of these having been recorded, except for a handful of continuing legal education programs used by Weil Gotshal for attorneys of the firm.

On September 20, 2010, I gave an in-house CLE lecture on "Professional Responsibility" (with Dan Alonso, Chief Assistant District Attorney) to the entering class of Assistant District Attorneys.

My records of in-house CLE lectures at Weil Gotshal include the following presentations:

Supreme Court Review (panel), July 7, 2009
Supreme Court Review (panel), July 8, 2008
Appeals and Oral Advocacy (with Miranda Schiller), November 21, 2008
Appeals and Oral Advocacy (with Miranda Schiller), December 4, 2007
Oral Arguments (with Christopher Pace), September 26, 2007

e. List all interviews you have given to newspapers, magazines or other publications, or radio or television stations, providing the dates of these interviews and four (4) copies of the clips or transcripts of these interviews where they are available to you.

I have searched my files and Internet databases to refresh my memory in an effort to produce as complete a list of interviews as I could, but it is still possible there are some I was not able to locate.

Vesselin Mitev, "Amici Line Up in Dispute Over Appointment of Ravitch," New York Law Journal (Aug. 18, 2009). Copy supplied.

Peter Page, "Appellate Appeal: Younger Attorneys Can Get on the Fast Track Into Court With A Trend to Appoint State Solicitors General," Broward Daily Business Review (Aug. 20, 2008). Identical or nearly identical versions of this article appeared in other publications. Copy supplied.

Joanna Breitstein, "Pharma's Day in Court," Pharmaceutical Executive (July 2008). Copy supplied.

Ellen Rosen, "What's Happened to the Lawyers Who Worked for Spitzer?" New York Times (May 18, 2007). Copy supplied.

"Caitlin Halligan to Join Weil, Gotshal & Manges LLP as Head of Appellate Practice Group," PR NewsWire (May 17, 2007). Copy supplied.

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John Caher, "Caitlin J. Halligan / Top Trials of 2005," New York Law Journal Magazine (Feb. 2006). Copy supplied.

Karen Setze, "U.S. Supreme Court Declines to Hear Challenge to New York 'Convenience' Test," State Tax Notes (Nov. 7, 2005). Copy supplied.

Gregory J. Langlois, "Dress Rehearsal: The Moot Court Program at Georgetown Law Center's Supreme Court Institute," Journal of Appellate Practice and Process (Fall 2005). Copy supplied.

Patrick D. Healy, "State Court is Debating the Future of Casinos," New York Times (Mar. 22, 2005). Copy supplied.

Glenn Coin, "After Hearing: Hope, Caution," Post-Standard (Jan. 13, 2005). Copy supplied.

Rick Brand, "Spitzer's Novel Claim: Court Revives Suit Over Chandler Estate," Newsday (Dec. 17, 2004). Copy supplied.

John Caher, "Spitzer's Vision is Reflected in Major Cases, Minor Details," New York Law Journal (Dec. 8, 2004). Copy supplied.

Tony Mauro, "Supreme Court Hears Arguments on Felons' Voting Rights," Legal Intelligencer (Nov. 9, 2004). Copy supplied.

Tony Mauro, "Stating Their Case," The American Lawyer (Aug. 18, 2003) (reprinted in other publications). Copy supplied.

John Caher, "Judge in Conduct Hearing Points Finger At Commission," New York Law Journal (Apr. 4, 2003). Copy supplied.

Margo Schlanger, Inmate Litigation, 116 Harv. L. Rev. 1555, 1564 (2003). Copy of excerpt supplied.

John Caher, "Spitzer Names Halligan Solicitor General," New York Law Journal (Sept. 25, 2001). Copy supplied.

Lisa I. Fried, "Internet Abuse Spawns New Age Cops," New York Law Journal (Sept. 27, 1999). Copy supplied.

Stephen Labaton, "Can Defendants Cry 'E-Sanctuary' and Escape the Courts?" New York Times (Sept. 22, 1999). Copy supplied.

Mark Harrington, "Keeping Law and Order On Net Transactions," Newsday (Sept. 17, 1999). Copy supplied.

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Lisa I. Fried, "E-Commerce: A Recent Ruling Stirs Compliance Concerns," New York Law Journal (Aug. 26, 1999). Copy supplied.

David McGuire, "Consumers, Industry Clash Over Online Disclosure," Newsbytes (June 8, 1999). Copy supplied.

Michael Hill, "High-Tech Issues: Faster Than the Speed of Legislation?" Associated Press State and Local Wire (June 1, 1999). Copy supplied.

Henry Gilgoff, "Dragnet for Net Fraud: Growth of Internet Commerce Brings Concerns About Consumer Protection," Newsday (Mar. 21, 1999). Copy supplied.

"State Online Consumer Protection Units Cropping Up," Communications Daily (Mar. 18, 1999). Copy supplied.

Heidi Kriz, "Stranger than Fiction," Wired Magazine (Feb. 18, 1999). Copy supplied.

On February 20, 2008, I commented in an interview with Nina Totenberg of National Public Radio regarding preemption decisions handed down by the Supreme Court of the United States. Transcript supplied.

On December 7, 2004, I commented in an interview with Nina Totenberg of National Public Radio regarding *Swedenburg v. Kelly*, a case regarding the constitutionality of state restrictions on shipment of wine that I argued in the United States Supreme Court. Transcript supplied.

On January 17, 2000, I appeared on a CNN Moneyline News Hour program regarding "E-Commerce." Transcript supplied.

On July 27, 1999, I appeared on a CNN Moneyline News Hour program regarding the application of New York laws to online gaming. Transcript supplied.

When I was Solicitor General of New York, I commented in numerous interviews on behalf of the New York State Attorney General, generally on cases handled by the Solicitor General's Office. Most of these interviews were on background and I have no record of them.

13. **Judicial Office**: State (chronologically) any judicial offices you have held, including positions as an administrative law judge, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

I have not held a judicial office.

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a. Approximately how many cases have you presided over that have gone to verdict or judgment? _____

   i. Of these, approximately what percent were:

jury trials:	___%
bench trials:	___% [total 100%]
civil proceedings:	___%
criminal proceedings:	___% [total 100%]

b. Provide citations for all opinions you have written, including concurrences and dissents.

c. For each of the 10 most significant cases over which you presided, provide: (1) a capsule summary of the nature the case; (2) the outcome of the case; (3) the name and contact information for counsel who had a significant role in the trial of the case; and (3) the citation of the case (if reported) or the docket number and a copy of the opinion or judgment (if not reported).

d. For each of the 10 most significant opinions you have written, provide: (1) citations for those decisions that were published; (2) a copy of those decisions that were not published; and (3) the names and contact information for the attorneys who played a significant role in the case.

e. Provide a list of all cases in which certiorari was requested or granted.

f. Provide a brief summary of and citations for all of your opinions where your decisions were reversed by a reviewing court or where your judgment was affirmed with significant criticism of your substantive or procedural rulings. If any of the opinions listed were not officially reported, provide copies of the opinions.

g. Provide a description of the number and percentage of your decisions in which you issued an unpublished opinion and the manner in which those unpublished opinions are filed and/or stored.

h. Provide 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, provide copies of the opinions.

i. Provide citations to all cases in which you sat by designation on a federal court of appeals, including a brief summary of any opinions you authored, whether majority, dissenting, or concurring, and any dissenting opinions you joined.

14. **Recusal:** If you are or have been a judge, identify the basis by which you have assessed the necessity or propriety of recusal (If your court employs an "automatic" recusal system

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by which you may be recused without your knowledge, please include a general description of that system.) Provide a list of any cases, motions or matters that have come before you in which a litigant or party has requested that you recuse yourself due to an asserted conflict of interest or in which you have recused yourself sua sponte. Identify each such case, and for each provide the following information:

I have not served as a judge.

a. whether your recusal was requested by a motion or other suggestion by a litigant or a party to the proceeding or by any other person or interested party; or if you recused yourself sua sponte;

b. a brief description of the asserted conflict of interest or other ground for recusal;

c. the procedure you followed in determining whether or not to recuse yourself;

d. your reason for recusing or declining to recuse yourself, including any action taken to remove the real, apparent or asserted conflict of interest or to cure any other ground for recusal.

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

a. List chronologically any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. If appointed, please include the name of the individual who appointed you. Also, state chronologically any unsuccessful candidacies you have had for elective office or unsuccessful nominations for appointed office.

From 1999 until early 2007, I served in the Office of the New York State Attorney General. During that time, I served as Chief of the Office's Internet Bureau (1999-2000), First Deputy Solicitor General (2001), and Solicitor General (2001-early 2007). I was appointed to those positions by New York Attorney General Eliot Spitzer.

Since January 2010, I have served as General Counsel of the New York County District Attorney's Office. I was appointed to that position by New York County District Attorney Cyrus Vance.

I have had no unsuccessful candidacies for elective office or unsuccessful nominations for appointed office.

b. List all memberships and offices held in and services rendered, whether compensated or not, to any political party or election committee. If you have ever held a position or played a role in a political campaign, identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

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In 2009, I was a member of the Women for Cy Committee of the Cy Vance for Manhattan District Attorney Campaign. I served as one of many co-hosts of a fundraiser.

In 2008, I coordinated research conducted by several other attorneys on the election laws of several states, which was provided to representatives of the Obama presidential campaign.

In 2004 and 2008, I canvassed voters on one or two occasions on behalf of the Democratic nominees for President (respectively, John Kerry and then-Senator Barack Obama).

In 1998, I volunteered briefly in formulating policy positions and conducting research for the campaign of Eliot Spitzer for New York State Attorney General.

I may have volunteered upon occasion for various political candidates during high school and college, but have no specific recollections of such activities.

16. **Legal Career:** Answer each part separately.

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

i. 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;

1997-1998; I served as a law clerk to Justice Stephen G. Breyer, Supreme Court of the United States.

1995-1996; I served as a law clerk to Judge Patricia M. Wald, United States Court of Appeals for the District of Columbia Circuit.

ii. whether you practiced alone, and if so, the addresses and dates;

I have never practiced alone.

iii. 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.

Summer 1995
Jenner and Block
1099 New York Avenue, N.W.
Washington, D.C. 20001
Summer Associate

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1996 – 1997
Wiley, Rein, and Fielding
1776 K Street, N.W.
Washington, D.C. 20006
Associate

1998 – 1999
Howard, Smith & Levin LLP (since merged with Covington & Burling)
1330 Avenue of the Americas
New York, New York 10019
Associate

1999 – 2007
Office of the New York State Attorney General
120 Broadway
New York, New York 10271
Solicitor General (2001 – 2007)
First Deputy Solicitor General (2001)
Chief, Internet Bureau (1999 – 2000)

2007 – 2009
Weil, Gotshal and Manges, LLP
767 Fifth Avenue
New York, New York 10153
Partner

January 2010 – present
New York County District Attorney's Office
One Hogan Place
New York, New York 10013
General Counsel

iv. whether you served as a mediator or arbitrator in alternative dispute resolution proceedings and, if so, a description of the 10 most significant matters with which you were involved in that capacity.

I have never served as a mediator or arbitrator.

b. Describe:

i. the general character of your law practice and indicate by date when its character has changed over the years.

As a junior associate at Wiley, Rein & Fielding (1996 – 1997) and Howard, Smith & Levin (briefly in 1998), I performed legal research and

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drafted briefs under the close supervision of a partner. I also reviewed documents in preparation for depositions.

As Chief of the Internet Bureau in the New York Attorney General's Office (1999 – 2000), I managed a small unit that investigated and litigated online fraud and other Internet cases. About half of my time was devoted to handling my own cases, with the balance spent supervising matters handled by other attorneys and working on Internet policy issues.

As First Deputy Solicitor General (2001), approximately one-third of my time was spent handling my own appeals, and the remainder was devoted to supervising other attorneys and addressing office-wide questions of law and legal policy.

As Solicitor General (2001 – early 2007), I supervised a group of approximately 45 lawyers and assisted in setting office-wide legal policy. Approximately one-third of my time was devoted to administration, policy matters, and legal issues that arose in a trial setting; approximately one-third was devoted to reviewing draft briefs written by other lawyers in my office; and the balance was devoted to cases that I personally handled on behalf of the Office.

As a partner and head of the appellate practice at Weil, Gotshal & Manges (2007 – 2009), I spent the majority of my time on appeals in which I served as lead counsel. I also devoted substantial time as part of legal teams handling trial-level matters, generally in federal courts and occasionally in arbitration. The balance of my time was spent on business development and administration.

As General Counsel to the New York County District Attorney (2010 – present), my responsibilities are varied. The vast majority of my time is spent on the Office's criminal matters; I also monitor a number of civil issues that affect the Office and its lawyers. I devote approximately one-third of my time to policy and budget issues. Additionally, I personally handle a docket of about 10 misdemeanor cases as part of an effort by the senior lawyers in the office to support the line prosecutors in the approximately 88,000 misdemeanor cases handled by the office each year.

ii. your typical clients and the areas at each period of your legal career, if any, in which you have specialized.

As Solicitor General and First Deputy Solicitor General, my clients included the State of New York and its agencies, as well as individual state officials and employees. While I devoted some time to formulating legal strategy at the investigative or trial stages of a matter, my practice was predominately in the federal and state appellate courts. The issues I

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handled were wide-ranging, including federal and state constitutional challenges to state statutes; questions of statutory interpretation; and various types of proceedings against state officials in both federal and state courts. As Chief of the New York State Attorney General's Internet Bureau, I investigated and litigated various issues that arose in the online environment, including online trading, fraud and consumer protection cases, and privacy.

In private practice, my clients were primarily large corporations, and also included several smaller businesses, two public entities, and several non-profit groups and individuals whom I represented on a pro bono basis. The subject matter of my work varied widely, including commercial litigation, ERISA, international trade, and arbitration.

In the New York County District Attorney's Office, my client is the People of the State of New York; my practice heavily emphasizes criminal law.

c. Describe the percentage of your practice that has been in litigation and whether you appeared in court frequently, occasionally, or not at all. If the frequency of your appearances in court varied, describe such variance, providing dates.

The vast majority of my practice has been in litigation. I did not appear in court as a junior associate. As First Deputy Solicitor General and Solicitor General, I appeared frequently in courts of appeal, and continued to appear in courts of appeal, albeit less frequently, as a partner.

i. Indicate the percentage of your practice in:
   1. federal courts: 65%
   2. state courts of record: 35%
   3. other courts:
   4. administrative agencies:

ii. Indicate the percentage of your practice in:
   1. civil proceedings: 90%
   2. criminal proceedings: 10%

d. State the number of cases in courts of record, including cases before administrative law judges, you tried to verdict, judgment or final decision (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

Although I have assisted in briefing or developing legal strategy for cases in numerous courts of record, I have not tried any cases to verdict, judgment, or final decision.

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i. What percentage of these trials were:
   1. jury:
   2. non-jury:

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

I have argued four cases before the Supreme Court of the United States:

Swedenburg v. Kelly, 544 U.S. 460 (2005)
City of Sherrill v. Oneida Indian Nation of New York, 544 U.S. 197 (2005)
United Haulers Assn., Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330 (2007)
United States v. Eurodif S.A., 129 S. Ct. 878 (2009).

Oral argument transcripts are supplied.

I have written and/or appeared as counsel of record on numerous certiorari petitions, oppositions to certiorari, merits briefs, and amicus briefs. My review of my own records, along with the Supreme Court's docket, indicate that those matters include:

Hoffman Plastic Compound, Inc. v. Nat'l Labor Relations Bd., No. 00-1595 (Amicus brief in support of respondent on behalf of New York and other states). Copy supplied.

Ulster Home Care, Inc. v. Spitzer, No. 01-248 (Brief in opposition to certiorari). Copy supplied.

N.Y. Ass'n of Convenience Stores v. Roth, No. 01-560 (Brief in opposition to certiorari). Copy supplied.

Nevada Dep't of Human Res. v. Hibbs, No. 01-1368 (Amicus brief in support of respondents on behalf of New York and other states). Copy supplied.

Grutter v. Bollinger, No. 02-241, and *Gratz v. Bollinger.*, No. 02-516 (Amicus brief in support of respondents on behalf of New York and other states). Copy supplied.

Pataki v. Consol. Edison Co. of N.Y., No. 02-358 (Certiorari petition and reply brief). Copies supplied.

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S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians of Fla., No. 02-626 (Amicus brief in support of respondents on behalf of New York and other states). Copy supplied.

Anderson v. Treadwell, No. 02-639 (Brief in opposition to certiorari). Copy supplied.

Weiss v. Commack Self-Service Kosher Meats, Inc., No. 02-672 (Certiorari petition). Copy supplied.

Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP, No. 02-682 (Amicus brief in support of respondent on behalf of New York and other states). Copy supplied.

Cooper Industries, Inc. v. Aviall Services, Inc., No. 02-1192 (Amicus brief in support of respondent on behalf of New York and other states). Copy supplied.

Pataki v. Saratoga County Chamber of Commerce, No. 03-392 (Certiorari petition and reply brief). Copies supplied.

Rondout Electric, Inc. v. N.Y. State Dep't of Labor, No. 03-560 (Brief in opposition to certiorari). Copy supplied.

Roper v. Simmons, No. 03-633 (Amicus brief in support of respondent on behalf of New York and other states). Copy supplied.

City of Sherrill v. Oneida Indian Nation of N.Y., No. 03-855 (Amicus brief in support of petitioners on behalf of New York). Copy supplied.

Novello v. DiBlasio, No. 03-1137 (Certiorari petition and reply brief.) Copies supplied.

Dibble v. Fenimore, No. 03-1184 (Brief in opposition to certiorari). Copy supplied.

Spargo v. N.Y. Comm'n on Judicial Conduct, No. 03-1273 (Brief in opposition to certiorari). Copy supplied.

Swedenburg v. Kelly, No. 03-1274 (Brief in support of certiorari and brief of respondents). Copies supplied.

Spitzer v. Mateo, No. 03-1589 (Certiorari petition and supplemental letter). Copies supplied.

Cutter v. Wilkinson, No. 03-9877 (Amicus brief in support of petitioners on behalf of New York and Washington States). Copy supplied.

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Lingle v. Chevron USA, Inc., No. 04-163 (Amicus briefs at certiorari and merits stages in support of petitioners on behalf of New York and other states). Copies supplied.

Muntaqim v. Coombe, No. 04-175 (Brief in opposition to certiorari and supplemental letter). Copies supplied.

San Remo Hotel v. City and County of San Francisco, No. 04-340 (Amicus brief in support of respondents on behalf of New York and other states). Copy supplied.

Domino's Pizza v. McDonald, No. 04-593 (Amicus brief in support of respondent on behalf of New York and other states). Copy supplied.

McBride v. Ortiz, No. 04-668 (Certiorari petition). Copy supplied.

Rapanos v. United States, No. 04-1034, and *Carabell v. U.S. Army Corps of Engineers*, No. 04-1384 (Amicus brief in support of respondents on behalf of New York and other states). Copy supplied.

Merrill Lynch v. Dabit, No. 04-1371 (Amicus brief in support of respondent on behalf of New York and other states). Copy supplied.

S.D. Warren Co. v. Me. Dep't of Envtl. Prot., No. 04-1527 (Amicus brief in support of respondent on behalf of New York and other states). Copy supplied.

Huckaby v. N.Y. State Div. of Tax Appeals, 04-1734 (Brief in opposition to certiorari). Copy supplied.

N.Y. Dep't of Transp. v. Newsday, Inc., No. 05-309 (Certiorari petition and motion to dismiss the petition). Copies supplied.

Karr v. Pataki, No. 05-361, and *Dalton v. Pataki*, No. 05-368 (Brief in opposition to certiorari). Copy supplied.

Woodford v. Ngo, No. 05-416 (Amicus briefs in support of certiorari petition and in support of petitioners on behalf of New York and other states). Copies supplied.

Patterson v. New York, No. 05-550 (Brief in opposition to certiorari). Copy supplied.

Envtl. Def. Fund v. Duke Energy Corp., No. 05-848 (Amicus brief in support of petitioners on behalf of New York and other states). Copy supplied.

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Seneca Nation of Indians v. New York, No. 05-905 (Brief in opposition to certiorari). Copy supplied.

Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, No. 05-908, and *Meredith v. Jefferson County Bd. of Educ.*, No. 05-915 (Amicus brief in support of respondents on behalf of New York and other states). Copy supplied.

Drogin v. Lee, No. 05-969, and *Thomas v. Lee*, No. 05-1114 (Amicus brief in support of certiorari petition on behalf of New York and other states). Copy supplied.

United States v. Pataki, No. 05-978, and *Cayuga Indian Nation of N.Y. v. Pataki*, No. 05-982 (Brief in opposition to certiorari). Copy supplied.

Watters v. Wachovia Bank, No. 05-1342 (Amicus brief in support of petitioner on behalf of New York and other states). Copy supplied.

United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., No. 05-1345 (Amicus brief in support of respondents on behalf of New York and other states). Copy supplied.

Jones v. Bock, No. 05-7058, and *Williams v. Overton*, No. 05-7142 (Amicus brief in support of respondents on behalf of New York and other states). Copy supplied.

United States v. Eurodif, S.A., No. 07-1059, and *USEC, Inc. v. Eurodif, S.A.*, No. 07-1078 (Brief in opposition to certiorari and brief of respondent). Copies supplied.

Major League Baseball Advanced Media v. C.B.C. Distribution & Mktg., Inc., No. 07-1099 (Amicus brief in support of petitioners on behalf of National Football League Players Association and National Football League Players Incorporated). Copy supplied.

Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., No. 08-861 (Amicus brief in support of respondent on behalf of constitutional law professors). Copy supplied.

New York v. Williams, No. 09-1425 (Certiorari petition and reply brief). Copies supplied.

I have assisted in the preparation of briefs filed in numerous other matters in the Supreme Court. My review of my own records indicated that those matters in which I provided substantial assistance include:

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United Student Aid Funds, Inc. v. Brannan, No. 96-1210 (Certiorari petition; supplemental brief of petitioner). Copies supplied.

Porter v. Nussle, No. 00-853 (Amicus brief in support of petitioners on behalf of New York and other states). Copy supplied.

Goord v. Lawrence, No. 00-1619 (Certiorari petition). Copy supplied.

Scheidler v. Nat'l Org. for Women, Inc., No. 01-1118, and *Operation Rescue v. Nat'l Org. for Women, Inc.*, No. 01-1119 (Amicus brief in support of respondents on behalf of New York and other states). Copy supplied.

Massachusetts v. EPA, No. 05-1120 (Certiorari petition, brief of petitioner, and reply brief). Copies supplied.

N.Y. State Bd. of Elections v. Torres, No. 06-766 (Certiorari petition). Copy supplied. A reply brief was filed after I had left the Attorney General's Office.

Orkin v. Taylor, No. 07-216 (Brief in opposition to certiorari). Copy supplied.

Liberty Elec. Power, LLC v. Nat'l Energy & Gas Transmission, Inc., No. 07-684 (Certiorari petition). Copy supplied.

Am. Isuzu Motors Inc. v. Ntsebeza, No. 07-919 (Certiorari petition and reply brief). Copies supplied.

Al-Marri v. Spagone, No. 08-368 (Amicus brief in support of petitioner on behalf of constitutional, criminal procedure, and other legal scholars). Copy supplied.

Am. Needle, Inc. v. Nat'l Football League, No. 08-661 (Amicus brief in support of petitioner on behalf of National Football League Players Association and others). Copy supplied.

As this list suggests, I have had varying levels of involvement in a significant number of Supreme Court cases given that much of my legal practice has been as an appellate lawyer. I have searched my files and Internet databases to refresh my memory in an effort to produce as complete as possible a list of cases in which I have been substantially involved, but it is still possible there are some I was not able to locate.

17. **Litigation**: Describe the ten (10) most significant litigated matters which you personally handled, whether or not you were the attorney of record. 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:

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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. *United States v. Eurodif, S.A.*; *USEC Inc. v. Eurodif, S.A.*, 129 S. Ct. 878 (2009) (2008-2009)

This case concerned the meaning of a provision in the 1930 Tariff Act, which allows for the imposition of "antidumping" duties on "foreign merchandise" sold in the United States at "less than its fair value." Pursuant to this provision, the United States Department of Commerce assessed duties on imports of "low enriched uranium," which is used to fuel nuclear reactors. When uranium is processed for this purpose, the enricher (here, Eurodif, S.A.) draws from a stock of uranium that is not differentiated by customer, and processes it to the desired quantity and assay. The Court of International Trade reversed the Department of Commerce's determination, concluding that in light of this arrangement, a customer does not retain an ownership right in a discrete amount of uranium feed, and thus a processing contract is a sale of services, not merchandise. The Federal Circuit affirmed. The Supreme Court of the United States granted certiorari and reversed; I briefed and argued the matter on behalf of Eurodif, S.A. The Court held that the Department of Commerce's application of the statute to the transactions at issue reflected a permissible reading of the statute.

Counsel for co-petitioner Ad Hoc Utilities Group was Nancy Fisher, Pillsbury Winthrop Shaw Pittman LLP, 2300 N Street, N.W., Washington, D.C. 20037, Tel: 202-663-8965. Opposing counsel included Edwin Kneedler, Acting Solicitor General (representing the United States), United States Department of Justice, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530, Tel: 202-514-2217, and Sheldon Hochberg (representing USEC, Inc.), Steptoe & Johnson LLP, 1330 Connecticut Avenue, N.W., Washington, D.C. 20036, Tel: 202-429-6218.

2. *United Haulers Association, Inc. v. Oneida-Herkimer Solid Waste Management Authority*, 550 U.S. 330 (2007) (2006-2007)

Oneida-Herkimer Solid Waste Management Authority enacted "flow control" ordinances governing the management of solid waste in two counties (Oneida and Herkimer) located in upstate New York. The ordinances required that private haulers deliver solid waste collected in the counties to the Authority's facility. Alleging that these provisions discriminated against interstate commerce in violation of the dormant Commerce Clause, a trade association and individual haulers sought to have the ordinances declared unconstitutional. The district court invalidated the laws under *C & A Carbone, Inc. v Clarkstown*, 511 U.S. 383 (1994), and the Second Circuit reversed, reasoning that

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Carbone did not control because the Oneida-Herkimer facilities were public, not private, entities. The Supreme Court of the United States granted certiorari; I filed an amicus brief and argued the case on behalf of New York State, which had worked with localities around the state to enact and implement similar waste ordinances. The Court affirmed, holding that laws favoring local government, as compared with those favoring local or in-state businesses, may be directed at legitimate, non-protectionist goals, and that accordingly, the challenged laws did not discriminate against interstate commerce.

Counsel for Oneida-Herkimer Solid Waste Management Authority was Michael Cahill, Germano & Cahill, P.C., 4250 Veterans Memorial Highway, Suite 275, Holbrook, New York 11741, Tel: 631-588-8878. Counsel for United Haulers Association, Inc. was Evan Tager, Mayer Brown LLP, 1999 K Street, N.W., Washington, D.C. 20006, Tel: 202-263-3000.

3. *Massachusetts v. Environmental Protection Agency*, 549 U.S. 497 (2007) (2006-2007)

A group of private organizations petitioned the Environmental Protection Agency to regulate emissions of "greenhouse gases" under a provision of the Clean Air Act that requires the Agency to prescribe standards for certain air pollutant emissions. The Agency denied the petition, and the groups, joined by Massachusetts, New York, and other states and local governments as intervenors, sought review in the U.S. Court of Appeals for the District of Columbia Circuit. The court of appeals concluded that the Administrator's exercise of discretion was permissible, and both the private organizations and the states petitioned for certiorari. The Supreme Court of the United States granted certiorari and reversed, in a 5-4 opinion. The Court held that there was no jurisdictional barrier to adjudicating the dispute; that the Agency has statutory authority to regulate the emissions of "greenhouse gases" from new motor vehicles; and that the Agency had not sufficiently explained its decision to refuse to regulate such emissions. In my capacity as Solicitor General of New York State, I assisted in the development of the legal arguments and briefs in this matter.

Counsel for Massachusetts was James Milkey, One Ashburton Place, Boston, Massachusetts 02108, Tel: 617-727-2200. Counsel for the Environmental Protection Agency was Gregory Garre, Deputy Solicitor General, United States Department of Justice, Washington, D.C. 20530, Tel: 202-514-2217.

4. *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005) (2004-2005)

The Oneida Indian Nation, a tribe whose ancestral home was in central New York State, purchased tracts of land in the City of Sherrill in 1997 and 1998. Those properties had once been within the boundaries of the historic Oneida Reservation, but were sold to a non-Indian in 1807 and remained in private hands until the 1997 and 1998 sales. The Nation sought to revive its sovereignty over these properties and claimed they were therefore not taxable, relying on *County of Oneida v. Oneida Indian Nation of New York*, 470 U.S. 226 (1985). In that case, the Supreme Court of the United States had held that the Nation could maintain a common-law claim for wrongful possession of lands that the

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historic tribe had conveyed to New York State in the late 1700s and early 1800s, but reserved the question of whether equitable considerations should limit such relief. The district court held in *Sherrill* that the properties purchased by the Nation were exempt from property taxes, and the Second Circuit affirmed. The Supreme Court of the United States granted certiorari, and I filed an amicus brief and argued the case on behalf of New York State. The Court held that in light of the longstanding authority exercised by the State and local governments over the land in question, and the Nation's delay in seeking relief, the Nation could not reassert sovereignty through open-market purchases of their aboriginal lands, and accordingly, their properties were subject to taxation.

Counsel for City of Sherrill was Ira Sacks, Dreier LLP, 449 Park Avenue, New York, New York, 10022, Tel: 212-328-6100. Counsel for Oneida Indian Nation of New York was Michael R. Smith, Zuckerman Spaeder, LLP, 1201 Connecticut Avenue, N.W., Washington, D.C., 20036, Tel: 202-778-1832. Counsel for the United States, which participated in oral argument as *amicus curiae*, was Malcolm Stewart, Deputy Solicitor General, United States Department of Justice, Washington, D.C., 20530, Tel: 202-514-2201.

5. *Swedenburg v. Kelly*, 544 U.S. 460 (2005) (2004-2005)

The plaintiff in this case, an out-of-state winery, challenged as unconstitutional New York's laws regulating the distribution of wine, which generally prohibited the direct shipment of wine from a winery to a consumer. While New York's laws allowed in-state wineries to make direct sales to consumers under certain circumstances, out-of-state wineries were required to ship their products to a wholesaler, who would in turn sell to a retailer. The district court invalidated the laws on the ground that they violated the dormant Commerce Clause; the Second Circuit reversed, on the ground that the statutes fell within the powers granted to the states by the Twenty-first Amendment. The Supreme Court of the United States granted certiorari, and consolidated the New York case with two cases from the Sixth Circuit invalidating a similar Michigan law (*Granholm, et al., v. Heald, et al.* and *Michigan Beer and Wine Wholesalers Association v. Heald, et al.*). I briefed and argued the case on behalf of New York. In a 5-4 decision, the Court held that both states' laws discriminated against interstate commerce in violation of the Commerce Clause, and that the Twenty-first Amendment did not immunize the laws from Commerce Clause scrutiny.

Counsel for State of Michigan was Thomas Casey, Solicitor General of Michigan, Office of the Michigan Attorney General, P.O. Box 30212, Lansing, Michigan 48909; Tel: 517-373-1124. Counsel for Michigan Beer & Wine Wholesalers Association was Miguel Estrada, Gibson, Dunn & Crutcher LLP, 1050 Connecticut Avenue, N.W., Washington, D.C. 20036, Tel: 202-955-8500. Opposing counsel included Clint Bolick (representing Swedenburg), 500 E. Coronado Road, Phoenix, Arizona 85004, Tel: 602-462-5000, and Kathleen Sullivan (representing Eleanor Heald), Quinn Emanuel Urquhart & Sullivan, LLP, 51 Madison Avenue, New York, New York 10010, Tel: 212-849-7000.

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6. *Clearing House Association, L.L.C. et al. v. Cuomo*, 510 F.3d 105 (CA2 2007), *rev'd in part*, 129 S. Ct. 2710 (2009) (2005-2007)

In the course of investigating whether certain national banks had violated New York's fair lending laws, the New York Attorney General requested that the banks provide nonpublic information about their residential lending practices. A banking trade group, joined by the Office of the Comptroller of the Currency, sought to enjoin the Attorney General's request, contending that a regulation promulgated by the Comptroller pursuant to the National Bank Act precluded the state from enforcing its fair lending laws against national banks. I became involved in the matter at this point; the district court enjoined the investigation. I briefed and argued the appeal to the Second Circuit, which affirmed in a divided opinion. The majority held that the Comptroller's regulation was a reasonable interpretation of the National Bank Act's provision barring state officials from exercising "visitorial powers" over national banks. The Supreme Court of the United States subsequently granted certiorari and reversed in part, holding that in light of evidence that the National Bank Act did not prohibit ordinary enforcement of state law, the regulation was not a reasonable interpretation of the statute.

Circuit Judges Cardamone and B.D. Parker, and District Judge Koeltl heard the case. Counsel for the Clearing House Association, L.L.C. was Robinson Lacy, Sullivan & Cromwell, L.L.P., 125 Broad Street, New York, New York 10004; Tel: 212-558-4000. Counsel for the Office of the Comptroller of the Currency was Douglas Jordan, Office of the Comptroller of the Currency, 250 E Street, S.W., Washington, D.C. 20219; Tel: 202-874-5280.

7. *Campaign for Fiscal Equity v. New York*, 100 N.Y. 2d 893 (2003); 8 N.Y. 3d 14 (2006) (2001-2006)

The New York State Constitution includes a provision requiring that the state offer a "sound basic education" to all children. The plaintiff, an education advocacy group, brought suit against New York State claiming that New York City schools did not meet this standard, and seeking additional funds for those schools. After a threshold decision on the justiciability of the constitutional provision, the New York Court of Appeals ruled in 2003 that the constitutional guarantee had not been satisfied, and remanded for further litigation on the appropriate remedy. Three years later, the Court of Appeals ordered the State to provide certain amounts in operating aid and capital funding to fulfill its constitutional obligation. I closely supervised the briefing and argument of both cases in the New York intermediate appellate courts and New York Court of Appeals.

Counsel for the Campaign for Fiscal Equity included Joseph Wayland, Simpson Thacher, 425 Lexington Avenue, New York, New York 10017; Tel: 212-455-3203, and Michael Rebell, Teachers College of Columbia University, 525 West 120th Street, New York, New York 10027; Tel: 212-678-4144.

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8. *Spargo v. New York State Commission on Judicial Conduct*, 351 F.3d 65 (CA2 2003) (2003-2004)

   The New York State Commission on Judicial Conduct charged plaintiff, an elected state judge, with violating several of the state's judicial conduct rules. The judge asked a federal district court to enjoin the state disciplinary proceedings, alleging that they violated the First Amendment and Equal Protection Clause. The district court, relying on the decision of the Supreme Court of the United States in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), declared the conduct rules facially unconstitutional and permanently enjoined their enforcement. I became involved in the matter at this juncture. On appeal, the Second Circuit reversed, holding that the pending state proceedings warranted absention under *Younger v. Harris*, 401 U.S. 37 (1971).

   Circuit Judges Miner, Calabresi, and Straub heard the case. Counsel for Thomas Spargo was David Kunz, DeGraff, Foy, Kunz & Devine L.L.P., 90 State Street, Albany, New York, 12207; Tel: 518-462-5300.

9. *Commack Self-Service Kosher Meats, Inc. v. Weiss*, 294 F.3d 415 (CA2 2002) (2000-2002)

   Under New York law, the state Department of Agriculture and Markets enforced laws intended to prevent intentional fraud in the sale of kosher food; those laws defined "kosher" to mean food "prepared in accordance with orthodox Hebrew religious requirements." After receiving numerous citations for violations of these laws, plaintiff, a kosher meat company, brought suit alleging, *inter alia*, that the provisions ran afoul of the Establishment Clause. The district court agreed, and declared the laws unconstitutional. I briefed and argued the matter in the Second Circuit, which affirmed. The Court held that the challenged provisions excessively entangled government and religion by mandating adherence to orthodox Hebrew religious requirements, and impermissibly advanced Orthodox Judaism's dietary restrictions.

   Circuit Judges Miner, Leval, and Pooler heard the case. Counsel for Intervenors Silver, et al. was Nathan Lewin, Lewin & Lewin, L.L.P., 1828 L Street, N.W., Washington, D.C. 20036; Tel: 202-828-1000. Counsel for Commack Self-Service Kosher Meats, Inc. was Robert Dinerstein, Dinerstein & Lesser, P.C., 6080 Jericho Turnpike, Commack, New York, 11725; Tel: 631-462-1226.

10. *Milk Industry Foundation v. Glickman*, 949 F. Supp. 882 (D.D.C. 1996); 955 F. Supp. 8 (D.D.C. 1997); 967 F. Supp. 564 (D.D.C. 1997) (1996-1997)

    In 1993, six New England states formed a compact (the Northeast Dairy Compact) that allowed them to raise the minimum prices paid by milk processors to dairy farmers in that region. Congress passed a law consenting to the compact, subject to a finding by the Secretary of Agriculture of a "compelling interest in the Compact region." The Secretary published such a finding, and plaintiff sought to enjoin implementation of the compact. By requiring that the Secretary make this determination, plaintiff argued, Congress had

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impermissibly delegated its power to consent to an interstate compact; in any event, the finding was arbitrary and capricious, in violation of the Administrative Procedure Act. The district court denied injunctive relief, issued a stay to allow the Secretary to amplify his finding, and granted summary judgment to the Secretary; I assisted in briefing the matter at each of these stages. The United States Court of Appeals for the District of Columbia Circuit subsequently affirmed.

District Judge Paul Friedman heard the case. Counsel for Secretary Glickman was Marcia Sowles, United States Department of Justice, Civil Division, Federal Programs Branch, 20 Massachusetts Avenue, N.W., Washington, D.C. 20530; Tel: 202-514-4960. Counsel for the Milk Industry Foundation was Steven Rosenbaum, Covington & Burling, 1201 Pennsylvania Avenue, N.W., Washington, D.C. 20004; Tel: 202-662-5568.

18. **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 fully the nature of your participation in these activities. List any client(s) or organization(s) for whom you performed lobbying activities and describe the lobbying activities you performed on behalf of such client(s) or organizations(s). (Note: As to any facts requested in this question, please omit any information protected by the attorney-client privilege.)

Both in private practice and in the public sector, my legal work has primarily centered on litigation. As General Counsel of the New York County District Attorney's Office and as Solicitor General in the New York Attorney General's Office, I have had significant responsibilities for managing legal staff, setting office policies on various subjects, evaluating the office's positions on a range of legal and policy matters, and addressing legal and budgetary issues with other government agencies.

From 2007-2009, I served, on a pro bono basis, as counsel to the Board of Directors of the Lower Manhattan Development Corporation, which is the government entity tasked with overseeing the revitalization of lower Manhattan following the terrorist attacks of September 11, 2001. In that capacity, I reviewed board actions and resolutions, monitored legal actions involving the Corporation, and assisted in negotiation of a major insurance dispute to which the Corporation was a party.

I have performed no lobbying activities on behalf of any client or organization.

19. **Teaching**: What courses have you taught? For each course, state the title, the institution at which you taught the course, the years in which you taught the course, and describe briefly the subject matter of the course and the major topics taught. If you have a syllabus of each course, provide four (4) copies to the committee.

From 2005 to 2007, I taught a seminar on "Contemporary Issues in Federalism" at Columbia Law School with Professor Gillian Metzger; in 2009, I taught the course alone. A copy of the 2009 syllabus is supplied. The topics addressed in the seminar include a historical and comparative perspective on federalism; federalism's theory and values;

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federal power and the Tenth Amendment; the Eleventh Amendment; international and horizontal dimensions of federalism; and an examination of how states exercise their sovereignty.

In the fall of 1996, I co-taught a seminar on social welfare law and policy at Georgetown University with Professor Peter Edelman. I did not retain a syllabus of the course.

20. **Deferred Income/ Future Benefits**: List the 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. Describe the arrangements you have made to be compensated in the future for any financial or business interest.

None.

21. **Outside Commitments During Court Service**: 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.

22. **Sources of Income**: 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, licensing fees, honoraria, and other items exceeding $500 or more (if you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here).

See attached Financial Disclosure Report.

23. **Statement of Net Worth**: Please complete the attached financial net worth statement in detail (add schedules as called for).

See attached Net Worth Statement.

24. **Potential Conflicts of Interest**:

    a. Identify the family members or other persons, parties, categories of litigation, and financial arrangements that are likely to present potential conflicts-of-interest when you first assume the position to which you have been nominated. Explain how you would address any such conflict if it were to arise.

    My husband is a partner at Paul, Weiss, Rifkind, Wharton, and Garrison, LLP, which may appear before the United States Court of Appeals for the District of Columbia Circuit. If confirmed, I would recuse myself from all matters involving his firm. I would also recuse myself from any matters that I handled or

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supervised while in the New York County District Attorney's Office; Weil, Gotshal, and Manges, LLP; or the New York State Attorney General's Office, as well as any matters substantially related to matters I handled or supervised in those offices, although I am not aware of any such conflicts of interest.

b. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern.

I would handle all matters involving actual or potential conflicts of interest through the careful application of the Code of Conduct for United States Judges, as well as other relevant canons and statutory provisions.

25. **Pro Bono Work**: 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.

During my time in private practice, I devoted significant time to serving pro bono clients. For example, from 2007 to 2008, I handled a case in the United States Court of Appeals for the Fifth Circuit on behalf of Hurricane Katrina and Hurricane Rita evacuees. The Federal Emergency Management Agency terminated my clients' rental assistance benefits without adequate notice of the grounds for termination or an opportunity for a hearing prior to termination; as a consequence, a number of them were at a severe risk of homelessness.

In other cases, I wrote amicus briefs on behalf of not-for-profit organizations in both state and federal high courts. My clients included the Fund for Modern Courts, an organization devoted to improving the administration and quality of justice in New York state courts, on whose behalf I filed a brief in support of raising the salaries of New York state judges, and Citizens Union, a nonpartisan group in New York. I also filed an amicus brief in the United States Supreme Court on behalf of a group of constitutional law scholars in *Free Enterprise Fund v. PCAOB*, a case concerning the constitutionality of an oversight entity created by the Sarbanes-Oxley Act. In addition, I assisted in formulating appellate strategies in a number of other pro bono matters handled by others at my law firm.

From 2007 to 2009, I also devoted substantial time to serving as pro bono counsel to the Board of the Lower Manhattan Development Corporation. The Corporation, a public entity, is responsible for facilitating the rebuilding of Lower Manhattan following the terrorist attack of September 11, 2001.

26. **Selection Process**:

a. Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and

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the interviews in which you participated). Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, please include that process in your description, as well as whether the commission recommended your nomination. List the dates of all interviews or communications you had with the White House staff or the Justice Department regarding this nomination. Do not include any contacts with Federal Bureau of Investigation personnel concerning your nomination.

There is no selection commission of which I am aware for the District of Columbia Circuit.

In April, 2010, I spoke with an attorney from the White House Counsel's Office, who informed me that my name was being forwarded to the Justice Department for vetting in regards to a potential nomination on the District of Columbia Circuit. I subsequently spoke with attorneys from the Justice Department regarding the vetting and nomination process. On June 8, 2010, I met with representatives of the White House Counsel's Office and the Justice Department. On September 29, 2010, the President submitted my nomination to the Senate.

b. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any currently pending or specific case, legal issue or question in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning your position on such case, issue, or question? If so, explain fully.

No.

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Rev. 1/2010

FINANCIAL DISCLOSURE REPORT
NOMINATION FILING

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
Halligan, Caitlin J.	D.C. Circuit	09/29/2010
4. Title (Article III judges indicate active or senior status; magistrate judges indicate full- or part-time)	**5a. Report Type** (check appropriate type)	**6. Reporting Period**
Circuit Judge -- nominee	☑ Nomination, Date 9/29/2010 ☐ Initial ☐ Annual ☐ Final 5b. ☐ Amended Report	01/01/2009 to 8/31/2010
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.**	
New York County District Attorney's Office 1 Hogan Place New York, New York 10013	Reviewing Officer_____ Date_____	

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

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

☐ NONE *(No reportable positions.)*

	POSITION	NAME OF ORGANIZATION/ENTITY
1.	Partner	Weil, Gotshal & Manges, LLP
2.	General Counsel	New York County District Attorney's Office
3.	Adjunct faculty member	Columbia Law School
4.	Member, Board of Directors	Fund for Modern Courts
5.	Member, Board of Directors	Gull Pond Property Owners' Association
6.	Member, Board of Directors	National Center for Law and Economic Justice

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

☑ NONE *(No reportable agreements.)*

	DATE	PARTIES AND TERMS
1.		
2.		
3.		

FINANCIAL DISCLOSURE REPORT Page 2 of 9	Name of Person Reporting Halligan, Caitlin J.	Date of Report 09/29/2010

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

A. Filer's Non-Investment Income

☐ NONE *(No reportable non-investment income.)*

DATE	SOURCE AND TYPE	INCOME (yours, not spouse's)
1. 2010 (YTD)	New York County District Attorney's Office; salary	$131,018.41
2. 2009	Weil, Gotshal, & Manges, LLP; partnership income	$1,258,646.00
3. 2009	Columbia University; salary	$6000.00
4. 2008	Weil, Gotshal, & Manges, LLP; partnership income	$1,346,736.00

B. Spouse's Non-Investment Income - *If you were married during any portion of the reporting year, complete this section.*
(Dollar amount not required except for honoraria.)

☐ NONE *(No reportable non-investment income.)*

DATE	SOURCE AND TYPE
1. 2008	Paul, Weiss, Rifkind, Wharton, & Garrison, LLP; partnership income
2. 2009	Paul, Weiss, Rifkind, Wharton, & Garrison, LLP; partnership income
3. 2010	Paul, Weiss, Rifkind, Wharton, & Garrison, LLP; partnership income
4.	

IV. REIMBURSEMENTS - *transportation, lodging, food, entertainment.*
(Includes those to spouse and dependent children: see pp. 25-27 of filing instructions.)

☐ NONE *(No reportable reimbursements.)*

SOURCE	DATES	LOCATION	PURPOSE	ITEMS PAID OR PROVIDED
1. Exempt				
2.				
3.				
4.				
5.				

FINANCIAL DISCLOSURE REPORT Page 3 of 9	Name of Person Reporting	Date of Report
	Halligan, Caitlin J.	09/29/2010

V. GIFTS. *(Includes those to spouse and dependent children; see pp. 28-31 of filing instructions.)*

☐ NONE *(No reportable gifts.)*

	SOURCE	DESCRIPTION	VALUE
1.	Exempt		
2.			
3.			
4.			
5.			

VI. LIABILITIES. *(Includes those of spouse and dependent children; see pp. 32-33 of filing instructions.)*

☑ NONE *(No reportable liabilities.)*

	CREDITOR	DESCRIPTION	VALUE CODE
1.			
2.			
3.			
4.			
5.			

FINANCIAL DISCLOSURE REPORT Page 4 of 9	Name of Person Reporting Halligan, Caitlin J.	Date of Report 09/29/2010

VII. INVESTMENTS and TRUSTS – *Income, value, transactions (Includes those of spouse and dependent children; see pp. 34-66 of filing instructions.)*

☐ NONE *(No reportable income, assets, or transactions.)*

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A-H)	B. Income during reporting period (2) Type (e.g., div., rent, or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. Gross value at end of reporting period (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, redemption)	D. Transactions during reporting period (2) Date mm/dd/yy	D. Transactions during reporting period (3) Value Code 2 (J-P)	D. Transactions during reporting period (4) Gain Code 1 (A-H)	D. Transactions during reporting period (5) Identity of buyer/seller (if private transaction)
1. HR-10 Plan					Exempt				
2. - Doubleline Total Return	A	Interest	L	T					
3. - Loomis Sayles Bond Fund	D	Interest	K	T					
4. - Vanguard Inflation Protected Securities	A	Interest	K	T					
5. - Vanguard Total Bond Market Index	D	Interest	M	T					
6. - Vanguard REIT Index		None	K	T					
7. - Loomis Sayles Global Bond	C	Interest							
8. - Pimco Commodity Real Return	B	Dividend							
9. - TCW Total Return	B	Interest							
10. - BlackRock Russell 1000 Growth S.		None							
11. - BlackRock Russell 1000 Value S.		None							
12. - BlackRock US Debt Index D. Fund		None							
13.									
14. 401(k) Plan									
15. - Pimco Total Return Fund	B	Interest	M	T					
16. - Vanguard Inflation Protected Securities	A	Interest	K	T					
17. - Vanguard REIT Index	B	Dividend	L	T					

1. Income Gain Codes: (See Columns B1 and D4)	A =$1,000 or less F =$50,001 - $100,000	B =$1,001 - $2,500 G =$100,001 - $1,000,000	C =$2,501 - $5,000 H1 =$1,000,001 - $5,000,000	D =$5,001 - $15,000 H2 =More than $5,000,000	E =$15,001 - $50,000
2. Value Codes (See Columns C1 and D3)	J =$15,000 or less N =$250,001 - $500,000 P3 =$25,000,001 - $50,000,000	K =$15,001 - $50,000 O =$500,001 - $1,000,000	L =$50,001 - $100,000 P1 =$1,000,001 - $5,000,000 P4 =More than $50,000,000	M =$100,001 - $250,000 P2 =$5,000,001 - $25,000,000	
3. Value Method Codes (See Column C2)	Q =Appraisal U =Book Value	R =Cost (Real Estate Only) V =Other	S =Assessment W =Estimated	T =Cash Market	

FINANCIAL DISCLOSURE REPORT Page 5 of 9	Name of Person Reporting Halligan, Caitlin J.	Date of Report 09/29/2010

VII. INVESTMENTS and TRUSTS — *income, value, transactions (Includes those of spouse and dependent children; see pp. 34-60 of filing instructions.)*

☐ NONE *(No reportable income, assets, or transactions.)*

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A-H)	B. (2) Type (e.g., div., rent, or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, redemption)	D. (2) Date mm/dd/yy	D. (3) Value Code 2 (J-P)	D. (4) Gain Code 1 (A-H)	D. (5) Identity of buyer/seller (if private transaction)
18. - Loomis Sayles Global Bond	A	Interest							
19. - Pimco Commodity Real Return	A	Dividend							
20. - TCW Total Return	C	Interest							
21. - Vanguard Total Bond Market Index	B	Interest							
22. - Schwab S&P 500 Index		None							
23.									
24. Brokerage Account									
25. Schwab NY Muni Money Fund	A	Interest	J	T					
26. Vanguard Muni Bond Intermediate Term	E	Interest	O	T					
27. DFA US Large Co. Inst.	B	Dividend	N	T					
28. Vanguard Dividend Appreciation	C	Dividend	M	T					
29. Vanguard Energy ETF	A	Dividend	K	T					
30. DFA US Small Cap. Port.	B	Dividend	N	T					
31. DFA Emerging Market	B	Dividend	M	T					
32. DFA International Small Co. Port.	B	Dividend	M	T					
33. Dodge & Cox International	A	Dividend	K	T					
34. Vanguard Europe Pacific ETF	C	Dividend	M	T					

1. Income Gain Codes (See Columns B3 and D4)	A =$1,000 or less	B =$1,001 - $2,500	C =$2,501 - $5,000	D =$5,001 - $15,000	E =$15,001 - $50,000
	F =$50,001 - $100,000	G =$100,001 - $1,000,000	H1 =$1,000,001 - $5,000,000	H2 =More than $5,000,000	
2. Value Codes (See Columns C1 and D3)	J =$15,000 or less	K =$15,001 - $50,000	L =$50,001 - $100,000	M =$100,001 - $250,000	
	N =$250,001 - $500,000	O =$500,001 - $1,000,000	P1 =$1,000,001 - $5,000,000	P2 =$5,000,001 - $25,000,000	
	P3 =$25,000,001 - $50,000,000		P4 =More than $50,000,000		
3. Value Method Codes (See Column C2)	Q =Appraisal	R =Cost (Real Estate Only)	S =Assessment	T =Cash Market	
	U =Book Value	V =Other	W =Estimated		

FINANCIAL DISCLOSURE REPORT Page 6 of 9	Name of Person Reporting Halligan, Caitlin J.	Date of Report 09/29/2010

VII. INVESTMENTS and TRUSTS – *Income, value, transactions (Includes those of spouse and dependent children; see pp. 34-60 of filing instructions.)*

☐ NONE *(No reportable income, assets, or transactions.)*

A. Description of Assets (Including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A-H)	 (2) Type (e.g., div., rent, or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	 (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, redemption)	 (2) Date mm/dd/yy	 (3) Value Code 2 (J-P)	 (4) Gain Code 1 (A-H)	 (5) Identity of buyer/seller (if private transaction)
35. DFA US Large Co. Port.	D	Dividend							
36. Goldman Sachs Commodity Strategy	A	Dividend							
37. Vanguard REIT Index	A	Dividend							
38. iShares Russell 2000		None							
39. iShares US Financial Services		None							
40. Columbia Marsico 21st Century		None							
41. Harding Loevner Emerging Market		None							
42.									
43. IRA									
44. - Metropolitan West Total Return	A	Interest	J	T					
45.									
46. Roth IRA									
47. - Metropolitan West Total Return	A	Interest	J	T					
48.									
49. 401(k) Plan #2									
50. - Pimco Total Return	B	Interest							
51. - T. Rowe PS Income	A	Interest							

1. Income Gain Codes: (See Columns B1 and D4)	A =$1,000 or less F =$50,001 - $100,000	B =$1,001 - $2,500 G =$100,001 - $1,000,000	C =$2,501 - $5,000 H1 =$1,000,001 - $5,000,000	D =$5,001 - $15,000 H2 =More than $5,000,000	E =$15,001 - $50,000
2. Value Codes (See Columns C1 and D3)	J =$15,000 or less N =$250,001 - $500,000 P3 =$25,000,001 - $50,000,000	K =$15,001 - $50,000 O =$500,001 - $1,000,000	L =$50,001 - $100,000 P1 =$1,000,001 - $5,000,000 P4 =More than $50,000,000	M =$100,001 - $250,000 P2 =$5,000,001 - $25,000,000	
3. Value Method Codes (See Column C2)	Q =Appraisal U =Book Value	R =Cost (Real Estate Only) V =Other	S =Assessment W =Estimated	T =Cash Market	

FINANCIAL DISCLOSURE REPORT Page 7 of 9	Name of Person Reporting Halligan, Caitlin J.	Date of Report 09/29/2010

VII. INVESTMENTS and TRUSTS – *Income, value, transactions (Includes those of spouse and dependent children; see pp. 34-60 of filing instructions.)*

☐ NONE *(No reportable income, assets, or transactions.)*

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A-H)	B. (2) Type (e.g., div., rent, or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, redemption)	D. (2) Date mm/dd/yy	D. (3) Value Code 2 (J-P)	D. (4) Gain Code 1 (A-H)	D. (5) Identity of buyer/seller (if private transaction)
S2.									
S3. 401(k) Plan #3									
S4. - Dodge & Cox Stock Fund	A	Dividend							
S5. - Pimco Total Return Instl	A	Interest							
S6.									
S7. Weil, Gotshal, & Manges Capital Account	G	Distribution							
S8. Paul Weiss Rifkind Wharton & Garrison Capital Account		None	M	T					

1. Income Gain Codes: (See Columns B1 and D4)	A =$1,000 or less	B =$1,001 - $2,500	C =$2,501 - $5,000	D =$5,001 - $15,000	E =$15,001 - $50,000
	F =$50,001 - $100,000	G =$100,001 - $1,000,000	H1 =$1,000,001 - $5,000,000	H2 =More than $5,000,000	
2. Value Codes (See Columns C1 and D3)	J =$15,000 or less	K =$15,001 - $50,000	L =$50,001 - $100,000	M =$100,001 - $250,000	
	N =$250,001 - $500,000	O =$500,001 - $1,000,000	P1 =$1,000,001 - $5,000,000	P2 =$5,000,001 - $25,000,000	
	P3 =$25,000,001 - $50,000,000		P4 =More than $50,000,000		
3. Value Method Codes (See Column C2)	Q =Appraisal	R =Cost (Real Estate Only)	S =Assessment	T =Cash Market	
	U =Book Value	V =Other	W =Estimated		

FINANCIAL DISCLOSURE REPORT Page 8 of 9	Name of Person Reporting Halligan, Caitlin J.	Date of Report 09/29/2010

VIII. ADDITIONAL INFORMATION OR EXPLANATIONS. *(Indicate part of Report.)*

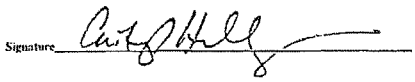
Part VII, Line 57 -- During the reporting period, I received both interest payments on the Weil, Gotshal, & Manges capital account as well as a lump-sum distribution.

FINANCIAL DISCLOSURE REPORT Page 9 of 9	Name of Person Reporting Halligan, Caitlin J.	Date of Report 09/29/2010

IX. CERTIFICATION.

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

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

Signature 

NOTE: ANY INDIVIDUAL WHO KNOWINGLY AND WILFULLY FALSIFIES OR FAILS TO FILE THIS REPORT MAY BE SUBJECT TO CIVIL AND CRIMINAL SANCTIONS (5 U.S.C. app. § 104)

FILING INSTRUCTIONS

Mail signed original and 3 additional copies to:

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

Caitlin Halligan

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	1	187	176	Notes payable to banks-secured			
U.S. Government securities				Notes payable to banks-unsecured			
Listed securities—see schedule	2	824	613	Notes payable to relatives			
Unlisted securities				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 – see schedule		912	755
Real estate owned—see schedule	4	050	000	Chattel mortgages and other liens payable			
Real estate mortgages receivable				Other debts-itemize:			
Autos and other personal property		40	000				
Cash value-life insurance		7	956				
Other assets itemize:							
529 College Savings Program – see schedule		115	651				
				Total liabilities		912	755
				Net Worth	7	312	641
Total Assets	8	225	396	Total liabilities and net worth	8	225	396
CONTINGENT LIABILITIES				GENERAL INFORMATION			
As endorser, comaker or guarantor				Are any assets pledged? (Add schedule)	NO		
On leases or contracts				Are you defendant in any suits or legal actions?	NO		
Legal Claims				Have you ever taken bankruptcy?	NO		
Provision for Federal Income Tax							
Other special debt							

FINANCIAL STATEMENT

NET WORTH SCHEDULES

Listed Securities	
DFA Emerging Markets Core Equity I (DFCEX)	$ 108,739
DFA International Small Company I (DFISX)	106,363
DFA US Large Co. (DFUSX)	485,747
DFA US Small Cap I (DFSTX)	290,849
Dodge & Cox International Stock (DODFX)	30,916
Doubleline Total Return (DBLTX)	65,230
Loomis Sayles Bond Retail (LSBRX)	93,330
Metropolitan West Total Return Bond I (MWTIX)	66,615
PIMCO Total Return Institutional (PTTRX)	125,127
Vanguard Total Bond Market Index (VBMFX)	128,140
Vanguard Energy ETF (VDE)	43,396
Vanguard Europe Pacific ETF (VEA)	227,327
Vanguard REIT Index (VGSIX)	101,363
Vanguard Dividend Appreciation ETF (VIG)	162,566
Vanguard Inflation-Protected Securities (VIPSX)	69,840
Vanguard Intermediate-Term Tax Exempt (VWITX)	719,065
Total Listed Securities	$ 2,824,613

529 College Savings Program	
Aggressive Growth Portfolio	$ 27,778
Inflation-Protected Securities Portfolio	31,059
Small-Cap Stock Index Portfolio	30,652
Value Stock Index Portfolio	26,162
Total Assets in 529 College Savings Program	$ 115,651

Real Estate Owned	
Personal residence	$ 3,450,000
Vacation home	600,000
Total Real Estate Owned	$ 4,050,000

Real Estate Mortgages Payable	
Personal residence (mortgage)	$ 410,760
Vacation home (mortgage)	413,024
Vacation home (home equity loan)	88,971
Total Real Estate Mortgages Payable	$ 912,755

AFFIDAVIT

I, **CAITLIN JOAN HALLIGAN**, do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

September 29, 2010
(DATE)

Caitlin Halligan
(NAME)

Marilyn R. Bauza
(NOTARY)

MARILYN R. BAUZA
Notary Public, State of New York
No. 01BA484148
Qualified in Westchester County
Certificate Filed in New York County
Commission Expires September 30, 2013

January 5, 2011

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

I have reviewed the Senate Questionnaire I previously filed in connection with my nomination on September 29, 2010, to be United States Circuit Judge for the District of Columbia Circuit. Incorporating the additional information below, I certify that the information contained in that document is, to the best of my knowledge, true and accurate.

- I am counsel of record in *Tolentino v. New York*, No. 09-11556, which is currently pending before the Supreme Court of the United States and is scheduled for oral argument on March 21, 2011. I have appended a copy of the brief in opposition to certiorari; the brief of respondent New York has not yet been filed.

I am also forwarding an updated Net Worth Statement and Financial Disclosure Report as requested in the Questionnaire. I thank the Committee for its consideration of my nomination.

Sincerely,

Caitlin J. Halligan

cc:
The Honorable Charles Grassley
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

No. 09-11556

IN THE

Supreme Court of the United States

JOSE TOLENTINO,

Petitioner,

- versus -

STATE OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

BRIEF IN OPPOSITION

CYRUS R. VANCE, JR.
District Attorney
CAITLIN J. HALLIGAN*
General Counsel
HILARY HASSLER
Chief of Appeals
ALAN B. GADLIN
ALLEN J. VICKEY
Assistant District Attorneys

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* *Counsel of Record for Respondent*

OCTOBER 7, 2010

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the exclusionary rule applies to preexisting government records obtained after an allegedly unlawful traffic stop, where the only link between the two is that the police learned the petitioner's identity as a result of the stop?

OPINIONS BELOW

The opinion of the New York Court of Appeals is reported at 14 N.Y.3d 382, 926 N.E.2d 1212. Pet. App. A1-A7. The opinion of the Appellate Division of the Supreme Court of the State of New York, First Department, is reported at 59 A.D.3d 298, 873 N.Y.S.2d 602. Pet. App. A1-A7. The opinion of the Supreme Court of the State of New York, New York County is unreported. Pet. App. A9-A10.

JURISDICTION

The New York Court of Appeals rendered its decision on March 30, 2010. The petition was filed on June 22, 2010. Petitioner properly invokes this Court's jurisdiction under 28 U.S.C. § 1257(a).

STATEMENT OF THE CASE

On January 1, 2005, several New York City police officers stopped petitioner, who was driving in Manhattan, for playing his music too loudly. They ascertained his identity and ran a computer check of petitioner's New York State Department of Motor Vehicles ("DMV") records. That check revealed that petitioner's license had been suspended, and that he had received at least ten suspensions on at least ten different dates for failure to answer a summons or pay a fine. Petitioner was charged with one count of Aggravated Unlicensed Operation of a Motor Vehicle in the First Degree. See N.Y. Veh. & Traf. Law § 511(3)(a)(ii).

Petitioner moved to suppress his DMV records and statements he made after his arrest as, inter alia, the product of an unlawful police stop of his vehicle.

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Alternatively, petitioner requested that the court hold a Mapp hearing[1] on these motions. Pet. App. A12. In his motion, petitioner noted that the felony complaint alleged that an officer had conducted a computer check of his DMV records, which revealed that his license had been suspended. As a general matter, "[t]he steps required to obtain a DMV records check are the stop of the vehicle and the elicitation of the driver's name or the driver's license number." Pet. App. A21. While acknowledging that DMV records are public records that existed in computerized form prior to his arrest, see Pet. App. A23, petitioner claimed that the police would not have obtained his DMV records "[b]ut for his unlawful seizure by the police . . . and they are therefore the fruit of the police illegality." Pet. App. A21.

The People opposed petitioner's motion on two grounds: first, that the officers' stop of petitioner was lawful, and second, that even if petitioner had been stopped illegally, the exclusionary rule had no application. Pet. App. A39-A42. With regard to the second point, the People argued that the Fourth Amendment imposes no sanction when an unlawful stop leads to discovery of a person's identity, which in turn leads to pre-existing official records. Pet. App. A39-A42.

While allowing a hearing on whether to suppress statements made by petitioner at the time of the stop, the trial court denied petitioner's request for a suppression

[1] A Mapp hearing is conducted to determine whether evidence was obtained as a result of a Fourth Amendment violation, and thus must be suppressed under the exclusionary rule. See Mapp v. Ohio, 367 U.S. 643 (1961).

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hearing regarding the DMV records.[2] The court concluded that "[a]n individual does not possess a legitimate expectation of privacy in files maintained by the [DMV] and such records do not constitute evidence which is subject to suppression under a fruit of the poisonous tree analysis." Pet. App. A9-A10.

On August 3, 2005, petitioner pled guilty to Aggravated Unlicensed Operation of a Motor Vehicle in the First Degree, which was the sole count in the indictment. He entered this plea before any hearing could be held on his motion to suppress his statements. On September 28, 2005, he was sentenced to five years probation.

Petitioner's subsequent appeal of the order denying his motion to suppress the DMV records was rejected.[3] Before New York's intermediate appellate court (the Appellate Division, First Department), petitioner claimed, inter alia, that the trial court had erred in holding that the exclusionary rule had no application to DMV records, and he sought a remand for a hearing on his motion to suppress those records. The Appellate Division unanimously affirmed. Pet. App. A8. The court recognized that "a defendant need not establish a privacy interest in an alleged fruit of a preexisting violation of his or her Fourth Amendment rights." Pet. App. A8. With respect to the

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[2] Under New York's criminal procedure law, a court may deny a suppression motion without a hearing if the motion papers do not allege a legal basis for suppression. See N.Y. Crim. Proc. Law § 710.60(3)(a).

[3] New York's criminal procedure law allows a defendant to appeal a final order denying a motion to suppress evidence, "notwithstanding the fact that such a judgment is entered upon a plea of guilty." N.Y. Crim. Proc. Law § 710.70(2).

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scope of the "fruits" doctrine, the Appellate Division held that "DMV records are not suppressible fruits." Pet. App. A8. In INS v. Lopez-Mendoza, 468 U.S. 1032, 1039 (1984), the Court stated that "[t]he...identity of a defendant...is never itself suppressible as a fruit of an unlawful arrest." Thus, the court concluded, "'there is no sanction to be applied when an illegal arrest only leads to discovery of [a person's] identity and that merely leads to the official file.'" Pet. App. A8 (quoting United States v. Guzman-Bruno, 27 F.3d 420, 422 [9th Cir. 1994] [internal citations omitted]). The court also found it significant that the DMV records had been compiled independently of petitioner's arrest. Pet. App. A8.

The New York Court of Appeals affirmed. The state high court noted that petitioner did not contend that his name or identity could be suppressed as the fruit of an allegedly unlawful stop. Rather, he claimed that the DMV records could be suppressed because absent an illegal stop, the police would not have learned petitioner's name and would not have been able to obtain the records. Pet. App. A3. The court examined federal circuit court decisions holding that the exclusionary rule has no application when the police unlawfully stop someone, learn his name, and use that name to check preexisting government immigration records. See id. (citing United States v. Farias-Gonzalez, 556 F.3d 1181, 1189 [11th Cir. 2009]; United States v. Bowley, 435 F.3d 426, 430-31 [3d Cir. 2006]; United States v. Roque-Villanueva, 175 F.3d 345, 346 [5th Cir. 1999]; Hoonsilapa v. INS, 575 F.2d 735, 737 [9th Cir. 1978]). Relying on these decisions, as well as this Court's decision in Lopez-Mendoza,

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the New York high court held that petitioner's DMV records were not subject to suppression as fruits of a purportedly unlawful stop. Pet. App. A3.

The Court of Appeals found further support for its holding in United States v. Crews, 445 U.S. 463 (1980). See Pet. App. A3. In Crews, a plurality of the Court held that "'[t]he exclusionary rule enjoins the Government from benefiting from evidence it has unlawfully obtained; it does not reach backward to taint information that was in official hands prior to any illegality.'" Pet. App. A3 (quoting Crews, 445 U.S. at 475). DMV records, the New York high court reasoned, like other preexisting records already in possession of the government, are not subject to suppression. Pet. App. A3.

In addition, the Court of Appeals distinguished this case from Davis v. Mississippi, 394 U.S. 721 (1969), and Hayes v. Florida, 470 U.S. 811 (1985), on two distinct grounds. First, the defendants in those cases, unlike petitioner, were illegally stopped for the purpose of obtaining fingerprints, which were not preexisting, to connect them to crimes under investigation. Second, the fingerprints were used to establish the defendants as perpetrators of a crime, not merely to establish the identities of the individuals stopped by the police. Pet. App. A4.

Lastly, the court reasoned that its ruling would not give the police an incentive to illegally stop, detain and search individuals. Because any evidence recovered in the course of such a stop is still subject to the exclusionary rule, the court explained, the police would be sufficiently deterred from conducting illegal car stops. Pet. App. A4.

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Two judges dissented, arguing that DMV "records are subject to suppression if obtained by the police through the exploitation of the Fourth Amendment violation." Pet. App. A5.

ARGUMENT

This case presents the narrow question of whether pre-existing government documents—here, DMV records—are subject to suppression, where police learn the identity of a driver through an allegedly unlawful traffic stop, and then procure his DMV records. The New York Court of Appeals correctly held below that the exclusionary rule has no application in this context, and petitioner offers no legitimate reason for this Court to review that decision. Accordingly, the petition for certiorari should be denied.

Petitioner points this Court to a purported split among the federal courts on the applicability of the exclusionary rule to fingerprints and related evidence used to establish a defendant's immigration status. See Pet. 23-25, 27. However, any division among the courts on the issue is not implicated here. See Point I, infra. All of the cases cited by petitioner involve fingerprints (and in some instances other types of evidence) that are obtained in the course of an unlawful search and seizure, and later used in a criminal proceeding brought under 8 U.S.C. § 1326.[4] While the decisions cited by petitioner discuss the import of this Court's decision in INS v. Lopez-

[4] 8 U.S.C. § 1326 makes it a crime to be present in the United States after having been previously deported.

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Mendoza, they do so in the context of a specific type of evidence and a specific criminal statute, neither of which is at issue in the decision below.

With respect to the question that was actually decided below, the New York Court of Appeals reached the correct result. See Point II, infra. Lopez-Mendoza suggests that a defendant's identity cannot be the subject of suppression in any circumstance. See 468 U.S. at 1039-40. Precedent that predates Lopez-Mendoza, in particular United States v. Crews, 445 U.S. 463, confirms this principle.

Finally, this case provides a poor vehicle for resolving any issues regarding the scope of the exclusionary rule. See Point III, infra. Although the People argued before the trial court that the stop of petitioner's car was indeed lawful, the trial court did not address this point. Even if this Court were to grant certiorari and rule in petitioner's favor on the legal question presented here, a remand would be required to determine the legality of the stop. If the traffic stop was found to be lawful, as is likely, then petitioner's DMV records would not be subject to suppression in any event.

I. To the extent that there is a split among the federal circuit courts, it is not implicated in this case.

Petitioner claims that the federal circuit courts are divided "as to the applicability of the exclusionary rule to pre-existing identity-related documents

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maintained by the government." Pet. 14. To the extent petitioner has identified a valid split, however, it is not implicated here.

According to petitioner, the Fourth, Eighth, and Tenth Circuits have held that "identity-related" evidence is subject to suppression,[5] while the Third, Fifth, Ninth, and Eleventh Circuits have reached the opposite result. See Pet. 23-25 (comparing United States v. Oscar-Torres, 507 F.3d 224 [4th Cir. 2007]; United States v. Guevara-Martinez, 262 F.3d 751 [8th Cir. 2001]; and United States v. Olivares-Rangel, 458 F.3d 1104 [10th Cir. 2006], with Bowley, 435 F.3d at 426; Roque-Villanueva, 175 F.3d at 345; Guzman-Bruno, 27 F.3d at 420; and Farias-Gonzalez, 556 F.3d at 1181).[6]

None of these cases, however, are directly on point. The decisions cited by petitioner all address the applicability of the exclusionary rule to fingerprint evidence, and in some cases other types of evidence, obtained from undocumented immigrants

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[5] While focusing on a purported split among the circuits, petitioner also cites United States v. Juarez-Torres, 441 F.Supp.2d 1108 (D. N.M. 2006). There, the district court set forth a view regarding the scope of the exclusionary rule that is arguably at odds with the one adopted by the court below. However, Juarez-Torres, unlike the case at issue here, concerns a prosecution under 8 U.S.C. § 1326. In any event, a difference of opinion between a single district court and a state court does not warrant review by this Court. See Supreme Court Rule 10(b).

[6] Petitioner fails to cite the Sixth Circuit's holding that under Lopez-Mendoza, a defendant's identity is not suppressible. See United States v. Navarro-Diaz, 420 F.3d 581, 588 (6th Cir. 2005). Additionally, while the Ninth Circuit has more recently suggested that in some instances fingerprints obtained after an unlawful arrest may be subject to suppression, it has otherwise stood by the general principle that evidence relating to a defendant's identity is not suppressible as fruit of the poisonous tree. See United States v. Garcia-Beltran, 443 F.3d 1126, 1131-35 (9th Cir. 2006).

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who are charged with violating 8 U.S.C. § 1326, which criminalizes presence in the United States following deportation.

At issue in this line of cases is not whether mere identity is suppressible, or even whether pre-existing evidence is suppressible because it was located merely by learning a defendant's identity, but rather whether fingerprint evidence generated only after, and as the result of, improper police behavior can be suppressed. See Oscar-Torres, 507 F.3d at 226, 229; Olivares-Rangel, 458 F.3d at 1105, 1112-13; Guevara-Martinez, 262 F.3d at 752, 754-55. In fact, two of the cases relied upon by petitioner expressly distinguish between mere identity and identity-related evidence. See Oscar-Torres, 507 F.3d at 230 ("Despite the illegality of his detention or arrest, [a defendant] cannot suppress his person or the fact of his identity."); Olivares-Rangel, 458 F.3d at 1111 ("The language in Lopez-Mendoza merely says that the defendant cannot suppress the entire issue of his identity."). Likewise, the Eighth Circuit appears to have distinguished between a defendant's identity, which it would not suppress, and "identity evidence," *i.e.*, fingerprints, which are subject to suppression. See United States v. Perez-Perez, 337 F.3d 990, 993-94 (8th Cir. 2003); United States v. Navarro-Diaz, 420 F.3d 581, 585 (6th Cir. 2005) (discussing the Eighth Circuit's subsequent narrowing of its holding in Guevara-Martinez); see also 6 Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment, § 11.4(g) n.415 (4th Ed. 2004 & Supp. 2008-09).

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Unlike these cases, the decision below does not involve section 1326, or fingerprint evidence. And contrary to what petitioner suggests, see Pet. 21, 25-26, the state high court did not hold that anything which could broadly be considered "identity-related evidence," such as fingerprints or witness identifications, are completely shielded from suppression. Rather, the court below "merely" held that pre-existing government records cannot be deemed the fruit of the poisonous tree when "the only link" between the assertedly improper police activity and those records "is that the police learned the defendant's name" as a result of that activity. Pet. App. A4. Thus, any limitation that the court below imposed on the scope of the exclusionary rule is quite narrow: the mere fact of a person's identity is not subject to suppression, whether directly or as a link in a causal chain that supposedly leads to some other evidence.

Indeed, even the circuits that have allowed suppression of fingerprint evidence in section 1326 cases would not likely apply the fruits doctrine on the facts presented here. Those courts distinguished fingerprints that were taken as part of a routine booking procedure, which were not suppressible, from fingerprints "obtained for an investigatory purpose exploiting the unconstitutional arrest," which could be suppressed. See Olivares-Rangel, 458 F.3d at 1121; Oscar-Torres, 507 F.3d at 231-32 (same; citing Olivares-Rangel); Guevara-Martinez, 262 F.3d at 753, 755-56 (same); see also Perez-Perez, 337 F.3d at 993-94. Put another way, the courts recognized the distinction between fingerprints obtained merely to identify a person and those

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actually created to serve as evidence. Here, contrary to petitioner's contention, see Pet. 20-21, the record is devoid of any evidence that the stop of petitioner's vehicle was motivated by an investigatory purpose rather than an administrative one. Thus, even under the rule set forth in Olivares-Rangel, Oscar-Torres, and Guevara-Martinez, suppression would not be an available remedy.

II. The decision below is fully consistent with this Court's precedent.

While petitioner contends that the decision below is at odds with numerous Fourth Amendment precedents of this Court, see Pet. 15-26, the analysis and holding of the New York Court of Appeals is fully consistent with relevant Supreme Court precedent.

Petitioner claims that the decision below misinterprets this Court's ruling in Lopez-Mendoza, see Pet. 21-26, but Lopez-Mendoza appears to resolve the question presented here in favor of respondent. There, the Court held that "the 'body' or identity of a defendant . . . in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest." 468 U.S. at 1039. Since the identity of the petitioner is all that was obtained by the police, that should end the inquiry. While petitioner claims that the Court in Lopez-Mendoza meant only to reiterate the well-established rule that a defendant can never use the exclusionary rule to contest personal jurisdiction, see Pet. 21-23, it likely would have stated simply that the "body" of a defendant is not subject to suppression had it so intended. More fundamentally, the

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jurisdictional rule logically must mean that identity can never be suppressed. After all, if a defendant "can suppress the Government's evidence of who he is, then he has accomplished the same thing he would have accomplished had he suppressed the ability of the court to exercise jurisdiction over him." Farias-Gonzalez, 556 F.3d at 1188. In other words, if the government can never use the mere fact of a defendant's identity once they learn it as a result of an unlawful arrest, then it would never be able to locate him and bring him before the court.

Moreover, even if the reach of Lopez-Mendoza were unclear, this Court had concluded prior to Lopez-Mendoza that a defendant could not use his mere identity as a basis for a "poisonous fruit" claim. In Crews, a majority of the Court found that a defendant's "face," or appearance, was not a suppressible fruit of an illegal arrest. See Crews, 445 U.S. at 477 (Powell, J., joined by Blackmun, J., concurring), 477-79 (White, J., joined by Burger, C.J. and Rehnquist, J., concurring). Notably, Crews involved a claim that a subsequent in-court identification of a defendant had to be suppressed where the defendant's identity was obtained through an unlawful arrest. See id. at 465.[7]

[7] Since the principle that mere identity is not a suppressible fruit predates Lopez-Mendoza, it is not surprising that three federal circuit courts have held that the identity of a defendant is not suppressible, without relying on Lopez-Mendoza. See United States v. Arias, 678 F.2d 1202, 1206 (4th Cir. 1982) (citing Crews for the proposition that "the identity of defendants is not suppressible under the exclusionary rule"); United States v. Adegbite, 846 F.2d 834, 838-39 (2d Cir. 1988) (quoting Arias); Farias-Gonzalez, 556 F.3d at 1185-86 & n.5, 1189 (concluding that the disputed language in Lopez-Mendoza was dicta, (Continued...)

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As the court below recognized, see Pet App. A3, Crews also suggests that the very nature of DMV records precludes any application of the exclusionary rule. Information that is in the possession of a public agency and has been compiled independently of and prior to an illegal stop is not suppressible as the "fruit" of that stop. See Crews, 445 U.S. at 475-77 & n.22 (plurality) ("The exclusionary rule enjoins the Government from benefiting from evidence it has unlawfully obtained; it does not reach backward to taint information that was in official hands prior to any illegality."); see also Bynum v. United States, 274 F.2d 767 (D.C. Cir. 1960) (cited with approval in Crews, 445 U.S. at 476-77, and Davis, 394 U.S. at 725-26 n.4). Indeed, evidence already in existence—and in the possession of the government—before any purported illegality cannot be viewed as the fruit of that illegality. After all, Fourth Amendment interests in preventing the government from searching for or seizing evidence cannot be implicated when the government already possesses the evidence. See generally Hudson v. Michigan, 547 U.S. 586, 594 (2006) (since the knock-and-announce rule for the execution of search warrants does not protect one's interest in preventing the government from seeing or taking evidence described in the warrant, the exclusionary rule is inapplicable for a violation of the knock-and-announce rule).

(...Continued)
but still holding "that the exclusionary rule does not apply to evidence to establish the defendant's identity in a criminal prosecution").

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Finally, this case is plainly distinguishable from Davis, 394 U.S. at 721, and Hayes, 470 U.S. at 811, as the court below also recognized. See Pet. App. A4-A5. In both Davis and Hayes, the evidence suppressed came into existence only after the unlawful stop or seizure, and as a direct product of the unlawful conduct. Indeed, in both cases, the police illegally detained defendants for the sole purpose of generating their fingerprints, so that they could compare those fingerprints to ones found at crime scenes. See Davis, 394 U.S. at 722-23; Hayes, 470 U.S. at 812-13. Here, by contrast, petitioner's DMV records were not only in existence before the purportedly illegal behavior, they were also in the government's possession before that behavior. And in both Davis and Hayes, the police were looking all along to generate proof that the defendants had committed specific crimes that the police were investigating; here, by contrast, the police simply wanted to know the identity of a driver they had stopped for playing music too loudly. See Pet. App. A4 (noting that the evidence in Davis and Hayes "established defendants' 'identities' as the perpetrators, but not their 'identities' in the sense relevant here").

III. This case presents a poor vehicle for resolving any questions about the scope of the exclusionary rule.

Because no court has yet decided if the police conduct at issue here was unlawful, this case presents an especially poor vehicle for resolving any questions about the scope of the exclusionary rule.

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In response to petitioner's motion to suppress his DMV records, the People alleged that petitioner was properly stopped for playing loud music from his vehicle. See Pet. App. A39 (People's Affirmation in Response to the Defendant's Omnibus Motion); see also Pet. App. A2 (noting that "[t]he police stopped [petitioner] for playing music too loudly").[8] The trial court, however, ruled only on the applicability of the exclusionary rule, without reaching the question of the legality of the traffic stop.

For this reason, even if this Court were to grant the petition for certiorari and hold that DMV records are subject to suppression in the circumstances presented here, a remand would be required to determine whether the records should, in fact, be suppressed. If the trial court concluded that the stop was lawful—and petitioner has not yet offered any reason to hold otherwise—then the records would be admissible. Thus, the question presented is not likely to be outcome-determinative.

[8] Several provisions of the New York City Administrative Code in effect at the time petitioner was stopped prohibited the operation of any sound-making device in, inter alia, any vehicle operated on a public street in a manner that creates unreasonable noise. See N.Y.C. Code § 24-220(a); § 10-108(a).

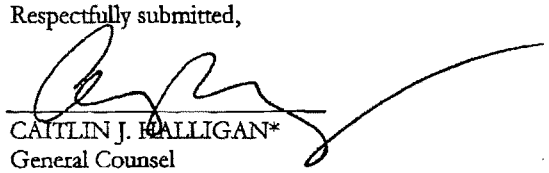
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67905.072

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

BY: 

CAITLIN J. HALLIGAN*
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Of Counsel

October 7, 2010

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Rev. 1/2008

FINANCIAL DISCLOSURE REPORT
NOMINATION FILING

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
Halligan, Caitlin J.	D.C. Circuit	01/05/2011
4. Title (Article III judges indicate active or senior status; magistrate judges indicate full- or part-time)	**5a. Report Type (check appropriate type)**	**6. Reporting Period**
Circuit Judge -- nominee	☑ Nomination. Date 01/05/2011 ☐ Initial ☐ Annual ☐ Final 5b. ☐ Amended Report	01/01/2010 to 12/31/2010
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.**	
New York County District Attorney's Office 1 Hogan Place New York, New York 10013	Reviewing Officer_____ Date_____	

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

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

☐ NONE *(No reportable positions.)*

POSITION	NAME OF ORGANIZATION/ENTITY
1. General Counsel	New York County District Attorney's Office
2. Adjunct faculty member	Columbia Law School
3.	
4.	
5.	

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

☑ NONE *(No reportable agreements.)*

DATE	PARTIES AND TERMS
1.	
2.	
3.	

FINANCIAL DISCLOSURE REPORT Page 2 of 9	Name of Person Reporting Halligan, Caitlin J.	Date of Report 01/05/2011

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

A. Filer's Non-Investment Income

☐ NONE *(No reportable non-investment income.)*

DATE	SOURCE AND TYPE	INCOME (yours, not spouse's)
1. 2010	New York County District Attorney's Office; salary	$181,995.13
2. 2009	Weil, Gotshal, & Manges, LLP; partnership income	$1,258,646.00
3. 2009	Columbia University; salary	$6000.00
4.		

B. Spouse's Non-Investment Income - *If you were married during any portion of the reporting year, complete this section.*
(Dollar amount not required except for honoraria.)

☐ NONE *(No reportable non-investment income.)*

DATE	SOURCE AND TYPE
1. 2010	Paul, Weiss, Rifkind, Wharton, & Garrison, LLP; partnership income
2. 2009	Paul, Weiss, Rifkind, Wharton, & Garrison, LLP; partnership income
3.	
4.	

IV. REIMBURSEMENTS - *transportation, lodging, food, entertainment.*
(Includes those to spouse and dependent children; see pp. 25-27 of filing instructions.)

☐ NONE *(No reportable reimbursements.)*

SOURCE	DATES	LOCATION	PURPOSE	ITEMS PAID OR PROVIDED
1. Exempt				
2.				
3.				
4.				
5.				

FINANCIAL DISCLOSURE REPORT Page 3 of 9	Name of Person Reporting Halligan, Caitlin J.	Date of Report 01/05/2011

V. GIFTS. *(Includes those to spouse and dependent children; see pp. 28-31 of filing instructions.)*

☐ NONE *(No reportable gifts.)*

SOURCE	DESCRIPTION	VALUE
1. Exempt		
2.		
3.		
4.		
5.		

VI. LIABILITIES. *(Includes those of spouse and dependent children; see pp. 32-33 of filing instructions.)*

☑ NONE *(No reportable liabilities.)*

CREDITOR	DESCRIPTION	VALUE CODE
1.		
2.		
3.		
4.		
5.		

FINANCIAL DISCLOSURE REPORT
Page 4 of 9

Name of Person Reporting	Date of Report
Hulligan, Caitlin J.	01/05/2011

VII. INVESTMENTS and TRUSTS – *income, value, transactions (Includes those of spouse and dependent children; see pp. 34-60 of filing instructions.)*

☐ NONE *(No reportable income, assets, or transactions.)*

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A-H)	B. (2) Type (e.g., div., rent, or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, redemption)	D. (2) Date Month - Day	D. (3) Value Code 2 (J-P)	D. (4) Gain Code 1 (A-H)	D. (5) Identity of buyer/seller (if private transaction)
1. HR-10 Plan					Exempt				
2. Doubleline Total Return	C	Interest	M	T					
3. Loomis Sayles Bond Fund	D	Interest	L	T					
4. Vanguard Inflation Protected Securities	A	Interest							
5. Vanguard Total Bond Market Index	C	Interest	M	T					
6. Vanguard REIT Index	A	Dividend	K	T					
7. Loomis Sayles Global Bond	B	Interest							
8. TCW Total Return		None							
9.									
10. 401(k) Plan									
11. PIMCo Total Return Fund	D	Interest	L	T					
12. Vanguard Inflation Protected Securities	A	Interest							
13. Vanguard REIT Index	C	Dividend	L	T					
14. Loomis Sayles Global Bond	A	Interest							
15. TCW Total Return		None							
16. Vanguard Total Bond Market Index	A	Interest							
17. PIMCo Low Duration	B	Interest	L	T					

1. Income Gain Codes: (See Columns B1 and D4)	A =$1,000 or less	B =$1,001 - $2,500	C =$2,501 - $5,000	D =$5,001 - $15,000	E =$15,001 - $50,000
	F =$50,001 - $100,000	G =$100,001 - $1,000,000	H1 =$1,000,001 - $5,000,000	H2 =More than $5,000,000	
2. Value Codes (See Columns C1 and D3)	J =$15,000 or less	K =$15,001 - $50,000	L =$50,001 - $100,000	M =$100,001 - $250,000	
	N =$250,001 - $500,000	O =$500,001 - $1,000,000	P1 =$1,000,001 - $5,000,000	P2 =$5,000,001 - $25,000,000	
	P3 =$25,000,001 - $50,000,000		P4 =More than $50,000,000		
3. Value Method Codes (See Column C2)	Q =Appraisal	R =Cost (Real Estate Only)	S =Assessment	T =Cash Market	
	U =Book Value	V =Other	W =Estimated		

FINANCIAL DISCLOSURE REPORT
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Name of Person Reporting	Date of Report
Halligan, Caitlin J.	01/05/2011

VII. INVESTMENTS and TRUSTS – *Income, value, transactions (Includes those of spouse and dependent children; see pp. 34-60 of filing instructions.)*

☐ NONE *(No reportable income, assets, or transactions.)*

A. Description of Assets (including trust assets). Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period: (1) Amount Code 1 (A-H)	B: (2) Type (e.g., div., rent, or int.)	C. Gross value at end of reporting period: (1) Value Code 2 (J-P)	C: (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period: (1) Type (e.g., buy, sell, redemption)	D: (2) Date Month - Day	D: (3) Value Code 2 (J-P)	D: (4) Gain Code 1 (A-H)	D: (5) Identity of buyer/seller (if private transaction)
18.									
19. Brokerage Account									
20. Schwab NY Muni Money Fund	A	Interest	K	T					
21. Vanguard Muni Bond Intermediate Term	E	Interest							
22. DFA US Large Co. Inst.	D	Dividend	O	T					
23. Vanguard Dividend Appreciation ETF	C	Dividend	M	T					
24. Vanguard Energy ETF	A	Dividend	L	T					
25. DFA US Small Cap. Port.	C	Dividend	N	T					
26. DFA Emerging Market	B	Dividend	M	T					
27. DFA International Small Co. Port.	C	Dividend	M	T					
28. Dodge & Cox International	A	Dividend	K	T					
29. Vanguard Europe Pacific ETF	D	Dividend	N	T					
30. DFA US Large Co. Port.	C	Dividend							
31. Vanguard Muni Bond Limited	A	Interest	M	T					
32. Vanguard TIPS	B	Interest	L	T					
33. Vanguard Inter-Term T/E Adm	D	Interest	O	T					
34.									

1. Income Gain Codes: (See Columns B1 and D4)	A =$1,000 or less	B =$1,001 - $2,500	C =$2,501 - $5,000	D =$5,001 - $15,000	E =$15,001 - $50,000
	F =$50,001 - $100,000	G =$100,001 - $1,000,000	H1 =$1,000,001 - $5,000,000	H2 =More than $5,000,000	
2. Value Codes (See Columns C1 and D3)	J =$15,000 or less	K =$15,001 - $50,000	L =$50,001 - $100,000	M =$100,001 - $250,000	
	N =$250,001 - $500,000	O =$500,001 - $1,000,000	P1 =$1,000,001 - $5,000,000	P2 =$5,000,001 - $25,000,000	
	P3 =$25,000,001 - $50,000,000		P4 =More than $50,000,000		
3. Value Method Codes (See Column C2)	Q =Appraisal	R =Cost (Real Estate Only)	S =Assessment	T =Cash Market	
	U =Book Value	V =Other	W =Estimated		

FINANCIAL DISCLOSURE REPORT
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Name of Person Reporting	Date of Report
Halligan, Caitlin J.	01/05/2011

VII. INVESTMENTS and TRUSTS – *income, value, transactions (Includes those of spouse and dependent children; see pp. 34-60 of filing instructions.)*

☐ NONE *(No reportable income, assets, or transactions.)*

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A-H)	B. (2) Type (e.g., div., rent, or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, redemption)	D. (2) Date Month - Day	D. (3) Value Code 2 (J-P)	D. (4) Gain Code 1 (A-H)	D. (5) Identity of buyer/seller (if private transaction)
35. IRA									
36. - Metropolitan West Total Return	A	Interest	J	T					
37.									
38. Roth IRA									
39. - Metropolitan West Total Return	B	Interest	J	T					
40.									
41. 401(k) Plan #2									
42. - PIMCo Total Return	A	Interest							
43. - T. Rowe PS Income	A	Interest							
44.									
45. 401(k) Plan #3									
46. - Dodge & Cox Stock Fund	A	Dividend							
47. - PIMCo Total Return Inst	A	Interest							
48.									
49. 529 College Savings Plan									
50. NY's 529 Coll. Saving Prg Direct Plan Aggr essive Growth Port		None	K	T					
51. NY's 529 Coll. Saving Prg Direct Plan Infl -Prot. Sec. Port		None	K	T					

1. Income Gain Codes (See Columns B1 and D4)	A =$1,000 or less F =$50,001 - $100,000 P3 =$25,000,001 - $50,000,000	B =$1,001 - $2,500 G =$100,001 - $1,000,000	C =$2,501 - $5,000 H1 =$1,000,001 - $5,000,000 P4 =More than $50,000,000	D =$5,001 - $15,000 H2 =More than $5,000,000	E =$15,001 - $50,000
2. Value Codes (See Columns C1 and D3)	J =$15,000 or less N =$250,001 - $500,000	K =$15,001 - $50,000 O =$500,001 - $1,000,000	L =$50,001 - $100,000 P1 =$1,000,001 - $5,000,000	M =$100,001 - $250,000 P2 =$5,000,001 - $25,000,000	
3. Value Method Codes (See Column C2)	Q =Appraisal U =Book Value	R =Cost (Real Estate Only) V =Other	S =Assessment W =Estimated	T =Cash Market	

FINANCIAL DISCLOSURE REPORT
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Name of Person Reporting	Date of Report
Halligan, Caitlin J.	01/05/2011

VII. INVESTMENTS and TRUSTS -- *income, value, transactions (Includes those of spouse and dependent children; see pp. 34-60 of filing instructions.)*

☐ NONE *(No reportable income, assets, or transactions.)*

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A-H)	B. (2) Type (e.g., div., rent, or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, redemption)	D. (2) Date Month - Day	D. (3) Value Code 2 (J-P)	D. (4) Gain Code 1 (A-H)	D. (5) Identity of buyer/seller (if private transaction)
52. NY's 529 Coll. Saving Prg Direct Plan Sm-Cap Stock Ind Port		None	K	T					
53. NY's 529 Coll. Saving Prg Direct Plan Value Stock Ind Port		None	K	T					
54.									
55. Paul Weiss Rifkind Wharton & Garrison Capital Account		None	M	T					

1. Income Gain Codes: (See Columns B1 and D4)	A =$1,000 or less	B =$1,001 - $2,500	C =$2,501 - $5,000	D =$5,001 - $15,000	E =$15,001 - $50,000
	F =$50,001 - $100,000	G =$100,001 - $1,000,000	H1 =$1,000,001 - $5,000,000	H2 =More than $5,000,000	
2. Value Codes (See Columns C1 and D3)	J =$15,000 or less	K =$15,001 - $50,000	L =$50,001 - $100,000	M =$100,001 - $250,000	
	N =$250,001 - $500,000	O =$500,001 - $1,000,000	P1 =$1,000,001 - $5,000,000	P2 =$5,000,001 - $25,000,000	
	P3 =$25,000,001 - $50,000,000		P4 =More than $50,000,000		
3. Value Method Codes (See Column C2)	Q =Appraisal	R =Cost (Real Estate Only)	S =Assessment	T =Cash Market	
	U =Book Value	V =Other	W =Estimate		

FINANCIAL DISCLOSURE REPORT Page 8 of 9	Name of Person Reporting Halligan, Caitlin J.	Date of Report 01/05/2011

VIII. ADDITIONAL INFORMATION OR EXPLANATIONS. *(Indicate part of Report.)*

FINANCIAL DISCLOSURE REPORT Page 9 of 9	Name of Person Reporting Halligan, Caitlin J.	Date of Report 01/05/2011

IX. CERTIFICATION.

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

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

Signature

NOTE: ANY INDIVIDUAL WHO KNOWINGLY AND WILFULLY FALSIFIES OR FAILS TO FILE THIS REPORT MAY BE SUBJECT TO CIVIL AND CRIMINAL SANCTIONS (5 U.S.C. app. § 104)

FILING INSTRUCTIONS

Mail signed original and 3 additional copies to:

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

Caitlin Halligan

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	1	319	485	Notes payable to banks-secured			
U.S. Government securities				Notes payable to banks-unsecured			
Listed securities—see schedule	3	399	437	Notes payable to relatives			
Unlisted securities				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 – see schedule		908	870
Real estate owned—see schedule	4	050	000	Chattel mortgages and other liens payable			
Real estate mortgages receivable				Other debts-itemize:			
Autos and other personal property		40	000				
Cash value-life insurance		3	310				
Other assets itemize:							
529 College Savings Program – see schedule		151	482				
				Total liabilities		908	870
				Net Worth	8	054	844
Total Assets	8	963	714	Total liabilities and net worth	8	963	714
CONTINGENT LIABILITIES				GENERAL INFORMATION			
As endorser, comaker or guarantor				Are any assets pledged? (Add schedule)	NO		
On leases or contracts				Are you defendant in any suits or legal actions?	NO		
Legal Claims				Have you ever taken bankruptcy?	NO		
Provision for Federal Income Tax							
Other special debt							

FINANCIAL STATEMENT

NET WORTH SCHEDULES

Listed Securities	
DFA Emerging Markets Core Equity I (DFCEX)	$130,925
DFA International Small Company I (DFISX)	$132,303
DFA US Large Co. (DFUSX)	$585,607
DFA US Small Cap I (DFSTX)	$385,162
Dodge & Cox International Stock (DODFX)	$37,007
Doubleline Total Return (DBLTX)	$103,762
Loomis Sayles Bond Retail (LSBRX)	$98,350
Metropolitan West Total Return Bond I (MWTIX)	$66,981
PIMCo Low Duration Fund (PLDDX)	$84,341
PIMCo Total Return Institutional (PTTRX)	$75,638
Vanguard Dividend Appreciation ETF (VIG)	$217,660
Vanguard Energy ETF (VDE)	$58,249
Vanguard Europe Pacific ETF (VEA)	$267,459
Vanguard Interm-Term Tax Exempt Adm (VWIUX)	$689,774
Vanguard Muni Bond Limited (VMLTX)	$129,017
Vanguard REIT Index (VGSIX)	$113,642
Vanguard TIPS (VAIPX)	$97,170
Vanguard Total Bond Market Index (VBMFX)	$126,390
Total Listed Securities	$ 3,399,437
529 College Savings Plan (as of December 31, 2010)	
Aggressive Growth Portfolio	$ 37,295
Inflation-Protected Securities Portfolio	37,093
Small-Cap Stock Index Portfolio	42,041
Value Stock Index Portfolio	35,053
Total Assets in 529 College Savings Plan	$ 151,482
Real Estate Owned	
Personal residence	$ 3,450,000
Vacation home	600,000
Total Real Estate Owned	$ 4,050,000
Real Estate Mortgages Payable	
Personal residence (mortgage)	$ 409,267
Vacation home (mortgage)	411,498
Vacation home (home equity loan)	88,105
Total Real Estate Mortgages Payable	$ 908,870

Thank you.

Ms. HALLIGAN. Thank you, Senator.

Senator COONS. We stand in recess.

[Recess.]

Senator COONS. I call the Committee back into order.

I would like to proceed with our second panel of nominees for consideration today, if we might. I would like to invite the three nominees remaining to stand. Please raise your right hands, if you would.

In case there is any question, Ms. Williams, Ms. D'Agostino, Mr. Feighery, if you would, please, sir.

[Nominees sworn.]

Senator COONS. Thank you. Please be seated, having been duly sworn. Let the record reflect each of the nominees has taken the oath.

Now, each of you, in turn, will have the opportunity to recognize your family and friends, and, if you so choose, to give an statement.

Ms. D'Agostino, starting with you, I would welcome you to acknowledge family, friends, and give your statement.

STATEMENT OF MAE D'AGOSTINO, NOMINEE TO BE UNITED STATES DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF NEW YORK

Ms. D'AGOSTINO. Thank you, Senator. First of all, I would like to thank you and Senator Grassley and the other members of the Committee for the opportunity to be here this morning.

I am going to begin by recognizing a few people who could not make it here today. My hometown, Albany, is under a blanket of snow, as I believe are many other parts of the country.

But first and foremost, my mother, Teresa D'Agostino, is home and, thanks to my brother-in-law, Bob, and my niece, Amanda, is hopefully watching this on the Webcast. And I had three dear friends who were essentially camping out at the Albany Airport to try to get here and did not make it; Michael Kanig (ph), Lori Shanks (ph), and Sean Casey (ph).

But with me today, I have my son, Ted, who is a junior in high school at Trinity Pawling School; my sister, Sally; and, my brother, Francis; and, my niece, April, very supportive of me my entire career.

I also have two cousins, Linda Sciotti and Anne Noel Occhialino; and, two friends, Emilio Garcia and Arete Sprio, who came last night from San Antonio.

Other than being allowed to make those kind introductions and to thank Senator Schumer for recommending me and the President of the United States for this great honor of the nomination, and to thank Senator Schumer for the very kind introduction, I have no other statement, Senator.

Senator COONS. Thank you, Ms. D'Agostino.

Ms. Williams, would you like to acknowledge or recognize friends or family and offer a statement?

[The biographical information follows.]

UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY

QUESTIONNAIRE FOR JUDICIAL NOMINEES

PUBLIC

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

   Mae Avila D'Agostino

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

   United States District Judge for the Northern District of New York

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

   Office: D'Agostino, Krackeler, Maguire & Cardona, P.C.
   16 Sage Estate
   Menands, New York 12204

   Residence: Latham, New York

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

   1954; Albany, New York

5. **Education**: List in reverse chronological order each college, law school, or any other institution of higher education attended and indicate for each the dates of attendance, whether a degree was received, and the date each degree was received.

   1977 – 1980, Syracuse University College of Law; J.D. 1980
   1973 – 1977, Siena College; B.A. (*magna cum laude*), 1977

6. **Employment Record**: List in reverse chronological order all governmental agencies, business or professional corporations, companies, firms, or other enterprises, partnerships, institutions or 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 description.

1997 – present
D'Agostino, Krackeler, Maguire & Cardona, P.C.
(formerly known as D'Agostino, Krackeler, Baynes & Maguire, P.C.)
16 Sage Estate
Menands, New York 12204
Partner

1991 – present
Albany Law School
80 New Scotland Avenue
Albany, New York 12208
Adjunct Professor of Trial Tactics and Medical Malpractice

1985 – 1990
Junior College of Albany
140 New Scotland Avenue
Albany, New York 12208
Instructor in paralegal studies

1981 – 1997
Maynard, O'Connor & Smith (now known as Maynard, O'Connor, Smith & Catalinotto)
Tower Place
Albany, New York 12203
Partner (1985 – 1997)
Associate (1981 – 1985)

1978 – 1980
Syracuse University College of Law
E.I. White Hall
Syracuse, New York 13244
Teaching Assistant – Legal Writing Program

Other Affiliations (uncompensated)

1990 – 1994
Siena College
515 Loudon Road
Loudonville, New York 12211
Chair of the Board of Associate Trustees (1993 – 1994)
Member of the Board of Trustees (1990 – 1993)

1991 – 1992
Albany County Bar Association
One Lodge Street, 2nd Floor
Albany, New York 12207
President

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1987 – 1990
Albany Law School
80 New Scotland Avenue
Albany, New York 12208
Member of the Board of Trustees

7. **Military Service and Draft Status**: Identify any service in the U.S. Military, including dates of service, branch of service, rank or rate, serial number (if different from social security number) and type of discharge received, and whether you have registered for selective service.

I have not served in the military. I was not required to register for Selective Service.

8. **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.

Super Lawyers (2005 – 2010)
Outstanding Lawyers in America (1999 – 2010)
Best Lawyers in America (1999 – 2010)
Kate Stoneman Award, Albany Law School (2008)
- For professional excellence in fostering women in the legal profession

Family Friendly Award, Albany County Woman's Bar Association (2001)
- Awarded to my law firm for fostering family friendly policies

Daniel H. Mahoney Award in Trial Advocacy, Capital District Trial Lawyers (1998)
- For outstanding service in the art of trial advocacy

Benjamin Kuhn Award, Siena College (1995)
- For outstanding service to the Siena College community

Siena College Distinguished Alumnae Award (1995)
- For service to the Siena College community

Women of Excellence Award, Albany Chamber of Commerce (1995)
President's Award, Albany County Bar Association (1992)
- For organizing Settlement Week program in the New York Supreme Court

Special Recognition Award, Albany Law School (1992)
- For serving as coach of the mock trial team from approximately 1985 – 1992

Young Lawyer Award, NYS Bar Insurance Negligence & Compensation Section (1989)

Syracuse University College of Law Honors & Awards
International Academy of Trial Lawyers Award
- For oral advocacy

Order of the Barristers Award
- For oral advocacy

Trial Lawyer's Cup (1st Place), New York State Bar Association (1979 – 1980)
Team Member, National Mock Trial Champions (1979)

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9. **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.

Associations
Albany County Bar Association
President (1991 – 1992)
American College of Trial Lawyers
Capital District Women's Bar Association
International Academy of Trial Lawyers
New York State Bar Association
Chair, Trial Lawyers Section (1992)

Committees
New York State Continuing Legal Education Board (2003)
New York State Courts, Third Department
Judicial Screening Committee (1993)
Local Task Force to Reduce Litigation Costs and Delay (1996 – 1997)
United States District Court for the Northern District of New York
Magistrate Judge and Bankruptcy Judge Merit Selection Panels (various years)
United State Bankruptcy Court for the Northern District of New York
Bankruptcy Court Public Liaison (approximately 2005 – present)

10. **Bar and Court Admission**:

a. List the date(s) you were admitted to the bar of any state and any lapses in membership. Please explain the reason for any lapse in membership.

New York (Third Department), 1981

There has been no lapse in membership.

b. List all courts in which you have been admitted to practice, including dates of admission and any lapses in membership. Please explain the reason for any lapse in membership. Give the same information for administrative bodies that require special admission to practice.

United States Court of Appeals for the Second Circuit, 2008
United States District Court for the Northern District of New York, 1981

There has been no lapse in membership.

11. **Memberships**:

a. List all professional, business, fraternal, scholarly, civic, charitable, or other organizations, other than those listed in response to Questions 9 or 10 to which

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you belong, or to which you have belonged, since graduation from law school. Provide dates of membership or participation, and indicate any office you held. Include clubs, working groups, advisory or editorial boards, panels, committees, conferences, or publications.

Chair of the Board of Associate Trustees, Siena College (1993 – 1994)
Member of the Board of Trustees, Siena College (1990 – 1993)
Member of the Board of Trustees, Albany Law School (1987 – 1990)
Wolferst Roost Country Club (1991 – present)

b. 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, or national origin. Indicate whether any of these organizations listed in response to 11a above currently discriminate or formerly discriminated on the basis of race, sex, religion or national origin 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.

In years prior to my full membership at Wolferst Roost Country Club, I understand women were not permitted to be full members. The policy changed at about the time that I was admitted to full membership to the club, and I believe I was the first woman afforded full membership. After representing a physician in a medical malpractice case who was a member of Wolferst Roost Country Club, I discussed with him the fact that it was inappropriate for the country club not to admit women as full members. I asked him to sponsor me for the full membership, and he did. Since that time, women have been welcomed as full members of the club. I am aware of no other current or former discrimination by the organizations of which I have been a member.

12. **Published Writings and Public Statements**:

a. List the titles, publishers, and dates of books, articles, reports, letters to the editor, editorial pieces, or other published material you have written or edited, including material published only on the Internet. Supply four (4) copies of all published material to the Committee.

Doctor File Should be Private, *Albany Times-Union*, Jan. 9, 2003 at D2. Copy supplied.

Independent Medical Examinations in Personal Injury Actions, *Insurance Negligence Compensation Law Section Journal of the New York State Bar Association* (Dec. 1989). Copy supplied.

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I searched my files and publicly-available Internet sources to create a response to this question as comprehensive as possible, but there may be other published material I have been unable to recall or identify.

b. Supply four (4) copies of any reports, memoranda or policy statements you prepared or contributed in the preparation of on behalf of any bar association, committee, conference, or organization of which you were or are a member. If you do not have a copy of a report, memorandum or policy statement, give the name and address of the organization that issued it, the date of the document, and a summary of its subject matter.

In 1992, I served on the Albany County Democratic Task Force. We issued a report making recommendations for the County Democratic Committee's structure. Copy supplied.

In approximately 1997, I served on a New York State Courts Local Task Force to Reduce Litigation Costs and Delay. While I believe the Task Force issued a report, I have not retained a copy.

While a member of the New York State Continuing Legal Education Board in 2003, I may have participated in approving reports as a member of the Board. Due to the passage of time, I have not retained records from my one year of service on the Board and I do not have copies of any such reports.

Having searched my records and my memory, there are no other reports that I prepared or to which I contributed that I recall or have been able to identify.

c. Supply four (4) copies of any testimony, official statements or other communications relating, in whole or in part, to matters of public policy or legal interpretation, that you have issued or provided or that others presented on your behalf to public bodies or public officials.

None that I recall or have been able to identify.

d. Supply four (4) copies, transcripts or recordings of all speeches or talks delivered by you, including commencement speeches, remarks, lectures, panel discussions, conferences, political speeches, and question-and-answer sessions. Include the date and place where they were delivered, and readily available press reports about the speech or talk. If you do not have a copy of the speech or a transcript or recording of your remarks, give the name and address of the group before whom the speech was given, the date of the speech, and a summary of its subject matter. If you did not speak from a prepared text, furnish a copy of any outline or notes from which you spoke.

I searched my files and calendars as well as publicly-available Internet sources to create a response to this question as comprehensive as possible, but there may be

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other speeches or talks I have given that I have been unable to recall or identify. In particular, I have presented to CLEs on trial skills and in other areas when asked to do so and I often present without notes. I also have sought to accept invitations to speak at my college and law school, especially at career and ethics programs, and I have not retained records of each occasion when I have done so. All presentations took place in Albany, New York, except as noted.

Albany County Bar Association, CLE Program, April 8, 2010. I gave a presentation entitled "Depositions from A to Z." Outline supplied.

Albany Law School, Health Law Careers Forum, February 24, 2010. I spoke as part of a panel on my practice in health law. I have no notes, transcript, or recording. The address of Albany Law School is 80 New Scotland Ave., Albany, NY 12208.

Albany Law School, Health Law Careers Forum, November 11, 2009. I spoke as part of a panel on my practice in health law. I have no notes, transcript, or recording. The address of Albany Law School is 80 New Scotland Ave., Albany, NY 12208.

New York State Bar Association, "Calculating and Proving Damages," June 2009. I have no notes, transcript, or recording. The address of the Association is One Elk Street, Albany, NY 12207.

New York County Lawyers Association (NYLCA), October 24, 2008 (New York, NY). I participated in a "Masters in Trial" CLE demonstration to educate attorneys about trial advocacy. I was part of the defense direct/cross-examination team. I have no notes, transcript, or recording. The address of NYCLA is 14 Vesey St., New York, NY 10007.

In 2008, I presented welcoming remarks at the U.S. District Court for the Northern District of New York to a Second Circuit panel hearing oral arguments. The text of my remarks is supplied.

New York State Academy of Trial Lawyers, "Turning Stalemate into Success—Achieving the Best Settlement for Your Client," May 2006. I have no notes, transcript, or recording. The address for the Academy is 39 N. Pearl St., 6th Floor, Albany, NY 12207.

New York State Bar Association, "The People's Law School," November 22, 2005. I was one of two speakers for a two-hour presentation covering civil lawsuits. Although this program was recorded, the New York State Bar Association advised me that it has not retained the tapes. The address of the Association is One Elk Street, Albany, NY 12207.

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Albany County Bar Association, CLE Program, May 12, 2005. I gave a presentation entitled "Depositions from A to Z." I used the same outline as supplied for my presentation on April 8, 2010.

Capital District Women's Bar Association, CLE Breakfast, September 22, 2004. I spoke on a panel on the legal profession and family, including issues related to maternity and family leave. I have no notes, transcript, or recording. News coverage of the event is supplied.

New York State Bar Association, Presentation to the Torts, Insurance and Compensation Law Section, September 2003. I have no notes, transcript, or recording. The address of the Association is One Elk Street, Albany, NY 12207.

New York State Bar Association, CLE entitled "How to Try Damages," November 2002. I have no notes, transcript, or recording. The address of the Association is One Elk Street, Albany, NY 12207.

Albany Law School Institute of Legal Studies, "Recent Development in Lead Paint Litigation for Counties," February 2002. I have no notes, transcript, or recording. The address of Albany Law School is 80 New Scotland Ave., Albany, NY 12208.

New York State Bar Association, CLE entitled "How to Try an Accident Case: For Novice and Experienced Attorneys," Spring 2000. I have no notes, transcript, or recording. The address of the Association is One Elk Street, Albany, NY 12207.

Albany County Bar Association, Memorial Ceremony, December 7, 1998. I gave welcome remarks at a ceremony to honor attorneys and judges who had passed away in 1998. I have no notes, transcript, or recording. News coverage of the event is supplied.

Capital Roundtable, February 1998. I spoke on a panel about Albany's major industries and communities, specifically about the legal workforce. I have no notes, transcript, or recording. News coverage of the event is supplied.

Albany County Bar Association, Judicial Portrait unveiling, September 14, 1997. I introduced speakers at a ceremony dedicating portraits of two state judges. I have no notes, transcript, or recording. News coverage of the event is supplied.

New York State Bar Association Committee on Women, "Rainmaking" panel, June 19, 1995. I gave remarks on a panel presented by NYSBA at Fordham Law School. I have no notes, transcript, or recording. The address of NYSBA is One Elk St., Albany, NY 12207.

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New York State Bar Association, CLE program, May 15, 1992. I moderated a program entitled "Anatomy of Trauma." I have no notes, transcript, or recording. The address of Association is One Elk St., Albany, NY 12207.

Albany County Bar Association, Celebration of Justice Edward S. Conway, January 16, 1992. I presided over a program at the Desmond Americana honoring New York Supreme Court Justice Conway. News coverage of the event is supplied.

Siena College (Loudonville, NY), Symposium on "Issues in Contemporary Ethics," February 26, 1991. I moderated a medical ethics panel. I have no notes, transcript, or recording. The address of Siena College is 515 Loudon Road, Loudonville, NY 12211.

Siena College (Loudonville, NY), Symposium on "Issues in Contemporary Ethics," April 5, 1990. I moderated a panel on a public sector ethics scenario. I have no notes, transcript, or recording. The address of Siena College is 515 Loudon Road, Loudonville, NY 12211.

e. List all interviews you have given to newspapers, magazines or other publications, or radio or television stations, providing the dates of these interviews and four (4) copies of the clips or transcripts of these interviews where they are available to you.

I searched my files as well as publicly-available Internet sources to create a response to this question as comprehensive as possible, but there may be other interviews I have given that I have been unable to recall or identify. I have supplied a copy of each item listed below.

Pharmacy Officers Attack Investigator's Motives, *Orlando Sentinel*, July 3, 2010 at B1.

Candidate's Reputation Extends Past Albany, *Albany Times-Union*, June 30, 2010 at B3.

'Fresh Voice' for U.S. Bench, *Albany Times-Union*, June 24, 2010 at D1.

Union Chiefs: Words Hurt, *Albany Times-Union*, May 18, 2010 at A1.

Helping Those Who Heal, *Super Lawyers Magazine*, September 2009 at 8.

Social Workers in 'Torturous' Case Are Ruled Immune from Lawsuit, *New York Law Journal*, January 26, 2009, N.Y.L.J. 1 (col 4).

Pharmacists Sue over Steroid Case, *Albany Times-Union*, October 10, 2008.

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D'Agostino Recognized for Seeking Changes, Expanding Opportunities for Women in Law, *Krackeler & Maguire Press Release*, June 12, 2008.

Realizing Mae's Potential, *Siena News*, Fall 2007 at 11.

Menands Law Firm Learning to Cope Without a Founding Partner, *Business Review*, June 5, 2006.

Colleagues and Friends Mourn Death of Attorney, *Albany Times-Union*, May 18, 2006 at B6.

Mae D'Agostino, Esq. Included in 2007 "Best Lawyers in America" List, *Krackeler & Maguire Press Release*, February 23, 2006.

Sex Case Teacher Chided in Court, *Albany Times-Union*, November 22, 2005 at B1.

Geisel Agrees to Rape Case Deal, *Albany Times-Union*, September 27, 2005 at B1.

Fired Teacher Charged with Rape, *America*, August 29, 2005 at 6.

The Nancy Grace Show, *CNN*, August 19, 2005.

At Large With Geraldo, *Fox News Network*, August 14, 2005.

Sex Scandal Teacher Turns Tables?, *CBS News*, August 5, 2005.

Media Frenzy Prompts Appeal, *Albany Times-Union*, August 4, 2005 at B1.

Anthony V. Cardona, Jr., Esq. of Delmar Named Partner at D'Agostino, Krackeler & Maguire P.C., *Krackeler & Maguire Press Release*, December 8, 2003.

Legal Eagles to Help Colleagues Brush Up on Law in Half-Day Class, *Albany Times-Union*, November 20, 2003 at B2.

Mae D'Agostino, Esq. Inducted into Two Prestigious Trial Lawyers Societies, *D'Agostino, Krackeler & Maguire Press Release*, November 7, 2003.

9/11 Put Searches in New Light, *Albany Times-Union*, June 27, 2002 at B3.

Catholic Church, Priest Sued, *The Journal News [Westchester County]*, June 22, 2002 at 1A.

Spaces, *Albany Times-Union*, December 2, 2001 at E1.

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Mother Wins a $720,000 Settlement in a Lead Poisoning Lawsuit, *Associated Press*, October 17, 2001.

Lead Victims Get $720,000, *Albany Times-Union*, October 17, 2001 at B4.

Jury's Verdict in Crash Disputed, *Albany Times-Union*, April 13, 2001 at B1.

Bill Passed in Silence Has Angry Voices Raised, *New York Law Journal*, August 10, 2000, N.Y.L.J. 1 (col 5).

Legal Barriers; African-American Lawyers Find Few Opportunities in Capital Region Law Firms, *Albany Times-Union*, January 9, 2000 at G1.

Retiring State Justice a Champion of Fairness, *Albany Times-Union*, December 25, 1999 at B1.

Ex-Student's Lawsuit Dismissal Upheld, *Albany Times-Union*, December 19, 1999 at E13.

Courthouse Introduces Metal Detectors, *Albany Times-Union*, July 20, 1999 at B4.

Judgments Shifting Toward Defendants, *Albany Times-Union*, June 20, 1999 at D1.

Marketing Gives Law Firms a Case of Ad Nauseam, *Albany Times-Union*, March 7, 1999 at 13.

Wounded Student's Lawsuit Thrown Out, *Albany Times-Union*, August 12, 1998 at B1.

Women Advance in Law Schools, *Albany Times-Union*, May 30, 1998 at B1.

Ex-D.A., Judge Chosen by Pataki, Wins Praise, *New York Law Journal*, May 28, 1998, N.Y.L.J. 1.

Women Can be Litigators and Still Have Time With Family, *Capital District Business Review*, April 24, 1988.

Verbatim, *Albany Times-Union*, February 22, 1998 at 11.

Jurist Recuses Self from Etkin Case, *Albany Times-Union*, August 8, 1997 at B4.

4 Split from Law Firm to Form New Practice, *Albany Times-Union*, July 2, 1997 at E1.

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Local Lawyers, *Albany Times-Union*, February 5, 1997 at A7.

The Search for Excellence Ends Here, *Albany Times-Union*, June 15, 1995 at C7.

Lawyers Put Family Name on Shingle After Leaving Carter Conboy Posts, *Capital District Business Review*, March 14, 1994 at 3.

Trashing the 'Junk' in Court, *Albany Times-Union*, July 25, 1993 at A1.

Ex-Troopers Off the Hook in $40M Wrongful Arrest Suit, *Daily Freeman*, July 9, 1993.

Medical Privacy; Husband Sues Employers for Getting Wife's Records, *Albany Times-Union*, April 6, 1993 at A1.

DJ's False Arrest Suit Nears Trial, *Albany Times-Union*, December 12, 1992 at B3.

150 Settlements Cut Court Calendar, *Albany Times-Union*, December 5, 1992 at B3.

Judge Suspends Trials Five Days to Encourage Settlements, *Albany Times-Union*, October 30, 1992 at B5.

Lawyers Race for Implant Lawsuits, *Albany Times-Union*, July 7, 1992 at C1.

Susan Tatro Talks Tough, Works Hard, *Albany Times-Union*, March 29, 1992 at D1.

Siena to Hold Ethics Symposium Thursday, *Albany Times-Union*, February 26, 1992 at B2.

Jury Backs Staffers, Albany Med in Trial; Detention of a Mother at Issue, *Albany Times-Union*, August 16, 1991 at B2.

Limitations of Juries an Endless Question, *Albany Times-Union*, May 5, 1991 at A7.

Trial Lawyers Use Videotapes to Provide Evidence, *Capital District Business Review*, April 29, 1991 at 15.

Litigator Shows Mettle in Emotion-Charged Cases, *Capital District Business Review*, February 25, 1991 at 10.

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Ethical Questions Topic of Siena College Forum, *Albany Times-Union*, February 18, 1991 at B4.

Colonie Settlement Formalized, *Albany Times-Union*, December 12, 1990 at B3.

$725,000 Settlement Approved in Colonie, *Albany Times-Union*, October 12, 1990 at B12.

Physician's Lawsuit over Physical Exams Targets State Regulations, *Albany Times-Union*, June 29, 1990 at B12.

Symposium to Examine Ethics Issues, *Albany Times-Union*, April 3, 1990 at C2.

Law School Team to Defend Title, *Albany Times-Union*, January 31, 1990 at B6.

New York Lawyers Divided Over Need to Continue Their Education, *Daily Gazette*, January 8, 1990 at B3.

Final Lawsuit Dismissed in Murder of Woman, *Albany Times-Union*, October 4, 1989 at B7.

Mandatory Pretrial Claim Review Under Fire, *Albany Times-Union*, July 9, 1989 at A1.

AIDS Victim Sues Under Toxic Exposure Law, *Albany Times-Union*, July 7, 1989 at B1.

Education on Trial; Mandatory Added Study Likely for Lawyers in State, *Albany Times-Union*, April 17, 1989 at A1.

Cameras Still Issue in Court; Bar Group Seeks Longer Test Period, *Albany Times-Union*, April 16, 1989 at B5.

Little League Coach's Suit Dismissed; Law Students Win Regional Contest, *Albany Times-Union*, February 14, 1989 at B4.

Albany Law Team Studies for Competition, *Albany Times-Union*, February 4, 1989 at D2.

Law Opens to Women, *Albany Times-Union*, September 5, 1988 at A1.

13. **Judicial Office**: State (chronologically) any judicial offices you have held, including positions as an administrative law judge, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

I have not held judicial office.

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a. Approximately how many cases have you presided over that have gone to verdict or judgment? _____

i. Of these, approximately what percent were:

jury trials:	____%
bench trials:	____%
civil proceedings:	____%
criminal proceedings:	____%

b. Provide citations for all opinions you have written, including concurrences and dissents.

c. For each of the 10 most significant cases over which you presided, provide: (1) a capsule summary of the nature the case; (2) the outcome of the case; (3) the name and contact information for counsel who had a significant role in the trial of the case; and (3) the citation of the case (if reported) or the docket number and a copy of the opinion or judgment (if not reported).

d. For each of the 10 most significant opinions you have written, provide: (1) citations for those decisions that were published; (2) a copy of those decisions that were not published; and (3) the names and contact information for the attorneys who played a significant role in the case.

e. Provide a list of all cases in which certiorari was requested or granted.

f. Provide a brief summary of and citations for all of your opinions where your decisions were reversed by a reviewing court or where your judgment was affirmed with significant criticism of your substantive or procedural rulings. If any of the opinions listed were not officially reported, provide copies of the opinions.

g. Provide a description of the number and percentage of your decisions in which you issued an unpublished opinion and the manner in which those unpublished opinions are filed and/or stored.

h. Provide 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, provide copies of the opinions.

i. Provide citations to all cases in which you sat by designation on a federal court of appeals, including a brief summary of any opinions you authored, whether majority, dissenting, or concurring, and any dissenting opinions you joined.

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14. **Recusal:** If you are or have been a judge, identify the basis by which you have assessed the necessity or propriety of recusal (If your court employs an "automatic" recusal system by which you may be recused without your knowledge, please include a general description of that system.) Provide a list of any cases, motions or matters that have come before you in which a litigant or party has requested that you recuse yourself due to an asserted conflict of interest or in which you have recused yourself sua sponte. Identify each such case, and for each provide the following information:

    a. whether your recusal was requested by a motion or other suggestion by a litigant or a party to the proceeding or by any other person or interested party; or if you recused yourself sua sponte;

    b. a brief description of the asserted conflict of interest or other ground for recusal;

    c. the procedure you followed in determining whether or not to recuse yourself;

    d. your reason for recusing or declining to recuse yourself, including any action taken to remove the real, apparent or asserted conflict of interest or to cure any other ground for recusal.

    I have not served as a judge.

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

    a. List chronologically any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. If appointed, please include the name of the individual who appointed you. Also, state chronologically any unsuccessful candidacies you have had for elective office or unsuccessful nominations for appointed office.

    I have not held public office. I have had no unsuccessful candidacies for elective office or unsuccessful nominations for appointed office.

    b. List all memberships and offices held in and services rendered, whether compensated or not, to any political party or election committee. If you have ever held a position or played a role in a political campaign, identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

    I have been a member of the Democratic Party. I have never held any political office within the party. In 1991 and 1992, I served as a volunteer member of the Albany County Democratic Task Force appointed by then-Party Chair Harold Joyce. This committee was charged to evaluate the structure and operations of the County Democratic Committee and to suggest a framework for the future.

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I have been asked by New York State Supreme Court Judges to be on their committees for re-election and I have agreed to do so. I have not otherwise personally campaigned for any Judge. I have allowed at least six NYS Supreme Court candidates to place my name on their letterhead as being a member of a committee to re-elect. I believe I have assisted New York State Supreme Court Justice Joseph Teresi in Albany County; NYS Supreme Court, Appellate Division, Third Department, Justice Karen Peters; Candidate for New York State Supreme Court Justice Rachel Kretzer; New York State Supreme Court Justice Frank Williams in Saratoga County; New York State Supreme Court Justice Thomas Mercure, Appellate Division, Third Department; and Presiding Justice of the New York State Supreme Court Appellate Division, Third Department, Anthony V. Cardona. There may be other judicial campaigns I have supported in this way that I am unable to recall.

16. **Legal Career:** Answer each part separately.

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

i. whether you served as clerk to a judge, and if so, the name of the judge, the court and the dates of the period you were a clerk;

I have never served as a clerk to a judge.

ii. whether you practiced alone, and if so, the addresses and dates;

I have never practiced alone.

iii. 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.

1981 – 1997
Maynard, O'Connor & Smith
6 Tower Place
Albany, New York 12203
Associate (1981 – 1984)
Partner (1985 – 1997)

1997 – present
D'Agostino, Krackeler, Maguire & Cardona, P.C.
(formerly known as D'Agostino, Krackeler, Baynes & Maguire, P.C.)
16 Sage Estate
Menands, New York 12204
Partner

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iv. whether you served as a mediator or arbitrator in alternative dispute resolution proceedings and, if so, a description of the 10 most significant matters with which you were involved in that capacity.

Approximately six years ago I served on a three-member panel of arbitrators that heard a case involving an automobile accident. The three arbitrators, including myself, heard informal statements by the plaintiff's attorney and defendant's attorney. As best I recall, we awarded $25,000.00 to the plaintiff.

b. Describe:

i. the general character of your law practice and indicate by date when its character has changed over the years.

I have practiced consistently in the area of defense litigation since I began practicing law in 1981. Early in my career I litigated motor vehicle accidents and general negligence claims. In the last decade, my practice has concentrated on cases with the potential for very high verdicts in all areas of civil litigation but particularly in medical malpractice. These cases include a number of brain-damaged infant cases and other personal injury cases involving catastrophic injuries. Although my practice has been almost exclusively in civil litigation, I handled two or three criminal matters early in my career.

ii. your typical clients and the areas at each of your legal career, if any, in which you have specialized.

My typical clients are physicians, hospitals, municipalities, construction companies and personal injury plaintiffs. I have not specialized in any specific area but I have had a concentration in the area of medical malpractice.

c. Describe the percentage of your practice that has been in litigation and whether you appeared in court frequently, occasionally, or not at all. If the frequency of your appearances in court varied, describe such variance, providing dates.

Throughout my legal career, I have been an active litigator and have appeared in court frequently.

i. Indicate the percentage of your practice in:

1. federal courts: 30%
2. state courts of record: 68%
3. other courts
4. administrative agencies: 2%

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ii. Indicate the percentage of your practice in:
1. civil proceedings: 100%
2. criminal proceedings:

d. State the number of cases in courts of record, including cases before administrative law judges, you tried to verdict, judgment or final decision (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

I believe I have tried approximately 120 cases to verdict, all as sole counsel.

i. What percentage of these trials were:
1. jury: 100%
2. non-jury:

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

I have not practiced before the Supreme Court of the United States.

17. **Litigation**: Describe the ten (10) most significant litigated matters which you personally handled, whether or not you were the attorney of record. 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. *Church v. San Juan Construction Company*, 285 A.D.2d 16 (3rd Dep't. 2001), *affirmed by* 99 N.Y.2d 104 (2002) New York State Supreme Court, Albany County. Trial Judge: the late Joseph Cannizzaro; 2001

This case involved a then-8-year-old boy who became a ventilator dependent quadriplegic following an automobile accident in which his mother had fallen asleep at the wheel. Prior to the time that I tried the case, there were three co-defendants. I was representing the guide rail construction company that had been involved in installing guide rail on the New York State Thruway. The plaintiff's mother fell

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asleep at a point on the highway where there was supposed to be another 100 feet of guide rail but for some unknown reason, the defendant I represented did not complete the length of the guide rail. By the time I was trying the case, San Juan Construction Company was defunct and the owners had moved out of the country. Therefore, I had to try the case without any clients available to assist me. Three days before I was to begin the case, three other co-defendants settled out for nearly $9 million dollars, leaving my client as the sole remaining defendant. The case was highly emotional and one of the most tragic cases in which I have been involved.

Prior to the trial, my law firm had made a motion for summary judgment, arguing that the work that had been done by the guide rail construction company had been approved by the project engineer and several years had passed before the accident. On motion for summary judgment, we argued that the contractor could not be held responsible for a job that had been approved, especially as the accident happened several years after the approval. We were still waiting for a decision on that motion at the time of trial.

My trial adversary was a very experienced trial attorney and he used the latest computer generated technology to try to demonstrate how the accident happened. An economist for the plaintiff had testified that it would cost approximately $60 million to take care of the young man who had been involved in the accident. After presenting the case to the jury, the jury ultimately returned a verdict of $6 million, holding my client responsible for only 10%. As a result of the previous settlements that had taken place and the application of New York State General Obligations Law, my client was not required to pay any money to the plaintiff. This was true, notwithstanding the fact that we had offered $2 million during the trial and it had been rejected.

Opposing Counsel was Arthur Thorn, Thorn & Gershon, 5 Wembley Court, Albany, New York 12212, Tel: 518-464-6770.

2. *Watrobski v. Carenet, Rubych, Mongano, Cheon*, New York State Supreme Court, County of Saratoga, Honorable Frank Williams; 2002

This was a brain damage infant case in which it was alleged that there was a failure to appropriately treat a pregnant patient and a failure to respond to the patient's calls that she was having some bleeding at approximately 34 weeks gestation. There were numerous questions of fact about what had transpired on the day that the infant plaintiff was born. My physician clients maintained that they had told the mother to go to the hospital but the mother maintained that she had been told to go to the doctor's office. When the mother arrived at the Carenet office, the obstetricians on duty faced a very dangerous situation called a double footling breach in which the infant is born feet first. This baby was delivered under the most difficult conditions in my client's busy medical office and the baby had profound injuries including spastic quadriplegia, blindness and mental incapacity. After approximately a two week trial, the jury found for my clients (the defendants).

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Opposing Counsel was William Ryan, Jr., Tabner, Ryan & Keniry, 18 Corporate Woods Blvd., Albany, New York 12211, Tel: Telephone: 518-465-9500.

3. *Beck v. Albany Medical Center*, New York State Supreme Court, County of Albany, Honorable Edward Conway; 1990

My client, a hospital technician, inadvertently gave a patient Technetium rather then Thallium for a routine scan that was going to be done at the hospital. There was absolutely no question that a syringe was mislabeled. The plaintiff in this case claimed that as a result of being administered Technetium rather then Thallium, she sustained over 100 urinary tract infections. I argued that the Technetium was not responsible for the urinary tract infections. The jury found that there was no proximate cause and returned a verdict for my clients (the defendants).

Opposing Counsel was Jerome Frost, 287 North Greenbush Road, Troy, New York 12180, Tel: 518-283-3000.

4. *Bowery v. St. Peter's Hospital*, U.S. District Court, Northern District of New York, Honorable Thomas McAvoy; 1995

This case, tried to the U.S. District Court for the Northern District of New York, was to my knowledge the first case involving the Americans with Disabilities Act tried in our District. One of the challenges in this case was to come up with an appropriate charge to submit to the court based on the Act. The plaintiff claimed that he was discriminated against because he had a seasonal disorder. My client, the employer, claimed that he was terminated because of his attitude, poor behavior and poor work habit. The verdict was for my client, St. Peter's Hospital.

Opposing Counsel was Frederick P. Korkosz, 744 Broadway, Albany, NY 12207, Tel: 518-813-9403.

5. *Mosher v. Wilkins*, New York State Supreme Court, County of Albany, Honorable Michael Lynch, 2009

This case involved a patient who received an interscalene block for shoulder surgery. There are known complications of interscalene blocks, but, in this case, once the interscalene block was administered in the neck, the patient went into respiratory arrest. This was a most unusual and unexpected complication. In order to adequately defend the physician, it was necessary that I fully educate the jury on the spinal cord, spinal column and all adjoining structures. In an important cross-examination, I also exposed the plaintiff's expert as someone who was not experienced in administering interscalene blocks. Plaintiff's counsel had argued that my client had inadvertently placed a needle directly into the spinal cord. The case was very challenging because, while the plaintiff did recover from her respiratory arrest, she was left with a

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permanently clawed, dominant hand with chronic pain. The jury returned a verdict in favor of my client, the defendant.

Opposing Counsel was Gregory Mills, Mills Law Firm, 1520 Crescent Road, Clifton Park, New York 12065, Tel: 518-373-9900.

6. *Martz v. Staunton*, New York State Supreme Court, County of Schenectady, Honorable Vito Caruso; 2000

Plaintiff in this case alleged that a neurologist failed to appropriately treat a patient's epilepsy. At trial, I had to educate the jury on the disease of epilepsy and explain why it was unusual for a seizure to take the life of an individual, as it did in this case. The claim made in this case was that the treating neurologist did not appropriately medicate the patient for his epilepsy and we had to do a survey for the jury of all of the drugs used to treat epilepsy and educate them on the limitations of treatment. The jury found for my client, the defendant.

Opposing Counsel was David Taffany, Anderson, Moschetti & Taffany, PLLC, 26 Century Hill Drive, Latham, New York 12110, Tel: 518-785-4900.

7. *Barber v. Stimpson*, New York State Supreme Court, County of Warren, Honorable Thomas Mercure; 1990

Plaintiff claimed that my client, a general surgeon in Glens Falls, New York, should not have been performing a hysterectomy on a patient and that his performance of this surgery caused the patient to develop a fistula, imposing a limitation on the patient's ability to live a full life due to urinary and fecal incontinence. Plaintiff claimed that the physician nicked the bowel during the surgery. The jury returned a verdict for my client, the defendant.

Opposing Counsel was Peter Moschetti, Anderson, Moschetti & Taffany, 26 Century Hill Drive, Latham, New York 12110, Tel: 518-785-4900.

8. *Loika v. United Parcel Service*, New York State Supreme Court, County of Albany, Honorable Joseph Harris; 1994

Plaintiff in this case had fallen while loading boxes as an employee of United Parcel Service. He claimed that he suffered permanent and debilitating injuries that prevented him from working. The trial court gave a charge stating that the Workers' Compensation Board finding in favor of the plaintiff was evidence of negligence on the part of the United Parcel Service. I argued strenuously that there was a different standard of care between a Workers' Compensation Board Hearing and a negligence action, which required preponderance of the evidence. This was also the first case where I used surveillance to capture the plaintiff doing hard physical labor when his own physicians were testifying that he was essentially unable to perform his daily activities of life.

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Opposing Counsel was Daniel Santola, Powers & Santola, 39 North Pearl Street, Albany, New York 12207, Tel: 518-465-5995.

9. *Loughlin v. Len*, New York State Supreme Court, County of Albany, Honorable Paul Cheesman; 1988

This was a medical malpractice case in which a 51-year-old man was diagnosed by my physician client with heart burn. Later that evening, the plaintiff's husband died of a massive heart attack at the age of 51 leaving small children and a wife. One of the first experts called by the plaintiff's counsel brought a file with him that had the name of another physician. After discovering the name of that physician, I spent the entire evening trying to gain information about the physician. I was able to contact the Health Department in the State of Washington, and I learned that the expert who was going to be called the following day had actually lost his license to practice in the State of Washington as well as New York State. This information was not known to the plaintiff's attorney, and it became known to me only after 24 hours of investigation during the trial. My resulting cross-examination called into doubt the quality of plaintiff's evidence. The jury found for my client, the defendant.

Opposing Counsel was Stephen Coffey, O'Connell & Aronowitz, 54 State Street, Albany, New York 12207, Tel: 518-462-5601.

10. *Malebranche v. Staunton*, 21 Misc. 3d 1137(A) (2006). New York State Supreme Court, County of Schenectady, Honorable Vincent Reilly; 2007

This unusual medical malpractice case pitted a physician against another physician. Plaintiff, a well-known surgeon, claimed not to have been appropriately treated for a stroke that he had suffered, with resultant neurological damages and an inability to work as a surgeon. The case involved very complex questions about the appropriate standards of care as they related to Heparin administration. At the conclusion of the plaintiff's case, the trial court granted a directed verdict in favor my clients, the defendants, finding that the plaintiff's expert had not appropriately established a violation of the standard of care. This case was appealed to the Appellate Division and was reversed. *See* 46 A.D.3d 959 (3rd Dep't. 2007). Just days before a scheduled re-trial, however, the case was discontinued on the merits and with prejudice.

Opposing Counsel was George Sarachan, Rosenblum, Ronan, Kessler & Sarachan, 110 Great Oaks Blvd., Albany, New York 12203, Tel: 518-464-0444.

18. **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 fully the nature of your participation in these activities. List any client(s) or organization(s) for whom you performed lobbying activities and describe the lobbying activities you performed on behalf of such client(s) or organizations(s).

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(Note: As to any facts requested in this question, please omit any information protected by the attorney-client privilege.)

I have had three major cases that did not go to trial involving alleged civil rights violation against New York County Departments of Social Services, which I represented. These cases were very challenging because in each of the cases, the welfare of children was involved. In two of the cases, we won motions for summary judgment. In the third case, we paid a settlement. Plaintiffs in each of the three cases alleged errors by the defendant Department of Social Services that caused harm to children. The cases involved issues of judgment and qualified immunity. Although, these cases did not go to trial, they were factually complex and compelling. Each of these cases impressed upon me insight into the civil rights of children in the custody of social services, foster parents and biological parents, and the experiences of these individuals – positive and negative – in these systems.

In 1992, I organized and managed Settlement Week in Albany County Courts. This was a major initiative in which the New York Supreme Court for Albany County was closed for trials for one week while each case on its calendar was mediated with volunteer mediators. My work was recognized with the Albany County Bar Association President's Award.

I have never performed lobbying activities for any client or organization.

19. **Teaching**: What courses have you taught? For each course, state the title, the institution at which you taught the course, the years in which you taught the course, and describe briefly the subject matter of the course and the major topics taught. If you have a syllabus of each course, provide four (4) copies to the committee.

When I first graduated from law school I taught paralegal studies at the Junior College of Albany. I no longer have an outline for that course.

From 1991 until 1997, I taught Trial Tactics at Albany Law School. I no longer have the outline for that course. My assigned readings drew from the book Fundamentals of Trial Techniques, by Thomas Mauet, and the students in the class mooted civil and criminal cases during each weekly meeting.

Since 1998, I have taught a course on Medical Malpractice and Health Law at Albany Law School. A copy of my outline is supplied.

20. **Deferred Income/ Future Benefits**: List the 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. Describe the arrangements you have made to be compensated in the future for any financial or business interest.

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Several years ago, my law firm settled a plaintiff's case. I structured a portion of my legal fees so that during the four years that my son will be in college, I will receive approximately $20,000 per year to use toward his college expenses.

21. **Outside Commitments During Court Service**: 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.

    If confirmed, I hope to continue to teach at Albany Law School, provided I can do so consistent with full discharge of the obligations I would assume to the court.

22. **Sources of Income**: 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, licensing fees, honoraria, and other items exceeding $500 or more (if you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here).

    See attached Financial Disclosure Report.

23. **Statement of Net Worth**: Please complete the attached financial net worth statement in detail (add schedules as called for).

    See attached Net Worth Statement.

24. **Potential Conflicts of Interest**:

    a. Identify the family members or other persons, parties, categories of litigation, and financial arrangements that are likely to present potential conflicts-of-interest when you first assume the position to which you have been nominated. Explain how you would address any such conflict if it were to arise.

       If confirmed, I would recuse myself from any case in which I had personal involvement and, for a period of time as required by the code, from any former client from my private practice.

       In addition, my niece is a partner in a law firm in the Albany area and I would recuse from any case in which she appeared or participated.

    b. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern.

       In each case, I would follow the federal recusal statutes and Canon 3 of the Code of Conduct for United States Judges. I would recuse myself in any proceeding in which my impartiality could reasonably be doubted.

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25. **Pro Bono Work**: 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.

During the course of my career, I have always done pro bono work. I have represented individuals in Social Security Disability claims. I have voluntarily lectured to staff attorneys at Legal Aid. Most recently, this year, I was asked by a New York State Supreme Court Judge to serve pro bono as guardian ad litem for an individual involved in a complex civil confinement hearing as a potential witness. I spent approximately 20 hours on the confinement case.

26. **Selection Process**:

a. Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and the interviews in which you participated). Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, please include that process in your description, as well as whether the commission recommended your nomination. List the dates of all interviews or communications you had with the White House staff or the Justice Department regarding this nomination. Do not include any contacts with Federal Bureau of Investigation personnel concerning your nomination.

In February 2010, I met with a member of Senator Charles Schumer's office to discuss the possibility of applying for the judgeship on the U.S. District Court for the Northern District of New York. On March 17, 2010, I submitted an application for that position. On June 4, 2010, I interviewed with Senator Schumer regarding the position. On June 11, 2010, I was interviewed by Senator Schumer's Judicial Nomination Commission in New York City. On June 21, 2010, I learned that Senator Schumer recommended me for nomination.

Since June 25, 2010, I have been in contact with pre-nomination officials at the U.S. Department of Justice. I interviewed with attorneys from the White House Counsel's Office and the Department of Justice on August 11, 2010. On September 29, 2010, the President submitted my nomination to the Senate.

b. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any currently pending or specific case, legal issue or question in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning your position on such case, issue, or question? If so, explain fully.

No.

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Rev. 1/2008

FINANCIAL DISCLOSURE REPORT
NOMINATION FILING

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
D'Agostino, Mae A.	U.S. District Court, Northern District of New York	09/29/2010
4. Title (Article III judges indicate active or senior status; magistrate judges indicate full- or part-time)	**5a. Report Type** (check appropriate type)	**6. Reporting Period**
District Judge	☑ Nomination, Date 09/29/2010 ☐ Initial ☐ Annual ☐ Final 5b. ☐ Amended Report	01/01/2009 to 08/31/2010
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.**	
Mae A. D'Agostino D'Agostino, Krackeler, Maguire & Cardona, PC 16 Sage Estates Albany, NY 12204	Reviewing Officer_____ Date_____	

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

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

☐ NONE *(No reportable positions.)*

POSITION	NAME OF ORGANIZATION/ENTITY
1. Partner	D'Agostino, Krackeler, Maguire & Cardona, PC
2.	
3.	
4.	
5.	

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

☐ NONE *(No reportable agreements.)*

DATE	PARTIES AND TERMS
1. 05/01/2008	American International Life Assurance Co, structured settlement for future payments of legal fees earned
2. 09/04/2002	American General Life Insurance Co., structured settlement for future payments of legal fees earned
3.	

FINANCIAL DISCLOSURE REPORT Page 2 of 8	Name of Person Reporting	Date of Report
	D'Agostino, Mae A.	09/29/2010

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

A. Filer's Non-Investment Income

☐ NONE *(No reportable non-investment income.)*

DATE	SOURCE AND TYPE	INCOME (yours, not spouse's)
1. 2008	Adjunct Professor Albany Law School	$3,200.00
2. 2008	D'Agostino, Krackeler, Baynes & Maguire, PC	$328,948.82
3. 2009	Adjunct Professor Albany Law School	$3,200.00
4. 2009	D'Agostino, Krackeler, Maguire & Cardona, PC	$145,538.09
5. 2009	American International Life Assurance Co., Structured Settlement - attorney fee received	$100,070.09
6. 2010 YTD	D'Agostino, Krackeler, Maguire & Cardona, PC	$100,041.00

B. Spouse's Non-Investment Income - *If you were married during any portion of the reporting year, complete this section.*
(Dollar amount not required except for honoraria.)

☑ NONE *(No reportable non-investment income.)*

DATE	SOURCE AND TYPE
1.	
2.	
3.	
4.	

IV. REIMBURSEMENTS - *transportation, lodging, food, entertainment.*
(Includes those to spouse and dependent children; see pp. 25-27 of filing instructions.)

☐ NONE *(No reportable reimbursements.)*

SOURCE	DATES	LOCATION	PURPOSE	ITEMS PAID OR PROVIDED
1. EXEMPT				
2.				
3.				
4.				
5.				

FINANCIAL DISCLOSURE REPORT Page 3 of 8	Name of Person Reporting	Date of Report
	D'Agostino, Mae A.	09/29/2010

V. GIFTS. *(Includes those to spouse and dependent children; see pp. 28-31 of filing instructions.)*

☐ NONE *(No reportable gifts.)*

SOURCE	DESCRIPTION	VALUE
1. EXEMPT		
2.		
3.		
4.		
5.		

VI. LIABILITIES. *(Includes those of spouse and dependent children; see pp. 32-33 of filing instructions.)*

☑ NONE *(No reportable liabilities.)*

CREDITOR	DESCRIPTION	VALUE CODE
1.		
2.		
3.		
4.		
5.		

FINANCIAL DISCLOSURE REPORT
Page 4 of 8

Name of Person Reporting	Date of Report
D'Agostino, Mae A.	09/29/2010

VII. INVESTMENTS and TRUSTS – *Income, value, transactions (Includes those of spouse and dependent children; see pp. 34-60 of filing instructions.)*

☐ NONE *(No reportable income, assets, or transactions.)*

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A-H)	B. (2) Type (e.g., div., rent, or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, redemption)	D. (2) Date Month - Day	D. (3) Value Code 2 (J-P)	D. (4) Gain Code 1 (A-H)	D. (5) Identity of buyer/seller (if private transaction)
1. Vanguard Prime Money Market	A	Dividend	M	T	Exempt				
2. Key Bank Money Market Checking	A	Interest	M	T					
3. Brokerage Account									
4. Fidelity Diversified International (FDIVX)	A	Dividend	J	T					
5. Spartan 500 Index Fid Adv Class (FSMAX)	A	Dividend	J	T					
6. Fidelity Cash Reserves (FDRXX)	A	Dividend	J	T					
7. Fidelity Contrafund (FCNTX)	A	Dividend	J	T					
8. Fidelity GNMA Fund (FGMNX)	A	Dividend	J	T					
9. Fidelity Low Priced Stock (FLPSX)	A	Dividend	J	T					
10. Fidelity Strategic Income (FSICX)	A	Dividend	J	T					
11. Fidelity Select Med Eqpr&Sys (FSMEX)	A	Dividend	J	T					
12. Artisan Mid Cap Value (ARTQX)	A	Dividend	J	T					
13. Columbia Val and Restruct Cl Z (UMBIX)	A	Dividend	J	T					
14. Oakmark Intrnl Small Cap I (OAKEX)	A	Dividend	J	T					
15. Perkins Mid Cap Value CL J (JMCVX)	A	Dividend	J	T					
16. Janus Overseas Fund CL T (JAOSX)	A	Dividend	J	T					
17. PIMCO Low Dur Cl D (PLDDX)	A	Dividend	J	T					

1. Income Gain Codes: (See Columns B1 and D4)	A =$1,000 or less	B =$1,001 - $2,500	C =$2,501 - $5,000	D =$5,001 - $15,000	E =$15,001 - $50,000
	F =$50,001 - $100,000	G =$100,001 - $1,000,000	H1 =$1,000,001 - $5,000,000	H2 =More than $5,000,000	
2. Value Codes (See Columns C1 and D3)	J =$15,000 or less	K =$15,001 - $50,000	L =$50,001 - $100,000	M =$100,001 - $250,000	
	N =$250,001 - $500,000	O =$500,001 - $1,000,000	P1 =$1,000,001 - $5,000,000	P2 =$5,000,001 - $25,000,000	
	P3 =$25,000,001 - $50,000,000		P4 =More than $50,000,000		
3 Value Method Codes (See Column C2)	Q =Appraisal	R =Cost (Real Estate Only)	S =Assessment	T =Cash Market	
	U =Book Value	V =Other	W =Estimated		

FINANCIAL DISCLOSURE REPORT
Page 5 of 8

Name of Person Reporting	Date of Report
D'Agostino, Mac A.	09/29/2010

VII. INVESTMENTS and TRUSTS — *income, value, transactions (Includes those of spouse and dependent children; see pp. 34-68 of filing instructions.)*

☐ NONE *(No reportable income, assets, or transactions.)*

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A-H)	B. (2) Type (e.g., div., rent, or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, redemption)	D. (2) Date Month - Day	D. (3) Value Code 2 (J-P)	D. (4) Gain Code 1 (A-H)	D. (5) Identity of buyer/seller (if private transaction)
18. PIMCO Invest Gr Corp Bond D (PBDDX)	A	Dividend	J	T					
19. PIMCO Glb Strat Bd CL D (PGSDX)	A	Dividend	J	T					
20. SSGA Emerging Markets (SSEMX)	A	Dividend	J	T					
21. Core Money Market	A	Interest	J	T					
22. 401(k) Plan #1									
23. -MFS Bond Fund - A	A	Dividend							
24. -MFS Total Return Fund - A	A	Dividend							
25. -MFS Money Market Fund	A	Dividend							
26. -MFS High Income Fund - A	A	Dividend							
27. -Massachusetts Investors Trust - A	A	Dividend							
28. -MFS International Value - A	A	Dividend							
29. -MFS Core Equity Fund - A	A	Dividend							
30. -MFS Conservative Alloc Fd - A	A	Dividend							
31. -MFS Growth Fund - A	A	Dividend							
32. -MFS Mid Cap Value Fund - A	A	Dividend							
33. -MFS International New Discovery - A	A	Dividend							
34. -MFS Global Equity Fund - A	A	Dividend							

1. Income Gain Codes: (See Columns B1 and D4)	A =$1,000 or less F =$50,001 - $100,000	B =$1,001 - $2,500 G =$100,001 - $1,000,000	C =$2,501 - $5,000 H1 =$1,000,001 - $5,000,000	D =$5,001 - $15,000 H2 =More than $5,000,000	E =$15,001 - $50,000
2. Value Codes (See Columns C1 and D3)	J =$15,000 or less N =$250,001 - $500,000 P3 =$25,000,001 - $50,000,000	K =$15,001 - $50,000 O =$500,001 - $1,000,000	L =$50,001 - $100,000 P1 =$1,000,001 - $5,000,000 P4 =More than $50,000,000	M =$100,001 - $250,000 P2 =$5,000,001 - $25,000,000	
3. Value Method Codes (See Column C2)	Q =Appraisal U =Book Value	R =Cost (Real Estate Only) V =Other	S =Assessment W =Estimated	T =Cash Market	

FINANCIAL DISCLOSURE REPORT Page 6 of 8	Name of Person Reporting D'Agostino, Mae A.	Date of Report 09/29/2010

VII. INVESTMENTS and TRUSTS – *income, value, transactions (Includes those of spouse and dependent children; see pp. 34-60 of filing instructions.)*

☐ NONE *(No reportable income, assets, or transactions.)*

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period: (1) Amount Code 1 (A-H)	B. Income during reporting period: (2) Type (e.g., div., rent, or int.)	C. Gross value at end of reporting period: (1) Value Code 2 (J-P)	C. Gross value at end of reporting period: (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period: (1) Type (e.g., buy, sell, redemption)	D. (2) Date Month - Day	D. (3) Value Code 2 (J-P)	D. (4) Gain Code 1 (A-H)	D. (5) Identity of buyer/seller (if private transaction)
35. 401(k) Plan #2									
36. -JPM Mrtg Bckd Sel	A	Dividend	M	T					
37. -Principal Sm Cap S&P 600 Indx Inst	A	Dividend	K	T					
38. -RdgWrth Ttl Rtn Bd I	A	Dividend	M	T					
39. -MSIF MdCap Gr I	A	Dividend	K	T					
40. -Thrnbrg Intl Val I	A	Dividend	L	T					
41. -Vngrd Sel Val Inv	A	Dividend	K	T					
42. -DWS Inst Eq 500 Indx Inst	A	Dividend	L	T					
43. -Vngrd Trgt Rtrmt 2010	A	Dividend	L	T					
44. -Morley Stable Val VI	A	Dividend	M	T					
45. -Vngrd Divd Gr Inv	A	Dividend	L	T					
46. Vanguard LifeStrategy Mod Gr - IRA	A	Dividend	J	T					
47. Vanguard Gr & Inc - Custodial Acct	A	Dividend	J	T					
48. Prudential Annuity (inherited)	D	Interest	L	T					

1. Income Gain Codes: (See Columns D1 and D4)	A =$1,000 or less F =$50,001 - $100,000	B =$1,001 - $2,500 G =$100,001 - $1,000,000	C =$2,501 - $5,000 H1 =$1,000,001 - $5,000,000	D =$5,001 - $15,000 H2 =More than $5,000,000	E =$15,001 - $50,000
2. Value Codes (See Columns C1 and D3)	J =$15,000 or less N =$250,001 - $500,000 P3 =$25,000,001 - $50,000,000	K =$15,001 - $50,000 O =$500,001 - $1,000,000	L =$50,001 - $100,000 P1 =$1,000,001 - $5,000,000 P4 =More than $50,000,000	M =$100,001 - $250,000 P2 =$5,000,001 - $25,000,000	
3. Value Method Codes (See Column C2)	Q =Appraisal U =Book Value	R =Cost (Real Estate Only) V =Other	S =Assessment W =Estimated	T =Cash Market	

FINANCIAL DISCLOSURE REPORT Page 7 of 8	Name of Person Reporting D'Agostino, Mac A.	Date of Report 09/29/2010

VIII. ADDITIONAL INFORMATION OR EXPLANATIONS. *(Indicate part of Report.)*

FINANCIAL DISCLOSURE REPORT Page 8 of 8	Name of Person Reporting D'Agostino, Mac A.	Date of Report 09/29/2010

IX. CERTIFICATION.

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

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

Signature: Mac A. D'Agostino

NOTE: ANY INDIVIDUAL WHO KNOWINGLY AND WILFULLY FALSIFIES OR FAILS TO FILE THIS REPORT MAY BE SUBJECT TO CIVIL AND CRIMINAL SANCTIONS (5 U.S.C. app. § 104)

FILING INSTRUCTIONS

Mail signed original and 3 additional copies to:

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

FINANCIAL STATEMENT

Mae D'Agostino

NET WORTH

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

ASSETS				LIABILITIES			
Cash on hand and in banks – see schedule		308	699	Notes payable to banks-secured			
U.S. Government securities				Notes payable to banks-unsecured			
Listed securities—see schedule		906	732	Notes payable to relatives			
Unlisted securities				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—primary residence		95	650
Real estate owned—see schedule		540	000	Chattel mortgages and other liens payable			
Real estate mortgages receivable				Other debts-itemize:			
Autos and other personal property		50	000				
Cash value-life insurance							
Other assets itemize:							
- Annuity		91	500				
- Structured settlements – see schedule		164	100				
				Total liabilities		95	650
				Net Worth	1	965	381
Total Assets	2	061	031	Total liabilities and net worth	2	061	031
CONTINGENT LIABILITIES				GENERAL INFORMATION			
As endorser, comaker or guarantor on leases or contracts				Are any assets pledged? (Add schedule)	NO		
Legal Claims				Are you a defendant in any suits or legal actions?	NO		
Provision for Federal Income Tax				Have you ever taken bankruptcy?	NO		
Other special debt							

FINANCIAL STATEMENT

NET WORTH SCHEDULES

Listed Securities		
Brokerage Account:		
Fidelity Diversified International		$ 2,499
Spartan 500 Index Fund Adv Class		7,804
Fidelity Cash Reserves		1,806
Fidelity Contrafund		6,730
Fidelity GNMA Fund		7,042
Fidelity Low Priced Stock		3,843
Fidelity Strategic Income		7,268
Fidelity Select Medical Equip & System		3,355
Artisan Mid Cap Value		3,941
Columbia Value and Restructuring CL Z		4,737
Oakmark International Small Cap I		3,622
Perkins Mid Cap Value Fund Class T		4,083
Janus Overseas Fund Class T		2,061
PIMCO Low Duration Class D		8,620
PIMCO Investment Grade Corp Bond CL D		7,159
PIMCO Global Advant Strategy Bond CL D		3,292
SSGA Emerging Markets		2,150
Core Money Market		865
401(k) Account:		
Thornburg Intl Val I		76,737
Prncpl Inv S&P Sm Cap 600 Index Fund		35,565
MSIF Mid Cap Growth I		32,232
Vanguard Select Value		43,646
DWS Inst Equity 500 Index Inst		65,492
Vanguard Dividend Growth Inv		60,056
Vanguard Target Retirement 2010		71,817
JPM Mrtg Bckd Sel		137,862
Ridgeworth Total Return Bd I		157,430
Mrly Stbl Val VI		124,588
Other Holdings:		
Vanguard LifeStrategy Moderate Growth Fund		12,466
Vanguard Growth & Income Fund (custodial account)		7,964
Total Listed Securities		$ 906,732

Real Estate Owned		
Primary residence		$ 440,000
Time Share		100,000
Total Real Estate Owned		$ 540,000

Structured Settlements		
AIG annuity (payment of $134,465 on 6/13/18)	(current est.)	$ 90,600
American Home Assurance (4 yearly payments of $20,000, beginning 08/12)	(current est.)	73,500
Total Structured Settlements		$ 164,100

67905.117

AFFIDAVIT

I, **Mae A. D'Agostino**, do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

October 1, 2010
(DATE)

(NAME)

(NOTARY)

KATHLEEN H. ROGERS
Notary Public, State Of New York
No. 01RO6084380
Qualified In Albany County
Commission Expired December 2, 2010

Mae A. D'Agostino
[redacted]

January 5, 2011

Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

I have reviewed the Senate Questionnaire I previously filed in connection with my nomination on September 29, 2010, to be United States District Judge for the Northern District of New York. I certify that the information contained in those documents is, to the best of knowledge, true and accurate.

I am also forwarding an updated net worth statement and financial disclosure report as requested in the questionnaire. I thank the committee for its consideration of my nomination.

Sincerely,

By: _____
Mae A. D'Agostino

MAD/khr
Enclosure
Cc:
Senator Charles E. Grassley
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

AO 10
Rev. 1/2008

FINANCIAL DISCLOSURE REPORT
NOMINATION FILING

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
D'Agostino, Mae A.	U.S. District Court, Northern District of New York	01/05/2011
4. Title (Article III judges indicate active or senior status; magistrate judges indicate full- or part-time)	**5a. Report Type (check appropriate type)**	**6. Reporting Period**
District Judge	☑ Nomination, Date 01/05/2011 ☐ Initial ☐ Annual ☐ Final 5b. ☐ Amended Report	01/01/2010 to 12/30/2010
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.**	
Mae A. D'Agostino D'Agostino, Krackeler, Maguire & Cardona, PC 16 Sage Estates Albany, NY 12204	Reviewing Officer_____ Date_____	

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

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

☐ NONE *(No reportable positions.)*

	POSITION	NAME OF ORGANIZATION/ENTITY
1.	Partner	D'Agostino, Krackeler, Maguire & Cardona, PC
2.		
3.		
4.		
5.		

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

☐ NONE *(No reportable agreements.)*

	DATE	PARTIES AND TERMS
1.	05/01/2008	American International Life Assurance Co, structured settlement for future payments of legal fees earned
2.	09/04/2002	American General Life Insurance Co., structured settlement for future payments of legal fees earned
3.		

FINANCIAL DISCLOSURE REPORT Page 2 of 8	Name of Person Reporting D'Agostino, Mac A.	Date of Report 01/05/2011

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

A. Filer's Non-Investment Income

☐ NONE *(No reportable non-investment income.)*

DATE	SOURCE AND TYPE	INCOME (yours, not spouse's)
1. 2009	Adjunct Professor Albany Law School	$3,200.00
2. 2009	D'Agostino, Krackeler, Maguire & Cardona, PC	$145,538.09
3. 2009	American International Life Assurance Co., Structured Settlement - att orney fee received	$100,070.09
4. 2010	D'Agostino, Krackeler, Maguire & Cardona, PC	$564,158.00

B. Spouse's Non-Investment Income - *If you were married during any portion of the reporting year, complete this section.*
(Dollar amount not required except for honoraria.)

☑ NONE *(No reportable non-investment income.)*

DATE	SOURCE AND TYPE
1.	
2.	
3.	
4.	

IV. REIMBURSEMENTS -- *transportation, lodging, food, entertainment.*
(Includes those to spouse and dependent children; see pp. 25-27 of filing instructions.)

☐ NONE *(No reportable reimbursements.)*

SOURCE	DATES	LOCATION	PURPOSE	ITEMS PAID OR PROVIDED
1. EXEMPT				
2.				
3.				
4.				
5.				

FINANCIAL DISCLOSURE REPORT Page 3 of 8	Name of Person Reporting D'Agostino, Mae A.	Date of Report 01/05/2011

V. GIFTS. *(Includes those to spouse and dependent children; see pp. 28-31 of filing instructions.)*

☐ NONE *(No reportable gifts.)*

	SOURCE	DESCRIPTION	VALUE
1.	EXEMPT		
2.			
3.			
4.			
5.			

VI. LIABILITIES. *(Includes those of spouse and dependent children; see pp. 32-33 of filing instructions.)*

☑ NONE *(No reportable liabilities.)*

	CREDITOR	DESCRIPTION	VALUE CODE
1.			
2.			
3.			
4.			
5.			

FINANCIAL DISCLOSURE REPORT Page 4 of 8	Name of Person Reporting D'Agostino, Mae A.	Date of Report 01/05/2011

VII. INVESTMENTS and TRUSTS – *Income, value, transactions (Include those of spouse and dependent children; see pp. 34-40 of filing instructions.)*

☐ NONE *(No reportable income, assets, or transactions.)*

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A-H)	B. (2) Type (e.g., div., rent, or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, redemption)	D. (2) Date Month - Day	D. (3) Value Code 2 (J-P)	D. (4) Gain Code 1 (A-H)	D. (5) Identity of buyer/seller (if private transaction)
1. Vanguard Prime Money Market	A	Dividend	M	T	Exempt				
2. Key Bank Money Market Checking	A	Interest	N	T					
3. Brokerage Account									
4. Fidelity Diversified International (FDIVX)	A	Dividend							
5. Spartan 500 Index Fid Adv Class (FSMAX)	A	Dividend	J	T					
6. Fidelity Cash Reserves (FDRXX)	A	Dividend	J	T					
7. Fidelity Contrafund (FCNTX)	A	Dividend	J	T					
8. Fidelity GNMA Fund (FGMNX)	A	Dividend	J	T					
9. Fidelity Low Priced Stock (FLPSX)	A	Dividend	J	T					
10. Fidelity Strategic Income (FSICX)	A	Dividend	J	T					
11. Fidelity Select Med Eqpt&Sys (FSMEX)	A	Dividend	J	T					
12. Artisan Mid Cap Value (ARTQX)	A	Dividend	J	T					
13. Columbia Val and Restruct Cl Z (UMBIX)	A	Dividend	J	T					
14. Oakmark Intrntl Small Cap I (OAKIX)	A	Dividend	J	T					
15. Perkins Mid Cap Value CL J (JMCVX)	A	Dividend	J	T					
16. Janus Overseas Fund CL T (JAOSX)	A	Dividend	J	T					
17. PIMCO Low Dur Cl D (PLDDX)	A	Dividend	J	T					

1. Income Gain Codes: (See Columns B1 and D4)	A =$1,000 or less F =$50,001 - $100,000	B =$1,001 - $2,500 G =$100,001 - $1,000,000	C =$2,501 - $5,000 H1 =$1,000,001 - $5,000,000	D =$5,001 - $15,000 H2 =More than $5,000,000	E =$15,001 - $50,000
2. Value Codes (See Columns C1 and D3)	J =$15,000 or less N =$250,001 - $500,000 P3 =$25,000,001 - $50,000,000	K =$15,001 - $50,000 O =$500,001 - $1,000,000	L =$50,001 - $100,000 P1 =$1,000,001 - $5,000,000 P4 =More than $50,000,000	M =$100,001 - $250,000 P2 =$5,000,001 - $25,000,000	
3. Value Method Codes (See Column C2)	Q =Appraisal U =Book Value	R =Cost (Real Estate Only) V =Other	S =Assessment W =Estimated	T =Cash Market	

FINANCIAL DISCLOSURE REPORT Page 5 of 8	Name of Person Reporting D'Agostino, Mac A.	Date of Report 01/05/2011

VII. INVESTMENTS and TRUSTS – *income, value, transactions (includes those of spouse and dependent children; see pp. 34-60 of filing instructions.)*

☐ NONE *(No reportable income, assets, or transactions.)*

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A-H)	B. Income during reporting period (2) Type (e.g., div., rent, or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. Gross value at end of reporting period (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, redemption)	D. (2) Date Month - Day	D. (3) Value Code 2 (J-P)	D. (4) Gain Code 1 (A-H)	D. (5) Identity of buyer/seller (if private transaction)
18. PIMCO Invest Gr Corp Bond D (PBDDX)	A	Dividend	J	T					
19. PIMCO Glb Strat Bd CL D (PGSDX)	A	Dividend	J	T					
20. SSGA Emerging Markets (SSEMX)	A	Dividend	J	T					
21. Core Money Market	A	Interest							
22. 401(k) Plan #1									
23. -MFS Bond Fund - A	A	Dividend							
24. -MFS Total Return Fund - A	A	Dividend							
25. -MFS Money Market Fund	A	Dividend							
26. -MFS High Income Fund - A	A	Dividend							
27. -Massachusetts Investors Trust - A	A	Dividend							
28. -MFS International Value - A	A	Dividend							
29. -MFS Core Equity Fund - A	A	Dividend							
30. -MFS Conservative Alloc Fd - A	A	Dividend							
31. -MFS Growth Fund - A	A	Dividend							
32. -MFS Mid Cap Value Fund - A	A	Dividend							
33. -MFS International New Discovery - A	A	Dividend							
34. -MFS Global Equity Fund - A	A	Dividend							

1. Income Gain Codes. (See Columns B1 and D4)	A =$1,000 or less F =$50,001 - $100,000	B =$1,001 - $2,500 G =$100,001 - $1,000,000	C =$2,501 - $5,000 H1 =$1,000,001 - $5,000,000	D =$5,001 - $15,000 H2 =More than $5,000,000	E =$15,001 - $50,000
2. Value Codes (See Columns C1 and D3)	I =$15,000 or less N =$250,001 - $500,000 P3 =$25,000,001 - $50,000,000	K =$15,001 - $50,000 O =$500,001 - $1,000,000	L =$50,001 - $100,000 P1 =$1,000,001 - $5,000,000 P4 =More than $50,000,000	M =$100,001 - $250,000 P2 =$5,000,001 - $25,000,000	
3. Value Method Codes (See Column C2)	Q =Appraisal U =Book Value	R =Cost (Real Estate Only)	S =Assessment V =Other	T =Cash Market W =Estimated	

FINANCIAL DISCLOSURE REPORT Page 6 of 8	Name of Person Reporting D'Agostino, Mae A.	Date of Report 01/05/2011

VII. INVESTMENTS and TRUSTS – *income, value, transactions (Includes those of spouse and dependent children; see pp. 14-60 of filing instructions.)*

☐ NONE *(No reportable income, assets, or transactions.)*

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A-H)	B. (2) Type (e.g., div., rent, or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, redemption)	D. (2) Date Month - Day	D. (3) Value Code 2 (J-P)	D. (4) Gain Code 1 (A-H)	D. (5) Identity of buyer/seller (if private transaction)
35. 401(k) Plan #2									
36. -JPM Mrtg Bcked Sel	A	Dividend	M	T					
37. -Principal Sm Cap S&P 600 Indx Inst	A	Dividend	K	T					
38. -RdgWrth Ttl Rtn Bd I	A	Dividend	M	T					
39. -MSIF MdCap Gr I	A	Dividend	K	T					
40. -Thrnbrg Intl Val I	A	Dividend	L	T					
41. -Vngrd Sel Val Inv	A	Dividend	K	T					
42. -DWS Inst Eq 500 Indx Inst	A	Dividend	L	T					
43. -Vngrd Trgt Rtrmt 2010	A	Dividend	L	T					
44. -Morley Stable Val VI	A	Dividend	M	T					
45. -Vngrd Divd Gr Inv	A	Dividend	L	T					
46. Vanguard LifeStrategy Mod Gr - IRA	A	Dividend	J	T					
47. Vanguard Gr & Inc - Custodial Acct	A	Dividend	J	T					
48. Prudential Annuity (inherited)	D	Interest	L	T					

1. Income Gain Codes (See Columns B1 and D4)	A =$1,000 or less F =$50,001 - $100,000 I =$15,000 or less N =$250,001 - $500,000 P3 =$25,000,001 - $50,000,000	B =$1,001 - $2,500 G =$100,001 - $1,000,000 K =$15,001 - $50,000 O =$500,001 - $1,000,000	C =$2,501 - $5,000 H1 =$1,000,001 - $5,000,000 L =$50,001 - $100,000 P1 =$1,000,001 - $5,000,000 P4 =More than $50,000,000	D =$5,001 - $15,000 H2 =More than $5,000,000 M =$100,001 - $250,000 P2 =$5,000,001 - $25,000,000	E =$15,001 - $50,000
2. Value Codes (See Columns C1 and D3)					
3. Value Method Codes (See Columns C2)	Q =Appraisal U =Book Value	R =Cost (Real Estate Only) V =Other	S =Assessment W =Estimated	T =Cash Market	

FINANCIAL DISCLOSURE REPORT Page 7 of 8	Name of Person Reporting D'Agostino, Mae A.	Date of Report 01/05/2011

VIII. ADDITIONAL INFORMATION OR EXPLANATIONS. *(Indicate part of Report.)*

FINANCIAL DISCLOSURE REPORT Page 8 of 8	Name of Person Reporting D'Agostino, Mae A.	Date of Report 01/05/2011

IX. CERTIFICATION.

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

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

Signature

NOTE: ANY INDIVIDUAL WHO KNOWINGLY AND WILFULLY FALSIFIES OR FAILS TO FILE THIS REPORT MAY BE SUBJECT TO CIVIL AND CRIMINAL SANCTIONS (5 U.S.C. app. § 104)

FILING INSTRUCTIONS

Mail signed original and 3 additional copies to:

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

Mae D'Agostino

FINANCIAL STATEMENT

NET WORTH

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

ASSETS				LIABILITIES			
Cash on hand and in banks -- see schedule		516	607	Notes payable to banks-secured			
U.S. Government securities				Notes payable to banks-unsecured			
Listed securities—see schedule		996	172	Notes payable to relatives			
Unlisted securities				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—primary residence		91	224
Real estate owned—see schedule		540	000	Chattel mortgages and other liens payable			
Real estate mortgages receivable				Other debts-itemize:			
Autos and other personal property		50	000				
Cash value-life insurance							
Other assets itemize:							
- Annuity		87	276				
- Structured settlements -- see schedule		166	400				
				Total liabilities		91	224
				Net Worth	2	265	231
Total Assets	2	356	455	Total liabilities and net worth	2	356	455
CONTINGENT LIABILITIES				GENERAL INFORMATION			
As endorser, comaker or guarantor on leases or contracts				Are any assets pledged? (Add schedule)	NO		
Legal Claims				Are you a defendant in any suits or legal actions?	NO		
Provision for Federal Income Tax				Have you ever taken bankruptcy?	NO		
Other special debt							

FINANCIAL STATEMENT

NET WORTH SCHEDULES

Listed Securities		
Brokerage Account:		
Spartan 500 Index Fund Adv Class		$ 8,823
Fidelity Cash Reserves		2,947
Fidelity Contrafund		7,802
Fidelity GNMA Fund		7,083
Fidelity Low Priced Stock		4,381
Fidelity Strategic Income		7,403
Fidelity Select Medical Equip & System		3,588
Artisan Mid Cap Value		4,484
Columbia Value and Restructuring CL Z		5,589
Oakmark International Small Cap I		4,009
Perkins Mid Cap Value Fund Class T		4,571
Janus Overseas Fund Class T		3,826
PIMCO Low Duration Class D		8,696
PIMCO Investment Grade Corp Bond CL D		7,207
PIMCO Global Advant Strategy Bond CL D		3,325
SSGA Emerging Markets		3,494
401(k) Account:		
Thornburg Intl Val I		91,714
Prncpl Inv S&P Sm Cap 600 Index Fund		46,924
MSIF Mid Cap Growth I		40,459
Vanguard Select Value		53,492
DWS Inst Equity 500 Index Inst		79,838
Vanguard Dividend Growth Inv		70,713
Vanguard Target Retirement 2010		79,232
JPM Mrtg Bckd Sel		141,024
Ridgeworth Total Return Bd I		155,335
Mrly Stbl Val VI		126,671
Other Holdings:		
Vanguard LifeStrategy Moderate Growth Fund		13,917
Vanguard Growth & Income Fund (custodial account)		9,625
Total Listed Securities		$ 996,172

Real Estate Owned		
Primary residence		$ 440,000
Time Share		100,000
Total Real Estate Owned		$ 540,000

Structured Settlements		
AIG annuity (payment of $134,465 on 6/13/18)	(current est.)	$ 91,800
American Home Assurance (4 yearly payments of $20,000, beginning 08/12)	(current est.)	74,600
Total Structured Settlements		$ 166,400

STATEMENT OF KATHLEEN M. WILLIAMS, NOMINEE TO BE UNITED STATES DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF FLORIDA

Ms. WILLIAMS. Yes. Thank you, Senator Coons. Thank you for chairing this proceeding today. Thanks to Senator Grassley and the other members for convening us. It is a rare privilege to be able to discuss my nomination with you.

I would also like to thank Senator Bill Nelson and Senator Marco Rubio for their very kind and generous introductory remarks.

I would be remiss if I did not acknowledge former Senator Mel Martinez and former Senator George LeMieux and the support they have given me throughout this process. And, of course, my profound gratitude to President Barack Obama. I am humbled and honored by his nomination and the confidence he has expressed in my abilities.

I have with me today some very special and important people. So with the committee's indulgence, I would like to introduce my extended family, starting with Catherine Dee and Dr. Adrienne Maraist, my sisters and friends since seventh grade. Dr. Maraist has with her today her daughters, Lydia and Sarah, and I am happy to see them here.

I would also like to acknowledge my college roommate, Ms. Laurie Vikander; my colleagues from my private sector days at Morgan, Lewis & Bockius, Peter Buscemi and William Gardner, and their wives and my friends, Dr. Melinda Gardner and Judith Miller.

My chief assistant has come up from south Florida, Michael Caruso, without whose support I would not be here. And my chief of our appellate division, Paul Rashkind, is here.

My office, I would like to say thank you to them. I am sure they are furiously multitasking while they are watching this Webcast.

I also have some former assistants from my office here today, David Marcus and Brian Stekloff (ph). The members of the Office of Defender Services at the Administrative Office of the Court, Dick Wolfe, Steve Ason (ph) and Judy Marotska (ph), and a good friend, Jennifer Burne (ph).

Finally, the two people without whom I would not have been able to make this journey, the gentleman behind me, Michael John Mullaney, the love of my life, who is now embarrassed by that unmanly characterization, and my dad, William Williams. I have a picture on my dresser at home that shows a 3-year-old me sitting atop the shoulders of my father in front of the Capitol building, and I wanted this Committee to know that in every way that is meaningful, he is still supporting me and I am still sitting atop his shoulders as I sit here today, and I want to thank you for the opportunity to remember him.

Thank you very much.

Senator COONS. Thank you, Ms. Williams.

Mr. Feighery.

[The biographical information follows.]

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UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY

QUESTIONNAIRE FOR JUDICIAL NOMINEES

PUBLIC

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

   Kathleen Mary Williams

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

   United States District Judge for the Southern District of Florida

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

   Federal Public Defender for the Southern District of Florida
   150 West Flagler Street, Suite 1500
   Miami, Florida 33130

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

   1956; Derby, Connecticut

5. **Education**: List in reverse chronological order each college, law school, or any other institution 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 – 1982, University of Miami School of Law; J.D., 1982
   1974 – 1978, Duke University; B.A. (*magna cum laude*), 1978

6. **Employment Record**: List in reverse chronological order all governmental agencies, business or professional corporations, companies, firms, or other enterprises, partnerships, institutions or 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 description.

   1990 – Present
   Federal Public Defender for the Southern District of Florida
   150 West Flagler Street, Suite 1500
   Miami, Florida 33130
   Federal Public Defender (1995 – Present)
   Chief Assistant Federal Public Defender (1990 – 1995)

1999 – 2000
Federal Public Defender for the Middle District of Florida
80 North Hughey Avenue, Room 417
Orlando, Florida 32801
Acting Federal Public Defender

1988 – 1990
Morgan, Lewis & Bockius
5300 First Union Financial Center
Miami, Florida 33131
Associate Attorney

1984 – 1988
United States Attorney's Office for the Southern District of Florida
99 N.E. Fourth Street
Miami, Florida 33132
Assistant United States Attorney

1987 – 1988
University of Miami School of Law
Coral Gables, Florida 33134
Adjunct Instructor of Legal Research and Writing

1982 – 1984
Fowler, White, Burnett, Hurley, Banick & Strickroot
1395 Brickell Avenue, Suite 1400
Miami, Florida 33131
Associate Attorney

1980 – 1982
Colson & Hicks
255 Aragon Avenue, Second Floor
Coral Gables, Florida 33134
Law Clerk

1978 – 1979
The Diaries of George Washington
Alderman Library
Charlottesville, Virginia 22904
Staff Assistant

1978 – 1979
National Legal Research Group, Inc.
2421 Ivy Road
Charlottesville, Virginia 22903
Clerical Assistant

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Summer 1978
Crazy Horse Tavern
Palm Beach Lakes Boulevard
West Palm Beach, Florida 33401
Waitress

Other Affiliations (uncompensated)

1997 – Present (approximate)
Federal Bar Association (Miami, Chapter)
1111 Brickell Avenue, Suite 1700
Miami, Florida 33131
President (2003) & Director (1997 – Present)

1995 - Present
Florida Association of Criminal Defense Lawyers (Miami)
150 West Flagler Street
Miami, Florida 33130
Director

1994 – 1996 (approximate)
Amigos Together for Kids
801 S.W. Third Avenue, Suite 300
Miami, Florida 33130
Director

7. **Military Service and Draft Status**: Identify any service in the U.S. Military, including dates of service, branch of service, rank or rate, serial number (if different from social security number) and type of discharge received, and whether you have registered for selective service.

I have not served in the military. I have not registered for selective service.

8. **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.

AV-Rated, Martindale Hubbell (current)
Lawyers in Leadership Award, U. Miami Ctr. for Ethics & Public Service (2009)
Founder's Award (Career Achievement), Fl. Assoc. of Criminal Defense Lawyers (2007)
C. Clyde Atkins Civil Liberties Award, American Civil Liberties Union (2003)
Criminal Justice Award, Dade County Bar Association (2001)
Commendation, Drug Enforcement Administration (1987)
Superior Performance Award, Department of Justice (approx. 1987)
Commendation, International Academy of Trial Lawyers (1982)
Trial Advocacy Award, University of Miami School of Law (1982)

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9. **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.

Administrative Office of the U.S. Courts (A.O.)
- Advisory Process Focus Group (2008)
- Defender Performance Measurement Working Group (approx. 1997 – 2008)
- Defender Representative to the Joint Advisory Council of the A.O. (2002 – 2008)
- Federal Defender Advisory Group, Chair (2002 – 2008)

Association of Federal Defenders

Eugene P. Spellman Inn of Court

Federal Bar Association (Miami Chapter)
- President (2003) & Director (1997 – Present)

Florida Association of Criminal Defense Lawyers (Miami)
- Director (1995 – Present)

Florida Association of Women Lawyers

Florida Bar Special Commission on Professional Regulation (2001)

U.S. Court of Appeals for the First Circuit
- Reappointment Committee for the Federal Defender of Puerto Rico (2008)

U.S. District Court for the Southern District of Florida
- Atty. Admissions, Peer Review, and Atty. Grievance Cmte. (2007 – Present)
- Bench-Bar Conference Committee (2008 & 2010)
- Civil Justice Advisory Group (1999 – Present)
- Community Liaison Cmte. (2007 – Present)
- Criminal Justice Act Panel Cmte., Chair (1995 – Present)
- Defense Liaison Group to U.S. Attorney's Office (1992 – 2002, approx.)
- Judicial Evaluation Cmte. (2002)
- Magistrate Judge Merit Selection & Reappointment Cmtes. (various years)

Volunteer Lawyers' Project for the Southern District of Florida
- Advisory Committee (approx. 1995 – Present)

As the Federal Public Defender for the Southern District of Florida since 1995, I have frequently served on Committees of the District Court and of the Administrative Office of U.S. Courts (which oversees the administration of the Federal Defender Program). I have sought to list all such committees of which I have a memory or record, but there may be others I have been unable to recall or identify.

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10. **Bar and Court Admission**:

a. List the date(s) you were admitted to the bar of any state and any lapses in membership. Please explain the reason for any lapse in membership.

Florida, 1982

There has been no lapse in membership.

b. List all courts in which you have been admitted to practice, including dates of admission and any lapses in membership. Please explain the reason for any lapse in membership. Give the same information for administrative bodies that require special admission to practice.

United States District Court for the Southern District of Florida, 1983
Supreme Court of Florida, 1982

There has been no lapse in membership.

11. **Memberships**:

a. List all professional, business, fraternal, scholarly, civic, charitable, or other organizations, other than those listed in response to Questions 9 or 10 to which you belong, or to which you have belonged, since graduation from law school. Provide dates of membership or participation, and indicate any office you held. Include clubs, working groups, advisory or editorial boards, panels, committees, conferences, or publications.

Amigos Together for Kids, Director (approx. 1994 – 1996)
City Club (1988 – 1990)
Leadership Miami (1984)

b. 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, or national origin. Indicate whether any of these organizations listed in response to 11a above currently discriminate or formerly discriminated on the basis of race, sex, religion or national origin 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 have never been a member of any organization that currently discriminates or, to my knowledge, formerly discriminated on the basis of race, sex, religion, or national origin.

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12. **Published Writings and Public Statements**:

a. List the titles, publishers, and dates of books, articles, reports, letters to the editor, editorial pieces, or other published material you have written or edited, including material published only on the Internet. Supply four (4) copies of all published material to the Committee.

"The Emperor's New Clothes: The Federalization of State Crimes," in THE FLORIDA DEFENDER (May 1999) and THE CHAMPION (Dec. 1999). Copy supplied.

The Office of the Federal Public Defender publishes a monthly "Defense Newsletter." Copies supplied of all issues that were in my files and in Federal Defender's Office files. A companion blog is published at http://defensenewsletter.blogspot.com/. Although I have not taken an active editorial role in either the newsletter or blog, my name appears on the mastheads.

I searched my memory, records, and available Internet databases, and while I have not identified other publications, there may be others I have been unable to identify or recall.

b. Supply four (4) copies of any reports, memoranda or policy statements you prepared or contributed in the preparation of on behalf of any bar association, committee, conference, or organization of which you were or are a member. If you do not have a copy of a report, memorandum or policy statement, give the name and address of the organization that issued it, the date of the document, and a summary of its subject matter.

Extracts from The Outline of the Defender Services Program Strategic Plan, January 2009. Copy supplied.

Administrative Office Advisory Process Study, 2008. Copy supplied.

Special Commission on Lawyer Regulation: Report and Recommendations, 2001. Copy supplied.

I searched my memory, records, and available Internet databases, and while I have not identified other reports, memoranda, or policy statements, there may be others I have been unable to identify or recall.

c. Supply four (4) copies of any testimony, official statements or other communications relating, in whole or in part, to matters of public policy or legal interpretation, that you have issued or provided or that others presented on your behalf to public bodies or public officials.

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Presentation before House and Senate Appropriations committees on need for increase in CJA compensation (Oct. 12, 2007). I have no notes, transcripts, or recording.

Testimony at Public Hearing on Proposed Amendments Before the U.S. Sentencing Comm'n (Mar. 15, 2006.) http://www.ussc.gov/hearings/03_15_06/0315USSC.pdf. Prepared statement and transcript supplied.

Testimony/statement before January 2006 en banc session of U.S. District Court regarding local case assignment practices. Press coverage supplied.

Presentation before House and Senate Appropriations committees on need for increase in CJA compensation (2004). I have no notes, transcripts, or recording.

Statement on behalf of Fed. Pub. and Cmty. Defenders, concerning the Proposed Guideline Amendments, before the U.S. Sentencing Comm'n, Washington, D.C. 40 (Mar. 5, 1998) at http:// www.ussc.gov/agendas/3_12_98/williams.pdf. Prepared statement and transcript supplied.

I searched my memory, records, and available Internet databases, and while I have not identified other testimony or official statements relating to matters of public policy, there may be others I have been unable to identify or recall.

d. Supply four (4) copies, transcripts or recordings of all speeches or talks delivered by you, including commencement speeches, remarks, lectures, panel discussions, conferences, political speeches, and question-and-answer sessions. Include the date and place where they were delivered, and readily available press reports about the speech or talk. If you do not have a copy of the speech or a transcript or recording of your remarks, give the name and address of the group before whom the speech was given, the date of the speech, and a summary of its subject matter. If you did not speak from a prepared text, furnish a copy of any outline or notes from which you spoke.

I done my best to identify all speeches or talks form my memory, from my records, and from available Internet databases. There are, however, other speeches and talks I have given that I cannot specifically recall and have been unable to identify. Since joining the Federal Public Defender's Office and particularly since assuming leadership of the office as the Federal Public Defender in 1995, I have made it my practice to speak frequently to law firms, lawyers' associations, and law schools about the work of the Office and the importance of pro bono work on behalf of indigent defendants. I have listed all presentations that I can; however, I have not kept comprehensive records of such presentations.

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Panelist, Hunton & Williams, Miami, Florida (July 21, 2010). A discussion of available vehicles for lawyers to perform pro bono work. I have no notes, transcripts, or recording.

I participated in the "Principal for a Day" program at South Miami Middle Community School in October 2009.

Remarks to Professor Ricardo Bascuas' Criminal Procedure Class, University of Miami School of Law (Feb. 26, 2009). I discussed aspects of criminal procedure with two sitting federal judges. I have made similar presentations to Professor Bascuas' classes during other terms, but I do not recall and have been unable to identify the dates.

Keynote Speaker, Orientation for Assistant Federal Defenders, Santa Fe, New Mexico (Nov. 14, 2008). Notes supplied.

Speaker, Florida Association of Criminal Defense Lawyers Annual Dinner, Rodney Thaxton Award Ceremony, Miami, Florida (May 2008). Notes supplied.

Keynote Speaker, Florida International University College of Law Graduation Dinner, Miami, Florida (April 2008). Notes supplied.

Speaker, Federal Bar Association, West Palm Beach, Florida (Feb. 15, 2008). Notes supplied.

Keynote Speaker, Orientation for Assistant Federal Defenders, Santa Fe, New Mexico (Nov. 11, 2007). The basic outline of this presentation is within the notes I have supplied for November 14, 2008.

"Federal and State Defender Cooperation." Federal Defenders of Montana and Office of the State Public Defenders Media, Misconceptions and Misnomers Seminar, Fairmont Hot Springs, Montana (Aug. 10, 2007). I have no notes, transcripts, or recording.

"Professionalism – You'll Know it When You See It and Why You Can't Live Without It." Panelist, The Florida Bar Annual Meeting, Orlando, Florida (June 28, 2007). Notes supplied.

Speaker, Federal Bar Association, Miami, Florida (April 16, 2007). Notes supplied.

"Prosecutorial Discretion: Underused?" Moderator, Criminal Justice Ethics Symposium, American Bar Association Criminal Justice Section and University of Miami School of Law, Miami, Florida (Apr. 13, 2007). Notes supplied.

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Keynote Speaker, Orientation for Assistant Federal Defenders, Santa Fe, New Mexico (Nov. 2006). The basic outline of this presentation is within the notes I have supplied for November 14, 2008.

Speaker, Florida Association of Criminal Defense Lawyers Annual Dinner, Introduction of Richard C. Klugh, Miami, Florida (May 13, 2006). Notes supplied.

Welcoming Remarks, Administrative Office of the U.S. Courts, Office of Defender Services Training Branch, "Sentencing Advocacy Workshop: Thinking Outside the Guideline Box," Miami Beach, Florida (Mar. 2, 2006). I have no notes, transcript, or recording.

Speaker, Investiture of Judge Martin Bidwill, Fort Lauderdale, Florida (Feb. 17, 2006). Notes supplied.

Speaker, Federal Bar Association, Miami, Florida (Dec. 8, 2005). Notes supplied.

"Shared Perspectives of Indigent Representation in State and Federal Courts." Panelist, Broward County Public Defender's Office, Fort Lauderdale, Florida (Nov. 17, 2005). I have no notes, transcript, or recording.

Keynote Speaker, Orientation for Assistant Federal Defenders, Santa Fe, New Mexico (Nov. 2005). The basic outline of this presentation is within the notes I have supplied for November 14, 2008.

"The Cuban Spy Trial In Miami: The Perfect Storm?" Panelist, American Constitution Society, Miami, Florida (Oct. 20, 2005). A discussion of the decision in *United States v. Campa*, 419 F.3d 1219 (11th Cir. 2005). I have no notes, transcript, or recording.

Federal Defender Breakout Session, Moderator, Eighth Circuit Judicial Conference, Colorado Springs, Colorado (Oct. 18, 2005). A discussion of national indigent defense issues with the Federal Defenders of the Eighth Circuit. I have no notes, transcript, or recording.

Speaker, Investiture of Judge William Thomas, Miami, Florida (Mar. 4, 2005). Notes supplied.

Keynote Speaker, Orientation for Assistant Federal Defenders, Santa Fe, New Mexico (Nov. 11, 2004). The basic outline of this presentation is within the notes I have supplied for November 14, 2008.

"Waivers in Plea Agreements." Winning Strategies for Defending Federal Criminal Cases, Nashville, Tennessee (July 30, 2004). A discussion of

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considerations attendant to appellate waivers. I have no notes, transcript, or recording.

"Waivers in Plea Agreements: How Much Is Too Much To Waive?" Winning Strategies for Defending Federal Criminal Cases, Santa Fe, New Mexico (Apr. 23, 2004). A discussion of considerations attendant to appellate waivers. I have no notes, transcript, or recording.

"How Effective Is Federal Sentencing?" Testimony before the ABA Justice Kennedy Commission, Washington, D.C. (Nov. 13, 2003). Notes supplied.

"Plea Agreements and Waivers." Annual CJA Training Seminar, Nashville, Tennessee (Oct. 11, 2003). A discussion of considerations attendant to appellate waivers. I have no notes, transcript, or recording.

"Leadership Breakfast Series." Center for Ethics, University of Miami School of Law, Miami, Florida (Sept. 29, 2003). A discussion of a legal career in indigent defense. I have no notes, transcript, or recording.

Informal comment at inaugural meeting of Florida Bar Discipline Process Review Commission (Sept. 5, 2003). Press coverage supplied.

Acceptance remarks, American Civil Liberties Union, C. Clyde Atkins Award, Miami, Florida (May 16, 2003). Notes supplied.

"Good Faith and The Limits of Zealous Advocacy." Moderator, Criminal Justice Ethics Symposium, University of Miami, School of Law, Miami, Florida (Apr. 11, 2003). A discussion of day to day ethical questions facing the criminal practitioner. I have no notes, transcript, or recording.

Speaker, Ethics and Professionalism Award, given to Daniel Pearson, University of Miami School of Law, Miami, Florida (Apr. 3, 2003). Notes supplied.

"Charting Our Future: Hearings on The Status of Women in Law." Panelist, American Bar Association Commission on Women, Miami, Florida (Mar. 21, 2003). A discussion of challenges facing women lawyers. I have no notes, transcript, or recording.

"*Gideon v. Wainwright*: A 40th Birthday Celebration." Panelist, FACDL-Miami Chapter and the Federal Public Defender's Office for the Southern District of Florida, Miami, Florida (Mar. 18, 2003). A discussion of the importance and continued viability of *Gideon v. Wainwright*. I have no notes, transcript, or recording.

"Your Client and The Media." Panelist, Advanced Federal Criminal Practice, Miami, Florida (Jan. 30, 2003). I have no notes, transcript, or recording.

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Keynote Speaker, Orientation for Assistant Federal Defenders, Santa Fe, New Mexico (Nov. 4, 2002). The basic outline of this presentation is within the notes I have supplied for November 14, 2008.

"Pre-Indictment/Information Ethical Considerations." Panelist, Criminal Justice Ethics Symposium, University of Miami, School of Law, Miami, Florida (Apr. 26, 2002). I have no notes, transcript, or recording.

"Challenges/Problems Running a Defender Office." Moderator, Annual Federal Defender Conference, Marco Island, Florida (Dec. 5, 2001). I have no notes, transcript, or recording.

"Investigation of a Drug Case." Montana Association of Criminal Defense Attorneys Annual Seminar, Great Falls, Montana (Aug. 23, 2001). A discussion of what to consider in defending methamphetamine prosecutions. I have no notes, transcript, or recording.

"Preparing Your Case To Win—Themes, Theories and Facts." Winning Strategies For Defending Federal Criminal Cases, San Antonio, Texas (Sept. 21-23, 2000). I have no notes, transcript, or recording.

"Defending State Crimes in Federal Court." Florida Association of Criminal Defense Lawyers Annual Meeting, Miami Beach, Florida (June 9, 2000). A discussion of the federalization of traditional state crimes. I have no notes, transcript, or recording.

"Do We Understand Diversity?" Panelist, National Seminar for Federal Defenders, New Orleans, Louisiana (June 5-7, 2000). I have no notes, transcript, or recording.

"Firearms Programs." Panelist, The Federal Bar Association of the United States Sentencing Commission Annual Seminar On the Federal Sentencing Guidelines, Clearwater Beach, Florida (May 4, 2000). A discussion of guideline sentences in firearms cases. I have no notes, transcript, or recording.

"CJA Panel Administrations and Issues." Panelist, National Conference of CJA Panel Attorneys, Albuquerque, New Mexico (Mar. 3-5, 2000). I have no notes, transcript, or recording.

"Issues of Common Concern, CJA Panel Support." Panelist, Annual Federal Defender Conference, San Diego, California (Jan. 24-26, 2000). I have no notes, transcript, or recording.

"Ethical Issues in Criminal Prosecution." Panelist, American Inns of Court, Fort Lauderdale, Florida (Jan. 18, 2000). I have no notes, transcript, or recording.

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Remarks at retirement celebration for U.S. District Judge Edward B. Davis (approx. June 2000). I have no notes, transcript, or recording.

"Initial Appearance and The Bail Hearing." Winning Strategies of Defending Federal Criminal Cases, Savannah, Georgia (June 3-5, 1999). I have no notes, transcript, or recording.

"Federalization of State Criminal Laws." Panelist, Federalist Society, Miami, Florida (Apr. 29, 1999). I have no notes, transcript, or recording. Press coverage with statement supplied.

"Current Issues in Federal Death Penalty Litigation." Moderator, Federal Death Penalty Litigation Seminar, Miami, Florida (Mar. 11, 1999). I have no notes, transcript, or recording.

"The Pretrial Process." Winning Strategies for Defending Federal Criminal Cases, Portland, Maine (Aug. 27-28, 1998). A discussion of pretrial issues that shape litigation. I have no notes, transcript, or recording.

"Bail." Winning Strategies for Defending Federal Criminal Cases, Dallas, Texas (June 19, 1998). I have no notes, transcript, or recording.
"Women As Cross-Examiners." American Bar Association Criminal Justice Section, Mid-Year Meeting, New York, New York (Apr. 22-25, 1998). A demonstration of cross-examination by women attorneys. I have no notes, transcript, or recording.

"Recent Developments in Guideline Sentencing." National Seminar for Federal Defenders, Atlanta, Georgia (Mar. 23-24, 1998). I have no notes, transcript, or recording.

I recall specifically speaking to Women's Business Forums in Dade and Broward counties, but cannot recall topics or dates (I believe these programs were conducted in the mid-1990's and sometime after 2002, respectively).

Since 1996, I have designed and coordinated the annual CJA/FPD litigation seminar for the Southern District of Florida. At each of these programs, I have moderated a panel entitled "A View from the Bench" or "CJA Town Meeting" where indigent defense lawyers engage in a dialogue with District Judges and CJA program administrators. I have no notes, transcripts, or recordings of these panels.

Also, as Chairperson of the Defender Services Advisory Group, I spoke at most every annual, national Defender and CJA Conference since 2002. Except for those presentations I have listed above, I have no notes, transcripts, or recordings of these appearances.

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e. List all interviews you have given to newspapers, magazines or other publications, or radio or television stations, providing the dates of these interviews and four (4) copies of the clips or transcripts of these interviews where they are available to you.

I have searched my files and publicly-available Internet databases to identify all interviews I have given, but there may be others I have been unable to recall or identify. Clips supplied for all interviews listed.

"Class notes," Barrister Alumni Magazine, Volume LXI, Fall 2009.

"JNC Picks 3 Judicial Finalists," MIAMI DAILY BUSINESS REVIEW, JULY 17, 2009.

"Scales of Justice: The Right to Counsel vs. the Need to Bar Tainted Legal Fees," THE WALL STREET JOURNAL, Nov. 20, 2008.

"Federal Defender Williams Leads Other Districts, Staff by Example," MIAMI DAILY BUSINESS REVIEW, Nov. 17, 2008.

"Naming Names: Likely Candidates for U.S. Attorney Post," BROWARD DAILY BUSINESS REVIEW, Nov. 10, 2008.

"Cocaine Prison Terms Reduced," FORT LAUDERDALE SUN-SENTINEL, Sept. 21, 2008.

"Defense Bar Protests Removal of Plea Deals from U.S. Website," MIAMI DAILY BUSINESS REVIEW, Apr. 23, 2007.

"Federal P.D. Starts Fourth Term," MIAMI DAILY BUSINESS REVIEW, FEB. 12, 2007.

"Federal Courts Face Layoffs, Loss of Services as an Already Bare-Bones Budget Remains Frozen," MIAMI DAILY BUSINESS REVIEW, Jan. 31, 2007.

"U.S. Seeking Wider Web Ban Protecting Plea Deal 'Snitches,'" MIAMI HERALD, Jan. 25, 2007.

"Three's the Charm?" MIAMI DAILY BUSINESS REVIEW, Dec. 19, 2005.

"Additional Federal Judges Tied to Split of 9th Circuit," MIAMI DAILY BUSINESS REVIEW, Dec. 5, 2005.

"Rules Secrecy Ends, But Direct Transfers of Cases Continues," MIAMI DAILY BUSINESS REVIEW, Nov. 21, 2005.

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"Little-Known U.S. Attorney Makes Rounds," MIAMI DAILY BUSINESS REVIEW, Aug. 1, 2005.

"Judge Skips Criminal Cases as Feds Target His Secretary," MIAMI DAILY BUSINESS REVIEW, July 11, 2005.

"Judges Maintain Secret Policy Manual," MIAMI DAILY BUSINESS REVIEW, June 15, 2005.

"Miami Attorney Debates Scalia at Supreme Court," MIAMI DAILY BUSINESS REVIEW, June 13, 2005.

"Free at Last," MIAMI DAILY BUSINESS REVIEW, May 9, 2005.

"'Vanishing trial' a Disturbing Trend," WESTSIDE GAZETTE, March 17, 2005 - March 23, 2005.

"Pleas Favored Over Trials," MIAMI HERALD, Mar. 14, 2005.

"Locals Dubious as Boot Camp Gets the Boot," MIAMI DAILY BUSINESS REVIEW, Feb. 14, 2005.

"Florida Bar Scrutinizes Discipline for Lawyers," PALM BEACH POST, March 5, 2004.

"Security Fears End Miami Trial," BROWARD DAILY BUSINESS REVIEW, Nov. 7, 2003.

"Defense Funding Crisis," MIAMI DAILY BUSINESS REVIEW, Oct. 3, 2003.

"Grievance Group Gears Up For Year-Long Examination," FLORIDA BAR NEWS, Oct. 1, 2003.

"Reuben Camper Cahn, 2003 Outstanding Assistant Federal Defender," LIBERTY LEGEND, Fall 2003.

"Court Secrets," MIAMI DAILY BUSINESS REVIEW, May 9, 2003.

"Immigration Crackdown Snares Arriving Haitians," MIAMI HERALD, May 5, 2003.

"Belief in Brown Unites Defenders," FORT LAUDERDALE SUN-SENTINEL, Apr. 27, 2003.

"Asylum Seekers Face U.S. Charges," FORT LAUDERDALE SUN-SENTINEL, Apr. 16, 2003.

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"Confession of Retarded Teenager Tossed Out in 1990 Cop Killing," MIAMI DAILY BUSINESS REVIEW, Mar. 20, 2003.

"Federal Prosecutors Ordered to Seek Death Penalty," MIAMI DAILY BUSINESS REVIEW, Jan. 29, 2003.

"Contractor Gets One Year in Airport Bribery Case," MIAMI HERALD, Apr. 18, 2002.

"Bush Urged to Order Behan Review," MIAMI HERALD, Mar. 16, 2002.

"Kathy Williams Next Chair of Defender Services Advisory Group," LIBERTY LEGEND, Winter 2002.

"Panel Lawyers in U.S. Courts to Get Pay Hike," MIAMI DAILY BUSINESS REVIEW, Dec. 20, 2001.

"Ex-Guard Gets Prison in Krome Sex Case," FORT LAUDERDALE SUN-SENTINEL, July 25, 2001.

"Grant Thornton's Stein Lands International Promotion," MIAMI HERALD, Apr. 24, 2000.

"Proud as a Peacock," MIAMI HERALD, Apr. 24, 2000.

"Smugglers Face Few Risks in Federal Court," PALM BEACH POST, Mar. 14, 1999.

"Theodore Sakowitz, 75, had been U.S. Public Defender," MIAMI HERALD, Jan. 20, 1999.

"Kathleen M. Williams, Federal Public Defender," BROWARD DAILY BUSINESS REVIEW, Jan. 7, 1999.

"Poor Defense: The Nation's Top Prosecutor Launches Campaign to Upgrade Legal Representation of Indigent Defendants," MIAMI DAILY BUSINESS REVIEW, June 10, 1998.

"Key Biscayne Realtor, Cash Disappear," MIAMI HERALD, June 1, 1998.

"Making Federal Case of Tourist Attacks Fails," MIAMI HERALD, Apr. 29 1998.

"Lithuanians Held in Miami in Probe of Nuclear Weapons Deals," MIAMI HERALD, July 7, 1997.

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"2 Held in Alleged Scheme to Sell Nuclear Weapons," LOS ANGELES TIMES, July 2, 1997.

"Tailing Turns into High-Tech Endeavor," THE ORANGE COUNTY REGISTER, Jan. 27, 1997.

"Legal Eagles Needed for Volunteer Project," MIAMI HERALD, Nov. 25, 1996.

"Appellate U.S. Attorney Retiring After 23 Years," BROWARD DAILY BUSINESS REVIEW, Sept. 19, 1996.

"Lawyers: Public Defense Cases Not Worth Time, Expense," PALM BEACH POST, Feb. 11, 1996.

"Punishment in War on Drugs Not ColorBlind, Lawyers Say," MIAMI HERALD, Nov. 24, 1995.

"Colombia's Heroin Couriers: Swallowing and Smuggling," THE NEW YORK TIMES, Nov. 2, 1995.

"Simpson-Inspired Tactic in Local Courts," MIAMI DAILY BUSINESS REVIEW, Sept. 22, 1995.

"Officials Voice Doubts About Restitution Bill," FORT LAUDERDALE SUN SENTINEL, Feb. 11, 1995.

"U.S. Judge Rules Crack Sentences Don't Target Blacks," PALM BEACH POST, Dec. 17, 1994.

"Hard Time for Hard Cases," SOUTH FLORIDA SUN-SENTINEL, Sept. 27, 1992.

"Crack Crackdown Singles Out Blacks, Lawyers Say," PALM BEACH POST, May 10, 1992.

"Case Against Noriega Buffeted by Inconsistency; Witnesses Draw a Sketchy Drug Connection," WASHINGTON POST, Oct. 6, 1991.

"Associates Jump Ship, Go Public," THE NATIONAL LAW JOURNAL, Aug. 5, 1991.

"Young Lawyers Competing for Jobs," MIAMI HERALD, Apr. 29, 1991.

"Murderer Got a Fair Trial, Report Says," PALM BEACH POST, Oct. 31, 1990.

"Convicted Killer Seeks New Trial, Cites Romance," MIAMI HERALD, Sept. 21, 1990.

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13. **Judicial Office**: State (chronologically) any judicial offices you have held, including positions as an administrative law judge, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

I have not held judicial office.

a. Approximately how many cases have you presided over that have gone to verdict or judgment? _____

i. Of these, approximately what percent were:

jury trials:	___%
bench trials:	___% [total 100%]
civil proceedings:	___%
criminal proceedings:	___% [total 100%]

b. Provide citations for all opinions you have written, including concurrences and dissents.

c. For each of the 10 most significant cases over which you presided, provide: (1) a capsule summary of the nature the case; (2) the outcome of the case; (3) the name and contact information for counsel who had a significant role in the trial of the case; and (3) the citation of the case (if reported) or the docket number and a copy of the opinion or judgment (if not reported).

d. For each of the 10 most significant opinions you have written, provide: (1) citations for those decisions that were published; (2) a copy of those decisions that were not published; and (3) the names and contact information for the attorneys who played a significant role in the case.

e. Provide a list of all cases in which certiorari was requested or granted.

f. Provide a brief summary of and citations for all of your opinions where your decisions were reversed by a reviewing court or where your judgment was affirmed with significant criticism of your substantive or procedural rulings. If any of the opinions listed were not officially reported, provide copies of the opinions.

g. Provide a description of the number and percentage of your decisions in which you issued an unpublished opinion and the manner in which those unpublished opinions are filed and/or stored.

h. Provide 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, provide copies of the opinions.

i. Provide citations to all cases in which you sat by designation on a federal court of

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appeals, including a brief summary of any opinions you authored, whether majority, dissenting, or concurring, and any dissenting opinions you joined.

14. **Recusal:** If you are or have been a judge, identify the basis by which you have assessed the necessity or propriety of recusal (If your court employs an "automatic" recusal system by which you may be recused without your knowledge, please include a general description of that system.) Provide a list of any cases, motions or matters that have come before you in which a litigant or party has requested that you recuse yourself due to an asserted conflict of interest or in which you have recused yourself sua sponte. Identify each such case, and for each provide the following information:

    a. whether your recusal was requested by a motion or other suggestion by a litigant or a party to the proceeding or by any other person or interested party; or if you recused yourself sua sponte;

    b. a brief description of the asserted conflict of interest or other ground for recusal;

    c. the procedure you followed in determining whether or not to recuse yourself;

    d. your reason for recusing or declining to recuse yourself, including any action taken to remove the real, apparent or asserted conflict of interest or to cure any other ground for recusal.

    I have not served as a judge.

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

    a. List chronologically any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. If appointed, please include the name of the individual who appointed you. Also, state chronologically any unsuccessful candidacies you have had for elective office or unsuccessful nominations for appointed office.

    In 1995, I was appointed by the United States Court of Appeals for the Eleventh Circuit to be Federal Public Defender for the Southern District of Florida. I have since been reappointed by the same Court to successive terms. I was also appointed by the same Court to be Acting Federal Public Defender for the Middle District of Florida from 1999 to 2000. I have not held elective office. I have had no unsuccessful candidacies for elective office or unsuccessful nominations for appointed office.

    b. List all memberships and offices held in and services rendered, whether compensated or not, to any political party or election committee. If you have ever held a position or played a role in a political campaign, identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

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I have never held office in any political party or election committee. I have never held a position or played a role in a political campaign.

16. **Legal Career:** Answer each part separately.

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

i. whether you served as clerk to a judge, and if so, the name of the judge, the court and the dates of the period you were a clerk;

I have not served as clerk to a judge.

ii. whether you practiced alone, and if so, the addresses and dates;

I have not practiced law alone.

iii. 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.

1982 – 1984
Fowler, White, Burnett, Hurley, Banick & Strickroot
1395 Brickell Avenue, Suite 1400
Miami, Florida 33131
Associate Attorney

1984 – 1988
United States Attorney's Office for the Southern District of Florida
99 N.E. Fourth Street
Miami, Florida 33132
Assistant United States Attorney

1988 – 1990
Morgan, Lewis & Bockius
5300 First Union Financial Center
Miami, Florida 33131
Associate Attorney

1999 – 2000
Federal Public Defender for the Middle District of Florida
80 North Hughey Avenue, Room 417
Orlando, Florida 32801
Acting Federal Public Defender

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1990 – Present
Federal Public Defender for the Southern District of Florida
150 West Flagler Street, Suite 1500
Miami, Florida 33130
Federal Public Defender (1995 – Present)
Chief Assistant Federal Public Defender (1990 – 1995)

iv. whether you served as a mediator or arbitrator in alternative dispute resolution proceedings and, if so, a description of the 10 most significant matters with which you were involved in that capacity.

I have not served as a mediator or arbitrator.

b. Describe:

i. the general character of your law practice and indicate by date when its character has changed over the years.

As a law firm associate from 1982 to 1984, I participated in insurance defense litigation. I then served four years as an Assistant United States Attorney from 1984 to 1988, during which time I was a federal criminal prosecutor. I returned to private practice from 1988 to 1990, where I worked on labor litigation and white collar criminal defense matters. Since 1990, I have been a full-time criminal defense practitioner representing indigent individuals accused of federal crimes.

ii. your typical clients and the areas at each period of your legal career, if any, in which you have specialized.

As an attorney in the private sector, my clients were primarily corporate entities with occasional representation of individual clients. Specifically, while at Fowler White from 1982 to 1984, I defended private insurance companies, city and county interests, hospital trusts, and corporations. While at Morgan, Lewis & Bockius from 1988 to 1990, my clients included financial institutions, government contractors, and multi-national corporations, which I represented in both criminal and labor litigation contexts.

As an attorney for the Department of Justice, I represented the efforts of federal law enforcement agencies and the interests of the people of the United States in bringing criminal prosecutions against persons accused of violations of federal law. The cases I handled ranged from simple narcotics and weapons matters to complex money-laundering and RICO litigation.

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As the Federal Public Defender, I represent persons accused of violating federal criminal statues who cannot afford to retain an attorney. My client demographics are multi-cultural, multi-ethnic, and multi-lingual. The only characteristic common among my clients is the financial inability to hire legal counsel of the client's choice. The matters we handle encompass a wide range of litigation including immigration, complex fraud, and national security.

c. Describe the percentage of your practice that has been in litigation and whether you appeared in court frequently, occasionally, or not at all. If the frequency of your appearances in court varied, describe such variance, providing dates.

As a law firm associate from 1982 to 1984 and from 1988 to 1990, I appeared in court occasionally. As an Assistant United States Attorney from 1984 to 1988, I appeared in court frequently. When I joined the Federal Defender's Office in 1990, and while Chief Assistant, I appeared in court frequently. However, after becoming the Federal Defender and the Chair of the Defender Services Advisory Group, my time in Court decreased to occasional appearances.

i. Indicate the percentage of your practice in:
   1. federal courts: 90%
   2. state courts of record: 10%
   3. other courts:
   4. administrative agencies:

ii. Indicate the percentage of your practice in:
   1. civil proceedings: 15%
   2. criminal proceedings: 85%

d. State the number of cases in courts of record, including cases before administrative law judges, you tried to verdict, judgment or final decision (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

I have tried approximately thirty-nine cases to verdict.

Since joining the Federal Defender's Office, I have tried one case alone and have tried approximately nine cases as co-counsel, twice in a lead attorney capacity. While an associate attorney with Morgan, Lewis & Bockius, I was co-counsel in an arbitration matter tried before a special master, and I tried one forfeiture case (non-jury) as lead counsel. As an Assistant United States Attorney, I tried approximately twenty-six cases to verdict; in all but five of the cases, I was sole counsel. I tried two cases to verdict while an attorney at Fowler White, as co-counsel.

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i. What percentage of these trials were:
   1. jury: 97%
   2. non-jury: 3%

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

I have never appeared before the Supreme Court of the United States nor have I personally authored any briefs filed with the Court; however, matters have been presented to and argued before the Court by attorneys in my office under my name as Federal Public Defender. For example, Assistant Federal Public Defenders routinely file petitions for certiorari in the Court on behalf of their clients. Hundreds of these petitions have been submitted under my name in the fifteen years I have been the Federal Defender.

Additionally, two cases have been briefed and argued before the Court by two different Assistant Federal Defenders during my time as Federal Public Defender. They were:

Dodd v. United States, 545 U.S. 353 (2005)
Gonzalez v. Crosby, 544 U.S. 969 (2005)

Finally, in addition to one amicus brief authored by an attorney in my office in the matter of *Boumediene v. Bush*, 553 U.S. 723, 128 S. Ct. 2229 (2008), my office has been a co-signator with all federal and community defenders in the United States in the following cases:

Magwood v. Culliver, 130 S. Ct. 1117 (2010)
Dillon v. United States, 130 S. Ct. 797 (2009)
Barber v. Thomas, 130 S. Ct. 737 (2009)
Kimbrough v. United States, 552 U.S. 85 (2007)
Gall v. United States, 552 U.S. 38 (2007)
Rita v. United States, 551 U.S. 338 (2007)
Mujahid v. Daniels, cert. denied 547 U.S. 1149 (2006) (amicus in support of cert. petition)

There may be other cases that I have been unable to recall or identify on which my name appears on the brief in an institutional capacity.

17. **Litigation**: Describe the ten (10) most significant litigated matters which you personally handled, whether or not you were the attorney of record. 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

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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) United States v. Dolores Eirin, Roberto Botero, et al., Case No. 81-6018-Cr EPS; *United States v. Eirin*, 778 F.2d 722 (11th Cir. 1985). In this case, I was co-counsel for the government, assisting the Chief Assistant of the office. The indictment alleged that wealthy and socially prominent Colombian businessman, Roberto Botero, aided by bank employee Dolores Eirin and others, laundered $57 million through the Landmark Bank of Ft. Lauderdale over a ten month period. Mr. Botero and Mrs. Eirin were found guilty on all counts.

The trial took place in July 1984, presided over by U.S. District Judge Eugene P. Spellman (since deceased). My Co-Counsel was: Gerald Houlihan, Esq., 9130 South Dadeland Boulevard, Suite 1209, Miami, Florida 33156; Telephone: (305) 460-4091. Opposing Counsel were: Joel Hirschhorn, Esq., 550 Biltmore Way, PH 3-A, Coral Gables, Florida 33134; Telephone: (305) 445-5320; David Bogenschutz, Esq., 600 South Andrews Avenue, Suite 500, Ft. Lauderdale, Florida 33301; Telephone: (954) 764-2500.

(2) United States v. Hernan Botero, 81-6018-Cr-EPS. After extradition to the United States, Hernan Botero was tried for the money laundering activities described in (1). Mr. Botero was found guilty on all counts.

The trial took place June 18–25, 1985, presided over by U.S. District Judge Eugene P. Spellman (since deceased). Co-Counsel was: Gerald Houlihan, Esq., 9130 South Dadeland Boulevard, Suite 1209, Miami, Florida 33156; Telephone: (305) 460-4091. Opposing Counsel was: Neal Sonnett, Esq., 2 South Biscayne Boulevard, Suite 2600, Miami, Florida 33131; Telephone: (305) 358-2000.

(3) *United States v. Madruga*, Case No. 86-00976-Cr-ALH; *United States v. Madruga*, 810 F.2d 1010 (11th Cir. 1987). I was sole counsel for the United States. This litigation was one of the first prosecutions brought pursuant to a new money laundering statute (Title 18 U.S.C. Section 1956). While Mr. Madruga and several of the more culpable defendants pled prior to trial, the two remaining defendants were convicted by a jury on all counts.

The trial took place September 14-22, 1987, presided over by then-U.S. District Judge Alcee Hastings. Opposing Counsel were: Jack Denaro, Esq., 7700 North Kendall Drive, Suite 504, Miami, Florida 33156; Telephone: (305) 274-9550; Miguel del Aguila, Esq.,

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6161 Blue Lagoon Drive, Suite 400, Miami, Florida 33126; Telephone: (305) 267-4665; Emilio de la Cal, Esq., 780 N.W. LeJeune Road, Suite 525, Miami, Florida 33126; Telephone: (305) 444-8244.

(4) *United States v. Luis Castano-Ochoa*, et al., Case No. 86-0138-Cr-WMH.
This case was a RICO prosecution brought against members of the Ochoa cocaine cartel. Mr. Castano-Ochoa and his co-defendant were found guilty on all counts. I was co-counsel for the government.

The trial took place May 5-June 15, 1987, presided over by U.S. District Judge William H. Hoeveler. Co-Counsel was: Richard Gregorie, Assistant United States Attorney, 99 N.E. Fourth Street, Miami, Florida 33132; Telephone: (305) 961-9148. Opposing Counsel were: Neal Sonnett, Esq., 2 South Biscayne Boulevard, Suite 2600, Miami, Florida 33131; Telephone: (305) 358-2000; Douglas Hartman, Esq., 10680 N.W. 25th Street, Suite 200, Miami, Florida 33172; Telephone: (305) 477-1184.

(5) *Robinson v. Caulkins Indiantown Co.*, Case No. 83-8655-Civ-WMH;
Cardin v. Via Tropical Fruits, Inc., et al., Case No. 88-14201-Civ-SM.
Both the *Robinson* and *Cardin* matters arose from allegations of racial and sexual discrimination at a Florida orange grove and juice processing plant. I was co-counsel for corporate defendants.

Robinson was resolved after I left the firm in 1990. It was presided over by U.S. District Judge William C. Hoeveler. Co-Counsel was: Terence Connor, Hunton & Williams LLP, 111 Brickell Avenue, Suite 2500, Miami, Florida 33131; Telephone: (305) 810-2517. Opposing Counsel was: Peter Helwig, Esq., 6700 South Florida Avenue, Suite 31, Lakeland, Florida 33813; Telephone: (863) 648-2958.

Cardin was resolved after I left the firm. It was presided over by U.S. District Judge Stanley Marcus. Co-Counsel was: Terence Connor, Hunton & Williams LLP, 111 Brickell Avenue, Suite 2500, Miami, Florida 33131; Telephone: (305) 810-2517; Opposing Counsel was: Joseph A. Vassallo, Esq., Vassallo & Bilotta, 1920 Wekiva Way, Suite 102, West Palm Beach, Florida 33411; Telephone: (561) 432-1994.

(6) *United States v. William Murray, et al.*, Case No. 93-10003-Cr-JLK.
This case charged a group of Key West citizens with distribution of narcotics. I represented defendant William Murray. The jury returned a verdict of not guilty for my client, Mr. Murray, and another co-defendant. A mistrial was declared as to two other co-defendants after the jury could not reach a verdict in their cases.

The case was tried July 14-29, 1993, presided over by U.S. District Judge James L. King. Co-Counsel were: Mel Black, Esq., 2937 S.W. 27th Avenue, Suite 202, Miami, Florida 33133; Telephone: (305) 443-1600; Richard Hersch, Esq., 2937 S.W. 27th Avenue, Suite 206, Coconut Grove, Florida 33133; Telephone: (813) 229-6585; William Aaron, Esq., 200 South Biscayne Boulevard, Suite 2770, Miami, Florida 33131; Telephone: (305)

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371-5800. Opposing Counsel was: Guy Lewis, 3059 Grand Avenue, Suite 340, Coconut Grove, Florida 33133; Telephone: (305) 442-1101.

(7) *United States v. Lemar Smith*, Case No. 00-704-Cr-DLG.
Mr. Smith, a guard at Krome Detention Center, was charged with the sexual assault of a detainee. The case was resolved by a misdemeanor plea. I was co-counsel for Mr. Smith along with now Chief Assistant Federal Defender Michael Caruso.

Mr. Smith's plea, sentencing, and restitution hearing took place in 2001, presided over by U.S. District Judge Donald L. Graham. Co-counsel was Michael Caruso, Chief Assistant Federal Public Defender, 150 West Flagler Street, Suite 1700, Miami, Florida 33130; Telephone: (305) 530-7000. Opposing Counsel were: Magistrate Patrick A. White, 301 North Miami Avenue, Third Floor, Miami, Florida 33128; Telephone: (305) 523-5780; Scott Ray, Assistant United States Attorney, 10723 Gloxinia Drive, Rockville, Maryland 20852; Telephone: Unknown.

(8) *United States v. Dale Babb*, Case No. 90-79-Cr-FAM.
Mr. Babb was charged with illegal possession of a weapon by a convicted felon. He was found not guilty after a jury trial. I was co-counsel to the Assistant Federal Defender assigned to represent Mr. Babb.

Trial took place in spring 1991, presided over by U.S. District Judge Federico A. Moreno. Co-Counsel was: Linda Osberg-Braun, Esq., 11900 Biscayne Boulevard, Suite 700, Miami, Florida 33181; Telephone: (305) 895-0300. Opposing Counsel was: Eduardo Palmer, Esq., 2100 Salzedo Street, Suite 300, Miami, Florida 33134; Telephone: (305) 476-1100.

(9) *United States v. Brenda Jackson*, Case No. 90-927-Cr-KLR.
Ms. Jackson was charged with postal embezzlement and was found guilty after a jury trial. I was co-counsel to the Assistant Federal Defender assigned to represent Mr. Jackson.

Trial took place March 1991, presided over by U.S. District Judge Kenneth L. Ryskamp. Co-Counsel was: Circuit Court Judge Mary Barzee, Richard E. Gerstein Building, 1351 N.W. 12th Avenue, Room 217, Miami, Florida 33125; Telephone: (305) 349-7074. Opposing Counsel was: Steve Petri, Assistant United States Attorney, 500 East Broward Boulevard, Seventh Floor, Fort Lauderdale, Florida 33394; Telephone: (954) 356-7255.

(10) *United States v. Ignacio Ramirez*, Case No. 85-539-Cr-EBD.
This case involved allegations of narcotics violations. Our client was found not guilty after a jury trial. I was co-counsel to the Assistant Federal Defender assigned to represent Mr. Ramirez.

Trial was July 8-10, 1991, presided over by U.S. District Judge Edward B. Davis (since deceased). Co-Counsel was: Jacqueline Rubin, Esq. (since deceased). Opposing Counsel

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was: Karen Rochlin, Assistant United States Attorney, 99 N.E. Fourth Street, Room 820, Miami, Florida 33132; Telephone: (305) 961-9234.

18. **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 fully the nature of your participation in these activities. List any client(s) or organization(s) for whom you performed lobbying activities and describe the lobbying activities you performed on behalf of such client(s) or organizations(s). (Note: As to any facts requested in this question, please omit any information protected by the attorney-client privilege.)

As the Federal Public Defender for the Southern District of Florida since 1995, I personally have represented indigent defendants as well as overseen thousands of additional representations. My management responsibilities have included hiring and personnel management, training design, and case management. It has been my privilege to lead a team of attorneys that has acquired a reputation for vigorous advocacy and earned a wide range of accolades in doing so (for example, the BACDL Harry Gulkin Award in 2002; the Miami Chapter FACDL Rodney Thaxton Award in 1996, 1998, 2001, 2004, 2006, 2007 and 2008; the West Palm Beach Federal Bar Association Kenneth Ryskamp Award in November 17, 2005).

I am especially proud of the programs our office has built to train, supervise, and provide continuing education and mentorship to public defenders. We were honored by the Senate's recognition of our work in S. Rept. 108-344 (2004), wherein the Senate Appropriations Committee stated that it "enthusiastically supports the program [the Federal Defender's Office for the Southern District of Florida] has built and highly encourages the judiciary to use their complete program as a guide for other [Federal Defenders' Offices] to follow."

I also count my leadership of the Defender Services Advisory Group as a defining period in my career. For six years, I represented Federal and Community Defenders and Criminal Justice Act lawyers around the country to the Defender Services Committee, a Judicial Conference committee that governs the federal indigent defense program, as well as in other attendant venues. Being the voice of the Defender program in matters ranging from substantive legal policy to appropriations issues was a significant challenge and a singular honor for me. The responsibility of educating decision makers as to the importance of a robust indigent defense program has made me a more effective leader in the legal community and a more effective participant in the apparatus of modern government.

19. **Teaching**: What courses have you taught? For each course, state the title, the institution at which you taught the course, the years in which you taught the course, and describe briefly the subject matter of the course and the major topics taught. If you have a syllabus of each course, provide four (4) copies to the committee.

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I taught legal research and writing to law students at the University of Miami School of Law during the 1987 to 1988 school year. The course was designed to introduce students to appellate brief writing and research. I have not retained a syllabus.

I have had a supporting role in the Federal Appellate Clinic at the University of Miami School of Law, launched last year by a former Assistant Federal Public Defender in my office who is now a tenured professor at the University of Miami. Students in the clinic work with appellate attorneys in our office.

20. **Deferred Income/ Future Benefits**: List the 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. Describe the arrangements you have made to be compensated in the future for any financial or business interest.

    None.

21. **Outside Commitments During Court Service**: 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 such plans, commitments, or agreements.

22. **Sources of Income**: 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, licensing fees, honoraria, and other items exceeding $500 or more (if you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here).

    See attached Financial Disclosure Report.

23. **Statement of Net Worth**: Please complete the attached financial net worth statement in detail (add schedules as called for).

    See attached Net Worth Statement.

24. **Potential Conflicts of Interest**:

    a. Identify the family members or other persons, parties, categories of litigation, and financial arrangements that are likely to present potential conflicts-of-interest when you first assume the position to which you have been nominated. Explain how you would address any such conflict if it were to arise.

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If confirmed, I would recuse myself from any cases involving clients or former clients represented by the Federal Public Defender's Office for the Southern District of Florida during my tenure as Defender.

My partner of the past 26 years is a senior attorney at the Department of Justice in Washington, D.C. Accordingly, in our current roles, I have recused myself from involvement in any prosecutions he supervises (the Chief Assistant Federal Defender has served as Acting Federal Defender in such cases and makes all decisions attendant to those litigations). If confirmed as a judge, I would recuse myself from any prosecutions in which my partner is counsel, supervisor, or has any other role. I anticipate such cases would be relatively rare.

b. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern.

If confirmed, I will handle all matters involving actual or potential conflicts of interests through the careful and diligent application of Canon 3 of the Code of Conduct for United States Judges, as well as other relevant canons and statutory provisions.

25. **Pro Bono Work**: 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.

As a public defender representing indigent criminal defendants since 1990, my full-time work has been in serving the disadvantaged. In addition, I have worked with community organizations such as Amigos Together For Kids and have taken every opportunity to speak at different venues on the importance of equal justice and the rule of law.

26. **Selection Process**:

a. Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and the interviews in which you participated). Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, please include that process in your description, as well as whether the commission recommended your nomination. List the dates of all interviews or communications you had with the White House staff or the Justice Department regarding this nomination. Do not include any contacts with Federal Bureau of Investigation personnel concerning your nomination.

On May 1, 2009, John M. Fitzgibbons, Chair of the Florida Federal Judicial Nominating Commission issued a notice that the Commission was accepting applications for the position of United States District Judge for the Southern

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District of Florida. I submitted an application to the Commission and was thereafter interviewed by the Commission on July 15, 2009. On July 20, 2009, Mr. Fitzgibbons wrote to Senator Bill Nelson and Senator Mel Martinez recommending me as one of three finalists for the position.

On September 2, 2009, I met with Senator Nelson and Senator Martinez in Miami, Florida. Since October 28, 2009, I have been in contact with pre-nomination officials at the Department of Justice. On December 15, 2009, I interviewed in Washington, D.C., with attorneys from the White House Counsel's Office and the Department of Justice. On July 21, 2010, the President submitted my nomination to the Senate.

b. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any currently pending or specific case, legal issue or question in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning your position on such case, issue, or question? If so, explain fully.

No.

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Rev. 1/2010

FINANCIAL DISCLOSURE REPORT
FOR CALENDAR YEAR 2009

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
Williams, Kathleen M.	Southern District of Florida	07/23/2010
4. Title (Article III judges indicate active or senior status; magistrate judges indicate full- or part-time)	**5a. Report Type (check appropriate type)**	**6. Reporting Period**
United States District Judge	☒ Nomination, Date ☐ Initial ☐ Annual ☐ Final 5b. ☐ Amended Report	to 01/01/2009 - 06/30/2010
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.**	
150 West Flagler Street Suite 1500 Miami, Florida 33130	Reviewing Officer_____ Date_____	

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

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

☒ NONE *(No reportable positions.)*

	POSITION	NAME OF ORGANIZATION/ENTITY
1.		
2.		
3.		
4.		
5.		

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

☒ NONE *(No reportable agreements.)*

	DATE	PARTIES AND TERMS
1.		
2.		
3.		

FINANCIAL DISCLOSURE REPORT Page 2 of 6	Name of Person Reporting Williams, Kathleen M.	Date of Report 07/23/2010

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

A. Filer's Non-Investment Income

☒ NONE *(No reportable non-investment income.)*

	DATE	SOURCE AND TYPE	INCOME (yours, not spouse's)
1.			
2.			
3.			
4.			

B. Spouse's Non-Investment Income - *If you were married during any portion of the reporting year, complete this section.*
(Dollar amount not required except for honoraria.)

☒ NONE *(No reportable non-investment income.)*

	DATE	SOURCE AND TYPE
1.		
2.		
3.		
4.		

IV. REIMBURSEMENTS — *transportation, lodging, food, entertainment.*
(Includes those to spouse and dependent children; see pp. 25-27 of filing instructions.)

☐ NONE *(No reportable reimbursements.)*

	SOURCE	DATES	LOCATION	PURPOSE	ITEMS PAID OR PROVIDED
1.	Exempt				
2.					
3.					
4.					
5.					

FINANCIAL DISCLOSURE REPORT Page 3 of 6	Name of Person Reporting Williams, Kathleen M.	Date of Report 07/23/2010

V. GIFTS. *(Includes those to spouse and dependent children; see pp. 28-31 of filing instructions.)*

☐ NONE *(No reportable gifts.)*

	SOURCE	DESCRIPTION	VALUE
1.	Exempt		
2.			
3.			
4.			
5.			

VI. LIABILITIES. *(Includes those of spouse and dependent children; see pp. 32-35 of filing instructions.)*

☐ NONE *(No reportable liabilities.)*

	CREDITOR	DESCRIPTION	VALUE CODE
1.	Neiman Marcus	Revolving Credit Card	J
2.	American Express	Revolving Credit Card	J
3.	Wachovia	Secured Note/Equity Line	M
4.			
5.			

FINANCIAL DISCLOSURE REPORT
Page 4 of 6

Name of Person Reporting	Date of Report
Williams, Kathleen M.	07/23/2010

VII. INVESTMENTS and TRUSTS – *income, value, transactions (Includes those of spouse and dependent children; see pp. 34-60 of filing instructions.)*

☐ NONE *(No reportable income, assets, or transactions.)*

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A-H)	B. (2) Type (e.g., div., rent, or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, redemption)	D. (2) Date mm/dd/yy	D. (3) Value Code 2 (J-P)	D. (4) Gain Code 1 (A-H)	D. (5) Identity of buyer/seller (if private transaction)
1. United Technologies Stock	E	Dividend	N	T	Exempt				
2. ATT Stock	C	Dividend	K	T					
3. Edison International Stock	A	Dividend	K	T					
4. Lockheed Martin Stock	B	Dividend	K	T					
5. IBM Stock	B	Dividend	K	T					
6. Manulife Stock	A	Dividend							
7. Martin Marietta Stock	A	Dividend							
8. Wachovia Money Market Sweep	A	Interest	J	T					
9. Tax Exempt Municipal Bond	A	Interest	J	T					
10. Hartford Fort Small Cap (HSLCX)		None	M	T					
11. Pioneer Hi Income Municipals (HICMX)	B	Dividend	M	T					
12. Princ Preferred Sec (PRFCX)	A	Dividend	L	T					
13. Allianz Vision Variable Annuity		None	M	T					
14. Nationwide All American Annuity		None	M	T					
15.									
16.									
17.									

1. Income Gain Codes: (See Columns B1 and D4)	A =$1,000 or less F =$50,001 - $100,000	B =$1,001 - $2,500 G =$100,001 - $1,000,000	C =$2,501 - $5,000 H1 =$1,000,001 - $5,000,000	D =$5,001 - $15,000 H2 =More than $5,000,000	E =$15,001 - $50,000
2. Value Codes (See Columns C1 and D3)	J =$15,000 or less N =$250,001 - $500,000 P3 =$25,000,001 - $50,000,000	K =$15,001 - $50,000 O =$500,001 - $1,000,000	L =$50,001 - $100,000 P1 =$1,000,001 - $5,000,000 P4 =More than $50,000,000	M =$100,001 - $250,000 P2 =$5,000,001 - $25,000,000	
3. Value Method Codes (See Column C2)	Q =Appraisal U =Book Value	R =Cost (Real Estate Only) V =Other	S =Assessment W =Estimated	T =Cash Market	

FINANCIAL DISCLOSURE REPORT Page 5 of 6	Name of Person Reporting Williams, Kathleen M.	Date of Report 07/23/2010

VIII. ADDITIONAL INFORMATION OR EXPLANATIONS. *(Indicate part of Report.)*

Investments reported in Part VII, lines 6 and 7, were fully divested prior to the end of the reporting period.

FINANCIAL DISCLOSURE REPORT Page 6 of 6	Name of Person Reporting Williams, Kathleen M.	Date of Report 07/23/2010

IX. CERTIFICATION.

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

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

Signature

NOTE: ANY INDIVIDUAL WHO KNOWINGLY AND WILFULLY FALSIFIES OR FAILS TO FILE THIS REPORT MAY BE SUBJECT TO CIVIL AND CRIMINAL SANCTIONS (5 U.S.C. app. § 104)

FILING INSTRUCTIONS

Mail signed original and 3 additional copies to:

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

Kathleen Williams

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		3	495	Notes payable to banks-secured		179	807
U.S. Government securities				Notes payable to banks-unsecured			
Listed securities—see schedule		772	595	Notes payable to relatives			
Unlisted securities				Notes payable to others			
Accounts and notes receivable:				Accounts and bills due		3	499
Due from relatives and friends				Unpaid income tax			
Due from others				Other unpaid income and interest			
Doubtful				Real estate mortgages payable			
Real estate owned primary residence		400	000	Chattel mortgages and other liens payable			
Real estate mortgages receivable				Other debts-itemize:			
Autos and other personal property		40	000	Auto Loan		16	640
Cash value-life insurance							
Other assets itemize:							
Thrift Savings Program		467	003				
Allianz Vision Variable Annuity		238	863				
Nationwide All American Annuity		235	573	Total liabilities		199	946
Tax Exempt Sec Tr			206	Net Worth	1	957	789
Total Assets	2	157	735	Total liabilities and net worth	2	157	735
CONTINGENT LIABILITIES				GENERAL INFORMATION			
As endorser, comaker or guarantor				Are any assets pledged?	NO		
On leases or contracts				Are you defendant in any suits or legal actions?	NO		
Legal Claims				Have you ever taken bankruptcy?	NO		
Provision for Federal Income Tax							
Other special debt							

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FINANCIAL STATEMENT

NET WORTH SCHEDULE

Listed Securities	
AT&T	$ 34,023
Edison International	17,186
IBM	25,606
Lockheed Martin	22,179
United Technologies	330,150
Hartford Fort Small Cap (HSLCX)	117,505
Pioneer Hi Income Municipals (HICMX)	151,613
Princ Preferred Sec (PRFCX)	74,333
Total Listed Securities	772,595

AFFIDAVIT

I, **KATHLEEN MARY WILLIAMS**, do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

7/26/10
(DATE)

(NAME)

Sworn and subscribed before me this 26th day of July, 2010.
*Personally known to me.

(NOTARY)

DEBORAH MCMULLEN RICHMAN
MY COMMISSION # DD671935
EXPIRES: August 01, 2011
Ft. Notary Discount Assoc. Co.

FEDERAL PUBLIC DEFENDER
Southern District of Florida

Kathleen M. Williams
Federal Public Defender

Location: Miami

Michael Caruso
Chief Assistant Federal Public Defender

Miami:

Hector A. Dopico
Daniel L. Ecarius
Anthony J. Natale
Paul M. Rashkind
Jan C. Smith,
Supervising Attorneys

Bonnie Phillips-Williams,
Executive Administrator

Stewart G. Abrams
Heloise B. Batoff
Sowmya Bharathi
Beatrice Gaiber Bronis
Miguel Caridad
Vanessa L. Chen
Timothy Coon
Tracy Dreispul
Vincent P. Farina
Aimee Ferrer
Margaret Y. Foldes
Ayana Harris
R. D'Arsey Houlihan
Paul M. Kurchin
Anne Lyons
Christine O'Connor
Kashyap Patel
Sabrina Puglisi
Samuel Randall
Michael D. Spivack

Ft. Lauderdale:

Robert N. Berube,
Supervising Attorney

Janice Bergmann
Brenda G. Bryn
Timothy M. Day
Chantel R. Doaker
Robin J. Farnsworth
Patrick M. Hunt
Bernardo Lopez
Nelson M. Marks
Arturo D. Menendez
Gail M. Stage
Daryl E. Wilcox

West Palm Beach:

Dave Lee Brannon,
Supervising Attorney

Robert E. Adler
Lori B. Barrist
Peter Birch
Jonathan Pinell
Robin C. Rosen-Evans
Samuel J. Smargon

Fort Pierce:

Panayotta Augustin-Birch
R. Fletcher Peacock

January 5, 2011

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

I have reviewed the Senate Questionnaire I previously filed in connection with my nomination on July 26, 2010, to be United States District Judge for the Southern District of Florida. Accordingly, with the submission of the additional information provided below, I certify that the information contained in these documents is, to the best of my knowledge, true and accurate.

Q.8 I have been advised that on April 28, 2011, I will be recognized by Legal Services of Miami, Inc. with the 2011 Equal Justice Leadership Award.

Q.9 My service on the Civil Justice Advisory group is not ongoing, but ended sometime in 1999, having commenced a few years previously. Similarly, my participation on the Attorney Admission and Community Liaison groups is not ongoing.

Q.15 On October 22, 2010, I was advised by the Eleventh Circuit Court of Appeals that I have been reappointed to a fifth term as Federal Public Defender.

Miami
150 West Flagler Street
Suite 1500
Miami, FL 33130-1555
Tel: (305) 536-6900
Fax: (305) 530-7120

Ft. Lauderdale
One East Broward Boulevard
Suite 1100
Ft. Lauderdale, FL 33301-1842
Tel: (954) 356-7436
Fax: (954) 356-7556

West Palm Beach
450 Australian Avenue South
Suite 500
West Palm Beach, FL 33401-5040
Tel: (561) 833-6288
Fax: (561) 833-0368

Ft. Pierce
109 North 2nd Street
Ft. Pierce, FL 34950
Tel: (772) 489-2123
Fax: (772) 489-3997

Q.16e My office was a co-signator with all federal and community defenders in the United State on an amicus brief in the following case:

Pepper v. United States, Case No. 09-6822, 2010 WL3578665

I also am forwarding an updated Net Worth Statement and Financial Disclosure Report and current medical information as requested in the Questionnaire. I thank the Committee for consideration of my nomination.

Sincerely,

Kathleen M. Williams
Federal Public Defender

cc: The Honorable Charles Grassley
Ranking Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

American Bar Association
www.supremecourtpreview.org

No. 09-6822

IN THE
Supreme Court of the United States

JASON PEPPER,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF THE FEDERAL PUBLIC AND COMMUNITY DEFENDERS AND THE NATIONAL ASSOCIATION OF FEDERAL DEFENDERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

NATIONAL ASSOCIATION OF FEDERAL DEFENDERS
FRANCES H. PRATT
1650 King St., Suite 500
Alexandria, VA 22314
(703) 600-0815

AMY BARON-EVANS*
LOUISE ARKEL
JENNIFER NILES COFFIN
FEDERAL DEFENDERS NATIONAL SENTENCING RESOURCE COUNSEL
51 Sleeper St., 5th Floor
Boston, MA 02210
(617) 391-2253
abaronevans@gmail.com

Counsel for Amici Curiae

* Counsel of Record

September 7, 2010

[Additional Parties Listed On Inside Cover]

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FEDERAL PUBLIC AND COMMUNITY DEFENDERS

Alabama, Middle
CHRISTINE FREEMAN

Alabama, Southern
CARLOS WILLIAMS

Alaska
FRED RICHARD CURTNER

Arizona
JON M. SANDS

Arkansas, Eastern and Western
JENNIFFER MORRIS HORAN

California, Central
SEAN KENNEDY

California, Eastern
DANIEL J. BRODERICK

California, Northern
BARRY J. PORTMAN

California, Southern
REUBEN CAHN

Colorado
RAYMOND P. MOORE

Connecticut
THOMAS G. DENNIS

Delaware
EDSON A. BOSTIC

District of Columbia
A. J. KRAMER

Florida, Middle
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Montana
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Nebraska
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Vermont
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Washington, Eastern
ROGER PEVEN

Washington, Western
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West Virginia, Northern
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QUESTION PRESENTED

Whether a court of appeals may categorically prohibit sentencing courts from considering defendants' post-sentencing rehabilitation in determining appropriate sentences.

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INTEREST OF *AMICI CURIAE*[1]

Amicus curiae, Federal Public and Community Defenders in the United States, have offices in 90 of the 94 federal judicial districts. *Amicus curiae*, the National Association of Federal Defenders, formed in 1995, is a nationwide, non-profit, volunteer organization whose membership is comprised of attorneys who work for federal public and community defender organizations authorized under the Criminal Justice Act. *Amici curiae* represent tens of thousands of individuals in federal court each year, including those who are sentenced and those who are resentenced. The issue presented in this case and its broader implications are of great importance to our work and the welfare of our clients.

INTRODUCTION

As Petitioner demonstrates, the Eighth Circuit's blanket prohibition on consideration of evidence of post-sentencing rehabilitation conflicts with the instructions set forth in 18 U.S.C. § 3553(a), directly violates 18 U.S.C. § 3661, and is entirely inconsistent with the abuse-of-discretion standard of review. Pet'r Br. 29-35. Moreover, the reasons the Eighth Circuit has offered to justify its rule do not withstand scrutiny. Pet'r Br. 36-49. *Amici* offer further evidence that the Eighth Circuit's rule is wholly unsound in

[1] The parties to the case, including the *amicus* appointed by the court to defend the judgment below, have consented to the filing of this brief and copies of letters of consent have been lodged with the Clerk of the Court. No counsel for a party authored any part of this brief. Sup. Ct. R. 37.6. No person or entity other than *amici curiae* made a monetary contribution to the preparation or submission of this brief.

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light of empirical research, national experience, and a realistic assessment of the disparities it creates.

In *United States v. Booker*, 543 U.S. 220 (2005), this Court excised § 3553(b)(1) and § 3742(e), and adopted an abuse-of-discretion standard called "reasonableness" review. The factors set forth in § 3553(a) now "guide sentencing" by the district courts, and "in turn will guide appellate courts . . . in determining whether a sentence is unreasonable." *Booker*, 543 U.S. at 261. Before *Booker*, it was an abuse of discretion for a judge to consider a circumstance the Commission had forbidden as a ground for departure. *Koon v. United States*, 518 U.S. 81, 109 (1996). After *Booker*, it is an abuse of discretion to *fail* to consider such a circumstance when relevant under § 3553(a). *Gall v. United States*, 552 U.S. 38, 51 (2007).

Despite this Court's clear instructions, the Eighth Circuit has decreed that post-sentencing rehabilitation is "not relevant" under § 3553(a), thus transferring its prohibition on "departures" on that basis to variances. *See United States v. Jenners*, 473 F.3d 894, 899 (8th Cir. 2007) (citing *United States v. Sims*, 174 F.3d 911, 913 (8th Cir. 1999)); *United States v. Pepper*, 486 F.3d 408, 411, 413 (8th Cir. 2007) (*Pepper II*) (citing *Jenners*, 473 F.3d at 899, and *Sims*, 174 F.3d at 913); *United States v. Pepper*, 518 F.3d 949, 953 (8th Cir. 2008) (*Pepper III*) (citing *Jenners*, 473 F.3d at 899). According to the Eighth Circuit, *Gall* did not alter its precedent that "post-sentence rehabilitation is an impermissible factor to consider in granting a downward variance." *Id.* at 953. In the Eighth Circuit, "'evidence of [a defendant's] post-sentence rehabilitation is not relevant and will not be permitted at resentencing.'" *United*

States v. Pepper, 570 F.3d 958, 965 (8th Cir. 2009) (*Pepper IV*)) (internal citations omitted).

The Eighth Circuit has partially nullified *Booker* by restoring § 3553(b)'s prohibition against basing sentences outside the guideline range on a ground forbidden by the Commission. *See* USSG § 5K2.19, p.s.; USSG App. C, amend. 602 (Nov. 1, 2000) (adopting *Sims* rule forbidding downward departures based on post-sentencing rehabilitation). The Eighth Circuit has thus assumed the power to do what the Sentencing Commission cannot do after *Booker*: issue mandatory policies categorically prohibiting consideration of relevant factors. The Eighth Circuit has deemed other factors to be "improper or irrelevant," without regard to § 3553(a), as well. *See, e.g.*, *United States v. Ross*, 487 F.3d 1120, 1124 (8th Cir. 2007) (defendant's religious awakening was an "improper or irrelevant factor"); *United States v. Blackford*, 469 F.3d 1218, 1220-21 (8th Cir. 2006) (disparity caused by government's refusal to agree to immunity pursuant to USSG § 1B1.8 was an "improper factor upon which to base a variance"); *United States v. Ture*, 450 F.3d 352, 359-60 (8th Cir. 2006) (consideration of defendant's obligation to pay back taxes, interest and penalties was "entirely improper").

This Court has rebuffed other attempts by the courts of appeals to deem certain considerations to be categorically "improper" or "impermissible." *See Gall*, 552 U.S. at 57-58; *Kimbrough v. United States*, 552 U.S. 85, 91 (2007). This Court should reject the Eighth Circuit's rule prohibiting consideration of evidence of post-sentencing rehabilitation as well.

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SUMMARY OF ARGUMENT

I. This Court should reject the Eighth Circuit's rule prohibiting district court judges from considering evidence of post-sentencing rehabilitation under § 3553(a) because it replicates, by appellate court fiat, an erroneous course followed by the Sentencing Commission, but eventually corrected by this Court in *Booker*, *Rita v. United States*, 551 U.S. 338 (2007), and *Gall*. That course was the elimination from judicial consideration of a defendant's personal characteristics, and thus of most of the mitigating factors that might apply in individual cases and that bear directly on the purposes of sentencing.

Prior to the Guidelines, the defendant's personal characteristics were among the most important considerations in sentencing. Courts understood that the defendant's history and characteristics were highly relevant to achieving rehabilitation, thus restoring the defendant to useful citizenship without risk to the public. The punishment fit the offender and not just the crime. But the Commission constructed the Guidelines almost solely of aggravating factors, and prohibited or discouraged mitigating offender characteristics as grounds for departure. This course was flawed, as shown by the Commission's empirical research and that of others. That research demonstrates that the offender's history and characteristics are highly relevant to the purposes of sentencing and may provide compelling grounds for mitigation.

In Jason Pepper's case, as in others, rehabilitation is a collection of personal characteristics and accomplishments that show a strongly diminished likelihood of recidivism and the ability to live a law-abiding life. According to the empirical research, a defendant

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like Pepper – who has abstained from drugs, attended college, held a steady job, established strong family ties, and taken on family responsibilities – does not require lengthy imprisonment to accomplish specific deterrence, protection of the public, or rehabilitation in the most effective manner.

II. While the Eighth Circuit's rule is based primarily on the claim that it prevents "disparity," this rationale does not bear scrutiny. The Eighth Circuit's refusal to permit consideration of post-sentencing rehabilitation while permitting consideration of pre-sentencing rehabilitation is logically flawed and creates disparities that cannot be justified by the purposes of sentencing. The Eighth Circuit's prohibition against consideration of post-sentencing rehabilitation prevents no unwarranted disparity and grossly distorts the concept of fairness to mean uniform, unwarranted, harshness.

It is thus clear that, even if the Eighth Circuit's rule did not flout the governing statutes and this Court's rulings in *Booker*, *Rita* and *Gall*, it would be insupportable.

ARGUMENT

I. THIS COURT SHOULD REJECT THE EIGHTH CIRCUIT'S RULE BECAUSE IT REPLICATES THE SENTENCING COMMISSION'S ERRONEOUS EXCLUSION OF MITIGATING OFFENDER CHARACTERISTICS FROM CONSIDERATION IN SENTENCING.

The Eighth Circuit's ruling is a continuation, by appellate court fiat rather than regulation, of an erroneous course followed by the Sentencing Commission that was eventually corrected by this

Court's decisions in *Booker*, *Rita* and *Gall*. That course was the elimination from judicial consideration of a defendant's personal characteristics, and thus of most of the mitigating factors that might apply in individual cases. This Court corrected that course in *Booker* by making § 3553(a) the governing provision and reinstating a defendant's personal "history and characteristics" as a principal factor that sentencing courts must consider. It further clarified in *Rita* that sentencing judges need not adhere to Guideline provisions that do not treat offender characteristics properly under § 3553(a). *Rita*, 551 U.S. at 357. And if there were any remaining doubt, this Court dispelled it in *Gall* by upholding a variance based on a number of factors disfavored by the Guidelines' policy statements. *Gall*, 552 U.S. at 53-60.

But the Eighth Circuit's rule against consideration of post-sentencing rehabilitation mimics the pre-*Booker* regime in which certain mitigating characteristics could not be considered. Its decision in this case, declaring Pepper's personal history and characteristics to be "not relevant," is entirely inconsistent with the governing statutes and this Court's decisions, as argued persuasively by Petitioner. Pet'r Br. 22-35. Moreover, the Eighth Circuit's rule creates an absurd disjunction. Judges are free to ignore or reject a Guidelines policy statement prohibiting or disfavoring departure because it fails to treat the defendant's characteristics in the proper way, *Rita*, 551 U.S. at 357, or because it is simply not "pertinent," *Kimbrough*, 552 U.S. at 101 (quoting § 3553(a)(5)). But judges in the Eighth Circuit must comply with an absolute appellate bar against consideration of post-sentencing rehabilitation. The courts of appeals should not be permitted to replicate

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the mandatory Guidelines' removal of relevant factors from consideration.

Accordingly, the Court should reject the Eighth Circuit's rule.

A. Prior To The Sentencing Reform Act, The Defendant's Personal Characteristics Were Among The Most Important Considerations In Sentencing.

Before the Guidelines, sentencing judges routinely considered defendants' personal history and characteristics. As this Court recognized in *Williams v. New York*, 337 U.S. 241 (1949), the "fullest information possible concerning the defendant's life and characteristics" was "[h]ighly relevant – if not essential" to sentencing, because "the punishment should fit the offender and not merely the crime." *Id.* at 247. The Court reiterated this principle in *North Carolina v. Pearce*, 395 U.S. 711 (1969), recognizing that a judge may impose "a new sentence, whether greater or less than the original sentence, in the light of events subsequent to the first trial that may have thrown new light upon the defendant's 'life, health, habits, conduct, and mental and moral propensities.'" *Id.* at 723 (internal citations omitted).

The reason for consideration of facts about the offender, such as his family life, employment history, and mental health, during this period was the understanding that this information was directly relevant to the most appropriate sentence in a system that emphasized rehabilitation with the goal of restoring the offender to "complete freedom and useful citizenship" without risk to the public. *Williams*, 337 U.S. at 249; *see* Douglas A. Berman, *Distinguishing Offense Conduct and Offender Characteristics in*

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Modern Sentencing Reforms, 58 Stan. L. Rev. 277, 278-79, 289 (2005) (noting that offender characteristics in a system organized by rehabilitative goals are viewed as a central consideration "when seeking to predict and prevent future criminal behavior").

B. The Original Commission's Decision To Omit Offender Characteristics From The Guidelines Was Intended To Be Provisional.

When Congress enacted the Sentencing Reform Act of 1984, it recognized that rehabilitation was an important purpose of punishment, along with just punishment, deterrence, and incapacitation. 18 U.S.C. § 3553(a)(2).[2] Congress encouraged the Commission to include all relevant offender characteristics in the Guidelines. 28 U.S.C. § 994(d). It specifically directed the Commission to consider age, education, vocational skills, mental and emotional condition, physical condition, drug dependence, employment record, family ties and responsibilities, community ties, and criminal history. *Id.* The Commission was to "explore the relevancy to the purposes of sentencing of all kinds of factors, whether they are obviously pertinent or not; to subject those factors to intelligent and dispassionate analysis; and on this basis to recommend, with supporting reasons, the fairest and most effective guidelines it can devise." S. Rep. No. 98-225, at 175 (1983). Under significant time constraints[3] and with differing inter-

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[2] Congress, moreover, believed that imprisonment was not an effective means of accomplishing rehabilitation. *See* 18 U.S.C. § 3582(a); 28 U.S.C. § 994(k).

[3] Stephen J. Schulhofer, *Assessing the Federal Sentencing Process: The Problem Is Uniformity, Not Disparity*, 29 Am. Crim. L. Rev. 833, 858 (1992).

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nal viewpoints, the original Commission did not include all "the offender characteristics which Congress suggested that [it] should,"[4] but instead "compromised" by promulgating offender characteristic rules that "look primarily to past record of convictions" to increase punishment.[5] All other offender characteristics were left out of the guidelines.[6] Only two mitigating factors were included in the guidelines, role in the offense, USSG § 3B1.2, and acceptance of responsibility, USSG § 3E1.1.[7]

As then-Judge and Commissioner Breyer recognized, the original Commission's policy regarding offender characteristics "deviated from average past practice," in which judges considered a wide variety of mitigating factors.[8] Justice Breyer later explained that the decision to leave offender characteristics other than criminal history out of the guidelines stemmed from "the difficulty of determining *which* other characteristics should be used."[9] It may also have been due to the difficulty of listing, describing, and assigning numerical values to such factors in

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[4] Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 19-20 & n.98 (1988) (citing 28 U.S.C. §§ 994(d) & 994(k)).

[5] *Id.* & n.96.

[6] Stephen Breyer, *Federal Sentencing Guidelines Revisited*, 11 Fed. Sent. Rep. 180, 1999 WL 730985, at *5 (Jan./Feb. 1999).

[7] Use of the term "guidelines" here refers to formal guideline rules promulgated pursuant to 28 U.S.C. § 994(a)(1), as distinct from policy statements.

[8] Breyer, *Key Compromises*, *supra* note 4, at 18-19.

[9] Breyer, *Guidelines Revisited*, *supra* note 6, at *5 (emphasis in original).

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the abstract.[10] Whatever the reason, the decision was "intended to be provisional and [] subject to revision in light of Guideline implementation and experience."[11]

In the meantime, judges were to depart whenever they found that a mitigating factor covered by the broad terms of § 3553(a)(1) existed in the case that was not adequately reflected (in kind or degree) in the applicable "guidelines," which should result in a different sentence in light of the purposes of sentencing set forth in § 3553(a)(2). *See* U.S.C. § 3553(b) (as enacted by Pub. L. No. 98-473, § 212(a) (Oct. 12, 1984)). "[T]he very theory of the Guidelines system is that when courts, drawing upon experience and informed judgment in cases, decide to depart, they will explain their departures," the "courts of appeals, and the Sentencing Commission, will examine, and learn from, those reasons," and "the resulting knowledge will help the Commission to change, to refine, and to improve, the Guidelines themselves." *United States v. Rivera*, 994 F.2d 942, 949-50 (1st Cir. 1993) (Breyer, C.J.); *see also Rita*, 551 U.S. at 358. The Commission would not "second-guess[] individual judicial sentencing actions either at the trial or appellate level," but instead would learn "whether the guidelines are being effectively

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[10] *See* USSG Ch. 1, Pt. A(4)(b); USSG § 5K2.0, p.s., comment. (backg'd); U.S. Sent'g Comm'n, *Report to Congress: Downward Departures from the Federal Sentencing Guidelines* 3 (2003); Paul J. Hofer & Mark H. Allenbaugh, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 Am. Crim. L. Rev. 19, 70-71 (2003) (Commission "preferred objective factors, such as drug weight or dollar amount, to subjective ones").

[11] Breyer, *Guidelines Revisited*, *supra* note 6, at *5.

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implemented and revise them if for some reason they fail to achieve their purposes."[12] In this way, the Guidelines would "reflect current views as to just punishment, and take account of the most recent information on satisfying the purposes of deterrence, incapacitation, and rehabilitation."[13]

C. The Commission Prohibited Or Strongly Discouraged Consideration Of Most Mitigating Factors As Grounds For Departure.

The first set of Guidelines, through policy statements, deemed age, educational and vocational skills, mental or emotional conditions, physical condition, employment record, family ties and responsibilities, and community ties to be "not ordinarily relevant" as grounds for departure. USSG §§ 5H1.1, 5H1.2, 5H1.3, 5H1.4, 5H1.5, 5H1.6, p.s. (Nov. 1, 1987). Drug dependence, alcohol abuse, personal financial difficulties, and economic pressures on a trade or business were prohibited grounds. USSG §§ 5H1.4, 5K2.12, p.s. (Nov. 1, 1987). The guidelines were thus constructed mostly of aggravating factors, while mitigating offender characteristics were deemed to be not ordinarily or never relevant for purposes of departure.

Over the ensuing years, no mitigating offender characteristics were added to the guidelines,[14] but

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[12] S. Rep. No. 98-225, at 178 (1983).

[13] *Id.*

[14] A handful of mitigating offense circumstances were added to the guidelines. *See* USSG §§ 2D1.1(b)(11) (two-level decrease if defendant meets safety valve criteria), 2D1.8(a)(2) (four-level decrease based on role in the offense), 2D1.11(a) (decreases if defendant receives mitigating role adjustment), 2L1.1(b)(1)

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further limitations on departure were added. While courts of appeals were to uphold reasonable departures, they strictly enforced policy statements restricting departures.[15] This combination of restrictive policy statements and strict appellate review effectively eliminated most mitigating factors from consideration.

When courts sought to recognize mitigating factors not already prohibited or discouraged by the policy statements, the Commission acted to curtail them. For example, when the Second Circuit upheld a departure based on the defendant's "diminutive size and immature appearance," after he had been sexually victimized and placed in solitary confinement for his protection,[16] the Commission issued a revised policy statement asserting that physical "appearance, including physique," is not ordinarily relevant in deciding whether to depart.[17] Similarly,

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(three-level decrease if alien smuggling offense involved only defendant's spouse or child), 2L2.1(b)(1) (same for immigration document offense).

[15] Courts of appeals were to reverse only "unreasonable" departures, 18 U.S.C. § 3742(e)(3), (f)(2) (2000), but were to reverse incorrect applications of the Guidelines, *id.* § 3742(e)(2), (f)(1). Policy statements were strictly enforced according to the latter provisions even before *de novo* review was added by the PROTECT Act. *See Williams v. United States*, 503 U.S. 193, 200 (1992); *see also* Hofer & Allenbaugh, *supra* note 10, at 83-84; Kevin R. Reitz, *Sentencing Guideline Systems and Sentence Appeals: A Comparison of Federal and State Experiences*, 91 Nw. L. Rev. 1441, 1468-70 (1997).

[16] *United States v. Lara*, 905 F.2d 599 (2d Cir. 1990).

[17] USSG § 5H1.4, p.s.; USSG App. C, amend. 386 (Nov. 1, 1991). The Commission explained that the amendment expressed its position regarding "depart[ures] based upon the defendant's alleged vulnerability to sexual assault in prison due to youthful

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in response to a Ninth Circuit holding that a disadvantaged childhood could justify downward departure in some circumstances, the Commission issued a policy statement asserting that a defendant's "lack of guidance as a youth and similar circumstances indicating a disadvantaged upbringing" are "not relevant" grounds for departure.[18] The Commission gave no official reason for this amendment, but members of the Commission at the time explained that the Commission was concerned that such a departure could "potentially be applied to an extremely large number of cases."[19] Thus, although the Commission recognized the manifest relationship between childhood disadvantage and crime, it prohibited courts from recognizing any distinction relevant to sentencing purposes between defendants raised in privilege and those raised in poverty and neglect. Military, civic, charitable and public service, employment-related contributions, and prior good works were all likewise deemed not ordinarily relevant[20] "in response to court decisions."[21]

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appearance and slender physique." 56 Fed. Reg. 1846, 1887 (Jan. 17, 1991).

[18] USSG § 5H1.12, p.s.; USSG App. C, amend. 466 (Nov. 1, 1992); *see* William W. Wilkins, Jr. & John R. Steer, *The Role of Sentencing Guideline Amendments in Reducing Unwarranted Sentencing Disparity*, 50 Wash. & Lee L. Rev. 63, 84 (1993) (citing *United States v. Floyd*, 945 F.2d 1096 (9th Cir. 1991), *overruled on other grounds*, 990 F.2d 501 (9th Cir. 1993) (en banc)).

[19] Wilkins & Steer, *supra* note 18, at 84-85.

[20] USSG § 5H1.11, p.s.; USSG App. C, amend. 386 (Nov. 1. 1991).

[21] U.S. Sent'g Comm'n, Simplification Draft Paper, *Departures and Offender Characteristics*, Part II(B)(3), *available at* http://www.ussc.gov/SIMPLE/depart.htm.

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The Commission similarly adopted the Eighth Circuit's minority view regarding post-sentencing rehabilitation, without apparent consideration of the decisions of the seven courts of appeals that had held that post-sentencing rehabilitation was an appropriate basis for downward departure. Adopting the Eighth Circuit's decision in *Sims*, the Commission prohibited downward departure for "[p]ost-sentencing rehabilitative efforts, even if exceptional." USSG § 5K2.19, p.s.; USSG App. C, amend. 602 (Nov. 1, 2000). In contrast, the seven other circuits found, in carefully-reasoned opinions, that post-sentencing rehabilitation is relevant to the purposes of sentencing, *see United States v. Core*, 125 F.3d 74, 78 (2d Cir. 1997); *United States v. Rhodes*, 145 F.3d 1375, 1381-82 (D.C. Cir. 1998); *United States v. Green*, 152 F.3d 1202, 1208 (9th Cir. 1998); *United States v. Rudolph*, 190 F.3d 720, 724 (6th Cir. 1999); that there is no unwarranted disparity between defendants who are resentenced after an appeal and defendants who are not, *see Core*, 125 F.3d at 77; *Rhodes*, 145 F.3d at 1378, 1381; *Green*, 152 F.3d at 1207 & n.6, 1208; *Rudolph*, 190 F.3d at 724; *United States v. Bradstreet*, 207 F.3d 76, 82 & n.6 (1st Cir. 2000); that there is no reasonable basis for treating post-offense rehabilitation and post-sentencing rehabilitation differently, *United States v. Sally*, 116 F.3d 76, 80 (3d Cir. 1997); *Core*, 125 F.3d at 77; *Green*, 152 F.3d at 1207; *United States v. Roberts*, 1999 WL 13073, at *6 & n.1 (10th Cir. Jan. 14, 1999) (unpublished); *Rudolph*, 190 F.3d at 723; and that a judge's consideration of post-offense rehabilitation in no way interferes with the Bureau of

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Prisons' award of good time credits for compliance with disciplinary regulations, *Core*, 125 F.3d at 78; *Rhodes*, 145 F.3d at 1379-80; *Rudolph*, 190 F.3d at 725; *Bradstreet*, 207 F.3d at 83. While the Commission cited most of these cases, it did not mention or address their reasoning, adopting instead the flawed reasons given in *Sims*. *See* Pet'r Br. 36-49.

The Commission subsequently eliminated or limited additional mitigating factors in response to the PROTECT Act's directive to "ensure that the incidence of downward departures are substantially reduced." Pub. L. No. 108-21, § 401(m)(2)(A) (2003).[22] Later, it came to light that Congress had been mistaken in its belief, underlying the PROTECT Act, that this Court's decision in *Koon v. United States*, 518 U.S. 81 (1996), had caused an increase in judicial leniency.[23]

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[22] The Commission issued policy statements prohibiting departures based on gambling addiction, USSG § 5H1.4, p.s.; role in the offense, USSG § 5H1.7, p.s.; acceptance of responsibility, USSG § 5K2.0(d)(2), p.s.; decision to plead guilty or enter into a plea agreement, USSG § 5K2.0(d)(4), p.s.; and fulfillment of restitution obligations to the extent required by law, USSG § 5K2.0(d)(5), p.s.; and limiting departure from the "career offender" guideline to one criminal history category, USSG § 4A1.3(b)(3)(A), p.s. *See generally* USSG App. C, amend. 651 (Oct. 27, 2003).

[23] Subsequent to the PROTECT Act, the Commission reported that *Koon* had had no noticeable impact on the rate of departures. *See* U.S. Sent'g Comm'n, *Report to Congress: Downward Departures from the Federal Sentencing Guidelines* 54-56 (2003). The increase in departures was instead due to an increase in government-sponsored departures, primarily to facilitate swift processing of a large number of immigration cases on the southwest border. Until 2003, the Commission had included these government-sponsored departures in the "other downward departure" rate. The Commission reported that at

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D. The Commission's Own Research And That Of Others Demonstrates That This Course Was Flawed Because Offender Characteristics Are Indeed Relevant To The Purposes Of Sentencing.

The Commission's policy statements prevented consideration of several factors, as too "ordinary," that research shows to be highly significant with respect to the likelihood of recidivism. These factors thus are closely related to the need to afford "adequate deterrence," the need "to protect the public" from further crimes of the defendant, and the need to provide treatment and training in the "most effective manner." 18 U.S.C. § 3553(a)(2)(B), (C), (D). For example, the Commission's research shows that offenders who are or have been steadily employed are less likely to recidivate than those who are unemployed, that offenders with more education are less likely to recidivate than those with less education, and that those who abstain from illicit drug use are less likely to recidivate than those who use drugs.[24] A significant Bureau of Prisons study also found that "[s]table employment or student status . . . prior to confinement is strongly related to a lower likelihood of recidivating."[25] Offenders who found employment

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least 40% of these "other downward departures" were sought by the government. *Id.* at 60.

[24] U.S. Sent'g Comm'n, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* 12-13 & Ex. 10 (2004).

[25] Miles D. Harer, Federal Bureau of Prisons, Office of Research and Evaluation, *Recidivism Among Federal Prisoners Released in 1987*, at 54 (Aug. 4, 1994), *available at* http://www.

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after their release recidivated at about half the rate of those who did not.[26]

The Commission's research shows that offenders who are or have ever been married are less likely to recidivate than those who have never been married,[27] and that offenders with financial dependents are less likely to recidivate than those without dependents.[28] Other empirical research has concluded that the "ability to sustain marriage may predict abstinence from crime," that attachment to a spouse as a young adult is "associated with a significant and substantial reduction in adult antisocial behavior," that offenders who maintain an interest in their families are more likely to be successful when released, and that male offenders who cease to commit crimes often do so in conjunction with the establishment of a sound relationship with a woman.[29] The Bureau of Prisons study similarly found that the recidivism rate among offenders who live with a spouse after release is less

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bop.gov/news/research_projects/published_reports/recidivism/orepprrecid87.pdf.

[26] *Id.* at 4-5.

[27] *Measuring Recidivism*, *supra* note 24, at 12-13 & Ex. 10.

[28] U.S. Sent'g Comm'n, *Recidivism and the "First Offender"* 8 (2004).

[29] *See* Correctional Service Canada, *Does Getting Married Reduce the Likelihood of Criminality*, Forum on Corrections Research, Vol. 7, No. 2 (May 2005) (citing Robert J. Sampson & John H. Laub, *Crime and Deviance Over Life Course: The Salience of Adult Social Bonds*, 55 Am. Soc. Rev. 609 (1990)); Robert J. Sampson, John H. Laub, & Christopher Winer, *Does Marriage Reduce Crime? A Counterfactual Approach to Within-Individual Causal Effects*, 44 Criminology 465, 497-500 (2006) (finding that "being married is associated with a significant reduction in the probability of crime").

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than half that of those who have other living arrangements.[30] "The relationship between family ties and lower recidivism has been consistent across study populations, different periods, and different methodological procedures."[31]

Conversely, particularly for offenders with a low risk of recidivism, lengthy imprisonment can increase the risk of recidivism by disrupting employment, reducing prospects of future employment, weakening family ties, and exposing less serious offenders to more serious offenders.[32]

A host of studies show the efficacy of drug treatment as an alternative to incarceration and as a method of reducing crime.[33] According to the

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[30] *See* Harer, *Recidivism*, *supra* note 25, at 5-6.

[31] Shirley R. Klein *et al.*, *Inmate Family Functioning*, 46 Int'l J. Offender Therapy & Comp. Criminology 95, 99-100 (2002).

[32] *See* Lynne M. Vieraitis *et al.*, *The Criminogenic Effects of Imprisonment: Evidence from State Panel Data 1974-2002*, at 6 Criminology & Pub. Pol'y 589, 591-93 (2007) (stating that "imprisonment causes harm to prisoners," isolating them from families and friends, making it difficult to successfully reenter society, and "reinforc[ing] criminal identities" through contacts with other criminals); U.S. Sent'g Comm'n, Staff Discussion Paper, *Sentencing Options Under the Guidelines* 18-19 (Nov. 1996) (imprisonment has criminogenic effects including "contact with more serious offenders, disruption of legal employment, and weakening of family ties"), *available at* http://www.ussc.gov/SIMPLE/sentopt.htm; Miles D. Harer, *Do Guideline Sentences for Low-Risk Drug Traffickers Achieve Their Stated Purposes?*, 7 Fed. Sent. Rep. 22 (1994) ("[T]he alienation, deteriorated family relations, and reduced employment prospects resulting from the extremely long removal from family and regular employment may well increase recidivism.").

[33] *See, e.g.*, Susan L. Ettner *et al.*, *Benefit-Cost in the California Treatment Outcome Project: Does Substance Abuse Treatment "Pay for Itself?"*, 41 Health Services Res. 192-213

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National Institute on Drug Abuse, "Effective treatment decreases future drug use and drug-related criminal behavior, can improve the individual's relationships with his or her family, and may improve prospects for employment."[34] Studies and experience have shown that recidivism is reduced by therapeutic mental health court programs designed to treat mental disorders as an alternative to longer prison sentences,[35] post-offense educational and vocational training,[36] and "problem-solving" courts in the federal system that include educational and vocational training as a condition of supervised release.[37]

(2006); Doug McVay, Vincent Schiraldi, & Jason Ziedenberg, Justice Policy Institute Policy Report, *Treatment or Incarceration: National and State Findings on the Efficacy of Cost Savings of Drug Treatment Versus Imprisonment* 5-6, 18 (2004).

[34] Nat'l Inst. on Drug Abuse, Nat'l Insts. of Health, *Principles of Drug Abuse Treatment for Criminal Justice Populations: A Research-Based Guide* 12 (2007).

[35] *See* Dale E. McNiel & Renée L. Binder, *Effectiveness of a Mental Health Court in Reducing Criminal Recidivism and Violence,* 16 Am. J. Psychiatry 1395-1403 (2007); Ohio Office of Criminal Justice Services, *Research Briefing 7: Recidivism of Successful Mental Health Court Participants* (2007), *available at* http://www.publicsafety.ohio.gov/links/ocjs_researchbriefing7.pdf.

[36] *See* Washington Institute for Public Policy, *Evidence-Based Public Policy Options to Reduce Future Prison Construction, Criminal Justice Costs, and Crime Rates* 9, Ex. 4 (2006) (comprehensive review of programs with demonstrated effect on reducing recidivism, including prison- and community-based educational programs), *available at* www.wsipp.wa.gov/rptfiles/06-10-1201.pdf.

[37] *See* U.S. Sent'g Comm'n, *Symposium on Alternatives to Incarceration* 22-24 (2008) (testimony of Chief Probation Officer Doug Burris, E.D. Mo.) (reporting that district's employment program has resulted in a 33% reduction in recidivism rates);

The Commission's research shows that the likelihood of recidivism declines with age.[38] Other research shows that the young are less culpable than the average offender,[39] and have a high likelihood of reforming in a short period of time.[40] Prison can be especially harmful to young and youthful-looking offenders, who are at particular risk of rape and other violence by other prisoners and staff.[41] A

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see also id. at 238-39 (testimony of Judge Jackson, E.D. Mo.) (reporting district's revocation rate as "lower than the circuit and the national rates"), *available at* http://www.ussc.gov/SYMPO2008/NSATI_0.htm.

[38] *Measuring Recidivism*, *supra* note 24, at 12 & Ex. 9.

[39] *See, e.g.*, Federal Advisory Committee on Juvenile Justice, U.S. Dep't of Justice, Office of Juvenile and Delinquency Prevention, *Annual Report* 8 (2005), *available at* www.ncjrs.gov/pdffiles1/ojjdp/212757.pdf; Jay N. Giedd, *Structural Magnetic Resonance Imaging of the Adolescent Brain*, 1021 Annals N.Y. Acad. Science 105-09 (2004); Margo Gardner & Laurence Steinberg, *Peer Influence on Risk Taking, Risk Preferences and Risky Decision Making in Adolescence and Adulthood: An Experimental Study*, 41 Developmental Psych. 625, 632 (2005).

[40] *See, e.g.*, Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am. Psychologist 1009, 1011-14 (2003); Robert J. Sampson & John H. Laub, *Crime in the Making: Pathways and Turning Points Through Life*, 39 Crime & Delinq. 396 (1993).

[41] *See* Allen J. Beck *et al.*, Bureau of Justice Statistics Special Report, *Sexual Violence Reported by Correctional Authorities, 2006*, at 4 (2007), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/svrca06.pdf; Kevin N. Wright, *The Violent and Victimized in Male Prison*, 16 J. Offender Rehab. 1, 6, 22 (1991); David M. Siegal, Note, *Rape in Prison and AIDS: A Challenge for the Eighth Amendment Framework of* Wilson v. Seiter, 44 Stan. L. Rev. 1541, 1545 (1992); U.S. Dep't of Justice, Office of Justice Programs, Bureau of Justice Assistance, *Juveniles in*

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"particularly strong indicator of whether a prisoner will be victimized is his physical build."[42]

Not surprisingly, most judges report that offender characteristics that are prohibited, discouraged or limited by the Commission's policy statements, including post-sentencing rehabilitation, are in fact "ordinarily relevant" to their determination of the appropriate sentence.[43] The Commission recently issued minor changes to some of its policy statements regarding offender characteristics, but continues to find it difficult to meaningfully change its approach to departures on those grounds.[44] The Commission is,

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Adult Prisons and Jails: A National Assessment 7-8 (2000), *available at* http://www.ncjrs.gov/pdffiles1/bja/ 182503.pdf.

[42] *See* Christopher D. Man & John P. Cronan, *Forecasting Sexual Abuse in Prison: The Prison Subculture of Masculinity as a Backdrop for "Deliberate Indifference,"* 92 J. Crim. L. & Criminology 127, 167 (2002); *see also* David M. Siegal, Note, *Rape in Prison and AIDS: A Challenge for the Eighth Amendment Framework of* Wilson v. Seiter, 44 Stan. L. Rev. 1541, 1545 (1992) ("Rape in prison occurs brutally and inevitably . . . [o]ften, the younger, smaller, or less streetwise inmates are the victims.").

[43] U.S. Sent'g Comm'n, *Results of Survey of United States District Judges January 2010 through March 2010*, table 13, *available at* http://www.ussc.gov/Judge_Survey/2010/Judge Survey_201006.pdf.

[44] The Commission amended the Introductory Commentary to Chapter 5, Part H (Specific Offender Characteristics) to admonish judges not to give offender characteristics "excessive weight" and that their "most appropriate use" is "not as a reason to sentence outside the applicable guideline range," but to determine the sentence within the guideline range. *See* 75 Fed. Reg. 27,388, 27,389-91 (May 14, 2010). Age, mental and emotional conditions, physical condition, and military service, formerly deemed "not ordinarily relevant" for purposes of departure, now "may be relevant" to departure. The standard

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however, beginning to review and revise certain guidelines in response to variance rates.[45] *See Booker*, 543 U.S. at 264 (describing Commission's continuing function to revise the advisory guidelines in response to "actual district court sentencing decisions"); *see also Rita*, 551 U.S. at 350; *Kimbrough*, 552 U.S. at 107.

E. Contrary To The Eighth Circuit's View, Post-Sentencing Rehabilitation Is Relevant To Sentencing Under § 3553(a).

The Eighth Circuit's ruling that the evidence of Jason Pepper's post-sentencing rehabilitation is "not relevant" to the appropriate sentence is wrong. In Pepper's case, as in others, rehabilitation is a collection of personal characteristics and accomplishments that show a strongly diminished likelihood of recidivism and the ability to lead a law-abiding life. According to the research cited above, a defendant like Pepper who has abstained from drugs, attended

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for factors that "may be relevant," however, is the same as that for factors deemed "not ordinarily relevant" before the PROTECT Act. *Compare id. with* USSG § 5K2.0 (2002). Drug dependence, formerly "not relevant," is now "not ordinarily relevant." 75 Fed. Reg. at 27,390. A need for substance abuse or mental health treatment may be a reason for a limited downward departure, but only for a small number of defendants with low offense levels, most of whom are not in need of treatment. *Id.* at 27,388, 27,390-91; U.S. Sent'g Comm'n, Transcript of Public Hearing 27-31 (Mar. 17, 2010).

[45] *See* 75 Fed. Reg. 27,388, 27,393 (May 14, 2010) (eliminating "recency" points from the criminal history score "in part because criminal history issues are often cited by sentencing courts as reasons for imposing non-government sponsored below range sentences, particularly in cases in which recency points were added to the criminal history score under §4A1.1(e)").

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college, held a steady job, established strong family ties, and taken on family responsibilities presents a very low risk of recidivism. *See* J.A. 94-95, 104-12, 116-21, 301-04, 320-21, 323-29. "[R]ather than being a gamble on the prospective efficacy of rehabilitative methods," a variance for post-sentencing rehabilitation "recognizes the empirical success of a specific defendant's attempts at rehabilitation." [46] *Rudolph*, 190 F.3d at 724. The district court should have been allowed to consider these facts about Pepper.

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[46] Other factors present in Pepper's case, apart from his rehabilitative efforts, also indicate a low likelihood of recidivism, which the guidelines do not take into account. Offenders with zero criminal history points are far less likely to recidivate than offenders with even one criminal history point. *Measuring Recidivism*, *supra* note 24, at 7. Non-violent offenders, including drug offenders, are less likely to recidivate than violent offenders. *Id.* at 13 & Ex. 11. Contrary to the Eighth Circuit's belief, *Pepper*, 486 F.3d at 412-13, lack of violence is not accounted for in the criminal history score. *See* U.S. Sent'g Comm'n, *Final Report of the Impact of* United States v. Booker *on Federal Sentencing* 105 (2006).

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II. THIS COURT SHOULD REJECT THE EIGHTH CIRCUIT'S RULE BECAUSE IT CREATES UNJUSTIFIED DISPARITIES, PREVENTS NO UNWARRANTED DISPARITIES, AND IS BASED ON A DISTORTED CONCEPT OF FAIRNESS TO MEAN UNIFORM HARSHNESS.

A. There Is No Reasonable Basis For Treating Post-Sentencing Rehabilitation Differently From Pre-Sentencing Rehabilitation, And Doing So Results In Unwarranted Disparities.

The Eighth Circuit's differential treatment of pre- and post-sentencing rehabilitation is illogical and unfair. Indeed, while purporting to prevent unwarranted disparities, the Eighth Circuit has actually created disparities that cannot be justified by the purposes of sentencing.

The arbitrariness of the Eighth Circuit's distinction between pre- and post-sentencing rehabilitation is revealed by a comparison of this case with other Eighth Circuit cases. Pepper immediately cooperated with law enforcement and was relieved to get away from methamphetamine. While detained before sentencing, he re-established his relationship with his father. At sentencing, he asked to be placed in a prison drug treatment program rather than boot camp, even though it would mean more time served in prison. J.A. 39-41. Such facts are relevant under § 3553(a) and provide a valid basis for a variance. *See United States v. Lazenby*, 439 F.3d 928, 930-32 (8th Cir. 2006) (recognizing as appropriate grounds for variance that defendant reunited with her son and refrained from using drugs). Pepper then served his 24-month sentence, during which he completed

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the drug treatment program he requested. Thereafter, over the course of nearly four years, he built a law-abiding life, attending school full time, excelling in his job, getting married, parenting and supporting his wife's daughter, and remaining drug-free. J.A. 94-95, 104-12, 116-21, 124-31, 133-34, 143-50, 301-05, 320-21, 323-29. The Eighth Circuit said it was "improper" to consider this evidence, but it upheld a variance in another case where the defendant, *while on pretrial release*, stopped using drugs, put himself through community college, was a model employee, and passed all drug tests. *See United States v. McMannus*, 262 Fed. App'x 732 (8th Cir. 2008). Thus, if Pepper had been able to accomplish what he did *before* his original sentencing, the Eighth Circuit would have upheld a variance on that basis. The reason Pepper could not do so was that, unlike McMannus, he was detained before his original sentencing.

Pepper and McMannus both pled guilty to trafficking in methamphetamine. Pepper was detained and McMannus was released. Defendants like McMannus who are released before trial can and do participate in rehabilitative programs, such as educational and vocational programs, substance abuse treatment, and mental health treatment, usually by court order as conditions of release and facilitated by the Office of Probation and Pretrial Services.[47] But

[47] *See* Office of Probation and Pretrial Services, *Monograph 110, Judicial Officer's Reference on Alternatives to Detention and Conditions of Release* (April 2009) (encouraging judges to consider alternatives to detention whenever appropriate and setting forth the relevant considerations); Administrative Office of the U.S. Courts, *Judicial Business of the U.S. Courts: 2009 Annual Report of the Director*, table S-14 (showing that nearly a third of defendants in pretrial services with substance

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defendants who, like Pepper, are detained, rarely if ever have access to rehabilitative programs, as the primary focus of pretrial detention is "necessarily detainee processing, movement, and management."[48] *See United States v. Perella*, 273 F. Supp. 2d 162, 166 (D. Mass. 2003) ("Offenders with drug problems are typically referred to drug programs either as a condition of pretrial release, or after sentencing," but "[t]here are few if any programs available . . . to prisoners detained prior to trial."). The different circumstances of defendants in these two situations do not justify a profound distinction in their treatment in sentencing.

The Eighth Circuit's distinction also disadvantages defendants charged with "blue collar" crimes as compared to those charged with "white collar" crimes. Most defendants charged with drug trafficking are detained because, under the Bail Reform Act, they are subject to a rebuttable presumption of detention before conviction, 18 U.S.C. § 3142(e)(3)(A), (g)(1), and must be detained after conviction and before

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abuse conditions receive judiciary-funded substance abuse treatment), *available at* http://www.uscourts.gov/Statistics/JudicialBusiness/JudicialBusiness2009.aspx; *id.* table H-8 (showing number of pretrial defendants released with a condition of mental health treatment).

[48] *See* U.S. Dep't of Justice, Office of Federal Detention Trustee, *Detention Needs Assessment and Baseline Report* 4 (2002) ("Detention is comparatively temporary in nature and involves the constant movement of detainees in and out of facilities. Detainee self-improvement programs (e.g., education, vocational training, drug treatment, work programs, etc.) are rare because detention is typically short-term."), *available at* http://www. justice.gov/ofdt/federal_detention_report_2002.pdf.

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sentencing except in the rarest of circumstances.[49] In contrast, defendants charged with white collar offenses are not subject to a presumption of detention and must ordinarily be released. 18 U.S.C. § 3142(a)-(c).

Finally, the Eighth Circuit's rule against post-sentencing rehabilitation is irrational in view of the fact that there is no prohibition against granting a reduced sentence at an original sentencing to facilitate prospective rehabilitation after sentencing. Indeed, under the Guidelines, a judge may grant a small departure to enable certain defendants to accomplish a specific treatment objective, after consideration of "the likelihood that completion of the treatment program will successfully address the treatment problem, thereby reducing the risk to the public from further crimes of the defendant." *See* USSG § 5C1.1, comment. (n.6) (2009); 75 Fed. Reg. 27,388, 27,388 (May 14, 2010). If it is acceptable to impose a reduced sentence based on a *prediction* of success after sentencing, surely it must be acceptable to recognize *actual* success for a period of time after sentencing. It is particularly irrational to forbid a court from considering post-sentencing rehabilitation where, as here, the defendant has proved that his rehabilitation is real and permanent.

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[49] Detention after conviction and before sentencing is mandatory unless there is a substantial likelihood that a motion for acquittal or new trial will be granted, or the government recommends that no sentence of imprisonment be imposed. 18 U.S.C. § 3143(a)(2)(A)(i), (ii). The latter exception is not possible in most drug trafficking cases since a term of imprisonment is required for a Class A or B felony. *See* 18 U.S.C. § 3559(a); 18 U.S.C. § 3561(a); 21 U.S.C. § 841(b).

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B. The Eighth Circuit's Prohibition Is Based On A Gross Distortion Of The Concept Of Fairness And Does Not Prevent Any Unwarranted Disparity.

The Eighth Circuit and the Commission, invoking the "battle cry of disparity,"[50] have adopted a rule of uniform harshness that turns fairness on its head. To force a judge, whose duty is to sentence the defendant before him as an individual, *Gall*, 552 U.S. at 50, 52; *Rita*, 551 U.S. at 357-58, to turn a blind eye to that individual's relevant mitigating characteristics because of abstract concerns about hypothetical defendants is a gross distortion of fairness. It ensures harshness for all, but helps no one – not the defendant before the court, not the hypothetical defendant who is not before the court, and not society at large. Conversely, consideration of post-sentencing rehabilitation assures the defendant before the court that he has been treated fairly. *See Rita*, 551 U.S. at 367 (Stevens, J., joined by Ginsburg, J., concurring) ("If the defendant is convinced that justice has been done in his case – that society has dealt with him fairly – the likelihood of his successful rehabilitation will surely be enhanced."). It furthers society's utilitarian goals, and it harms no one. Prison time is not a zero-sum game where less time for one means more time for another or vice versa.

Petitioner persuasively establishes that differences in sentencing outcomes resulting from the ordinary operation of the criminal justice system do not create *unwarranted* disparities. Pet'r Br. 45-46. The ordinary operating principle here is that sentencing

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[50] Kate Stith & Jose A. Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* 104-42 (1998).

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courts may and should consider the facts as they exist at the time of a resentencing, including facts that came into existence after a previous sentencing. *Id.* at 41-44. For this reason alone, there *is* no unwarranted disparity between defendants whose cases are appealed and remanded for resentencing and defendants who are sentenced only once. *See Bradstreet*, 207 F.3d at 82 & n.6; *Rudolph*, 190 F.3d at 724; *Green*, 152 F.3d at 1207 n.6, 1208; *Rhodes*, 145 F.3d at 1378, 1381; *Core*, 125 F.3d at 77. Defendants whose cases are appealed and remanded for resentencing and defendants who are sentenced only once are simply not similarly situated.

The Eighth Circuit, however, created a different operating principle unique to post-sentencing rehabilitation, *i.e.*, good conduct. It held that evidence that arises after an original sentencing may not be considered at a resentencing, and thus evidence of post-sentencing rehabilitation is "not relevant." *See Pepper*, 570 F.3d at 965; *Sims*, 174 F.3d at 913. In contrast, the Eighth Circuit held that a defendant's bad conduct that occurred after the original sentencing may be considered at resentencing. *United States v. Stapleton*, 316 F.3d 754, 757 (8th Cir. 2003). The Eighth Circuit's prohibition against post-sentencing rehabilitation is thus an arbitrary one-way ratchet based on a legal principle that does not in fact exist.[51]

[51] The one reason the Sentencing Commission gave for its policy statement banning downward departures based on post-sentencing rehabilitative efforts, in addition to the reasons given by the Eighth Circuit in *Sims*, was that it "is consistent with Commission policies expressed in § 1B1.10." USSG App. C, amend. 602 (Nov. 1, 2000). Ironically, that policy statement, as revised in 2008, now recognizes that post-sentencing conduct is relevant. *See* USSG § 1B1.10, p.s., comment. (n.1(B)(iii)) (inviting

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This Court has recognized that it is not for the courts of appeals to ban certain factors because, in their view, consideration of the factor might cause a disparity. "Section 3553(a)(6) directs *district courts* to consider the need to avoid unwarranted disparities – along with other § 3553(a) factors – when imposing sentences," weighing any disparities "against the other § 3553(a) factors and any unwarranted disparity created by the [guideline] itself." *Kimbrough*, 552 U.S. at 108.

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courts to consider post-sentencing conduct in determining whether a reduction is warranted and the extent of such reduction within the amended guideline range). If post-sentencing conduct is relevant for that purpose, post-sentencing rehabilitation is surely relevant for purposes of a variance below an advisory guideline range. *Cf. United States v. Douglas*, 576 F.3d 1216, 1220 (11th Cir. 2009) (noting that circuit has held that post-sentencing conduct is an impermissible factor under § 3553(a), but the Commission has made it relevant under § 1B1.10, and reversing because district court did not sufficiently consider evidence of post-sentencing rehabilitation).

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CONCLUSION

The Eighth Circuit's appellate ban on consideration of evidence of post-sentencing rehabilitation violates the governing statutes, and also is not supported by any legitimate rationale. This Court should therefore reject it. This Court should vacate the judgment of the court of appeals and remand with instructions that no sentence imposed on remand require Jason Pepper to serve additional time in prison.

Respectfully submitted,

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Counsel for Amici Curiae

* Counsel of Record

September 7, 2010

AO 10
Rev. 1/2010

FINANCIAL DISCLOSURE REPORT
FOR CALENDAR YEAR 2009

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
Williams, Kathleen M.	Southern District of Florida	01/05/2011
4. Title (Article III judges indicate active or senior status; magistrate judges indicate full- or part-time)	**5a. Report Type** (check appropriate type)	**6. Reporting Period**
United States District Judge	☒ Nomination, Date 01/05/2011 ☐ Initial ☐ Annual ☐ Final 5b. ☐ Amended Report	to 01/01/2010 - 12/28/2010
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.**	
150 West Flagler Street Suite 1500 Miami, Florida 33130	Reviewing Officer_____ Date_____	

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

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

☒ NONE *(No reportable positions.)*

	POSITION	NAME OF ORGANIZATION/ENTITY
1.		
2.		
3.		
4.		
5.		

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

☒ NONE *(No reportable agreements.)*

	DATE	PARTIES AND TERMS
1.		
2.		
3.		

FINANCIAL DISCLOSURE REPORT Page 2 of 6	Name of Person Reporting Williams, Kathleen M.	Date of Report 01/05/2011

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

A. Filer's Non-Investment Income

☒ NONE *(No reportable non-investment income.)*

	DATE	SOURCE AND TYPE	INCOME (yours, not spouse's)
1.			
2.			
3.			
4.			

B. Spouse's Non-Investment Income - *If you were married during any portion of the reporting year, complete this section.*
(Dollar amount not required except for honoraria.)

☒ NONE *(No reportable non-investment income.)*

	DATE	SOURCE AND TYPE
1.		
2.		
3.		
4.		

IV. REIMBURSEMENTS – *transportation, lodging, food, entertainment.*
(Includes those to spouse and dependent children; see pp. 25-27 of filing instructions.)

☐ NONE *(No reportable reimbursements.)*

	SOURCE	DATES	LOCATION	PURPOSE	ITEMS PAID OR PROVIDED
1.	Exempt				
2.					
3.					
4.					
5.					

FINANCIAL DISCLOSURE REPORT Page 3 of 6	Name of Person Reporting	Date of Report
	Williams, Kathleen M.	01/05/2011

V. GIFTS. *(Includes those to spouse and dependent children; see pp. 28-31 of filing instructions.)*

☐ NONE *(No reportable gifts.)*

	SOURCE	DESCRIPTION	VALUE
1.	Exempt		
2.			
3.			
4.			
5.			

VI. LIABILITIES. *(Includes those of spouse and dependent children; see pp. 32-33 of filing instructions.)*

☐ NONE *(No reportable liabilities.)*

	CREDITOR	DESCRIPTION	VALUE CODE
1.	Wachovia	Secured Note/Equity Line	M
2.			
3.			
4.			
5.			

FINANCIAL DISCLOSURE REPORT
Page 4 of 6

Name of Person Reporting	Date of Report
Williams, Kathleen M.	01/05/2011

VII. INVESTMENTS and TRUSTS -- *income, value, transactions (Includes those of spouse and dependent children; see pp. 34-60 of filing instructions.)*

☐ NONE *(No reportable income, assets, or transactions.)*

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A-H)	B. (2) Type (e.g., div., rent, or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, redemption)	D. (2) Date mm/dd/yy	D. (3) Value Code 2 (J-P)	D. (4) Gain Code 1 (A-H)	D. (5) Identity of buyer/seller (if private transaction)
[1] United Technologies Stock	D	Dividend	N	T	Exempt				
[2] ATT Stock	C	Dividend	K	T					
[3] Edison International Stock	A	Dividend	K	T					
[4] Lockheed Martin Stock	B	Dividend	K	T					
[5] IBM Stock	B	Dividend	K	T					
[6] Wachovia Money Market Sweep (Savings Account)	A	Interest	J	T					
[7] Tax Exempt Municipal Bond	A	Interest	A	T					
[8] Hartford Fort Small Cap (HSLCX)		None	N	T					
[9] Pioneer Hi Income Municipals	B	Dividend	N	T					
[10] Princ Preferred Sec (PRFCX)	A	Dividend	L	T					
[11] Allianz Vision Variable Annuity		None	N	T					
[12] Nationwide All American Annuity		None	N	T					
[13] Wachovia Cash Account	A	Interest	D	T					
14.									
15.									
16.									
17.									

1. Income Gain Codes: (See Columns B1 and D4)	A =$1,000 or less	B =$1,001 - $2,500	C =$2,501 - $5,000	D =$5,001 - $15,000	E =$15,001 - $50,000
	F =$50,001 - $100,000	G =$100,001 - $1,000,000	H1 =$1,000,001 - $5,000,000	H2 =More than $5,000,000	
2. Value Codes (See Columns C1 and D3)	J =$15,000 or less	K =$15,001 - $50,000	L =$50,001 - $100,000	M =$100,001 - $250,000	
	N =$250,001 - $500,000	O =$500,001 - $1,000,000	P1 =$1,000,001 - $5,000,000	P2 =$5,000,001 - $25,000,000	
	P3 =$25,000,001 - $50,000,000		P4 =More than $50,000,000		
3. Value Method Codes (See Column C3)	Q =Appraisal	R =Cost (Real Estate Only)	S =Assessment	T =Cash Market	
	U =Book Value	V =Other	W =Estimated		

FINANCIAL DISCLOSURE REPORT Page 5 of 6	Name of Person Reporting Williams, Kathleen M.	Date of Report 01/05/2011

VIII. ADDITIONAL INFORMATION OR EXPLANATIONS. *(Indicate part of Report.)*

FINANCIAL DISCLOSURE REPORT Page 6 of 6	Name of Person Reporting Williams, Kathleen M.	Date of Report 01/05/2011

IX. CERTIFICATION.

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

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

Signature

NOTE: ANY INDIVIDUAL WHO KNOWINGLY AND WILFULLY FALSIFIES OR FAILS TO FILE THIS REPORT MAY BE SUBJECT TO CIVIL AND CRIMINAL SANCTIONS (5 U.S.C. app. § 104)

FILING INSTRUCTIONS

Mail signed original and 3 additional copies to:

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

Kathleen Williams

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		3	321	Notes payable to banks-secured		214	564
U.S. Government securities				Notes payable to banks-unsecured			
Listed securities—see schedule		887	349	Notes payable to relatives			
Unlisted securities				Notes payable to others			
Accounts and notes receivable:				Accounts and bills due		1	873
Due from relatives and friends				Unpaid income tax			
Due from others				Other unpaid income and interest			
Doubtful				Real estate mortgages payable			
Real estate owned primary residence		400	000	Chattel mortgages and other liens payable			
Real estate mortgages receivable				Other debts-itemize:			
Autos and other personal property		40	000	- Auto Loan		12	614
Cash value-life insurance							
Other assets itemize:							
- Thrift Savings Program		472	000				
- Allianz Vision Variable Annuity		260	536				
- Nationwide All American Annuity		264	174	Total liabilities		229	051
				Net Worth	2	098	329
Total Assets	2	327	380	Total liabilities and net worth	2	327	380
CONTINGENT LIABILITIES				GENERAL INFORMATION			
As endorser, comaker or guarantor				Are any assets pledged?	NO		
On leases or contracts				Are you defendant in any suits or legal actions?	NO		
Legal Claims				Have you ever taken bankruptcy?	NO		
Provision for Federal Income Tax							
Other special debt							

FINANCIAL STATEMENT

NET WORTH SCHEDULE

Listed Securities	
AT&T	$ 40,238
Edison International	20,434
IBM	29,178
Lockheed Martin	20,775
United Technologies	397,500
Hartford Fort Small Cap (HSLCX)	152,963
Pioneer Hi Income Municipals (HICMX)	148,839
Princ Preferred Sec (PRFCX)	77,422
Total Listed Securities	$ 887,349

STATEMENT OF TIMOTHY J. FEIGHERY, NOMINEE TO BE CHAIRMAN OF THE FOREIGN CLAIMS SETTLEMENT COMMISSION

Mr. FEIGHERY. Thank you, Mr. Chairman. Thank you for giving me the opportunity to express my thanks to many of the people who are here and who have been instrumental in my being here before you today.

I would, first of all, like to thank Senator Schumer for his very generous remarks and for taking the time out of his busy schedule to introduce me today.

I would also like to thank President Obama for the honor of this nomination, and you, Mr. Chairman and Ranking Member Grassley and members of the committee, for allowing me to appear before you today.

I would like to acknowledge my friends and colleagues who are here today and those who are watching on Webcast. I appreciate very much their friendship and support. And I would also like to acknowledge my eight brothers and sisters and their families, my big family, 18 nieces and nephews in all, and, also, the Smoot family, who they will all be tuning in at some point on the Webcast.

And now I would like, if I could, to introduce some of the members of my family who are able to be here today, beginning with my father, Tom Feighery, who is a native of the Bronx, New York, and my mother, Anne Feighery, a native of the Town of Tullamore, County Offaly in Ireland.

It is not an easy journey for them, but I can't thank them enough for being here today and, also, for their love and support throughout my life.

I am also very pleased that my three children, Finn, aged 11, Teddy, aged 9, and Anne, aged 6, can be here today, although I see that they are taking a break at an opportune time. But they have been looking forward to this day and I think mostly because they get some time off school.

Senator COONS. The chair notes they have rejoined us. So, Mr. Feighery, if you would like to renew your recognition of them. After a completely understandable break, they continue their excellent behavior. So let us remind for a moment, Mr. Feighery.

Mr. FEIGHERY. I will introduce again then my three children, Anne here, aged 6, Teddy in the middle, who is aged 9, and Finn, aged 11.

I am grateful that they are able to experience a real life civics lesson here today. So in lieu of missing school, they do get a real life lesson. So thank you, members of the committee, for that, also.

I thank them for their unconditional love every day and I am very proud of them.

Finally, I would like to introduce you to my wife, Sarah, a native of North Carolina, who has been my partner in all things since we first met here in D.C. about 15 years ago. She is a constant source of strength for me and I am eternally grateful for her love and support.

And Senator Schumer noted that I might have left New York under duress, and I can assure the Senator that it was a labor of love.

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And with that, Mr. Chairman, I thank you again and I look forward to questions.

[The biographical information follows.]

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UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY

QUESTIONNAIRE FOR NON-JUDICIAL NOMINEES

PUBLIC

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

   Timothy John Feighery

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

   Chairman, Foreign Claims Settlement Commission

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

   Office of the Legal Adviser
   Office of International Claims and Investment Disputes
   U.S. Department of State
   Suite 237, South Building
   2430 E St. NW
   Washington, DC 20037

   [redacted]

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

   1962; New York (Bronx), New York

5. **Education**: List in reverse chronological order each college, law school, or any other institution of higher education attended and indicate for each the dates of attendance, whether a degree was received, and the date each degree was received.

   Fordham University School of Law, 1984 – 1987; J.D., May 1987
   Fordham College, 1980 – 1984; BA (Philosophy), May 1984

6. **Employment Record**: List in reverse chronological order all governmental agencies, business or professional corporations, companies, firms, or other enterprises, partnerships, institutions or 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 description.

1.	*Employer:*	*Office of the Legal Adviser* *U.S. Department of State*
	Address:	*2201 C St NW* *Washington D.C. 20520*
	Job Title:	*Attorney Adviser; July 2004 - Present*

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2.	*Employer:*	*George Mason University School of Law*
	Address:	*3301 Fairfax Drive* *Arlington VA 22201*
	Job Title:	*Adjunct Professor; August 2005 – May 2010*
3.	*Organization:*	*American Bar Association, International Courts Committee* *740 15th Street, N.W.* *Washington, DC* *Co-Vice Chair, 2008 - 2010*
4.	*Employer:*	*U.S. Justice Department (9/11 Compensation Fund)*
	Address:	*1100 L St NW* *Washington D.C. 20530*
	Job Title:	*Deputy Special Master; August 2003 – July 2004*
5.	*Employer:*	*United Nations Compensation Commission*
	Address:	*Villa La Pelouse, Palais des Nations* *1211 Geneva, Switzerland*
	Job Title:	*Chief of Section; January 2000 – August 2003*
6.	*Employer:*	*U.S. Federal Trade Commission*
	Address:	*600 Pennsylvania Ave. NW* *Washington D.C. 20580*
	Job Title:	*Senior Attorney; August 1998 – December 1999*
7.	*Employer:*	*United Nations Compensation Commission*
	Address:	*Villa La Pelouse, Palais des Nations* *1211 Geneva, Switzerland*
	Job Title:	*Team Leader; February 1996 – July 1998*
8.	*Employer:*	*Webster University*
	Address:	*Geneva, Switzerland*
	Job Title:	*Adjunct Professor; 1997*
9.	*Employer:*	*Kaye Scholer LLP*
	Address:	*425 Park Avenue* *New York, NY 10022*
	Job Title:	*Summer Associate, Associate (worked in New York, Brussels and Washington D.C. offices); May 1986 – December 1995*
10.	*Employer:*	*Dingle Corporation* *Rte 6, Putnam Plaza* *Carmel, NY 10512*
	Job Title	*Employee of family-owned bar/restaurant, 1984-1986*

7. **Military Service and Draft Status**: Identify any service in the U.S. Military, including dates of service, branch of service, rank or rate, serial number (if different from social security number) and type of discharge received, and whether you have registered for selective service.

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No service in the U.S. military; registered for the selective service.

8. **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.

5 Superior Honor Awards (2005, 2006, 2007, 2009 & 2010) and 2 Meritorious Honor Awards (2006 & 2008) from the State Department;
Member, Fordham Law Review (1987)

9. **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, New York State Bar Association
Co-Vice Chair, International Courts Committee, American Bar Association (2008-Present)

10. **Bar and Court Admission**:

a. List the date(s) you were admitted to the bar of any state and any lapses in membership. Please explain the reason for any lapse in membership.

New York State, 1988; no lapses in membership

b. List all courts in which you have been admitted to practice, including dates of admission and any lapses in membership. Please explain the reason for any lapse in membership. Give the same information for administrative bodies that require special admission to practice.

New York State 1988, no lapses; New York Office of Court Administration

11. **Memberships**:

a. List all professional, business, fraternal, scholarly, civic, charitable, or other organizations, other than those listed in response to Questions 9 or 10 to which you belong, or to which you have belonged, since graduation from law school. Provide dates of membership or participation, and indicate any office you held. Include clubs, working groups, advisory or editorial boards, panels, committees, conferences, or publications.

Riverside Gardens Citizens Association, August 2004 – Present
Riverside Gardens Swim & Tennis Club, August 2004 - Present

b. Indicate whether any of these organizations listed in response to 11a above currently discriminate or formerly discriminated on the basis of race, sex, religion or national origin 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.

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None

12. **Published Writings and Public Statements**:

a. List the titles, publishers, and dates of books, articles, reports, letters to the editor, editorial pieces, or other published material you have written or edited, including material published only on the Internet. Supply four (4) copies of all published material to the Committee.

Contributor, "2007 Year In Review: ABA International Law Section, Committee on International Courts," 42 International Lawyer 345 (Summer 2008)
Contributor, "2008 Year In Review: ABA International Law Section, Committee on International Courts," 43 International Lawyer 425 (Summer 2009)
Assessing the Costs of Iraq's 1990 Invasion and Occupation of Kuwait – The United Nations Compensation Commission, Refugee Survey Quarterly 22 (4):87-104
Book Review: Arbitration Clauses for International Contracts by Paul D. Friedland, 16 ICSID Foreign Investment Law Journal No. 1, p. 285 (2001);
Book Review: The ICSID Convention: The Law of the International Centre for the Settlement of Investment Disputes by K.V.S.K. Nathan, 17 ICSID Foreign Investment Law Journal No. 1, p. 200 (2002).

b. Supply four (4) copies of any reports, memoranda or policy statements you prepared or contributed in the preparation of on behalf of any bar association, committee, conference, or organization of which you were or are a member. If you do not have a copy of a report, memorandum or policy statement, give the name and address of the organization that issued it, the date of the document, and a summary of its subject matter.

See 12(a).

c. Supply four (4) copies of any testimony, official statements or other communications relating, in whole or in part, to matters of public policy or legal interpretation, that you have issued or provided or that others presented on your behalf to public bodies or public officials.

None

d. Supply four (4) copies, transcripts or recordings of all speeches or talks delivered by you, including commencement speeches, remarks, lectures, panel discussions, conferences, political speeches, and question-and-answer sessions. Include the date and place where they were delivered, and readily available press reports about the speech or talk. If you do not have a copy of the speech or a transcript or recording of your remarks, give the name and address of the group before whom the speech was given, the date of the speech, and a summary of its subject matter. If you did not speak from a prepared text, furnish a copy of any outline or notes from which you spoke.

Presentation in October 2009 to Fordham Law School students on practicing law in the State Department Legal Adviser's Office (powerpoint used attached)

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Presentation to the European University Law Institute in Florence, Italy, based on an article prepared by David Caron and Brian Morris on the functioning of the United Nations Compensation Commission (David D. Caron and Brian Morris. "The United Nations Compensation Commission: Practical Justice, Not Retribution" EUROPEAN JOURNAL OF INTERNATIONAL LAW 13 (2002): 183-199). There is no record of my presentation.

e. List all interviews you have given to newspapers, magazines or other publications, or radio or television stations, providing the dates of these interviews and four (4) copies of the clips or transcripts of these interviews where they are available to you.

None

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

a. List chronologically any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. If appointed, please include the name of the individual who appointed you. Also, state chronologically any unsuccessful candidacies you have had for elective office or unsuccessful nominations for appointed office.

None

b. List all memberships and offices held in and services rendered, whether compensated or not, to any political party or election committee. If you have ever held a position or played a role in a political campaign, identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

None

14. **Legal Career:** Answer each part separately.

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

i. whether you served as clerk to a judge, and if so, the name of the judge, the court and the dates of the period you were a clerk;

I have not clerked for a judge.

ii. whether you practiced alone, and if so, the addresses and dates;

I have not been a sole practitioner

iii. 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.

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Dates:	*July 2004 - Present*
Gov't Agency:	*Office of the Legal Adviser*
	U.S. State Department
Address:	*2201 C St NW*
	Washington D.C. 20520
Job Title:	*Attorney Adviser*
Dates:	*August 2005 – May 2010*
Employer:	*George Mason University School of Law*
Address:	*3301 Fairfax Drive*
	Arlington VA 22201
Job Title:	*Adjunct Professor*
Dates:	*August 2003 – July 2004*
Gov't Agency:	*U.S. Justice Department (9/11 Compensation Fund)*
Address:	*1100 L St NW*
	Washington D.C. 20530
Job Title:	*Deputy Special Master*
Dates:	*January 2000 – July 2003*
Employer:	*United Nations Compensation Commission*
Address:	*Villa La Pelouse, Palais des Nations*
	1211 Geneva, Switzerland
Job Title:	*Chief of Section*
Dates:	*August 1998 – December 1999*
Gov't Agency:	*U.S. Federal Trade Commission*
Address:	*600 Pennsylvania Ave. NW*
	Washington D.C. 20580
Job Title:	*Senior Attorney*
Dates:	*February 1996 – July 1998*
Employer:	*United Nations Compensation Commission*
Address:	*Villa La Pelouse, Palais des Nations*
	1211 Geneva, Switzerland
Job Title:	*Team Leader*
Dates:	*1997*
Employer:	*Webster University*
Address:	*Geneva, Switzerland*
Job Title:	*Adjunct Professor*
Dates:	*September 1987 – December 1995*
Law Firm:	*Kaye Scholer LLP*
Address:	*425 Park Avenue*
	New York, NY 10022
Job Title:	*Associate (worked in New York, Brussels and Washington D.C. offices)*

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iv. whether you served as a mediator or arbitrator in alternative dispute resolution proceedings and, if so, a description of the 10 most significant matters with which you were involved in that capacity.

No

b. Describe:

i. the general character of your law practice and indicate by date when its character has changed over the years.

From law school graduation until December 1995 I was employed as an associate in a large international law firm, and represented corporate clients in civil litigations (many were antitrust litigations). My role as an associate was to support the legal work of more senior lawyers (senior associates, counsel, partners) in the litigations to which I was assigned.

In December 1995 I left the firm and began working in the public interest – first with the United Nations, and later with the U.S. Federal Trade Commission, Justice Department and now the State Department.

ii. your typical clients and the areas at each period of your legal career, if any, in which you have specialized.

Typical clients while I practiced at Kaye Scholer were almost exclusively corporations – mostly large international corporations, and some small corporations.

After beginning work in the public interest, I began my current specialization, which is international law and international claims.

c. Describe the percentage of your practice that has been in litigation and whether you appeared in court frequently, occasionally, or not at all. If the frequency of your appearances in court varied, describe such variance, providing dates.

My practice at Kaye Scholer did not involve court appearances. I was present in the United States Supreme Court in one case on which I worked but had no role before the Court and was not listed as Counsel of Record (Texaco v. Hasbrouck, 496 U.S. 543 (1990); argued December 5, 1989). Early in my career, I represented indigent defendants pro bono in the New York State Criminal Court system and appeared before that court a number of times, but have no record of those appearances or the dates.

Since joining the State Department, a much more significant amount of my time has been spent practicing before courts – specifically, the Iran/US Claims Tribunal in The Hague, The Netherlands. From September 2006 to March 2008, I spent in excess of 50 days before the Tribunal in defense of the United States in a claim brought by Iran.

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i. Indicate the percentage of your practice in:
   1. federal courts;
   2. state courts of record;
   3. other courts;
   4. administrative agencies

Pre-2004: *Negligible*
Post-2004: *A small percentage (before the Iran/U.S. Claims Tribunal)*

ii. Indicate the percentage of your practice in:
   1. civil proceedings; *99%*
   2. criminal proceedings. *1%*

Over the course of my career, I have been engaged almost exclusively in civil matter; the only exception being small criminal cases undertaken on a pro bono basis.

d. State the number of cases in courts of record, including cases before administrative law judges, you tried to verdict, judgment or final decision (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

One case: Case No. B/61 before the Iran/U.S. Claims Tribunal in The Hague, The Netherlands. I was the supervising attorney of a large State Department legal team, and made more than 10 arguments before the Tribunal. The Tribunal issued a partial Award in this case in July 2009, dismissing Iran's largest claims.

i. What percentage of these trials were:
   1. jury; *0%*
   2. non-jury. *100%*

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

As an associate with two years of experience, I researched and drafted portions of the Brief and Reply Brief of Petitioner Texaco, Inc. in Texaco v. Hasbrouck. I had no role in the strategic decisions made in relation to these briefs.

15. **Litigation**: Describe the ten (10) most significant litigated matters which you personally handled, whether or not you were the attorney of record. 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;

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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.

The only cases that I have personally handled are:

(1) Case No. B/61, Iran v. United States, Iran-U.S. Claims Tribunal. This case is an arbitration under the Algiers Accords, brought by Iran against the United States for the United States' alleged failure to transfer to Iran military properties purchased by Iran from private United States' corporations. I was the supervising attorney for this case and represented the United States along with numerous other lawyers from the State Department Office of the Legal Adviser (counsel of record is the Agent of the United States in The Hague, The Netherlands). Iran was represented by Iranian counsel, and also by the Paris office of the international law firm, Eversheds. Lead counsel for Iran was Rodman Bundy, with co-counsel David Sellers, Charles Claypoole, and William Thomas, all of Eversheds In July 2009 the Tribunal issued a Partial Award in the case, dismissing Iran's claim for compensation under one of its specific theories of liability. A portion of the case remains open and is the subject of further procedures before the Tribunal. I represented the United States in this case from August 2004 to the present.

(2) Case No. B1, Iran v. United States, Iran-U.S. Claims Tribunal. This case is an arbitration under the Algiers Accords, brought by Iran against the United States for the United States' alleged breach of its Foreign Military Sales contracts with Iran. I am the supervising attorney for this case and represent the United States along with numerous other lawyers from the State Department Office of the Legal Adviser (counsel of record is the Agent of the United States in The Hague, The Netherlands). To the best of my knowledge, Iran is represented by Iranian counsel. Final briefing has not yet been completed in this case. I represented the United States in this case from April 2007 to the present.

Both of these cases are being arbitrated before the full panel of the Iran/U.S. Claims Tribunal. For the hearings in Case B/61, the full panel was comprised of: Third-country judges: Krzyzstof Skubiszewski (Poland, President), Gaetano Arangio Ruiz (Italy) & Bengt Broms (Finland); United States judges: Charles Brower, George Aldrich & Gabrielle McDonald; and Iranian judges: Aghahosseini, Ameli and Noori.

The full panel is presently comprised of Hans van Houtte (Belgium, President), Gaetano Arangio Ruiz (Italy) & Bengt Broms (Finland); United States judges: Charles Brower, George Aldrich & Gabrielle McDonald; and Iranian judges: Iranian judges Abedian Kalkhoran, Nikbakht Fini and Seifi.

I was not involved in litigations or arbitrations during my time at the UNCC or the FTC. While an associate at Kaye, Scholer, I worked on numerous litigations, generally as part of large litigation teams, but none of these went to court with one exception (noted above): I researched and drafted portions of the Brief and Reply Brief of Petitioner Texaco, Inc. in Texaco v. Hasbrouck before the Supreme

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Court (but do not appear on these briefs), and was present at, but did not participate in, the oral argument before the Supreme Court. The docket number for this case was No. 87-2048. The Petition was rejected 9-0 by the Supreme Court, and the opinion can be found at 496 U.S. 543 (1990).

In addition to the above, the following is a list of lawyers with whom I have worked over the course of my professional career:

(1) Sylvia Becker
Kaye Scholer LLP
Washington DC
(202) 682-3579

(2) David Copeland
Kaye Scholer LLP
New York
(212) 836-8105

(3) Michael D. Blechman
Kaye Scholer LLP
New York
(212) 836-8353

(4) James D. Herschlein
Kaye, Scholer LLP
New York,
(212) 836-8655

(5) Morris Bloom
Federal Trade Commission
Washington DC
(202) 326-2707

(6) Robert Tovsky
Federal Trade Commission
Washington, DC
(202) 326-2634

(7) Michael Mucchetti (UNCC)
Office of Rep. Lloyd Doggett
Washington, D.C.
(202) 225-4865

(8) Justice Brian Morris (UNCC)
Montana Supreme Court
(406) 444-5490

(9) Jeffrey Kovar
State Department
Washington, D.C.
(202) 776-8365

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(10) Clifton Johnson
State Department
Washington, D.C.
(202) 647-5654

16. **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 fully the nature of your participation in these activities. List any client(s) or organization(s) for whom you performed lobbying activities and describe the lobbying activities you performed on behalf of such client(s) or organizations(s). (Note: As to any facts requested in this question, please omit any information protected by the attorney-client privilege.)

At the very beginning of my career I spent a large amount of my time working as the junior associate on an antitrust litigation on behalf of New York State Electric & Gas (NYSEG), which was sued by a small power producer, Long Lake Energy, for alleged anticompetitive practices relating to Long Lake's efforts to develop hydroelectric power projects in upstate New York. I prepared an extensive and detailed fact memorandum based on chronologies of events correlating Long Lake's development efforts and NYSEG's own activities in developing hydro power in upstate New York. The case settled before trial, but it gave me extensive training in drafting legal memoranda and briefs, and preparing scripts for depositions.

While I worked in Belgium for Kaye Scholer, most of my time was spent working on a pharmaceutical patent litigation on behalf of Bayer AG; my role was mainly to work reviewing Bayer's patent files at its headquarters in Germany, and working with potential fact witness, including their patent staff as well as the scientists who invented the pharmaceutical at issue (ciprofloxacin). The case was brought in U.S. court by a U.S. manufacturer of generic drugs (Barr), which challenged Bayer's patents for the drug. The case did not go to trial and was settled between the parties.

When I joined the United Nations Compensation Commission (UNCC) staff in Geneva in 1996 I was the Team Leader of a non-Kuwait corporate claims program, responsible for analyzing and presenting for decision to Panels of Commissioners claims for compensation for losses allegedly suffered as a result of Iraq's 1990 invasion and occupation of Kuwait filed by over 3,000 international corporations. The typical loss types asserted included loss of physical assets, lost income, loss of income-producing properties, lost profits, losses due to relief provided to employees. In some cases, guidelines promulgated by the UNCC Governing Council dictated the treatment of loss types; in other cases, research was required by the Panels of Commissioners and performed under my supervision to provide guidance to those Panels. I also planned the five-year work program for completion of this category of claims, and lead the supporting legal effort for the first Panel report on these claims. During my time at the UNCC from 2000 – 2003, I was a Chief of Section of the Legal Services Branch, and managed the construction and engineering claims program as well as the non-Kuwaiti claims program already discussed. I was responsible for all aspects of the work of the secretariat in relation to these claims, including budgeting, hiring professional and non-professional staff, establishing terms of reference for the retention of outside experts to assist the Panels of Commissioners, and dealing with the Commissioners themselves.

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The lawyers and non-legal staff under my supervision supported the work of four separate Panels of Commissioners, who made recommendations of compensation in relation to over $22 billion in claims.

In my work on the September 11th Compensation Fund, results were of two kinds: first, there was the need to achieve the result of getting a measure of compensation to the families of victims of the 9/11 attacks quickly. The second, and in many ways the most important result, was giving those same families a forum enabling them to state for the record how much their loved one meant to them. As a Deputy Special Master of the Fund, I made initial determinations on applications for compensation and conducted hearings with victims' families. In my view, the ability to be heard was very much a factor in claimants' decisions to participate in the Fund (claimants had an alternative option of pursuing claims for compensation through the judicial system), and a significant part of its success was the fact that so many claimants were able to participate in the hearing process. Presiding over the hearings themselves was extraordinarily difficult, but a necessary part of making a final determination on the appropriate measure of compensation to be paid to a given claimant, consistent with the regulatory scheme established by Congress. In most cases, the hearing process resulted in an increase in the amount of compensation that would otherwise have been paid. In some cases, it resulted in a reduction. In all cases, they were highly emotional and draining for all involved. In the last four months of the program, I presided over more than 80 hearings with victim families. Compensation was paid out to all claimants within the time period imposed by the Special Master, and the program stands as a unique American success.

Finally, my work at the Department of State includes also the most significant legal activities of my career – specifically, representing the United States in international arbitration against Iran. In this capacity, I have argued on many occasions before the Iran/U.S. Claims Tribunal, and have supervised teams of lawyers in preparing briefs and arguments before that body. I have worked with and supervised attorneys who have had no previous practice experience, as well as highly experienced State Department lawyers. I have had front-line responsibility for all aspects of our defense of these claims, including, in addition to responsibility for the legal product, the identification and engagement of experts, the retention of contractors to perform functions for the litigation team (including, for example, information technology support), budgeting, ensuring adequate legal and legal support staffing, liaising with other agencies of the government, and briefing other agencies with interests in the claims process. In all my work, I in turn have been supervised by an Assistant Legal Adviser.

17. **Teaching**: What courses have you taught? For each course, state the title, the institution at which you taught the course, the years in which you taught the course, and describe briefly the subject matter of the course and the major topics taught. If you have a syllabus of each course, provide four (4) copies to the committee.

International Law, George Mason University School of Law (Evening Division, 2005 – December 2009)

This was an introductory survey course in international law that teaches broad principles of international law, including the interface of national law with international law, as well as introductions to various sub-specialties that have developed over the years,

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including environmental law, law of the sea, human rights law and humanitarian law. The most recent syllabus for this course is included.

European Union Law, George Mason University School of Law (Evening Division 2006 – May 2010)
This was an introductory survey course in European Union Law that traces the formation of the modern European Union from its post World War II beginnings through the 2009 Treaty of Lisbon. This course addresses structural issues relating to the Union, including the interrelationship between Member State law and EU law itself, as well as substantive areas of EU law including competition law, trade law and the free movement of goods, services, persons and establishment. The most recent syllabus for this course is included.

Webster University, Geneva Switzerland
I taught two course at Webster University: an undergraduate Business & Society class in 1997, and a graduate International Business Law class, also in 1997. These classes were co-taught with David Isenegger, a Canadian attorney at the United Nations Compensation Commission, and Robert O'Brien, an American attorney at the United Nations Compensation Commission. Both of these courses were broad, introductory-type courses, and I focused on antitrust and competition law. I have no records for either of these courses.

18. **Deferred Income/ Future Benefits**: List the 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. Describe the arrangements you have made to be compensated in the future for any financial or business interest.

Thrift Savings Plan; current (November 2010) balance: $103,500

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

None

20. **Sources of Income**: 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, licensing fees, 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 SF-278 attached hereto.

21. **Statement of Net Worth**: Please complete the attached financial net worth statement in detail (add schedules as called for).

See attached net worth statement.

22. **Potential Conflicts of Interest**:

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a. Identify the family members or other persons, parties, affiliations, pending and categories of litigation, financial arrangements or other factors that are likely to present potential conflicts-of-interest when you first assume the position to which you have been nominated. Explain how you would address any such conflict if it were to arise.

None.

b. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern.

In connection with the nomination process, I have consulted with the Office of Government Ethics and the Department of Justice's designated agency ethics official to identify potential conflicts of interest. Any potential conflicts of interest will be resolved in accordance with the terms of an ethics agreement that I have entered into with the Department's designated agency ethics official.

23. **Pro Bono Work**: 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. If you are not an attorney, please use this opportunity to report significant charitable and volunteer work you may have done.

At Kaye Scholer I worked many pro bono hours on matters classified by the firm as pro bono, as well as through volunteering with the New York Legal Aid Society to represent individuals before New York courts in minor criminal matters (e.g., theft) as well as housing issues.

Since 1996, my career has been devoted to work in the public interest, including for the UN, the Federal Trade Commission, the 9/11 Compensation Fund, and the State Department. While at the State Department, aside from my existing work, I volunteered to work overnight on special "crisis centers" set up to communicate with relatives of potential U.S. victims of overseas disasters (for example, the 2004 tsunami in the Indian Ocean).

In addition to these legal activities, I have served as a member of my local civic association (Riverside Gardens Citizens Association),attending planning and zoning meetings on behalf of this association convened by the Mount Vernon Council of Civic Associations. Since 2004, I have served as a volunteer soccer coach with the Gunston and Lee-Mt. Vernon Soccer Clubs, and baseball with the Fort Hunt Youth Athletic Association.

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FINANCIAL STATEMENT Timothy Feighery

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	$1,000	Notes payable to banks-secured	See sch. 2
U.S. Government securities	None	Notes payable to banks-unsecured	See sch. 2
Listed securities-add schedule (see attached schedule 1)	$99,397	Notes payable to relatives	None
Unlisted securities--add schedule	None	Notes payable to others	None
Accounts and notes receivable:	None	Accounts and bills due (see attached schedule 2)	$15,672
Due from relatives and friends		Unpaid income tax	None
Due from others		Other unpaid income and interest	None
Doubtful		Real estate mortgages payable-add schedule (see schedule 3)	$529,099
Real estate owned-add schedule	$650,000 (Home)	Chattel mortgages and other liens payable	None
Real estate mortgages receivable	None	Other debts-itemize:	None
Autos and other personal property	$8,000		
Cash value-life insurance			
Other assets itemize:			
Thrift Savings Plan	$103,500		
College Savings (529) Plans	$40,140	Total liabilities	$544,771
		Net Worth	$357,266
Total Assets	$902,037	Total liabilities and net worth	$902,037
CONTINGENT LIABILITIES	None	GENERAL INFORMATION	
As endorser, comaker or guarantor	None	Are any assets pledged? (Add schedule)	No
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	None		
Other special debt	None		

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Schedule to Net Worth Statement

Schedule 1 – Listed securities (as of Nov. 1, 2010)

Fidelity Roth IRA:

Fidelity Diversified International (FDIVX)	$ 18,266.00
Fidelity Asset Manager 50% (FASMX)	$ 23,336.00
Fidelity Asset Manager 20% (FASIX)	$ 26,330.00
Fidelity Magellan (FMAGX)	$ 30,075.00
Rentech Common (RTK)	$ 130.00
Dominion Resources Inc. Common (D)	$ 1,300.00
Total	**$ 99,397.00**

Schedule 2 – Accounts and bills due (as of Nov 1, 2010)

FIA CSNA	$ 7,072.00
Beneficial National Bank	$ 300.00
Suntrust Bank Line of Credit	$ 4,800.00
UN Federal Credit Union	$ 3,500.00
Total	**$ 15,672.00**

Schedule 3 – Real Estate mortgages Payable (as of Nov. 1, 2010)

Suntrust Mortgage Corporation (First Trust)	$430,578.00
Suntrust Mortgage Corporation (Second Trust)	$128,521.00
Total	**$529,099.00**

U.S. Department of Justice

NOV 19 2010

Washington, D.C. 20530

Mr. Robert Cusick
Director
Office of Government Ethics
1201 New York Avenue, NW
Suite 500
Washington, DC 20005-3919

Dear Mr. Cusick:

In accordance with the provisions of Title I of the Ethics in Government Act of 1978 as amended, I am forwarding the financial disclosure report of Timothy J. Feighery. President Obama has announced his intent to nominate Mr. Feighery to serve as the Chairman, Foreign Claims Settlement Commission (FCSC).

We have conducted a thorough review of the enclosed report. The conflict of interest statute, 18 U.S.C. § 208, requires that Mr. Feighery recuse himself from participating personally and substantially in any particular matter that has a direct and predictable effect on his financial interests or the financial interests of any other person whose interests are imputed to him, unless he first obtains a written waiver, pursuant to Section 208(b)(1), or qualifies for a regulatory exemption, pursuant to Section 208(b)(2). Mr. Feighery understands that the interests of the following persons are imputed to him: his spouse; minor children; any general partner of a general partnership in which he is a limited or general partner; any organization in which he serves as an officer, director, trustee, general partner or employee; and any person or organization with which he is negotiating or has an arrangement concerning prospective employment. In determining whether a particular matter has a direct and predictable effect on his financial interests or on those of any other person whose interests are imputed to him, Mr. Feighery will consult with Department of Justice ethics officials.

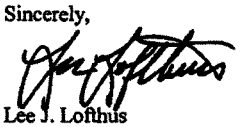
We have advised Mr. Feighery that because of the standard of conduct on impartiality at 5 C.F.R. § 2635.502, he should seek advice before participating in any particular matter involving specific parties in which a member of his household has a financial interest or in which someone with whom he has a covered relationship is or represents a party. Mr. Feighery previously resigned from his positions as Secretary and General Counsel of Oceanoco, Inc.; Adjunct Professor of Law with George Mason University; Co-Vice Chair, International Courts Committee, American Bar Association; and Planning and Zoning Representative of the Riverside Gardens Citizens Association ("Association") to the Mount Vernon Council of Citizens Associations. For a period of one year from the date of his resignation from each of these

organizations, he will not participate personally and substantially in any particular matter involving specific parties in which the organization is a party or represents a party, unless he is first authorized to participate pursuant to 5 C.F.R. § 2635.502(d).

Mr. Feighery understands that as an appointee he is required to sign the Ethics Pledge (Exec. Order No. 13490) and that he will be bound by the requirements and restrictions therein in addition to the commitments he has made in this and any other ethics agreement.

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

Sincerely,



Lee J. Lofthus
Assistant Attorney General
for Administration and
Designated Agency Ethics Official

Enclosure

NOMINEE STATEMENT

I have read the attached Ethics Agreement signed by Lee J. Lofthus, Assistant Attorney General for Administration and Designated Agency Ethics Official on 11/19, 2010, and I agree to comply with the conflict of interest statute and regulations, and to follow the procedures set forth in the agreement. In addition, I understand that as an appointee I am required to sign the Ethics Pledge (Exec.Order 13490) and that I will be bound by the requirements and restrictions therein in addition to the commitments I have made in this and any other ethics agreement.

Timothy J. Feighery

11/19/10
Date

SF 278 (Rev. 03/2000)
5 C.F.R. Part 2634
U.S. Office of Government Ethics

Executive Branch Personnel PUBLIC FINANCIAL DISCLOSURE REPORT

Form Approved:
OMB No. 3209 - 0001

Date of Appointment, Candidacy, Election, or Nomination (Month, Day, Year)	Reporting Status (Check Appropriate Items)	Incumbent	Calendar Year Covered by Report	New Entrant, Nominee, or Candidate	Termination Filer	Termination Date (If Applicable) (Month, Day, Year)
[redacted]		[redacted]	[redacted]	[redacted]		[redacted]

Reporting Individual's Name	Last Name: [redacted] — First Name and Middle Initial: [redacted]
Position for Which Filing	Title of Position: [redacted] — Department or Agency (If Applicable): [redacted]
Location of Present Office (or forwarding address)	Address (Number, Street, City, State, and ZIP Code): [redacted] — Telephone No. (Include Area Code): [redacted]
Position(s) Held with the Federal Government During the Preceding 12 Months (If Not Same as Above)	Title of Position(s) and Date(s) Held: [redacted]
Presidential Nominees Subject to Senate Confirmation	Name of Congressional Committee Considering Nomination: [redacted] — Do You Intend to Create a Qualified Diversified Trust? [redacted] Yes [redacted] No

Certification I CERTIFY that the statements I have made on this form and all attached schedules are true, complete and correct to the best of my knowledge.	Signature of Reporting Individual: [redacted]	Date (Month, Day, Year): 06/29/2010
Other Review (If desired by agency)	Signature of Other Reviewer: [redacted]	Date (Month, Day, Year): 11/16/2010
Agency Ethics Official's Opinion On the basis of information contained in this report, I conclude that the filer is in compliance with applicable laws and regulations (subject to any comments at the box below).	Signature of Designated Agency Ethics Official/Reviewing Official: [redacted]	Date (Month, Day, Year): 11/19/2010
Office of Government Ethics Use Only	Signature: [redacted]	Date (Month, Day, Year):

Comments of Reviewing Official (If additional space is required, use the reverse side of this sheet)

(Check box if filing extension granted & indicate number of days _____) ☐

(Check box if comments are continued on the reverse side) ☐

Fee for Late Filing
Any individual who is required to file this report and does so more than 30 days after the date the report is required to be filed, or, if an extension is granted, more than 30 days after the last day of the filing extension period, shall be subject to a $200 fee.

Reporting Periods

Incumbents: The reporting period is the preceding calendar year except Part II of Schedule C and Part I of Schedule D where you must also include the filing year up to the date you file. Part II of Schedule D is not applicable.

Termination Filers: The reporting period begins at the end of the period covered by your previous filing and ends at the date of termination. Part II of Schedule D is not applicable.

Nominees, New Entrants and Candidates for President and Vice President:

Schedule A--The reporting period for income (BLOCK C) is the preceding calendar year and the current calendar year up to the date of filing. Value assets as of any date you choose that is within 31 days of the date of filing.

Schedule B--Not applicable.

Schedule C, Part I (Liabilities)--The reporting period is the preceding calendar year and the current calendar year up to any date you choose that is within 31 days of the date of filing.

Schedule C, Part II (Agreements or Arrangements)--Show any agreements or arrangements as of the date of filing.

Schedule D--The reporting period is the preceding two calendar years and the current calendar year up to the date of filing.

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Reporting Individual's Name	SCHEDULE A	Page Number
Feighery, Timothy J		2 of 6

Assets and Income BLOCK A	Valuation of Assets at close of reporting period BLOCK B										Income: type and amount. If "None (or less than $201)" is checked, no other entry is needed in Block C for that item. BLOCK C									
											Type			Amount						
For you, your spouse, and dependent children, report each asset held for investment or the production of income which had a fair market value exceeding $1,000 at the close of the reporting period, or which generated more than $200 in income during the reporting period, together with such income. For yourself, also report the source and actual amount of earned income exceeding $200 (other than from the U.S. Government). For your spouse, report the source but not the amount of earned income of more than $1,000 (except report the actual amount of any honoraria over $200 of your spouse). None ☐	$1,001 - $15,000	$15,001 - $50,000	$50,001 - $100,000	$100,001 - $250,000	$250,001 - $500,000	$500,001 - $1,000,000*	$1,000,001 - $5,000,000*	$5,000,001 - $25,000,000*	Over $50,000,000*	Excepted Trust	Dividends	Interest	None (or less than $201)	$201 - $1,000	$1,001 - $2,500	$2,501 - $5,000	$5,001 - $15,000	$15,001 - $50,000	$50,001 - $100,000	$100,001 - $1,000,000	Over $1,000,000*	Over $5,000,000	Other Income (Specify Type & Actual Amount)	Date (Mo., Day, Yr.) Only if Honoraria
Examples: General Airlines Common			X								X				X								Loss Partnership Income $15,000	
Examples: Doe, Jones & Smith, Hometown, State																								
Examples: Keystone Equity Fund																								
Examples: IRA: Heartland 500 Index Fund																	X							
1 Fidelity IRA Fidelity Diversified International (FDIVX)		X											X											
2 Fidelity IRA Fidelity Asset Manager 50% (FASMX)													X											
3 Fidelity IRA Fidelity Asset Manager 20% (FASIX)													X											
4 Fidelity IRA Fidelity Magellan (FMAGX)													X											
5 Rentech Common													X											
6 Dominion Common		X											X											

* This category applies only if the asset/income is solely that of the filer's spouse or dependent children. If the asset/income is either that of the filer or jointly held by the filer with the spouse or dependent children, mark the other higher categories of value, as appropriate.

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U.S. Office of Government Ethics

Reporting Individual's Name	SCHEDULE A continued (Use only if needed)	Page Number
Faigney, Timothy J		3 of 8

	Assets and Income (BLOCK A)	Valuation of Assets at close of reporting period (BLOCK B)									Income: type and amount. If "None (or less than $201)" is checked, no other entry is needed in Block C for that item. (BLOCK C)											
											Type			Amount						Other Income (Specify Type & Actual Amount)	Date (Mo., Day, Yr.) Only if Honoraria
		$1,001 - $15,000	$15,001 - $50,000	$50,001 - $100,000	$100,001 - $250,000	$250,001 - $500,000	$500,001 - $1,000,000*	$1,000,001 - $5,000,000	$5,000,001 - $25,000,000	Over $50,000,000	Excepted Trust	Dividends	Interest	None (or less than $201)	$201 - $1,000	$1,001 - $2,500	$2,501 - $5,000	$5,001 - $15,000	$15,001 - $50,000	$50,001 - $100,000	$100,001 - $1,000,000*	Over $1,000,000*	Over $5,000,000		
1	George Mason University																							Salary 2010 7,500	
2	George Mason University																							Salary 2010 2,885	
3	Virginia College Savings Plan (VPEP) Benficiary: Child 1		X											X											
4	Virginia College Savings Plan (VPEP) Benficiary: Child 2		X											X											
5	Virginia College Savings Plan (VPEP) Benficiary: Child 3		X											X											
6																									
7																									
8																									
9																									

* This category applies only if the asset/income is solely that of the filer's spouse or dependent children. If the asset/income is either that of the filer or jointly held by the filer with the spouse or dependent children, mark the other higher categories of value, as appropriate.

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Do not complete Schedule B if you are a new entrant, nominee, or Vice Presidential or Presidential Candidate

Reporting Individual's Name	SCHEDULE B	Page Number
Feighery, Timothy J		4 of 8

Part I: Transactions

Report any purchase, sale, or exchange by you, your spouse, or dependent children during the reporting period of any real property, stocks, bonds, commodity futures, and other securities when the amount of the transaction exceeded $1,000. Include transactions that resulted in a loss.

Do not report a transaction involving property used solely as your personal residence, or a transaction solely between you, your spouse, or dependent child. Check the "Certificate of divestiture" block to indicate sales made pursuant to a certificate of divestiture from OGE.

None ☐

	Identification of Assets	Transaction Type (P, S, E)	Date (Mo., Day, Yr.)	Amount of Transaction ($)	Certificate of Divestiture
	Example: Central Airlines Common	J	2/1/99		
1					
2					
3					
4					
5					

*This category applies only if the underlying asset is solely that of the filer's spouse or dependent children. If the underlying asset is either held by the filer or jointly held by the filer with the spouse or dependent children, use the other higher categories of value, as appropriate.

Part II: Gifts, Reimbursements, and Travel Expenses

For you, your spouse and dependent children, report the source, a brief description, and the value of: (1) gifts (such as tangible items, transportation, lodging, food, or entertainment) received from one source totaling more than $260, and (2) travel-related cash reimbursements received from one source totaling more than $260. For conflicts analysis, it is helpful to indicate a basis for receipt, such as personal friend, agency approval under 5 U.S.C. § 4111 or other statutory authority, etc. For travel-related gifts and reimbursements, include travel itinerary, dates, and the nature of expenses provided. **Exclude** anything given to you by the U.S. Government; given to your agency in connection with official travel; received from relatives; received by your spouse or dependent child totally independent of their relationship to you; or provided as personal hospitality at the donor's residence. Also, for purposes of aggregating gifts to determine the total value from one source, exclude items worth $104 or less. See instructions for other exclusions.

None ☐

	Source (Name and Address)	Brief Description	Value
Examples	Nat'l Assn. of Bush Collectors, NY, NY	Airline ticket, hotel room & meals incident to national conference 6/15/99 (personal activity unrelated to duty)	$500
	Frank Jones, San Francisco, CA	Leather briefcase (personal friend)	$300
1			
2			
3			
4			
5			

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Reporting Individual's Name	SCHEDULE C	Page Number
Faighary, Timothy J		5 of 6

Part I: Liabilities

Report liabilities over $10,000 owed to any one creditor at any time during the reporting period by you, your spouse, or dependent children. Check the highest amount owed during the reporting period. Exclude a mortgage on your personal residence unless it is rented out; loans secured by automobiles, household furniture or appliances; and liabilities owed to certain relatives listed in instructions. See instructions for revolving charge accounts.

None ☒

	Creditors (Name and Address)	Type of Liability	Date Incurred	Interest Rate	Term if applicable	Category of Amount or Value (c) $15,001 - $50,000	$50,001 - $100,000	$100,001 - $250,000	$250,001 - $500,000	$500,001 - $1,000,000	$1,000,001 - $5,000,000	$5,000,001 - $25,000,000	$25,000,001 - $50,000,000	Over $50,000,000
Examples	First Dimrka Bank, Washington, DC	Mortgage on rental property, Delaware	1991	8%	25 yrs.									
	John Jones, 123 St., Washington, DC	Promissory note	1999	10%	on demand									
1														
2														
3														
4														
5														

*This category applies only if the liability is solely that of the filer's spouse or dependent children. If the liability is that of the filer or a joint liability of the filer with the spouse or dependent children, mark the other higher categories, as appropriate.

Part II: Agreements or Arrangements

Report your agreements or arrangements for: (1) continuing participation in an employee benefit plan (e.g. pension, 401k, deferred compensation); (2) continuation of payment by a former employer (including severance payments); (3) leaves of absence; and (4) future employment. See instructions regarding the reporting of negotiations for any of these arrangements or benefits.

None ☒

	Status and Terms of any Agreement or Arrangement	Parties	Date
Example	Pursuant to partnership agreement, will receive lump sum payment of capital account & partnership share calculated on service performed through 1/01.	Doe Jones & Smith, Hometown, State	7/05
1			
2			
3			
4			
5			
6			

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Reporting Individual's Name:	SCHEDULE D	Page Number
Feighery, Timothy J		[illegible] of [illegible]

Part I: Positions Held Outside U.S. Government

Report any positions held during the applicable reporting period, whether compensated or not. Positions include but are not limited to those of an officer, director, trustee, general partner, proprietor, representative, employee, or consultant of any corporation, firm, partnership, or other business enterprise or any non-profit organization or educational institution. Exclude positions with religious, social, fraternal, or political entities and those solely of an honorary nature.

None ☐

	Organization (Name and Address)	Type of Organization	Position Held	From (Mo., Yr.)	To (Mo., Yr.)
Examples	Nat'l Assn. of Rock Collectors, NY, NY	Non-profit education	President	6/93	Present
	Doe Jones & Smith, Hometown, State	Law firm	Partner	7/85	1/00
1	Oceanoco, Inc.	Corporation	Secretary & General Counsel	08/2008	7/2010
2	George Mason University	Non-profit education	Adjunct Professor of Law	09/2005	7/2010
3	American Bar Association	Professional association	Co-Vice-Chair, International Courts Committee	08/2008	7/2010
4	Riverside Gardens Citizens Association	Community association	Planning & Zoning Rep. to Mount Vernon Council of Citizens' Assocs.	09/2009	12/2009
5					
6					

Part II: Compensation in Excess of $5,000 Paid by One Source

Report sources of more than $5,000 compensation received by you or your business affiliation for services provided directly by you during any one year of the reporting period. This includes the names of clients and customers of any corporation, firm, partnership, or other business enterprise, or any other non-profit organization when you directly provided the services generating a fee or payment of more than $5,000. You need not report the U.S. Government as a source.

Do not complete this part if you are an Incumbent, Termination Filer, or Vice Presidential or Presidential Candidate.

None ☒

	Source (Name and Address)	Brief Description of Duties
Examples	Doe Jones & Smith, Hometown, State	Legal services
	Micro University (client of Doe Jones & Smith), Moneytown, State	Legal services in connection with university construction
1	George Mason University Law School	Adjunct Professor: taught two course (International Law and European Union Law) each calender year
2		
3		
4		
5		
6		

Prior Editions Cannot Be Used.

[illegible] Adobe Acrobat version 7.0.1 (11/01/2006)

AFFIDAVIT

I, TIMOTHY J. FEIGHERY, do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

11/23/2010 (DATE)

(NAME)

11/23/2010

(NOTARY)

GWENDOLYN D. CARTER
ANNE ARUNDEL COUNTY
MY COMM. EXP. 8/25/2012

Timothy J. Feighery
1701 Old Stage Rd
Alexandria VA 22308

January 6, 2010

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

I have reviewed the questionnaire I previously filed in connection with my nomination on November 15, 2010 to be the Chairman of the Foreign Claims Settlement Commission. Incorporating the additional information below, I certify that the information contained in that document is, to the best of my knowledge, true and accurate.

- The first line of the third paragraph on page 13 (relating to my teaching at Webster University) should read "two courses" rather than "two course."

- There has been no material change to my net worth during the period from November 15, 2010 to the present.

I thank the Committee for its consideration of my nomination.

Sincerely,

Timothy J. Feighery

Senator COONS. Thank you very much, Mr. Feighery, Ms. D'Agostino, Ms. Williams. All of us in public service are sustained by a broad network of friends and family, and I appreciate your particularly moving recognitions of the folks who have sustained you in your journey of service so far.

So let me begin then, if I might, with questions. Ms. D'Agostino and Ms. Williams, would you briefly describe your judicial philosophy, please, beginning with Ms. D'Agostino?

Ms. D'AGOSTINO. Well, Senator, my judicial philosophy is really quite simple. Firstly, a judge must follow at all times the rule of law. Second, it is very important, I think, for a judge to treat everyone who comes before him or her with great respect, irregardless of the individual's walk of life of station. And, third, I think that a judge must have an impartiality and an objectivity that is beyond reproach.

Senator COONS. Thank you, Ms. D'Agostino.

Ms. Williams.

Ms. WILLIAMS. Yes, Senator. The role of a judge, I believe, is to be a fair and impartial arbiter of any matter that comes before him or her. To commit yourself to this service, I think you start with a commitment to equal justice and due process and the rule of law and you treat everyone who comes before you with fairness and dignity and respect.

So I believe, as a judge, I would study the matter carefully, I would listen well to all parties and all litigants, and I would then attempt to apply the law in a fair and judicious manner for a just resolution of whatever came before me.

Senator COONS. Thank you, Ms. Williams.

Mr. Feighery, many folks are not familiar with the Foreign Claims Settlement Commission. If you could, please, briefly describe for us its role and what your role might be as chairman. I believe Senator Schumer gave us an introduction to it previously, but it certainly could not hurt for us to have a further explication of the point.

Mr. FEIGHERY. Thank you, Senator. Thank you for the question.

The Foreign Claims Settlement Commission is a quasi-judicial organization that takes the claims that are delegated to it either by Congress or by reference from the State Department and then decides those claims under the rule of law and under the carefully circumscribed claims settlement or other rules.

So it is very much—it has a long history in the United States and has greatly served the most worthy of our citizens, the U.S. victims of either terrorism of expropriation abroad or other matters.

So it has a very important role to continue to play, although it does play it quite under the radar.

Senator COONS. And next, if I might, would each of you just explain for us how the previous experiences you have had, whether as a trial advocate, as a public defender, or as someone who has served in a number of different claims commissions, how have the experiences you have had professionally prepared you to serve in the respective roles for which you have been nominated and how would you expect the role to change, as either Chairman or district court judge?

Ms. D'Agostino.

Ms. D'AGOSTINO. Well, Senator, over the course of the last 30 years, I have tried many, many cases to a conclusion and, along the way, I have also had an opportunity to settle many cases. I think I have learned a great deal about litigation, a great deal about bringing matters to a reasonable conclusion.

And as Senator Schumer was kind enough to point out during his introduction, I was able, along with another attorney in Albany, to organize a settlement of many cases in our community.

If I am fortunate enough to become a district court judge, I will bring the skills that I have learned over the last 30 years. I will attempt to treat everyone with great respect, and, hopefully, I would take all of my trial skills and my negotiating skills and bring those to the bench and be a very effective district court judge.

Senator COONS. Thank you, Ms. D'Agostino.

Ms. Williams.

Ms. WILLIAMS. Thank you, Senator. I have spent my entire career in the Federal court system as a Federal prosecutor, as a Federal defender, as a civil attorney, and as a public sector attorney, as a trial attorney, and now administrator of a medium-size law firm, and I believe the skill sets I have acquired in each of those roles would help me not only substantively, but in the administration of justice.

Senator COONS. Thank you, Ms. Williams.

Mr. Feighery.

Mr. FEIGHERY. Thank you, Mr. Chairman. I think my prior experiences both at the United Nations Compensation Commission, working with Special Master Ken Feinberg on the 9/11 Fund, and, also, my work at the State Department has prepared me to take on the role of the chairman, if I am so fortunate to be confirmed, in that I have worked in these claim funds and am familiar with the submission of claims, the organization of claims, the issues that go into resolving claims, the need to work within the regulatory or statutory framework that you are handed within that particular claims category or organization.

I think all of these, including the managerial experiences that I have had along the way in these particular programs, will help me, should I be fortunate enough to become Chairman of the Foreign Claims Settlement Commission.

Senator COONS. Thank you, Mr. Feighery. That is my first round of questions.

Senator GRASSLEY. Well, welcome to all of you. Glad to have you here.

Starting with Ms. Williams. You made some remarks before the Federal Bar Association in December 2005, "Interestingly, while we don't seem to have a problem using foreign nations to part people, there are those who do have a problem using foreign law to inform debates here, especially in regard to the death penalty."

This comment appears to be alluding to the Supreme Court decision in *Roper*. The Supreme Court, as you know, said the Eighth Amendment precluded execution of minors.

I do not want to dwell on the execution of minors, but I do want to dwell on the foreign law aspect. Do you think it is proper to look to foreign law to determine the meaning of the U.S. Constitution;

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and, if not, what did you mean in your statement about using foreign law to inform debate?

Ms. WILLIAMS. I do not believe, Senator, that foreign law has any place in making or interpreting constitutional provisions. I was using that as a juxtaposition to provoke thought in my audience for some of the events transpiring, which included use of foreign prisons to detain persons.

Senator GRASSLEY. It will be a follow-up, but I think you have already answered it, but let me be more specific.

In your view, is it ever proper for judges to rely on foreign law or the views of, quote-unquote, the world community in determining the meaning of the Constitution?

Ms. WILLIAMS. No, Senator, unless it is explicitly provided for in statute or perhaps in extradition matters where you must examine the reciprocity. It is not proper, no.

Senator GRASSLEY. On several occasions, you have made statements that appear to call into question certain practices of the prosecution of suspected terrorists.

For instance, in a speech you gave before the ACLU in 2003, you made a reference to "secret detention, secret lists of detainees, secret proceedings, secret evidence, and absolutely, positively, under no circumstances, the right to lawyer."

In a speech you gave in May 2008, you made similar remarks. You stated that you, "have never believed that I would practice in a time when people were detained indefinitely by the Government of the United States, held in secret, without access to lawyers."

In your view, what due process rights are required for foreign terrorists captured on the battlefield and detained outside the United States?

Ms. WILLIAMS. Well, Senator, let me first say that the Supreme Court, in *Hamdan* and *Hamdi*, has considered detention issues and they have told us what is not due process as opposed to a primmer for what is.

The ultimate question, though, would be, as a judge, how I would apply the law. My personal circumstance, however, is such that I would never preside over a terrorism case. My office has handled a terrorism matter and detainee matters, but because of my personal relationship with Mr. Mullaney, who is the chief of counterterrorism for the Department of Justice, I would recuse, as I have recused from all matters regarding terrorists or detainees.

Senator GRASSLEY. Could it be, as young as you are, though, that down the road 20 years, you might be involved in a terrorist case?

Ms. WILLIAMS. Hopefully, with some retirement for my partner, down the road 20 years, I may be involved and, as such, I would apply the law as it was handed down by the Supreme Court and the 11th Circuit and not deviate in any way.

Senator GRASSLEY. I have more questions to ask you, but I think I better move on and maybe submit questions in writing.

Mr. Feighery, I understand that there are currently a significant number of claims before the Federal Claims Settlement Commission that await adjudication.

Now, it may be that you have not studied this, so you may not be able to answer it, but if confirmed, how would you plan to

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prioritize claims and what will you—and then I suppose I am leading up to the point of how would you try to get rid of this backlog.

Mr. FEIGHERY. Thank you very much, Senator, for the question. I have not studied this. I am not privy to the amount of the backlog or the kinds of claims, and all I can tell you is I would do what I have always done, which is to work hard with the staff and work our way through this backlog.

And I recognize that this is very important and of great concern to the claimants, and so that would be my first priority, if I were confirmed.

Senator GRASSLEY. The commission operated on a budget for fiscal year 2010 of $2.1 million; for fiscal year 2011, the commission has requested an increase of $42,000. How will you ensure accountability and efficiency of the taxpayers' funds?

Mr. FEIGHERY. Well, the first thing I would do when I get in there is after understanding what the backlog is, is to have an understanding of where the money of the commission is spent and how it is spent and take whatever steps are necessary to make sure that the money we have is spent for the primary purpose of ensuring that American victims get their just compensation.

Senator GRASSLEY. Thank you. Why do you not go ahead?

Senator COONS. Thank you, Senator Grassley.

If I might, just one or two more questions from me. Ms. Williams, in your role as a Federal public defender, you have expressed, on some occasions, opposition to the severity of punishments contained in the sentencing guidelines, the Federal guidelines.

If confirmed, in serving as the district court judge, what deference would you give to the Federal sentencing guidelines?

Ms. WILLIAMS. Thank you, Senator. I, in my role as an advocate and a defender, identified shortcomings in a mandatory guideline system. As the chair is aware, the Supreme Court has stated—and all circuits, that I am aware of—in an advisory guideline system, you must start with an accurate calculation of the guidelines.

So it appears that courts everywhere have given significant deference to the guidelines, as it is a starting point, and I would adhere to that in any sentences I would render.

Senator COONS. Thank you very much, Ms. Williams.

Ms. D'Agostino, could you, just briefly, for us, describe the role that precedent plays for you in applying the law as a district court judge?

Ms. D'AGOSTINO. Yes, Senator. I believe that precedent must be followed. It is the role of the district court judge to apply the law, to look at the precedent, and it would be very, very important at all times to follow prevailing precedent.

Senator COONS. Thank you, Ms. D'Agostino.

Mr. Feighery, what are the biggest challenges facing the Foreign Claims Settlement Commission moving forward, should you serve as chairman?

Mr. FEIGHERY. Mr. Chairman, thank you for the question. I think Ranking Member Grassley pointed to it, which is the backlog of claims that have been noted several times, and that is something that is clearly the single biggest challenge of the commission.

We have got to work our way through that backlog as soon as possible, because these victims should not have to wait a day longer than absolutely necessary.

Senator COONS. What do you think are the most important resources or possible changes in structure operations that might address the backlog?

Mr. FEIGHERY. Well, again, I am not sure, not being there. But if I were to be confirmed, I will take a quick and hard look at the resources. And I know, from my prior experience, that human resources in this kind of work are the most valuable and necessary.

Senator COONS. Thank you, Mr. Feighery.

Senator Grassley.

Senator GRASSLEY. I would ask Ms. D'Agostino a couple of questions.

It is quite obvious that you have had a great deal of experience as a civil litigator and an excellent background in that area, and I have a question about your experience with criminal law and maybe you have a lot more than what we read about.

But if I am right, not having as much experience in criminal law, is there anything more that you could share with us about your legal background to ease any concerns about the lack of criminal law experience?

Ms. D'AGOSTINO. Senator Grassley, you are absolutely correct that I have spent the majority of my career, actually all of it, in the field of civil litigation.

With respect to criminal law, though, Senator, I would approach my preparation for this great honor, if I am to be a Federal court judge, the same way that I have approached my entire career.

I made a pledge to myself 30 years ago that I would never go into a courtroom unprepared. And if I do become a Federal district court judge, I will do everything in my power to immediately read everything that I can about criminal procedure. I will avail myself of all of the opportunities that exist for new judges to be schooled on these matters. And when I take the bench, if I do take the bench, I will make certain that I am prepared to handle the criminal aspect.

With respect to the rules of evidence and with respect to appropriate conduct in court, I think my vast civil experience will serve me well.

Senator GRASSLEY. You probably know that Senator Schumer and I have been advocates for cameras in the courtroom, and it looks like you have a little different view. I want to assure you that I would not vote against you just because you disagreed with us on cameras in the courtroom, but I would like to get your feeling on this.

I believe it would open the courts to the public and bring about greater accountability, and I think Senator Schumer would say the same thing. So I have sponsored the Sunshine in the Courtroom Act, giving judges discretion to allow media coverage of Federal court proceedings.

I understand, in the past, that you have expressed concern about allowing cameras in the courtroom for New York trial courts. You have been quoted in a 1989 Albany Times Union article, in which

you expressed concerns that the New York legislature would make permanent cameras in the courtrooms.

Specifically, you said, "If just one innocent person is convicted of a crime because of a wrong atmosphere in a courtroom, the system has failed."

My understanding is that since 1997, the State of New York no longer allows cameras in trial court proceedings. Did you have any firsthand experience with cameras in the courtroom during the period in which they were allowed in New York trial courts and, if so, how do you feel it affected your courtroom environment?

Ms. D'AGOSTINO. Thank you, Senator. Let me just begin by saying that my position on cameras in the courtroom has really evolved since 1988 or 1989. When cameras were first being used in New York, I was not certain if there were going to be appropriate safeguards to make sure that jurors did not feel uncomfortable with cameras, to make sure that witnesses did not feel uncomfortable.

As the years have gone on and I have seen cameras in the courtroom in so many other jurisdictions, I have come to believe that is very appropriate as long as appropriate safeguards are in place. I think it does open up the courtroom to the people.

If people can come in and watch a trial, and they often do in the cases that I try, I do not see a problem with people watching programs on Webcasts or television, and I really have not been asked since 1989 if my opinion has changed.

But certainly, over the years, as I have seen the great success with cameras in the courtroom, I have no problem with it whatsoever.

Senator GRASSLEY. I guess you answered two other questions all at once.

Here is something that is somewhat philosophical, but, to me, it has got some practical aspects of the type of people I want on the courts.

You probably remember that when Justice Stevens announced his retirement, the President said that he would select a Supreme Court nominee, "with a keen understanding of how the law affects the daily lives of American people."

Do you believe judges should ever base their decisions on desired outcomes, or I suppose the opposite of that would be solely based upon the law and the facts presented?

Ms. D'AGOSTINO. Senator, I believe that a judge must decide cases on the law and the facts and precedent and not with a view toward what the outcome should be or with a view toward creating new law. We must look at precedent. We must, as judges, follow the rule of law at all times.

Senator GRASSLEY. Can I draw the conclusion it is pretty clear to you that there would never be circumstances where your own values could be placed in making some sort of a decision?

Ms. D'AGOSTINO. I would never let my own values result in a decision, Senator. That would be inappropriate. My job would be to rely on precedent and to apply the appropriate rules of law, as I know them.

Senator GRASSLEY. Well, I will try one more time. And you are not answering unfavorably, obviously, but this will be the last attempt.

During her confirmation hearings, Justice Sotomayor rejected President Obama's so-called empathy standard, stating, "We apply the law to facts. We don't apply feelings to facts," and I assume you would say you agree with Justice Sotomayor.

Ms. D'AGOSTINO. I do completely agree with that statement, Senator.

Senator GRASSLEY. I still may have some questions for answer in writing.

Senator COONS. Thank you, Senator Grassley. There being no other Committee Members present, I having no further questions, we will hold the record open for a week. Members of the Committee can submit further written questions, as Senator Grassley indicated he might.

I also ask, without objection, to submit for the record a statement from Chairman Leahy on these judicial nominees and the judicial nomination process.

[The statement appears as a submission for the record.]

Senator COONS. Again, I want to thank all three of our nominees from the second panel today, congratulate you on your nominations, on your strong families, and on the strong careers you have already had in public service, and express my gratitude for your responses to our questions today and for your willingness to continue in your careers in public service.

Thank you all very much. We stand adjourned.

[Whereupon, at 3:50 p.m., the Committee was adjourned.]

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

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QUESTIONS AND ANSWERS

Responses of Mae A. D'Agostino
Nominee to be United States District Judge for the Northern District of New York
to the Written Questions of Senator Charles Grassley

1. **In 2008, President Obama said,**

> **"We need somebody who's got the heart, the empathy, to recognize what it's like to be a young teenage mom. The empathy to understand what it's like to be poor, or African-American, or gay, or disabled, or old. And that's the criteria by which I'm going to be selecting my judges."**

Do you agree with the President's statement?

Response: I do not believe that Judges can arrive at decisions based upon empathy. Judges must apply the law to the facts.

2. **Have you ever expressed an opinion regarding whether the death penalty constitutes cruel and unusual punishment under the Constitution? If so, what opinion did you express?**

Response: I have never expressed an opinion regarding whether the death penalty constitutes cruel and unusual punishment under the Constitution.

3. **What is your personal view regarding whether the death penalty is constitutional?**

Response: The Supreme Court has ruled that the death penalty does not constitute cruel and unusual punishment under the Constitution except under narrow circumstances as set forth in the cases of Roper v. Simmons; Atkins vs. Virginia and Kennedy vs. Louisiana.

4. **Do you believe that the death penalty is an acceptable form of punishment?**

Response: The Supreme Court has stated the death penalty is constitutional and I would follow that precedent.

5. **Do you hold any personal views that would preclude you from enforcing the death penalty?**

Response: I do not hold any personal views that would preclude me from enforcing the death penalty.

6. **Do you believe that when Congress enacts a law that is contrary to the Constitution or takes action not authorized by some enumerated power therein, a court must either invalidate the Congressional action or, where appropriate, limit its application on an "as applied" basis?**

Response: Yes.

7. What is the most important attribute of a judge, and do you possess it?

Response: I believe the most important attribute of a judge is the ability to objectively apply the law to the facts and to treat all litigants with respect and dignity. I do believe I have these attributes.

8. Please explain your view of the appropriate temperament of a judge. What elements of judicial temperament do you consider the most important, and do you meet that standard?

Response: I believe that a judge must always be objective and impartial. A judge must also have patience and a desire to treat all people who come before him or her with dignity and respect. I do believe I meet these standards.

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

Response: Yes.

10. At times, judges are faced with cases of first impression. If there were no controlling precedent that dispositively concluded an issue with which you were presented, to what sources would you turn for persuasive authority? What principles will guide you, or what methods will you employ, in deciding cases of first impression?

Response: In a case of first impression, if there was no controlling precedent, I would look at prior rulings of the Supreme Court and Appellate Courts to see if analogies could be made from those cases to the case of first impression. I would look carefully at the wording of the Constitution and any statutes that could in any way reflect on the issue of first impression.

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

Response: I would apply the decision of the Supreme Court or the Court of Appeals and not use my own judgment of the merits.

12. As you know, the federal courts are facing enormous pressures as their caseload mounts. If confirmed, how do you intend to manage your caseload?

Response: If confirmed, I would intend to utilize a scheduling order system to keep all of the cases before me on track to be resolved in a timely fashion. I would work closely

with the other judges in the Northern District of New York and the Court Clerks to move cases through the system expeditiously.

13. Do you believe that judges have a role in controlling the pace and conduct of litigation and, if confirmed, what specific steps would you take to control your docket?

Response: I do believe that judges have a role in controlling the pace and conduct of litigation. As mentioned above, I would use a scheduling order system so that attorneys and litigants are fully aware of certain deadlines in order to complete discovery, depositions and motions. Firm trial dates would be assigned following the completion of discovery.

14. Under what circumstances do you believe it appropriate for a federal court to declare a statute enacted by Congress unconstitutional?

Response: When Congress exceeds its authority, it is appropriate for federal courts to strike down an act of Congress.

15. Please describe with particularity the process by which these questions were answered.

Response: I received the questions on February 9, 2011. I prepared responses on February 10, 2011. I also consulted with representatives of the Department of Justice regarding my responses, and then finalized them before authorizing their transmittal to the Committee.

16. Do these answers reflect your true and personal views?

Response: Yes.

Responses of Timothy John Feighery to questions submitted by Senator Charles E. Grassley

Question 1: Did you perform any work related to the Libya Claims Program while you were working at the Department of State? If so, will you be required to recuse yourself from adjudicating claims under the Libya Claims Program?

Answer: I did not perform any work related to the Libya Claims Program while working at the Department of State.

Question 2: Every claim filed with the Foreign Claims Settlement Commission under the Libya Claims Program had been a cognizable claim in an Article III court under the Foreign Sovereign Immunities Act. However, the Libya Claims Resolution Act granted immunity to Libya for those claims. As a result, claims filed in Article III courts were dismissed for lack of subject matter jurisdiction. The Commission thus far has interpreted its jurisdictional rules narrower than the scope of jurisdictional rules in Article III courts. How do you plan to exercise the Commission's jurisdiction to treat victims whose claims were dismissed fairly?

a. With respect to the claimants who had cognizable claims in an Article III court prior to the passage of the Libya Claims Resolution Act, but whose claims fail to meet the Commission's jurisdictional requirements, do you believe those claimants will have a viable Takings claim against the United States in federal court?

Answer: If I am fortunate enough to be confirmed as Chairman of the Foreign Claims Settlement Commission, I would ensure that the Commission will continue to be guided by its authorizing statutes in carrying out its work of adjudicating claims to make certain that all the claims before it receive fair treatment. With regard to the Takings question, I have no knowledge of the nature of any of the cases before Article III courts that were dismissed pursuant to the Libya Claims Resolution Act. If I am confirmed, however, I plan to review all claims carefully and, consistent with its authorizing statutes, and commit to the fair treatment of all claimants before the Foreign Claims Settlement Commission.

Question 3: In addition to the Libya Claims Program, the Commission has one other active claims program, the Albanian Claims program. This program involves property expropriation claims that are decades old. Considering that there is a backlog of claims under the Libya Claims Program and that there are outstanding claims under the Albanian Claims Program, how do you plan to prioritize your resources?

Answer: It is my understanding that while the Commission continues to accept and adjudicate any valid claims under the Albanian Claims Program, the majority of the claims received to date under this program have been adjudicated. With this in mind, if I am fortunate enough to be confirmed as Chairman, I would review the Commission's resources and allocate them as appropriate to ensure the fair treatment of all claims filed with the Commission.

Responses of Caitlin Joan Halligan
Nominee to be United States Circuit Judge for the District of Columbia Circuit
to the Written Questions of Senator Tom Coburn, M.D.

1. **You spoke in favor of holding gun manufacturers liable for criminal acts committed with handguns. And, as Solicitor General of New York, you filed a lawsuit against gun manufacturers on behalf of your state. Do you believe there is a basis in current law for holding firearm manufacturers liable for crimes in which a handgun is used? If so, what is that basis?**

   Response: In 2003, I gave a speech at the New York Court of Appeals' annual "Law Day" ceremony, in the place of the New York State Attorney General. At the time, the Attorney General was pursuing a common law action against a number of gun manufacturers, wholesalers, and retailers. That lawsuit was dismissed on legal grounds by a New York State intermediate appellate court.

   In light of the New York state court's decision, there is no basis in New York law for holding firearm manufacturers liable for crimes in which a handgun is used. I am not familiar with the laws of any other state or federal law, and have no basis for an opinion regarding any such claims that might be brought in other jurisdictions.

2. **Some people refer to the Constitution as a "living" document that is constantly evolving as society interprets it. Do you agree with this perspective of constitutional interpretation?**

   Response: The Constitution does not constantly evolve. While the circumstances in which judges must apply the Constitution may change over time, the text of the Constitution remains the same.

3. **Justice William Brennan once said: "Our Constitution was not intended to preserve a preexisting society but to make a new one, to put in place new principles that the prior political community had not sufficiently recognized." Do you agree with him that constitutional interpretation today must take into account this supposed transformative purpose of the Constitution?**

   Response: No.

4. **Do you believe judicial doctrine rightly incorporates the evolving understandings of the Constitution forged through social movements, legislation, and historical practice?**

   Response: No.

5. **Do you believe empathy is an essential ingredient for arriving at just decisions and outcomes and should play a role in a judge's consideration of a case?**

   Response: No. A judge should decide cases based solely on the facts presented in a particular case and the applicable law.

6. **Is any transaction involving the exchange of money subject to Congress's Commerce Clause power?**

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Response: In *United States v. Lopez*, 514 U.S. 549, 558 (1995), the Supreme Court held that the Commerce Clause power allows Congress to regulate (1) "the channels of interstate commerce"; (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities"; and (3) "those activities that substantially affect interstate commerce." In *United States v. Morrison*, 529 U.S. 598, 608-09 (2000), and *Gonzales v. Raich*, 545 U.S. 1, 16-17 (2005), the Supreme Court again held that the Commerce Clause power allows Congress to regulate these three categories of activities. Under these Supreme Court precedents, an activity would have to fall within one of the three enumerated categories to be subject to regulation by Congress.

The Court did not suggest in *Lopez*, *Morrison*, or *Raich* that the test for determining if an activity lies within Congress' Commerce Clause power is whether it involves an exchange of money. In *Raich*, the Court upheld the application of the federal Controlled Substances Act to marijuana that was "a locally cultivated product that is used domestically rather than sold on the open market" as within Congress' Commerce Clause power. 545 U.S. at 32-33.

7. What limitations remain on the individual Second Amendment right now that it has been incorporated against the States?

Response: In *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008), the Supreme Court stated that "the right secured by the Second Amendment is not unlimited." It explained that "nothing in [the Court's] opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *Id.* at 626-27. The Court also held that the sorts of weapons protected by the Second Amendment were those "in common use at the time," a limitation "fairly supported by the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.'" *Id.* at 627.

In *McDonald v. City of Chicago*, 130 S.Ct. 3020, 3050 (2010), the Supreme Court held that "the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in *Heller*." The Court noted that, in *Heller*, it had recognized that the Second Amendment right was not unlimited, and stated that "incorporation does not imperil every law regarding firearms." *McDonald*, 130 S.Ct. at 3047.

a. Is it limited only to possession of a handgun for self-defense in the home, since both *Heller* and *McDonald* involved cases of handgun possession for self-defense in the home?

Response: In *District of Columbia v. Heller*, 554 U.S. 570, 627-28 (2008), the Supreme Court stated that the individual Second Amendment right extends to weapons that are "in common use at the time," and that "the inherent right of self-defense has been central to the Second Amendment right." The Court held that an "absolute prohibition of handguns held and used for self-defense in the home" is barred by the Second Amendment. *Id.* at 636. In *McDonald v. City of Chicago*, the Court stated that "[s]elf-defense is a basic right," and held that "the right to possess a handgun in the home for the purpose of self-defense . . . applies equally to the Federal Government and the States." 130 U.S. 3020, 3036, 3050 (2010).

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In *Heller*, the Court recognized that "since this case represents this Court's first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field." 554 U.S. at 635. While *McDonald* clarified that the Second Amendment right recognized in *Heller* applies to the states, it did not delineate the boundaries of that right.

8. **In *Roper v. Simmons*, 543 U.S. 551 (2005), Justice Kennedy relied in part on the "evolving standards of decency" to hold that capital punishment for any murderer under age 18 was unconstitutional. You filed a brief in that case that said: "if an enduring national consensus emerges that a punishment is truly excessive, and thus inconsistent with evolving standards of decency, the Eighth Amendment precludes its continued use."_Do you believe the Eighth Amendment, or any other amendment, should be analyzed by assessing the national consensus?**

Response: In *Atkins v. Virginia*, 536 U.S. 304, 316 (2002), the Supreme Court assessed whether "a national consensus has developed against [execution of mentally retarded criminals]." The Supreme Court again used that standard in deciding *Roper v. Simmons*. If confirmed, I would be obligated to follow the Supreme Court's precedents in analyzing an Eighth Amendment claim.

I am not aware of any case in which the Supreme Court has analyzed any amendment other than the Eighth Amendment by assessing the national consensus.

   a. **How are judges to assess the national consensus?**

      Response: In *Roper v. Simmons*, 543 U.S. 551, 564 (2005), the Supreme Court assessed the national consensus regarding execution of persons who were under the age of 18 at the time they committed their crimes by looking to "the enactments of [state] legislatures that have addressed the question." The Court also considered that "even in the 20 States without a formal prohibition on executing juveniles, the practice is infrequent," and that "a consistency of direction of change has been demonstrated" with respect to the practice. *Id.* at 564-66.

   b. **Should the original meaning of the Eighth Amendment evolve as polling trends change?**

      Response: No.

   c. **What about other amendments?**

      Response: The original meaning of other amendments would not evolve as polling trends change.

9. **I understand that the Supreme Court has ruled on this matter, but do you agree with Justice Kennedy's analysis in *Roper*?**

Response: As a nominee to an intermediate appellate court, I do not believe it would be appropriate for me to comment on precedent of the Supreme Court. If confirmed, I would be obligated to apply the Supreme Court's rulings.

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a. Do you agree that the Constitution's prohibition on cruel and unusual punishment "embodies a principle whose application is appropriately informed by our society's understanding of cruelty and by what punishments have become unusual?"

Response: Since *Trop v. Dulles*, 356 U.S. 86, 101 (1958), the Supreme Court has considered "evolving standards of decency that mark the progress of a maturing society" in determining the meaning of the Eighth Amendment. If confirmed, I would be obligated to apply Supreme Court precedent.

b. How would you determine what the evolving standards of decency are?

Response: I would follow the standard set forth by the Supreme Court, which has considered "objective indicia of consensus, as expressed in particular by the enactments of [state] legislatures that have addressed the question." *Roper v. Simmons*, 543 U.S. 551, 564 (2005).

c. Do you think that a judge could ever find that the "evolving standards of decency" dictated that the death penalty is unconstitutional in all cases?

Response: In *Gregg v. Georgia*, 428 U.S. 153 (1976), the Supreme Court has held that the death penalty is not per se unconstitutional. No lower court could hold otherwise.

d. What factors do you believe would be relevant to the judge's analysis?

Response: Please see my response to Question 9(c).

10. In your view, is it ever proper for judges to rely on contemporary foreign or international laws or decisions in determining the meaning of the Constitution?

Response: I believe that the U.S. Constitution should be interpreted with reference to domestic legal sources, not international laws or decisions. In numerous Eighth Amendment cases, "the [Supreme] Court has consistently referred to foreign and international law as relevant to its assessment of evolving standards of decency." *Roper v. Simmons*, 543 U.S. 551, 604 (2005) (O'Connor, J., dissenting). The Court has recognized, though, that international norms are not "controlling" in deciding whether a punishment violates the Eighth Amendment, "for the task of interpreting the Eighth Amendment remains our responsibility." *Id.* at 575.

a. Is it appropriate for judges to look for foreign countries for "wise solutions" and "good ideas" to legal and constitutional problems?

Response: I am aware of only one circumstance in which the Supreme Court has referred to the law of foreign countries, and that is with regard to the Eighth Amendment.

b. If so, under what circumstances would you consider foreign law when interpreting the Constitution?

Response: I would consider foreign law when interpreting the Constitution only as directed to do so by the Supreme Court.

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c. Do you believe foreign nations have ideas and solutions to legal problems that could contribute to the proper interpretation of our laws?

Response: The U.S. Constitution and U.S. laws should be interpreted with reference to domestic legal sources.

d. Would you consider foreign law when interpreting the Eighth Amendment? Other amendments?

Response: I would follow the precedent of the Supreme Court in interpreting the Eighth Amendment. The Supreme Court has not indicated that foreign law is in any way relevant to interpreting any other amendments of the U.S. Constitution.

11. You were a member of the Association of the Bar of the City of New York's Committee on Federal Courts when it published a February 6, 2004, report entitled "The Indefinite Detention of 'Enemy Combatants' and National Security in the Context of the War on Terror." And, you were one of 33 committee members who signed the report. There were four additional committee members who abstained from consideration of the report. Can you please describe your involvement with the Association, including the years you were a member, the meeting schedule (how many per month/year), approximately how many of those meetings you attended, and how many reports were issued during your tenure.

Response: I was a member of the Association of the Bar of the City of New York's Committee on Federal Courts from September 2003 to the summer of 2006. I do not recall or have any personal records of how frequently the Committee met, or how many of the Committee's meetings I attended.

In order to fully respond to the Senate Judiciary Committee's Questions for the Record, I contacted the Association, which has now provided me with all available minutes of the Federal Courts Committee's meetings during the period of my service. Those minutes indicate that the Committee met approximately 10 times per year. The Association had minutes for only 23 meetings, and those minutes reflect that I attended a total of five meetings during my tenure on the Committee.

In preparing my Senate Judiciary Committee Questionnaire, I reviewed the Association's files, which indicated that the Federal Courts Committee issued ten reports or public statements during my tenure on the Committee. All of these documents are listed in my response to Question 12(b) of the Senate Judiciary Committee questionnaire.

a. What is the Association's process for issuing a report?

Response: The website of the Association of the Bar of the City of New York states that committees are "strongly urged to develop reports, comment letters and other means of addressing important policy issues within their jurisdiction." It further states that pursuant to the bylaws of the Association, reports must be approved by the President of the Association.

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To fully respond to the Senate Judiciary Committee's Questions for the Record, I inquired about the Association's process for determining whether Bar Association Committee members have approved a report prior to its issuance. I was informed that the minutes will often reflect that a vote was taken on a report, although sometimes they will not, reflecting that there was a consensus on the report.

b. How does it seek and obtain members' signatures?

Response: With regard to the process for listing the names of Committee members at the end of a report, the Association's website states that "[a]t the end of the report the entire committee should be listed," and that "those who dissent or abstain from the report should be indicated." The Association further informed me that the process for listing names is "opt-out": the names of each Committee member are listed on a report, unless he or she has explicitly requested to be noted as abstaining or dissenting. A decision to abstain or dissent may be communicated informally, rather than in a Committee meeting, such as through e-mail, telephone call, or personal conversation.

c. How does one abstain from signing a report? What is the process?

Response: Please see my response to Question 11(b).

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Responses of Caitlin J. Halligan
Nominee to be United States Circuit Judge for the District of Columbia Circuit
to the Written Questions of Senator Lindsey Graham

The following questions concern *The Indefinite Detention of "Enemy Combatants": Balancing Due Process and National Security in the Context of the War on Terror*, a 2004 publication you signed as a member of the Association of the Bar of the City of New York, Committee on Federal Courts.

1. **The report stated, "the President's war power, coupled with his primacy in the realm of foreign affairs, rightly afford the President a wide discretion in prosecuting the war on terror abroad....But no such near total deference is appropriate with respect to the President's actions at home, where due process and the rule of law prevail." (p. ES-5)**

   Do you believe that the battlefield in the War on Terror extends to the United States?

   Response: I am not a student or practitioner in this area of law. I understand the relevant armed conflict to be the one recognized by Congress in the Authorization for Use of Military Force ("AUMF").

   The AUMF authorizes the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons." In *Hamdi v. Rumsfeld*, 542 U.S. 507, 516 (2004), the Supreme Court held that the AUMF gives the President authority to detain an individual who was "part of or supporting forces hostile to the United States or coalition partners in Afghanistan and who engaged in an armed conflict against the United States there." That authority covers all "nations, organizations, or persons associated with the September 11, 2001, terrorist attacks." *Id.* at 517.

   The AUMF does not include any geographic limitation on the reach of the authority it confers upon the President. The Supreme Court has not squarely addressed the outer boundaries of this authority. In construing the scope of the AUMF, the Court noted that it "answer[ed] only the narrow question before us: whether the detention of citizens falling within that definition is authorized." *Id.* at 516.

2. **The report said of Ali al-Marri, who was since convicted of conspiracy to provide material support to Al Qaeda, "al-Marri, a civilian in this country legally, seems suspected of providing logistical support for al Queda [sic] sleeper cells: presumably criminal activity, if proven, but not 'combatant' activity under any likely definition of the term." (p.70)**

   Do you consider material support for Al Qaeda to be "combatant" activity?

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Response: I do not know what the passage you refer to meant, but it seems to suggest that an alien who provides material support to Al Qaeda could not be subject to military detention as an "enemy combatant." In *Hamdi v. Rumsfeld*, 542 U.S. 507, 516 (2004), the Supreme Court held that an "enemy combatant" subject to detention under the Authorization for Use of Military Force includes any individual who was "part of or supporting forces hostile to the United States or coalition partners in Afghanistan, and who engaged in an armed conflict against the United States there." The Supreme Court noted in *Hamdi* that the precise contours of this category would be defined by the lower courts in subsequent cases, *id.* at 522 n.1, and the court to which I have been nominated has decided a number of cases on this point.

An individual who has provided material support for Al Qaeda would be subject to prosecution as a combatant, before a military tribunal. Under the Military Commissions Act of 2009, an individual (other than a "privileged belligerent") who "has purposefully and materially supported hostilities against the United States or its coalition partners" is subject to trial before a military commission. Such a person would also be subject to prosecution in federal court for violating a law that makes it a federal crime to "knowingly provid[e] material support or resources to a foreign terrorist organization." In *Holder v. Humanitarian Law Project*, 130 S.Ct. 2705 (2010), the Supreme Court upheld the prosecution of several individuals under this statute for providing "training" and "expert advice or assistance" to a foreign terrorist organization.

3. **The report argues that "the domestic war on terror seems closer to a law enforcement effort than to a military campaign." (p. 94)**

   Do you agree with this statement?

   Response: To the extent this statement suggests that the war on terror is either a military campaign or a law enforcement effort, that dichotomy is a false one. The Authorization for Use of Military Force recognizes the existence of an armed conflict arising out of the 9/11 terror attacks, and authorizes the President to use "all necessary and appropriate force" in that conflict. Law enforcement efforts – for example, prosecutions for violations of federal criminal statutes, as well as assistance from local law enforcement agencies -- are also a critical tool in fighting the war on terror.

4. **The report states that "the Joint Resolution of September 18, 2001, does not constitute authorization for indefinite enemy combatant detentions in the United States." (p. 110)**

   In your view, does the Authorization for Use of Military Force authorize combatant detention?

   Response: In *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), the Supreme Court held that the Authorization for Use of Military Force gives the President authority to detain individuals who have been properly designated "enemy combatants." The Supreme Court has stated

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that it understands the AUMF "to include the authority to detain for the duration of the relevant conflict, and our understanding is based on longstanding law-of-war principles." *Id.* at 521. The Court further noted that "[i]f the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel." *Id.*

5. **The report contends that "accused terrorists seized in the United States and citizens seized abroad must be tried (or released)." (p. 113)**

   Do you agree with this statement?

   Response: *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), held that the Authorization for Use of Military Force authorizes the President to detain in the United States a U.S. citizen captured on the battlefield as an "enemy combatant." The Supreme Court has held that "a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker." *Id.* at 533.

6. **The report argues that terrorism trials should take place in Article III court absent "exceptional circumstances" warranting the use of military commissions. (p. 152)**

   Do you agree that Article III courts should be used for terrorism trials absent "exceptional circumstances?" If so, please describe the "exceptional circumstances" that would compel trial by military commission.

   Response: I do not agree with this statement. The Military Commissions Act of 2009 does not restrict trials by military commission to cases presenting "exceptional circumstances."

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Responses of Caitlin J. Halligan
Nominee to be United States Circuit Judge for the District of Columbia Circuit
to the Written Questions of Senator Charles Grassley

1. **You were asked at your hearing about the report the Federal Courts Committee of the New York Bar entitled, *The Indefinite Detention of Enemy Combatants: Balancing Due Process and National Security in the Context of the War on Terror.* Though you are a signatory to this report, you indicated at your hearing that you were unaware of the report's existence until approximately the summer of 2010. In response to Senator Coons, you noted that the Supreme Court has held that indefinite detention is authorized by the Authorization to Use Military Force (AUMF) statute. You added, "But the bottom line is that the report does not represent my work. It does not reflect my views." Similarly, in response to a question from Senator Kyl you said, "I must say I do not really have clear views about a range of the other issues raised in the report, but I certainly do not agree with them and it does not reflect my work or my views." Aside from indefinite detention and the AUMF, please identify any other aspects of the report that you "do not agree with."**

   Response: I am not a student or practitioner in this area of law. Several of the assertions set forth in the report have been rejected by the Supreme Court. Most significantly, the report contended that there was no Congressional authorization for the President to detain Yaser Esam Hamdi, and suggested more generally that the Authorization for Use of Military Force ("AUMF") did not permit the detention of "enemy combatants" in the United States. Approximately four months after the Committee's report was issued, however, the Supreme Court held in *Hamdi v. Rumsfeld*, 542 U.S. 507, 517 (2004), that "Congress has in fact authorized Hamdi's detention through the AUMF." The Court further held that "[t]here is no bar to this Nation's holding one of its own citizens as an enemy combatant." *Id.* at 519. Additionally, the Court indicated that the authority conferred by the AUMF does not vary depending on the location where an "enemy combatant" is detained; the President's authority under the AUMF is the same, whether he chooses to detain an "enemy combatant" within the United States or elsewhere. *Id.* at 524.

   If any of the issues addressed in the Bar Association report were to come before me as a judge, I would not be influenced in any way by the report. A number of the legal questions discussed in the report may come before the court to which I have been nominated, and I do not feel it would be appropriate to opine on them.

   a. **Please explain the process by which the Committee issues reports. Please include a description of how the Committee selects topics for such reports, the drafting process, the publication process, whether and how the Committee communicates regarding any aspect of the process, and Committee members' involvement in any aspect of the process, including approval of and abstention from consideration of any such reports.**

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Response: The website of the Association of the Bar of the City of New York states that committees are "strongly urged to develop reports, comment letters and other means of addressing important policy issues within their jurisdiction." It further states that pursuant to the bylaws of the Association, reports must be approved by the President of the Association.

In order to fully respond to the Senate Judiciary Committee's Questions for the Record, I contacted the Association on February 11, 2011. The Association has now provided me with all available minutes from the Federal Courts Committee meetings that took place during the period of my service, and all available minutes from the one-year period preceding my membership, during which time the Committee was considering the February 2004 report. I also inquired about the Association's process regarding approval of and abstention or dissent from Association reports.

I was informed that the minutes will often reflect that a vote was taken on a report, although sometimes they will not, reflecting that there was a consensus on the report. With regard to the process for listing the names of Committee members at the end of a report, the Association's website states that "[a]t the end of the report the entire committee should be listed," and that "those who dissent or abstain from the report should be indicated." The Association further informed me that the process for listing names is "opt-out": the names of each Committee member are listed on a report, unless he or she has explicitly requested to be noted as abstaining or dissenting. A decision to abstain or dissent may be communicated informally, rather than in a Committee meeting, such as through e-mail, telephone call, or personal conversation.

b. In your questionnaire, you listed the above-mentioned report in response to Question 12(b), which asks for "any reports, memoranda or policy statements you prepared or contributed in the preparation of on behalf of any bar association, committee, conference, or organization of which you were or are a member." You added: "I do not recall personally contributing or participating in these reports other than as a member of the Committee approving them."

i. To clarify, did you in fact approve the above-mentioned report, as your answer to Question 12(b) appears to indicate?

Response: I included the February 2004 report in my response to Question 12(b) of the Senate Judiciary Committee questionnaire last summer because when I reviewed the reports or public statements in the Bar Association's files that had been issued by the Committee during the period of my membership, the report was included in that group. At the time of my review of the Bar Association's files this summer, I had no recollection of having seen the report previously. None of my personal files, emails, or calendars make any reference to the report.

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The minutes of the Committee's meetings indicate that in September 2002, the Federal Courts Committee first considered whether to prepare a report on some of the legal issues arising out of the September 11, 2001 terror attacks, and formed a subcommittee to draft such a report. The minutes further indicate that an outline of the report was circulated to Committee members in November 2002, and the report was discussed at the November 2002, and December 2002 Committee meetings. (The Association informed me that it does not have any minutes for meetings from January 2003 through June 2003.) I was not a member at any time during this period.

After I joined the Committee in September 2003, the Committee held meetings in September and October of 2003. I was absent from both of these meetings. According to the minutes, the Committee chair updated the Committee on the progress of the draft report at both meetings, and at the October 2003 meeting, stated that the report was "near completion."

The minutes indicate that I attended my first Committee meeting in November 2003. According to the minutes, there were four items on the agenda, including a presentation from a federal judge, who also responded to questions from the Committee on a variety of topics. The minutes note that the Committee "considered the draft report circulated by [the Committee chair] on 'enemy combatant' detentions and offered several suggestions for revising the draft report." The minutes indicate that I also attended the December 2003 meeting. According to the minutes, there were ten items on the agenda. The minutes note that the Committee chair told the Committee that the draft report on "enemy combatant" detentions would be revised to incorporate a case recently issued by the Second Circuit.

I was absent from the January 2004 meeting. According to the minutes, the Committee chair notified the Committee that the draft report "was almost complete" and that a proposed final draft would be circulated shortly. According to the minutes of the February 2004 meeting, which I did not attend, the Committee chair stated that the report had been released.

None of the minutes include any reference to a formal vote on the Committee's report. (By comparison, the minutes of the January 2004 meeting reflect a formal vote on a public statement regarding a proposed change to the Federal Rules of Civil Procedure.) Nor do the minutes reflect that a consensus on the report was reached at any particular point in time.

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The minutes do not include any information regarding precisely when, or how, drafts of the report were circulated to Committee members. I have no record or recollection of receiving or reading a draft of the report prior to its issuance, but it is quite possible that one was sent to me.

c. Please provide all documents, correspondence (including e-mail), or other materials between you and any other members of the Committee pertaining to the report.

Response: On February 11, 2011, the Association provided me with minutes of the Committee's meetings in response to my inquiry. These are the only documents, correspondence (including e-mail), or other materials that I have between myself and any other members of the Committee pertaining to the report. I have appended to a letter sent today under separate cover all of the Bar Association's minutes that I received which make any reference to the report. Because the minutes are deemed confidential by the Association, the Association has redacted certain information, none of which relates to me or to the report.

2. I asked you several questions regarding whether it is ever appropriate to rely on foreign law when interpreting the Constitution. Some who defend the Supreme Court's use of foreign law have attempted to draw a distinction between "relying" on foreign law, and merely using foreign law to "inform" our understanding of the U.S. Constitution.

a. Do you believe the Supreme Court was relying on foreign law when it reached its decisions in *Roper v. Simmons* (2005) or *Atkins v. Virginia* (2002)?

Response: *Atkins v. Virginia*, 536 U.S. 304, 312 (2002), states that in deciding whether a punishment violates the Eighth Amendment, the "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." In a footnote, the Court further stated that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved." *Id.* at 316 n.21. The Court notes that this factor, among others, "lends further support to our conclusion that there is a consensus among those who have addressed the issue." *Id.*

In *Roper v. Simmons*, 543 U.S. 551, 575 (2005), the Supreme Court considered international norms regarding imposition of the death penalty on individuals who were under 18 years of age at the time of their crimes. The Court stated that it "finds confirmation" in the practices of other nations, but acknowledged that those norms were not "controlling, for the task of interpreting the Eighth Amendment remains our responsibility." *Id.*

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b. Do you believe the Supreme Court's use of foreign law in *Roper* and *Simmons* was appropriate?

Response: As a nominee to an intermediate appellate court, I do not believe it would be appropriate for me to comment on precedent of the Supreme Court. If confirmed, I would be obligated to apply the Supreme Court's rulings.

c. Prior to her elevation to the Supreme Court, then-Judge Sotomayor gave a speech in which defended the Supreme Court's use of foreign law. She said, "we have looked in some Supreme Court cases to foreign law to help us decide our issues." She then cited *Roper* and *Lawrence v. Texas* as examples. She concluded by arguing, "I for one believe that if you look at the ideas of everyone and consider them and test them ... your own understanding will be better informed." Do you agree with then-Judge Sotomayor?

Response: I do not know what Justice Sotomayor meant by this statement. To the extent that she was suggesting that foreign law controls the meaning of the United States Constitution or statutes, the Supreme Court has held that it does not.

d. Do you believe it is appropriate for a judge to use foreign law to "inform" his or her interpretation of the U.S. Constitution?

Response: A judge should look to domestic legal sources in interpreting the United States Constitution – specifically, the text of the Constitution, the original intent of the framers, and governing precedent.

3. At your hearing, I asked you whether you personally agree that the Second Amendment protects an individual right to own and bear arms. You said, "The Supreme Court has been clear about that. Yes, it does protect individual rights to bear arms, Senator." I also asked whether you agree that the rights conferred under the Second Amendment are fundamental. In response you said, "That is clearly what the Supreme Court held and I would follow that precedent, Senator." While I appreciate your willingness to acknowledge and follow governing precedent, I am interested in what you personally believe.

a. Setting precedent aside, do you personally agree that the Second Amendment confers an individual right to bear arms?

Response: I am not personally familiar with this issue, and have never expressed an opinion on it. If confirmed, I would faithfully apply the Supreme Court's rulings in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 130 S.Ct. 3020 (2010), which hold that the Second Amendment confers an individual right to bear arms, and that this right is fully applicable to the States.

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b. If so, and again setting precedent aside, do you personally believe that the right is fundamental?

Response: I am not personally familiar with this issue, and have never expressed an opinion on it. If confirmed, I would faithfully apply Supreme Court precedent regarding the individual right to bear arms.

4. At your hearing, I asked whether you agreed with a quotation from Justice Scalia, where he said, "Every time the Supreme Court defines another right in the Constitution, it reduces the scope of democratic debate." You answered, "I think that courts should be very careful about striking down any statute that is enacted by a legislature." I appreciate the confusion, as this question immediately followed an exchange where we discussed when it is appropriate for a judge to strike down a statute as unconstitutional, but this answer did not address my question. Do you agree with Justice Scalia?

Response: I do not know the context in which Justice Scalia made this statement, or what he meant by "democratic debate"; I assume it might include legislative debate and action, as well as public discourse, on a particular topic.

The Supreme Court held in *Marbury v. Madison*, 5 U.S. 137, 177 (1803), that "[i]t is emphatically the province and duty of the judicial department to say what the law is." The legislative or public response to a decision by the Supreme Court cannot affect the Court's adherence to "the principle" established in *Marbury*: "that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument." *Id.* at 180.

a. Do you believe the Supreme Court reduced the scope of democratic debate when it decided *Roe v. Wade*?

Response: I do not know what Justice Scalia meant by "democratic debate." To the extent he was referring to state and federal legislative action, or to public discourse, regarding abortion, the question of how *Roe v. Wade* affected democratic debate is not an issue that I have studied sufficiently to form an opinion.

5. In *Keeping Faith with the Constitution*, co-authored by Ninth Circuit nominee Goodwin Liu, Pamela Karlan, and Christopher Schroeder, the authors wrote:

> **"interpreting the Constitution . . . requires adaptation of its broad principles to the conditions and challenges faced by successive generations. The question . . . is not how the Constitution would have been applied at the founding, but rather how it should be applied today . . . in light of changing needs, conditions, and understandings of our society."**

Do you agree or disagree with those statements?

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Response: Occasionally, judges are sometimes required to decide how the Constitution applies to circumstances which the framers could not have envisioned, and which the Supreme Court has not yet addressed. For example, a number of state and federal courts have considered how the Fourth Amendment's ban on unreasonable searches and seizures applies to surreptitious placement of a GPS device on a suspect's automobile. In such instances, the Supreme Court's precedent interpreting the meaning of the relevant constitutional provision should guide the decision of an inferior federal court. If a judge is faced with a question that is not resolved by precedent, the best way to interpret the provision is in accord with the text and original intent.

6. In response to Question 11(a) of your Questionnaire, you said,

> **"In December 2009, the American Constitution Society Board of Directors elected me to serve a board term beginning in 2010. I informed the organization prior to January 1, 2010, that I would not be able to serve as a director because I had accepted a position with the New York County District Attorney's Office that would preclude such participation."**

To clarify, at the time of your election, were you a member of the American Constitution Society?

Response: The American Constitution Society is a dues-paying organization. I was informed by the organization that because I have never paid membership dues, I was not a member.

7. You participated in *Massachusetts v. Environmental Protection Agency*. On the threshold matter of standing, the Majority opinion relaxed the normal standing requirements. The Court stated that because Massachusetts had a "stake in protecting its quasi-sovereign interests, the Commonwealth is entitled to special solicitude in our standing analysis."

a. Do you personally believe States should be treated differently than private parties for the purpose of standing?

Response: The Supreme Court held in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992), that a party invoking the power of a federal court must establish three elements: an "injury in fact" that is "concrete and particularized" and "actual or imminent"; "a causal connection between the injury and the conduct complained of"; and that it is "'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" In *Massachusetts v. Environmental Protection Agency*, 549 U.S. 497, 518 (2007), the Supreme Court stated that "[i]t is of considerable relevance that the party seeking review here is a sovereign State and not, as it was in *Lujan*, a private individual." The Court concluded that the standing submissions made by the petitioners pertaining to Massachusetts satisfied the requirements set forth in

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Lujan. *Id.* at 521. If confirmed, I would apply the Supreme Court's precedents regarding standing.

b. One of the purposes of standing is to weed out general grievances of harm that are better handled by policy makers and the legislative branch. For this reason, in his dissent, Chief Justice Roberts said, "the limitation of the judicial power to cases and controversies is crucial in maintaining the tripartite allocation of power set forth in the Constitution?" Do you agree with Chief Justice Roberts?

Response: Yes. Article III's limitation of the judicial power to "cases" and "controversies" is enforced through the standing requirements that the Supreme Court set forth in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). These requirements ensure that courts decide only questions that are presented to them by litigants who have a clear stake in the outcome of a dispute, rather than addressing questions of policy that are reserved to the political branches of government.

8. What is the most important attribute of a judge, and do you possess it?

Response: I believe that a firm commitment to the rule of law is the most important attribute of a judge, and I believe I possess this attribute. My strong conviction that our nation's legal system is one of its greatest strengths led me to law school almost twenty years ago, and I continue to believe that today.

9. Please explain your view of the appropriate temperament of a judge. What elements of judicial temperament do you consider the most important, and do you meet that standard?

Response: In my view, the most important elements of judicial temperament are fairness, impartiality, and respect for both litigants and fellow judges. I believe I meet that standard, and would conduct myself in accordance with it if confirmed.

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

Response: I am fully committed to following the precedents of the Supreme Court and giving them full force and effect.

11. At times, judges are faced with cases of first impression. If there were no controlling precedent that dispositively concluded an issue with which you were presented, to

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what sources would you turn for persuasive authority? What principles will guide you, or what methods will you employ, in deciding cases of first impression?

Response: If faced with a case of first impression, I would look first to the text of the provision at issue. If the plain language and structure of the text did not yield a clear answer, I would be mindful of the legislative purpose in enacting the provision. If any ambiguity still remained, I would look to precedent from other circuit courts, as well as to precedent from the Supreme Court and my own court interpreting analogous provisions.

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

Response: If confirmed, I would apply the precedent of the Supreme Court and the United States Court of Appeals for the District of Columbia Circuit.

13. Under what circumstances do you believe it appropriate for a federal court to declare a statute enacted by Congress unconstitutional?

Response: A federal court should declare a statute unconstitutional if it violates a provision clearly set forth in the U.S. Constitution, or transgresses the boundaries that the Constitution imposes on the powers of the legislative branch. In considering a constitutional challenge to a statute, an appellate judge should be guided by the precedent of the Supreme Court regarding any relevant constitutional provisions.

14. Under what circumstances, if any, do you believe an appellate court judge should overturn precedent within his or her own circuit?

Response: Only an *en banc* court can overturn precedent within a circuit.

15. Please describe with particularity the process by which these questions were answered.

Response: I drafted the answers to these questions. I discussed my answers with a staff member of the U.S. Department of Justice. I prepared my final answers.

16. Do these answers reflect your true and personal views?

Response: Yes.

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Responses of Caitlin Joan Halligan
Nominee to be United States Circuit Judge for the District of Columbia Circuit
to the Written Questions of Senator Jon Kyl

(1) You testified at your hearing that the listing of your name on the City Bar report ("The Indefinite Detention of 'Enemy Combatants': Balancing Due Process and National Security in the Context of the War on Terror," The Association of the Bar of the City of New York, Committee on Federal Courts) merely "reflects my membership on the committee" that issued the report (transcript, page 43).

(a) Is it your position that you didn't have the option of being shown as dissenting from the report?

Response: With regard to the process for listing the names of Committee members at the end of a report, the City Bar Association's website states that "[a]t the end of the report the entire committee should be listed," and that "those who dissent or abstain from the report should be indicated." On February 11, 2011, the Association further informed me that the process for listing names is "opt-out": the names of each Committee member are listed on a report, unless he or she has explicitly requested to be noted as abstaining or dissenting. A decision to abstain or dissent may be communicated informally, rather than in a Committee meeting, such as through e-mail, telephone call, or personal conversation.

(b) Is it your position that you didn't have the option of being shown as abstaining from the report?

Response: Please see my response to Question 1(a).

(2) During your hearing I asked you about an amicus brief that you filed in the *Al-Marri* case in which you argued that the United States lacks the authority to detain enemy combatants captured in the United States. Your name appears at the top of the list of lawyers on the brief. You responded that the brief "was filed on behalf of a client" and "does not represent [your] personal views." I later asked you if it was not the case that you were not required to file an amicus brief, and that you did so voluntarily. Your responded that "[t]hat was a decision made by the attorney general and any work I did on those briefs was under his direction."

I have since had occasion to review you *Al-Marri* brief again. It was not filed on behalf of the state attorney general. The named client is identified as various "legal scholars." Moreover, you are identified on the brief as an attorney for Weil, Gotshal, a private law firm, not as an attorney for the state attorney general.

(a) Were you or your law firm paid by the various "clients" on whose behalf the brief was submitted?

Response: No.

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(b) Is it still your position that you were required to participate in the writing of this brief — that your participation was not voluntary?

Response: I misunderstood your question as referring to amicus briefs I had filed during my tenure as New York Solicitor General, and I appreciate the opportunity to clarify my response. My participation in the amicus brief that was filed in the *Al-Marri* case was voluntary. My personal views are not relevant to legal arguments I make on behalf of my clients.

(3) Ali Al-Marri, the individual on whose behalf you filed the above-mentioned brief, eventually pleaded guilty to providing material support to the Al Qaeda terrorist organization. In his guilty plea, Al-Marri admitted to attending terrorist training camps in the years prior to the 9/11 terrorist attacks and receiving weapons training there. Al-Marri also admitted that he was instructed by Khalid Sheikh Mohammed, the organizer of the 9/11 attacks, to enter the United States just prior to those attacks and to await further instruction from Al Qaeda. Al-Marri entered the United States on September 10, 2011. Finally, Al-Marri admitted that while in the United States, he researched chemical weapons and communicated with Al Qaeda members.

Your amicus brief in the Al-Marri case argues that the United States lacks the authority to detain Al-Marri, who was in the United States legally, as an enemy combatant.

(a) The 19 individuals who carried out the 9/11 attacks also had entered the United States legally. Had the United States learned, prior to 9/11, that those men were Al Qaeda sleeper agents, is it your view that United States would have lacked the authority to detain them as enemy combatants?

Response: My personal views are not relevant to legal arguments I make on behalf of my clients.

The Supreme Court considered the question of the President's authority to detain "enemy combatants" after the 9/11 attacks in *Hamdi v. Rumsfeld*, 542 U.S. 507, 517-18 (2004), and held that the Authorization for Use of Military Force ("AUMF") authorized the President to detain "enemy combatants" "for the duration of the particular conflict in which they were captured." While *Hamdi* confirms the President's authority to detain "enemy combatants" after 9/11, your question concerns the authority of the United States to detain individuals as "enemy combatants" prior to 9/11, and thus prior to enactment of the AUMF.

I have not studied this area of law, but I believe Justice Jackson's concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) would provide the appropriate analytical framework for considering this issue. In his opinion, Justice Jackson sets forth three situations: first, "[w]hen the President acts pursuant to an express or implied authorization of Congress"; second, "[w]hen the President acts in the absence of either a congressional grant or denial of authority"; and third, "[w]hen

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the President takes measures incompatible with the expressed or implied will of Congress." *Id.* at 635-37.

The circumstances you raise would fall into the second category. There, the President "can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain." *Id.* at 637. With regard to this category of Presidential actions, the Court noted, "any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law." *Id.* The Supreme Court has not defined the precise boundaries of the President's Article II powers in the absence of congressional action. In *Hamdi* itself, the Supreme Court declined to answer the question of whether "the Executive possesses plenary authority to detain pursuant to Article II of the Constitution," that is, in the absence of explicit Congressional authorization, ruling only that the AUMF authorized Hamdi's detention. 542 U.S. at 516-17.

(b) Setting aside what your own view may be, wouldn't the position espoused in your Al-Marri brief also preclude the United States from detaining the 9/11 hijackers as enemy combatants?

Response: The amicus brief filed in the Al-Marri case was intended primarily to argue that other sources of legal authority for civil detention schemes did not resolve the question of whether the government could detain Al-Marri.

The Authorization for Use of Military Force ("AUMF") authorizes the President to detain "enemy combatants," as the Supreme Court recognized in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). There is no doubt that the 9/11 hijackers were exactly the type of people that Congress had in mind when it passed the AUMF. To the extent your question concerns the scope of the President's military detention authority prior to passage of the AUMF, the framework set forth by Justice Jackson in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), would provide guidance.

(c) Your brief emphasizes that Al-Marri was in the United States lawfully. In your view, would the same immunity from wartime detention also have extended to Al-Marri if he had been in the United States on a tourist visa? Or a student visa?

Response: The Authorization for Use of Military Force ("AUMF") authorizes the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons."

The AUMF does not include any geographic limitation on the reach of the authority it confers upon the President. The Supreme Court, however, has not squarely addressed the outer boundaries of this authority. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 516-518

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(2004). If the AUMF were construed to extend to the United States, it might be applied differently to citizens versus non-citizens, and with respect to non-citizens, to lawful permanent residents versus temporary visa holders. I have not studied this area of law closely, and I do not have any personal views on these issues. In addition, these questions might come before the court to which I have been nominated, and I do not think it would be appropriate to opine on them.

(d) In *Ex parte Quirin*, 317 U.S. 1 (1942), the Supreme Court upheld the detention and military trial of 8 Nazi saboteurs who have been captured inside the United States. All of them had received sabotage training at a school in Germany, including weapons training. In upholding the men's detention and military trial, the Supreme Court noted:

> **the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful. The spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals.**

(1) Is it your view that the United States also lacked the authority to detain the 8 Nazi saboteurs involved in the *Quirin* case?

Response: No.

(2) Setting aside what your view may be, wouldn't the position espoused in your Al-Marri brief also preclude the United States from detaining the Nazi saboteurs involved in the *Quirin* case?

Response: I have not studied *Ex Parte Quirin*, 317 U.S. 1 (1942), or this area of law. While the Supreme Court in *Quirin* explained that under the laws of war, combatants "are subject to capture and detention as prisoners of war by opposing military forces," 317 U.S. at 30-31, the central question in *Quirin* concerned the President's authority to try combatants before a military tribunal. With respect to the President's authority to detain "enemy combatants" in the current armed conflict with Al Qaeda and the Taliban, the Supreme Court held in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), that the Authorization for Use of Military Force confers such authority.

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Responses of Caitlin J. Halligan
Nominee to be United States Circuit Judge for the District of Columbia Circuit
to the Written Questions of Senator Mike Lee

1. **During the hearing, I asked you several questions regarding the Commerce Clause and the limits placed on Congress by the Constitution. You made clear that the context in which a statute arises is key to understanding whether Congress has transgressed its powers. You also stated that the courts have a responsibility to "police the boundaries that the Constitution sets forth," and that, when faced with a constitutional issue, a judge must "look to the text and attempt to understand the original intent behind those words." I understand that extraordinary circumstances are more likely to permit validation of legislative actions, but barring such circumstances, and apart from circumstances present in *Lopez* and *Morrison*, what are the limits on Congress's Commerce Clause powers?**

   Response: The Supreme Court set forth the limits on Congress' Commerce Clause power in *United States v. Lopez*, 514 U.S. 549 (1995). It held that Congress may regulate (1) "the channels of interstate commerce"; (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities"; and (3) "those activities that substantially affect interstate commerce." *Id.* at 558. The Court reiterated that the Commerce Clause power allows Congress to regulate only these three categories of activities in *United States v. Morrison*, 529 U.S. 598, 608-09 (2000), and *Gonzales v. Raich*, 545 U.S. 1, 16-17 (2005).

   In *Morrison*, the Court applied this framework to "reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce." 529 U.S. at 617.

   In addition to these limits on the scope of Congress' Commerce Clause powers, other provisions of the Constitution – for example, the First, Second, or Fourteenth Amendments – constrain Congress' power, even when its action is otherwise authorized by the Commerce Clause.

2. **Based on your understanding of the original intent behind the text of the Commerce Clause, do you believe that Congress has at any time overstepped its authority under that provision since *Wickard*, other than in *Lopez* and *Morrison*?**

   Response: Without the benefit of considering a particular statute, along with an accompanying legislative record that identifies Congress' reasons for enacting that law, it is difficult for me to identify a specific instance in which Congress has overstepped its authority under the Commerce Clause. The Supreme Court has not identified any other statutes that exceed Congress' Commerce Clause power. With respect to a particular statute, the answer would turn on whether Congress

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had acted to regulate the "channels" or "instrumentalities" of interstate commerce, or "activities that substantially affect interstate commerce." *United States v. Lopez*, 514 U.S. 549, 558 (1995).

3. **I asked you about a speech you once gave in which you suggested that the courts can be used as a tool of social progress. I recognize that you do not recall what you were thinking at the time. As far as your current understanding, do you believe that the courts play an active role in social progress? If so, in what respect?**

Response: In my view, the role of the courts is to decide discrete questions that come before them by analyzing the law and facts presented in each case. "Social progress," however one might define it, seems to me to concern questions of public policy. The Constitution leaves those issues to the political branches of the government, not the judiciary.

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Responses of Caitlin J. Halligan
Nominee to be United States Circuit Judge for the District of Columbia Circuit
to the Written Questions of Senator Jeff Sessions

1. **At your hearing, you testified that "the best way in which we can interpret [the Constitution] is to look to the text and the original intent of the Framers." You also testified that "if faced with a constitutional question, a judge has to look to the text and attempt to understand the original intent behind those words."**

   a. **Is it a fair reading of your testimony to say that the best way to interpret the Constitution is to interpret and construe its text in accord with the original intent underlying the text?**

      Response: Most questions regarding the proper interpretation of a constitutional provision can and should be resolved by reference to the precedents of the Supreme Court. If a judge is faced with a question of constitutional interpretation that is not resolved by precedent, the best way to interpret a provision is in accord with the text and underlying original intent.

   b. **Before your hearing, had you ever stated that "original intent" methodology was the best way to interpret the Constitution? If so, when and to whom?**

      Response: I do not recall expressing an opinion on this issue in the past.

   c. **By "original intent," were you referring to the originalist methodology that aims to discern what the Framers intended, as distinct from the original public meaning of a Constitutional provision at the time that it was ratified? If not, how do you define the phrase "original intent"?**

      Response: It is my understanding that the term "originalism" may be used to refer to either "original meaning" or "original intent." "Original meaning," as I understand it, refers to the public meaning of a constitutional provision at the time it was enacted; "original intent" looks to the framer's intent. I have not had the opportunity to explore this distinction in any depth, but both considerations may be relevant in discerning original intent.

   d. **Where the "original intent" is not sufficiently clear to settle whether a democratic enactment violates a provision of the Constitution, is it proper for a judge to resort to other resources to decide the meaning of the provision? If so, please explain your view on the best way for a judge to do so, including what other resources you view as relevant and important. If not, does the lack of clarity require that the judge defer to the democratic enactment?**

      Response: In the vast majority of cases, the Supreme Court's precedents will instruct an inferior federal court on the meaning of a constitutional provision.

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Even if Supreme Court precedent does not clearly settle whether a particular statute violates a provision of the Constitution, precedent should provide guidance on how the text and structure of the provision should be interpreted, and on the original intent of the framers. With respect to whether a judge should defer to a statute in the face of a lack of clarity, a duly-enacted statute is presumed constitutional.

e. Based on your current understanding of the original intent of the Fourteenth Amendment, do you believe that the original intent (however you define that phrase) of the Fourteenth Amendment supports recognition of a constitutional right to abortion?

Response: I have not studied the original intent of the Fourteenth Amendment in any depth. The Supreme Court held in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 846 (1992), that "[c]onstitutional protection" regarding abortion "derives from the Due Process Clause of the Fourteenth Amendment."

f. Based on your current understanding of the original intent of the Fourteenth Amendment, do you believe that the original intent (however you define that phrase) of the Fourteenth Amendment supports recognition of a constitutional right to same-sex marriage or of a constitutional obligation on the part of any government not to define marriage as the union of a man and a woman?

Response: The Supreme Court has not determined whether the original intent of the Fourteenth Amendment supports recognition of a constitutional right to same-sex marriage or a constitutional obligation on the part of any government not to define marriage as the union of a man and a woman. This question is the subject of active litigation in at least one federal circuit court, and presumably will be presented to the Supreme Court in the future.

2. You testified that the briefs you authored as New York's Solicitor General "were written and filed at the direction of the [New York] attorney general himself." Was it part of your job to make recommendations to the state attorney general regarding which cases the state should file *amicus* briefs in and which positions the state should take?

Response: My responsibility as New York Solicitor General was to assess the legal arguments relevant to a wide range of issues that were of interest to the New York Attorney General or members of his staff. My recommendations about any position the state should take in *amicus* briefs or other litigation were based on an analysis of the legal issues and the state's interest in the issue at hand, and generally reflected a synthesis of the views of others, including members of the Attorney General's staff and client agencies.

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3. **At your hearing, Senator Grassley asked whether you believe it is ever appropriate to rely on foreign law in deciding the meaning of the U.S. Constitution, to which you answered: "I do not, Senator."**

   a. **Before your hearing, had you ever stated that it is not appropriate to rely on foreign law in deciding the meaning of the U.S. Constitution? If so, when and to whom?**

   Response: I do not recall expressing an opinion on this issue in the past.

   b. **Justice Breyer has offered this reason in defense of the practice of invoking foreign court decisions in deciding the meaning of the Constitution:**

   > **"[I]n some of these countries there are institutions, courts that are trying to make their way in societies that didn't used to he democratic, and they are trying to protect human rights, they are trying to protect democracy. They're having a document called a constitution, and they want to be independent judges. And for years people all over the world have cited the Supreme Court, why don't we cite them occasionally? They will then go to some of their legislators and others and say, 'See, the Supreme Court of the United States cites us.' That might give them a leg up, even if we just say it's an interesting example."**

   Do you agree with this reason or find it persuasive? If so, why?

   Response: It may be useful for U.S. judges to share their views about the importance of an independent judiciary with judges and legislators from other nations, especially societies that are deepening their commitment to the rule of law. But an interest in bolstering the standing of judges in foreign nations does not provide any basis whatsoever for relying on the decisions of foreign courts in interpreting the meaning of the U.S. Constitution.

   c. **Justice Breyer has also offered this reason why the decision of a foreign court may be relevant in deciding the meaning of the Constitution:**

   > **"Well, it's relevant in the sense that you have a person who's a judge, who has similar training, who's trying to, let's say, apply a similar document, something like cruel and unusual or—there are different words, but they come to roughly the same thing—who has a society that's somewhat structured like ours. And really, it**

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isn't true that England is the moon, nor is India. I mean, there are human beings there just as there are here and there are differences and similarities.... And the fact that this has gone on all over the world and people have come to roughly similar conclusions, in my opinion, was the reason for thinking it at least is the kind of issue that maybe we ought to hear in our court, because I thought our people in this country are not that much different than people other places."

Do you agree with this reason or find it persuasive? If so, why?

Response: Even if other nations may share certain basic commitments to the rule of law and individual rights, the decisions of a foreign court are not relevant to interpreting the meaning of the U.S. Constitution.

4. **Did you provide your services *pro bono* in the *Al-Marri v. Spagone* matter?**

Response: Yes.

5. **Have you ever expressed an opinion on whether the death penalty is unconstitutional? If so, what was that opinion? If not, do you have such an opinion?**

Response: I do not recall expressing a personal opinion on this issue in the past. I defended the constitutionality of death penalty in New York State during my service as New York Solicitor General. The Supreme Court held that the death penalty is not per se unconstitutional in *Gregg v. Georgia*, 428 U.S. 153 (1976), and I would faithfully apply that precedent if confirmed.

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[CONFIDENTIAL - FOR COMMITTEE PURPOSES ONLY]

Minutes of the meeting of the Committee on Federal Courts of the Association of the Bar of the City of New York held at the House of the Association, 42 West 44th Street, New York, New York at 6:30 p.m. on September 4, 2002.

The following members were present:

Thomas H. Moreland, Chairman
Yehudis Lewis, Secretary
David JB Arroyo
Roger G. Brooks
Lewis Clayton
James L. Cott
Hon. Michael Dolinger
Martin D. Edel
Ahuva Genack
Barry S. Gold
Hon. Steven M. Gold
Lynne Troy Henderson
James B. Henly
Fred Taylor Isquith
Bruce Robinson Kelly
Clifford P. Kirsch (adjunct)
Roseann B. MacKechnie (adjunct)
Michael B. Mushlin
Lynn K. Neuner
Douglas J. Pepe
J. Douglas Richards
Amy Rothstein
Gail P. Rubin
James A. Shifren

The following members were absent:

Stuart M. Altman
Bernard W. Bell
Francisco E. Celedonio
Steven Froot
Alan R. Glickman
Stephanie J. Goldstein
Marc L. Greenwald
Fran M. Jacobs
Michael S. Kim
Mitchell A. Lowenthal
Richard W. Mancino
Peter C. Salerno
Alexandra A. Shapiro
Deborah Brown Steinberg
Hilary M. Williams
Victor Worms

Chairman Thomas H. Moreland called the meeting to order at 6:40 p.m.

Mr. Moreland began the meeting by having each of the Committee members introduce themselves.

The Committee approved the minutes of the June 26, 2002, meeting.

Mr. Moreland asked each of the adjunct members, Roseann MacKechnie, chief clerk of the United States Court of Appeals for the Second Circuit, Robert Heinemann, Clerk of the United States District Court for the Eastern District of New York, and Clifford Kirsch, District Executive for the United States District Court for the Southern District of New York, to report on recent court developments of interest. Ms. MacKechnie reported on, among other things, the video conferencing technology

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available in the Second Circuit and the Second Circuit's new web site. Mr. Kirsch reported on, among other things, the courtroom technology available in the Southern District, expected courtroom renovations and the availability of electronic filing. Mr. Heinemann reported on, among other things, the status of the Eastern District's building project and the clerk's office's efforts to bar code all case files. Mr. Moreland thanked Ms. MacKechnie, Mr. Kirsch and Mr. Heinemann for their reports.

Mr. Moreland next invited the subcommittee on Second Circuit Rule § 0.23 [redacted] to update the Committee on its efforts. Subcommittee chair [redacted] reported that the subcommittee submitted to the Advisory Committee on the Federal Rules of Appellate Procedure, copy to the Department of Justice, a report in support of the Department of Justice's proposed nationwide appellate rule governing the citation of summary orders. [redacted] The Committee agreed and decided instead to send to the Chief Judge Walker of the Second Circuit a copy of the subcommittee's report on the DOJ proposal. Mr. Moreland and [redacted] undertook to send the report.

Mr. Moreland reported that Committee members [redacted] volunteered to participate in the Association's Judiciary Committee in its review of the qualifications of [redacted] two nominees for the federal bench.

Mr. Moreland asked the subcommittee organizing a public forum to discuss the federal judicial nomination process [redacted] to update the Committee on its efforts. Subcommittee member ~~Roger Brooks~~ reviewed the various proposed panelists and moderators under consideration. [redacted] invited the Committee to suggest possible moderators. The date for the forum is December 9.

Mr. Moreland asked Committee Member [redacted] to discuss a possible study on mediation programs in our local federal courts. [redacted] suggested that the Committee compare the mediation program in place in the Southern District of New York with the program in place in the Southern District of Florida. [redacted] suggested that the mediation programs in our local federal courts might be more successful if their mediators, like the mediators in Florida, received compensation for their services. Mr. Moreland appointed [redacted] to chair a subcommittee for the purpose of exploring the scope of any such possible study and invited other members to join the subcommittee.

Mr. Moreland reported on a recent meeting he attended with eight other committee chairpersons concerning a possible coordinated project on issues arising from the legal aftermath of the events of September 11. Mr. Moreland noted that the issue of "court stripping" was the most logical area for the Committee to address. One

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Committee member questioned whether the Committee's time would be better spent focusing on procedural issues and not substantive legal issues. Mr. Moreland asked for volunteers to form a subcommittee to consider the scope of the committee's efforts in this area.

Finally, Mr. Moreland asked the Committee to consider other possible projects, including judicial salaries, nationwide rules governing admissions *pro hac vice*, and the practice of some federal judges of issuing speaking orders in the context of the later review of such judges for nomination to higher benches.

The meeting was adjourned at 7:45 p.m.

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[redacted]

Minutes of the meeting of the Committee on Federal Courts of the Association of the Bar of the City of New York held at the House of the Association, 42 West 44th Street, New York, New York at 6:30 p.m. on October 10, 2002.

The following members were present:

Thomas H. Moreland, Chairman	Fran M. Jacobs
Stuart M. Altman	Bruce Robinson Kelly
David JB Arroyo	Clifford P. Kirsch (adjunct)
Lewis Clayton	Roseann B. MacKechnie (adjunct)
Martin D. Edel	Douglas J. Pepe
Ahuva Genack	Amy Rothstein
Barry S. Gold	Gail P. Rubin
Marc L. Greenwald	Peter C. Salerno
Lynne Troy Henderson	Alexandra A. Shapiro
James B. Henly	Hilary M. Williams
Fred Taylor Isquith	Victor Worms

The following members were absent:

Yehudis Lewis, Secretary	Stephanie J. Goldstein
Bernard W. Bell	Michael S. Kim
Roger G. Brooks	Mitchell A. Lowenthal
Francisco E. Celedonio	Richard W. Mancino
James L. Cott	Michael B. Mushlin
Hon. Michael Dolinger	Lynn K. Neuner
Steven Froot	J. Douglas Richards
Alan R. Glickman	James A. Shifren
Hon. Steven M. Gold	Deborah Brown Steinberg

Chairman Thomas H. Moreland called the meeting to order at 6:35 p.m.

Mr. Moreland introduced [redacted] of the United States District Court for the Southern District of New York, and invited her to address the Committee. [redacted] reviewed the ongoing work of that Committee, focusing especially on the possible need for amendments to the Federal Rules of Civil Procedure dealing with the electronic discovery. After highlighting some of the key issues concerning electronic discovery, [redacted] urged the Committee to submit comments to the Advisory Committee on this subject pursuant to the request circulated by Professor Richard Marcus, consultant to the Committee.

[redacted] then responded to questions from the Chair and Committee members on several additional subjects. The Chair thanked [redacted] for her remarks.

XL3:221517.1

The Committee approved the minutes of the meeting held on September 4, 2002.

The Chair reported on the composition of the final panel for the Committee's December 9 forum on the federal judge nomination process:

Hon. Viet D. Dinh, Assistant Attorney General
Office of Legal Policy
United States Department of Justice

Professor Michael J. Gerhardt
Hanson Professor of Law
College of William & Mary School of Law
Author: *The Federal Appointments Process: A Constitutional and Historical Analysis*

Jeffrey Berman, Esq.
Chief Counsel for the Subcommittee on Administrative Oversight and the Courts
U.S. Senate Judiciary Committee

Professor Jeffrey Rosen
The George Washington University Law School
Legal Editor, *The New Republic*

[redacted] Chair of the subcommittee on mediation programs, reported on the subcommittee's work to date in defining a program of study. There are 44 mediation programs in the various federal district courts throughout the country, and 28 of them provide compensation for mediators. The subcommittee is considering how best to review the effectiveness of the local mediation programs, possibly by comparing them to one or more mediation programs in other district courts.

The Chair reported that the subcommittee on issues arising from the post-9/11 antiterrorism initiatives met in September and has another meeting scheduled for October 23. It expects to present to the Committee at its November 12 meeting a proposed scope for a project dealing with this subject.

[redacted] led a discussion on the subject of electronic discovery, which reviewed several of the issues that [redacted] had highlighted. The Committee resolved to work toward preparing a comment for the Advisory Committee on this subject.

[redacted] presented to the Committee the issue of sealed settlement agreements, and in particular the recent rules proposed in the District of South Carolina, and under consideration in at least one other federal district court, that would prohibit the sealing of settlement agreements approved by the court. After

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discussing some of the issues concerning this subject, the Committee agreed that the subcommittee should proceed with a view toward making a recommendation at the November 12 meeting concerning whether a report should be prepared on this subject.

[redacted] reported on the extent to which federal district court judges are assigned other than through random selection out of the wheel. Various situations were presented, [redacted] The issue of how to determine when a new case is related to a pending case, and therefore to be assigned to the judge pending over the latter, was also discussed. The Committee will discuss this subject further at its next meeting.

The Committee briefly discussed the issue of federal judges pay and the possible initiatives to eliminate the present counterproductive linking of the judges' pay with that of Congress. The Chair stated that [redacted] had agreed to spearhead the Committee's efforts in this area.

The meeting was adjourned at 8:15 p.m.

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[CONFIDENTIAL – FOR COMMITTEE PURPOSES ONLY]

Minutes of the meeting of the Committee on Federal Courts of the Association of the Bar of the City of New York held at the House of the Association, 42 West 44th Street, New York, New York at 6:30 p.m. on November 12, 2002.

The following members were present:

Thomas H. Moreland, Chairman
Yehudis Lewis, Secretary
Stuart M. Altman
Francisco E. Celedonio
Lewis Clayton
Barry S. Gold
Lynne Troy Henderson
James B. Henly
Robert Heinemann (Adjunct)
Fred Taylor Isquith
Michael S. Kim
Bruce Robinson Kelly
Clifford P. Kirsch (adjunct)
Richard W. Mancino
Michael B. Mushlin
Amy Rothstein

The following members were absent:

David JB Arroyo
Bernard W. Bell
Roger G. Brooks
James L. Cott
Hon. Michael Dolinger
Martin D. Edel
Steven Froot
Ahuva Genack
Alan R. Glickman
Hon. Steven M. Gold
Stephanie J. Goldstein
Marc L. Greenwald
Fran M. Jacobs
Mitchell A. Lowenthal
Roseann B. MacKechnie (adjunct)
Lynn K. Neuner
Douglas J. Pepe
J. Douglas Richards
Gail P. Rubin
Peter C. Salerno
Alexandra A. Shapiro
James A. Shifren
Deborah Brown Steinberg
Hilary M. Williams
Victor Worms

Chairman Thomas H. Moreland called the meeting to order at 6:35 p.m.

Mr. Moreland introduced [redacted] of the United States District Court for the Southern District of New York, and invited him to address the Committee. [redacted] discussed, among other things, the importance of civility and brevity to effective advocacy. [redacted] accepted questions from the Committee on these and other topics and invited members of the bar to submit suggestions on ways to improve the federal courts system. Mr. Moreland thanked [redacted] for his remarks.

KL3:222205.1

The Committee approved the minutes of the meeting held on October 10, 2002.

Mr. Moreland urged members to attend the Committee's December 9 forum on the federal judge nomination process and reported that [redacted] has been approached to serve as moderator.

[redacted], Chair of the subcommittee on mediation programs, reported on the subcommittee's work to date in defining a program of study. [redacted] proposed studying whether paid mediators were more effective in settling cases than unpaid mediators, funding for ADR programs and the effect of ADR on the declining trial rate in the federal courts system. The Committee authorized the subcommittee to explore all of these issues. The subcommittee will update the Committee on its progress at the next meeting.

Mr. Moreland asked the Committee to reflect on which issues the subcommittee on the post-9/11 antiterrorism initiatives should emphasize in its report, referencing the outline attached to the agenda.

Mr. Moreland also reported that the subcommittee on electronic discovery was in the process of gathering information for its proposed comment to the Advisory Committee.

On behalf of the subcommittee on sealed settlement agreements, subcommittee Chair [redacted] recommended against preparing a report on the subject. The subcommittee does not believe there is a perceived problem with respect to our local federal courts and the frequency of sealing settlement agreements. There was no dissent from the subcommittee's recommendation.

On behalf of the subcommittee on random selection of judges, subcommittee [redacted] also recommended against submitting a proposed comment on the subject. Mr. Moreland asked the subcommittee to consider whether an informational report on the subject would be valuable to practitioners. The Committee will discuss this subject further at its next meeting.

The Committee briefly discussed the Criminal Advocacy Committee's request that we undertake a joint project to consider possible changes to certain court rules affecting criminal actions. [redacted] has volunteered to work on this project. Once [redacted] has a clearer sense of the merit of the proposed changes the Committee will discuss whether it wishes to proceed with the joint project.

Finally, Mr. Moreland ask the Committee members to consider whether the Committee should sponsor a presentation or debate by Kenneth Starr and Martin Garbus on their respective recently published books on the United States Supreme Court.

The meeting was adjourned at 8:05 p.m.

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[CONFIDENTIAL – FOR COMMITTEE PURPOSES ONLY]

Minutes of the meeting of the Committee on Federal Courts of the Association of the Bar of the City of New York held at the House of the Association, 42 West 44th Street, New York, New York at 6:30 p.m. on December 18, 2002.

The following members were present:

Thomas H. Moreland, Chairman
David JB Arroyo
Roger G. Brooks
James L. Cott
Martin D. Edel
Ahuva Genack
Hon. Steven M. Gold
James B. Henly
Michael B. Mushlin
Lynn K. Neuner
Amy Rothstein
Gail P. Rubin
Peter C. Salerno
Deborah Brown Steinberg
Victor Worms

The following members were absent:

Yehudis Lewis, Secretary
Stuart M. Altman
Bernard W. Bell
Francisco E. Celedonio
Lewis Clayton
Hon. Michael Dolinger
Steven Froot
Alan R. Glickman
Barry S. Gold
Stephanie J. Goldstein
Marc L. Greenwald
Robert Heinemann (adjunct)
Lynne Troy Henderson
Fred Taylor Isquith
Fran M. Jacobs
Bruce Robinson Kelly
Michael S. Kim
Clifford P. Kirsch (adjunct)
Mitchell A. Lowenthal
Roseann B. MacKechnie (adjunct)
Richard W. Mancino
Douglas J. Pepe
J. Douglas Richards
Alexandra A. Shapiro
James A. Shifren
Hilary M. Williams

Chairman Thomas H. Moreland called the meeting to order at 6:40 p.m.

The Committee approved the minutes of the meeting held on November 12, 2002.

Mr. Moreland inquired whether any members of the Committee had reviewed the electronic filing procedures that had been published by the Southern District since the last Committee meeting. After some discussion, Mr. Moreland said he would distribute a copy of the procedures so that the Committee could determine whether any comment on them was in order.

Mr. Moreland reported on the December 9 forum sponsored by the Committee dealing with the role of ideology in the nomination and confirmation of

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federal judges. He reported that the forum was a success. Bernard Bell served as the able moderator, and all four panelists made noteworthy contributions to the discussion. He expressed disappointment, however, at the fact that relatively few members of the Committee had attended the forum, though the overall attendance was satisfactory.

The Committee next turned to a review of the proposed letter dealing with the pay of federal judges. Subcommittee Chair [redacted], and subcommittee member [redacted], led a discussion of the letter during which various proposed changes were made to what all agreed was an excellent draft. The Committee authorized the subcommittee and the Chair to finalize the letter for submission to the President of the Association.

The Chair then asked [redacted] to report on her experience as a counsel for a number of the claimants to the Federal Victims Compensation Fund, and to give her observations concerning the operations of the Fund generally. [redacted] reported that there was a serious shortage of attorneys to handle claims, with something like 500 out of the 700 claims filed to date having been filed *pro se*. These representations are challenging, and require considerable trusts and estates and tax work in addition to a litigator's skill of presenting the merits of a claim. Some members of the Committee commented that it would seem that these cases would be well suited to representation by some of the large firms, with their various specialty departments contributing to the representation. The Chair indicated he would make some phone calls to try to determine whether the Association should be attempting to do more to increase the numbers of attorneys and law firms handling these claims.

The Chair next called on [redacted], Chair of the Subcommittee on Mediation Programs, to update the Committee on the subcommittee's proposed project. [redacted] led a discussion as to possible issues with respect to the local mediation programs, their utilization and effectiveness. She said there was a dearth of available statistics concerning the programs, and thus the subcommittee's report necessarily would be of a more descriptive nature. Comments from members of the Committee were to the effect that the nature of the Eastern District and Southern District programs, and how particular cases were selected or not selected for mediation, was not well known and might benefit from greater discussion within the Bar. [redacted] commented on the role of magistrate judges in conducting settlement conferences, and on the differences between such settlement conferences and mediations. Various members of the Committee commented on their experiences with respect to mediations in the local courts and in other parts of the country, there appearing to be a wide range of mediation programs and which vary widely in their effectiveness. The subcommittee will report back at the next meeting of the Committee.

The Chair reported that the Redbook was nearing completion, there being only one small segment of it remaining to be finalized.

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The Chair reported that the subcommittee working on the report related to September 11 terrorism issues was at work and hoped to have a draft report ready within the next two months.

The Chair reported that at the Committee's next meeting, the agenda will principally be to hear from a guest speaker who can speak with considerable insight about the September 11-related issues. Our guest will be John Cooke, Director of Education of the Federal Judicial Center, who has spoken and written on prosecutions of pros and cons of using the federal courts, as compared with tribunals and other forums, in the context of accused terrorists or "enemy combatants".

The meeting was adjourned at 7:55 p.m.

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[CONFIDENTIAL – FOR COMMITTEE PURPOSES ONLY]

Minutes of the meeting of the Committee on Federal Courts of the Association of the Bar of the City of New York held at the House of the Association, 42 West 44th Street, New York, New York at 6:30 p.m. on September 4, 2003.

The following members were present:

Thomas H. Moreland, Chairman
Amy Busa, Secretary
Jill S. Abrams
Stuart M. Altman
David JB Arroyo
Carmine D. Boccuzzi
Eric O. Corngold
James L. Cott
Hon. Michael Dolinger
Martin D. Edel
Barry S. Gold
Rita W. Gordon
Marc L. Greenwald
Robert Heinemann (adjunct)
Lynne Troy Henderson
Lowell Johnston
Bruce Robinson Kelly
Clifford P. Kirsch (adjunct)
Roseann B. MacKechnie (adjunct)
Michael B. Mushlin
Katherine Huth Parker
Amy Rothstein
Gail P. Rubin
Peter C. Salerno
James A. Shifren
Victor Worms

Also present as a guest was [redacted], U.S. District Judge for the Southern District of New York.

The following members were absent:

Francisco E. Celedonio
Lewis Clayton
Thomas A. Dubbs
Alan R. Glickman
Thomas H. Golden
Caitlin J. Halligan
Fran M. Jacobs
Lynn Mary Kelly
Lynn K. Neuner
Douglas J. Pepe
J. Douglas Richards
Wendy H. Schwartz
Alexandra A. Shapiro
Ellen B. Unger
Alan Vinegrad
Hilary M. Williams

Chairman Thomas H. Moreland called the meeting to order at 6:45 p.m.

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Mr. Moreland welcomed new members and proposed that yearly dinner dues would be $225 for those in private practice and $155 for those in public service or academia, which was approved.

As an informational item, Mr. Moreland noted the Committee's letter to Congress supporting legislation to implement the Volcker Commission recommendations on judicial salaries.

Mr. Moreland introduced [redacted] U.S. District Judge for the Southern District of New York, who discussed the pending institution in the S.D.N.Y. of an electronic case filing system and his impressions of Congress's attempt to lower the number of downward departures in sentencing. [redacted] responded to questions from the Committee on a variety of topics. Mr. Moreland thanked [redacted] for his remarks.

Mr. Moreland asked adjunct member Clifford Kirsch to summarize significant developments in the Southern District of New York. Mr. Kirsch reported that the Southern District was poised to implement Electronic Case Filing in November, 2003, which will also include a modification of the criminal electronic filing system. Mr. Kirsch noted that a floor vote was expected soon on three potential new judges to fill vacancies. Mr. Kirsch stated that a $13,505,000 bill was sent to the Office of Management and Budget (OMB) to modernize the old courthouse at 40 Foley Square, for 2005. Once the project begins, the building will be vacated with all judges relocated to 500 Pearl Street and staff relocated to leased space. Mr. Kirsch has received a five year estimate from the General Services Administration for completion. The Circuit is also seeking a new facility in Middletown to coordinate the Northern District of New York. Mr. Kirsch explained that the Judiciary Budget may be under continuing resolution and that an 11% cut in appropriations is expected, which will impact staffing and may cause the inability to fill vacancies. Finally, Mr. Kirsch reported that new civil filings in the Southern District were down this year, a decrease partially caused by the high number of cases last year from removals, the IPO cases, and cases relating to the attack on the World Trade Center. As for commercial cases, the Southern District reports that new filings are steady and similar to the amount last year.

Adjunct member Robert Heinemann summarized significant developments in the Eastern District of New York. Mr. Heinemann noted that although the Eastern District did not make Electronic Case Filing mandatory, it will do so soon. Currently 25% of the civil docket uses ECF. As for judicial vacancies, the Eastern District still has three vacancies with the potential that one will be filled soon. Mr. Heinemann predicts that the budget and resulting staffing decisions will be challenging. There are also space concerns in Brooklyn and more money is needed to complete the expansion of the Brooklyn courthouse and the renovation of the Post Office building for the Bankruptcy Court. The current estimate is that these projects will be completed in the latter part of 2004.

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Adjunct member Roseann MacKechnie updated the Committee on recent events in the Second Circuit. Judge Fred Parker passed away, resulting in a new vacancy. Judges Raggi and Wesley were recently sworn in to fill vacancies left by Judges Kearse and Leval assuming senior status. The Circuit is planning for a renovation at 40 Foley Square and has also used surplus money to invest in scanning machines to tie into ECF. The Second Circuit has updated its website and is using Pacer. The Circuit is again reviewing video conferencing. The reviews have been mixed, with some expressing concern that the technology may not be as good as it could be. As head of the CJA and pro bono group, Judge Sotomayor is developing a plan for attorneys to take pro bono Second Circuit appeals, especially immigration appeals. Recently, the Circuit has faced enormous growth in its immigration appeals, which are now 36% of the docket, up from 12-14%. There are 600-700 immigration cases awaiting conferencing. Ms. MacKechnie also estimates that the Circuit will soon face a greater increase in habeas corpus appeals from the Eastern District, as Judge Weinstein is quickly deciding these cases.

Mr. Moreland next updated the Committee on pending projects, and encouraged any members who wished to volunteer to contact him.

The Committee sent a letter favoring the national rule on citations to unpublished Circuit court opinions. The Advisory Committee on the Federal Rules of Appellate Procedure has published a proposed rule (32.1) to prohibit Circuits from preventing citations to unpublished opinions. The proposed rule does not suggest what weight a court should give such unpublished opinions. Mr. Moreland noted that the Committee should comment on the proposed rule.

The Redbook is nearing completion, but two volunteers are needed to assist the project.

[redacted], chair of the subcommittee on mediation programs, reported that interviews are underway with the Southern District Judges and will soon be initiated with Judges in the Eastern District. Four new subcommittee members have been added to help interview.

The subcommittee on issues arising from post-9/11 anti-terrorism initiatives is working on a draft report, which it hopes to submit to the Committee in October. Mr. Moreland also noted that the Association of the Bar of the City of New York filed an *amicus* brief in the *Padilla* interlocutory appeal.

The Committee will be addressing the Federal Sentencing Guidelines controversy, in particular the recently imposed requirement that the Attorney General submit a report to the House and Senate Judiciary Committees when a district court grants a downward departure in any case other than one involving a downward departure for substantial assistance. [redacted] have agreed to serve as a subcommittee to consider this subject.

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Possible new projects were then discussed. [redacted] inquired whether, in order to lessen the cost of commercial cases, there should be a simplified set of federal rules for parties to insert by reference in contracts. The perceived diversion of commercial cases from federal court to either state court or ADR venues prompted this concern. A number of committee members, however, questioned why the diversion of commercial cases to ADR was not a positive outcome.

[redacted] proposed studying whether there was possible interference with U.S. foreign affairs by litigation brought under Alien Tort Claims Act and/or principles of universal jurisdiction.

The third possible project is to evaluate the need for additional resources in the Court of Appeals to cope with the increased volume of immigration deportation cases, and/or to examine the revised procedures of the Board of Immigration Appeals that has created this increased volume.

Finally, the Committee may address whether investigative detentions are being improperly employed under the material witness statute, 18 U.S.C. § 3144.

The meeting was adjourned at 8:05 p.m.

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[CONFIDENTIAL – FOR COMMITTEE PURPOSES ONLY]

Minutes of the meeting of the Committee on Federal Courts of the Association of the Bar of the City of New York held at the House of the Association, 42 West 44th Street, New York, New York at 6:30 p.m. on October 8, 2003.

The following members were present:

Thomas H. Moreland, Chairman	Clifford P. Kirsch (adjunct)
Amy Busa, Secretary	Roseann B. MacKechnie (adjunct)
Carmine D. Boccuzzi	Lynn K. Neuner
Francisco E. Celedonio	Douglas J. Pepe
Hon. Michael Dolinger	Amy Rothstein
Thomas A. Dubbs	Gail P. Rubin
William C. Fredericks	Peter C. Salerno
Thomas H. Golden	Wendy H. Schwartz
Rita W. Gordon	Ellen B. Unger
Marc L. Greenwald	Alan Vinegrad
Lynn Mary Kelly	Victor Worms

Also present as guests were Steve Carlson and Kathy Moccio of Dorsey & Whitney LLP.

The following members were absent:

Jill S. Abrams	Fran M. Jacobs
Stuart M. Altman	Lynne Troy Henderson
David JB Arroyo	Lowell Johnston
Lewis Clayton	Bruce Robinson Kelly
Eric O. Corngold	Hon. Joan B. Lobis
James L. Cott	Michael B. Mushlin
Martin D. Edel	Katherine Huth Parker
Barry S. Gold	Alexandra A. Shapiro
Caitlin J. Halligan	James A. Shifren
Robert Heinemann (adjunct)	Hilary M. Williams

Secretary Amy Busa called the meeting to order at 6:30 p.m.

Ms. Busa welcomed Steve Carlson and Kathy Moccio of Dorsey & Whitney. Mr. Carlson and Ms. Moccio presented the results of Dorsey & Whitney's study for the American Bar Association on the recent "Procedural Reforms to Improve Case Management" by the Board of Immigration Appeals ("BIA") and their impact on the Courts of Appeal. Such reforms include decreasing the number of BIA members, eliminating most *de novo* review, and increasing the use in issuing "affirmances without opinion" – an increase that has resulted in a surge of appeals from the BIA to the federal courts of appeal. Dorsey & Whitney concluded that rather than resolve the backlog of appeals in the BIA, the procedural reforms have merely shifted the backlog to the federal courts. On October 13, 2003, the ABA is expected to call on the BIA to discard these

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procedural reforms or to modify them. Mr. Carlson and Ms. Moccio responded to questions, after which Chairman Thomas H. Moreland thanked them for their appearance

The minutes for the meeting held on September 4. 2003 were deemed approved.

As an informational item, Mr. Moreland noted that there is an Association of the Bar of the City of New York reception planned for all local federal judges on November 13, 2003.

[redacted] updated the Committee on their subcommittee's project to determine the appropriate reach of the Aliens Tort Claims Act ("ATCA"). Specifically, the subcommittee is studying whether the Committee should advocate an amendment to the ATCA defining whether the Act either should provide only a basis for jurisdiction or that it should provide not only a basis for jurisdiction but also an independent cause of action. The Committee discussed the relevant tensions between U.S. foreign policy and the protection of human rights. The subcommittee agreed to cogitate further on the appropriate course of action. The subcommittee also discussed the possible need for an amendment to the Foreign Sovereign Immunities Act ("FSIA") in light of the Supreme Court's decision in *Dole Food Co. v. Patrickson*, holding that a foreign state must itself own a majority of a corporation's shares if the corporation is to be deemed an instrumentality of the state under the FSIA. One possible an amendment would state that an indirect subsidiary of a foreign sovereign should be covered under the Foreign Sovereign Immunity Act. The subcommittee agreed to outline for the Committee a possible amendment and the reasons for sponsoring it.

[redacted] summarized for the Committee the progress of the subcommittee on mediation programs in our local federal courts. Approximately seventy percent of the interviews of judges in the Southern District of New York are complete. In initiating the interview of judges from the Eastern District of New York, the subcommittee will coordinate with the Eastern District's advisory committee, which is also reporting on the alternative dispute resolution in the Eastern District.

Mr. Moreland updated the Committee on the progress of the subcommittee on issues arising from post-9/11 anti-terrorism initiatives. The report is near completion. Mr. Moreland noted that the Second Circuit may be hearing arguments the week of November 17th on the *Padilla* case.

[redacted] reported that the subcommittee on the federal sentencing guidelines controversy is reviewing the newly released guidelines by the U.S. Sentencing Committee to determine whether the Committee should issue to Congress a report or comment on the PROTECT Act and/ or the JUDGES Act. The New York Association of Criminal Defense Lawyers has proposed a multi-bar public educational forum regarding the pressure to reduce downward departures. [redacted] noted that the United States Judicial Conference has resolved to seek the repeal of the PROTECT Act.

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[CONFIDENTIAL – FOR COMMITTEE PURPOSES ONLY]

Minutes of the meeting of the Committee on Federal Courts of the Association of the Bar of the City of New York held at the House of the Association, 42 West 44th Street, New York, New York at 6:30 p.m. on November 11, 2003.

The following members were present:

Thomas H. Moreland, Chairman
Amy Busa, Secretary
Jill S. Abrams
David JB Arroyo
Carmine D. Boccuzzi
Francisco E. Celedonio
Eric O. Corngold
Hon. Michael Dolinger
Martin D. Edel
William C. Fredericks
Rita W. Gordon
Marc L. Greenwald
Caitlin J. Halligan
Lynne Troy Henderson
Lowell Johnston
Bruce Robinson Kelly
Lynn Mary Kelly
Clifford P. Kirsch (adjunct)
Michael B. Mushlin
Katherine Huth Parker
Douglas J. Pepe
Amy Rothstein
Alexandra A. Shapiro
Wendy H. Schwartz
James A. Shifren
Ellen B. Unger
Alan Vinegrad

Also present as a guest was [redacted] for the Southern District of New York.

The following members were absent:

Stuart M. Altman
Lewis Clayton
James L. Cott
Thomas A. Dubbs
Barry S. Gold
Thomas H. Golden
Robert Heinemann (adjunct)
Fran M. Jacobs
Hon. Joan B. Lobis
Roseann B. MacKechnie (adjunct)
Lynn K. Neuner
J. Douglas Richards
Gail P. Rubin
Peter C. Salerno
Hilary M. Williams
Victor Worms

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Chairman Thomas H. Moreland called the meeting to order at 6:30 p.m.

Mr. Moreland introduced [redacted], U.S. District Judge (ret.) for the Southern District of New York, who discussed the impact of the federal sentencing guidelines and his impressions of Congress's recent attempt to lower the number of downward departures in sentencing. [redacted] responded to questions from the Committee on a variety of topics. Mr. Moreland thanked [redacted] for his remarks.

The minutes from the October 8, 2003 meeting were deemed approved.

The committee then considered the draft report circulated by Mr. Moreland on "enemy combatant" detentions and offered several suggestions for revising the draft report.

The subcommittee examining the Foreign Sovereign Immunities Act discussed further the possible need for an amendment in light of the Supreme Court's decision in *Dole Food Co. v. Patrickson*.

The meeting was adjourned at 8:05 p.m.

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[CONFIDENTIAL – FOR COMMITTEE PURPOSES ONLY]

Minutes of the meeting of the Committee on Federal Courts of the Association of the Bar of the City of New York held at the House of the Association, 42 West 44th Street, New York, New York at 6:30 p.m. on December 18, 2003.

The following members were present:

Thomas H. Moreland, Chairman
Amy Busa, Secretary
David JB Arroyo
Thomas A. Dubbs
Martin D. Edel
William C. Fredericks
Caitlin J. Halligan
Robert Heinemann (adjunct)
Lynne Troy Henderson
Fran M. Jacobs
Clifford P. Kirsch (adjunct)
Michael B. Mushlin
Katherine Huth Parker
Peter C. Salerno
Wendy H. Schwartz

The following members were absent:

Jill S. Abrams
Stuart M. Altman
Carmine D. Boccuzzi
Francisco E. Celedonio
Lewis Clayton
Eric O. Corngold
James L. Cott
Hon. Michael Dolinger
Barry S. Gold
Thomas H. Golden
Rita W. Gordon
Marc L. Greenwald
Lowell Johnston
Lynn Mary Kelly
Bruce Robinson Kelly
Hon. Joan B. Lobis
Roseann B. MacKechnie (adjunct)
Lynn K. Neuner
Douglas J. Pepe
Amy Rothstein
Gail P. Rubin
Alexandra A. Shapiro
James A. Shifren
Ellen B. Unger
Alan Vinegrad
Hilary M. Williams
Victor Worms

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Chairman Thomas H. Moreland called the meeting to order at 6:30 p.m.

The minutes from the November 11, 2003 meeting were deemed approved.

[redacted] discussed the decision whether to submit an amicus brief in the *Sosa* case before the Supreme Court, involving the construction of the Alien Tort Claims Act. [redacted]

The Committee considered a possible new project examining Judge Weinstein's report summarizing his review of approximately 500 habeas corpus petitions in the Eastern District, and his making suggestions on the procedures to be used in reviewing such petitions. [redacted] and Caitlin Halligan have agreed to review Judge Weinstein's report and recommend whether any response by the Committee is in order.

Mr. Moreland advised the Committee of the Patent Law Committee's proposal to redistribute the non-patent jurisdiction of the Federal Circuit to other circuit courts. Our Committee is asked to review how this might best be accomplished.

Mr. Moreland notified the Committee that the draft report on "enemy combatant" detentions would be revised to incorporate the Second Circuit's recent decision in the *Padilla* case.

[redacted] reported that the subcommittee on BIA procedural reforms is examining the consequences of the surge of appeals to the Second Circuit. The Immigration Committee is interested in working with the Committee on this project.

The subcommittee on mediation programs in our local federal courts continues its interviews of all judges on this subject.

The subcommittee on the federal sentencing guidelines met with the New York Criminal Defense Lawyers Association [redacted] Justice policy of monitoring downward departures.

[redacted] for the subcommittee on Foreign Sovereign Immunities Act, will be authorized to proceed with drafting a report on the possible need for an amendment to the Act in light of *Dole Food Co. v. Patrickson*.

The subcommittee on the proposed Fed. R. Civ. P. 32.1 regarding citations to unpublished court of appeal decisions expects to circulate a draft report for the next meeting.

The meeting was adjourned at 7:50 p.m.

KL3:2311792.1

[CONFIDENTIAL – FOR COMMITTEE PURPOSES ONLY]

Minutes of the meeting of the Committee on Federal Courts of the Association of the Bar of the City of New York held at the House of the Association, 42 West 44th Street, New York, New York at 6:30 p.m. on January 14, 2004.

The following members were present:

Thomas H. Moreland, Chairman
Amy Busa, Secretary
Jill S. Abrams
James L. Cott
Hon. Michael Dolinger
Martin D. Edel
William C. Fredericks
Barry S. Gold
Rita W. Gordon
Robert Heinemann (adjunct)
Lynne Troy Henderson
Fran M. Jacobs
Bruce Robinson Kelly
Lynn Mary Kelly
Clifford P. Kirsch (adjunct)
Michael B. Mushlin
Lynn K. Neuner
Katherine Huth Parker
Douglas J. Pepe
Amy Rothstein
Gail P. Rubin
Peter C. Salerno
Alan Vinegrad
Victor Worms

The following members were absent:

David JB Arroyo
Carmine D. Boccuzzi
Francisco E. Celedonio
Lewis Clayton
Eric O. Corngold
Thomas A. Dubbs
Thomas H. Golden
Marc L. Greenwald
Caitlin J. Halligan
Lowell Johnston
Roseann B. MacKechnie (adjunct)
Wendy H. Schwartz
Alexandra A. Shapiro
James A. Shifren
Ellen B. Unger
Hilary M. Williams

[redacted] attended as a guest of the Committee.

KL3:2317482.1

Chairman Thomas H. Moreland called the meeting to order at 6:30 p.m.

The minutes from the December 18, 2003 meeting were deemed approved.

Mr. Moreland welcomed [redacted], III, District Judge for the Southern District of New York. [redacted] spoke to the Committee about the Southern District's efforts to transition to electronic case filing. [redacted] also discussed the Southern District's establishment of a relationship with the Federal Reserve Bank in New York for the deposit of settlement funds in large cases. These funds will ultimately earn a higher rate of return than funds deposited with the Court Registry Investment System.

The subcommittee on proposed Federal Rule of Civil Procedure 32.1 submitted a letter comment to the Committee on Rules of Practice and Procedure. The Committee debated whether it was appropriate for the Committee to recommend that copies of the cited unpublished decisions be submitted in all cases, as is the recommendation in the draft letter, only on request, or only if they are unavailable on a publicly accessible electronic database. By a vote of [redacted] in favor of 'always,' [redacted] in favor of 'on request,' the Committee approved the draft letter.

[redacted] reported her and Caitlin Halligan's recommendation that the Committee take no action regarding Judge Weinstein's report summarizing his review of approximately 500 habeas corpus petitions in the Eastern District.

The subcommittee on mediation programs in our local federal courts summarized its progress in interviewing local federal judges.

Mr. Moreland notified the Committee that the draft report on "enemy combatant" detentions was almost complete and that he will circulate shortly a proposed final draft to the Committee and other Committees at the Association of the Bar of the City of New York. The President of the Bar Association has approved the draft in principle.

The subcommittee on the federal sentencing guidelines controversy reported that it was progressing on a blueprint of suggestions regarding the Feeney Amendment. [redacted] noted that the Bar Association proposed a breakfast meeting on the controversy and that the New York Criminal Defense Lawyers Association will host a lunch in March on this topic.

[redacted] reported that the subcommittee on BIA procedural reforms is examining the consequences of the surge of appeals to the Second Circuit. The Committee debated whether the impact on the Circuit courts was merely a bulge or an indication of a larger phenomenon. The Immigration Committee is interested in working with the Committee on this project.

The final draft of the Redbook is expected at the end of January.

KLJ.2317482.1

Carmine Boccuzzi will draft a proposed report regarding the possible need for an amendment of the Foreign Sovereign Immunities Act in light of *Dole Food Co. v. Patrickson.*

The meeting was adjourned at 8:00 p.m.

KL3:2317482.1

[CONFIDENTIAL – FOR COMMITTEE PURPOSES ONLY]

Minutes of the meeting of the Committee on Federal Courts of the Association of the Bar of the City of New York held at the House of the Association, 42 West 44th Street, New York, New York at 6:30 p.m. on February 17, 2004.

The following members were present:

Thomas H. Moreland, Chairman
Amy Busa, Secretary
David JB Arroyo
Martin D. Edel
William C. Fredericks
Robert Heinemann (adjunct)
Lynne Troy Henderson
Bruce Robinson Kelly
Roseann B. MacKechnie (adjunct)
Lynn K. Neuner
Gail P. Rubin
Wendy H. Schwartz

The following members were absent:

Jill S. Abrams
Carmine D. Boccuzzi
Francisco E. Celedonio
Lewis Clayton
Eric O. Corngold
James L. Cott
Hon. Michael Dolinger
Thomas A. Dubbs
Barry S. Gold
Thomas H. Golden
Rita W. Gordon
Marc L. Greenwald
Caitlin J. Halligan
Fran M. Jacobs
Lowell Johnston
Lynn Mary Kelly
Clifford P. Kirsch (adjunct)
Michael B. Mushlin
Katherine Huth Parker
Douglas J. Pepe
Amy Rothstein
Peter C. Salerno
Alexandra A. Shapiro
James A. Shifren
Ellen B. Unger
Alan Vinegrad
Hilary M. Williams
Victor Worms

Chairman Thomas H. Moreland called the meeting to order at 6:30 p.m.

The minutes from the January 14, 2004 meeting were deemed approved.

Mr. Moreland discussed a new project for the Committee involving a review of federal court procedures to avoid judicial conflicts of interest in order to assess their possible utility in the New York state court system. This joint project will be undertaken with the Association's Committees on State Courts of Superior Jurisdiction and Council on Judicial Administration.

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The subcommittee on BIA procedural reforms reported on its pending project that examines the impact of the reforms on the Second Circuit. The subcommittee is analyzing whether the resulting increase in immigration cases in the Second Circuit is a bulge or a permanent state of affairs.

Mr. Moreland then updated the Committee on the enemy combatant report, which has been released and generated some press interest. The report was the subject of the President's letter in the February issue of 44th Street notes.

Mr. Moreland also noted that the Committee sent its letter to the Committee on Rules of Practices and Procedure on proposed Fed. R. Civ. P. 32.1 regarding citations to unpublished courts of appeal decisions.

Mr. Moreland reported that at the next meeting [redacted] will present a draft report regarding the possible need for an amendment of the Foreign Sovereign Immunities Act in light of *Dole Food Co. v. Patrickson.*

Mr. Moreland noted that [redacted] and [redacted] are examining about-to-be proposed "style" amendments to the Federal Rules of Civil Procedure.

[redacted] of the Committee on Patent Law joined the Committee to solicit support for a possible Patent Committee proposal [redacted]

In discussion after [redacted] departure [redacted]

The meeting was adjourned at 7:50 p.m.

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[CONFIDENTIAL – FOR COMMITTEE PURPOSES ONLY]

Minutes of the meeting of the Committee on Federal Courts of the Association of the Bar of the City of New York held at the House of the Association, 42 West 44th Street, New York, New York at 6:30 p.m. on March 18, 2004.

The following members were present:

Thomas H. Moreland, Chairman	Lynne Troy Henderson
Amy Busa, Secretary	Bruce Robinson Kelly
Carmine D. Boccuzzi	Lynn Mary Kelly
Francisco E. Celedonio	Clifford P. Kirsch (adjunct)
Hon. Michael Dolinger	Michael B. Mushlin
Martin D. Edel	Douglas J. Pepe
Barry S. Gold	Peter C. Salerno
Rita W. Gordon	Wendy H. Schwartz
Marc L. Greenwald	Alexandra A. Shapiro

The following members were absent:

Jill S. Abrams	Lowell Johnston
David JB Arroyo	Roseann B. MacKechnie (adjunct)
Lewis Clayton	Lynn K. Neuner
Eric O. Corngold	Katherine Huth Parker
James L. Cott	Amy Rothstein
Thomas A. Dubbs	Gail P. Rubin
William C. Fredericks	James A. Shifren
Thomas H. Golden	Ellen B. Unger
Caitlin J. Halligan	Alan Vinegrad
Robert Heinemann (adjunct)	Hilary M. Williams
Fran M. Jacobs	Victor Worms

Chairman Thomas H. Moreland called the meeting to order at 6:30 p.m.

The minutes from the February 17, 2004 meeting were deemed approved.

The Committee discussed the proposed report concerning tiering and the Foreign Sovereign Immunities Act after *Dole*, drafted by [redacted]. The report [redacted]

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[redacted]

The subcommittee on proposed 'style' amendments to the Federal Rules of Civil Procedure observed that some proposed amendments may border on creating substantive changes to the rules, but generally avoided this risk. The subcommittee recommended that the Committee currently take no action, but revisit when the proposed amendments are published, whether the amendments result in substantive changes.

The subcommittee on BIA procedural reforms reported on its pending project that examines the impact of these reforms on the Second Circuit. So far, the subcommittee [redacted]

The subcommittee on the federal sentencing guidelines controversy updated the Committee on its progress in preparing a compendium of significant articles and speeches advocating a repeal of the Feeney Amendment, [redacted]

The subcommittee on mediation programs in our local federal courts has almost completed its interview of Southern District of New York judges and is beginning to interview Eastern District of New York judges.

Mr. Moreland reported that the draft of the Redbook is finished and ready for final review.

The meeting was adjourned at 8:00 p.m.

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[CONFIDENTIAL – FOR COMMITTEE PURPOSES ONLY]

Minutes of the meeting of the Committee on Federal Courts of the Association of the Bar of the City of New York held at the House of the Association, 42 West 44th Street, New York, New York at 6:30 p.m. on November 29, 2004.

The following members were present:

Molly S. Boast, Chairperson
Jessica L. Margolis, Secretary
Robert L. Begleiter
Amy Busa
Thomas A. Dubbs
William C. Fredericks
Andrew W. Goldwater
Rita W. Gordon
Kiyo A. Matsumoto
Laura M. Midwood
Lynn K. Neuner
Gail P. Rubin
Laura S. Schnell
Ettie Ward
Charles B. Updike
Clifford P. Kirsch (adjunct)
Robert Heinemann (adjunct)

The following members were absent:

Jill S. Abrams
David JB Arroyo
Neil S. Binder
Carmine D. Boccuzzi
Eric O. Corngold
Richard Daddario
Martin D. Edel
Thomas H. Golden
Marc L. Greenwald
Caitlin J. Halligan
Lynne Troy Henderson
Bruce Robinson Kelly
Lynn Mary Kelly
Katherine Huth Parker
Douglas J. Pepe
E. Joshua Rosenkranz
Wendy H. Schwartz
James A. Shifren
Ellen B. Unger
Alan Vinegrad
Hilary M. Williams
Linda A. Willet
Roseann B. MacKechnie (adjunct)

Chairperson Molly Boast called the meeting to order.

Ms. Boast introduced the [redacted] and invited questions from the Committee. In response to a Committee member question, [redacted] discussed how her experience [redacted]. She noted, [redacted] gives her a greater understanding of the dynamics of trials, [redacted]

[redacted]

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[redacted] spoke generally about the process engaged in by Second Circuit Judges. She noted that there is almost no communication among panel members concerning a particular case before oral argument. Once argument has concluded, the panel members confer about how they feel the appeal should be resolved. Although there generally is a consensus among panel members during the conference, this is not always the case. Disagreement at the conference, however, does not always mean there will be a dissent; often judges are persuaded after reading the majority opinion, or the case is determined on narrower grounds.

[redacted] stated that unlike judges at the district court level, who tend to decide as many issues as possible in a decision, judges on the Second Circuit decide as few issues as possible. Generally, the judges consider jurisdictional and procedural issues first, and only reach the merits if the case is not disposed of on one of those issues.

In response to a question from a Committee member [redacted] addressed the Second Circuit's position on unpublished opinions. In short, the Second Circuit is very opposed to a rule change permitting citation to unpublished opinion. [redacted] noted that summary orders are supposed to contain no new law (i.e., they should be a short statement followed by a citation), and as such, there should never be a need to cite to such opinions.

When asked whether she has any advice for attorneys concerning oral argument, [redacted] stated that judges generally do an enormous amount of work prior to argument, and that they approach argument with specific questions and concerns in mind. She therefore advised that litigants be responsive to questions from the panel, and that they consider what particular questions may signal about of the panel's leanings.

[redacted] discussed her general practice with respect to preparing for oral arguments. First, she reads the briefs and relevant portions of the record. Depending on the issues involved, her law clerks then may prepare a bench memo concerning the appeal, (if it is a criminal matter, she may handle it without the assistance of clerks). [redacted] reads relevant cases, statutory provisions or other items as she deems appropriate. She also takes notes and begins to work out her thoughts on the issues, including questions she may have or even a potential resolution. She generally attends the argument understanding how she would decide the appeal should the issues be decided without oral argument.

[redacted] noted that panel members sometimes exchange bench memos to help resolve complicated issues. Similarly, when writing a decision, a particular judge may seek advice or other assistance from his or her colleagues.

In response to a Committee member question, [redacted]

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[redacted] noted that as a Second Circuit judge, she is far removed from the daily grind of litigation, and it can be difficult to stay informed about the practical problems litigators face. But the appellate judges have varied backgrounds, and therefore bring different personal experiences to the table.

In response to a Committee member question, [redacted] stated that she does not know what the Supreme Court will do about the Federal Sentencing Guidelines. She predicts that they probably will be struck down – the question is whether in whole or in part? If the Guidelines are completely stricken, [redacted] anticipates there will be a period of uncertainty, as the majority of the judges on the bench now "grew up" with the Guidelines. [redacted]

Molly Boast thanked [redacted]

The minutes from the Committee's October meeting were approved.

Ms. Boast informed the Committee that the Association was planning on submitting an amicus brief in *Hamdan v. Rumsfeld*, which would be due on December 29, 2004. The issue to be addressed is whether military tribunals meet the requirements of Common Article III of the Geneva Convention. Although a member of the Criminal Committee has agreed to draft the brief, Ms. Boast feels it important that someone from the Federal Courts Committee review the draft and comment as appropriate (or, alternatively, Ms. Boast could [redacted]

[redacted] expressed concern that the Committee's report from last year on related issues may be interpreted more broadly than what was intended by the consensus reached in last year's committee, which limited the report to the application of habeas law to United States citizens. [redacted] cited this as a reason why it is advisable to have a Committee member review the amicus brief to be submitted by the Association.

[redacted] next addressed proposed amendments to the Federal Rules of Civil Procedure intended to address the issue of e-discovery. [redacted] stated that the Committee will need to decide what role it wants to play with respect to the proposed amendments, including what positions, if any, the Committee should take. [redacted] identified several features of the proposed amendments: (1) the meet and confer provision will be extended to cover issues implicated by electronic discovery (for example, the form in which documents are to be produced); (2) the Rules will be adjusted to account explicitly for privileged documents inadvertently turned over in electronic form; (3) in circumstances where electronic data is not "readily accessible," the proposed Rules contemplate a two step process: first, the party withholding the documents must assert the objection, and second, the party requesting the documents must demonstrate good cause; (4) the proposed amendments will include a sanctions provisional, though

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the standard of culpability has yet to be established; and (5) interrogatory and other discovery responses will need to reference electronic as well as paper information where appropriate.

Ms. Boast noted that the Committee has until February 15, 2005, to submit comments on the proposed rules. The subcommittee will make a recommendation about whether there are issues worth addressing.

The meeting was adjourned at 8:00 p.m.

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February 22, 2011

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

The Honorable Charles E. Grassley
Ranking Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Chairman Leahy and Ranking Member Grassley,

I have received Questions for the Record from several members of the Senate Judiciary Committee concerning the report on indefinite detention that was issued by the Federal Courts Committee of the Association of the Bar of the City of New York in February 2004. In order to respond to the Questions as fully as possible, on February 11, 2011, I contacted the Association.

I included the February 2004 report in my response to Question 12(b) of the Senate Judiciary Committee questionnaire because when I reviewed all of the reports and public statements in the Bar Association's files that had been issued by the Federal Courts Committee during the period of my membership (from September 2003 to summer of 2006), the report was included in that group. At the time of my review last summer, I had no recollection of having seen the February 2004 report previously. None of my personal files, emails, or calendars made any reference to the report.

The Bar Association has now provided me with minutes of the Federal Courts Committee's meetings in response to my inquiry of February 11, 2011. Those minutes indicate that in September 2002, prior to my joining the Committee, the Federal Courts Committee first considered whether to prepare a report on some of the legal issues arising out of the September 11, 2001 terror attacks, and formed a subcommittee to draft such a report. The minutes further indicate that an outline of the report was circulated to Committee members in November 2002, and the report was discussed at the October, November, and December 2002 meetings. (The Association informed me that it does not have any minutes for meetings from January 2003 through June 2003.) I was not a member at any time during this period.

After I joined the Committee in September 2003, the Committee held meetings in September and October of 2003. I was absent from both of these meetings. According to the minutes, the Committee chair updated the Committee on the progress of the draft report at both meetings, and at the October 2003 meeting, informed the Committee that the report was "near completion."

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The minutes indicate that I attended my first meeting of the Committee in November 2003. According to the minutes, there were four items on the Committee's agenda, including a presentation from a federal judge, who also responded to questions from the Committee on a variety of topics. The minutes note that the Committee "considered the draft report circulated by [the Committee chair] on 'enemy combatant' detentions and offered several suggestions for revising the draft report." The minutes indicate that I also attended the December 2003 meeting of the Committee. According to the minutes, there were ten items on the agenda. The minutes note that the Committee chair told the Committee that the draft report on "enemy combatant" detentions would be revised to incorporate a case recently issued by the Second Circuit.

I was absent from the January 2004 meeting. According to the minutes, the Committee chair notified the Committee that the draft report "was almost complete" and that a proposed final draft would be circulated shortly. According to the minutes of the February 2004 meeting, which I did not attend, the Committee chair stated that the report had been released.

None of the minutes include any reference to a formal vote on the Committee's report. (By comparison, the minutes of the January 2004 meeting reflect a formal vote on a public statement regarding a proposed change to the Federal Rules of Civil Procedure.) Nor do the minutes reflect that a consensus on the report was reached at any particular point in time.

The minutes do not include any information regarding precisely when, or how, drafts of the report were circulated to Committee members. I have no record or recollection of receiving or reading a draft of the report prior to its issuance, but it is quite possible that one was sent to me.

To fully respond to the Senate Judiciary Committee's questions, I inquired about the Association's process regarding approval of and abstention or dissent from Association reports. I was informed that the minutes will often reflect that a vote was taken on a report, although sometimes they will not, reflecting that there was a consensus on the report. With regard to the process for listing the names of Committee members at the end of a report, the Association's website states that "[a]t the end of the report the entire committee should be listed," and that "those who dissent or abstain from the report should be indicated." The Association further informed me that the process for listing names is "opt-out": the names of each Committee member are listed on a report, unless he or she has explicitly requested to be noted as abstaining or dissenting. A decision to abstain or dissent may be communicated informally, rather than in a Committee meeting, such as through e-mail, telephone call, or personal conversation.

I recognize the importance of the issues addressed in the report, and as I testified to the Senate Judiciary Committee, the report certainly does not reflect my personal views. I regret not apprising myself of the work of the Federal Courts Committee immediately upon joining in 2003, and I further regret being unable to recall the meetings in November and December of 2003. In an effort to be responsive to the questions of members of the Senate Judiciary Committee, I have engaged in further inquiry beyond my records and recollections, the results of which I have reported in this letter. I am also attaching copies of all of the Bar Association's minutes that I received which make any

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reference to the report. Because the minutes are deemed confidential by the Association, the Association has redacted certain information. None of that redacted information relates to me or to the report.

Throughout this process, I have sought to be forthcoming with the Committee, which is why I initially included this report in my response to Question 12(b), notwithstanding my lack of recollection of it. My testimony to the Committee was, and remains, accurate with respect to all of my recollections, and also with respect to my views on the subjects raised in the report. I apologize to the Committee for any confusion on this issue.

Sincerely,



Caitlin J. Halligan

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Responses of Kathleen Williams
Nominee to be United States District Judge for the Southern District of Florida
to the Written Questions of Senator Tom Coburn, M.D.

1. **Some people refer to the Constitution as a "living" document that is constantly evolving as society interprets it. Do you agree with this perspective of constitutional interpretation?**

   Response: No.

2. **Justice William Brennan once said: "Our Constitution was not intended to preserve a preexisting society but to make a new one, to put in place new principles that the prior political community had not sufficiently recognized." Do you agree with him that constitutional interpretation today must take into account this supposed transformative purpose of the Constitution?**

   Response: I do not agree with Justice Brennan's comments as a paradigm for constitutional interpretation.

3. **Do you believe judicial doctrine rightly incorporates the evolving understandings of the Constitution forged through social movements, legislation, and historical practice?**

   Response: I believe that judicial decisions are based on the Constitution, statutes passed by Congress, and binding precedent of the Supreme Court and the circuit courts.

4. **Do you believe empathy is an essential ingredient for arriving at just decisions and outcomes and should play a role in a judge's consideration of a case?**

   Response: No, I do not believe that empathy has a role in judicial decision-making.

5. **Is any transaction involving the exchange of money subject to Congress's Commerce Clause power?**

   Response: No. The Supreme Court has identified certain limitations to the exercise of Commerce Clause power in *United States v. Lopez*, 514 U.S. 549 (1995) and *United States v. Morrison*, 529 U.S. 598 (2000).

6. **What limitations remain on the individual Second Amendment right now that it has been incorporated against the States?**

   Response: The Supreme Court has recognized an individual's right to bear arms. However, the Supreme Court has not determined what limitations remain, although certain limitations are acknowledged in *District of Columbia v. Heller*, 554 U.S. 570, 128 S. Ct. 2783 (2008) and *McDonald v. City of Chicago, Ill.*, 130 S. Ct. 3020 (2010).

   a. **Is it limited only to possession of a handgun for self-defense in the home,**

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since both *Heller* and *McDonald* involved cases of handgun possession for self-defense in the home?

Response: While the Supreme Court has ruled that an individual has the right to bear arms, the Court noted that its decision "does not imperil every law regulating firearms" (*McDonald* at 3047). The Court has not definitively set forth what limitations remain, although some are referenced in *Heller* and *McDonald*.

7. **In 2005, you gave remarks to the Federal Bar Association and said: "Interestingly, while we don't seem to have a problem using foreign nations to park people, there are those who do have a problem using foreign law to inform debates here, especially with regard to the death penalty." Do you believe judges should look to foreign law in making their decisions and forming their opinions?**

Response: No.

a. **Is it appropriate for judges to look for foreign countries for "wise solutions" and "good ideas" to legal and constitutional problems?**

Response: No.

b. **If so, under what circumstances would you consider foreign law when interpreting the Constitution?**

Response: I would not consider foreign law when interpreting the Constitution.

c. **In *Roper v. Simmons*, 543 U.S. 551 (2005), Justice Kennedy relied in part on the "evolving standards of decency" to hold that capital punishment for any murderer under age 18 was unconstitutional. I understand that the Supreme Court has ruled on this matter, but do you agree with Justice Kennedy's analysis?**

Response: As a district court judge, I would adhere to the Supreme Court's decision in *Roper* and all applicable 11th Circuit precedent.

d. **Do you agree that the Constitution's prohibition on cruel and unusual punishment "embodies a principle whose application is appropriately informed by our society's understanding of cruelty and by what punishments have become unusual?"**

Response: If confirmed as a district court judge, I would follow the law regarding the death penalty as set forth statutorily and in the binding precedents of the Supreme Court and the 11th Circuit Court of Appeals.

e. **How would you determine what the evolving standards of decency are?**

Response: If confirmed as a district court judge, I would follow the law regarding

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the death penalty as set forth statutorily and in the binding precedents of the Supreme Court and the 11th Circuit Court of Appeals.

f. Do you think that a judge could ever find that the "evolving standards of decency" dictated that the death penalty is unconstitutional in all cases?

Response: No. The Supreme Court has affirmed the constitutionality of the death penalty.

g. What factors do you believe would be relevant to the judge's analysis?

Response: The relevant factors are those set forth by the Supreme Court and the 11th Circuit Court of Appeals.

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Responses of Kathleen Williams
Nominee to be United States District Judge for the Southern District of Florida
to the Written Questions of Senator Charles Grassley

1. **You testified before the U.S. Sentencing Commission on several occasions. You criticized sentencing guidelines as being overly harsh. In 2006, you referred to the application of the Sentencing Guidelines prior to the Supreme Court's decision in *United States v. Booker* as an "unprecedented social and juridical tragedy." Please describe in what ways the application of guidelines pre-*Booker* were an "unprecedented social and juridical tragedy."**

Response: As an advocate, in my testimony before the Commission, I noted what seemed to be the enormous financial and social cost occasioned by an increasing federal incarceration rate, especially to persons and communities of color.

As cited in my testimony at that time, the federal inmate population had reportedly grown from 24,000 in 1980 to over 188,000 at a cost of over four billion dollars a year. Moreover, approximately 65% of the federal prison population were African -American or Hispanic.

I was particularly concerned with the imbalanced consequences meted out to indigent defendants charged in crack cocaine prosecutions. These cases were illustrative of some of the problems posed in a mandatory guideline regime. However, subsequent remedies fashioned by the Sentencing Commission, aided by members of this Committee, represent an important step in redressing those unwarranted disparities and in fulfilling what the Commission repeatedly references in Chapter 1 of the Guidelines: an empirically based and evolutionary guidelines process.

2. **In your 2006 testimony before the Sentencing Commission, you called into question the need for a sentencing enhancement for smuggling terrorists. You said: "It will be a rare occurrence, but it is not something that needs to have enhanced penalties within the guidelines; it is something that every district court judge is capable of assessing with the Advisory Guidelines and 3553 factors." Do you continue to believe that enhanced penalties for smuggling terrorists are unnecessary? Please explain your rationale.**

Response: In 2006, I testified before the Sentencing Commission as a representative of the Defender community. As I stated in my testimony, I advocated that the guideline calculus for an immigration violation involving the smuggling of terrorists -- along with the arguments available to the Government pursuant to Title 18 U.S.C. §3553, which allows a court to enhance guideline sentences under appropriate circumstances --

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provides ample capacity to mete out robust sentences for those involved in terrorism offenses.

3. **During your hearing, Senator Coons noted your criticism of the Sentencing Guidelines and asked how much deference you would afford them if confirmed. You replied,**

> **"As the chair is aware, the Supreme Court has stated -- and all circuits, that I am aware of -- in an advisory guideline system, you must start with an accurate calculation of the guidelines. So it appears that courts everywhere have given significant deference to the guidelines, as it is a starting point, and I would adhere to that in any sentences I would render."**

You correctly noted that District Court judges must begin the sentencing analysis by calculating the appropriate guideline range, but merely calculating the applicable range does not mean the District Judge will afford the guidelines deference. Aside from calculating the applicable guideline range as required by precedent, how much deference will you afford the sentencing guidelines, if confirmed?

Response: As I testified, the guidelines are the starting point for all sentences and must be followed and accurately calculated by the court throughout the sentencing process. Accordingly, it is clear that a trial court must give the sentencing guidelines significant deference consonant with the law and precedent of the Supreme Court and the Circuit Courts. If I serve as a judge, I will sentence in accord with these principles.

4. **Do you agree that the sentence a defendant receives for a particular crime should not depend on the judge he or she happens to draw?**

Response: Yes.

5. **Under what circumstances do you believe it is appropriate for a district court judge to depart downward from the sentencing guidelines?**

Response: A downward departure (or an upward departure) is only warranted when the facts and law presented in a particular case support that departure.

6. **When Justice Stevens announced his retirement, the President said that he would select a Supreme Court nominee with "a keen understanding of how the law affects the daily lives of the American people." Do you believe judges should ever base their decisions on a desired outcome, or solely on the law and facts presented?**

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Response: A judge should never base his or her decision on a desired outcome; decisions should be made by applying the law to the facts of the case.

7. **Do you believe a judge should consider his or her own values or policy preferences in determining what the law means?**

Response: No.

a. **If so, under what circumstances?**

Response:

8. **During her confirmation hearings, Justice Sotomayor rejected President Obama's so-called "empathy standard" stating, "We apply the law to facts. We don't apply feelings to facts." Do you agree with Justice Sotomayor?**

Response: I do agree with Justice Sotomayor.

9. **What is the most important attribute of a judge, and do you possess it?**

Response: The most important attribute of a judge is his or her unwavering integrity and commitment to the principles of equal justice, due process, and our Constitution. I believe I possess the integrity and commitment demanded of this position.

10. **Please explain your view of the appropriate temperament of a judge. What elements of judicial temperament do you consider the most important, and do you meet that standard?**

Response: A judge should demonstrate his or her fairness and impartiality in any matter by listening carefully to the parties' positions and scrupulously applying the law to those facts presented by the parties. I believe that I possess the appropriate temperament to fulfill the obligations of a jurist and the expectations of the litigants who would come before me.

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

Response: Yes.

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12. At times, judges are faced with cases of first impression. If there were no controlling precedent that dispositively concluded an issue with which you were presented, to what sources would you turn for persuasive authority? What principles will guide you, or what methods will you employ, in deciding cases of first impression?

Response: In deciding a case of first impression in this circuit, after studying the plain language of the statute at issue, I would ascertain whether another circuit had persuasive precedent and study those cases to determine whether they applied in the matter before me. In a case of first impression anywhere, I would look to analogous statutory schemes to see if precedent construing that statute could inform a just resolution to the facts of the case at hand. If statutory text was ambiguous, I would look to any evidence of legislative intent for possible guidance. In either situation, I would be circumspect in narrowly tailoring a decision to address the particular issues and facts presented to me.

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

Response: In deciding any case, I would be bound by the precedents of the 11th Circuit Court of Appeals and the Supreme Court and I would follow those precedents.

14. As you know, the federal courts are facing enormous pressures as their caseload mounts. If confirmed, how do you intend to manage your caseload?

Response: If confirmed, I intend to manage my caseload with attentiveness, discipline, and active involvement. I would schedule regular status conferences and set reasonably stringent deadlines for the litigants in order to focus critical issues and expeditiously resolve the matters before me.

15. Do you believe that judges have a role in controlling the pace and conduct of litigation and, if confirmed, what specific steps would you take to control your docket?

Response: I believe that judges best control the pace and conduct of litigation by consulting frequently with the parties on the status of the case and setting reasonable but firm deadlines for discovery and pre-trial motion practice. I would do my utmost to be fully conversant with a case at each stage of the litigation and make myself available to parties to render decisions that would promote a fair, equitable, and prompt resolution of the matter.

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16. Under what circumstances do you believe it appropriate for a federal court to declare a statute enacted by Congress unconstitutional?

Response: The Supreme Court has recognized certain limitations on the exercise of Congress' legislative prerogative [for example, with regard to the Commerce Clause, in *United States v. Lopez*, 514 U.S. 549 (1995) and *United States v. Morrison*, 529 U.S. 598 (2000)]. These limitations are based on a strict reading and application of constitutional text and a mindfulness of the importance of stare decisis. Moreover, the question of constitutionality involves a decision as to whether the entirety of a statutory plan is unsustainable or if it is unconstitutional as applied to the facts of the particular matter. Additionally, the issue of severability of certain provisions must be addressed.

17. Please describe with particularity the process by which these questions were answered.

Response: I prepared my answers after careful consideration of each question. I then reviewed my responses with representatives of the Department of Justice. I finalized my paperwork which I then forwarded to the Department of Justice for submission to the Committee.

18. Do these answers reflect your true and personal views?

Response: Yes.

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Responses of Kathleen Williams
Nominee to be United States District Judge for the Southern District of Florida
to the Written Questions of Senator Jeff Sessions

1. **During your 2003 ACLU award acceptance speech, you stated that the United States is unfairly prosecuting "[p]oor, black, and politically persecuted Haitians" seeking asylum in the U.S. out of concerns that "Haiti may be a secret staging area for possible terrorists."**

   a. **Do you stand by those statements?**

      Response: As an advocate for indigent defendants, I made remarks in my 2003 acceptance speech highlighting what attorneys in my office and others had observed; that is, an increased prosecution of Haitians attempting to enter our country after 9/11 as compared to what had appeared to be the previous practice to deport or exclude them without prosecution.

   b. **Can you provide the Committee with examples of the specific prosecutions of Haitian asylum seekers that you believe were motivated, not by the criminal conduct of the defendant, but by the prosecution's purported view of Haiti as "a secret staging area for possible terrorists"?**

      Response: The reference to Haiti as a staging area was meant to convey irony within the context of the speech. As best I can recall, the genesis of that comment was a newspaper article where a correlation was made between increased immigration prosecutions taking place in 2002 and 2003 and terrorist interdiction. I made this observation to bring attention to the plight of many Haitians endeavoring to enter this country and gain asylum. I do not know of any prosecution premised on Haiti being a staging area for terrorists.

2. **At your hearing, Senator Grassley asked about your December 2005 remarks before the Federal Bar Association, in which you stated:**

   "Interestingly, while we don't seem to have a problem using foreign nations to park people, there are those who do have a problem using foreign law to inform debates here, especially with regard to the death penalty."

   a. **Your remarks appear to criticize those who take issue with American judges using foreign law to inform legal debates in this country, especially regarding the death penalty. I have a problem with the citation and reliance on foreign law by U.S. courts. Please explain what, in your view, is wrong with my viewpoint?**

      Response: The Senator's viewpoint is entirely sound. My remarks were not intended to indicate support for the notion that foreign law is applicable to American judicial decision making. My intention in that speech was to juxtapose two different situations and to provoke discussion regarding reliance on foreign

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institutions in those different contexts. However, I was not commenting on judicial decision making and, as I testified in the hearing before the Committee on February 2, 2011, I do not believe that foreign law has a place in that process. Only the legislature and the executive can look to such sources to inform their decisions.

b. You single out the death penalty as a legal area that is more appropriate for the use of foreign law.

i. Do you believe the use or citation of foreign law is more appropriate in certain legal contexts, such as in Eighth Amendment analysis? If so, please list examples of those legal contexts.

Response: I do not believe the citation of foreign law is appropriate in judicial decision making in any context unless expressly authorized by the Constitution or statute.

ii. Do you believe the laws of foreign countries should inform U.S. courts' view on the evolving standards of decency in death penalty cases?

Response: The only standards that are appropriate for consideration in a capital matter are those set forth by the Supreme Court and the 11th Circuit.

3. Have you ever expressed an opinion regarding the constitutionality of the death penalty? If so, what was that opinion? If not, do you have such an opinion?

Response: To my knowledge, I have never expressed an opinion regarding the constitutionality of the death penalty. The Supreme Court has found the death penalty to be constitutional and I would adhere to the law regarding the death penalty as set forth by the Supreme Court.

4. If confirmed, will you have any reservation in applying the death penalty?

Response: No.

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SUBMISSIONS FOR THE RECORD

Senator Kirsten E. Gillibrand
Statement for the Record
Caitlin Halligan Nomination Hearing
February 2, 2011

Mr. Chairman, I am pleased to support the nomination of Caitlin Halligan, a highly regarded and talented New Yorker, who has been nominated by President Obama to serve on the United States Court of Appeals for the District of Columbia. Throughout her career, Ms. Halligan has demonstrated an outstanding commitment to public service, a strong intellect and the highest level of integrity and professionalism. I applaud the President for this excellent nomination.

Ms. Halligan earned her law degree with high honors from Georgetown University Law Center, where she served as managing editor of the *Georgetown Law Journal*. Following law school, she clerked for two widely-respected federal judges; Judge Patricia Wald on the U.S. Court of Appeals for the D.C. Circuit and for U.S. Supreme Court Justice Stephen Breyer. She has since gone on to become one of New York's top appellate litigators, with an impressive career spanning the public and private sectors.

Ms. Halligan served for six years as the Solicitor General of New York, successfully representing the people of New York in both state and federal appellate courts. After a few years in private practice, heading the appellate division of the prestigious law firm Weil, Gotshal & Manges, she returned to public service last year as the General Counsel for the Manhattan District Attorney's Office, where she is a senior member of the executive team that oversees over 100,000 investigations and prosecutions annually in Manhattan.

Her vast experience has prepared her well for service on the U.S. Court of Appeals for the D.C. Circuit. She has served as counsel of record for more than fifty matters before the United States Supreme Court, and has argued four cases before the Supreme Court, and many cases before the U.S. Court of Appeals for the Second Circuit, the New York Court of Appeals, and intermediate appellate courts in New York.

Notable among her many accomplishments, Ms. Halligan was the first person to head the New York Attorney General's Internet Bureau. She was responsible for standing up this important bureau to protect consumers and families against online threats and prosecute cyber-criminals. The importance of the work that has been done by this bureau to foster and protect internet safety cannot be overstated. New Yorkers and consumers across the United States have better protections when they do business over the internet because of the efforts of the bureau that she led, including cases to stop online credit card fraud, protect personal information, and stop deceptive consumer practices.

I am particularly impressed by her service as pro-bono counsel to the Board of the Lower Manhattan Development Corporation, which was created following the terrorist attacks of September 11th, 2001, which devastated Lower Manhattan. Through her work with

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the Lower Manhattan Redevelopment Corporation, Ms. Halligan has been instrumental in efforts to reconstruct the World Trade Center Towers, create a memorial and museum to honor the victims of September 11th, and revitalize Lower Manhattan's residential and commercial sectors.

In addition to all of her professional accomplishments, Ms. Halligan is also working to foster the next generation of legal scholars. Since 2005, she has served as adjunct faculty at Columbia Law School, where she teaches an advanced seminar on federalism and constitutional law.

Throughout her career, Ms. Halligan has received accolades from her colleagues for her sharp intellect, legal skill, and impeccable character. From 2001 to 2005, she was selected each year to receive the "best brief" award from the National Association of Attorneys General for excellence in legal brief writing. She has been characterized as someone whose "heart is in public service."

In nominating her for this position, President Obama said that at every step of her career, Caitlin Halligan "has served with excellence and unwavering integrity." She has been unanimously rated "well qualified" by the American Bar Association, has demonstrated a consistent commitment to serving her fellow New Yorkers, and I am confident that if confirmed, she will serve with strong fidelity to the law and to justice.

I urge all of my colleagues to support this outstanding nominee.

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FOREIGN RELATIONS
SUBCOMMITTEE ON AFRICAN AFFAIRS, RANKING MEMBER

COMMERCE, SCIENCE AND TRANSPORTATION

HEALTH, EDUCATION, LABOR, AND PENSIONS
SUBCOMMITTEE ON EMPLOYMENT AND WORKPLACE SAFETY, RANKING MEMBER

VETERANS' AFFAIRS

SELECT COMMITTEE ON ETHICS
VICE CHAIRMAN

SMALL BUSINESS AND ENTREPRENEURSHIP

November 16, 2010

The Honorable Patrick Leahy
Chairman
U.S. Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Jeff Sessions
Ranking Member
U.S. Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Leahy and Ranking Member Sessions:

I write you today regarding Timothy J. Feighery, President Obama's nominee to be the Chairman of the Foreign Claims Settlement Commission. On November 15, 2010, the White House formally transmitted Mr. Feighery's nomination to the Senate and it is currently pending before the Committee on the Judiciary.

As you both are well aware, the Foreign Claims Settlement Commission (FCSC) has had two positions vacant for some time, which has prevented the FCSC from adjudicating the claims against foreign governments brought by U.S. nationals. These delays are concerning to me.

Specifically, I have constituents interested in the adjudication of the claims against the Government of Libya that were referred to the FCSC by the Department of State on January 15, 2009. Too many years have passed since my constituents and others were violated by acts of terrorism carried out by the Libyans, and I believe that these people need closure. I hope that you both will work hard to approve Mr. Feighery's nomination as soon as possible so that the full Senate can approve it before the end of the 111th Congress.

Sincerely,

Johnny Isakson
United States Senate

Cc: The Honorable Harry Reid, Majority Leader, United States Senate
The Honorable Mitch McConnell, Republican Leader, United States Senate

Statement of

The Honorable Patrick Leahy

United States Senator
Vermont
February 2, 2011

Statement Of Senator Patrick Leahy (D-Vt.)
Chairman, Senate Judiciary Committee
On Judicial Nominations
February 2, 2011

Today, the Judiciary Committee holds its first confirmation hearing of the 112th Congress, welcoming three nominees for lifetime appointments to the Federal bench and a nominee to be Chairman of the Foreign Claims Settlement Commission. All four of these superbly qualified nominees were first nominated by President Obama last year and have been re-nominated.

I thank Senator Coons for chairing this important confirmation hearing. I also thank the Committee's new Ranking Member, Senator Grassley, for working with me to schedule this hearing. At a time of skyrocketing judicial vacancies, it is important the Committee begin its consideration of pending nominations.

Yesterday in a speech at the National Press Club, White House Counsel Bob Bauer highlighted the pressing need for Senate consideration and confirmation of judicial nominations. He is right. Judicial vacancies total more than 100, nearly half of which are judicial emergencies, and the ability of all Americans to have equal access to a fair hearing in court is at risk.

The judiciary itself has weighed in regarding this crisis. In his "Year-End Report on the Federal Judiciary," Chief Justice Roberts called attention to the problem facing many overburdened district and circuit courts across the country. The Committee has received letters from the Chief Judges of the Ninth Circuit Court of Appeals and United States District Courts in California, Colorado, Illinois and the District of Columbia, all pleading with the Senate to end the blockade of nominations and confirm judges to fill vacancies in their courts. The Senate must move beyond the partisanship that has resulted in this vacancies crisis.

At a time when nearly one out of every eight Federal judgeships was vacant, the Senate last year adjourned without voting on 19 judicial nominations favorably reported by the Judiciary Committee. Attorney General Holder had warned that, "The federal judicial system that has been a rightful source of pride for the United States -- the system on which we all depend for a prompt and fair hearing of our cases when we need to call on the law -- is stressed to the breaking point." The National Association of Assistant United States Attorneys, a group of career Federal prosecutors, wrote to Senate leaders saying that, "Our federal courts cannot function effectively

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when judicial vacancies restrain the ability to render swift and sure justice." The Senate failed to heed these warnings.

We must do better. We can consider and confirm the President's nominations to the Federal bench in a timely manner. At the end of the 111th Congress, there were 19 judicial nominations left on the Senate's Executive Calendar awaiting a vote. These were superbly qualified nominees with a strong commitment to the rule of law and a demonstrated faithfulness to the Constitution. Fifteen of these nominees were reported with strong bipartisan support; 13 of them were reported unanimously by the Judiciary Committee. They could and should have been considered and confirmed before Congress adjourned.

The real costs of these unnecessary delays fall on Americans who depend on the courts. Last September, in a letter to Senate leaders, President Obama wrote that these delays are "undermining the ability of our courts to deliver justice to those in need . . . from working mothers seeking timely compensation for their employment discrimination claims to communities hoping for swift punishment for perpetrators of crimes to small business owners seeking protection from unfair and anticompetitive practices." The President is right.

Having enough Federal judges to fulfill the responsibilities of the Federal judiciary is not a partisan issue. The Senate should ensure that the Federal judiciary has the judges and resources it needs to provide justice to Americans in courts throughout the country. When I was Chairman of the Judiciary Committee during 17 months of President Bush's first two years in office with a Democratic majority, we favorably reported 100 of his Federal circuit and district court nominees. All 100 were confirmed. I continued to work hard to make progress considering President Bush's circuit and district court nominations as Ranking Member during the President Bush's third and fourth years in office when Senator Hatch was the Committee chairman, and the Senate confirmed another 105.

Overall, judicial vacancies were reduced during the Bush administration from more than 10 percent to less than four percent. During the Bush administration, the Federal court vacancies were reduced from 110 to 34 and Federal circuit court vacancies were reduced from a high of 32 down to single digits. Regrettably, this progress has not continued with a Democratic President in office. Instead, the minority has allowed votes on only 60 of the 80 of President Obama's Federal circuit and district court nominees favorably reported by the Judiciary Committee and vacancies have again skyrocketed to over 100 and remain over 10 percent.

One of the nominees before us today, Caitlin Halligan, has been nominated to fill the 10th seat on the D.C. Circuit, a very important court often called the second highest court in the Nation due to its unique jurisdiction. She is a highly respected appellate litigator who has excelled in private practice and public service, including six years as Solicitor General of the State of New York. I hope we will be able to consider her nomination fairly and in a timely manner as a sign of new cooperation in filling vacancies. Senate Democrats tried to turn the page on fights over judges when we confirmed President Bush's nomination of John Roberts to the D.C. Circuit in 2003, after two of President Clinton's highly qualified nominees, including now-Justice Elena Kagan—were stalled during the last two years of his administration. We cooperated in confirming three more of President Bush's D.C. Circuit nominees, filling the 10th and 11th seats

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on the D.C. Circuit. I hope we can cooperate now to fill the vacant 10th seat.

Judicial vacancies on courts throughout the country hinder the Federal judiciary's ability to fulfill its constitutional role. They create a backlog of cases that prevents people from having their day in court. This is unacceptable. In order for the Senate to ensure that the courts are functioning at full capacity, we must restore regular order. A return to regular order would mean that nominations sent by the Judiciary Committee to the Senate should be considered expeditiously not stalled interminably. Noncontroversial nominations should be taken up and approved on a regular basis. They should not be stalled for weeks and months for no good reason. We must return to the Senate's long-standing practice of quickly considering well-qualified consensus judicial nominations reported by the Judiciary Committee. Senators should not be stalling noncontroversial nominees. We should not have months and months of damaging delays for no good reason on virtually every judicial nomination.

If Senators want to have a debate on a nomination, we should have one. But then we should vote. Nominations that do have opposition should be taken up on a regular basis for debate, with cloture votes if necessary, so that all nominations can be acted upon in a reasonable amount of time.

I welcomed Senator Grassley's remarks last week on the qualities he looks for in judicial nominees and I agree with him. I also agreed with Senator Hatch, a former chairman of this Committee, who said we need to do a better job of moving the vast majority of noncontroversial nominations quickly. I have often said that the 100 of us in the Senate stand in the shoes of over 300 million Americans. We owe it to them to do our constitutional duty of voting on the President's nominations to be Federal judges. We owe it to them to make sure that hard-working Americans are able to have their cases heard in our Federal courts.

All three branches of the Federal Government come together when the Senate considers a President's nomination to a lifetime appointment on the Federal bench. The Senate's has a constitutional duty to act responsibly to consider the President's nominees and to confirm members of the Judiciary. Most importantly, the Senate has a responsibility to the American people to help ensure that Federal judges are there to protect their rights and administer justice.

NOMINATIONS OF JIMMIE V. REYNA, NOMINEE TO BE U.S. CIRCUIT JUDGE FOR THE FEDERAL CIRCUIT; JOHN A. KRONSTADT, NOMINEE TO BE U.S. DISTRICT JUDGE FOR THE CENTRAL DISTRICT OF CALIFORNIA; VINCENT L. BRICCETTI, NOMINEE TO BE U.S. DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF NEW YORK; ARENDA L. Wright-Allen, NOMINEE TO BE U.S. DISTRICT JUDGE FOR THE EASTERN DISTRICT OF VIRGINIA; MICHAEL FRANCIS URBANSKI, NOMINEE TO BE U.S. DISTRICT JUDGE FOR THE WESTERN DISTRICT OF VIRGINIA

WEDNESDAY, FEBRUARY 16, 2011

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 3:02 p.m., Dirksen Senate Office Building, Room SD–226, Hon. Richard Blumenthal presiding.

Present: Senators Feinstein, Klobuchar, Grassley, and Cornyn.

OPENING STATEMENT OF HON. RICHARD BLUMENTHAL, A U.S. SENATOR FROM THE STATE OF CONNECTICUT

Senator BLUMENTHAL. I am pleased to call to order this hearing of the Committee on the Judiciary and to welcome all of you here this afternoon for a very significant proceeding on a number of judicial nominees. I want to welcome the nominees and their families, and say to you that we are appreciative that you're here to support members of your families or friends in this very important moment.

I'm also grateful to Chairman Leahy for giving me the honor of chairing this meeting, and to my colleagues for being here in support of the nominees from their home States.

I just want to say, by way of brief opening statement, that I am always struck when I return to Connecticut, my home State, but how strongly people feel that they want justice done, they want the bench of the Federal courts to reflect the highest quality and instincts and background. I think we have nominees today who are

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in that tradition. We face many challenges as a Nation. Americans want us to work together. They want us to fill the vacancies that now exist. There are more than 100 of them. That is nearly 1 out of 8 Federal judgeships. Nearly half of these vacancies have been declared judicial emergencies. Over the last 2 years, quite simply, the Senate has failed to keep pace with those vacancies, has not kept pace even with the pace of retirements. We want to make sure that we attract the best and the brightest to our Federal bench.

I am impressed. I have been impressed even in the short time that I've been in the U.S. Senate by the good faith on both sides of the aisle, and I want to welcome Senator Grassley, the Ranking Member, here. I appreciate his being here.

But also, all across the political spectrum from all branches of government, Chief Justice John Roberts to the Attorney General, feeling that we need to begin moving on these nominations. And I believe that we are, and that both parties will be working together to that end. I look forward to working with Senator Grassley, as well as Chairman Leahy and other members on both sides of the aisle, to do my part, that we continue moving in the right direction, increase the pace of nominations and confirmations so that we can fulfill the hopes of the American people, that we act to make sure that justice is done in this great country.

So I would again like to welcome the five nominees. We have with us today Jimmie Reyna, who has been nominated to be a judge on the Federal Circuit Court of Appeals. Mr. Reyna is a partner in Williams Mullin, and is an expert in international trade. He will be introduced by Senator Cornyn, and Senator Cardin, if he is here.

We would also like to welcome Mr. John Kronstadt, who has been nominated to be U.S. District Court for the Central District of California. Mr. Kronstadt is currently a Los Angeles County Superior Court judge, and previously spent 24 years in private practice, including 17 years as a partner at the firm of Arnold & Porter. He will be introduced by Senator Feinstein, his home State Senator.

I'd also like to welcome Mr. Vincent Briccetti. He's been nominated to be on the United States District Court for the Southern District of New York. He's currently in private practice in his own firm, and he's worked both as a prosecutor and a defense lawyer.

Finally, we also welcome Arenda Wright-Allen, who has been nominated to the U.S. District Court for the Eastern District of Virginia, and Michael Francis Urbanski, nominated to be U.S. District judge for the Western District of Virginia. He is currently Supervisory Assistant, Federal Public Defender. Ms. Wright-Allen is a former Assistant U.S. Attorney, a former Navy JAG officer, and she would be the first African-American woman to serve on the District Court in Virginia.

Mr. Urbanski served as a magistrate judge in the Western District of Virginia since 2004, and Ms. Wright-Allen and Mr. Urbanski will be introduced by their home State Senators who are here with us today, Senator Webb and Senator Warner.

I would like to yield, now, to Senator Grassley for his opening remarks.

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STATEMENT OF HON. CHUCK GRASSLEY, A U.S. SENATOR FROM THE STATE OF IOWA

Senator GRASSLEY. Thank you, Mr. Chairman.

I join the Chairman in welcoming the nominees who are here today, and of course with their families and friends. Everybody is proud of these nominations for their respective family members.

This week we confirmed two more nominees to vacancies in the Federal judiciary. Both of these were what we call judicial emergencies. We have now confirmed five nominees during this new Congress. We have taken positive action in one way or another on nearly half of the 50 judicial nominees submitted during this Congress. So we're moving forward, as I indicated I would do on consensus nominees.

On today's agenda are four District Court nominations and the U.S. Circuit Judge for the Federal Circuit. Mr. Chairman, I will not take time here to repeat the full biographical information on our nominees. I was going to take a minute or two on each of the nominees, but since what you have already said about them and their professional background and what they're being appointed to, I'm going to just put that part of my remarks in the record.

But I would like to comment, because of the special nature of the Federal Circuit, not about Mr. Reyna, but about the circuit. Of course, everybody knows that the nominee has significant experience in international trade issues. One of the major concerns of the circuit, the Federal Circuit is unique among the courts of appeal. It is not geographically based, but has nationwide subject matter jurisdiction in designated areas. In addition to international trade, the court hears cases on patents, trademarks, government contracts, certain money claims against the U.S. Government, veterans' benefits, and public safety officers' benefit claims.

Of particular interest to me, because over the last 22 years I have been very involved in whistle-blower protection legislation, is the U.S. Court of Appeals for the Federal Circuit having exclusive jurisdiction over cases related to Federal personnel matters. That includes exclusive jurisdiction over appeals from the Merit System Protection Board, which in turn hears whistle-blower cases under the Whistleblower Protection Act, and eventually some of those—or many, many, many of them—are appealed to this specialized court.

So I thank you, Mr. Chairman, for your courtesies. Again, I welcome and congratulate the nominees.

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

Senator BLUMENTHAL. Thank you, Senator.

Now, if I may call on, first, Senator Feinstein to introduce Superior Court Judge Kronstadt.

PRESENTATION OF JOHN A. KRONSTADT, NOMINEE TO BE U.S. DISTRICT JUDGE FOR THE CENTRAL DISTRICT OF CALIFORNIA PRESENT BY HON. DIANNE FEINSTEIN, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator FEINSTEIN. Thank you very much, Mr. Chairman. I appreciate that. I am obviously very pleased to be here today to introduce California Superior Court Judge John Kronstadt to the Com-

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mittee. Judge Kronstadt came to my attention through a judicial advisory Committee which I have established. They recruit, interview, vet, and advise on nominees. So this candidate has been reviewed based on his legal acumen, his reputation for skill and professionalism, his breadth of personal experience, temperament, and overall commitment to excellence in the field of law.

Judge Kronstadt quickly rose to the top of candidates recommended to me by this Committee because he has all of these qualities in spades. Since 2002, he has presided as a judge on the Superior Court of Los Angeles County. His docket consists primarily of civil cases, ranging from employment litigation, to contract disputes, to intellectual property and other commercial matters. He has overseen some 250 trials, as well as countless pre-trial proceedings. In almost 9 years on the court, only one of his decisions has ever been reversed. That's a good record.

Within the Los Angeles area, Judge Kronstadt is regarded as one of the finest judges on the bench. Fellow judges, litigants, and local lawyers describe him as "incredibly smart", "very fair", "even-tempered", and "a hard worker who cares an incredible amount about the jury system".

Judge Kronstadt also brings a distinguished background in private practice, as the Chairman mentioned. Prior to becoming a judge, he spent roughly two dozen years as a litigator, trying complex civil cases before Federal courts, State courts, and administrative agencies. He began his career as an associate, and then a partner at the law firm of Arnold & Palmer, first in Washington, DC and then in Los Angeles.

Between years with that firm, he also spent 15 years managing his own firm with three colleagues. That was the firm of Blanc, Williams, Johnston, and Kronstadt. Judge Kronstadt has a bachelor of arts degree from Cornell and a law degree from Yale.

Beyond his educational and professional qualifications, he has also shown an impressive dedication to education and the teaching of students throughout his career. So since 2002, he has spent roughly 1,500 hours as a volunteer with the Constitutional Rights Foundation, including serving as the foundation's president.

This is a nonprofit, nonpartisan organization in Los Angeles that seeks to educate young people to become active and responsible participants in our society, something, Mr. Chairman, we sorely need, and to teach them about the importance of civic participation in a democratic society. He has developed a program for the foundation known as Courtroom to Classroom. This facilitates visits by judges to 8th and 11th grade public school classrooms throughout the Los Angeles area.

Judges who volunteer provide copies of the Constitution to students and organize mock trial activities to allow them to experience constitutional law and the courtroom at a young age. He has also organized similar activities as chair of the Los Angeles County Superior Court's Community Outreach Committee. He has developed a training program for the L.A. County Bar Association that has reached over 1,000 new attorneys. So he is truly eminently qualified and a very active and good citizen.

He is here with his wife, who is a fellow judge on the Los Angeles Superior Court, and two daughters and a son, which have also

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brought themselves here. I think it's very nice that they're here to hear this for their father. So, I thank you very much, Mr. Chairman.

Senator BLUMENTHAL. Thank you, Senator.

As many of you may know, we're in session this afternoon. The Senate is in session, so the Senators who are here to introduce the nominees from their States may not be able to stay. I know everyone will understand if they have to leave after they speak. Thank you very much, Senator.

Senator FEINSTEIN. Thank you.

Senator BLUMENTHAL. Senator Cornyn and Senator Cardin, to introduce Jimmie Reyna, please.

PRESENTATION JIMMIE V. REYNA, NOMINEE TO BE U.S. CIRCUIT COURT FOR THE FEDERAL CIRCUIT PRESENT BY HON. JOHN CORNYN, A U.S. SENATOR FROM THE STATE OF TEXAS

Senator CORNYN. Thank you, Mr. Chairman, for the opportunity to introduce Jimmie Reyna to the Committee, someone who I've come to know, admire and respect, and had the privilege of, along with Senator Cardin, recommending to the President that he nominate him for a seat on the U.S. Court of Appeals for the Federal Circuit.

Based on his personal and professional background, I think he possesses the commitment, the skill, and the temperament necessary to apply the law faithfully. Mr. Reyna—his personal history exemplifies the American ideal of opportunity through service and hard work. He was born to Baptist missionaries in New Mexico. He battled adversity to graduate as valedictorian from his high school class, and earn a scholarship to college at the University of Rochester.

After graduating from law school at the University of New Mexico, he came to the Nation's capital with, in his words, "no job and a lot of hope". Well, since then, Mr. Reyna has repeatedly put that hope into action and it's paid off.

Perhaps the strongest testament to Mr. Reyna's abilities comes from the trust that others have placed in him. Throughout this 32-year legal career, he has consistently been recognized as an exceptional attorney by his peers. He has received a perfect AV rating from Martindale Hubble, and was distinguished as one of the best lawyers in the city of Washington, DC by *Super Lawyers* magazine. Even more impressive, in 2009 the Mexican government awarded him the Oakley Award in Law, its highest legal honor given to noncitizens.

Mr. Reyna's legal background has also prepared him to serve with distinction on the Federal Circuit. For the past 24 years, he has practiced extensively within the field of international trade, as Senator Grassley noted, rising to the position on the board of directors of the Williams Mullin law firm.

In addition to his private legal practice, he served on the U.S. roster of dispute settlement panelists for trade disputes under the North American Free Trade Agreement, and on the World Trade Organization dispute settlement mechanism.

Mr. Reyna has also established himself as a scholar in the field of international law, authoring books on both NAFTA and GATT.

As the former chairs of the American Bar Association's Section on International Law have noted, Mr. Reyna has "an impeccable reputation within the international law community".

Because the Federal Circuit hears appeals from the U.S. Court of International Trade, his broad expertise in this area will help the court adjudicate some of the most complex cases on its docket. In a system where judicial resources are so scarce, his presence on the court will undoubtedly advance the interests of justice.

Mr. Reyna's accolades, however, don't stop at the courtroom door. He has demonstrated a lifelong commitment to public service. As president of the National Hispanic Bar Association, he launched the first-ever outreach program designed to instill trust and confidence in the American legal system within the immigrant community, and he has worked tirelessly to protect some of our society's most vulnerable citizens, serving for more than a decade on the board of directors of the Community Services for the Autistic Adults and Children Foundation.

Despite the many demands on his schedule, Mr. Reyna has also found the time in his career to practice extensively pro bono, helping to ensure that the American value of equal justice under law is preserved for all, no matter what their income may be. If the true measure of a person is what they are willing to do for others in need, then Mr. Reyna has once again exceeded all standards.

Mr. Chairman, based on the impeccable credentials and distinguished legal career which I have just outlined here, I would urge my colleagues to join me in supporting the nomination of Jimmie V. Reyna to the Federal Circuit Court. Thank you very much.

Senator BLUMENTHAL. Thank you, Senator.

Senator Cardin.

PRESENTATION JIMMIE V. REYNA, NOMINEE TO BE U.S. CIRCUIT COURT FOR THE FEDERAL CIRCUIT PRESENT BY HON. BENJAMIN L. CARDIN, A U.S. SENATOR FROM THE STATE OF MARYLAND

Senator CARDIN. Mr. Chairman, thank you very much. I'm pleased to join Senator Cornyn in recommending and introducing Jimmie Reyna to the Judiciary Committee. We are very pleased that he has been willing to put his name forward to serve in this position, and I thank him for his commitment to public service. I want to acknowledge the sacrifice that he and his family will be making, and we very much appreciate that sacrifice.

I am pleased to recommend Jimmie Reyna for a vacancy that now exists in the U.S. Court of Appeals for the Federal Circuit. Mr. Reyna comes to this Committee with 23 years of experience in international trade law. You have heard that from Senator Grassley and from Senator Cornyn.

Mr. Reyna currently is a partner in the Washington, DC office of Williams Mullin. Mr. Reyna directs the firm's trade and custom practice group, as well as the firm's Latin America Task Force, and also served for several years on his firm's board of directors, where he currently serves as vice president.

Mr. Reyna has also authored several articles and two books on international trade issues. His third book on the subject is due to be published this spring.

His experience in trade law would bring important expertise to the Federal Circuit, a unique court with nationwide jurisdiction that deals with many trade law issues and yet currently lacks a trade specialist.

Mr. Reyna was admitted to the New Mexico Bar in 1979, and the District of Columbia Bar in 1994. He received his JD from the University of New Mexico School of Law, and his BA from the University of Rochester. The American Bar Association's Standing Committee on the Federal Judiciary evaluated Mr. Reyna's nomination and rated him unanimously "Well Qualified", the highest possible rating.

Senator Cornyn has talked about Mr. Reyna's personal history, which is very compelling. In his practice, he has often represented clients pro bono, devoting a large portion of his time to providing advice and representing individuals who could not afford legal assistance. To me, that speaks volumes of his commitment to our legal system, to make sure everyone has access to our system. He has carried out that responsibility as a lawyer and leader in the legal community.

A few years later, Mr. Reyna moved with his family to the Washington, DC metro area, where he built his well-regarded career in international trade. Mr. Reyna has continuously proven that he is an outstanding and civic-minded person. He is a well-known national leader in U.S. Hispanic affairs. He has held various leadership positions in the Hispanic National Bar Association, including the national president, vice president of Regional Affairs, regional president, and chair of the International Law Committee.

Mr. Reyna is also a founder and member of the board of directors of the U.S.-Mexico Law Institute. Through his work, Mr. Reyna has strived to ensure that members of disadvantaged communities are informed about the law, that the legal community is prepared to handle the legal challenges facing the growing Latino community, and that the judiciary remain strongly independent, impartial, and accessible to all.

Mr. Reyna's civil service is not limited to his work in the Hispanic community. He has been recognized by the Court of International Trade for his extensive pro bono work before that court. He also serves on the board of directors of the Community Services for Autistic Adults and Children Foundation.

Mr. Reyna's nomination will also bring much-needed diversity to the Federal Circuit. Throughout his career, he has shown a strong commitment to diversity and racial equality, not only through his service to the Hispanic community, but also through his service on the ABA's Presidential Commission on Diversity in the Legal Profession, and as chair of the Williams Mullin Diversity Committee.

If Mr. Reyna is confirmed, he will be the first minority to serve on the Federal Circuit in its history. With the nomination of Mr. Reyna, the Senate has another opportunity to further increase diversity on the Federal bench. Because of his various qualifications, he has earned and received support from various organizations and individuals, including seven former chairs of the American Bar Association's Section on International Law who wrote an endorsement letter for Mr. Reyna, affirming that Mr. Reyna has the professional credentials, the experience and skills, the appropriate tempera-

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ment, and the fair and sound judgment to serve on the Federal Circuit.

Mr. Chairman, I would also like to put into the record a letter from Congressman Chris Van Holland from Maryland in support of Mr. Reyna's confirmation.

Last, but certainly not least, Mr. Reyna is a resident of Silver Spring, Maryland and a constituent of mine.

I would urge the Committee to favorably consider his nomination. I think he will make an excellent addition to the Federal bench.

Senator BLUMENTHAL. Thank you. Without objection, we will take your letter, the letter from Representative Van Holland, and insert it in the record.

[The prepared statement of Representative Van Holland appears as a submission for the record.]

Senator BLUMENTHAL. Thank you for being here, both you and Senator Cornyn.

Senators Webb and Warner, if you would introduce both Ms. Wright-Allen and Mr. Urbanski, magistrate judge.

PRESENTATION OF ARENDA L. WRIGHT-ALLEN, NOMINEE TO BE U.S. DISTRICT JUDGE FOR THE EASTERN DISTRICT OF VIRGINIA AND MICHAEL FRANCIS URBANSKI, NOMINEE TO BE U.S. DISTRICT JUDGE FOR THE WESTERN DISTRICT OF VIRGINIA PRESENTED BY HON. JIM WEBB, A U.S. SENATOR FROM THE STATE OF VIRGINIA

Senator WEBB. Thank you, Mr. Chairman and Ranking Member Grassley, Senator Klobuchar, other members of the Committee. I have a longer statement I would ask be entered into the record at this point.

Senator BLUMENTHAL. Without objection.

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

Senator WEBB. Thank you.

I am pleased to join Senator Mark Warner, my colleague, for the purpose of introducing two outstanding attorneys from Virginia, Arenda L. Wright-Allen and Judge Michael Urbanski, whom the President has nominated for seats on the U.S. District Courts for the Eastern and Western Districts of Virginia.

These two individuals represent the highest degree of integrity, competence, and commitment to the rule of law, and each in their own way exemplifies the best of the Virginia bar. Whenever a vacancy has occurred on the Virginia Federal bench, Senator Warner and I have conducted a thorough and extensive review of the candidates for the vacant position.

This review includes interviews, recommendations by Virginia's Bar Associations, and in-person interviews with the candidates. The candidate pool from which we had to choose this time was excellent and deep. It included judges, legal scholars, and skilled trial attorneys. Both of the candidates before you received the highest rating of the Virginia State Bar.

From this very competitive field, Senator Warner and I recommended Ms. Wright-Allen and Judge Urbanski. Ms. Wright-Allen—let me say this as a former Secretary of the Navy and

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former Marine—I personally appreciate and understand the sacrifices that veterans have made to our country, and Ms. Wright-Allen is a veteran.

She initially stood out because of her service in the Navy. She served for 5 years as an active duty JAG officer, and continued that service as a reserve JAG officer until she retired as a Commander in 2005. Her record of service there was excellent, and this extensive court experience has been valuable, I think, in her follow-on career, and also will serve her well as a Federal judge, should she be confirmed.

Ms. White Allen has dedicated her civilian career to serving her community as a Federal prosecutor, and since 2005, as a Federal public defender. Unanimously, prosecutors and defenders who have worked with her on either side have attested to her talent, dedication, and above all her exceptional character. Upon meeting Ms. White Allen, it was clear to me that she possesses the judicial temperament and dedication to make an excellent judge.

She is joined here today by quite a contingent, including her husband, Delroy Anthony Allen, and her son, Yanni Anthony Allen. I am sure she is going to want to introduce all those people who are with her when she is before you.

I am very proud to say that our nominees for the Western District of Virginia is a product of Virginia's public universities. Judge Urbanski graduated from the College of William & Mary in 1978, and then from the University of Virginia Law School in 1981. He currently served as a magistrate judge for the Western District of Virginia. Prior to becoming a magistrate judge, he practiced in Roanoke, Virginia from 1989 to 2004, and was the head of the litigation section at the law firm of Woods & Rogers.

Judge Urbanski's candidacy was overwhelmingly supported by the Bar Associations which he covers as a magistrate judge. He has a reputation for dedication, good temperament, and bringing energy to his job, which has resulted in the efficient administration of justice for many citizens in the Western District.

Prior to becoming a Federal magistrate judge, Judge Urbanski earned a reputation as one of the top trial lawyers in western Virginia. I'm convinced that he embodies all of the talents to become an excellent district judge.

He is joined today by his wife Ellen, his son Will, his mother Irene Urbanski, who is 87 years young, his sister Terry McGlennon, his brother-in-law John McGlennon, his nephews Andrew and Colin, and he also has a large contingent, I think, who have come here today to support him and I am sure he will introduce them at the appropriate time.

So I have every confidence that the Committee will find these two very fine citizens' attorneys well qualified for the Federal bench and that we can move their nominations forward with all due haste.

I, at this point, would like to yield to my colleague, Senator Mark Warner.

Senator BLUMENTHAL. Thank you, Senator.

Senator Warner.

PRESENTATION OF ARENDA L. WRIGHT-ALLEN, NOMINEE TO BE U.S. DISTRICT JUDGE FOR THE EASTERN DISTRICT OF VIRGINIA AND MICHAEL FRANCIS URBANSKI, NOMINEE TO BE U.S. DISTRICT JUDGE FOR THE WESTERN DISTRICT OF VIRGINIA PRESENTED BY HON. MARK R. WARNER, A U.S. SENATOR FROM THE STATE OF VIRGINIA

Senator WARNER. Thank you, Mr. Chairman. Let me thank Senator Leahy and Ranking Member Grassley for the prompt scheduling of this hearing, and I'd like to thank Senator Klobuchar for being here. I want to commend you, Mr. Chairman, Senator Blumenthal, for only being here in the Senate for 45 days, and yet already chairing a Committee.

[Laughter.]

Senator BLUMENTHAL. I haven't blown it yet.

[Laughter.]

Senator WARNER. It is a remarkable achievement.

Senator BLUMENTHAL. Thank you, Senator.

Senator WARNER. Let me echo. I'd like to also ask that my fuller statement be submitted for the record.

Senator BLUMENTHAL. Thank you. Without objection.

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

Senator WARNER. Let me echo what my colleague and friend, Senator Webb, has said. I am very proud to join with our senior Senator, Jim Webb, in introducing Arenda Wright-Allen and Judge Michael Urbanski to become, respectively, the next district judges from the Eastern District and Western District of Virginia.

As Senator Feinstein mentioned on her process, Senator Webb and I have a similar process where we spent a great deal of time reviewing candidates. We had the opportunity, with two positions open, to see, as Senator Webb indicated, a wide array of candidates. These two individuals, both in terms of their legal temperament, their background, and quite honestly the intangible personal skills, that I think we both agreed will be exemplary members of the Federal judiciary. We both are honored to recommend them for their appointments.

As Senator Webb and others have mentioned already, Ms. Arenda Wright-Allen will be a groundbreaking nomination. She has served our country in the Armed Services as a U.S. Navy Judge Advocate General. She also, I think, will bring a unique background as someone who has served both as a prosecutor, and as a public defender, somebody who has seen our criminal justice system and our court system from both sides.

I also have to say, Senator Webb and I were both taken with her strength of personal convictions and very powerful personal story as well. So, Senator Webb has gone ahead and noted her family members. I know she and Judge Urbanski are anxious to get here, as I am sure the other candidates are. But I am very proud to join with Senator Webb in her nomination.

Let me also introduce as well, or re-introduce as well, Judge Michael Urbanski. You heard from Senator Webb some of his legal background. He started as a law clerk for Hon. James Turk, judge, then he served in trial bar, he served in a major firm in the Roa-

noke area. He has been a U.S. magistrate judge for the Western District.

Since Senator Webb went through so many of his other attributes, let me just mention some of his attributes outside the courtroom. As magistrate judge, Judge Urbanski is responsible for managing all the pro se prisoner cases filed in the Western District, and working with other judges in the region, Judge Urbanski has begun participating in a pilot reentry program designed to help assist Federal felons in exiting the penitentiary system and making that appropriately difficult transition back to society.

Those programs—on a personal note, I might add—were always ones that were sometimes subject to cuts, but I know in your previous tenure as attorney general as well, so often those programs provide that transition back so that we can eliminate or cut back the enormously high rates of recidivism in our system.

In 2008, he went as well into our public schools, particularly in the Roanoke area, going through and working at the middle school and high school levels, making sure students were familiar with the challenges and penalties involved in drug trafficking. That program has touched the lives of more than 6,000 students.

Again, like Ms. Wright-Allen, I think he will bring extensive practical experience, personal experience, and knowing many members of his family, I can vouch that he brings the right personal experience as well.

So I join all of our colleagues and I hope Judge Kronstadt from California, Jimmie Reyna from Maryland, joining hopefully the Federal Court of Appeals, and these two wonderful candidates from Virginia, Ms. Wright-Allen and Judge Urbanksi, will be acted upon favorably by the Committee.

My hope is, again on a personal note, with the kind of shortages that you mentioned in your—judicial shortages that you mentioned in your opening comments, that this Committee will act in a judicious manner, and quick manner on them, and that these two very qualified nominees—for that matter, all four of these nominees—if your Committee acts favorably, they can see their nominations move quickly to the floor and they can go ahead and step up and provide the kind of public service that I know all four will be able to provide.

With that, Mr. Chairman, I thank you.

Senator BLUMENTHAL. Thank you very much, Senator Warner. I would like to thank you and the other Senators who have given of their time. I know how busy today is. Thank you so much for being here, and the others for their excellent introductions as well.

Senator Schumer would have been here to introduce Vincent Briccetti, but he was called to the White House. I have a statement from him, which I am going to enter into the record, if there is no objection.

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

Senator BLUMENTHAL. And also a statement from Chairman Leahy, who could not be with us as well.

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

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Senator BLUMENTHAL. Vincent Briccetti has been nominated, as you know, to be a District judge for the Southern District of New York. He was born in Mt. Kisko, and he earned his B.A. at Columbia, and then his J.D. from Fordham University of Law, where he was articles editor of the Fordham Law Review. He is uniquely qualified to serve as a trial court judge because he has very extensive experience as a litigator, some years of which he spent in Connecticut, as a matter of fact—in Stanford, Connecticut—with the law firm of Paul, Hastings, Genofsky, & Walker.

Since 1992, he has worked in private practice in his own firm, but he has also served as an Assistant U.S. Attorney in the Southern District of New York, and as an associate with Townley & Updike in New York, and a law clerk for Judge John Canella of the Southern District of New York.

As I mentioned, I have a statement on behalf of Senator Schumer to be entered into the record in support of this nomination, and I also have—and I will enter into the record as long as there is no objection—letters from others who could not be here, including Janet DiFiori, District Attorney for the County of Westchester, in support of Mr. Briccetti, and Steven Robinson, on behalf of Vincent Briccetti, which I will enter into the record, and Bart Schwartz, also in his support.

[The letters appear as a submission for the record.]

Senator BLUMENTHAL. So if we can proceed, I would like to ask, first, that Jimmie Reyna come forward and we will begin with the hearing.

I am going to ask you to stand and raise your right hand.

[Whereupon, the nominee was duly sworn.]

Senator BLUMENTHAL. If you would like to begin with a statement, Mr. Reyna, we would be happy to have it.

STATEMENT OF JIMMIE V. REYNA, NOMINATED TO BE U.S. CIRCUIT JUDGE FOR THE FEDERAL CIRCUIT

Mr. REYNA. Yes. Thank you, Senator. It is a privilege to be here today, especially this being your first chairmanship of this committee. I thank you for the invitation, and I thank Senator Leahy and Ranking Member Grassley for scheduling this hearing and having me here to testify and participate today.

Mr. Chair, if I may, I'd like to introduce the members of my family.

Senator BLUMENTHAL. Please do.

Mr. REYNA. I hope I get everybody. I'd first like to introduce my wife, Dolores Ramirez Reyna. She and I, in 2 weeks, are going to celebrate our 39th anniversary. We got married when we were freshmen in college, and we've had two wonderful children. My oldest son Jimmie, is autistic and couldn't be here today with us. He's got commitments in the work that he's doing. My other son, Justin, is here. Justin is an attorney licensed in DC. My sister Paz Martinez, from New Mexico, is here. My brother Julian Reyna, my sister Lillian Chapman. I also have with me some cousins, Margie Martinez, Lita McEachern, and Danny Reyna are here.

There's two individuals who are not here that I'd like to speak on, and that is my sister-in-laws, Felicita Ramirez and Michelle Reyna. Also not here—physically anyway—are my parents and my

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brother. My parents, as you heard from Senator Cornyn, were Baptist missionaries. My father was a migrant second-generation American born into a migrant family, and they were all migrant workers. My mother was an immigrant from Mexico. They met in a seminary in El Paso. They had five children, four of whom I introduced to you today.

We were raised in a very modest environment, but very rich in love, the arts, religion, philosophy, literature. All of the children are graduates of college. We all played musical instruments at one time or the other, though some were much more accomplished than others, I being the least accomplished.

But they taught us many things. My mother would often tell me—she'd look at me. Even as a child, she'd look at me and say, "conganas, conganas", which in Spanish means, "with enthusiasm, with respect, with dignity". After a while, all she had to do was look at me and nod her head at me, and I knew what she was telling me.

My father, to augment family income, would often take us out to the fields. All the children here picked cotton. We've hoed cotton. We've worked in the onion fields. He taught us that all work is honorable. Throughout high school, after football practice, or debate, or speech, I would go and I always had a job. I'd go do my job after that. Then I'd go home, and my dad and I would go out together and we'd clean offices. We did that the whole time I was in high school, and part of junior high.

So we talk about the American dream: it's the children that live it, it's the parents that dream it. I have no further statement, Mr. Chairman. I'm open for questions.

Senator BLUMENTHAL. Thank you very much. I want to welcome you personally to the Committee and really commend and thank you for that extraordinary personal story, your professional achievements, which are so impressive, and your willingness to serve—indeed, all the nominees' willingness to serve—in this very challenging and profoundly significant role as a member of the bench.

Let me begin by asking you whether you would please describe for this Committee how you see as different the role of advocate, which you have been, and the role of judge.

Mr. REYNA. Yes, Senator. Thank you for the question, because it applies directly to me, having been a private practitioner going, if confirmed, to the bench. A lawyer is an advocate and a lawyer gathers evidence, facts, witnesses, information, and prepares all that information to present a singular view. That view is either to attack or defend clients' interests, to advance, perhaps to give counsel on, say, an investment on an adoption. So an attorney is an advocate and is zealous in that advocacy.

A judge, on the other hand, has no personal point of view as to points of litigation. I believe that a judge, at the courthouse door, checks personal feelings and personal biases, or perhaps an idea that a judge may have about a particular issue that is involved in the litigation or the case. I think that the role of a judge is to be unbiased, to be objective, and to apply the applicable law to the facts and to be just in his or her work.

Senator BLUMENTHAL. Thank you. We've heard, and clearly you have had, a very significant experience in international law. I wonder if you could describe for the Committee how that experience would be of benefit to you in the role that you would have.

Mr. REYNA. As we heard from Senator Grassley, and also Senator Cornyn and Senator Cardin, the jurisdiction of the Court of Appeals for the Federal Circuit includes international trade appeals that are taken up from the Court of International Trade in New York, and cases that also come up out of the U.S. International Trade Commission.

In the past 23 years I have specialized in international trade and all aspects of international trade, I think that my work on antidumping cases, countervailing duty cases, Customs cases, investment, all laws and regulations that affect the cross-border movement of goods, services and individuals, I think that that experience will serve me well on the Federal Circuit and will bring valuable experience to the court.

Senator BLUMENTHAL. Thank you.

You know, there has been some reference here about the importance of diversity on the bench. I know that you have worked for diversity, particularly in bringing the Hispanic community into the Bar. I wonder if you could reflect for the Committee what more can, and should, be done to increase the diversity of the Bar, and perhaps even what you might do as a role model, but also in other ways as a member of the bench.

Mr. REYNA. I've been involved in diversity issues, I guess, since college and then through law school. Within the past decade or so, I've been involved in diversity issues and the judiciary, unbeknownst at that time that I would be sitting here before you today.

I think that diversity on the judiciary is extremely important and I think it's vital to our judiciary and our system of justice. I think what can be done more, is part of the work that I did, I undertook as president of the Hispanic National Bar Association and the work that I did within the American Bar Association, and that is to help repair excellent practitioners of all walks of life so that they may be prepared to someday be judges.

Senator BLUMENTHAL. And finally, if you could tell us a little bit about the pro bono work that you've done. There's been some mention of it by Senators Cornyn and Cardin, and Senator Grassley. I wonder if you could describe in a little bit more detail what you've done by way of pro bono work.

Mr. REYNA. As a solo practitioner in Albuquerque, New Mexico, I found out that there is no end of pro bono clients. If you open your door, a line will form of individuals that need legal help but cannot pay for it. I undertook quite a bit, maybe a little bit more than I could have afforded, but I took on a lot of pro bono work at that time.

Most recently, the Court of International Trade has commended me three different times for taking on pro bono cases that I've been requested by the court to handle, and the representation, for example, 53 women in Pennsylvania who lost their work because of the closing of the factory due to the production being moved abroad under the Trade Adjustment Act and laws of the United States. So

I've devoted a lot of time, a lot of my energy and career toward pro bono work.

Senator BLUMENTHAL. Thank you.

I'm going to yield to Senator Grassley.

Senator GRASSLEY. Yes. I'm going to touch on this issue of whistle-blowers that the court has jurisdiction of. I know you might not have a lot of experience in that area, but you're going to be called upon to make some decisions.

As a person that sponsored whistle-blower legislation back to 1989, and I have a great faith in most whistle-blowers helping make government more transparent and accountable, and consequently a source of information sometimes to make sure that government is doing what it's supposed to do.

I noticed that throughout the history of the Federal Circuit being involved in whistle-blower cases, they decided 219 cases involving the Federal Government whistle-blowers and it found in favor of the whistle-blowers in only 3 of those cases. I'm not condemning or making any judgment based on it, except it just seems a little bit far-fetched that whistle-blowers will only win in 3 out of 219 cases.

But anyway, one of the things that I want to ask a question about is a standard that they set in the *LaChance* v. *White* case in 1999. In that case, the Federal Circuit held that a whistle-blower had to present irrefragable proof—I–R–R–E–F–R–A–G–A–B–L–E—that wrongdoing actually occurred in order to prove the claim.

Senator KLOBUCHAR. They use that term all the time in Iowa. Is that right, Senator Grassley?

[Laughter.]

Senator GRASSLEY. I was about to say the opposite.

[Laughter.]

Senator GRASSLEY. It's a whole new standard that I haven't seen anyplace else. I think I know what they mean.

So to get to some discussion with you, in reviewing your questionnaire it appears that you've had little, if any, experience with whistle-blower law or any Federal personnel law. Considering that the Federal Circuit has exclusive jurisdiction over these cases, what, if any, experience do you have with the whistle-blower protection law?

Mr. REYNA. Thank you, Senator. I think one of the best-kept secrets in U.S. law, that you've been a champion of whistle-blowers for so long. The whistle-blower laws that we have in place are a direct part of the work that you've done, and I think the country owes you gratitude for that.

That said, if confirmed, as a judge on the Federal Circuit, I would approach every whistle-blower case that would come before me with utmost importance, and I would apply the law, the applicable law, to the facts. I would see to arrive at a just and a very expedient decision. I say "expedient" because we're talking about American workers and we're talking about workers that have given their time and energy and work for the Federal Government. It's important that their matters be resolved quickly.

Now, as to the standard that you just articulated, that is a new word to me, too. In New Mexico, we do not have that word as well.

[Laughter.]

Mr. REYNA. However, I will, as a judge on the Federal Circuit, apply the precedent that exists when reviewing whistle-blower cases, and I will also apply the law that exists within the whistle-blower statutes. I can confirm this to you, Senator, that in the cases that I adjudicate, I will seek to provide clarity and guidance for future litigants and for our American workers in the government.

Senator GRASSLEY. OK. In the inaugural issue of the *Hispanic National Bar Association Journal of Law and Policies*, I quote you: "We often hear that the U.S. Constitution is a living document, and as attorneys we recognize that the law can both lag behind social development and accelerate change."

Do you personally believe the Constitution is a living document, and if so, what does it mean for the Constitution to be a living document?

Senator GRASSLEY. Thank you, Senator. The quote that you read, I wrote as the senior editor of the Hispanic Bar Association Journal of Law and Policy. I'm the senior editor of that and I helped found that journal. I wrote that and I said we often hear—and we do. We hear many people claim that the Constitution is a living document, and we hear many different attributes made and labels placed on the Constitution.

What I was doing in that editorial comment, is I was calling attention and calling to action the purpose of the journal, and that is to serve as a catalyst for an exchange of legal ideas so that lawyers, legal scholars, regulators, and academics could gather together and have a free-flow exchange of ideas. So I was advocating, and I was advocating as an editor when I wrote those words. If confirmed as a judge on the Federal Circuit, I will not be an advocate and I would decide cases in an impartial and objective manner.

As to the term "living", what that means—living Constitution, I believe that the Constitution stands on its own text. I think that the Constitution says what it says, and I believe that, as a result of that, over the 200 years of the history of our country, the Supreme Court has built a case of precedent, and there's been case law that has developed over time. If confirmed, I will—and cases come before me.

And if those cases involved constitutional issues, the constitutionality of a statute, I will first apply the precedent, then I will apply the text, and then I will apply the law, or perhaps even look at the purpose of the originators of the Constitution. But at all times I will approach every matter involving the constitutionality of any statute with the utmost seriousness and I will confine any opinion I'm involved in to the breadth of the statute and to the breadth of the issues that are before us in a very confined, narrow sense.

Senator GRASSLEY. Thank you, Mr. Chairman.

Senator BLUMENTHAL. Thank you, Senator Grassley.

Senator Klobuchar.

Senator KLOBUCHAR. Thank you very much, Chairman Blumenthal and Senator Grassley, for holding this hearing. We're glad, by the way, Senator Blumenthal, that you're on this Committee.

Senator BLUMENTHAL. Thank you.

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Senator KLOBUCHAR. And I want to thank all of our nominees for being here. You all have such impressive backgrounds. I was fortunate enough to be introduced to Mr. Reyna last year by Peter Reyes, who is an intellectual property lawyer at Cargill in Minnesota. I think you know you have many friends in our State.

Mr. REYNA. Yes.

Senator KLOBUCHAR. So we're glad you're here today.

I just, as someone who came who was in private practice like yourself for quite awhile—I was in it, I think, for 14 years, and you were in it for 30 years. Is that correct, Mr. Reyna?

Mr. REYNA. Yes. I've always been in private practice.

Senator KLOBUCHAR. Could you talk about how you expect that to be a useful experience on the bench, having come from the private sector?

Mr. REYNA. Yes. In fact, Senator—and thank you for the question—my legal career has been very diverse. I've handled a lot of different types of cases. One of my most memorable cases is an adoption, for example, where afterwards when the court approved the adoption, a very simple, basic legal procedure, out in the hallway the family surrounded me and cried. That case gave me an understanding of the power in the law, the power to bind families. Since then, I've also represented large corporations. I've represented a whole broad range of clients. I think that being a private practitioner appearing before courts gives me a very unique perspective.

I understand what it is private practitioners want, what they seek when they appear before a court. They seek a just and a very speedy resolution. If confirmed, one of the things that I'll work for, Senator Klobuchar, is to ensure that I give respect to all the litigants, give them all an opportunity to be heard, and that I will work to have an expedient resolution.

Senator KLOBUCHAR. Very good. And I know that Senator Blumenthal asked you, and Senator Grassley also mentioned your experience as head of the National Hispanic Bar, which I think you said you were president from 2006 to 2007, and you talked a little bit with Senator Blumenthal about the diversity issues.

But what in that experience, as well as your experience in the private sector, has led you to think what is the greatest challenge that the Federal courts are facing? I'm going to be taking over the Subcommittee on courts in this Committee with Senator Grassley. I was just curious, just from your perspective as a leader in the National Bar, as well as your work before the courts, what you see as the biggest challenge as we move ahead.

Mr. REYNA. Thank you, Senator. I believe that there are many—or a good number—of very significant challenges facing the judiciary. One of them I will address, since you alluded to it, is diversity. I think that diversification of diversity in the judiciary is extremely important. I started working on this particular issue in conjunction with work I was doing with the Sandra Day O'Connor initiative on a fair and impartial judiciary.

I also believe that the judiciary must arrive at more expedient resolutions. It's taken a long time for the litigants to get a case decided. Litigants—and I say this as a private practitioner—represent clients whose businesses often could be at peril or depend

on the outcome of a case. The community, the legal community and society as a whole, depends very much on the guidance that courts give when they render a decision. So those are two factors that I think are important challenges to the judiciary.

Senator KLOBUCHAR. Two challenges we also have in the U.S. Senate, I could add. Not that it's taking too long to do the nominations process. But my last question just would be, you did such a beautiful job of talking about your family and your parents and what they meant to you, and you talked about your mother's advice about showing respect and showing enthusiasm for what you do. But what do you think will be your biggest thing that you remember from the advice from your parents and your background that you'll take to the bench in terms of your own background, and what has that meant to you as a judge?

Mr. REYNA. Again, I grew up in a religious household. The faith that my parents had exists in all the children and everybody behind me. I think with that comes with having respect and dignity to everyone that you deal with. Yesterday, I was walking down the street on 16th Street and the doorman of a building called me over and introduced me to his sister. What he said is, this man, I don't know his name, but he's been walking past this door for the past 20 years and we've been saying hi to each other, and I want you to meet my sister. He introduced us.

The reason that happened is because it's true, I would walk by there and for the past 20 years, I see him standing there and we say hi. He says hi and he's looking at me. I think that springs from my parents, the value that every human being has within them the capacity to give respect to others, but more than that, that we all merit the respect and dignity of each other, whether we do this in government, whether we do this in our family lives, or whether we do this on our own.

Senator KLOBUCHAR. Thank you very much.

Mr. REYNA. Thank you.

Senator BLUMENTHAL. Thank you, Senator Klobuchar.

I believe there are no further questions of Mr. Reyna, so thank you very much for being here today. We're going to move on to the second panel. Again, thank you to you and your family.

Mr. REYNA. Thank you, Mr. Chairman.

Senator BLUMENTHAL. Congratulations on your anniversary.

Mr. REYNA. Thank you very much.

Senator BLUMENTHAL. If you would please come forward, and your name tags will indicate the order in which you are to speak.

If you would raise your right hand.

[Whereupon, the nominees were duly sworn.]

[The biographical Information follows.]

UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY

QUESTIONNAIRE FOR JUDICIAL NOMINEES

PUBLIC

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

   Jimmie V. Reyna

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

   United States Circuit Judge for the Federal Circuit

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

   Office: 1666 K Street, N.W., Suite 1200
   Washington, D.C. 20006

   [redacted]

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

   1952; Tucumcari, New Mexico

5. **Education**: List in reverse chronological order each college, law school, or any other institution of higher education attended and indicate for each the dates of attendance, whether a degree was received, and the date each degree was received.

   1975 – 1978, University of New Mexico School of Law; J.D., 1978
   1971 – 1975, University of Rochester; B.A., 1975

6. **Employment Record**: List in reverse chronological order all governmental agencies, business or professional corporations, companies, firms, or other enterprises, partnerships, institutions or 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 description.

   1998 – present
   Williams Mullen, P.C.
   1666 K Street, N.W., Suite 1200
   Washington, D.C. 20006
   Partner (1998 – present) and Director (2006 – 2007 & 2009 – present)

1986 – 1998
Stewart and Stewart
2100 M Street, N.W., Suite 200
Washington, D.C. 20016
Partner (1993 – 1998)
Associate (1986 – 1993)

1983 – 1986
Jimmie V. Reyna, Attorney at Law
921 Luna Circle
Albuquerque, New Mexico 88101
Sole Practitioner

1982 – 1983
Aragon and Reyna
400 Gold Street, N.W.
Albuquerque, New Mexico 87107
Partner

1981 – 1982
Jimmie V. Reyna, Attorney at Law
400 Gold Street, N.W., Suite 800
Albuquerque, New Mexico 87107
Sole Practitioner

1979 – 1981
Shaffer, Butt, Thornton & Baer
400 Gold Street, N.W., Suite 1200
Albuquerque, New Mexico 87107
Associate

Summers 1977 and 1978
Southwestern Company, Franklin, Tennessee
Door-to-door book salesman / Independent Contractor

Fall 1976
Ortega, Snead, Dixon & Hanna, P.A.
201 12th Street, N.W.
Albuquerque, New Mexico 87103
Law Clerk

Fall 1976
University of New Mexico School of Law
1117 Stanford Drive, N.E.
Albuquerque, New Mexico 87131
Student Researcher for the American Indian Newsletter

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Other Affiliations (uncompensated)

2006 – present
Community Services for Autistic Adults and Children ("CSAAC") Foundation
Jane Salzano Center for Autism
8615 East Village Avenue
Montgomery Village, Maryland 20886
Member, Board of Directors

2003 – 2008
National Hispanic Bar Association
1001 Connecticut Avenue, N.W., Suite 507
Washington, D.C. 20036
Immediate-Past National President (2007 – 2008)
National President (2006 – 2007)
National President-Elect (2005 – 2006)
National Vice President of Regional Affairs (2005)
Regional President, Region V (MD, DC, VA) (2003 – 2004)

2005 – 2006
Hispanic National Bar Association Foundation
1900 K Street NW, Suite 100
Washington, D.C. 20006
Member, Board of Directors

1994 – 2006
U.S. - Mexico Law Institute
c/o Jackson Walker L.L.P.
901 Main Street, Suite 600
Dallas, Texas 75202
Member, Board of Directors

1992 – 1998 & 2003 – 2006
Community Services for Autistic Adults and Children
The Jane Salzano Center for Autism
8615 East Village Avenue
Montgomery Village, Maryland 20886
Member, Board of Directors

1982 – 1984
Albuquerque Hispano Chamber of Commerce
1309 4th Street, S.W.
Albuquerque, New Mexico 87102
Member, Board of Directors (1982 – 1984)
President (1984)

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1985 – 1986
Hispanic Culture Foundation
National Hispanic Cultural Center (and Foundation)
1701 4th Street, S.W.
Albuquerque, New Mexico 87102
Founder, Incorporator, pro bono counsel

7. **Military Service and Draft Status**: Identify any service in the U.S. Military, including dates of service, branch of service, rank or rate, serial number (if different from social security number) and type of discharge received, and whether you have registered for selective service.

I have not served in the U.S. Military. I have registered for selective service.

8. **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.

Super Lawyers, Washington, D.C. (2008, 2010, 2011)
Super Lawyers, National Corporate Edition (2009)
Best Lawyers in America (2009, 2010, 2011)
Ohtli Medal, Government of Mexico (2009)
Extraordinary Leadership Award, Hispanic National Bar Association (2007)
Distinguished Citizen Award, Military Airlift Command, U.S. Air Force (1985)
Spirit of Excellence Award, Albuquerque Hispano Chamber of Commerce (1985)
Lifetime Honorary Membership, Society of Hispanic Professional Engineers (1982)

9. **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 (ABA)
- Section on International Law
  - Vice-chair, Mexican Law Committee (1992)
  - Co-chair, Mexican Law Committee (1993 – 1994 & 2003 – 2005)
  - Chair, U.S.-Mexico Foreign Trade Subcommittee (1989 – 90, 1994)
  - Section Liaison to the Hispanic National Bar Association (2007 – present)
- Section on Dispute Resolution
  - International Committee
    - Co-chair, Subcommittee on MERCOSUR (1999 – 2001)
    - Co-chair, Subcommittee on WTO (2001 – 2006)
- ABA President's Council on Diversity in the Legal Profession (2006 – 2007)

Customs International Trade Bar Association

District of Columbia Bar Association

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Hispanic Bar Association of the District of Columbia

Inter-American Bar Association

International Bar Association

National Hispanic Bar Association (HNBA)
Immediate-Past National President (2007 – 2008)
National President (2006 – 2007)
National President-Elect (2005 – 2006)
National Vice President of Regional Affairs (2005)
Regional President Region V (MD, DC, VA) (2003 – 2004)
Chair of International Law Committee (1999 – 2003)
HNBA Delegate to ABA House of Delegates (2007 – 2008)
HNBA Representative to the National Hispanic Leadership Agenda (2008 – 2010)

New Mexico State Bar Association

10. **Bar and Court Admission**:

a. List the date(s) you were admitted to the bar of any state and any lapses in membership. Please explain the reason for any lapse in membership.

District of Columbia, 1994
New Mexico, 1979

There has been no lapse in membership.

b. List all courts in which you have been admitted to practice, including dates of admission and any lapses in membership. Please explain the reason for any lapse in membership. Give the same information for administrative bodies that require special admission to practice.

Supreme Court of the United States, 2005
U.S. Court of Appeals for the Federal Circuit, 1989
U.S. Court of Appeals for the Tenth Circuit, 1982
U.S. Court of International Trade, 1987
U.S. District Court for the District of New Mexico, 1980
District of Columbia Court of Appeals, 1994
Supreme Court of the State of New Mexico, 1979

There has been no lapse in membership.

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11. **Memberships**:

a. List all professional, business, fraternal, scholarly, civic, charitable, or other organizations, other than those listed in response to Questions 9 or 10 to which you belong, or to which you have belonged, since graduation from law school. Provide dates of membership or participation, and indicate any office you held. Include clubs, working groups, advisory or editorial boards, panels, committees, conferences, or publications.

Big Brothers Big Sisters of America
Member, Nationwide Hispanic Advisory Council (May 2010 – present)

Historical Society of the U.S. Court of International Trade
Chair, Membership Committee (2007 – present)

Hispanic National Bar Association Journal of Law and Policy
Senior Co-Editor (2005 – present)

Indian River Inlet Boating Association (2008)

International Trade Update Advisory Committee (ABA Section on International Law and Georgetown University Law Center) (2006 – present)

Mid-Atlantic Hispanic Chamber of Commerce
Member, Board of Advisors (February 2010 – present)

National Hispanic Leadership Agenda
Hispanic National Bar Association Representative (2008 – 2010)

I have made financial contributions, both individually and with my spouse, to a number of charitable organizations over the years. I have not included in the list above any organizations to which I only have given funds and where I have not participated in programmatic activities, although the organizations' development protocols may deem me a "member." These organizations include the March of Dimes, the Red Cross, and the Special Olympics.

b. 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, or national origin. Indicate whether any of these organizations listed in response to 11a above currently discriminate or formerly discriminated on the basis of race, sex, religion or national origin 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.

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None of the organizations listed in response to 11a above currently discriminate or, to the best of my knowledge, formerly discriminated on the basis of race, sex, religion or national origin either through formal membership requirements or the practical implementation of membership policies.

12. **Published Writings and Public Statements**:

a. List the titles, publishers, and dates of books, articles, reports, letters to the editor, editorial pieces, or other published material you have written or edited, including material published only on the Internet. Supply four (4) copies of all published material to the Committee.

To answer this question, I have searched my files and papers and conducted an electronic Internet search for information and materials responsive to this question. Although I have sought to compile a list as complete as possible, there may be other published material that I have been unable to remember or identify.

Books
Passport to North American Trade: Rules of Origin and Customs Procedures Under the NAFTA (1995). Copy supplied.

The GATT Uruguay Round: A Negotiating History (1986-1992) (Terence P. Stewart, series ed.). I was author of a volume in the series entitled *Services* (1993). Copy supplied.

Additionally, I am working as editor and chapter author of a planned publication entitled *International Trade Laws and Customs Regulations of Latin America.* The book will be comprised of country-specific chapters on trade laws and customs regulations written by authors resident in the respective countries; I will edit these country-specific chapters. In addition, I plan to write (but have not yet written) an introductory section offering a general overview of trade policy issues that affect the Americas. I am seeking to complete both parts in time to send the manuscript to the publisher, Kluwer Law International, for a late 2010 publication.

Journal Editorial Service
Hispanic National Bar Association Journal of Law and Policy, Vol. 2, Issue 1, summer 2010 (Senior Editor). Copy supplied.

Hispanic National Bar Association Journal of Law and Policy, Vol. 1, Issue 1, summer 2008 (Senior Editor). Copy supplied.

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Articles

El Respeto Dominará las Audiencias, La Opinion, July 14, 2009 (Spanish Language). Copy supplied.

Navigating Preferential Trade Arrangements in the Americas: Safe Passage for the EU Legal Practitioner (Inter-American Bar Association Conference XL, June 24, 2004). Copy supplied.

Trade Policy Issues and Implications Concerning International Regulation of the Internet (Hispanic Internet Summit, April 2001). Copy supplied.

WTO Negotiations on Maritime Services: A Survey of Issues and Implications, *Admiralty and Trade Issues in the New Millennium* (Maritime Law & International Trade Society, Regent University, April 2000). Copy supplied.

Taking the Inter Out of International Trade, *Appliance* (Latin America Edition), October 1998 (Spanish Language). Copy supplied.

Free Trade In the Americas: Developments and Trends in Standards and Standards-Related Measures, American Bar Association Section on International Law and Practice, 1998. Copy supplied.

NAFTA Chapter 19 Bi-national Panel Reviews in Mexico: A Marriage of Two Distinct Legal Systems, 5 U.S.-Mexico L.J. 63, 1997. Copy supplied.

Trade Treaties: Regulation of Trade through Trade Agreements, in "Export Practice: Customs and International Trade Law," Practicing Law Institute, Spring 1994. Copy supplied.

A Preliminary Review of the Operation and Effect of the NAFTA Rules of Origin, 1 U.S.-Mexico Law Journal 127, 1993. Copy supplied.

Developing International Markets: Expanding Production to Other Countries, in "Helping Your Virginia Client Go International," IVB-1 (Virginia Law Foundation, 1992). Copy supplied.

NAFTA Safeguards: Providing Temporary Relief from Increased Imports, in "The North American Free Trade Agreement: Issues, Options and Implications" 94 (Baker and Bialos, ed. 1992, ABA). Copy supplied.

The Role of Certain Consultative and Bilateral Arrangements Between the U.S. and Mexico as a Foundation for Free Trade Negotiations, (United States and Mexico Business Conference, Albuquerque, New Mexico 1990). I have been unable to obtain a copy of this article.

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Williams Mullen Firm Materials

I edited issues of a newsletter published by the firm entitled *Highlights in International Trade and Commerce Newsletter*. The specific publication dates for which I was involved are: Sept. 24, 2010; Aug. 10, 2010; July 8, 2010; June 14, 2010; May 18, 2010; Apr. 23, 2010; Mar. 6, 2009; Aug. 1, 2008; Mar. 19, 2008; and Feb. 7, 2008. Copies supplied.

Playing it Safe: Staying Ahead of the U.S. Business Regulation Curve Ball (July 29, 2009).

Surprises Lurk in "Buy American" Requirements of Stimulus Package (March 2009).

Briefing on Recent Developments Affecting Business with China (2008) (co-author with Michael E. Burke and Hans H. Huang).

b. Supply four (4) copies of any reports, memoranda or policy statements you prepared or contributed in the preparation of on behalf of any bar association, committee, conference, or organization of which you were or are a member. If you do not have a copy of a report, memorandum or policy statement, give the name and address of the organization that issued it, the date of the document, and a summary of its subject matter.

To answer this question, I have searched my files and papers and conducted an electronic Internet search for information and materials responsive to this question. I also consulted with the Executive Director of the Hispanic National Bar Association so as to be able to supply as complete a list as possible of materials from my service as an officer of the Association. Although I have sought to compile a list as complete as possible, there may be other reports, memoranda, and policy statements that I have been unable to remember or identify.

HNBA Press Release: Hispanic National Bar Association Urges Passage of the Dream Act (Sept. 25, 2007). Copy supplied.

HNBA Press Release: HNBA Launches New Program to Build Understanding of U.S. Law and Government within Hispanic Youth (July 27, 2007). Copy supplied.

Proposed New Interpretation 301-6 for Standard 301(a), Section of Legal Education and Admissions to the Bar, American Bar Association. Comments of the Hispanic National Bar Association (July 23, 2007). Copy supplied.

La Promesa en el Derecho (The Promise in the Law). I am the founder and editor of this publication, which is an HNBA community outreach tool aimed at building

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trust and confidence in U.S. legal system among U.S. Latino youth (July 31, 2007) (reprinted July 2009 and July 2010). Copy supplied.

HNBA Press Release: Hispanic National Bar Association Dismayed at the Sidetracking of Comprehensive Immigration Reform Legislation (June 8, 2007). Copy supplied.

HNBA Press Release: Hispanic National Bar Association Recognizes Positive Movement Towards Comprehensive Immigration Reform (May 18, 2007). Copy supplied.

HNBA Press Release: HNBA Moves to Oppose PBS World War II Documentary (Apr. 13, 2007). Copy supplied.

HNBA Press Release: HNBA Supports STRIVE Act: Immigration Legislation That Strikes the Right Balance (Mar. 28, 2007). Copy supplied.

HNBA Press Release: HNBA Joins New York City Hispanic Bar Organizations in Call for Convention Fix and Commission-Based Appointment System for New York Supreme Court Justices (Jan. 18, 2006). Copy supplied.

HNBA Press Release: HNBA Urges U.S. Senate and President Bush to Move Swiftly to Enact Fair Minimum Wage for America (Jan. 11, 2007). Copy supplied.

HNBA Press Release: HNBA Condemns Holiday Immigration Raids and Calls for a Moratorium on Further Action (Dec. 18, 2006). Copy supplied.

HNBA Press Release: HNBA to Guard Against Election Threats and Suppression (Oct. 19, 2006). Copy supplied.

In addition to the press releases listed above, HNBA occasionally issued statements in my name as President such as those commending individuals who accepted regional officerships of the organization. Neither I nor HNBA retained a record of such statements.

Letter to Susan H. Kuhbach re: Comments of Williams Mullen on Application of the Countervailing Duty Law to Imports from the People's Republic of China (Jan. 16, 2006). Copy supplied.

c. Supply four (4) copies of any testimony, official statements or other communications relating, in whole or in part, to matters of public policy or legal interpretation, that you have issued or provided or that others presented on your behalf to public bodies or public officials.

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To answer this question, I have searched my files and papers and conducted an electronic Internet search for information and materials responsive to this question. Although I have sought to compile a list as complete as possible, there may be other testimony, official statements, or other communications relating to matters of public policy or legal interpretation that I have been unable to remember or identify.

On several occasions, I have given testimony to the Montgomery County Council on the needs of autistic individuals in our community. Some of the particular issues on which I have spoken include a broken elevator and malfunctioning air conditioning in facilities dedicated to serving individuals with autism. I have no notes, transcript, or recordings.

In 1989 or 1990, I testified before the U.S. International Trade Commission on Rules of Origin. I have been unable to locate a transcript of my remarks but I will supply one to the Committee if I am successful in doing so.

During the George W. Bush Administration, I participated in occasional special White House issue briefings on immigration. I occasionally made comments at these briefings but I have no notes, transcript, or recording of them.

In November or December 2008, I participated in a large group meeting with members of the domestic policy team of the Obama-Biden Transition. I spoke for two or three minutes on general issues regarding diversity in law schools. I have no notes, transcript, or recording.

Written Statement of the Hispanic National Bar Association in Support of the Confirmation of the Honorable Sonia Sotomayor as Associate Justice of the Supreme Court of the United States (July 15, 2009). Copy supplied.

d. Supply four (4) copies, transcripts or recordings of all speeches or talks delivered by you, including commencement speeches, remarks, lectures, panel discussions, conferences, political speeches, and question-and-answer sessions. Include the date and place where they were delivered, and readily available press reports about the speech or talk. If you do not have a copy of the speech or a transcript or recording of your remarks, give the name and address of the group before whom the speech was given, the date of the speech, and a summary of its subject matter. If you did not speak from a prepared text, furnish a copy of any outline or notes from which you spoke.

To answer this question, I have searched my files and papers and conducted an electronic Internet search for information and materials responsive to this question. Although I have sought to compile a list as complete as possible, there may be other speeches or talks that I have been unable to remember or identify. I have spoken frequently at international trade conferences and events as part of my professional practice development and participation in the bar.

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09/21/10: "Legal Perspectives – International Reps & Distributors," at the Housewares Export Council Global Forum. PowerPoint supplied.

06/08/2010: "Trade in the Americas." Washington International Trade Association. Ronald Reagan Building and International Trade Center, Washington, DC. I was the moderator and provided opening remarks. Notes and handout supplied.

06/01/2010: Government Affairs Committee of the International Housewares Association. Washington, DC. I spoke on trade issues facing the housewares industry. I have no notes, transcript, or recording. News coverage supplied.

04/21/2010: "U.N. Convention on Contracts for the International Sale of Goods." Monthly meeting of the HNBA International Law Committee. Telephone conference call presentation on current international issues. PowerPoint supplied.

10/30/2009: "Cultural Differences in the Americas; Lemons to Lemonade: Unique Perspectives of Hispanic In-House Counsel." ABA Section on International Law, Fall Meeting, Miami, Florida. I provided opening remarks for this panel I organized of Latino in-house counsel speaking on legal developments in the Americas and how cultural differences impact handling large corporate matters in the Americas. I have no notes, transcript, or recording. The address of the ABA is 321 N. Clark St., Chicago, IL 60654.

10/08/2009: "Multidisciplinary Partnerships and the Balanced Scorecard – What's the Score?" Annual Meeting, Public Interest Section, International Bar Association, Madrid, Spain. I have no notes, transcript, or recording. The address of the IBA is One Stephen St., 10th Fl., London, United Kingdom W1T 1AT.

09/11/2009: "An Encounter on the Camino Real." Ohtli Award Ceremony, Annual Convention of the Hispanic National Bar Association, International Hispanic Culture Center, Albuquerque, New Mexico. Keynote address as recipient of the Ohtli Award. Notes supplied.

09/10/2009: "Status on the U.S. Hispanic Judiciary." Plenary Session of the Hispanic National Bar Association Annual Convention, Albuquerque, New Mexico. I was the moderator and organizer of a panel of judges and law professors. I have no notes, transcript, or recording. The address of the HNBA is P.O. Box 14347, Washington, D.C. 20044.

03/05/2009: "Continued Dumping and Subsidy Offset: Intermission or Final Curtain Call?" The Year in Review in Customs Law. 2009 International Trade Update. ABA Section on International Law and Georgetown University Law

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Center. Georgetown University Law Center, Washington, DC. I have no notes, transcript, or recording. The address of the ABA is 321 N. Clark St., Chicago, IL 60654.

9/29/2008: "The Origins of Diversity." Rocky Mountain Legal Diversity Summit, Colorado Bar Association and the Colorado Hispanic Bar Association, Soldiers Field, Denver, Colorado. Keynote speaker. I have no notes, transcript, or recording. The address of the CHBA is P.O. Box 8895, Denver, CO 80201.

08/10/2007: "So Whose Pipeline is This?" ABA Young Lawyers Division Assembly, 2007 ABA Annual Meeting, San Francisco, California. Remarks on diversity in the legal profession. I have no notes, transcript, or recording. The address of the ABA is 321 N. Clark St., Chicago, IL 60654.

08/09/2007: "Fair and Impartial Courts—Another Perspective?" 2007, ABA Annual Meeting, San Francisco, California. Panelist. I have no notes, transcript, or recording. The address of the ABA is 321 N. Clark St., Chicago, IL 60654.

07/10/2007: "Why A Strong Judiciary Requires a Diverse Profession." Wake County Bar Association luncheon/meeting, Raleigh, North Carolina. Luncheon speaker. I have no notes, transcript, or recording. The address of the Wake County Bar Association is P.O. Box 3686, Cary, NC 27519.

6/14/2007: "PASOS: Desde el Pasado Hacia el Futuro (Strides: From the Past Towards the Future)." HBA-DC Pasos Ceremony. Hispanic Bar Association – DC. Catholic University School of Law. Speaker at annual ceremony for recent law school graduates and their families. PowerPoint supplied.

06/05/2007: "Our Fundamental Obligations as Attorneys." Wal-Mart Legal Diversity Conference, Rogers, Arkansas. I gave remarks to audience of outside counsel for Wal-Mart. I have no notes, transcript, or recording. The address of Wal-Mart Stores is 702 SW 8th St., Bentonville, AR 72716.

06/02/2007: "Of Doves and Watermelons." U.S. District Court Naturalization Ceremony, District of Columbia, Judge Ricardo Urbina. Washington, D.C. Keynote speaker at naturalization ceremony for new U.S. citizens. I used the same notes as for the ceremony on March 31, 2006.

05/23/2007: "Latino Lawyers: The West Meets the East." Monthly Meeting, Los Abogados de Arizona, Phoenix, Arizona. Speaker at luncheon meeting of Los Abogados de Arizona. Comments on how certain cultural differences can be blurred within the legal profession. I have no notes, transcript, or recording. The address of Los Abogados de Arizona is c/o Davis Miles PLLC, 80 E. Rio Salado Pkwy., Ste. 401, Tempe, AZ 85281.

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03/13/2007: "Structuring and Negotiating International Transactions and Investments." ABA Section on International Law, Fall Meeting, Buenos Aires, Argentina. I spoke on a panel that addressed U.S. and foreign issues in structuring a new direct investment abroad. I have no notes, transcript, or recording. The address of the ABA is 321 N. Clark St., Chicago, IL 60654.

03/07/2007: "The Voice of the Latino/a Lawyer: Accomplishments and Challenges." Tenth Annual Hispanic Law Conference, American University, Washington College of Law, Washington, D.C. I made comments on challenges that law students must be prepared to overcome. Audio supplied.

02/22/2007: "Diversity Town Hall." 20th Annual Corporate Counsel Conference, National Bar Association, Miami, Florida. I was one of four principal speakers who addressed diversity issues affecting African-Americans and Latinos in the legal profession. I have no notes, transcript, or recording. The address of the National Bar Association is 1225 11th St., NW, Washington, DC 20001.

02/08/2007: "Start By Mastering the Law." Council Meeting, ABA Young Lawyers Divisions, American Bar Association Midyear Meeting, Miami, Florida. I have no notes, transcript, or recording. The address of the ABA is 321 N. Clark St., Chicago, IL 60654.

02/03/2007: "Mentoring and the Law." Kickoff program of the HNBA National Mentoring, Sandra Day O'Connor College of Law, Arizona State University, Phoenix, Arizona. Remarks to mentees and their parents, mentors and local members of the bar on the start of the HNBA mentoring program in Phoenix. I have no notes, transcript, or recording. The address of the HNBA is P.O. Box 14347, Washington, D.C. 20044.

02/02/2007: "Onions and a Dirty Chevrolet." 2007 Annual Dinner, Oregon Hispanic Bar Association, Portland, Oregon. Keynote Speaker. Notes supplied.

10/31/2006: "Latinos in the Federal Workplace, Comments on GAO Report: Additional Insights Could Enhance Agency Efforts Related to Hispanic Representation Report No. GAO-06-832, September 20, 2006. Council of Federal EEO and Civil Rights Executives Meeting. Washington, D.C. I discussed a Government Accountability Office report. Minutes covering my remarks are supplied.

10/27/2006: "The Doha Negotiation Round on Trade in Services. How Many Lives Does A GATS Have?" World Trade Organization (WTO) Academy, Georgetown University Law Center, Washington, D.C. Panelist. I addressed the status of the ongoing negotiations on the WTO General Agreement on Trade in Services and other issues related to the WTO Doha Round negotiations. Notes supplied.

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10/14/2006: "The New Paradigm of the Hispanic Legal Professional," HNBA Region VI Annual Dinner, Charlotte, North Carolina. My comments focused on the need for the development of legal professionals to serve the future U.S. population. I have no notes, transcript, or recording. The address of the HNBA is P.O. Box 14347, Washington, D.C. 20044.

09/15/2006: "A Strong America Requires Strong Hispanic Lawyers." Annual Meeting & Banquet, Mexican-American Bar Association of Texas, El Paso, Texas. Keynote speaker. I have no notes, transcript, or recording. I have no address for the organization.

09/06/2006: "Trade Adjustment Assistance: Where Have We Been and Where are We Going?" 14th Judicial Conference of the Court of International Trade, New York, NY. I served as a member of a panel that addressed developments in law and court cases concerning U.S. trade adjustment assistance. I have no notes, transcript, or recording.

09/02/2006: "The Elements of Service: The New Paradigm of the U.S. Hispanic Legal Professional." Keynote speaker on the occasion of being sworn in as National President of the Hispanic National Bar Association, HNBA Annual Convention, San Francisco, CA. Speech text supplied.

04/27/2006: "Prácticas Desleales De Comercio Internacional." II Congreso Nacional De Exportadores. ["Unfair Trade Practices in International Trade." II Congress of the National Exporters.] Tegucigalpa, Honduras. Keynote speaker on antidumping and countervailing duty laws of the United States. PowerPoint supplied.

03/31/2006: "Of Doves and Watermelons." U.S. District Court Naturalization Ceremony, District of New Mexico, District Judge Robert Brack. Las Cruces, New Mexico. Keynote speaker. Notes supplied.

11/04/2005: "Ties That Really Bind: Cross-Border Issues Concerning Power, Gas, and Energy." 14th Annual Conference, United States-Mexico Law Institute, Mexico City. Panelist addressing U.S.-Mexico legal issues that affect cross-border movement of power and forecasting future trends in U.S.-Mexico energy relations. I have no notes, transcript, or recording. The United States-Mexico Law Institute is no longer an active organization.

03/11/2005: "Information Technology and Trade Agreements: Issues and Implications." Mid-Year Conference, Hispanic National Bar Association, Dallas, Texas. Panelist addressing implications of certain intellectual property issues (patent and trademark/service mark infringement) on international trade. PowerPoint supplied.

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03/01/2005: "The Importance of Doing Business in the Americas, A Legal Perspective on Economic, Political, and Social Issues," 8th Annual Hispanic Law Conference, American University, Washington, DC. Speaker. I have no notes, transcript, or recording. The address of HNBA, the event co-sponsor is P.O. Box 14347, Washington, D.C. 20044.

09/10/2004: "Post-NAFTA Conflicts: Immigration, Transportation and the Energy Sector." 13th Annual Conference, United States-Mexico Law Institute, Santa Fe, New Mexico. Introductory remarks for morning session of programs. Transcript supplied.

06/24/2004: "Navigating Preferential Trade Arrangements in the Americas: Safe Passage for the EU Legal Practitioner." XL Conference, Inter-American Bar Association. Madrid, Spain. I presented a paper, which is supplied.

04/24/2004: Seventh Annual Hispanic Law Conference and Networking Reception: "Election 2004 Counting on Hispanic Votes." American University, Washington College of Law, Washington, D.C. I moderated a debate panel. I have no notes, transcript, or recording. The address of the College of Law is 4801 Massachusetts Ave., NW, Washington, D.C. 20016.

03/24/2004: "A Vintage Year in Trade." Mexican-American Law Student Association, University of New Mexico School of Law. Notes supplied.

Spring 2004: "Panel Discussion: Mexico's Preferential Customs Programs." United States-Mexico Law Journal. Transcript supplied.

Spring 2004: "Oh Romeo, Donde Estas?" United States-Mexico Law Journal. I gave introductory remarks to a panel entitled "Comments on the United States-Mexico Relationship." I also moderated the panel. Transcripts of both my remarks and of the panel are supplied.

09/14/2003: "The Red and Green Lights of Homeland Security." 12th Annual Conference, United States-Mexico Law Journal. Oaxaca, Mexico. Panel moderator. Transcript supplied.

10/02/2002: "Developing a Career and Practice in International Law." HNBA Annual Convention. Atlanta, GA. Handout supplied.

June 2002: "Regional Trade Agreements: A Focus on the Free Trade Agreement of the Americas" and "The WTO, China, and Taiwan: Impact of the Newest Members." Housewares Export Council of North America, Toronto, Ontario, Canada. I have no notes, transcript, or recording of either presentation. The address of the Housewares Export Council is 6400 Shafer Court, Suite 650, Rosemont, IL 60018.

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04/22/2002: "Free Trade Area of the Americas: Issues and Implications." Richmond Export Import Club. Richmond, Virginia. PowerPoint supplied.

Spring 2002: "Question and Comments by Members of the Institute." United States-Mexico Law Journal. Transcript supplied.

01/31/2002: "Free Trade, Preferential Trade Agreements and Rules of Origin." International Trade Update 2002, Georgetown University Law Center CLE, and the ABA Section of International Law and Practice. Georgetown University Law Center. Washington, DC. Moderated a CLE panel. Copy of case study supplied.

10/05/2001: Address at the Richmond Journal of Global Law & Business Fall Symposium, "The Changing Labor Markets of the Western Hemisphere: Labor Issues Relating to the Free Trade Area of the Americas." Panel. I have no notes, transcript, or recording. The address of the Journal is T.C. Williams School of Law, 28 Westhampton Way, University of Richmond, VA 23173.

09/06/2001: "Introduction: What is the Future of U.S.-Mexico Market Convergence?" 10th Annual Conference, United States-Mexico Law Institute, Guanajuato, Mexico. Speaker on extent that globalization and market integration forces are blurring social and political boundaries. Remarks supplied.

04/26/2001: "Trade Policy Issues and Implications Concerning International Regulation of the Internet." Hispanic Internet Summit, The Leadership Forum for Hispanics in the New Economy. Hispanic National Bar Association, San Juan, Puerto Rico. I presented a paper, which is supplied.

Spring 2001: "The Operational Realities of Resolving or Not Resolving Standards Disputes Under NAFTA." Panel moderator. United States-Mexico Law Journal. Transcript supplied.

Spring 2001: "Mexican Lawyers Going North and U.S. Lawyers Going South: Interstate Legal Practice, NAFTA and U.S. State Bar Regulations." United States-Mexico Law Journal. Transcript supplied.

10/26/2000: "Standards Related Measures; Product Standards (Labeling Requirements); Accounting Services; Environmental Regulations; Labor Standard; Cultural Standards." 9th Annual Conference, United States-Mexico Law Institute, Santa Fe, New Mexico. I have no notes, transcript, or recording. The United States-Mexico Law Institute is no longer an active organization.

09/23/2000: "Footprints of Trade Challenges for a New Millennium." Keynote Speaker, Annual Summit, Society of International Business Fellows. Seattle, Washington. Speech text supplied.

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04/07/2000: "WTO Negotiations on Maritime Transport Services: A Survey of Issues and Implications." Conference on Admiralty and Trade Issues in the New Millennium, Maritime Law and International Trade Society, Regent University, Virginia Beach, VA. I presented a paper, which is supplied.

06/15/1999: "China and the World Trade Organization." Annual Meeting of Housewares Export Council of North America. Nassau, Bahamas. Handout supplied.

03/24/1999: "GATS 2000 Negotiations, Issues and Implications, Express Integrated Transportation Services." Presentation to staff and members of the WTO Division on Trade in Services. Geneva, Switzerland. PowerPoint presentation supplied.

03/18/1999: "Litigation in Mexican Courts and Alternative Forms of Dispute Resolution." Practicing Law in the Era of NAFTA: Mastering the New Global Marketplace, American Bar Association Section on Dispute Resolution and St. Mary's University School of Law, San Antonio, Texas. Panelist. I addressed "Displacing the Mexican *Tribunal Fiscal de la Federación* in Challenges to Final Antidumping Duty Reviews." I have no notes, transcript, or recording. The address of the ABA is 321 N. Clark St., Chicago, IL 60654.

03/08/1999: "Regulation of Commerce in Latin America." Spring Meeting, Electronic Retailing Association, Miami, FL. PowerPoint supplied.

Spring 1999: "A Case Study of Three Opportunities to Improve the Private Financial Infrastructure of Mexico: Secured Financing of Inventory; Accounts Receivable and Equipment; the Securitization of Assets; the Laws of Bankruptcy and Insolvency." United States-Mexico Law Journal. Transcript supplied.

01/19/1999: "International Regulation of Electronic Commerce." Air Cargo Internet Symposium, Journal of Commerce, New Orleans, LA. PowerPoint and attachments supplied.

08/03/1998: "Free Trade in the Americas: Developments and Trends in Standards and Standards Related Measures." ABA Section on International Law and Practice, ABA Annual Convention. Toronto, Canada. I presented a paper, which is supplied.

1998: "Cross-Border Movement of Goods: Developments in U.S. Mexico Customs Procedures." 7th Annual Conference, U.S.-Mexico Law Institute. Transcript supplied.

05/03/1997: "Aspectos Jurídicos del Tratado de Libre Comercio: El Destina del la Globalización Económica será la Globalización del Derecho? Ajustes a los sistemas de derecho provocados por los acuerdos de comercio internacional."

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Asamblea Anual de la Federación Nacional de Colegios, Barras y Asociaciones de Abogados, Tlaxcala, Tlaxcala, México. ["Legal Aspects of the Free Trade Agreement: Is the Destiny of Economic Globalization the Globalization of Law? Adjustments to legal systems provoked by international trade agreements." Annual Assembly, Federation of National Societies, Bars, and Associations of Lawyers.] I presented a paper, which is supplied. Subsequent to this event, this paper was formally presented to the Supreme Court of Mexico at the special request of several Justices in attendance of the Assembly.

1997: "Practice Before U.S.-Mexico Binational Panels Under Chapter Nineteen of NAFTA: A Panel Discussion." United States-Mexico Law Journal. Transcript supplied.

08/06/1996: "International Practitioners Workshop: How to Conduct Commercial Negotiations in Mexico and Other Latin American Countries." Panelist. Annual Meeting of the American Bar Association. Orlando, FL. I have no notes, transcript, or recording. The address of the ABA is 321 N. Clark St., Chicago, IL 60654.

04/16/1996: "U.S. Exports to Mexico: Understanding Mexico's New Customs Law, Standards, and Labeling Requirements." American Bar Association Section of International Law & Practice Program. I have no notes, transcript, or recording. The address of the ABA is 321 N. Clark St., Chicago, IL 60654.

1996: "Comments on the Tension Between Trade and Antitrust Laws." United States-Mexico Law Journal Symposium. Panel moderator. Transcript supplied.

1996: "Questions and Comments." United States-Mexico Law Journal Symposium. Transcript supplied.

07/26/1995: "Women and Minorities in International Trade." American Bar Association Section of International Law & Practice Program. Panelist. Washington, DC. I have no notes, transcript, or recording. The address of the ABA is 321 N. Clark St., Chicago, IL 60654.

1994: "Introductory Remarks." United States-Mexico Law Journal Symposium. Transcript supplied.

02/23/1993: "Estructura y Operación del Acuerdo de Libre Comercio de America del Norte (ALCAN)." [Structure and Operation of NAFTA.] Association of Free Trade Zones of the Dominican Republic. Santo Domingo, Dominican Republic. Notes supplied.

05/22/1992: "Developing International Markets: Expanding Production to Other Countries." 4th Annual International Law Seminar, Helping Your Virginia

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Business Client Go International, Virginia Law Foundation. Williamsburg. VA. I presented a paper, which is supplied.

In addition to the speeches listed above, I have served as guest lecturer in D.C.-area law schools addressing international trade and trade policy topics, such as the TRIPS Agreement under the World Trade Organization; developments in antidumping and countervailing duty law; and the conduct and status of trade negotiations under multilateral, regional, and bilateral arrangements. When I present to such classes, I speak without notes and I am not aware of any transcript or recording. While I have not kept track of these class presentations and have been unable to recreate a list of them, my recurring commitment has been to speak to trade classes taught by Adjunct Professor Betty Southard Murphy (Partner, Baker Hostetler) to LL.M. students at the Washington College of Law, American University.

c. List all interviews you have given to newspapers, magazines or other publications, or radio or television stations, providing the dates of these interviews and four (4) copies of the clips or transcripts of these interviews where they are available to you.

To answer this question, I have searched my files and papers and conducted an electronic Internet search for interviews and other related information and materials applicable to this section of the questionnaire. While there may exist other interviews that I have given, the following are interviews for which I have retained record or otherwise identified. Clips supplied except as noted.

The Greater Incidence of Autism. April 22, 2010, Radio Interview, WLZL, FM. Lahnam, MD. I discussed the trend of increasing incidence of autism. I have no transcript or recording.

Law School Admission for Minorities in Decline: Study. Law 360. January 7, 2010.

President's Message. Noticias. Winter 2010.

Mexico's Highest Honor. Legal Bisnow. October 19, 2009.

Jimmie V. Reyna Receives Highest Recognition from the Government of Mexico. Williams Mullen News Release. September 8, 2009.

Press Conference: "The Nomination of Judge Sonia Sotomayor." Hispanics for a Fair Judiciary. Russell Senate Office Building, Washington, DC. May 26, 2009. Transcript supplied.

Sotomayor Could be First Hispanic Justice on Supreme Court. Radio Interview, WTOP FM. May 26, 2009. Audio supplied.

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During summer 2009, I gave approximately a dozen additional interviews to various media outlets about the nomination and confirmation process of now-Justice Sotomayor. I specifically recall speaking with CNN En Espanol, Voice of America, and Univision. I have been unable to find transcripts or recordings for these interviews.

Dupont Corporate Counsel Takes on National Leadership Role. Delaware Law Weekly. September 10, 2008.

Justice Department Charges 148 Illegal Aliens with Identity Theft. July 7, 2008. CNS News.

Attorney is Here for Manatee's 'Huge Need.' Bradenton Herald. October 14, 2007.

Pulse of the Legal Profession: 800 Lawyers Reveal What They Think About Their Lives, Their Careers, and the State of The Profession. ABA Law Journal. October 01, 2007.

Women, Minorities Travel Tougher Road to Top. South Carolina Lawyers Weekly. June 25, 2007.

Glass Ceilings Often Prove Shatterproof. St. Louis Countian. April 26, 2007.

National Latino Organizations Call for Moratorium on Immigration Raids. US Fed News. December 18, 2006.

Law Professor in Good Position to Promote Diversity at CU. CU Independent. November 17, 2006.

Lorenzo Trujillo, Assistant Dean, University of Colorado Law School, Appointed New HNBA General Counsel. U.S. Newswire. October 16, 2006.

Jimmie V. Reyna to Lead National Hispanic Bar. Virgina Lawyers Weekly. September 25, 2006.

Pointing Latino Lawyers to Judgeships; Hispanic Group Pushes for More Diversity on Bench. The San Francisco Chronicle. September 1, 2006.

Jimmie V. Reyna to lead Hispanic National Bar Association. Virginia Lawyers Weekly. November 7, 2005.

Latinos Disappointed, Still Holding Out Hope for a Hispanic Nominee. New America Media. July 21, 2005.

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Roving Medical Tests Offered by U.S. Firm. The Toronto Star. September 23, 2004.

Interview: University of New Mexico Law Alumni News. 2002.

NHMA Helps Revise Mexican Certification Standards for Small U.S. Electric Exporters. January 1, 2000. Appliance Manufacturer.

Protesters Say Their Mission Was Accomplished in Seattle; Despite Violence, Groups Get Word Out on WTO. The Baltimore Sun, December 5, 1999.

FTAA Efforts to Ease Restraints May Surface at WTO Meeting. Journal of Commerce, November 8, 1999.

Carriers Influencing FTAA Pact. Journal of Commerce, Inc., November 4, 1999.

Entrepreneurs Against Castro. Diario Las Americas. November 4, 1999. Original and translated versions supplied.

Air Express Firms Flock Together for Trade Gains. Journal of Commerce, Inc., May 12, 1998.

Developing Into a Legal Eagle. World Trade Magazine Inc., January 1996.

In addition to the interviews quoted above, I have sometimes been quoted in the foreign press and particularly the Spanish language press. I have not kept track of such interviews, which have sometimes consisted of a single sentence offered on the way out of a meeting, but the list below contains those clips I have been able to locate.

Sotomayor Gana Más Respaldo – Comité Judicial Vota 13 a 6 Su Designación a la Suprema Corte; Ahora Pasa al Senado. La Opinion. July 29, 2009.

Para el 28 el Voto Sobre Sotomayor – Los Demócratas del Comite Judicial Quieren Votar Hoy, Mientras Los Republicanos Piden Más Tiempo. La Opinion. July 21, 2009.

Se Despeja el Camino a Sotomayor – Llegan a su Fin las Audiencias de Confirmación. La Opinion. July 17, 2009.

Se Equilibra Debate por Sotomayor. La Opinion. July 12, 2009.

Nueavas Leyes Dificultan La Vida de Los Indocumentados – Estados y Ciudades Aprueban Medidas Reaccionarias. EFE News Service. December 30, 2006.

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Bush dice que sistema migratorio EEUU lleva a trato "inhumano" de extranjeros. EFE News Service. December 20, 2006

Renacen Esperanzas Latinas. La Opinion. October 28, 2005.

Harriet Miers, Designada por la Casa Blanca para la Corte Suprema de Justicia Retira Nominación. CNN en Español. October 27, 2005.

No Soy un Ideólogo, Dice Roberts. La Opinion. September 16, 2005.

Bush Insta al Senado a Confirmer a Roberts. La Opinion. July 21, 2005.

Bush Nomina a John G. Roberts para el Supremo. La Opinion. July 20, 2005.

13. **Judicial Office**: State (chronologically) any judicial offices you have held, including positions as an administrative law judge, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

I have not held any judicial office.

a. Approximately how many cases have you presided over that have gone to verdict or judgment? _____

i. Of these, approximately what percent were:

jury trials: ___%
bench trials: ___%

civil proceedings: ___%
criminal proceedings: ___%

b. Provide citations for all opinions you have written, including concurrences and dissents.

c. For each of the 10 most significant cases over which you presided, provide: (1) a capsule summary of the nature the case; (2) the outcome of the case; (3) the name and contact information for counsel who had a significant role in the trial of the case; and (3) the citation of the case (if reported) or the docket number and a copy of the opinion or judgment (if not reported).

d. For each of the 10 most significant opinions you have written, provide: (1) citations for those decisions that were published; (2) a copy of those decisions that were not published; and (3) the names and contact information for the attorneys who played a significant role in the case.

e. Provide a list of all cases in which certiorari was requested or granted.

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f. Provide a brief summary of and citations for all of your opinions where your decisions were reversed by a reviewing court or where your judgment was affirmed with significant criticism of your substantive or procedural rulings. If any of the opinions listed were not officially reported, provide copies of the opinions.

g. Provide a description of the number and percentage of your decisions in which you issued an unpublished opinion and the manner in which those unpublished opinions are filed and/or stored.

h. Provide 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, provide copies of the opinions.

i. Provide citations to all cases in which you sat by designation on a federal court of appeals, including a brief summary of any opinions you authored, whether majority, dissenting, or concurring, and any dissenting opinions you joined.

14. **Recusal:** If you are or have been a judge, identify the basis by which you have assessed the necessity or propriety of recusal (If your court employs an "automatic" recusal system by which you may be recused without your knowledge, please include a general description of that system.) Provide a list of any cases, motions or matters that have come before you in which a litigant or party has requested that you recuse yourself due to an asserted conflict of interest or in which you have recused yourself sua sponte. Identify each such case, and for each provide the following information:

I have never served as a judge.

a. whether your recusal was requested by a motion or other suggestion by a litigant or a party to the proceeding or by any other person or interested party; or if you recused yourself sua sponte;

b. a brief description of the asserted conflict of interest or other ground for recusal;

c. the procedure you followed in determining whether or not to recuse yourself;

d. your reason for recusing or declining to recuse yourself, including any action taken to remove the real, apparent or asserted conflict of interest or to cure any other ground for recusal.

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

a. List chronologically any public offices you have held, 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

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you. Also, state chronologically any unsuccessful candidacies you have had for elective office or unsuccessful nominations for appointed office.

Since 1995, I have been a member of the World Trade Organization (WTO) indicative list of non-governmental panelist candidates for dispute settlement. I was first nominated by the U.S. Trade Representative, Ambassador Mickey Kantor, in July 1995 and confirmed by the Dispute Settlement Body of the WTO in September 1995. I subsequently have been renominated and reconfirmed to sequential terms.

I have not held public office. I have had no unsuccessful candidacies for elective office or unsuccessful nominations for appointed office.

b. List all memberships and offices held in and services rendered, whether compensated or not, to any political party or election committee. If you have ever held a position or played a role in a political campaign, identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

My wife and I served as Precinct Co-captains for our neighborhood precinct for the Maryland Democratic Party from 1996 to 2002. During the 2008 presidential campaign, I did a very limited amount of volunteering, encouraging other attorneys to support the Obama-Biden campaign's election protection work. I did not ultimately become involved in Election Day work myself. I have not otherwise held any role in a party or campaign.

16. **Legal Career:** Answer each part separately.

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

i. whether you served as clerk to a judge, and if so, the name of the judge, the court and the dates of the period you were a clerk;

I have not served as a law clerk to a judge or court.

ii. whether you practiced alone, and if so, the addresses and dates;

1981 to 1982: 400 Gold St., Suite 800, Albuquerque, New Mexico.
1983 to 1986: 921 Luna Circle, Albuquerque, New Mexico.

iii. 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.

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1979 – 1981
Shaffer, Butt, Thornton & Baer
400 Gold St. N.W., Suite 1200
Albuquerque, New Mexico
Associate

1982
Aragon and Reyna
400 Gold St. N.W. Suite 800
Albuquerque, New Mexico
Partner

1986 – 1998
Stewart and Stewart
2100 M St., N.W., Suite 200
Washington, D.C. 20016
Associate (1986 – 1993)
Partner (1993 – 1998)

1998 – present
Williams Mullen, PC
1666 K St., Suite 1200
Washington, D.C. 20006
Partner

iv. whether you served as a mediator or arbitrator in alternative dispute resolution proceedings and, if so, a description of the 10 most significant matters with which you were involved in that capacity.

I have not served as a mediator or arbitrator in alternative dispute resolution proceedings.

I am a member of the U.S. roster of panelists for disputes under Chapter 19 (antidumping and countervailing duty cases) of the North American Free Trade Agreement (NAFTA). In addition, I am on the U.S. Indicative List of Non-Governmental Dispute Settlement Panelists for disputes arising under the dispute settlement mechanism of the World Trade Organization (WTO). In the case of the WTO, I have been qualified for disputes involving both trade in goods and trade in services. My service on both the NAFTA and WTO commenced when those trade arrangements first went into effect, 1994 and 1995, respectively.

I have not served as a panelist on a WTO dispute. I served on a NAFTA Chapter 19 dispute settlement panel that reviewed the final antidumping duty determination issued by Mexico's Secretaria de Economía (formerly the Secretaria de Comercio y Fomento Industrial), which resulted from an

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antidumping duty investigation on Imports of Polystyrene Crystals from the United States and Germany.

b. Describe:

i. the general character of your law practice and indicate by date when its character has changed over the years.

The general character of my law practice has changed over the years and as a result my legal career has been rich in the diversity of clients I have represented and the matters I have handled. Initially, my practice involved insurance defense and subrogation matters. The practice was heavy in court and trial work and I handled trials throughout New Mexico.

In 1982, I formed my own firm and my practice changed mainly to plaintiff injury, civil rights, domestic relations, criminal law, and some insurance subrogation work. During 1982, I entered into a partnership that lasted only a few months and I then returned to work as a solo practitioner.

In 1986, I moved to the Washington, D.C. area where I joined Stewart and Stewart, a boutique international trade firm where I started as an associate working on antidumping and countervailing duty cases. I became a partner in 1993 and my work increasingly involved trade policy, trade negotiations, and trade in services. In 1998, I joined the D.C. office of Williams Mullen to build a trade practice. My work at Williams Mullen has almost exclusively involved international trade, trade policy, trade negotiations and trade agreements, international investment and commerce, international business regulation and compliance matters such as under the Foreign Corrupt Practice Act, export controls, and customs.

ii. your typical clients and the areas at each period of your legal career, if any, in which you have specialized.

As a solo practitioner early in my career, with few exceptions, my clients were individuals and most of them were poor or disadvantaged. Since 1986, my clients mainly have been multinational corporations involved in cross-border movement of goods, services, and investments.

c. Describe the percentage of your practice that has been in litigation and whether you appeared in court frequently, occasionally, or not at all. If the frequency of your appearances in court varied, describe such variance, providing dates.

While practicing in New Mexico from 1979 to 1986, I appeared in court frequently. When I moved to Washington, D.C., I initially continued to appear in court frequently but in total have appeared in court occasionally over the last 25 years.

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i. Indicate the percentage of your practice in:
   1. federal courts: 10 %
   2. state courts of record: 10 %
   3. other courts: 5 %
   4. administrative agencies: 75 %

ii. Indicate the percentage of your practice in:
   1. civil proceedings: 95 %
   2. criminal proceedings: 5 %

d. State the number of cases in courts of record, including cases before administrative law judges, you tried to verdict, judgment or final decision (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

I have tried approximately 25 cases to verdict or final decision (approximately 17 as sole or chief counsel and 8 as co-counsel or associate counsel).

i. What percentage of these trials were:
   1. jury: 30 %
   2. non-jury: 70 %

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

I have not practiced before the Supreme Court of the United States.

17. **Litigation**: Describe the ten (10) most significant litigated matters which you personally handled, whether or not you were the attorney of record. 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.

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(1) *Asociacion Colombiana de Exportadores de Flores v. United States*, No. 89-1748 and No. 89-1742 (Fed. Cir.)

The Floral Trade Council, an association of U.S. flower growers that was my client, had successfully petitioned the U.S. Department of Commerce for a finding that certain imported flowers from Colombia were being sold at less than fair value. As a result, the Department imposed antidumping duties. When the Floral Trade Council subsequently requested investigation of specific Colombian flower growers, the Colombian growers brought this challenge in the Court of International Trade seeking to enjoin the administrative review of the dumping case on grounds that it was contrary to the Department's own regulation. The Court of International Trade refused to grant the injunction. I represented the Floral Trade Council as appellee before the U.S. Court of Appeals for the Federal Circuit, which affirmed the decision favorable to my client. 903 F.2d 1555 (Fed. Cir. 1990).

The case was heard by Chief Judge Markey, Senior Circuit Judge Bennet, and Circuit Judge Plager. Counsel for the government was Jeanne Davidson, Department of Justice, 1100 L St., NW, Washington, DC 20530, Tel 202-616-8277. Counsel for the Plaintiffs-Appellants was James Lyons, now General Counsel of the U.S. International Trade Commission, 500 E St., SW, Washington, DC 20436, Tel 202-205-2000. My co-counsel was Terence P. Stewart, Stewart and Stewart, 2100 M St., NW, Suite 200, Washington, DC 20037, Tel 202-785-4185.

(2) *Floral Trade Council v. United States*, No. 93-06-00372 (Ct. Int'l Trade)

Dumping cases involve various stages (investigation, annual review, scope determinations, ITC injury, etc.) that often produce multiple appeals on important issues even as the captions of the cases may make them seem to be the same matter. A significant portion of my trade cases involved representation of the Floral Trade Council and so I have included several distinct cases involving that client among these ten most significant litigated matters.

In this case the Floral Trade Council, my client, challenged the 1991 Department of Commerce annual review of the antidumping order obtained the prior year. Specifically, we challenged the administrative review determination that certain margins were not based on verifiable data and we further challenged the consequent decision to apply a zero margin rate to all uninvestigated parties, including both old and new shippers. The Court of International Trade agreed that the Department had erred by failing to adjust the *all other* rate (set at zero) based on a finding that rates for particular producers were out of proportion but other positive rates were not unrepresentative. 799 F. Supp. 116 (Ct. Int'l Trade 1992).

Judge Restani presided over the case. My co-counsel was Terence P. Stewart, Stewart and Stewart, 2100 M St., NW, Suite 200, Washington, DC 20037, Tel 202-785-4185. Counsel for the government was Jeanne Davidson, Department of Justice, 1100 L St., NW, Washington, DC 20530, Tel 202-616-8277.

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(3) *Truong v. U.S. Sec'y of Agric.*, No. 05-00419 (Ct. Int'l Trade)

In 2004, the Department of Agriculture recertified Texas shrimpers for Trade Adjustment Assistance. My client, Mrs. Truong, filed an application for benefits 21 days after the deadline in 2005. The Department of Agriculture denied her claim for benefits as untimely. I represented Mrs. Truong pro bono in this suit seeking equitable tolling on grounds that the government had not complied with the statutory notice provisions for recertification benefits. Initially, the Court of International Trade remanded the case for administrative findings of fact. 461 F. Supp. 2d 1349 (Ct. Int'l Trade 2006). When the Department found against her, we appealed again, and the Court of International Trade held that the Department's findings were not supported by the evidence. 484 F. Supp. 2d 1324 (Ct. Int'l Trade 2007). The government subsequently settled the matter on terms favorable to my client.

Judge Pouge presided over the case. Associate counsel was Francisco Orellana, now Compliance Counsel at Chevron Upstream and Gas, 6001 Bollinger Canyon Road, San Ramon, CA 94583, Tel 925-842-3067. Trial counsel for the government was David Silverbrand, Department of Justice, 1100 L St., NW, Washington, DC 20530, Tel 202-514-2000.

(4) *Fmr. Employees of Tyco Elecs. v. U.S. Dep't of Labor*, No. 02-00152 (Ct. Int'l Trade)

Plaintiffs, my clients, were dismissed from their jobs at a Tyco manufacturing plant in Pennsylvania. They first sought relief in 2001 under the Trade Adjustment Assistance program administered by the Department of Labor on grounds that their job loss was a result of shift in production of fiber optic components to Mexico, but their application was denied. In January 2002, they appealed the denial by filing a complaint *in forma pauperis* with the Court of International Trade. At the Court's request, I took on the case *pro bono*. Following multiple remands from the Court of International Trade, we reached a settlement with the Department in which it awarded certification and retroactive benefit eligibility. The Court affirmed the certification. 318 F. Supp. 2d 1354 (Ct. Int'l Trade 2004). The Court recounted the full litigation history of the case in awarding attorneys fees and litigation expenses under the Equal Access to Justice Act because the Department's position in the litigation had not been substantially justified. 350 F. Supp. 2d 1075 (Ct. Int'l Trade 2004).

Judge Carmen presided over the case. Trial attorneys for the government were John Maher and Stephen Tosini, Department of Justice, 1100 L St., NW, Washington, DC 20530, 202-514-2000. Associate counsel was Francisco Orellana, now Compliance Counsel at Chevron Upstream and Gas, 6001 Bollinger Canyon Road, San Ramon, CA 94583, Tel 925-842-3067.

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(5) *Rhodia, Inc. v. United States*, Consol. Court No. 00-08-00407 (Ct. Int'l Trade)

My firm's client, Rhodia, a domestic producer of bulk aspirin, filed in 1999 a petition seeking antidumping duties on imports of the product from the People's Republic of China that were being sold at prices below fair market value. While the U.S. Department of Commerce determined that there were sales at less than fair value, we appealed several aspects of the calculation of antidumping duty margin. The Court upheld the Department's determinations as to Rhodia's claims. 185 F. Supp. 2d 1343 (Ct. Int'l Trade 2001).

Judge Pouge presided over the case. Primary and lead counsel was James R. Cannon, Jr., 1666 K Street, NW, Suite 1200, Washington, DC 20006, Tel 202-833-9200. I was on the brief. Counsel for the government was Ada E. Bosque, Department of Justice, 450 5th St., NW, Washington, DC 20530, Tel 202-514-2000. Counsel for Defendant-Intervenor Jilin Pharmaceutical were William Clinton, Adams Lee, Robert Gosselink and Albert Lo of White & Case, 701 Thirteenth St., NW, Washington, DC 20005, Tel 202-626-3620. Counsel for Defendant Intervenor Shandon Xinhua Pharmaceutical Factory Inc. was William E. Perry, now of Dorsey & Whitney LLP, 701 Fifth Avenue, Suite 6100, Seattle, WA 98104, Tel 206-903-8894.

(6) *Torrington Co. v. United States*, Court No. 91-08-00566 (Ct. Int'l Trade)

My client, Torrington Co., challenged the results of the U.S. Department of Commerce's first administrative review of an antidumping duty on imports of antifriction bearings from Sweden. We contended that the Department had made findings unsupported by substantial evidence in the record and contrary to the law in several respects. The Court remanded to the Department of Commerce with instructions to include in the foreign market value the full amount of Value Added Tax paid on each sale in the home market, without adjustment. 832 F. Supp. 405 (Ct. Int'l Trade 1993).

Judge Tsucalas presided over the case. My co-counsel was Terence P. Stewart, Stewart and Stewart, 2100 M St., NW, Suite 200, Washington, DC 20037, Tel 202-785-4185.

(7) *Foundation Reserve Ins. Co. v. Mullenix*, No. 13778 (N.M.)

Foundation Reserve issued automobile insurance to Mullenix, doing business as Tucumcari Wrecking Co ("Tucumcari"). In June 1979, a Tucumcari tow truck covered by the policy was involved in an accident that damaged a tractor-trailer rig insured by my client, Aetna Casualty & Surety. In 1981, Aetna filed an action against Tucumcari in County District Court. Tucumcari demanded that Foundation Reserve defend the action, which it declined to do. Seeking to resolve the dispute, Foundation Reserve brought this action for declaratory relief against Tucumcari, the tractor-trailer rig owner, and Aetna (as insurer of the damaged tractor-trailer rig). The trial court granted summary judgment against Foundation Reserve. On appeal to the Supreme Court of New Mexico, the issue was whether there is a duty to defend under an insurance policy even if it can be shown in a collateral proceeding that there is no duty to pay under the terms of the policy. The

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Court concluded that there is a duty to defend a primary action "until the court finds that the insurer is relieved of liability under the noncoverage provision of the policy." 642 P.2d 604 (N.M. 1982).

Justice Federici wrote the opinion. Counsel for Plaintiff-Appellant was Jonathan Hewes, of the Rodey Law Firm (now retired). Counsel for Defendant-Appellee Mullenix was Don W. Cihak, Brockman & Cihak, PO Box 984, 201 S 2nd St., Tucumcari, NM, Tel 505-461-0797.

(8) *Floral Trade Council of Davis v. United States*, No. 88-10-00822 (Ct. Int'l Trade)

I represented the Floral Trade Council in this challenge to a determination by the U.S. Department of Commerce that daisies were not within the scope of the antidumping duty orders covering certain fresh cut flowers from Colombia, Ecuador and Mexico. We raised issues related to the like product determination of the International Trade Commission that found that each of the seven investigated flowers constituted a distinct U.S. industry. The Court held that the determination had been substantially supported by the record. 716 F. Supp. 1580 (Ct. of Int'l Trade 1989).

Judge Restani presided over the case. My client was the Plaintiff, Floral Trade Counsel and my co-counsel were Eugene L. Stewart, Terence P. Stewart, and James R. Cannon, Jr., Stewart and Stewart, 2100 M St., NW, Suite 200, Washington, DC 20037, Tel 202-785-4185. Counsel for the government was Platte B. Moring, Department of Justice, 1100 L St., NW, Washington, DC 20530, Tel 202-616-8277, and Andrea Fekkes Dynes, Department of Commerce, 1401 Constitution Ave., NW, Washington, DC 20230, Tel (202) 482-2000. Counsel for the Defendant-Intervenors were Patrick F.J. Macrory and C. Anthony Friedrich, of Aiken Gump, 1333 New Hampshire Avenue, N.W., Washington, DC 20036, 202-887-4000.

(9) *Floral Trade Council v. United States*, No. 90-06-00290 (Ct. Int'l Trade)

My clients, the Floral Trade Council, challenged the determination reached by the U.S. Department of Commerce in the second administrative review of the antidumping duty order covering fresh cut flowers from Colombia to reject use of third country prices, and use of a certain monthly averaging methodology to account for the perishability of the flowers. The Court of International Trade remanded for further consideration by the Department with respect to several of the issues we raised. 775 F. Supp. 1492 (Ct Int'l Trade 1991).

Judge Restani presided over the case. I represented the Floral Trade Council and my co-counsel were Terence P. Stewart and James R. Cannon, Stewart & Stewart, 2100 M St., NW, Suite 200, Washington, DC 20037, Tel 202-785-4185. The government was represented by Jeanne Davidson, Department of Justice, 1100 L St., NW, Washington, DC 20530, Tel 202-616-8277, and Andrea Fekkes Dynes, Department of Commerce, 1401 Constitution Ave., NW, Washington, DC 20230, (202) 482-2000. Defendant-Intervenors were represented by Lawrence A. Schneider, Michael T. Shor, and Susan G.

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Lee of Arnold & Porter, 555 Twelfth Street, NW, Washington, DC 20004, 202.942.5000; and Patrick F. J. Macrory, Spencer S. Griffith, of Akin Gump, 1333 New Hampshire Avenue, N.W., Washington, DC 20036, 202.887.4000.

(10) *Asociacion Colombiana de Exportadores de Flores v. United States.* No 87-04-00622

Foreign exporter plaintiffs challenged the Department of Commerce's use of unverified data (rates) in calculating antidumping rates that were established and applied to all Colombian companies not specifically investigated (the *all other* rate). These companies had not submitted questionnaire responses or otherwise participated in the original antidumping duty investigation. My client, the Floral Trade Council, was defendant-intervenor and I defended the government's methodology used to establish the *all other* rate. The court affirmed the Department on several grounds and remanded on one issue. 717 F. Supp. 834 (Ct. Int'l Trade 1989).

Judge Restani presided over the case. My client was the Floral Trade Council and my co-counsel were Terence P. Stewart and James R. Cannon, Jr., Stewart and Stewart, 2100 M St., NW, Suite 200, Washington, DC 20037, Tel 202-785-4185. Plaintiffs were represented by Patrick F.J. Macrory, Spencer S. Griffith and Gwyn F. Murray, of Aiken Gump, 1333 New Hampshire Avenue, N.W., Washington, DC 20036, 202.887.4000. Plaintiff -Intervenors, Floramerica, et al., were represented by Thomas A. Rothwell, Jr. and James M. Lyons of Heron, Burchette, Ruckert & Rothwell , a firm that no longer exists, but James Lyons is now General Counsel of the U.S. International Trade Commission, 500 E St., SW, Washington, DC 20436, Tel 202-205-2000. The government was represented by Jeanne E. Davidson, Department of Justice, 1100 L St., NW, Washington, DC 20530, Tel 202-616-8277, and Anne W. White, Office of the Chief Counsel for Import Administration, Department of Commerce, 1401 Constitution Ave., NW, Washington, DC 20230, Tel (202) 482-2000.

18. **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 fully the nature of your participation in these activities. List any client(s) or organization(s) for whom you performed lobbying activities and describe the lobbying activities you performed on behalf of such client(s) or organizations(s). (Note: As to any facts requested in this question, please omit any information protected by the attorney-client privilege.)

In my International Trade and Customs practice, I have advised and represented clients in legal and regulatory matters involving the cross-border movement of goods, services, and investments for a broad range of industry and services sectors. In addition to traditional litigation activity, my experience includes: import trade relief; trade regulation; trade policy; trade negotiations and agreements; international treaties and accords; investment; business and corporate law; export controls; food safety; and arbitration and dispute resolution. My non-litigation legal activities have been varied and have been a

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substantial part of my work in the last 25 years. Some of the most significant such activities have been as follows:

1. Chapter 19 of the North American Free Trade Agreement ("NAFTA") establishes a mechanism for the review ("appeal") of final antidumping and countervailing duty determinations issued by the competent authorities of the United States, Canada, and Mexico. I served as a panelist on the second Chapter 19 bi-national panel established in Mexico to hear an appeal of a final Mexican antidumping duty determination on imports of polystyrene crystals from the United States and Germany. As a panelist, I was required to apply Mexican trade law.

2. During the negotiations of the Free Trade Agreement to the Americas ("FTAA"), I represented a coalition of express delivery companies seeking to improve market access within the Americas. A significant problem was that there existed no adequate industry service sector classification that completely and accurately captured all of the different types of services required to offer overnight express deliveries. I led efforts on behalf of the coalition to secure within the context of the FTAA negotiations a new and appropriate classification for the express delivery services industry and to secure enhanced trade liberalization for the sector within a large plurilateral trade agreement.

3. Shortly after NAFTA went into effect, the Mexican government undertook to revamp its product standards regime in anticipation that imports from the United States and Canada would sharply increase as a result of the duty elimination effect of the NAFTA. Mexico adopted new product standards and it established new conformity assessment procedures (product testing methods) that operated as trade barriers to the products manufactured and exported to Mexico by my clients. In brief, Mexico required that products undergo annual multiple testing of the same products, and annual testing of products that were only slightly different from each other. On behalf of a major U.S. based international trade association of producers and exporters, I worked directly with the Mexican government in addressing the trade restrictive aspects of the product standards and conformity assessment procedures. Mexico adopted and implemented revised standards and assessment procedures and, as a result, administrative related costs and expenses for my clients were reduced by multiples of millions of dollars annually.

4. I represented the U.S. subsidiary of a large foreign auto producer on matters concerning investment in a South American country. My role was to undertake rule of origin determinations for various components that were to be used in the manufacture of autos. In addition, I was asked to forecast shifts in future trade trends; and in particular, trade policy that would affect tariffs and duties on parts and components used to produce the automobiles.

5. I represented a U.S. energy company seeking to join forces with a U.S. state for purposes of delivery of natural gas to Mexico. I was retained by the parties to address legal issues on the exportation of energy to a foreign country, constitutional issues involving a state's ability to enter into treaties with a foreign country, and the manner in which natural gas would be treated at the customs border.

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8. During 2001, I represented the U.S. fabricated steel sector in the Section 201 steel investigation brought before the U.S. International Trade Commission against imports from many countries of the world. The case was one of the largest Section 201 (safeguards or escape clause) cases in the history of the United States. Although, I worked with the fabricated steel construction industry trade association, my clients were thousands of producers of fabricated steel scattered throughout the United States; they ranged from small two-person shops with little technology to some of the world's largest and most sophisticated producers of fabricated steel. The case required detailed analysis of massive amounts of industry, technical, financial, pricing, and import data.

19. **Teaching**: What courses have you taught? For each course, state the title, the institution at which you taught the course, the years in which you taught the course, and describe briefly the subject matter of the course and the major topics taught. If you have a syllabus of each course, provide four (4) copies to the committee.

I have not taught any courses.

20. **Deferred Income/ Future Benefits**: List the 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. Describe the arrangements you have made to be compensated in the future for any financial or business interest.

None, except that I anticipate a future income arrangement on publication of my book *International Trade Laws and Customs Regulations of Latin America*.

21. **Outside Commitments During Court Service**: 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, I do not have any such plans.

22. **Sources of Income**: 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, licensing fees, honoraria, and other items exceeding $500 or more (if you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here).

See attached Financial Disclosure Report.

23. **Statement of Net Worth**: Please complete the attached financial net worth statement in detail (add schedules as called for).

See attached Net Worth Statement.

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24. **Potential Conflicts of Interest**:

a. Identify the family members or other persons, parties, categories of litigation, and financial arrangements that are likely to present potential conflicts-of-interest when you first assume the position to which you have been nominated. Explain how you would address any such conflict if it were to arise.

I am not aware of any such potential conflicts of interest.

b. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern.

If confirmed to serve as a United States Circuit Judge, I will continuously be vigilant for potential conflicts of interest and will take immediate steps to resolve all conflicts of interest in accordance with applicable rules, procedures, and ethical considerations, including the federal recusal statutes and the Code of Conduct for United States Judges. Where necessary, I will consult with the Chief Judge of the court and with senior colleagues.

25. **Pro Bono Work**: 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 legal career, I have consistently sought to fulfill my obligations on service to the disadvantaged. In the area of international trade, I have served as *pro bono* counsel on major cases on request of and appointment by the Court of International Trade. I estimate that I have spent hundreds of hours on Trade Adjustment Assistance cases and other claims on behalf of *pro bono* clients. As a sole proprietor of a law firm prior to my move to the Washington, D.C. area, I devoted a large percentage of my practice to rendering advice and representing individuals who needed but could not afford an attorney.

My work within the Hispanic National Bar Association has been primarily driven by three distinct but related goals concerning legal representation of the disadvantaged. First, I have created, implemented, and worked on programs designed to ensure that all disadvantaged segments of U.S. society are informed about the law, the legal process, and our legal and governmental institutions, so as to enhance access to legal representation and our system of justice. Second, I have worked hard to develop a legal profession that is able and willing to take on the legal challenges raised by a growing Latino community, much of which is disadvantaged. Third, I have created programs and participated with others on projects aimed at strengthening the independence, impartiality, and accessibility of our judiciary, including working with the Justice Sandra Day O'Connor program on a Fair and Impartial Judiciary.

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In addition, I have devoted significant time and resources over the entire length of my legal career to serving individuals with autism.

26. **Selection Process**:

a. Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and the interviews in which you participated). Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, please include that process in your description, as well as whether the commission recommended your nomination. List the dates of all interviews or communications you had with the White House staff or the Justice Department regarding this nomination. Do not include any contacts with Federal Bureau of Investigation personnel concerning your nomination.

There is no selection commission for the Federal Circuit.

The Hispanic National Bar Association sent a letter recommending me as a candidate for nomination to President Obama with a copy to Attorney General Holder. I understand that other letters of endorsement and communications of support were delivered to the White House. I had a handful of contacts with White House staff as I sought general information about the nomination process.

Since June 16, 2010, I have been in contact with pre-nomination officials at the U.S. Department of Justice. On August 11, 2010, I interviewed with attorneys from the White House Counsel's Office and from the Department of Justice. On September 29, 2010, the President submitted my nomination to the Senate.

b. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any currently pending or specific case, legal issue or question in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning your position on such case, issue, or question? If so, explain fully.

No.

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Rev. 1/2010

FINANCIAL DISCLOSURE REPORT
NOMINATION FILING

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
Reyna, Jimmie V.	Federal Circuit	09/29/2010
4. Title (Article III judges indicate active or senior status; magistrate judges indicate full- or part-time)	**5a. Report Type** (check appropriate type)	**6. Reporting Period**
Circuit Judge	☑ Nomination, Date 09/29/2010 ☐ Initial ☐ Annual ☐ Final 5b. ☐ Amended Report	01/01/2009 to 08/31/2010
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.	
Williams Mullen, P.C. 1666 K St., NW, Suite 1200 Washington, DC 2006	Reviewing Officer_____ Date_____	

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

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

☐ NONE *(No reportable positions.)*

	POSITION	NAME OF ORGANIZATION/ENTITY
1.	Shareholder, Board of Directors	Williams Mullen Clark & Dobbins, P.C.
2.	Board of Directors	Community Services for Autistic Adults and Children Foundation
3.		
4.		
5.		

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

☑ NONE *(No reportable agreements.)*

	DATE	PARTIES AND TERMS
1.		
2.		
3.		

FINANCIAL DISCLOSURE REPORT Page 2 of 8	Name of Person Reporting Reynn, Jimmie V.	Date of Report 09/29/2010

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

A. Filer's Non-Investment Income

☐ NONE *(No reportable non-investment income.)*

	DATE	SOURCE AND TYPE	INCOME (yours, not spouse's)
1.	2008	Williams Mullen, P.C., partnership distribution	$331,703.00
2.	2009	Williams Mullen, P.C., partnership distribution	$340,220.00
3.	2010	Williams Mullen, P.C., partnership distribution	$240,747.00
4.			

B. Spouse's Non-Investment Income - *If you were married during any portion of the reporting year, complete this section.*
(Dollar amount not required except for honoraria.)

☐ NONE *(No reportable non-investment income.)*

	DATE	SOURCE AND TYPE
1.	2009	Montgomery County Public Schools, salary
2.	2010	Montgomery County Public Schools, salary
3.		
4.		

IV. REIMBURSEMENTS -- *transportation, lodging, food, entertainment.*
(Includes those to spouse and dependent children; see pp. 25-27 of filing instructions.)

☐ NONE *(No reportable reimbursements.)*

	SOURCE	DATES	LOCATION	PURPOSE	ITEMS PAID OR PROVIDED
1.	Exempt				
2.					
3.					
4.					
5.					

FINANCIAL DISCLOSURE REPORT Page 3 of 8	Name of Person Reporting Reyna, Jimmie V.	Date of Report 09/29/2010

V. GIFTS. *(Includes those to spouse and dependent children; see pp. 28-31 of filing instructions.)*

☐ NONE *(No reportable gifts.)*

	SOURCE	DESCRIPTION	VALUE
1.	Exempt		
2.			
3.			
4.			
5.			

VI. LIABILITIES. *(Includes those of spouse and dependent children; see pp. 32-33 of filing instructions.)*

☐ NONE *(No reportable liabilities.)*

	CREDITOR	DESCRIPTION	VALUE CODE
1.	CitiMortgage	Mortgage on rental property, Montgomery County, MD (See Pt. VII, line 1)	M
2.			
3.			
4.			
5.			

FINANCIAL DISCLOSURE REPORT Page 4 of 8	Name of Person Reporting Reyna, Jimmie V.	Date of Report 09/29/2010

VII. INVESTMENTS and TRUSTS -- *income, value, transactions (Includes those of spouse and dependent children; see pp. 34-60 of filing instructions.)*

☐ NONE *(No reportable income, assets, or transactions.)*

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A-H)	B. (2) Type (e.g., div., rent, or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, redemption)	D. (2) Date mm/dd/yy	D. (3) Value Code 2 (J-P)	D. (4) Gain Code 1 (A-H)	D. (5) Identity of buyer/seller (if private transaction)
1. Rental Property, Montgomery County, MD	E	Rent	N	W					
2. Chevy Chase Bank, account	A	Interest	K	T					
3. MCT Credit Union, account	A	Interest	K	T					
4. BOE, common stock		None	J	T					
5. GE, common stock		None	J	T					
6. SIR, common stock		None	J	T					
7. BALBX, mutual fund		None	K	T					
8. AFBXX, money market	A	Interest	K	T					
9. CIBBX, mutual fund		None	K	T					
10. CWGBX, mutual fund		None	K	T					
11. RLBFX, mutual fund		None	M	T					
12. Northwestern Life, Variable Policy #1									
13. - Select Bond		None	J	T					
14. - Money Market	A	Interest	J	T					
15. - Index 400 Stock		None	J	T					
16. - Small Cap Growth Stock		None	J	T					
17. - Russell Real Estate Securities		None	J	T					

1. Income Gain Codes: (See Columns B1 and D4)	A =$1,000 or less F =$50,001 - $100,000	B =$1,001 - $2,500 G =$100,001 - $1,000,000	C =$2,501 - $5,000 H1 =$1,000,001 - $5,000,000	D =$5,001 - $15,000 H2 =More than $5,000,000	E =$15,001 - $50,000
2. Value Codes (See Columns C1 and D3)	J =$15,000 or less N =$250,001 - $500,000 P3 =$25,000,001 - $50,000,000	K =$15,001 - $50,000 O =$500,001 - $1,000,000	L =$50,001 - $100,000 P1 =$1,000,001 - $5,000,000 P4 =More than $50,000,000	M =$100,001 - $250,000 P2 =$5,000,001 - $25,000,000	
3. Value Method Codes (See Column C2)	Q =Appraisal U =Book Value	R =Cost (Real Estate Only) V =Other	S =Assessment W =Estimated	T =Cash Market	

FINANCIAL DISCLOSURE REPORT
Page 5 of 8

Name of Person Reporting	Date of Report
Reyna, Jimmie V.	09/29/2010

VII. INVESTMENTS and TRUSTS -- *income, value, transactions (includes those of spouse and dependent children; see pp. 34-60 of filing instructions.)*

☐ NONE *(No reportable income, assets, or transactions.)*

A. Description of Assets (including trust assets). Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A-H)	B. (2) Type (e.g., div., rent, or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, redemption)	D. (2) Date mm/dd/yy	D. (3) Value Code 2 (J-P)	D. (4) Gain Code 1 (A-H)	D. (5) Identity of buyer/seller (if private transaction)
18. - Small Cap Value		None	K	T					
19. Northwestern Life, variable Policy #2									
20. - Select Bond		None	J	T					
21. - Money Market	A	Interest	J	T					
22. - Index 400 Stock		None	J	T					
23. - Small Cap Growth Stock		None	J	T					
24. - Russel Real Estate Securities		None	J	T					
25. - Small Cap Value		None	J	T					
26. New York Life , Variable Policy									
27. - International Equity		None	J	T					
28. - UIF Eme Equity		None	J	T					
29. - TRP Eq Inc		None	J	T					
30. - VE GLBL HA		None	J	T					
31. - Cmnn Stock		None	J	T					
32. - Worldwide		None	J	T					
33. - Contrafund		None	J	T					
34. Williams Mullen Clark & Dobbins Retirement Acct, no control		None	L	T					

1. Income Gain Codes: (See Columns B1 and D4)	A =$1,000 or less	B =$1,001 - $2,500	C =$2,501 - $5,000	D =$5,001 - $15,000	E =$15,001 - $50,000
	F =$50,001 - $100,000	G =$100,001 - $1,000,000	H1 =$1,000,001 - $5,000,000	H2 =More than $5,000,000	
2. Value Codes (See Columns C1 and D3)	J =$15,000 or less	K =$15,001 - $50,000	L =$50,001 - $100,000	M =$100,001 - $250,000	
	N =$250,001 - $500,000	O =$500,001 - $1,000,000	P1 =$1,000,001 - $5,000,000	P2 =$5,000,001 - $25,000,000	
	P3 =$25,000,001 - $50,000,000		P4 =More than $50,000,000		
3. Value Method Codes (See Column C2)	Q =Appraisal	R =Cost (Real Estate Only)	S =Assessment	T =Cash Market	
	U =Book Value	V =Other	W =Estimated		

FINANCIAL DISCLOSURE REPORT Page 6 of 8	Name of Person Reporting Reynu, Jimmie V.	Date of Report 09/29/2010

VII. INVESTMENTS and TRUSTS – *income, value, transactions (Includes those of spouse and dependent children; see pp. 34-60 of filing instructions.)*

☐ NONE *(No reportable income, assets, or transactions.)*

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A-H)	B. (2) Type (e.g., div., rent, or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, redemption)	D. (2) Date mm/dd/yy	D. (3) Value Code 2 (J-P)	D. (4) Gain Code 1 (A-H)	D. (5) Identity of buyer/seller (if private transaction)
35. Williams Mullen Clark & Dobbins, Capital Acct., no control		None	L	T					

1. Income Gain Codes: (See Columns B1 and D4)	A =$1,000 or less F =$50,001 - $100,000	B =$1,001 - $2,500 G =$100,001 - $1,000,000	C =$2,501 - $5,000 H1 =$1,000,001 - $5,000,000	D =$5,001 - $15,000 H2 =More than $5,000,000	E =$15,001 - $50,000
2. Value Codes (See Columns C1 and D3)	J =$15,000 or less N =$250,001 - $500,000 P3 =$25,000,001 - $50,000,000	K =$15,001 - $50,000 O =$500,001 - $1,000,000	L =$50,001 - $100,000 P1 =$1,000,001 - $5,000,000 P4 =More than $50,000,000	M =$100,001 - $250,000 P2 =$5,000,001 - $25,000,000	
3. Value Method Codes (See Column C2)	Q =Appraisal U =Book Value	R =Cost (Real Estate Only) V =Other	S =Assessment W =Estimated	T =Cash Market	

FINANCIAL DISCLOSURE REPORT Page 7 of 8	Name of Person Reporting Reyna, Jimmie V.	Date of Report 09/29/2010

VIII. ADDITIONAL INFORMATION OR EXPLANATIONS. *(Indicate part of Report.)*

FINANCIAL DISCLOSURE REPORT Page 8 of 8	Name of Person Reporting Reyna, Jimmie V.	Date of Report 09/29/2010

IX. CERTIFICATION.

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

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

Signature

NOTE: ANY INDIVIDUAL WHO KNOWINGLY AND WILFULLY FALSIFIES OR FAILS TO FILE THIS REPORT MAY BE SUBJECT TO CIVIL AND CRIMINAL SANCTIONS (5 U.S.C. app. § 104)

FILING INSTRUCTIONS

Mail signed original and 3 additional copies to:

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

Jimmie Reyna

FINANCIAL STATEMENT

NET WORTH SCHEDULES

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		56	386	Notes payable to banks-secured		51	000
U.S. Government securities				Notes payable to banks-unsecured			
Listed securities—see schedule		8	313	Notes payable to relatives			
Unlisted securities				Notes payable to others			
Accounts and notes receivable:				Accounts and bills due		3	000
Due from relatives and friends				Unpaid income tax			
Due from others				Other unpaid income and interest			
Doubtful				Real estate mortgages payable —see schedule		940	451
Real estate owned—see schedule	1	925	000	Chattel mortgages and other liens payable			
Real estate mortgages receivable				Other debts-itemize:			
Autos and other personal property		210	000				
Cash value-life insurance		221	117				
Other assets itemize:							
401(k) Accounts—see schedule		316	189				
Law Firm Capital and Cash Contributions		80	815				
Law Firm Retirement Account (no control)		97	496	Total liabilities		994	451
				Net Worth	1	920	865
Total Assets	2	915	316	Total liabilities and net worth	2	915	316
CONTINGENT LIABILITIES				GENERAL INFORMATION			
As endorser, comaker or guarantor		77	500	Are any assets pledged? (Add schedule)	NO		
On leases or contracts				Are you defendant in any suits or legal actions?	NO		
Legal Claims				Have you ever taken bankruptcy?	NO		
Provision for Federal Income Tax							
Other special debt							

FINANCIAL STATEMENT

NET WORTH SCHEDULES

Listed Securities	
Blackrock Global Opportunities Eq. Tr (BOE)	$ 4,122
General Electric Co. (GE)	2,489
Sirius XM Radio Inc. (SIR)	1,702
Total Listed Securities	8,313
Real Estate Owned	
Personal residence	$ 850,000
Vacation home	750,000
Rental property	290,000
Wilderness Lot	5,000
Boat Slip	30,000
Total Real Estate Owned	1,925,000
Real Estate Mortgages Payable	
Personal residence	$ 405,600
Vacation home	303,000
Rental property	231,851
Total Real Estate Payable	940,451
Securities Held in 401(k) Retirement Accounts	
Am. Funds Am. Balanced Fund R5 (RLBFX)	$ 238,554
Am. Balanced Fund Cl. B (BALBX)	17, 284
Am. Funds Money Market Fd Cl B (AFBXX)	15,289
Capital Income Builder Fund Cl B (CIBBX)	27,808
Capital World Gro. Inc. Fund Cl B (CWGBX)	17,254
Total Listed Securities	316,189

AFFIDAVIT

I, Jimmie V. Reyna, do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

September 30, 2010
(DATE)

(NAME)

(NOTARY)

Vicki Jacobs Little
Notary Public, District of Columbia
My Commission Expires 2/28/2013

Jimmie V. Reyna
[redacted]

January 5, 2010

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

I have reviewed the Senate Questionnaire I previously filed in connection with my nomination on September 30, 2010, to be a United States Circuit Judge for the Federal Circuit. Incorporating the additional information listed below, I hereby certify that the information contained in the prior submission is, to the best of my knowledge, true and accurate.

- The publication of the book project entitled *International Trade Laws and Customs Regulations of Latin America* is expected during early spring of 2011. Ques. 12a. Books.

- *Highlights in International Trade and Commerce Newsletter*: November 5, 2010 and January 3, 2011. Four copies of each are attached. Ques. 12a. Williams Mullen Firm Publications.

- Clovis News Journal Online, *First Person: Setting the Bar*, 10/21/2010; Law.Com, *All Federal Circuit Vacancies Now Have Nominees, but Quick Confirmation Unlikely*, 10/06/2010. Four copies of the articles are attached. Ques. 12e. Interviews/Newspaper.

I am also forwarding an updated Net Worth Statement and Financial Disclosure Report as requested in the Questionnaire. I thank the Committee for its consideration of my nomination.

Sincerely,

Jimmie V. Reyna

Cc: The Honorable Charles E. Grassley
Ranking Member
United States Senate
Washington, DC 20510



Highlights in International Trade and Commerce

Newsletter

11.05.2010

The International Law Section of Williams Mullen prepared the following brief descriptions of selected issues in international trade and commerce for general information purposes and use by clients and friends of the firm.

Report on Plan to Double Exports Focuses on Small and Medium-Sized Enterprises

The Export Promotion Cabinet ("EPC"), a high-level interagency task force established by an Executive Order in March, has issued a report detailing its plans for doubling U.S. exports in the next five years. The National Export Initiative is focused on eight areas: increasing advocacy efforts on behalf of U.S. exporters, bringing more U.S. sellers and foreign buyers together, expanding small business export engagement and success, increasing access to export financing, reinforcing efforts to remove trade barriers, stepping up enforcement of trade rules and promoting policies internationally that will lead to strong, sustainable and balanced world economic growth. The EPC's recommendations include: focusing advocacy, promotion and financing efforts on small and medium-sized enterprises; improving the federal government's trade promotion programs with an emphasis on federal export assistance, trade missions, and increasing export credit; ensuring global economic recovery and growth; reducing barriers to trade and enforcing trade obligations; and focusing more promotion efforts on the export of services. The full report can be found here.

The Foreign Manufacturers Legal Accountability Act Envisions New Registration Requirement

The Foreign Manufacturers Legal Accountability Act, H.R. 4678, is awaiting consideration by the "lame duck" House when it reconvenes on November 15. Partly in response to several recent recalls of imported goods, the bill would prohibit the

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importation of consumer products, pharmaceutical products and chemicals into the United States unless the foreign manufacturer of such products has a registered agent in the United States. A registry of these agents would be maintained so that U.S. consumers would be able to pursue products liability or other civil actions against such imports. Foreign companies and importers have opposed the legislation, saying it unfairly increases selling costs and violates World Trade Organization rules, by creating a non-tariff barrier discriminating between U.S. and foreign manufacturers. Proponents, however, counter that the bill would both protect U.S. consumers by holding foreign producers accountable for unsafe products and more nearly level the competitive playing field. The House Subcommittee on Commerce, Trade and Consumer Protection has approved the bill. A companion bill was introduced in the Senate last year and referred to the Senate Finance Committee.

CBP Withdraws Its Proposed Change to First Sale Rule

U.S. Customs and Border Protection ("CBP") has determined that it will continue to accept the First Sale Rule for purposes of valuing imported merchandise. Under the First Sale Rule, duties are applied to the price paid in the first transaction "for exportation," even if the merchandise passes through the hands of several middlemen before arriving in the United States. As reported in previous HIGHLIGHTS, CBP in January 2008 proposed changing its method for assessing duties on imported goods to one used by other countries, which value imported goods at the price paid in the last sale prior to the goods entering the United States. Importers and trade organizations strongly opposed the proposed change because higher duties would result. CBP has now formally withdrawn the proposal. This comes after Congress, in the Food, Conservation and Energy Act of 2008 (the "Act"), required CBP to collect information from importers on whether they were using the First Sale Rule for their declared value and then to report those data to the International Trade Commission. Congress also stated that CBP could not alter the valuation method prior to January 1, 2011, and that CBP could do so then only in accordance with the terms set forth in the Act. Look for CBP to resume its campaign against the First Sale Rule some time next year.

ITC Seeks Input on Possible GSP Modifications

The International Trade Commission ("ITC") is assessing the impact of possible modifications to the Generalized System of Preferences ("GSP"). As explained in prior HIGHLIGHTS, GSP treatment provides preferential duty-free entry for almost 5,000 products from certain designated beneficiary countries and territories in the developing world, to promote the economic growth of those regions. The modifications would remove the current duty-free status enjoyed by three U.S. Harmonized Tariff Schedule subheadings for certain beneficiary developing countries. The three subheadings are 9404.30.80 (certain sleeping bags), for all GSP-eligible countries, and 3919.10.20 and 3919.90.50 (certain types of self-adhesive plates, sheets, film, foil, tape, strip, and other flat shapes of plastics, in rolls), for Indonesia. The ITC is looking at the impact on U.S. industries, U:S. imports, and U.S. consumers and is seeking input from interested parties. The ITC will hold a public hearing on December 1. Requests to appear at the hearing must be filed by 5:15 p.m. on November 15. The ITC also is accepting written

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comments, which must be submitted by 5:15 p.m. on December 8.

If you have any questions concerning the subject matter addressed above, please feel free to contact any of the attorneys listed on the left.

Highlights in International Trade and Commerce by Williams Mullen is prepared for information purposes only and does not constitute legal advice. Persons seeking legal advice concerning the issues addressed in this issue are encouraged to contact competent legal counsel.

For comments or suggestions, please contact the publication editor, Jimmie V. Reyna, Esq.



Highlights in International Trade and Commerce

Newsletter

01.03.2011

The International Law Section of Williams Mullen prepared the following brief descriptions of selected issues in international trade and commerce for general information purposes and use by clients and friends of the firm.

Other Government Agencies Will Follow CPSC and Issue Their Own Detention Notices

According to a Consumer Product Safety Commission ("CPSC") official, other government agencies will follow in the CPSC's footsteps and begin issuing their own detention notices. The CPSC began issuing its detention notices in June. These CPSC notices are generally in lieu of notices issued by U.S. Customs and Border Protection ("CBP"). They contain a point of contact at CPSC, information about the violation, instructions for the importer, and information about conditional release. The same CPSC official also commented on several other recent developments involving the Consumer Product Safety Improvement Act ("CPSIA"). The CPSC is seeing some common problems with the testing and certification requirements of the CPSIA, particularly that testing and certification are not always sufficiently thorough and that manufacturers and importers are not testifying and certifying for all the rules affecting a given product. In addition, the CPSIA requirement regarding conformity certificates does not mean that an importer must place a paper certificate in the box of a shipment. It suffices simply to have these documents available if CPSC asks for them; electronic form is preferable. The official also noted that the trade has been slow to comply with the CPSIA tracking label requirements for children's products and warned that the products could be stopped at the port of entry if they do not comply. Several new CPSC requirements apply to products manufactured on or after December 1, 2010, including: new standards for infant bath seats, new standards for infant walkers and requirements for consumer product registration cards to be included with additional durable infant and toddler products (children's folding chairs, changing tables, infant bouncers, infant bath tubs, bed rails and

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infant swings). In addition, the CPSC should finalize by the end of 2010 the rulemakings to establish new mandatory standards for cribs and to designate certain children's wear with drawstrings and hairdryers without immersion protection to be substantial product hazards and, therefore, refused entry. Finally, the CPSC's stay of enforcement on the testing and certification requirements for lead in children's products is due to be lifted in February of 2011.

Commerce Seeks Comments on Potential Change to Antidumping Respondent Selection Process

The Commerce Department is considering amending the methodology it uses to select respondents in antidumping proceedings. The United States levies antidumping duties on imports priced at less than their fair or "normal value" when they have caused, or threaten to cause, injury to the U.S. domestic industry. In some antidumping investigations or reviews, the number of foreign producers or exporters is so large that it is impracticable for Commerce to examine each company individually. By statute, Commerce can limit its examination either to a statistically valid sample of exporters, producers or types of products or to the exporters and producers accounting for the largest volume of subject merchandise from the exporting country. To date, Commerce has almost always relied on the second option. This means that smaller importers typically have not been selected for individual examination. To remedy this problem, Commerce has proposed a new sampling methodology. It involves sorting the relevant companies from largest to smallest based on import volumes. Then, the companies would be divided into groups or strata, with each group accounting for roughly the same share of import volume. Finally, one respondent from each stratum would be selected for examination. Commerce is accepting comments on its proposed methodology until January 18, 2011.

Irish Economy's Restructuring Offers Potential Investment Opportunities

The restructuring of the Irish economy is presenting, and will continue to present, a number of acquisition opportunities for value funds and investors as the Irish State privatizes a series of State-owned companies. Areas of focus include the energy, health insurance, air transport and gaming sectors. The National Asset Management Agency, the State-owned toxic debt vehicle, is preparing to dispose of its $100 billion asset portfolio, much of which is located in the United States and United Kingdom. Despite reports in the press, the Irish economy, outside the banking sector, is generally solid.

ITC Issues Report on IPR Infringement and Indigenous Innovation Policies in China

The U.S. International Trade Commission (ITC) issued the first of two reports on intellectual property rights (IPR) infringement in China and Chinese indigenous innovation policies. The report concludes that IPR infringement continues to be a problem for U.S. firms in China, reducing market opportunities and undermining their profitability. Moreover, China's indigenous innovation policies, which promote the development, commercialization and purchase of Chinese products and technologies, may create new barriers to U.S. foreign direct investment and exports to China,

according to the report. The report also outlines a framework for analyzing the effects of IPR infringement and indigenous innovation policies on the US economy and jobs, which will be used in the second report.

If you have any questions concerning the subject matter addressed above, please feel free to contact any of the attorneys listed on the left.

Highlights in International Trade and Commerce by Williams Mullen is prepared for information purposes only and does not constitute legal advice. Persons seeking legal advice concerning the issues addressed in this issue are encouraged to contact competent legal counsel.

For comments or suggestions, please contact the publication editor, Jimmie V. Reyna, Esq.

Clovis Online.com
Your Community, Your News

First person: Setting the bar

2010-10-21 15:53:22

Jimmie Reyna is hoping to go from the flat terrains of Clovis to one of the nation's highest courts.

Reyna, 57, has been nominated by Barack Obama to the United States Court of Appeals for the Federal Circuit. Currently a partner at the Washington, D.C. firm of Williams Mullen, the 1971 Clovis High valedictorian has also been national president of the Hispanic National Bar Association and held several leadership positions on American Bar Association committees and sections.

He is a 1975 graduate of the University of Richmond and received his juris doctor degree in 1978 from the University of New Mexico School of Law.

(Editor's note: Reyna has been instructed to not answer specific questions about his legal career due to a pending court confirmation process.)

Growing up in Clovis: I remember all the fun that I had, wonderful friends that I had. It was a completely great time for me. I also remember the geography, the flatness of the terrain, the country roads, the amount of sky, the blowing wind.

Coming through Clovis: One of the things that I always do when I go to Clovis is ride around and see how the town has changed. I also go to some of the drive-in restaurants I like and a lot of memories come back.

I think in a way, downtown, there's less commercial activity. It's more on the outskirts of the town. You notice the big stores that have opened up, the expansion of the town.

I am also aware of the changes in its economic base, the growth of the dairy farms.

Something's missing: For Clovis specifically, I miss all of my good friends, and there are a lot of them. Robert Brack is a federal judge in Las Cruces. We first met in the seventh grade, and we've been friends ever since. When I see him, I see Clovis. I remember sitting on top of a car with a jug of A&W root beer, looking at the stars at night and dreaming of what we were going to do when we grow up.

Meeting the wife: I left Clovis to go to an orientation program at the University of Rochester. Dolores was absolutely gorgeous, hair past her waist, bright eyes. As I got to know her, she was a wonderful person. We got married our freshman year in college, and we're still married; 39 years.

From the parents: What they (Julian and Consuelo Reyna) gave me was my religious faith. They exemplified that faith. I think by far, that's the most wonderful gift they gave me. Along with that comes integrity and hard work.

My mother was always pushing me to do more and do it with enthusiasm.

My dad gave me the ethic of hard work and not to be ashamed of any job I've had. I've had plenty of jobs, including door-to-door and working at an onion farm in Portales. He taught me that all work is honorable, and whatever job you're doing, you should do your best at it.

— Compiled by Kevin Wilson

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Back to Article

All Federal Circuit Vacancies Now Have Nominees, but Quick Confirmation Unlikely

Sheri Qualters

10-06-2010

President Barack Obama's recent nomination of Jimmie Reyna for one of three vacancies on the U.S. Court of Appeals for the Federal Circuit covers all open slots and adds a candidate with deep international trade expertise. But court watchers expect that at least two of the confirmations to the 12-judge court, including Reyna's, will stretch into next year.

On Sept. 29, Obama nominated Reyna, who directs the international trade and customs practice group and the Latin America task force in the Washington office of Williams Mullen. Reyna also served as the Hispanic National Bar Association's president for its 2006-2007 term.

The other nominees include a federal judge and an appellate specialist. In March, Obama nominated Judge Kathleen O'Malley of the Northern District of Ohio.

In April, he nominated Edward DuMont, a partner in the Washington office of Wilmer Cutler Pickering Hale and Dorr.

Reached at his Washington office, Reyna said he's "honored at having been nominated" and "I look forward to the confirmation process." According to a statement from Williams Mullen's president and chief executive officer, Thomas Frantz, the firm is proud that Obama recognized Reyna's record of service by nominating him to the Federal Circuit. "A natural leader with legal acumen and grace, Jimmie has served the firm and its clients with distinction for twelve years," Frantz stated.

Reyna's extensive international trade experience at the International Trade Commission is a useful addition to the court, said Harold Wegner, a patent partner in the Washington office of Foley & Lardner, who closely follows the Federal Circuit. "His appointment to the Federal Circuit should fill a vacuum as a person with special expertise in this area that is part of the jurisdiction of the appellate court," Wegner said.

With all the high-profile patent cases the Federal Circuit receives, there's a need to guard against overlooking the other jurisdictions of the court, said Edward Reines, a partner in the Redwood Shores, Calif., office of New York's Weil, Gotshal & Manges and chairman of the Federal Circuit Advisory Committee. "Reyna is a well-known trade expert and will help the court with its trade docket," Reines said.

Aside from patent appeals, the Federal Circuit's jurisdiction includes International Trade Commission and U.S. Court of International Trade appeals, government contract cases and certain cases involving government employees' or veterans' benefits and monetary claims against the government.

The Senate Judiciary Committee advanced O'Malley's nomination to the full U.S. Senate with a voice vote on Sept. 23.

It would be surprising if DuMont or Reyna were confirmed this year because DuMont hasn't had a Senate Judiciary Committee hearing, said James Crowne, director of legal affairs of the American Intellectual Property Law Association (AIPLA).

Lawyers anticipate more Federal Circuit vacancies next year because all of the nine active judges were born in the 1940s or earlier, Crowne said. "A lot of people may very well expect those types of developments based on the age of the judges," Crowne said.

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Rev. 1/2010

FINANCIAL DISCLOSURE REPORT
NOMINATION FILING

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
Reyna, Jimmie V.	Federal Circuit	01/05/2011
4. Title (Article III judges indicate active or senior status; magistrate judges indicate full- or part-time)	**5a. Report Type (check appropriate type)**	**6. Reporting Period**
Circuit Judge	☑ Nomination, Date 01/05/2011 ☐ Initial ☐ Annual ☐ Final 5b. ☐ Amended Report	01/01/2010 to 12/31/2010
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.**	
Williams Mullen, P.C. 1666 K St., NW, Suite 1200 Washington, DC 2006	Reviewing Officer_____ Date_____	

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

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

☐ NONE *(No reportable positions.)*

	POSITION	NAME OF ORGANIZATION/ENTITY
1.	Shareholder, Board of Directors	Williams Mullen Clark & Dobbins, P.C.
2.	Board of Directors	Community Services for Autistic Adults and Children Foundation
3.		
4.		
5.		

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

☑ NONE *(No reportable agreements.)*

	DATE	PARTIES AND TERMS
1.		
2.		
3.		

FINANCIAL DISCLOSURE REPORT Page 2 of 8	Name of Person Reporting Reyna, Jimmie V.	Date of Report 01/05/2011

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

A. Filer's Non-Investment Income

☐ NONE *(No reportable non-investment income.)*

	DATE	SOURCE AND TYPE	INCOME (yours, not spouse's)
1.	2009	Williams Mullen, P.C. partnership distribution	$340,220.00
2.	2010	Williams Mullen, P.C., partnership distribution	$281,372.00
3.			
4.			

B. Spouse's Non-Investment Income - *If you were married during any portion of the reporting year, complete this section.*
(Dollar amount not required except for honoraria.)

☐ NONE *(No reportable non-investment income.)*

	DATE	SOURCE AND TYPE
1.	2010	Montgomery County Public Schools, salary
2.		
3.		
4.		

IV. REIMBURSEMENTS - *transportation, lodging, food, entertainment.*
(Includes those to spouse and dependent children; see pp. 25-27 of filing instructions.)

☐ NONE *(No reportable reimbursements.)*

	SOURCE	DATES	LOCATION	PURPOSE	ITEMS PAID OR PROVIDED
1.	Exempt				
2.					
3.					
4.					
5.					

FINANCIAL DISCLOSURE REPORT Page 3 of 8	Name of Person Reporting Reyna, Jimmie V.	Date of Report 01/05/2011

V. GIFTS. *(Includes those to spouse and dependent children; see pp. 28-31 of filing instructions.)*

☐ NONE *(No reportable gifts.)*

	SOURCE	DESCRIPTION	VALUE
1.	Exempt		
2.			
3.			
4.			
5.			

VI. LIABILITIES. *(Includes those of spouse and dependent children; see pp. 32-33 of filing instructions.)*

☐ NONE *(No reportable liabilities.)*

	CREDITOR	DESCRIPTION	VALUE CODE
1.	CitiMortgage	Mortgage on rental property, Montgomery County, MD (Sec Pt. VII, line 1)	M
2.			
3.			
4.			
5.			

FINANCIAL DISCLOSURE REPORT Page 4 of 8	Name of Person Reporting Reyna, Jimmie V.	Date of Report 01/05/2011

VII. INVESTMENTS and TRUSTS -- *Income, value, transactions (includes those of spouse and dependent children; see pp. 34-36 of filing instructions.)*

☐ NONE *(No reportable income, assets, or transactions.)*

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A-H)	(2) Type (e.g., div., rent, or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	(2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, redemption)	(2) Date mm/dd/yy	(3) Value Code 2 (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)
1. Rental Property, Montgomery County, MD	D	Rent	N	W					
2. Chevy Chase Bank, account	A	Interest	J	T					
3. MCT Credit Union, account	A	Interest	K	T					
4. PNC, account	A	Interest	J	T					
5. BOE, common stock		None	J	T					
6. GE, common stock		None	J	T					
7. SIR, common stock		None	J	T					
8. BALBX, mutual fund		None	K	T					
9. AFBXX, money market	A	Interest	K	T					
10. CIBBX, mutual fund		None	K	T					
11. CWGBX, mutual fund		None	K	T					
12. RLBFX, mutual fund		None	M	T					
13. Northwestern Life, Variable Policy #1									
14. - Select Bond		None	J	T					
15. - Money Market	A	Interest	J	T					
16. - Index 400 Stock		None	J	T					
17. - Small Cap Growth Stock		None	J	T					

1. Income Gain Codes: (See Columns B1 and D4)	A =$1,000 or less F =$50,001 - $100,000	B =$1,001 - $2,500 G =$100,001 - $1,000,000	C =$2,501 - $5,000 H1 =$1,000,001 - $5,000,000	D =$5,001 - $15,000 H2 =More than $5,000,000	E =$15,001 - $50,000
2. Value Codes (See Columns C1 and D3)	J =$15,000 or less N =$250,001 - $500,000	K =$15,001 - $50,000 O =$500,001 - $1,000,000	L =$50,001 - $100,000 P1 =$1,000,001 - $5,000,000	M =$100,001 - $250,000 P2 =$5,000,001 - $25,000,000	
	P3 =$25,000,001 - $50,000,000		P4 =More than $50,000,000		
3. Value Method Codes (See Column C2)	Q =Appraisal T =Book Value	R =Cost (Real Estate Only)	S =Assessment V =Other	W =Estimate	T =Cash Market

FINANCIAL DISCLOSURE REPORT
Page 5 of 8

Name of Person Reporting	Date of Report
Reyna, Jimmie V.	01/05/2011

VII. INVESTMENTS and TRUSTS — *Income, value, transactions (includes those of spouse and dependent children; see pp. 34-60 of filing instructions.)*

☐ NONE *(No reportable income, assets, or transactions.)*

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A-H)	B. Income during reporting period (2) Type (e.g., div., rent, or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. Gross value at end of reporting period (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, redemption)	D. Transactions during reporting period (2) Date mm/dd/yy	D. Transactions during reporting period (3) Value Code 2 (J-P)	D. Transactions during reporting period (4) Gain Code 1 (A-H)	D. Transactions during reporting period (5) Identity of buyer/seller (if private transaction)
18. - Russell Real Estate Securities		None	J	T					
19. - Small Cap Value		None	K	T					
20. Northwestern Life, variable Policy #2									
21. - Select Bond		None	J	T					
22. - Money Market	A	Interest	J	T					
23. - Index 400 Stock		None	J	T					
24. - Small Cap Growth Stock		None	J	T					
25. - Russel Real Estate Securities		None	J	T					
26. - Small Cap Value		None	J	T					
27. New York Life . Variable Policy									
28. - International Equity		None	J	T					
29. - UIF Eme Equity		None	J	T					
30. - TRP Eq Inc		None	J	T					
31. - VE GLBL HA		None	J	T					
32. - Cmmn Stock		None	J	T					
33. - Worldwide		None	J	T					
34. - Contrafund		None	J	T					

1 Income Gain Codes (See Columns B1 and D4)	A =$1,000 or less	B =$1,001 - $2,500	C =$2,501 - $5,000	D =$5,001 - $15,000	E =$15,001 - $50,000
	F =$50,001 - $100,000	G =$100,001 - $1,000,000	H1 =$1,000,001 - $5,000,000	H2 =More than $5,000,000	
2 Value Codes (See Columns C1 and D3)	J =$15,000 or less	K =$15,001 - $50,000	L =$50,001 - $100,000	M =$100,001 - $250,000	
	N =$250,001 - $500,000	O =$500,001 - $1,000,000	P1 =$1,000,001 - $5,000,000	P2 =$5,000,001 - $25,000,000	
	P3 =$25,000,001 - $50,000,000		P4 =More than $50,000,000		
3. Value Method Codes (See Column C2)	Q =Appraisal	R =Cost (Real Estate Only)	S =Assessment	T =Cash Market	
	U =Book Value	V =Other	W =Estimated		

FINANCIAL DISCLOSURE REPORT Page 6 of 8	Name of Person Reporting Reyno, Jimmie V.	Date of Report 01/05/2011

VII. INVESTMENTS and TRUSTS – *Income, value, transactions (Include those of spouse and dependent children; see pp. 34-60 of filing instructions.)*

☐ NONE *(No reportable income, assets, or transactions.)*

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A-H)	B. Income during reporting period (2) Type (e.g., div., rent, or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. Gross value at end of reporting period (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, redemption)	D. (2) Date mm/dd/yy	D. (3) Value Code 2 (J-P)	D. (4) Gain Code 1 (A-H)	D. (5) Identity of buyer/seller (if private transaction)
35. Williams Mullen Clark & Dobbins Retirement Acct, no control		None	L	T					
36. Williams Mullen Clark & Dobbins, Capital Acct., no control		None	L	T					

1. Income Gain Codes (See Columns B1 and D4)	A =$1,000 or less F =$50,001 - $100,000	B =$1,001 - $2,500 G =$100,001 - $1,000,000	C =$2,501 - $5,000 H1 =$1,000,001 - $5,000,000	D =$5,001 - $15,000 H2 =More than $5,000,000	E =$15,001 - $50,000
2. Value Codes (See Columns C1 and D3)	I =$15,000 or less N =$250,001 - $500,000 P3 =$5,000,001 - $25,000,000	J =$15,001 - $50,000 O =$500,001 - $1,000,000	K =$50,000 - $100,000 P1 =$1,000,001 - $5,000,000 P4 =More than $50,000,000	L =$100,001 - $250,000 P2 =$5,000,001 - $25,000,000	M =$100,001 - $250,000
3. Value Method Codes (See Column C2)	Q =Appraisal U =Book Value	R =Cost (Real Estate Only) V =Other	S =Assessment W =Estimated	T =Cash Market	

FINANCIAL DISCLOSURE REPORT Page 7 of 8	Name of Person Reporting Reyna, Jimmie V.	Date of Report 01/05/2011

VIII. ADDITIONAL INFORMATION OR EXPLANATIONS. *(Indicate part of Report.)*

FINANCIAL DISCLOSURE REPORT Page 8 of 8	Name of Person Reporting Reyna, Jimmie V.	Date of Report 01/05/2011

IX. CERTIFICATION.

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

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

Signature

NOTE: ANY INDIVIDUAL WHO KNOWINGLY AND WILFULLY FALSIFIES OR FAILS TO FILE THIS REPORT MAY BE SUBJECT TO CIVIL AND CRIMINAL SANCTIONS (5 U.S.C. app. § 104)

FILING INSTRUCTIONS

Mail signed original and 3 additional copies to:

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

Jimmie Reyna

FINANCIAL STATEMENT

NET WORTH SCHEDULES (As on December 28, 2010)

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		41	436	Notes payable to banks-secured		58	100
U.S. Government securities				Notes payable to banks-unsecured			
Listed securities—see schedule		9	408	Notes payable to relatives			
Unlisted securities				Notes payable to others			
Accounts and notes receivable:				Accounts and bills due		3	200
Due from relatives and friends				Unpaid income tax			
Due from others				Other unpaid income and interest			
Doubtful				Real estate mortgages payable —see schedule		936	087
Real estate owned—see schedule	1	925	000	Chattel mortgages and other liens payable			
Real estate mortgages receivable				Other debts-itemize:			
Autos and other personal property		210	000				
Cash value-life insurance		230	772				
Other assets itemize:							
401(k) Accounts—see schedule		320	028				
Law Firm Capital and Cash Contributions		80	815				
Law Firm Retirement Account (no control)		97	496	Total liabilities		997	387
				Net Worth	1	917	568
Total Assets	2	914	955	Total liabilities and net worth	2	914	955
CONTINGENT LIABILITIES				GENERAL INFORMATION			
As endorser, comaker or guarantor		77	500	Are any assets pledged? (Add schedule)	No		
On leases or contracts				Are you defendant in any suits or legal actions?	No		
Legal Claims				Have you ever taken bankruptcy?	No		
Provision for Federal Income Tax							
Other special debt							

FINANCIAL STATEMENT

NET WORTH SCHEDULES (as on December 28, 2010)

Listed Securities	
Blackrock Global Opportunities Eq. Tr (BOE)	$ 4,235.
General Electric Co. (GE)	2,743.
Sirius XM Radio Inc. (SIR)	2,430.
Total Listed Securities	9,408.
Real Estate Owned	
Personal residence	$ 850,000
Vacation home	750,000
Rental property	290,000
Wilderness Lot	5,000
Boat Slip	30,000
Total Real Estate Owned	1,925,000
Real Estate Mortgages Payable	
Personal residence	$ 403,560
Vacation home	301,859
Rental property	230,668
Total Real Estate Payable	936,087
Securities Held in 401(k) Retirement Accounts	
Am. Funds Am. Balanced Fund R5 (RLBFX)	$ 239,400
Am. Balanced Fund Cl. B (BALBX)	18,368
Am. Funds Money Market Fd Cl B (AFBXX)	15,289
Capital Income Builder Fund Cl B (CIBBX)	28,789
Capital World Gro. Inc. Fund Cl B (CWGBX)	18,182
Total Listed Securities	320,028

Senator BLUMENTHAL. Please be seated.

If we could go in order. Perhaps we will begin with Judge Kronstadt, if you have an opening statement.

STATEMENT OF JOHN A. KRONSTADT, NOMINATED TO BE U.S. DISTRICT JUDGE FOR THE CENTRAL DISTRICT OF CALIFORNIA

Judge KRONSTADT. Good afternoon. Thank you very much, Senator Blumenthal and Senator Grassley, for seeing us today—seeing me today. I'm honored to be here.

I also wish to thank President Obama for placing my name before the Senate, and wish to thank Senator Feinstein for speaking on my behalf today with her very generous remarks.

If I may, I have some family and friends present whom I'd like to introduce.

Senator BLUMENTHAL. And I should just interrupt you to say, if any of your families would like to move to the chairs that have now been opened, you should feel welcome to do so, or you can stay where you are, whichever you'd prefer. I'm sorry to interrupt. Go ahead.

Judge KRONSTADT. No. Thank you.

With me today is my wife, Judge Helen Bendix of the Los Angeles County Superior Court, who was mentioned earlier by Senator Feinstein. I can assure you that without Judge Bendix, my wife, I would not be here today. We were college mates, we were law school classmates, and we've been life mates a little more than 36 years. I think that says it all. I would definitely not be here without her support.

Also present, and we're very proud of each of our children. All three of our children have traveled to Washington today from various points in the United States, and we're pleased and thrilled they're all here: our daughter Jessica, a lawyer in Los Angeles; our son Eric, who's a graduate student in California; and our daughter Nicola, who's an undergraduate student here on the East Coast, all have made the trip. And again, I thank you all for coming. I'm honored. You've made our lives far richer.

Also here are some other family members, my cousins, Nancy Kronstadt, Denise Kronstadt. Denise has traveled from New York and Nancy lives here in Washington. I'm grateful for their being here, as they are reminders of the wonderful generation before ours who guided us through our lives.

Also present are some good friends, Mike Klein, Joan Fabry. I'm grateful for their support today. Jeffrey Kaplan, a law school classmate of my wife's and mine, is also here. I'm grateful for that. Allison Teeter is present, and her husband Glen. Allison is a close family member. I'm grateful for her traveling several hours today from West Virginia to be here.

There are also some who are not here, who couldn't be here. My sisters are not here. I wish they had been here, but they're not able to be here today. My aunts, who are both the links to my parents—my father's sister and my mother's sister are here in my mind, and may be watching on the webcast; I hope so. I'm grateful for them and their support.

And I'm also reminded, based on some earlier comments of some others, obviously, who are my parents, neither of whom is alive today. But obviously without them I would not be here. Each was the child of immigrants, each was the first person in his or her family to go to college, and each contributed to the life that I've led. My mother, who died more than a half century ago, adhered to the view that whatever you start, finish in style. That's an adage that I've tried to follow and I've tried to pass on to our children.

My father, who raised the three of us as a single parent for much of our lives, or growing up lives, was a very accomplished and terrific professional and a wonderful father. So I think of them too, because without them I certainly would not be here today. So I'm very grateful, and thank you very much.

Senator BLUMENTHAL. Thank you.

Mr. Briccetti.

Judge KRONSTADT. Oh, excuse me. I missed—I overlooked someone. My daughter Jessica's friend, Will Turner, also traveled from afar to be here. I apologize.

[Laughter.]

Senator BLUMENTHAL. Thank you.

Mr. Briccetti.

[The biographical Information follows.]

UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY

QUESTIONNAIRE FOR JUDICIAL NOMINEES

PUBLIC

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

   John Arnold Kronstadt

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. If city and state of residence differs from your place of employment, please list the city and state where you currently reside.

   Office: Los Angeles County Superior Court
   111 North Hill Street
   Department 30, Room 400
   Los Angeles, California 90012

   [redacted]

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

   1951; Washington, D.C.

5. **Education**: List in reverse chronological order each college, law school, or any other institution of higher education attended and indicate for each the dates of attendance, whether a degree was received, and the date each degree was received.

   1974 – 1976, Yale Law School; J.D., 1976
   1973 – 1974, George Washington University Law School; no degree
   1969 – 1972, Cornell University; B.A., 1973

6. **Employment Record**: List in reverse chronological order all governmental agencies, business or professional corporations, companies, firms, or other enterprises, partnerships, institutions or 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 description.

2002 – Present
Los Angeles County Superior Court
111 North Hill Street
Los Angeles, California 90012
Judge

2000 – 2002
Arnold & Porter LLP
777 South Figueroa Street, 44th Floor
Los Angeles, California 90017
Partner

1991 – 2000
Blanc Williams Johnston & Kronstadt
1900 Avenue of the Stars, Suite 1900
Los Angeles, California 90067
Partner

1985 – 1991
Blanc Gilburne Williams & Johnston
1900 Avenue of the Stars
Los Angeles, California 90067
Partner

1978 – 1985
Arnold & Porter
555 Twelfth Street, NW
Washington, D.C. 20004
Partner (1984 – 1985)
Associate (1978 – 1983)

1976 – 1977
United States District Court for the Central District of California
312 North Spring Street
Los Angeles, California 90012
Law Clerk to the Honorable William P. Gray

1975 – 1976
Yale University
127 Wall Street
New Haven, Connecticut 06511
Undergraduate Teaching Assistant to Professor Charles Black (spring 1976)
Research Assistant to Professor James William Moore (1975 – 1976)
Graduate Resident Fellow of Pierson College (1975 – 1976)

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Summer 1975
Arnold & Porter LLP
555 Twelfth Street, NW
Washington, D.C. 20004
Summer Associate

Summer 1974
Sellers Conner & Cuneo
1625 K Street, NW
Washington, D.C. 20006
Summer Associate

Spring 1973
Matthews Phillips Builders
Columbia, Maryland 21044
Finishing Superintendent

Other Affiliations (uncompensated)

2002 – Present
Constitutional Rights Foundation
601 South Kingsley Drive
Los Angeles, California 90005
Executive Committee and Board of Directors (2004 – present)
President (2006 – 2007)

1999 – 2002
Los Angeles County Bar Association
1055 West Seventh Street
Los Angeles, California 90017
Assistant Vice President, Executive Committee and Trustee (1999 – 2002)

7. **Military Service and Draft Status**: Identify any service in the U.S. Military, including dates of service, branch of service, rank or rate, serial number (if different from social security number) and type of discharge received, and whether you have registered for selective service.

I have not served in the military. I have registered for selective service.

8. **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.

Constitutional Rights Foundation, Presidential Service (2007)
Los Angeles County Bar Association, Patricia D. Phillips Award, Outstanding LACBA Committee Chair (1998)

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9. **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.

Constitutional Rights Foundation
Board of Directors, Member of Executive Committee (2004 – present)
President (2006 – 2007)

Los Angeles County Bar Association
State Courts Coordinating Committee (2000 – 2002)
Federal Courts Coordinating Committee (2000 – 2002)
Trustee, Assistant Vice President and Executive Committee (1999 – 2002)
Amicus Briefs Committee (1997 – 2002)
Chair (1997 – 1999)
Chair, New Lawyer Training Committee (1998 – 2000)
Ad Hoc Committee, Proposed Disciplinary Rules (C.D. Cal.) (1998)
Ad Hoc Committee on Ninth Circuit Restructuring (1998)

Los Angeles County Superior Court
Chair, Community Outreach Committee
Chair, Outreach Governance Committee

10. **Bar and Court Admission**:

a. List the date(s) you were admitted to the bar of any state and any lapses in membership. Please explain the reason for any lapse in membership.

California, 1976
District of Columbia, 1978

In California, a person serving as a judge is not considered a member of the State Bar. I am aware of no other lapses in membership.

b. List all courts in which you have been admitted to practice, including dates of admission and any lapses in membership. Please explain the reason for any lapse in membership. Give the same information for administrative bodies that require special admission to practice.

United States Court of Appeals for the Ninth Circuit, 1989
United States Court of Appeals for the D.C. Circuit, 1981
United States District Court for the District of Arizona, 1998
United States District Court for the Central District of California, 1980
United States District Court for the District of Columbia, 1980
Supreme Court of California, 1976
District of Columbia Court of Appeals, 1978

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In California, a person serving as a judge is not considered a member of the State Bar. I am aware of no other lapses in membership.

11. **Memberships**:

a. List all professional, business, fraternal, scholarly, civic, charitable, or other organizations, other than those listed in response to Questions 9 or 10 to which you belong, or to which you have belonged, since graduation from law school. Provide dates of membership or participation, and indicate any office you held. Include clubs, working groups, advisory or editorial boards, panels, committees, conferences, or publications.

Hawkeye Conservationists (neighborhood organization in Hawkeye, N.Y.) (approximately 2005 – present)

Adirondack 46ers (2000 – present)

National Park Conservation Association (2000 – present)

Chancery Club (1999 – present)

Jonathan Club (1999 – present)

Da Camera Society (1985 – present)

Adirondack Mountain Club (approximately 1980 – present)

Cornell University Alumni organizations (1978 – present)

Quill & Dagger (Cornell University Honorary Society) (1972 – present)

b. 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, or national origin. Indicate whether any of these organizations listed in response to 11a above currently discriminate or formerly discriminated on the basis of race, sex, religion or national origin 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.

None of the organizations listed above currently discriminates on the basis of race, sex, religion or national origin. The Jonathan Club at one time did not admit women or certain minorities as members; those policies ended more than 10 years before I became a member. The Quill & Dagger honorary society at Cornell, to which I was elected in 1972, had no female members from its founding in 1893 until 1974, when women were first admitted. It has remained open to all candidates since that time.

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12. **Published Writings and Public Statements**:

a. List the titles, publishers, and dates of books, articles, reports, letters to the editor, editorial pieces, or other published material you have written or edited, including material published only on the Internet. Supply four (4) copies of all published material to the Committee.

This list represents the published material I have identified through searches of my files and Internet databases. I have tried my best to list all of them here, although there may be some that I have not been able to identify or locate.

Tribute to Justice Paul Boland, which appeared in the following article: *Court of Appeal Justice Paul Boland Dies at 65*, METROPOLITAN NEWS ENTERPRISE, Sept. 7, 2007. Copy supplied.

Calling All Attorneys: The Students of Los Angeles Need You!, ADVOCATE, Oct. 2006. Copy supplied.

Forum Column, DAILY JOURNAL, July 2003. Copy supplied.

John A. Kronstadt, Charles Ivie & Gary Roberts, *"Clearly Shown," An Exacting Standard for Scientific Determinations Under Prop. 65: Part II*, PROP 65 NEWS, Aug. 1, 1997. Copy supplied.

John A. Kronstadt, Charles Ivie & Gary Roberts, *"Clearly Shown," An Exacting Standard for Scientific Determination Under Prop. 65, Part I: What the Words Mean*, PROP 65 NEWS, July 1, 1997. Copy supplied.

John A. Kronstadt & Allen R. Grogan, *Impact of Antitrust Law on Licensing in the Information Technology Sector*, PRACTICING LAW INSTITUTE, Order No. G4-4003 (June and July 1997). Copy supplied.

Innovation and Antitrust, PRACTICING LAW INSTITUTE, Order No. G4-3885 (June and July 1992). Copy supplied.

Innovation and Antitrust, PRACTICING LAW INSTITUTE, Order No. G4-3830 (Apr. 1, 1989). Copy supplied.

b. Supply four (4) copies of any reports, memoranda or policy statements you prepared or contributed in the preparation of on behalf of any bar association, committee, conference, or organization of which you were or are a member. If you do not have a copy of a report, memorandum or policy statement, give the name and address of the organization that issued it, the date of the document, and a summary of its subject matter.

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Brief of the LACBA, *et al.* as *amici curiae* in support of State Bar of California, *Warden v. State Bar of California*, 21 Cal. 4th 628 (1999) (No. S060702). Copy supplied.

Comments of the Los Angeles County Bar Association on the Tentative Draft Report of the Commission on Structural Alternatives for the Federal Courts of Appeals (Oct. 30, 1998). Copy supplied.

In addition, the Constitutional Rights Foundation has issued annual reports every year since I joined the Board of Directors and the Executive Committee in 2004. I did not participate in the writing or editing of these reports; they were prepared by CRF Staff members and were not presented to the Board for consideration or approval. Copies of these reports are available at http://www.crf-usa.org/about-crf.html.

Other than these items, I do not recall any other writings that are responsive to this question.

c. Supply four (4) copies of any testimony, official statements or other communications relating, in whole or in part, to matters of public policy or legal interpretation, that you have issued or provided or that others presented on your behalf to public bodies or public officials.

None that I recall or have been able to identify.

d. Supply four (4) copies, transcripts or recordings of all speeches or talks delivered by you, including commencement speeches, remarks, lectures, panel discussions, conferences, political speeches, and question-and-answer sessions. Include the date and place where they were delivered, and readily available press reports about the speech or talk. If you do not have a copy of the speech or a transcript or recording of your remarks, give the name and address of the group before whom the speech was given, the date of the speech, and a summary of its subject matter. If you did not speak from a prepared text, furnish a copy of any outline or notes from which you spoke.

The following is a list of speaking engagements of which I have a record. To create this list, I searched my personal files, appointment books and the Internet. I have, however, spoken frequently over the years, and did not retain a record of many of those appearances. Notwithstanding my best efforts to create a list responding to this question that is as complete as possible, there may be other presentations I have given that I have been unable to identify or recall.

August 13, 2010: California Administrative Office of Courts, co-presenter of "Judicial Outreach: Outreach Increases Trust & Confidence in the Courts. And, It Rocks!" The PowerPoint from this presentation is supplied.

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September 29, 2009: Los Angeles Superior Court, Judicial Education System, co-presenter on issues related to arbitration. The written materials from this presentation are supplied.

September 22, 2009: Los Angeles Superior Court, Bench-Bar Committee, co-presenter of "Community Outreach, Bench-Bar-School Partnerships." The PowerPoint from this presentation is supplied.

July 1, 2009: California Administrative Office of Courts, California on My Honor Program, "Partnership Opportunities, Schools and Courts," presenter to primary, middle school and high school teachers to provide information about civic education. The PowerPoint for this presentation is supplied.

April 28, 2009: California Administrative Office of Courts, Regional Meeting, co-presenter of "Community Outreach." The PowerPoint from this presentation is supplied.

October 2008: California Administrative Office of Courts, CJER Continuing Judicial Studies Program, co-presenter of "Statements of Decision and Bench Trial Practices." The PowerPoint from this presentation is supplied.

July 2008: California Administrative Office of Courts, California on My Honor Program, "Judicial Impartiality," co-presenter to primary, middle school and high school teachers concerning judicial impartiality. The PowerPoint from this presentation is supplied.

August 27, 2007: Los Angeles County Family Law Bar Association, panelist for a program entitled, "Family Law Trial Institute 101: Trial Wrap." Although I believe a recording may have been made of this presentation, I have not been able to obtain a copy of it. If I am able to do so in the future, I will supply it. The address of the Association is 1055 West Seventh Street, Suite 2700, Los Angeles, CA 90017.

April 2007: Los Angeles Superior Court, Judicial Education System, presenter on "Statements of Decision and Bench Trial Practices." I used the same PowerPoint as that supplied for the October 2008 Continuing Judicial Studies Program.

February 24, 2007: Los Angeles County Family Law Bar Association, panelist on trial practices for program entitled, "Family Law Trial Institute Part II." Materials supplied.

January 2007: Los Angeles Superior Court, Family Law Seminar, co-presenter to other Family Law Judges on legal issues in family law cases that are related to issues in civil actions. I have been unable to obtain any materials from my presentation at this event.

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July 2006: California Administrative Office of Courts, CJER 2006 Summer Continuing Judicial Studies Program, co-presenter of "Statements of Decision." The PowerPoint from this presentation is supplied.

January 2006: Los Angeles Superior Court, Family Law Seminar, presenter of "Statements of Decision Process under California Civil Procedure." I used the same PowerPoint as that supplied for the July 2006 Continuing Judicial Studies Program.

In addition, since 2005, I have participated in the Constitutional Rights Foundation program, "Courtroom to Classroom." In this program, two lawyers and a judge visit 8th and 11th grade classrooms to talk about an area of our system of government and to oversee a mock trial about an actual U.S. Supreme Court case. I have visited classrooms approximately 20 times as part of this program. While serving as president of CRF, I gave introductory remarks about the program in a video for the organization's web site. My remarks and additional materials about this program are available on the CRF website: http://www.crf-usa.org/courtroom-to-classroom/courtroom-to-classroom.html.

On a few occasions between 2004 and 2010, I made presentations at events sponsored by the Los Angeles Superior Court about the value of community outreach by bench officers. I have been unable to determine the dates of each of these talks. A copy of a PowerPoint I used for one these presentations is supplied.

Between 2004 and 2007, I presented at several events of the Los Angeles County Family Law Bar Association in addition to the particular events listed above. To the best of my recollection, the subjects of those talks included best trial practices and aspects of certain valuations with respect to real estate. A copy of my presentation notes for one session (January 7, 2004) is supplied. I have been unable to determine the dates of any other talks or locate any other notes, transcripts, recordings or other materials.

Between 2000 and 2002, I visited inner-city schools to teach Constitutional principles as part of the First Impressions Project organized by then Superior Court Judge Veronica McBeth. In my work, I generated my own classroom materials for elementary school students that addressed the basic principles of our Constitutional system. I also provided copies of the Constitution and all of its amendments to each student in each class that I visited. I no longer have copies of these materials.

I have also appeared as a guest lecturer on three occasions at law schools. I did so at Washington University in St. Louis in 2008, where I addressed family law issues to a group of law students interested in that field. In 2009, I was a co-presenter to a small seminar at Southwestern Law School about practical issues in litigation. Approximately 30 years ago, I appeared as a guest lecturer, speaking

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about summary judgment, in a civil procedure class at UCLA Law School. I have no notes, transcripts or recordings of these lectures.

e. List all interviews you have given to newspapers, magazines or other publications, or radio or television stations, providing the dates of these interviews and four (4) copies of the clips or transcripts of these interviews where they are available to you.

I have searched my files and Internet databases in an effort to produce as complete a list of interviews as I could, but it is still possible there are some I was not able to locate.

Steven M. Ellis, *L.A. Superior Court Judge Dzintra Janavs to Retire*, METROPOLITAN NEWS ENTERPRISE, Dec. 31, 2007, at 1. Copy supplied.

Governor Says He Will Re-Appoint Janavs to Superior Court, METROPOLITAN NEWS ENTERPRISE, June 12, 2006, at 1. Copy supplied.

Sarah Garvey, *Judge Considers Dealing with Jury Best Part of Job*, DAILY JOURNAL, Oct. 1, 2003. Copy supplied.

Lorelei Laird, *Davis Appoints Two to Los Angeles Superior Court Bench*, METROPOLITAN NEWS ENTERPRISE, Oct. 17, 2002, at 1. Copy supplied.

Robert Greene, *LACBA Amicus Brief in MCLE Case to Back Exemptions*, METROPOLITAN NEWS ENTERPRISE, Sept. 26, 1997, at 1. Copy supplied.

Peter Larsen, *Electronics Firm Files Antitrust Suit*, DAILY NEWS, Apr. 18, 1989, at N5. Copy supplied.

Gail Gregg, *Putting Kids First*, NEW YORK TIMES, Apr. 13, 1986. Copy supplied.

Deborah Jeon, *ABA Considers Academic Credit for Clerkships*, LEGAL TIMES, July 18, 1983, at 2. Copy supplied.

Leslie Goodman-Malamuth, *Local Firms Tout Merits of Summer Associate Programs*, LEGAL TIMES, Oct. 1, 1982, at A2. Copy supplied.

Ruth Marcus, *The Lavish Wooing of Legal Whiz Kids*, WASHINGTON POST, Aug. 29, 1982, at C1. Copy supplied.

13. **Judicial Office**: State (chronologically) any judicial offices you have held, including positions as an administrative law judge, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

On November 14, 2002, I was appointed by Governor Gray Davis as a judge of the Los Angeles County Superior Court. This is a general trial court. My term of office was then

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extended for a six-year term, effective January 2005, and will be extended for a second six-year term, effective January 2011. My January 2011 term will expire on December 31, 2016, if not extended. Each of the six-year extensions resulted from the automatic renewal that occurred when I was not challenged in an election.

a. Approximately how many cases have you presided over that have gone to verdict or judgment?

I have presided over approximately 250 trials that have gone to verdict or judgment.

i. Of these, approximately what percent were:

jury trials:	15%
bench trials:	85%
civil proceedings:	88%
criminal proceedings:	12%

b. Provide citations for all opinions you have written, including concurrences and dissents.

None of the opinions that I have written has been published.

c. For each of the 10 most significant cases over which you presided, provide: (1) a capsule summary of the nature the case; (2) the outcome of the case; (3) the name and contact information for counsel who had a significant role in the trial of the case; and (3) the citation of the case (if reported) or the docket number and a copy of the opinion or judgment (if not reported).

(1) *MCP Metalspecialties, Inc. v. P. Kay Metal, Inc.* (LASC Case No. BC 389014)

This matter involved claims and cross-claims with respect to international sales transactions between merchants that involved a substantial quantity of goods. The action was filed on April 14, 2008; I oversaw the matter from January 2009 through the October 2009 jury trial, which resulted in a judgment in which plaintiff was the prevailing party. I handled many motions and presided at the trial. I also worked with the parties at settlement conferences.

Counsel for plaintiffs: Michael Stewart, Sheppard Mullin Richter & Hampton, LLP, 650 Town Center Drive, 4th Floor, Costa Mesa, CA 92626, (714) 513-5100.

Counsel for defendant: Mark D. Campbell, Loeb & Loeb, 10100 Santa Monica Blvd., Suite 2200, Los Angeles, CA 90067, (310) 282-2000; and Lewis Anten, 16830 Ventura Blvd., Suite 236, Encino, CA 91436, (818) 501-3535.

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(2) *Robinson v. City of Lynwood* (LASC Case No. BC 384862)

This matter involved claims of racial and whistle-blower discrimination in a public employment workplace. The action was filed on February 1, 2008. I oversaw the matter from January 2009 through its conclusion in August 2009. I decided many motions, presided at a jury trial that resulted in a hung jury, and oversaw the subsequent settlement conference in which the parties reached agreement.

Counsel for the plaintiff: Helena S. Wise, 3111 West Burbank Blvd. #101, Burbank, CA 91505, (818) 843-8086.

Counsel for defendants: Mark Meyerhoff, Liebert Cassidy Whitmore, 6033 West Century Blvd. #500, Los Angeles, CA 90045, (310) 981-2026.

(3) *IRMO Foerster and Bohbot* (LASC Case No. D 215047)

Upon remand from the Court of Appeal, this long-cause family law matter presented a series of unusual and extremely complex post-judgment issues. The two principal issues were to determine the date of valuation of certain assets, including intellectual property, and the valuation of those assets. Other issues presented included the relationship between these matters and a pending federal action with respect to the sale of a business to a public company. The action was first filed on April 25, 1988. I oversaw the matter from May 2006 through September 2008. The matter resulted in a multi-part bench trial during which I issued written decisions, copies of which are supplied. My decisions were affirmed by the Court of Appeal.

Counsel for petitioner: Steven Knowles, Knowles Collum LLP, 9100 Wilshire Blvd., #250W, Beverly Hills, CA 90212, (310) 461-0600; and David Felsenthal, Novian & Novian LLP, 1801 Century Park East, #1201, Los Angeles, CA 90067, (310) 553-1222.

Counsel for respondent: Tom P. Lallas, Levy Small & Lallas, 815 Moraga Drive, Los Angeles, CA 90049, (310) 471-3000; and Neal R. Hersh, Hersh Mannis & Bogen, 9150 Wilshire Blvd., Suite 209, Beverly Hills, CA 90212, (310) 786-1910.

(4) *People v. Hunt* (LASC Case No. 2 MT 03979)

This criminal matter concerned a manslaughter charge (Cal. Penal Code § 192(c)(2)) brought against an MTA bus driver as a result of a bus-pedestrian collision that resulted in the death of the pedestrian. The matter was filed in 2002. I oversaw the jury trial of the matter in May 2003, which resulted in a defense verdict. Prior to the commencement of the trial, I ruled on several motions. I also

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made several substantive rulings during the trial itself. Complex evidentiary questions were presented along with other legal issues.

Counsel for the People: Jeffery C. Gallagher, Office of the City Attorney, 1945 South Hill St., Los Angeles, CA 90012, (213) 978-2400.

Counsel for defendant: John E. Sweeney, 315 South Beverly Dr. #305, Beverly Hills, CA 90212, (310) 277-9595.

(5) *IRMO Valli* (LASC Case No. BD 414038)

This long-cause, family law matter presented complex issues of valuation and ownership. The case was filed on September 24, 2004. I oversaw the trial aspects of these issues between June 2006 and December 2008. Other judges handled other aspects of the matter during this time period. My decisions determined the extent and value of certain community property assets. A copy of my Statement of Decision is supplied.

Counsel for the petitioner: Peter Walzer and Christopher Melcher, Walzer & Melcher LLP, 21700 Oxnard St., Suite 2080, Woodland Hills, CA 91367, (818) 591-3700.

Counsel for respondent: William S. Ryden, Jaffe & Clemens, 433 N. Camden Dr., #1000, Beverly Hills, CA 90272, (310) 550-7477.

(6) *Hunter v. Masterburger* (LASC Case No. BC 378380)

This matter involved claims for premises liability with respect to injuries that plaintiff sustained at a commercial property when a large pane of glass collapsed. The action was filed on October 1, 2007; I oversaw the matter from January 2009 through October 2009. I handled many motions and presided at the jury trial, which resulted in a defense verdict.

Counsel for plaintiff: Thris Van Taylor, 110 South La Brea Ave., Suite 475, Inglewood, CA 90301, (323) 678-3009.

Counsel for defendants: Christopher E. Faenza and Mary Childs, Yoka & Smith, 777 South Figueroa St., Suite 4200, Los Angeles, CA 90017, (213) 427-2300.

(7) *IRMO Sheiner and Gelber* (LASC Case No. LD 028469)

This post-judgment family law matter involved complex issues of valuation, income and assets. It also presented certain custody-related issues. The matter was filed on April 22, 1999. I oversaw the matter from October 2003 through August 2004, when I rendered a decision on numerous issues, which concluded the matter. A copy of my decision is supplied.

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Counsel for petitioner: Robert N. Kipper, 345 Maple Drive, #395, Beverly Hills, CA 90210, (310) 275-1130.

Counsel for the respondent: Leon Bennett, 6320 Canoga Ave., #1400, Woodland Hills, CA 91367, (818) 888-7731.

(8) *Simons v. Moser* (LASC Case No. BC 394615)

This breach of contract and fraud matter was filed on July 18, 2008. The claims arose from a contract pursuant to which the parties agreed that the plaintiff would invest in, and co-manage, a business that the defendant had established. I oversaw the matter from January 2009 through October 2009. During that time period, I decided several motions with respect to the complaint and cross-complaint, the last of which granted summary judgment for the defendant on the complaint. A copy of that decision is supplied. Thereafter, the matter settled.

Counsel for plaintiff: Steven A. Simons, 15315 Magnolia Blvd., Suite 308, Sherman Oaks, CA 91403, (818) 368-9642.

Counsel for defendant: Jeffrey Erdman, Bennett & Erdman, 5670 Wilshire Blvd., Suite 1400, Los Angeles, CA 90036, (323) 935-0041.

(9) *Axis Surplus Insurance Co. v. Reinoso* (LASC Case No. BC 377072)

This insurance coverage case involved a dispute that arose from an underlying action brought against the insureds by tenants in residential apartments that the insureds owned and managed. I oversaw the matter from 2009 to 2010. During that time period, I decided cross-motions for summary judgment through an extensive, written decision and then presided at the bench trial of the matter, in which plaintiff prevailed. A copy of that lengthy decision is supplied.

Counsel for plaintiff: Allan E. Anderson and Kim Karelis, Ropers, Majeski, Kohn and Bentley, 515 South Flower Street, Suite 1100, Los Angeles, CA 90071, (213) 312-2000.

Counsel for defendants: Jay Coggan, 1925 Century Park East, Suite 2320, Los Angeles, CA 90067, (310) 407-0922; and David Tarlow, Ervin Cohen & Jessup LLP, 9401 Wilshire Blvd., 9th Floor, Beverly Hills, CA 90212, (310) 273-6333.

(10) *Marie Music Group, LLC v. Chris Lord Alge* (LASC Case No. BC 381801)
This case involved a dispute between two award-winning music "mixers" and a party that represented them for many years in various business transactions related to their work as mixers. The mixers challenged the right of their former agent to have received substantial fees for her work because she was not licensed under California's Talent Agencies Act. The case presented novel legal issues

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under that statute. I decided the core issues in the case through cross-motions brought by the parties. A copy of my decision is supplied. I determined that, although the mixers are "artists," as defined by the Act, the representation at issue concerned "recording contracts," which are exempt from coverage under the Act. Further proceedings were pending when the parties reached a settlement on November 12, 2010.

Counsel for petitioners/defendants: Peter J. Anderson, 100 Wilshire Blvd #2010, Santa Monica, California 90401, (310) 260-6030.

Counsel for respondent/plaintiff: Jeffrey Huron, 1875 Century Park East, Suite 1000, Los Angeles, California 90067, (310) 284-3400.

d. For each of the 10 most significant opinions you have written, provide: (1) citations for those decisions that were published; (2) a copy of those decisions that were not published; and (3) the names and contact information for the attorneys who played a significant role in the case.

None of my opinions has been published. Ten significant opinions that I have written, copies of which are supplied, are the following:

1. *IRMO Foerster and Bohbot* (LASC Case No. D 215047).

Counsel for petitioner: Steven Knowles, Knowles Collum LLP, 9100 Wilshire Blvd., #250W, Beverly Hills, CA 90212, (310) 461-0600; and David Felsenthal, Novian & Novian LLP, 1801 Century Park East, #1201, Los Angeles, CA 90067, (310) 553-1222.

Counsel for respondent: Tom P. Lallas, Levy Small & Lallas, 815 Moraga Drive, Los Angeles, CA 90049, (310) 471-3000; and Neal R. Hersh, Hersh Mannis & Bogen, 9150 Wilshire Blvd., Suite 209, Beverly Hills, CA 90212, (310) 786-1910.

2. *Burnette v. Cole* (LASC Case No. SC 095312).

Counsel for plaintiff: Marilyn H. Nelson, 9665 Wilshire Blvd., Suite 1050, Beverly Hills, CA 90212, (310) 274-0846.

Counsel for defendant: Scott C. Haith, 27240 West Turnberry, #200, Valencia, CA 91355, (661) 362-0744.

3. *IRMO Valli* (LASC Case No. BD 414038).

Counsel for petitioner: Peter Walzer and Christopher Melcher, Walzer & Melcher LLP, 21700 Oxnard St., Suite 2080, Woodland Hills, CA 91367, (818) 591-3700.

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Counsel for respondent: William S. Ryden, Jaffe & Clemens, 433 N. Camden Dr., #1000, Beverly Hills, CA 90272, (310) 550-7477.

4. *IRMO Sheiner and Gelber* (LASC Case No. LD 028469).

Counsel for petitioner: Robert N. Kipper, 345 Maple Drive, #395, Beverly Hills, CA 90210, (310) 275-1130.

Counsel for the respondent: Leon Bennett, 6320 Canoga Ave., #1400, Woodland Hills, CA 91367, (818) 888-7731.

5. *Aura Systems Inc. v. Loeb & Loeb* (LASC Case No. BC 402952).

Counsel for plaintiff: Ronald W. Makarem, Makarem & Associates, 11601 Wilshire Blvd. Suite 2440, Los Angeles, CA 90025, (310) 312-0299; and Tamara M. Kurtzman, 8383 Wilshire Blvd. Suite 919, Beverly Hills, CA 90211, (323) 782-6999.

Counsel for defendant Loeb & Loeb: Robert E. Mangels, Jeffer Mangels, Butler & Mitchell LLP, 1900 Avenue of the Stars, 7th Floor, Los Angeles, CA 90067, (310) 201-3533.

Counsel for defendant Bender: Desmond J. Hinds, Hinshaw & Culbertson, LLP, 11601 Wilshire Blvd. Suite 800, Los Angeles, CA 90025, (310) 909-8000.

6. *Simons v. Moser* (LASC Case No. BC 394615).

Counsel for plaintiff: Steven A. Simons, 15315 Magnolia Blvd., Suite 308, Sherman Oaks, CA 91403, (818) 368-9642.

Counsel for defendant: Jeffrey Erdman, Bennett & Erdman, 5670 Wilshire Blvd., Suite 1400, Los Angeles, CA 90036, (323) 935-0041.

7. *Axis Surplus Insurance Co. v. Reinoso* (LASC Case No. BC 377072).

Counsel for plaintiff: Allan E. Anderson and Kim Karelis, Ropers, Majeski, Kohn and Bentley, 515 South Flower Street, Suite 1100, Los Angeles, CA 90071, (213) 312-2000.

Counsel for defendants: Jay Coggan, 1925 Century Park East, Suite 2320, Los Angeles, CA 90067, (310) 407-0922; and David Tarlow, Ervin Cohen & Jessup LLP, 9401 Wilshire Blvd. 9th Floor, Beverly Hills, CA 90212, (310) 273-6333.

8. *Marie Music Group, LLC v. Chris Lord Alge* (LASC Case No. BC 381801).

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Counsel for petitioners/defendants: Peter J. Anderson, 100 Wilshire Blvd #2010, Santa Monica, CA 90401, (310) 260-6030.

Counsel for respondent/plaintiff: Jeffrey Huron, 1875 Century Park East, Suite 1000, Los Angeles, CA 90067, (310) 284-3400.

9. *Pacific Bell Tel. Co. v. Malcolm Drilling, Inc.* (LASC Case No. BC385483).

Counsel for plaintiff: Mark Pollick, 12520 High Bluff Drive, Suite 360, San Diego, CA 92130, (858) 793-7936.

Counsel for defendant: Lawrence G. Lossing, Lossing & Elston, 100 Pine Street, Suite 3110, San Francisco, CA 94111, (415) 882-4200.

10. *Carey-Hogue v. PacifiCare Life & Health Ins. Co.* (LASC Case No. BC 415200).

Counsel for plaintiffs: Brian S. Kabateck, Richard L. Kellner and Joshua H. Haffner, Kabateck Brown Kellner LLP, 644 South Figueroa Street, Los Angeles, CA 90017, (213) 217-5000.

Counsel for defendants: William E. Grauer, Mazda K. Antia and Brad Lebow, Cooley Godward Kronish LLP, 4401 Eastgate Mall, San Diego, CA 92121, (858) 550-6000.

e. Provide a list of all cases in which certiorari was requested or granted.

None of which I am aware.

f. Provide a brief summary of and citations for all of your opinions where your decisions were reversed by a reviewing court or where your judgment was affirmed with significant criticism of your substantive or procedural rulings. If any of the opinions listed were not officially reported, provide copies of the opinions.

To the best of my knowledge, as of the time of this questionnaire, there is only one matter in which a decision that I made was reversed. I am unaware of any cases in which a decision of mine was affirmed, but criticized.

The reversal occurred in an unpublished decision, *Greenberg v. City of La Canada*, No. B213717, 2010 WL 3388406 (Cal. App. 2d Dist. 2010). In that matter, Judge Grimes, who had preceded me in my current assignment, granted summary judgment to the defendants. In a post-judgment motion proceeding, I awarded attorney's fees to the prevailing party based on Judge Grimes' decision. On appeal, Judge Grimes' decision granting summary judgment was affirmed, but mine, granting attorney's fees, was reversed. The Court of Appeal found that I

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abused my discretion in awarding fees because I had not found expressly that the underlying action was without merit to the degree necessary to allow the award of attorney's fees.

g. Provide a description of the number and percentage of your decisions in which you issued an unpublished opinion and the manner in which those unpublished opinions are filed and/or stored.

I have issued approximately 25 to 30 unpublished opinions. This represents 100% of the opinions that I have written. These opinions are filed in the court's case files for each matter.

h. Provide 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, provide copies of the opinions.

There are no such decisions.

i. Provide citations to all cases in which you sat by designation on a federal court of appeals, including a brief summary of any opinions you authored, whether majority, dissenting, or concurring, and any dissenting opinions you joined.

I have not sat by designation on a federal court of appeals.

14. **Recusal:** If you are or have been a judge, identify the basis by which you have assessed the necessity or propriety of recusal (If your court employs an "automatic" recusal system by which you may be recused without your knowledge, please include a general description of that system.) Provide a list of any cases, motions or matters that have come before you in which a litigant or party has requested that you recuse yourself due to an asserted conflict of interest or in which you have recused yourself sua sponte. Identify each such case, and for each provide the following information:

a. whether your recusal was requested by a motion or other suggestion by a litigant or a party to the proceeding or by any other person or interested party; or if you recused yourself sua sponte;

b. a brief description of the asserted conflict of interest or other ground for recusal;

c. the procedure you followed in determining whether or not to recuse yourself;

d. your reason for recusing or declining to recuse yourself, including any action taken to remove the real, apparent or asserted conflict of interest or to cure any other ground for recusal.

Pursuant to the California Code of Civil Procedure, a party to a matter pending in a trial court has the right to file a petition, pursuant to Cal. Code Civ. Proc. § 170.6, to effect the automatic recusal of a judge in a pending matter. Since my appointment in 2002, there

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have been several such filings in cases that had been assigned to me. I do not keep track of them, but estimate that there have been fewer than 10 per year.

As to cases in which parties requested my recusal due to an asserted conflict of interest, the following cases are those that I recall:

Truman v. Ivo (LASC No.SC098180). In this matter, upon my *sua sponte* disclosure that I knew a lawyer at one of the law firms involved because our daughters had played on the same athletic team several years earlier, the other side requested that I recuse myself pursuant to Cal. Code Civ. Proc. § 170.1. After I declined to do so because I found that there was no basis for my recusal under this statutory standard, consistent with California practice, the matter was referred to a judge from outside of Los Angeles County for a decision. That judge denied the request for recusal.

Pishavee v. University of California (LASC No. SC087215). In this matter, following several hearings and my determination to grant a motion for summary judgment brought by defendants, plaintiff sought my recusal on the ground that I had served as the President of the Constitutional Rights Foundation and was a member of the Chancery Club, as was a member of the firm that represented defendants. (That person played no role in the case.) The Chancery Club is a professional organization that selects members based on their career achievements and public service. Only lawyers are eligible for admission, but those who become judges may maintain membership. Applying the standards of Cal. Code Civ. Proc. § 170.1, I determined that neither my membership in the Chancery Club nor my membership on the Board of the Constitutional Rights Foundation was a basis for my recusal. Consistent with California practice, the matter was referred to a judge from outside of Los Angeles County for a decision. That judge denied the request for recusal. Subsequently, the Court of Appeal affirmed my decision granting summary judgment.

Kidd v. Violence Intervention Program (LASC No. BC402191). In this matter, following several hearings and my determination to grant a motion for summary judgment brought by defendants, plaintiff sought my recusal on the ground that I could not be fair to plaintiff because I resided in Pacific Palisades, had practiced with a large law firm and allegedly acted impatiently and improperly in the action. Among the assertions made by plaintiff's counsel was that I had *ex parte* communications with defense counsel. After I determined that these assertions were baseless, I declined to recuse myself. Consistent with California practice, the matter was referred to a judge from outside of Los Angeles County for a decision. That judge denied the request for recusal. Plaintiffs' counsel also sought to disqualify the entire Los Angeles County Superior Court bench in the matter on the ground that a then-Court Commissioner had once served on the Board of one of the defendants; that motion was denied by the Supervising Judge of the Civil Departments of the Los Angeles County Superior Court.

Katz v. Birenbaum (LASC No. SC 079729). In this matter, following my ruling that a judgment creditor had acted improperly in failing to return $500,000 in funds obtained during the pendency of an appeal, the creditor sought my recusal on the ground that I had

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acted intemperately. I declined to recuse myself because the allegations were without basis and did not constitute a ground for recusal pursuant to Cal. Code of Civ. Proc. § 170.1. The Court of Appeal denied review of this determination.

Funk v. Funk (LASC No. BD 389308). In this family law matter, I recused myself *sua sponte* upon its assignment to me. I did so because I knew both parties socially and knew their minor children. Accordingly, I concluded that I should recuse myself pursuant to Cal. Code of Civil Proc. § 170.1(6)(A)(i) because my "recusal would further the interests of justice." There was no challenge to this ruling. I then offered to serve as the settlement judge in the matter. Both parties and their respective counsel stipulated to my serving in that role. Following several conferences with all parties and counsel, the matter settled.

Hasson v. Shapell Industries, Inc. (LASC No. BC434850). In this commercial matter, upon my being assigned to the case, the parties presented a stipulation requesting my recusal on the ground that counsel for one of the parties was married to one of my former law partners, was a person whom I had known socially for more than 25 years, was a partner in a law firm at which my wife once practiced, and serves with me on the Board of Directors of the Constitutional Rights Foundation. I concluded that I should recuse myself pursuant to Cal. Code of Civil Proc. § 170.1(6)(A)(i), *i.e.*, my "recusal would further the interests of justice."

Armour v. Ritter (LASC No. BD390510). While serving as a Family Law Judge, between 2007 and 2008, I presided at a trial in an earlier phase of this matter as to certain issues. Although appellate proceedings were commenced, they were dismissed by the parties, leaving my decision undisturbed. In August 2010, the Court of Appeal reversed the decision of another trial judge who had tried a portion of the case prior to the commencement of the trial proceedings before me in 2007. As a result of my prior participation in the matter, the Presiding Judge of the Family Law Department assigned the retrial of the matter to me. Respondent objected, raising various issues, including that my daughter is an associate at a law firm that would be representing certain non-party witnesses at the re-trial. Although I concluded that the objections made by Respondent were not meritorious, I recused myself based on Cal. Code of Civil Proc. § 170.1(6)(A)(i) and § 170.3(c)(2), *i.e.*, after determining that my recusal "would further the interests of justice." I found that the amount of judicial resources that would be consumed at the trial and appellate level on the recusal issue was unwarranted, as was the several-month delay in trial proceedings in a seven-year old case, given that: (i) there was not a significant overlap between the issues that I had addressed in the prior trial and those that were to be adjudicated in the new trial; and (ii) my assignment had changed from Family Law to civil actions in 2008. Following my recusal, the parties requested that I preside at a settlement conference with them and their counsel. I agreed to do so.

Guo v. Han (LASC No. BC415219, BC417128). In this civil matter, the case was assigned to me, but was tried by another judge of our court due to my engagement in another matter on the date set for trial. Following the trial, defendants filed a pleading contending that I was biased in the matter, and seeking my disqualification under Cal.

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Code of Civ. Proc. § 170.3(c)(1). The basis for the filing was disagreement with certain court rulings, some of which had been issued by the judge who tried the case. Because the filing was untimely and presented no basis for disqualification, but only disagreements with certain rulings, I ordered that it be stricken pursuant to Cal. Code. Civ. Proc. § 170.4(b). I also filed a verified answer in the matter denying any bias or prejudice. The time for the defendants to seek appellate review of this decision has not yet expired.

Luciano v. A.W. Chesterton (LASC No. BC 421968). In this civil matter, upon learning that one of the parties was represented by the law firm at which one of my children works as an attorney, I recused myself pursuant to Cal. Code Civ. Proc. § 170.1(a)(5), which mandates recusal under these circumstances. I further stated that I could preside over the matter only if all parties so stipulated pursuant to Cal. Code Civ. Proc. § 170.3(b)(1). Subsequently, I was notified that the matter had been settled as to all parties except the plaintiff and the party represented by the law firm at which my child works, and that those two parties had stipulated to my continuing to preside in the matter.

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

a. List chronologically any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. If appointed, please include the name of the individual who appointed you. Also, state chronologically any unsuccessful candidacies you have had for elective office or unsuccessful nominations for appointed office.

I have not held public office other than judicial office. I have had no unsuccessful candidacies for elective office or unsuccessful nominations for appointed office.

b. List all memberships and offices held in and services rendered, whether compensated or not, to any political party or election committee. If you have ever held a position or played a role in a political campaign, identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

Upon request, I have occasionally endorsed candidates for elected judicial office. Although there may be others, those that I recall or have been able to identify include Los Angeles County Superior Court judicial candidates Laura Matz, Harvey Silberman, and Cynthia Loo. Otherwise, I do not recall ever playing a role in any political campaign.

16. **Legal Career:** Answer each part separately.

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

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i. 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;

1976 – 1977; I served as a law clerk to William P. Gray (since deceased) who was then a judge on the United States District Court for the Central District of California.

ii. whether you practiced alone, and if so, the addresses and dates;

I have not practiced alone.

iii. 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.

1978 – 1985
Arnold & Porter
555 Twelfth Street, NW
Washington, D.C. 20004
Associate (1978 – 1983)
Partner (1984 – 1985)

1985 – 1991
Blanc Gilburne Williams & Johnston
1900 Avenue of the Stars
Los Angeles, California 90067
Partner

1991 – 2000
Blanc Williams Johnston & Kronstadt
1900 Avenue of the Stars
Los Angeles, California 90067
Partner

2000 – 2002
Arnold & Porter LLP
777 South Figueroa Street, 44th Floor
Los Angeles, California 90017
Partner

iv. whether you served as a mediator or arbitrator in alternative dispute resolution proceedings and, if so, a description of the 10 most significant matters with which you were involved in that capacity.

I have not served as a mediator or arbitrator.

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b. Describe:

i. the general character of your law practice and indicate by date when its character has changed over the years.

In January 1978, I began my career in practice with Arnold & Porter in Washington, D.C. I had worked at the firm as a summer associate following my second year of law school. I remained with the firm for the next seven and a half years, first as an associate and then as a partner. During that time, I devoted the vast majority of my time to complex litigation matters in which we represented substantial public companies in connection with antitrust and securities matters pending in federal courts and before certain administrative agencies.

In May 1985, I moved to Los Angeles to join several friends in a firm that later became Blanc Williams Johnston & Kronstadt. My practice consisted of a variety of complex litigation matters and counseling on matters related to potential litigation and administrative enforcement proceedings. I served as lead counsel in matters involving antitrust, corporate governance, trade secret, copyright, securities regulation, environmental issues, sales of businesses, and similar disputes. I remained with our firm until May 2000.

In May 2000, together with many of my colleagues from Blanc Williams Johnston & Kronstadt, I re-joined Arnold & Porter in its Los Angeles office. My practice was the same as it had been for the prior 15 years.

ii. your typical clients and the areas at each period of your legal career, if any, in which you have specialized.

Typical clients during my career included publicly-traded companies as well as individual entrepreneurs and officers in privately-held companies. My practice areas included intellectual property, antitrust and other complex, commercial litigation.

c. Describe the percentage of your practice that has been in litigation and whether you appeared in court frequently, occasionally, or not at all. If the frequency of your appearances in court varied, describe such variance, providing dates.

My practice was litigation-based. I appeared in court frequently.

i. Indicate the percentage of your practice in:

1. federal courts: 45%
2. state courts of record: 45%
3. other courts:
4. administrative agencies: 10%

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ii. Indicate the percentage of your practice in:
1. civil proceedings: 100%
2. criminal proceedings:

d. State the number of cases in courts of record, including cases before administrative law judges, you tried to verdict, judgment or final decision (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

I did not try a case to verdict in my career as a practitioner. I was lead counsel in a two-week jury trial that ended in a mistrial and was then settled.

i. What percentage of these trials were:
1. jury:
2. non-jury:

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

I have not practiced before the Supreme Court of the United States. I recall that early in my career, as an associate at Arnold & Porter, I may have assisted with preparation of a petition for a writ of *certiorari*; I do not recall any details about the matter.

17. **Litigation**: Describe the ten (10) most significant litigated matters which you personally handled, whether or not you were the attorney of record. 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) *Summit Tech., Inc. v. High-Line Med. Instruments Co.*, Case No. 95-6491 ABC (SHx) (1995) (C.D. Cal.) (Judge Audrey B. Collins)

I was lead counsel for Summit Technology, Inc. in this matter, which involved copyright, trademark and related claims concerning the importation of used Summit Excimer lasers

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from overseas. Summit claimed that those who had imported the lasers were not permitted to do so and that they were putting patients at risk by using equipment that was not approved by the FDA for use in the United States. The case, which was active from approximately 1998-2000, was settled.

Counsel of Record for Defendant William Ellis	John L. Alioto, Alioto & Alioto, 1127 Pope St., Suite 201, Saint Helena, CA 94574, (707) 963-0606; Margaret M. Weems, Weems Law Offices, Fair-Anselm Plaza West, 769 Center Blvd. #38, Fairfax, CA 94930, (415) 259-0294
Counsel of Record for Defendant Kenneth York	Maxwell M. Blecher, William Hsu, Blecher & Collins, 515 S. Figueroa St. 17th Floor, Suite 1750, Los Angeles, CA 90071, (213) 622-4222; Hon. Alicia G. Rosenberg, 312 North Spring St., Los Angeles, CA 90012, (213) 894-5419
Counsel of Record for High-Line Medical Instruments	James R. Kalyvas, Foley & Lardner, 555 S Flower St. #3500, Los Angeles, CA 90071, (213) 972-4542; Shana T. Mintz, U.S. Attorney's Office, 300 N. Los Angeles St., Federal Building, Room 7516, Los Angeles, CA 90012, (213) 894-4756

(2) *A.G. Layne v. Lockheed Martin Corp.*, Case No. BS 040026 (Cal. Super. Ct. 1998) (Judge Fumiko Wasserman)

I served as associate counsel with James S. Rogers for defendant ITT Industries, Inc. This litigation, which occurred between 1998 and 1999, involved the confirmation of an arbitration award following a several-year arbitration with respect to environmental contamination issues at various sites in the San Fernando Valley. The matter was then appealed to the Second Appellate District. A parallel proceeding was brought before Judge Marianna Pfaelzer in the United States District Court for the Central District of California entitled, *Lockheed Martin Corporation v. ITT Industries*, Case No. 96-5679-MRP-Anx. The federal case was largely quiescent during the state proceedings. The matter was finally resolved when the California Supreme Court declined to review the Court of Appeal decision affirming the confirmation of the arbitration award.

Counsel of Record for Various Parties	Steven L. Mayer, Howard Rice Nemerovski Canady Falk & Rabkin, 3 Embarcadero Center, 7th Floor, San Francisco, CA 94111, (415) 399-3039
Counsel of Record for ITT Industries	James A. Rogers (retired)
Counsel of Record for Lockheed-Martin Corporation	Gregory R. McClintock, 2490 Swanfield Ct., Thousand Oaks, CA 91361, (310) 384-1117

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(3) *Drabek v. AAI Corp.*, Case No. SC 0498101 (Cal. Super. Ct.) (master calendar)

This action, which was litigated between 1998 and 2000, involved claims that our client, SkodaExport, a Czech Republic entity, owed brokerage commissions to a Czech National residing in California in connection with the sale of certain equipment in California. Following discovery and litigation concerning whether the matter was subject to arbitration, the case was settled with respect to our client. I served as lead counsel.

Counsel of Record for Plaintiff	Leland Alan Stark, 201 Santa Monica Blvd., Suite 320, Santa Monica, CA 90401, (310) 656-0088; Hon. Thadd A. Blizzard, Superior Court of Sacramento County, 720 Ninth St., Department 35, Sacramento, CA 95814, (916) 874-7885
Counsel of Record for SkodaExport	Joseph R. Profaizer, Paul/Hastings, 875 15th St., NW, Washington, DC 20005, (202) 551-1860
Counsel of Record for Co-Defendants	Jonathan A. Ross, Bradley & Gmelich, 700 N. Brand Blvd., 10th Floor, Glendale, CA 91203, (818) 243-5200; Iain A.W. Nasatir, Pachulski, Stang, Ziehl, & Jones, 10100 Santa Monica Blvd., Suite 1100, Los Angeles, CA 90067, (310) 277-6910

(4) *Toon Boom Techs., Inc. v. Cambridge Animation Sys.*, Case No. EC 0249101 (Cal. Super. Ct.) (Judge Charles W. Stoll)

I served as lead counsel for defendant Cambridge Animation Systems. This matter, which was litigated between 1998 and 1999, involved claims of trade secret misappropriation brought by one competitor against another in connection with the decision by certain employees to move from one to the other. Following a TRO proceeding, discovery and a preliminary injunction proceeding, the matter was settled.

Associate Counsel	Professor Susan P. Crawford, Associate Professor of Law, Cardozo School of Law, 55 Fifth Avenue, New York, NY 10003, (212) 790-0493
Counsel of Record for Toon Boom	Franklin Brockway Gowdy, Morgan Lewis & Bockius LLP, 1 Market Spear St. Tower, San Francisco, CA 94105, (415) 442-1525
Counsel of Record for Thomas Carrigan and Thomas Tillburn	Howard Z. Rosen, Posner & Rosen LLP, 3600 Wilshire Blvd., Suite 1800, Los Angeles, CA 90010, (231) 389-6050

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(5) *Forest Lawn Mortuary v. Waterfield Tech. Grp.*, Case No. BC 217228 (Cal. Super. Ct.) (Judge Richard Kalustian); Case No. CV99-11974 (C.D. Cal.) (Judge Dean D. Pregerson)

I served as lead counsel for the plaintiff in this matter, which was litigated in 1999 and 2000. It involved a dispute whether a specially-designed computer system met contractual standards and specifications. Following initial discovery, the parties successfully mediated the matter before retired District Judge John Davies.

Counsel of Record for Waterfield Technology	Julie Akins McCoy, 5001 Birch St., #19, Newport Beach, CA 92660, (949) 474-0619
Counsel of Record for Don Stacey	Donald R. Stacey, Getman, Stacey, Tamposi, Schulthess & Steere, P.A., 3 Executive Park Dr., Suite 9, Bedford, NH 03110, (603) 634-4300

(6) *Agricultural Cooperatives Accounting Cases*, (Judicial Council Coordination Proceeding No. 1998) (before the Coordination Trial Judges, The Honorable James S. Thaxter and The Honorable Nickolas Dibiaso of the Superior Court of the State of California, County of Fresno)

This matter was litigated in the late 1980s. These cases involved a variety of claims arising from the operations of several agricultural cooperatives. The claims included auditing issues, wrongful termination and a variety of class action claims brought on behalf of various growers who were members of the cooperatives. I served as lead counsel for one of the executives of the cooperatives. Following extensive litigation, the matter was settled.

Counsel of Record for Sun-Maid Growers of California	Joseph M. Marchini, Baker, Manock & Jensen, 5260 N. Palm, Suite 421, Fresno, CA 93704, (559) 432-5400
Counsel of Record for Sun-Maid Growers of California	Catherine Conway, Akin Gump Strauss Hauer & Feld, L.L.P., 2029 Century Park East, Suite 2600, Los Angeles, CA 90067, (310) 552-6435
Counsel of Record for Sun-Diamond	Miles N. Ruthberg, Latham & Watkins, 355 S. Grand Ave., Los Angeles, CA 90071, (213) 891-8574
Counsel of Record for Coopers & Lybrand	Franklin Brockway Gowdy, Morgan Lewis & Bockius LLP, 1 Market Spear St. Tower, San Francisco, CA 94105, (415) 442-1525

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Co-Counsel	Stephen M. Kristovich, Munger, Tolles & Olson, LLP, 355 S. Grand Ave., 35th Floor, Los Angeles, CA 90071, (213) 683-9251; James D. Burnside, III, Dowling Aaron & Keeler Inc., 8080 North Palm Ave. 3rd Floor, Fresno, CA 93711, (559) 432-4500; Sam R. Morley, 11062 Canyon Vista Dr., Cupertino, CA 95014, (650) 948-1600

(7) *ANI v. AT&T*, Case No. 92-2836 JSL (SHx) (C.D. Cal.) (Judge Spencer Letts)

I served as lead counsel for plaintiff in this matter, litigated in the mid-1990s, which involved disputes concerning AT&T's treatment of resellers of its long distance services. Antitrust and Communications Act claims were presented. The matter was resolved by settlement.

Counsel of Record for AT&T	Jeffrey K. Riffer, Elkins Kalt Weintraub Reuben Gartside LLP, 1800 Century Park E. 7th Floor, Los Angeles, CA 90067, (310) 746-4406
Co-Counsel	Maxwell M. Blecher, William Hsu, Blecher & Collins, 515 S. Figueroa St., 17th Floor, Suite 1750, Los Angeles, CA 90071, (213) 622-4222; Hon. Alicia G. Rosenberg, 312 N. Spring St. Los Angeles, CA 90012, (213) 894-5419; David J. Pasternak, Pasternak & Pasternak, 1875 Century Park East, #2200, Los Angeles, CA 90067, (310) 553-1500

(8) *In Re Mission Ins./Underwriters Reinsurance*, Case No. C 572724 (Cal. Super. Ct.) (Judge Kurt Lewin)

This matter was litigated in the mid-1990s. It was a complex receivership proceeding concerning a failed insurance company, and it involved dozens of parties. I was co-counsel to a reinsurer of Mission Insurance Company, and I took the lead in many areas. Following extensive litigation, the matter was settled as to the claims asserted against our reinsurance client.

Co-Counsel	Daniel M. Lewis, Arnold & Porter (retired), 5101 Randall Lane, Bethesda, MD 20816, (310) 320-5192
Counsel of Record for Insurance Commissioner of California	Karl L. Rubinstein, P.O. Box 18657, Corpus Christi, TX 78480, (361) 949-8478
Counsel of Record for Certain Mission Officers	Iain A.W. Nasatir, Pachulski, Stang, Ziehl & Jones, 10100 Santa Monica Blvd., Suite 1100, Los Angeles, CA 90067, (310) 277-6910

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Counsel of Record for Other Insured Parties	Peter Chaffetz, Chaffetz Lindsey LLP, 1350 Avenue of the Americas, New York, NY 10019, (212) 257-6960; Edward J. Boyle, Wilson, Elser, Moskowitz, Edelman & Dicker LLP, 150 E. 42nd St., New York, NY 10017, (212) 490-3000; Steven E. Sletten, Gibson, Dunn & Crutcher, 333 S. Grand Ave., Los Angeles, CA 90071, (213) 229-7505; Margaret Levy, Manatt, Phelps & Phillips, LLP, 11355 W. Olympic Blvd., Los Angeles, CA 90064, (310) 312-4000

(9) *Sterling Ridge Partners v. Gibson, Dunn & Crutcher*, Case No. 697452 (Cal. Super. Ct.) (Judge Mason L. Fenton)

I served as lead counsel for builder developer, Paul E. Griffin, Jr. This case was litigated between 1992 and 1993, in connection with claims brought by investors about a planned development project in the Santa Clarita Valley. Following a several-week trial, the matter was settled.

Counsel of Record for Plaintiffs	Tom A. Nunziato, 11355 W. Olympic Blvd., Los Angeles, CA 90064, (310) 444-3201
Counsel of Record for Defendant Gibson, Dunn & Crutcher	Thomas R. Malcolm, Jones, Day, Reavis & Pogue, 3161 Michelson Dr., Suite 800, Irvine, CA 92612, (949) 851-3939

(10) *Watkins-Johnson v. Robert E. Stollar* (American Arbitration Association)

I served as lead counsel for Mr. Stollar in an arbitration proceeding in a matter arising out of the sale of his business and his subsequent employment by the buyer. The matter was settled following several months of discovery and the commencement of the arbitration proceeding.

Counsel of Record for Watkins-Johnson	James R. Madison, 750 Menlo Ave., Suite 250, Menlo Park, CA 94025, (416) 614-0160

18. **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 fully the nature of your participation in these activities. List any client(s) or organization(s) for whom you performed lobbying activities and describe the lobbying activities you performed on behalf of such client(s) or organizations(s). (Note: As to any facts requested in this question, please omit any information protected by the attorney-client privilege.)

My practice consisted of a variety of complex litigation matters, counseling on matters related to potential litigation or administrative enforcement proceedings, and public service work. I served as lead counsel in matters involving antitrust, corporate governance, trade secret, copyright, securities regulation, environmental issues, sales of businesses, and similar disputes. Most of these matters involved intense litigation for a

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period of time, followed by a negotiated resolution or summary disposition. I also provided advice to many clients over the years on antitrust, environmental and intellectual property issues that did not involve litigation. I never performed any lobbying activities.

19. **Teaching**: What courses have you taught? For each course, state the title, the institution at which you taught the course, the years in which you taught the course, and describe briefly the subject matter of the course and the major topics taught. If you have a syllabus of each course, provide four (4) copies to the committee.

    I have not taught any courses.

20. **Deferred Income/ Future Benefits**: List the 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. Describe the arrangements you have made to be compensated in the future for any financial or business interest.

    None.

21. **Outside Commitments During Court Service**: 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.

    If confirmed, and provided I may do so consistent with all applicable ethics rules, I plan to continue to serve on the Board of Directors of the Constitutional Rights Foundation. It is a non-profit, non-partisan organization dedicated to the education of young Americans about civic issues and responsibilities. I have been involved with this organization for many years. I have not, and will not, receive any compensation for my volunteer work.

22. **Sources of Income**: 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, licensing fees, honoraria, and other items exceeding $500 or more (if you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here).

    See attached Financial Disclosure Report.

23. **Statement of Net Worth**: Please complete the attached financial net worth statement in detail (add schedules as called for).

    See attached Net Worth Statement.

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24. **Potential Conflicts of Interest**:

a. Identify the family members or other persons, parties, categories of litigation, and financial arrangements that are likely to present potential conflicts-of-interest when you first assume the position to which you have been nominated. Explain how you would address any such conflict if it were to arise.

If confirmed, I would resolve any potential conflict of interest by adhering to 28 U.S.C. § 455, the Code of Conduct for United States Judges, and all applicable policies and procedures of the United States courts. My daughter is an attorney who practices with a law firm with offices in Los Angeles and other cities. If confirmed, I will recuse from any matter in which she is involved and will disclose or recuse as provided for in the Code on any other matter in which her firm is involved. I am unaware of any other circumstances that would raise potential conflict-of-interest issues.

b. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern.

I would resolve any potential conflict of interest by adhering to 28 U.S.C. § 455, the Code of Conduct for United States Judges, and all applicable policies and procedures of the United States courts. I would recuse myself in any matter in which my spouse or I holds a financial interest or has a sufficiently close connection with counsel or the parties (business or social). In the event of uncertainty, I would err on the side of recusal.

25. **Pro Bono Work**: 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.

(a) Los Angeles County Bar Association ("LACBA")

While in practice, I devoted hundreds of hours to the LACBA. I was the first recipient of the Patricia Philips Award as Outstanding Committee Chair. My service to the LACBA included serving as the chair of the LACBA's *Amicus* Briefs Committee from 1997 to 1999. I was a principal author of LACBA's *amicus* brief to the California Supreme Court in *Lew Warden v. State Bar of California*, 21 Cal. 4th 628 (1999).

In 1998, I led LACBA's effort to create a training program for new lawyers. Over the next two years, we presented highly-rated MCLE sessions that reached more than 1000 lawyers. The programs addressed each aspect of a civil case as it moved through the state and federal court systems. Our efforts led to the involvement of many leading attorneys and judges in Los Angeles.

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I served as LACBA Vice-President, a member of its Executive Committee and on several other committees listed in response to Question 9.

(b) Constitutional Rights Foundation ("CRF")

I joined the Board of the CRF because of my interest in encouraging attorneys to spend time teaching inner-city school children about important principles of our Constitutional system. I led an effort with senior CRF staff to develop a program in which attorneys are paired with judges and then visit eighth grade and eleventh grade classrooms to make presentations in connection with U.S. History classes. This is called "Courtroom to Classroom." I also participated in CRF's Mock Trial Program. Since becoming a judge, I have continued my work with CRF, including service as its President for two years (2006 – 2007). I estimate that I have devoted more than 1500 hours to CRF since taking the bench.

(c) Alliance for Children's Rights ("AFCR")

Over a two-year period, I represented clients sent by the AFCR. These individuals needed counseling in connection with adoption and other family-related proceedings.

(d) First Impressions Project

I visited inner-city schools to teach Constitutional principles as part of the First Impressions Project organized by then-Superior Court Judge Veronica McBeth. In my work, I generated my own classroom materials for elementary school students that addressed the basic principles of our Constitutional system. I provided copies of the Constitution and all of its amendments to each student in each class that I visited.

(e) Court Outreach Efforts

I have spent a significant amount of time on efforts to expand Court Outreach to our community through my roles as Chair of our Court's Community Outreach Committee and Outreach Governance Committee. My work on both of these committees has been directed at efforts to have judges fulfill their obligations to participate in community activities that will enhance understanding of our courts. The efforts of our court include visits to schools to interact with students; visits to civic organizations to speak about the role of courts; programs with clergy to discuss the role of courts; the establishment of Teen Courts, in which certain juvenile cases are tried to a jury of the accused's peers; and mock trials in the courthouse. I have also been working for almost two years to expand the statewide efforts on outreach. I have coordinated with the Administrative Office of Courts to create means of sharing outreach ideas and programs among courts in different counties, and have organized a statewide course about outreach that has been designed for judges. Its initial presentation was in August 2010 at the statewide "Judicial College," an educational event for newly-appointed judges. I have also taught at statewide programs for teachers about civic education.

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26. **Selection Process**:

a. Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and the interviews in which you participated). Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, please include that process in your description, as well as whether the commission recommended your nomination. List the dates of all interviews or communications you had with the White House staff or the Justice Department regarding this nomination. Do not include any contacts with Federal Bureau of Investigation personnel concerning your nomination.

On November 6, 2009, I sent my application for appointment to David S. Casey, Esq., Statewide Chair of Senator Feinstein's Judicial Advisory Committees. Thereafter, Holly Fujie, Esq., the Chair of Senator Feinstein's Central District Committee, invited me to an interview with that Committee on February 2, 2010. Following that interview, I was interviewed by Mr. Casey on February 11, 2010.

Since July 1, 2010, I have been in contact with pre-nomination officials at the U.S. Department of Justice. I interviewed in Washington, D.C. with attorneys from the White House Counsel's Office and the Department of Justice on August 12, 2010. The President submitted my nomination to the Senate on November 17, 2010.

b. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any currently pending or specific case, legal issue or question in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning your position on such case, issue, or question? If so, explain fully.

No.

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Rev. 1/2010

FINANCIAL DISCLOSURE REPORT
NOMINATION FILING

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
Kronstadt, John A.	U.S. District Court for the Central District of California	11/17/2010
4. Title (Article III judges indicate active or senior status; magistrate judges indicate full- or part-time)	**5a. Report Type** (check appropriate type)	**6. Reporting Period**
U.S. District Judge	☑ Nomination, Date 11/17/2010 ☐ Initial ☐ Annual ☐ Final 5b. ☐ Amended Report	01/01/2009 to 10/31/2010
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.**	
111 North Hill Street Department 30; Room 400 Los Angeles, CA 90012	Reviewing Officer_____ Date_____	

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

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

☐ NONE *(No reportable positions.)*

	POSITION	NAME OF ORGANIZATION/ENTITY
1.	Trustee	Trust #1
2.	Trustee	Trust #2
3.		
4.		
5.		

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

☑ NONE *(No reportable agreements.)*

	DATE	PARTIES AND TERMS
1.		
2.		
3.		

FINANCIAL DISCLOSURE REPORT Page 2 of 15	Name of Person Reporting Kronstadt, John A.	Date of Report 11/17/2010

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

A. Filer's Non-Investment Income

☐ NONE *(No reportable non-investment income.)*

DATE	SOURCE AND TYPE	INCOME (yours, not spouse's)
1. 2008	Los Angeles Superior Court Salary and benefits	$220,163.04
2. 2009	Los Angeles Superior Court Salary and benefits	$220,163.04
3. 2010	Los Angeles Superior Court Salary and benefits	$183,469.19
4.		

B. Spouse's Non-Investment Income - *If you were married during any portion of the reporting year, complete this section.*
(Dollar amount not required except for honoraria.)

☐ NONE *(No reportable non-investment income.)*

DATE	SOURCE AND TYPE
1. 2010	Pepperdine University School of Law; Adjunct Professor
2. 2010	Los Angeles Superior Court Salary and Benefits
3. 2009	Los Angeles Superior Court Salary and Benefits
4.	

IV. REIMBURSEMENTS — *transportation, lodging, food, entertainment.*
(Includes those to spouse and dependent children; see pp. 25-27 of filing instructions.)

☐ NONE *(No reportable reimbursements.)*

SOURCE	DATES	LOCATION	PURPOSE	ITEMS PAID OR PROVIDED
1. Exempt				
2.				
3.				
4.				
5.				

FINANCIAL DISCLOSURE REPORT Page 3 of 15	Name of Person Reporting	Date of Report
	Kronstadt, John A.	11/17/2010

V. GIFTS. *(Includes those to spouse and dependent children; see pp. 28-31 of filing instructions.)*

☐ NONE *(No reportable gifts.)*

	SOURCE	DESCRIPTION	VALUE
1.	Exempt		
2.			
3.			
4.			
5.			

VI. LIABILITIES. *(Includes those of spouse and dependent children; see pp. 32-33 of filing instructions.)*

☑ NONE *(No reportable liabilities.)*

	CREDITOR	DESCRIPTION	VALUE CODE
1.			
2.			
3.			
4.			
5.			

FINANCIAL DISCLOSURE REPORT
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Name of Person Reporting	Date of Report
Kranstadt, John A.	11/17/2010

VII. INVESTMENTS and TRUSTS – *income, value, transactions (Includes those of spouse and dependent children; see pp. 34-60 of filing instructions.)*

☐ NONE *(No reportable income, assets, or transactions.)*

A. Description of Assets (including trust assets). Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period: (1) Amount Code 1 (A-H)	B. (2) Type (e.g., div., rent, or int.)	C. Gross value at end of reporting period: (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period: (1) Type (e.g., buy, sell, redemption)	D. (2) Date mm/dd/yy	D. (3) Value Code 2 (J-P)	D. (4) Gain Code 1 (A-H)	D. (5) Identity of buyer/seller (if private transaction)
1. Horizons Mid Cap Equity Fund	A	Int./Div.	M	T	Exempt				
2. Horizons Large Cap Equity Fund	A	Int./Div.	J	T					
3. Horizons Stable Income Fund	B	Int./Div.	K	T					
4. Los Angeles County Stable Balanced Fund	A	Int./Div.	L	T					
5. Los Angeles County Stable Value Fund	B	Int./Div.	M	T					
6. Allianz NFJ International AFJCX	A	Int./Div.	L	T					
7. Black Rock Large Cap Value MCLVX	A	Int./Div.	L	T					
8. Columbia Marsico 21st Century NMYCX	A	Int./Div.	M	T					
9. Henderson International Opportunities HFOCX	A	Int./Div.	L	T					
10. Nuveen Tradewinds Global NWGCX		None	M	T					
11. ML Winton Futures Access LLC, Class C LP		None	M	T					
12. Vanguard Health Care VGHAX	A	Int./Div.	L	T					
13. Vanguard Wellington VWENX	A	Int./Div.	M	T					
14. Vanguard Bond VBIRX	A	Int./Div.	M	T					
15. Vanguard Money Market VMMXX	A	Int./Div.	J	T					
16. Bridgeway Small Cap Growth BRSGX	A	Int./Div.	J	T					
17. CGM Mutual CGMFX	A	Int./Div.	J	T					

1. Income Gain Codes (See Columns B1 and D4)	A =$1,000 or less	B =$1,001 - $2,500	C =$2,501 - $5,000	D =$5,001 - $15,000	E =$15,001 - $50,000
	F =$50,001 - $100,000	G =$100,001 - $1,000,000	H1 =$1,000,001 - $5,000,000	H2 =More than $5,000,000	
2. Value Codes (See Columns C1 and D3)	J =$15,000 or less	K =$15,001 - $50,000	L =$50,001 - $100,000	M =$100,001 - $250,000	
	N =$250,001 - $500,000	O =$500,001 - $1,000,000	P1 =$1,000,001 - $5,000,000	P2 =$5,000,001 - $25,000,000	
	P3 =$25,000,001 - $50,000,000		P4 =More than $50,000,000		
3. Value Method Codes (See Column C2)	Q =Appraisal	R =Cost (Real Estate Only)	S =Assessment	T =Cash Market	
	U =Book Value	V =Other	W =Estimated		

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Name of Person Reporting	Date of Report
Kronstadt, John A.	11/17/2010

VII. INVESTMENTS and TRUSTS – *income, value, transactions (Includes those of spouse and dependent children; see pp. 34-60 of filing instructions.)*

☐ NONE *(No reportable income, assets, or transactions.)*

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A-H)	B. (2) Type (e.g., div., rent, or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, redemption)	(2) Date mm/dd/yy	(3) Value Code 2 (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)
18. CGM Mutual LOMMX	A	Int./Div.	J	T					
19. CGM Realty CGMRX	A	Int./Div.	K	T					
20. Dodge & Cox Int. DODFX	A	Int./Div.	L	T					
21. Dodge & Cox Stock DODGX	A	Int./Div.	K	T					
22. Fairholme Funds FAIRX	A	Int./Div.	K	T					
23. DOW	A	Int./Div.	J	T					
24. INTC	A	Int./Div.	K	T					
25. IBM	B	Int./Div.	K	T					
26. WM	A	Int./Div.	J	T					
27. Los Angeles County Horizons Non-US Equity	A	Int./Div.	K	T					
28. Los Angeles County Horizons Small Cap Equity	A	Int./Div.	K	T					
29. Los Angeles County Horizons Midcap Equity	A	Int./Div.	K	T					
30. Los Angeles County Horizons Non US Equity	A	Int./Div.	K	T					
31. Los Angeles County Horizons Small Cap Equity	A	Int./Div.	K	T					
32. Los Angeles County Savings Large Cap Equity	A	Int./Div.	M	T					
33. Los Angeles County Savings Balanced Fund	A	Int./Div.	L	T					
34. Los Angeles County Horizons Stable Income Fund	A	Int./Div.	K	T					

1. Income Gain Codes: (See Columns B1 and D4)	A =$1,000 or less	B =$1,001 - $2,500	C =$2,501 - $5,000	D =$5,001 - $15,000	E =$15,001 - $50,000
	F =$50,001 - $100,000	G =$100,001 - $1,000,000	H1 =$1,000,001 - $5,000,000	H2 =More than $5,000,000	
2. Value Codes (See Columns C1 and D3)	J =$15,000 or less	K =$15,001 - $50,000	L =$50,001 - $100,000	M =$100,001 - $250,000	
	N =$250,001 - $500,000	O =$500,001 - $1,000,000	P1 =$1,000,001 - $5,000,000	P2 =$5,000,001 - $25,000,000	
	P3 =$25,000,001 - $50,000,000		P4 =More than $50,000,000		
3. Value Method Codes (See Column C2)	Q =Appraisal	R =Cost (Real Estate Only)	S =Assessment	T =Cash Market	
	U =Book Value	V =Other	W =Estimated		

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Name of Person Reporting	Date of Report
Kronstadt, John A.	11/17/2010

VII. INVESTMENTS and TRUSTS – *income, value, transactions (includes those of spouse and dependent children; see pp. 34-60 of filing instructions.)*

☐ NONE *(No reportable income, assets, or transactions.)*

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A-H)	B. (2) Type (e.g., div., rent, or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, redemption)	D. (2) Date mm/dd/yy	D. (3) Value Code 2 (J-P)	D. (4) Gain Code 1 (A-H)	D. (5) Identity of buyer/seller (if private transaction)
35. Cal. Judges Retirement System Pension Plan		None	O	T					
36. University of California Savings Fund	A	Int./Div.	J	T					
37. University of California Equity Fund	A	Int./Div.	K	T					
38. TIAA CREF Stock	A	Int./Div.	J	T					
39. TIAA CREF Global Equities	A	Int./Div.	J	T					
40. TIAA CREF Growth	A	Int./Div.	J	T					
41. TIAA CREF Equity Index	A	Int./Div.	J	T					
42. California Municipal Bonds	D	Int./Div.	L	T					
43. Oppenheimer Advantage Bank Deposit Sweep Account	A	Int./Div.	L	T					
44. Merrill Lynch Money Market	A	Int./Div.	J	T					
45. Franklin California High Yield Municipal Fund	D	Int./Div.	N	T					
46. Oppenheimer International Bond Fund OIBCX	B	Int./Div.	K	T					
47. Vanguard Windsor II VWNFX	A	Int./Div.	J	T					
48. Vanguard CA Tax Exempt Money Market VCTXX	A	Int./Div.	J	T					
49. PowerShares QQQ Trust	A	Int./Div.	L	T					
50. ABT	A	Int./Div.	J	T					
51. AXP	A	Int./Div.	K	T					

1. Income Gain Codes: (See Columns B1 and D4)	A =$1,000 or less	B =$1,001 - $2,500	C =$2,501 - $5,000	D =$5,001 - $15,000	E =$15,001 - $50,000
	F =$50,001 - $100,000	G =$100,001 - $1,000,000	H1 =$1,000,001 - $5,000,000	H2 =More than $5,000,000	
2. Value Codes (See Columns C1 and D3)	J =$15,000 or less	K =$15,001 - $50,000	L =$50,001 - $100,000	M =$100,001 - $250,000	
	N =$250,001 - $500,000	O =$500,001 - $1,000,000	P1 =$1,000,001 - $5,000,000	P2 =$5,000,001 - $25,000,000	
	P3 =$25,000,001 - $50,000,000		P4 =More than $50,000,000		
3. Value Method Codes (See Column C2)	Q =Appraisal	R =Cost (Real Estate Only)	S =Assessment	T =Cash Market	
	U =Book Value	V =Other	W =Estimated		

FINANCIAL DISCLOSURE REPORT Page 7 of 15	Name of Person Reporting Kronstadt, John A.	Date of Report 11/17/2010

VII. INVESTMENTS and TRUSTS – *Income, value, transactions (includes those of spouse and dependent children; see pp. 34-60 of filing instructions.)*

☐ NONE *(No reportable income, assets, or transactions.)*

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 1 (A-H)	(2) Type (e.g., div., rent, or int.)	(1) Value Code 2 (J-P)	(2) Value Method Code 3 (Q-W)	(1) Type (e.g., buy, sell, redemption)	(2) Date mm/dd/yy	(3) Value Code 2 (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)
52. AMGN	A	Int./Div.	K	T					
53. T	A	Int./Div.	J	T					
54. BAC	A	Int./Div.	J	T					
55. CVX	A	Int./Div.	J	T					
56. XOM	A	Int./Div.	J	T					
57. MHS	A	Int./Div.	J	T					
58. MSFT	A	Int./Div.	K	T					
59. MON	A	Int./Div.	J	T					
60. PG	A	Int./Div.	K	T					
61. QCOM	A	Int./Div.	L	T					
62. RDSA	A	Int./Div.	J	T					
63. SJM	A	Int./Div.	J	T					
64. UPS	A	Int./Div.	J	T					
65. WMT	A	Int./Div.	K	T					
66. Vanguard 529 Moderate Age-Based Option	A	Int./Div.	J	T					
67. Vanguard 529 Agressive Age-Based Option	A	Int./Div.	J	T					
68. DODFX	A	Int./Div.	J	T					

1. Income Gain Codes: (See Columns B1 and D4)	A =$1,000 or less F =$50,001 - $100,000	B =$1,001 - $2,500 G =$100,001 - $1,000,000	C =$2,501 - $5,000 H1 =$1,000,001 - $5,000,000	D =$5,001 - $15,000 H2 =More than $5,000,000	E =$15,001 - $50,000
2. Value Codes (See Columns C1 and D3)	J =$15,000 or less N =$250,001 - $500,000 P3 =$25,000,001 - $50,000,000	K =$15,001 - $50,000 O =$500,001 - $1,000,000	L =$50,001 - $100,000 P1 =$1,000,001 - $5,000,000 P4 =More than $50,000,000	M =$100,001 - $250,000 P2 =$5,000,001 - $25,000,000	
3. Value Method Codes (See Column C2)	Q =Appraisal U =Book Value	R =Cost (Real Estate Only) V =Other	S =Assessment W =Estimated	T =Cash Market	

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Name of Person Reporting	Date of Report
Kronstadt, John A.	11/17/2010

VII. INVESTMENTS and TRUSTS – *income, value, transactions (Includes those of spouse and dependent children; see pp. 34-60 of filing instructions.)*

☐ NONE *(No reportable income, assets, or transactions.)*

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A-H)	B. (2) Type (e.g., div., rent, or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, redemption)	D. (2) Date mm/dd/yy	D. (3) Value Code 2 (J-P)	D. (4) Gain Code 1 (A-H)	D. (5) Identity of buyer/seller (if private transaction)
69. HD	A	Int./Div.	J	T					
70. IBM	A	Int./Div.	J	T					
71. MON	A	Int./Div.	J	T					
72. TXN	A	Int./Div.	J	T					
73. Vanguard Health Care VGHCX	A	Int./Div.	K	T					
74. Vanguard Windsor II VWNFX	A	Int./Div.	J	T					
75. Vanguard Money Market VMMXX	A	Int./Div.	J	T					
76. California Municipal Bonds	A	Int./Div.	K	T					
77. Union Bank Investment Services Sweep Account	A	Int./Div.	K	T					
78. American Funds Money Market Fund 529-B	A	Int./Div.	L	T					
79. Americab Funds American Balanced Fund 529-E	A	Int./Div.	J	T					
80. California Municipal Bonds	A	Int./Div.	M	T					
81. Bruce Fund Mutual Fund	A	Int./Div.	K	T					
82. Northwest Mutual Whole Life Insurance	C	Int./Div.	L	T					
83. Lincoln Financial Group American Legacy II Variable Annuity		None	M	T					
84. Putnam Hartford Capital Manager Variable Annuity		None	L	T					
85. Round Hill Partnership (Real Property)	D	Distribution	L	W					

1. Income Gain Codes: (See Columns B1 and D4)	A =$1,000 or less F =$50,001 - $100,000	B =$1,001 - $2,500 G =$100,001 - $1,000,000	C =$2,501 - $5,000 H1 =$1,000,001 - $5,000,000	D =$5,001 - $15,000 H2 =More than $5,000,000	E =$15,001 - $50,000
2. Value Codes (See Columns C1 and D3)	J =$15,000 or less N =$250,001 - $500,000 P3 =$25,000,001 - $50,000,000	K =$15,001 - $50,000 O =$500,001 - $1,000,000	L =$50,001 - $100,000 P1 =$1,000,001 - $5,000,000 P4 =More than $50,000,000	M =$100,001 - $250,000 P2 =$5,000,001 - $25,000,000	
3. Value Method Codes (See Column C2)	Q =Appraisal U =Book Value	R =Cost (Real Estate Only) V =Other	S =Assessment W =Estimated	T =Cash Market	

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Name of Person Reporting	Date of Report
Kronstadt, John A.	11/17/2010

VII. INVESTMENTS and TRUSTS – *Income, value, transactions (Includes those of spouse and dependent children; see pp. 34-60 of filing instructions.)*

☐ NONE *(No reportable income, assets, or transactions.)*

A. Description of Assets (including trust assets). Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A-H)	B. (2) Type (e.g., div., rent, or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, redemption)	D. (2) Date mm/dd/yy	D. (3) Value Code 2 (J-P)	D. (4) Gain Code 1 (A-H)	D. (5) Identity of buyer/seller (if private transaction)
86. Union Bank of California Cash Account	A	Interest	M	T					
87. Oppenheimer Advantage Bank Deposit Sweep Account	A	Int./Div.	L	T					
88.									
89. Trust #1									
90. - 1111 Spring St. Partnership	A	Distribution	K	T					
91. - Round Hill Partnership (Real Estate) Appraisal 12/30/2009	E	Distribution	M	Q					
92. - Country Club Offices Part. (Real Est.)Appraisal 12/30/09	A	Distribution	J	Q					
93. - Penn Center Limited Part. (Real Est.) Appraisal 12/30/09	E	Distribution	M	Q					
94. - Potomac Place Assoc. Part. (Real Est.) Apprais. 1/26/10	D	Distribution	L	Q					
95. - AZO		None	J	T					
96. - KMX		None	J	T					
97. - DIS	A	Dividend	J	T					
98. - F		None	J	T					
99. - LOW	A	Dividend	J	T					
100. - MCD	A	Dividend	J	T					
101. - V	A	Dividend	J	T					
102. - MO	A	Dividend	J	T					

1. Income Gain Codes: (See Columns B1 and D4)	A =$1,000 or less	B =$1,001 - $2,500	C =$2,501 - $5,000	D =$5,001 - $15,000	E =$15,001 - $50,000
	F =$50,001 - $100,000	G =$100,001 - $1,000,000	H1 =$1,000,001 - $5,000,000	H2 =More than $5,000,000	
2. Value Codes (See Columns C1 and D3)	J =$15,000 or less	K =$15,001 - $50,000	L =$50,001 - $100,000	M =$100,001 - $250,000	
	N =$250,001 - $500,000	O =$500,001 - $1,000,000	P1 =$1,000,001 - $5,000,000	P2 =$5,000,001 - $25,000,000	
	P3 =$25,000,001 - $50,000,000		P4 =More than $50,000,000		
3. Value Method Codes (See Column C2)	Q =Appraisal	R =Cost (Real Estate Only)	S =Assessment	T =Cash Market	
	U =Book Value	V =Other	W =Estimated		

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Name of Person Reporting	Date of Report
Kronstadt, John A.	11/17/2010

VII. INVESTMENTS and TRUSTS – *Income, value, transactions (Includes those of spouse and dependent children; see pp. 34-60 of filing instructions.)*

☐ NONE *(No reportable income, assets, or transactions.)*

A. Description of Assets (including trust assets). Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A-H)	B. (2) Type (e.g., div., rent, or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, redemption)	D. (2) Date mm/dd/yy	D. (3) Value Code 2 (J-P)	D. (4) Gain Code 1 (A-H)	D. (5) Identity of buyer/seller (if private transaction)
103. - CVS	A	Dividend	J	T					
104. - CL	A	Dividend	J	T					
105. - SBMRY	A	Dividend	J	T					
106. - XOM	B	Dividend	J	T					
107. - SLB	A	Dividend	J	T					
108. - RIG	A	Dividend	J	T					
109. - BRK.A	A	Dividend	J	T					
110. - BAM	A	Dividend	J	T					
111. - JPM	A	Dividend	J	T					
112. - MKL		None	J	T					
113. - TROW	A	Dividend	J	T					
114. - BDX	A	Dividend	J	T					
115. - LH		None	J	T					
116. - MRK	A	Dividend	J	T					
117. - XBI	A	Dividend	J	T					
118. - TEVA	A	Dividend	J	T					
119. - CAT	A	Dividend	J	T					

1. Income Gain Codes: (See Columns B1 and D4)	A =$1,000 or less	B =$1,001 - $2,500	C =$2,501 - $5,000	D =$5,001 - $15,000	E =$15,001 - $50,000
	F =$50,001 - $100,000	G =$100,001 - $1,000,000	H1 =$1,000,001 - $5,000,000	H2 =More than $5,000,000	
2. Value Codes (See Columns C1 and D3)	J =$15,000 or less	K =$15,001 - $50,000	L =$50,001 - $100,000	M =$100,001 - $250,000	
	N =$250,001 - $500,000	O =$500,001 - $1,000,000	P1 =$1,000,001 - $5,000,000	P2 =$5,000,001 - $25,000,000	
	P3 =$25,000,001 - $50,000,000		P4 =More than $50,000,000		
3. Value Method Codes (See Column C2)	Q =Appraisal	R =Cost (Real Estate Only)	S =Assessment	T =Cash Market	
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Name of Person Reporting	Date of Report
Kronstadt, John A.	11/17/2010

VII. INVESTMENTS and TRUSTS – *income, value, transactions (Includes those of spouse and dependent children; see pp. 34-60 of filing instructions.)*

☐ NONE *(No reportable income, assets, or transactions.)*

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A-H)	B. (2) Type (e.g., div., rent, or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, redemption)	D. (2) Date mm/dd/yy	D. (3) Value Code 2 (J-P)	D. (4) Gain Code 1 (A-H)	D. (5) Identity of buyer/seller (if private transaction)
120. - DHR	A	Dividend	J	T					
121. - GD	A	Dividend	J	T					
122. - GE	A	Dividend	J	T					
123. - ITW	A	Dividend	J	T					
124. - UTX	A	Dividend	J	T					
125. - ACN	A	Dividend	J	T					
126. - AAPL	A	Dividend	J	T					
127. - ADP	A	Dividend	J	T					
128. - CSCO	A	Dividend	J	T					
129. - FISV	A	Dividend	J	T					
130. - GOOG	A	Dividend	J	T					
131. - INTC	A	Dividend	J	T					
132. - IBM	A	Dividend	J	T					
133. - MSFT	A	Dividend	J	T					
134. - ORCL	A	Dividend	J	T					
135. - QCOM	A	Dividend	J	T					
136. - ALB	A	Dividend	J	T					

1. Income Gain Codes (See Columns B1 and D4)	A =$1,000 or less	B =$1,001 - $2,500	C =$2,501 - $5,000	D =$5,001 - $15,000	E =$15,001 - $50,000
	F =$50,001 - $100,000	G =$100,001 - $1,000,000	H1 =$1,000,001 - $5,000,000	H2 =More than $5,000,000	
2. Value Codes (See Columns C1 and D3)	J =$15,000 or less	K =$15,001 - $50,000	L =$50,001 - $100,000	M =$100,001 - $250,000	
	N =$250,001 - $500,000	O =$500,001 - $1,000,000	P1 =$1,000,001 - $5,000,000	P2 =$5,000,001 - $25,000,000	
	P3 =$25,000,001 - $50,000,000		P4 =More than $50,000,000		
3. Value Method Codes (See Column C2)	Q =Appraisal	R =Cost (Real Estate Only)	S =Assessment	T =Cash Market	
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Name of Person Reporting	Date of Report
Kronstadt, John A.	11/17/2010

VII. INVESTMENTS and TRUSTS – *income, value, transactions (includes those of spouse and dependent children; see pp. 34-60 of filing instructions.)*

☐ NONE *(No reportable income, assets, or transactions.)*

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A-H)	B. (2) Type (e.g., div., rent, or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, redemption)	(2) Date mm/dd/yy	(3) Value Code 2 (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)
137. - ABX	A	Dividend	J	T					
138. - IFF	A	Dividend	J	T					
139. - PX	A	Dividend	J	T					
140. - AMT	A	Dividend	J	T					
141. - MICC	A	Dividend	J	T					
142. - NEE	A	Dividend	J	T					
143. - WMT	A	Dividend	J	T					
144. - Household Finance Corp. Bonds	B	Interest	K	T					
145. - Wal-Mart Stores Global Note	B	Interest	K	T					
146. - BBT	A	Int./Div.							
147. - KFT	A	Int./Div.							
148. - PEP	A	Int./Div.							
149. - PG	A	Int./Div.							
150. - RTP	A	Int./Div.							
151. - Fed. National Mtg. Assn. Note	A	Int./Div.							
152. - Fed. Home Loan Mtg. Corp. Note	A	Int./Div.							
153. - General Electric Credit Corp. Note	A	Int./Div.							

1. Income Gain Codes: (See Columns B1 and D4)	A =$1,000 or less	B =$1,001 - $2,500	C =$2,501 - $5,000	D =$5,001 - $15,000	E =$15,001 - $50,000
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2. Value Codes (See Columns C1 and D3)	J =$15,000 or less	K =$15,001 - $50,000	L =$50,001 - $100,000	M =$100,001 - $250,000	
	N =$250,001 - $500,000	O =$500,001 - $1,000,000	P1 =$1,000,001 - $5,000,000	P2 =$5,000,001 - $25,000,000	
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3. Value Method Codes (See Column C2)	Q =Appraisal	R =Cost (Real Estate Only)	S =Assessment	T =Cash Market	
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VII. INVESTMENTS and TRUSTS – *Income, value, transactions (includes those of spouse and dependent children; see pp. 34-60 of filing instructions.)*

☐ NONE *(No reportable income, assets, or transactions.)*

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A-H)	B. Income during reporting period (2) Type (e.g., div., rent, or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. Gross value at end of reporting period (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, redemption)	D. Transactions during reporting period (2) Date mm/dd/yy	D. Transactions during reporting period (3) Value Code 2 (J-P)	D. Transactions during reporting period (4) Gain Code 1 (A-H)	D. Transactions during reporting period (5) Identity of buyer/seller (if private transaction)
154. - Federal Agricultural Mortgage Corp. Note	A	Int./Div.							
155. - CHL	A	Int./Div.							
156. - DEO	A	Int./Div.							
157. - OMC	A	Int./Div.							
158. - SYY (X)	A	Int./Div.							
159.									
160.									
161.									

1. Income Gain Codes: (See Columns B1 and D4)	A =$1,000 or less F =$50,001 - $100,000	B =$1,001 - $2,500 G =$100,001 - $1,000,000	C =$2,501 - $5,000 H1 =$1,000,001 - $5,000,000	D =$5,001 - $15,000 H2 =More than $5,000,000	E =$15,001 - $50,000
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3. Value Method Codes (See Column C2)	Q =Appraisal U =Book Value	R =Cost (Real Estate Only) V =Other	S =Assessment W =Estimated	T =Cash Market	

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VIII. ADDITIONAL INFORMATION OR EXPLANATIONS. *(Indicate part of Report.)*

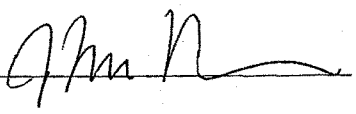
With respect to Trust #2: Trust #2 has no assets at the present time. It may be a beneficiary of a portion of the assets in Trust #1. Should Trust #2 receive assets from Trust #1, I would be the trustee of such assets when held in Trust #2.

FINANCIAL DISCLOSURE REPORT Page 15 of 15	Name of Person Reporting Kronstadt, John A.	Date of Report 11/17/2010

IX. CERTIFICATION.

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

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

Signature 

NOTE: ANY INDIVIDUAL WHO KNOWINGLY AND WILFULLY FALSIFIES OR FAILS TO FILE THIS REPORT MAY BE SUBJECT TO CIVIL AND CRIMINAL SANCTIONS (5 U.S.C. app. § 104)

FILING INSTRUCTIONS

Mail signed original and 3 additional copies to:

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

John Kronstadt

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		165	850	Notes payable to banks-secured			
U.S. Government securities				Notes payable to banks-unsecured			
Listed securities – see schedule	3	428	189	Notes payable to relatives			
Unlisted securities				Notes payable to others – auto loan		30	000
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 – primary residence		767	600
Real estate owned – see schedule	3	600	000	Chattel mortgages and other liens payable			
Real estate mortgages receivable				Other debts-itemize:			
Autos and other personal property		250	000				
Cash value-life insurance		155	117				
Other assets itemize:							
- Annuities		210	500				
- Partnership Interest		50	000				
- California municipal bonds		315	800	Total liabilities		797	600
- California Judicial Pension Plan		784	189	Net Worth	8	162	045
Total Assets	8	959	645	Total liabilities and net worth	8	959	645
CONTINGENT LIABILITIES				GENERAL INFORMATION			
As endorser, comaker or guarantor				Are any assets pledged? (Add schedule)	NO		
On leases or contracts				Are you defendant in any suits or legal actions?	NO		
Legal Claims				Have you ever taken bankruptcy?	NO		
Provision for Federal Income Tax							
Other special debt							

FINANCIAL STATEMENT

NET WORTH SCHEDULES

Listed Securities	
American Funds Mutual Funds	$ 86,374
Allianz NFJ Mutual Fund	48,511
Black Rock Mutual Fund	104,383
Bridgeway Mutual Fund	3,541
Bruce Mutual Fund	22,377
CGM Mutual Funds	72,989
Columbia Marsico Mutual Fund	190,773
Dodge and Cox Mutual Funds	190,126
Fairholme Funds Mutual Fund	38,035
Franklin California Mutual Fund	279,500
Henderson International Mutual Fund	86,577
Los Angeles County Horizons Mutual Funds	852,850
ML Winton FuturesAccess LLC, Class C LP	107,544
Nuveen Tradewinds Mutual Fund	171,304
Oppenheimer International Mutual Fund	36,159
Oppenheimer Sweep Account	347
Power Shares Trust	104,360
TIAA CREF Mutual Funds	3,000
Union Bank of California Sweep Account	352
University of California Mutual Funds	40,600
Vanguard Mutual Funds	602,530
Abbott Laboratories stock	10,264
Alcatel-Lucent stock	202
American Express Co. stock	16584
Amgen Inc. stock	22,876
AT&T Inc. stock	2,852
Bank of America Corp. stock	3,435
Chevron Corp. stock	10,160
Dow stock	9,000
Exxon Mobil Corp. stock	13,298
Home Depot	2,600
IBM stock	37,336
Intel stock	32,080
Medco Health Solutions, Inc. stock	2,521
Microsoft Corp. stock	26,665
ModusLink Global Solutions, Inc. stock	180
Monsanto Company stock	6,061
Procter & Gamble Co. stock	31,785
QUALCOMM Inc. stock	92,447
Royal Dutch Shell stock	13,950
Smucker Co. stock	257
Texas Instruments Inc. stock	5,914
UPS Inc. stock	6,737
Wal-mart Stores, Inc. stock	32,502
Waste Management, Inc. stock	6,251
Total Listed Securities	$ 3,428,189
Real Estate Owned	
Personal residence	$ 3,500,000
Vacation home (50% interest)	100,000
Total Real Estate Owned	$ 3,600,000

67905.515

AFFIDAVIT

I, **John Arnold Kronstadt**, do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

11/15/2010
(DATE)

(NAME)

(NOTARY)

WALTER A. FERNANDEZ
COMM. #1770243
Notary Public - California
Los Angeles County
My Comm. Expires Oct. 7, 2011

The Superior Court
LOS ANGELES, CALIFORNIA 90012
CHAMBERS OF
JOHN A. KRONSTADT, JUDGE

TELEPHONE
(213) 974-1234

January 5, 2011

The Honorable Patrick J. Leahy
Chairman
Committee on Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Following my re-nomination as a United States District Judge for the Central District of California, I reviewed the Senate Judiciary Committee Questionnaire that I submitted in November 2010. I certify that, to the best of my knowledge, all of the information in the Questionnaire remains true and accurate. I also have updated my Net Worth Statement and Financial Disclosure Report as requested in the Questionnaire and am forwarding these materials to the Committee.

I thank the Committee for its consideration of my nomination.

Respectfully,

John A. Kronstadt
Judge of the Superior Court

cc: The Honorable Charles Grassley
Ranking Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

JAK:ks

AO 10
Rev. 1/2010

FINANCIAL DISCLOSURE REPORT
NOMINATION FILING

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
Kronstadt, John A.	U.S. District Court for the Central District of California	01/05/2011
4. Title (Article III judges indicate active or senior status; magistrate judges indicate full- or part-time)	**5a. Report Type (check appropriate type)**	**6. Reporting Period**
U.S. District Judge	☑ Nomination, Date 01/05/2011 ☐ Initial ☐ Annual ☐ Final 5b. ☐ Amended Report	01/01/2010 to 12/31/2010
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.**	
111 North Hill Street Department 30; Room 400 Los Angeles, CA 90012	Reviewing Officer_____ Date_____	

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

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

☐ NONE *(No reportable positions.)*

	POSITION	NAME OF ORGANIZATION/ENTITY
1.	Trustee	Trust #1
2.	Trustee	Trust #2
3.		
4.		
5.		

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

☑ NONE *(No reportable agreements.)*

	DATE	PARTIES AND TERMS
1.		
2.		
3.		

FINANCIAL DISCLOSURE REPORT Page 2 of 15	Name of Person Reporting Kronstadt, John A.	Date of Report 01/05/2011

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

A. Filer's Non-Investment Income

☐ NONE *(No reportable non-investment income.)*

	DATE	SOURCE AND TYPE	INCOME (yours, not spouse's)
1.	2009	Los Angeles Superior Court Salary and benefits	$220,163.04
2.	2010	Los Angeles Superior Court Salary and benefits	$183,469.19
3.			
4.			

B. Spouse's Non-Investment Income - *If you were married during any portion of the reporting year, complete this section.*
(Dollar amounts not required except for honoraria.)

☐ NONE *(No reportable non-investment income.)*

	DATE	SOURCE AND TYPE
1.	2010	Pepperdine University School of Law; Adjunct Professor
2.	2010	Los Angeles Superior Court Salary and Benefits
3.		
4.		

IV. REIMBURSEMENTS - *transportation, lodging, food, entertainment.*
(Includes those to spouse and dependent children; see pp. 25-27 of filing instructions.)

☐ NONE *(No reportable reimbursements.)*

	SOURCE	DATES	LOCATION	PURPOSE	ITEMS PAID OR PROVIDED
1.	Exempt				
2.					
3.					
4.					
5.					

FINANCIAL DISCLOSURE REPORT Page 3 of 15	Name of Person Reporting Kronstadt, John A.	Date of Report 01/05/2011

V. GIFTS. *(Includes those to spouse and dependent children; see pp. 28-31 of filing instructions.)*

☐ NONE *(No reportable gifts.)*

	SOURCE	DESCRIPTION	VALUE
1.	Exempt		
2.			
3.			
4.			
5.			

VI. LIABILITIES. *(Includes those of spouse and dependent children; see pp. 32-33 of filing instructions.)*

☑ NONE *(No reportable liabilities.)*

	CREDITOR	DESCRIPTION	VALUE CODE
1.			
2.			
3.			
4.			
5.			

FINANCIAL DISCLOSURE REPORT Page 4 of 15	Name of Person Reporting Kronstadt, John A.	Date of Report 01/05/2011

VII. INVESTMENTS and TRUSTS – *Income, value, transactions (Includes those of spouse and dependent children; see pp. 34-60 of filing instructions.)*

☐ NONE *(No reportable income, assets, or transactions.)*

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A-H)	 (2) Type (e.g., div., rent, or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	 (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, redemption)	 (2) Date mm/dd/yy	 (3) Value Code 2 (J-P)	 (4) Gain Code 1 (A-H)	 (5) Identity of buyer/seller (if private transaction)
1. Horizons Mid Cap Equity Fund	A	Int./Div.	M	T	Exempt				
2. Horizons Large Cap Equity Fund	A	Int./Div.	J	T					
3. Horizons Stable Income Fund	B	Int./Div.	K	T					
4. Los Angeles County Stable Balanced Fund	A	Int./Div.	L	T					
5. Los Angeles County Stable Value Fund	B	Int./Div.	M	T					
6. Allianz NFJ International AFJCX	A	Int./Div.	L	T					
7. Black Rock Large Cap Value MCLVX	A	Int./Div.	L	T					
8. Columbia Marsico 21st Century NMYCX	A	Int./Div.	M	T					
9. Henderson International Opportunities HFOCX	A	Int./Div.	L	T					
10. Nuveen Tradewinds Global NWGCX		None	M	T					
11. ML Winton Futures Access LLC, Class C LF		None	M	T					
12. Vanguard Health Care VGHAX	A	Int./Div.	L	T					
13. Vanguard Wellington VWENX	A	Int./Div.	M	T					
14. Vangurad Bond VBIRX	A	Int./Div.	M	T					
15. Vanguard Money Market VMMXX	A	Int./Div.	J	T					
16. Bridgeway Small Cap Growth BRSGX	A	Int./Div.	J	T					
17. CGM Mutual CGMFX	A	Int./Div.	J	T					

1. Income Gain Codes (See Columns B1 and D4)	A =$1,000 or less F =$50,001 - $100,000	B =$1,001 - $2,500 G =$100,001 - $1,000,000	C =$2,501 - $5,000 H1 =$1,000,001 - $5,000,000	D =$5,001 - $15,000 H2 =More than $5,000,000	E =$15,001 - $50,000
2. Value Codes (See Columns C1 and D3)	J =$15,000 or less N =$250,001 - $500,000 P3 =$25,000,001 - $50,000,000	K =$15,001 - $50,000 O =$500,001 - $1,000,000	L =$50,001 - $100,000 P1 =$1,000,001 - $5,000,000 P4 =More than $50,000,000	M =$100,001 - $250,000 P2 =$5,000,001 - $25,000,000	
3. Value Method Codes (See Column C2)	Q =Appraisal U =Book Value	R =Cost (Real Estate Only) V =Other	S =Assessment W =Estimated	T =Cash Market	

FINANCIAL DISCLOSURE REPORT Page 5 of 15	Name of Person Reporting Kronstadt, John A.	Date of Report 01/05/2011

VII. INVESTMENTS and TRUSTS – *income, value, transactions (Includes those of spouse and dependent children; see pp. 34-60 of filing instructions.)*

☐ NONE *(No reportable income, assets, or transactions.)*

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A-H)	B. Income during reporting period (2) Type (e.g., div., rent, or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. Gross value at end of reporting period (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, redemption)	D. Transactions during reporting period (2) Date mm/dd/yy	D. Transactions during reporting period (3) Value Code 2 (J-P)	D. Transactions during reporting period (4) Gain Code 1 (A-H)	D. Transactions during reporting period (5) Identity of buyer/seller (if private transaction)
18. CGM Mutual LOMMX	A	Int./Div.	J	T					
19. CGM Realty CGMRX	A	Int./Div.	K	T					
20. Dodge & Cox Int. DODFX	A	Int./Div.	L	T					
21. Dodge & Cox Stock DODGX	A	Int./Div.	K	T					
22. Fairholme Funds FAIRX	A	Int./Div.	K	T					
23. DOW	A	Int./Div.	J	T					
24. INTC	A	Int./Div.	K	T					
25. IBM	B	Int./Div.	K	T					
26. WM	A	Int./Div.	J	T					
27. Los Angeles County Horizons Non-US Equity	A	Int./Div.	K	T					
28. Los Angeles County Horizons Small Cap Equity	A	Int./Div.	K	T					
29. Los Angeles County Horizons Midcap Equity	A	Int./Div.	K	T					
30. Los Angeles County Horizons Non US Equity	A	Int./Div.	K	T					
31. Los Angeles County Horizons Small Cap Equity	A	Int./Div.	K	T					
32. Los Angeles County Savings Large Cap Equity	A	Int./Div.	M	T					
33. Los Angeles County Savings Balanced Fund	A	Int./Div.	L	T					
34. Los Angeles County Horizons Stable Income Fund	A	Int./Div.	K	T					

1. Income Gain Codes (See Columns B1 and D4)	A =$1,000 or less	B =$1,001 - $2,500	C =$2,501 - $5,000	D =$5,001 - $15,000	E =$15,001 - $50,000
	F =$50,001 - $100,000	G =$100,001 - $1,000,000	H1 =$1,000,001 - $5,000,000	H2 =More than $5,000,000	
2. Value Codes (See Columns C1 and D3)	J =$15,000 or less	K =$15,001 - $50,000	L =$50,001 - $100,000	M =$100,001 - $250,000	
	N =$250,001 - $500,000	O =$500,001 - $1,000,000	P1 =$1,000,001 - $5,000,000	P2 =$5,000,001 - $25,000,000	
	P3 =$25,000,001 - $50,000,000		P4 =More than $50,000,000		
3. Value Method Codes (See Column C2)	Q =Appraisal	R =Cost (Real Estate Only)	S =Assessment	T =Cash Market	
	U =Book Value	V =Other	W =Estimated		

FINANCIAL DISCLOSURE REPORT Page 6 of 15	Name of Person Reporting Kronstadt, John A.	Date of Report 01/05/2011

VII. INVESTMENTS and TRUSTS – *income, value, transactions (Includes those of spouse and dependent children; see pp. 34-60 of filing instructions.)*

☐ NONE *(No reportable income, assets, or transactions.)*

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A-H)	B. Income during reporting period (2) Type (e.g., div., rent, or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. Gross value at end of reporting period (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, redemption)	D. (2) Date mm/dd/yy	D. (3) Value Code 2 (J-P)	D. (4) Gain Code 1 (A-H)	D. (5) Identity of buyer/seller (if private transaction)
35. Cal. Judges Retirement System Pension Plan		None	O	T					
36. University of California Savings Fund	A	Int./Div.	J	T					
37. University of California Equity Fund	A	Int./Div.	K	T					
38. TIAA CREF Stock	A	Int./Div.	J	T					
39. TIAA CREF Global Equities	A	Int./Div.	J	T					
40. TIAA CREF Growth	A	Int./Div.	J	T					
41. TIAA CREF Equity Index	A	Int./Div.	J	T					
42. Oppenheimer Advantage Bank Deposit Sweep Account	A	Int./Div.	L	T					
43. State of California SMBIA Bonds	A	Int./Div.	K	T					
44. State of California Public Works Board Bond	A	Int./Div.	K	T					
45. Merrill Lynch Money Market	A	Int./Div.	J	T					
46. Franklin California High Yield Municipal Fund	D	Int./Div.	N	T					
47. Oppenheimer International Bond Fund OIBCX	B	Int./Div.	K	T					
48. Vanguard Windsor II VWNFX	A	Int./Div.	J	T					
49. Vanguard CA Tax Exempt Money Market VCTXX	A	Int./Div.	J	T					
50. PowerShares QQQ Trust	A	Int./Div.	L	T					
51. ABT	A	Int./Div.	J	T					

1. Income Gain Codes: (See Columns B1 and D4)	A =$1,000 or less	B =$1,001 - $2,500	C =$2,501 - $5,000	D =$5,001 - $15,000	E =$15,001 - $50,000
	F =$50,001 - $100,000	G =$100,001 - $1,000,000	H1 =$1,000,001 - $5,000,000	H2 =More than $5,000,000	
2. Value Codes (See Columns C1 and D3)	J =$15,000 or less	K =$15,001 - $50,000	L =$50,001 - $100,000	M =$100,001 - $250,000	
	N =$250,001 - $500,000	O =$500,001 - $1,000,000	P1 =$1,000,001 - $5,000,000	P2 =$5,000,001 - $25,000,000	
	P3 =$25,000,001 - $50,000,000		P4 =More than $50,000,000		
3. Value Method Codes (See Column C3)	Q =Appraisal	R =Cost (Real Estate Only)	S =Assessment	T =Cash Market	
	U =Book Value	V =Other	W =Estimated		

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Name of Person Reporting	Date of Report
Kronstadt, John A.	01/05/2011

VII. INVESTMENTS and TRUSTS – *income, value, transactions (includes those of spouse and dependent children; see pp. 34-60 of filing instructions.)*

☐ NONE *(No reportable income, assets, or transactions.)*

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A-H)	B. (2) Type (e.g., div., rent, or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, redemption)	D. (2) Date mm/dd/yy	D. (3) Value Code 2 (J-P)	D. (4) Gain Code 1 (A-H)	D. (5) Identity of buyer/seller (if private transaction)
52. AXP	A	Int./Div.	K	T					
53. AMGN	A	Int./Div.	K	T					
54. T	A	Int./Div.	J	T					
55. BAC	A	Int./Div.	J	T					
56. CVX	A	Int./Div.	J	T					
57. XOM	A	Int./Div.	J	T					
58. MHS	A	Int./Div.	J	T					
59. MSFT	A	Int./Div.	K	T					
60. MON	A	Int./Div.	J	T					
61. PG	A	Int./Div.	K	T					
62. QCOM	A	Int./Div.	L	T					
63. RDSA	A	Int./Div.	J	T					
64. SJM	A	Int./Div.	J	T					
65. UPS	A	Int./Div.	J	T					
66. WMT	A	Int./Div.	K	T					
67. Vanguard 529 College Savings Plan Moderate Age-Based Option	A	Int./Div.	J	T					
68. Vanguard 529 College Savings Plan Agressive Age-Based Option	A	Int./Div.	J	T					

1. Income Gain Codes: (See Columns B1 and D4)	A =$1,000 or less	B =$1,001 - $2,500	C =$2,501 - $5,000	D =$5,001 - $15,000	E =$15,001 - $50,000
	F =$50,001 - $100,000	G =$100,001 - $1,000,000	H1 =$1,000,001 - $5,000,000	H2 =More than $5,000,000	
2. Value Codes (See Columns C1 and D3)	J =$15,000 or less	K =$15,001 - $50,000	L =$50,001 - $100,000	M =$100,001 - $250,000	
	N =$250,001 - $500,000	O =$500,001 - $1,000,000	P1 =$1,000,001 - $5,000,000	P2 =$5,000,001 - $25,000,000	
	P3 =$25,000,001 - $50,000,000		P4 =More than $50,000,000		
3. Value Method Codes (See Column C2)	Q =Appraisal	R =Cost (Real Estate Only)	S =Assessment	T =Cash Market	
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Name of Person Reporting	Date of Report
Kronstadt, John A.	01/05/2011

VII. INVESTMENTS and TRUSTS — *income, value, transactions (includes those of spouse and dependent children; see pp. 34-60 of filing instructions.)*

☐ NONE *(No reportable income, assets, or transactions.)*

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A-H)	B. (2) Type (e.g., div., rent, or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, redemption)	D. (2) Date mm/dd/yy	D. (3) Value Code 2 (J-P)	D. (4) Gain Code 1 (A-H)	D. (5) Identity of buyer/seller (if private transaction)
69. DODFX	A	Int./Div.	J	T					
70. HD	A	Int./Div.	J	T					
71. IBM	A	Int./Div.	J	T					
72. MON	A	Int./Div.	J	T					
73. TXN	A	Int./Div.	J	T					
74. Vanguard Health Care VGHCX	A	Int./Div.	K	T					
75. Vanguard Windsor II VWNFX	A	Int./Div.	J	T					
76. Vanguard Money Market VMMXX	A	Int./Div.	J	T					
77. Alameda County California Pension Obligation Bonds	A	Int./Div.	K	T					
78. Union Bank Investment Services Sweep Account	A	Int./Div.	K	T					
79. American Funds Money Market Fund 529-B	A	Int./Div.	L	T					
80. Americab Funds American Balanced Fund 529-E	A	Int./Div.	J	T					
81. Conejo VY Calif. Uni. Sch. Dist Bonds	A	Int./Div.	K	T					
82. Alameda Cal. Uni. Sch. Dist Bond	A	Int./Div.	K	T					
83. San Francisco City and County Redevelopment Bonds	A	Int./Div.	K	T					
84. Bruce Fund Mutual Fund	A	Int./Div.	K	T					
85. Northwest Mutual Whole Life Insurance	C	Int./Div.	L	T					

1. Income Gain Codes (See Columns B1 and D4)	A =$1,000 or less F =$50,001 - $100,000 J =$15,000 or less N =$250,001 - $500,000 P3 =$25,000,001 - $50,000,000	B =$1,001 - $2,500 G =$100,001 - $1,000,000 K =$15,001 - $50,000 O =$500,001 - $1,000,000	C =$2,501 - $5,000 H1 =$1,000,001 - $5,000,000 L =$50,001 - $100,000 P1 =$1,000,001 - $5,000,000 P4 =More than $50,000,000	D =$5,001 - $15,000 H2 =More than $5,000,000 M =$100,001 - $250,000 P2 =$5,000,001 - $25,000,000	E =$15,001 - $50,000
2. Value Codes (See Columns C1 and D3)					
3. Value Method Codes (See Column C2)	Q =Appraisal U =Book Value	R =Cost (Real Estate Only) V =Other	S =Assessment W =Estimated	T =Cash Market	

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Name of Person Reporting	Date of Report
Kronstadt, John A.	01/05/2011

VII. INVESTMENTS and TRUSTS – *income, value, transactions (includes those of spouse and dependent children; see pp. 34-60 of filing instructions.)*

☐ NONE *(No reportable income, assets, or transactions.)*

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A-H)	B. (2) Type (e.g., div., rent, or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, redemption)	D. (2) Date mm/dd/yy	D. (3) Value Code 2 (J-P)	D. (4) Gain Code 1 (A-H)	D. (5) Identity of buyer/seller (if private transaction)
86. Lincoln Financial Group American Legacy II Variable Annuity		None	M	T					
87. Putnam Hartford Capital Manager Variable Annuity		None	L	T					
88. Round Hill Partnership (Real Property)	D	Distribution	L	W					
89. Union Bank of California Cash Account	A	Interest	M	T					
90. Oppenheimer Advantage Bank Deposit Sweep Account	A	Int./Div.	L	T					
91.									
92. Trust #1									
93. - 1111 Spring St. Partnership	A	Distribution	K	T					
94. - Round Hill Partnership (Real Estate) Appraisal 12/30/2009	D	Distribution	M	Q					
95. - Country Club Offices Part. (Real Est.)Appraisal 12/30/09	A	Distribution	J	Q					
96. - Penn Center Limited Part. (Real Est.) Appraisal 12/30/09	E	Distribution	M	Q					
97. - Potomac Place Assoc. Part. (Real Est.) Apprais. 1/26/10	D	Distribution	L	Q					
98. - AZO (Y)									
99. - KMX (Y)									
100. - DIS (Y)									
101. - F (Y)									
102. - LOW (Y)									

1. Income Gain Codes (See Columns B1 and D4)	A =$1,000 or less	B =$1,001 - $2,500	C =$2,501 - $5,000	D =$5,001 - $15,000	E =$15,001 - $50,000
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	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	
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3. Value Method Codes (See Column C2)	Q =Appraisal	R =Cost (Real Estate Only)	S =Assessment	T =Cash Market	
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FINANCIAL DISCLOSURE REPORT Page 10 of 15	Name of Person Reporting Kronstadt, John A.	Date of Report 01/05/2011

VII. INVESTMENTS and TRUSTS – *income, value, transactions (Includes those of spouse and dependent children; see pp. 34-60 of filing instructions.)*

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103. - MCD (Y)									
104. - V (Y)									
105. - MO (Y)	A	Dividend							
106. - CVS (Y)									
107. - CL (Y)	A	Dividend							
108. - SBMRY (Y)									
109. - XOM (Y)									
110. - SLB (Y)									
111. - RIG (Y)									
112. - BRK.A (Y)									
113. - BAM (Y)									
114. - JPM (Y)									
115. - MKL (Y)									
116. - TROW (Y)									
117. - BDX (Y)									
118. - LH (Y)									
119. - MRK (Y)									

1. Income Gain Codes: (See Columns B1 and D4)	A =$1,000 or less F =$50,001 - $100,000	B =$1,001 - $2,500 G =$100,001 - $1,000,000	C =$2,501 - $5,000 H1 =$1,000,001 - $5,000,000	D =$5,001 - $15,000 H2 =More than $5,000,000	E =$15,001 - $50,000
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FINANCIAL DISCLOSURE REPORT Page 11 of 15	Name of Person Reporting Kronstadt, John A.	Date of Report 01/05/2011

VII. INVESTMENTS and TRUSTS – *income, value, transactions (Includes those of spouse and dependent children; see pp. 34-60 of filing instructions.)*

☐ NONE *(No reportable income, assets, or transactions.)*

A. Description of Assets (Including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A-H)	 (2) Type (e.g., div., rent, or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	 (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, redemption)	 (2) Date mm/dd/yy	 (3) Value Code 2 (J-P)	 (4) Gain Code 1 (A-H)	 (5) Identity of buyer/seller (if private transaction)
120. - XBI (Y)									
121. - TEVA (Y)									
122. - CAT (Y)	A	Dividend							
123. - DHR (Y)									
124. - GD (Y)									
125. - GE (Y)									
126. - ITW (Y)									
127. - UTX (Y)	A	Dividend							
128. - ACN (Y)									
129. - AAPL (Y)									
130. - ADP (Y)	A	Dividend							
131. - CSCO (Y)									
132. - FISV (Y)									
133. - GOOG (Y)									
134. - INTC (Y)	A	Dividend							
135. - IBM (Y)									
136. - MSFT (Y)	A	Dividend							

1. Income Gain Codes (See Columns B1 and D4)	A =$1,000 or less F =$50,001 - $100,000	B =$1,001 - $2,500 G =$100,001 - $1,000,000	C =$2,501 - $5,000 H1 =$1,000,001 - $5,000,000	D =$5,001 - $15,000 H2 =More than $5,000,000	E =$15,001 - $50,000
2. Value Codes (See Columns C1 and D3)	J =$15,000 or less N =$250,001 - $500,000 P3 =$25,000,001 - $50,000,000	K =$15,001 - $50,000 O =$500,001 - $1,000,000	L =$50,001 - $100,000 P1 =$1,000,001 - $5,000,000 P4 =More than $50,000,000	M =$100,001 - $250,000 P2 =$5,000,001 - $25,000,000	
3. Value Method Codes (See Column C2)	Q =Appraisal U =Book Value	R =Cost (Real Estate Only) V =Other	S =Assessment W =Estimated	T =Cash Market	

FINANCIAL DISCLOSURE REPORT
Page 12 of 15

Name of Person Reporting	Date of Report
Kronstadt, John A.	01/05/2011

VII. INVESTMENTS and TRUSTS -- *income, value, transactions (Includes those of spouse and dependent children; see pp. 34-60 of filing instructions.)*

☐ NONE *(No reportable income, assets, or transactions.)*

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A-H)	B. (2) Type (e.g., div., rent, or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, redemption)	(2) Date mm/dd/yy	(3) Value Code 2 (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)
137. - ORCL (Y)									
138. - QCOM (Y)									
139. - ALB (Y)									
140. - ABX (Y)									
141. - IFF (Y)									
142. - PX (Y)									
143. - AMT (Y)									
144. - MICC (Y)	A	Dividend							
145. - NEE Y)									
146. - WMT (Y)									
147. - Household Finance Corp. Bonds (Y)	B	Interest							
148. - Wal-Mart Stores Global Note (Y)	B	Interest							
149. - BBT (Y)									
150. - KFT (Y)									
151. - PEP (Y)									
152. - PG (Y)									
153. - RTP (Y)									

1. Income Gain Codes: (See Columns B1 and D4)	A =$1,000 or less	B =$1,001 - $2,500	C =$2,501 - $5,000	D =$5,001 - $15,000	E =$15,001 - $50,000
	F =$50,001 - $100,000	G =$100,001 - $1,000,000	H1 =$1,000,001 - $5,000,000	H2 =More than $5,000,000	
2. Value Codes (See Columns C1 and D3)	J =$15,000 or less	K =$15,001 - $50,000	L =$50,001 - $100,000	M =$100,001 - $250,000	
	N =$250,001 - $500,000	O =$500,001 - $1,000,000	P1 =$1,000,001 - $5,000,000	P2 =$5,000,001 - $25,000,000	
	P3 =$25,000,001 - $50,000,000		P4 =More than $50,000,000		
3. Value Method Codes (See Column C2)	Q =Appraisal	R =Cost (Real Estate Only)	S =Assessment	T =Cash Market	
	U =Book Value	V =Other	W =Estimated		

FINANCIAL DISCLOSURE REPORT Page 13 of 15	Name of Person Reporting Kronstadt, John A.	Date of Report 01/05/2011

VII. INVESTMENTS and TRUSTS – *Income, value, transactions (Includes those of spouse and dependent children; see pp. 34-60 of filing instructions.)*

☐ NONE *(No reportable income, assets, or transactions.)*

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 1 (A-H)	(2) Type (e.g., div., rent, or int.)	(1) Value Code 2 (J-P)	(2) Value Method Code 3 (Q-W)	(1) Type (e.g., buy, sell, redemption)	(2) Date mm/dd/yy	(3) Value Code 2 (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)
154. - Fed. National Mtg. Assn. Note (Y)									
155. - Fed. Home Loan Mtg. Corp. Note (Y)									
156. - General Electric Credit Corp. Note (Y)									
157. - Federal Agricultural Mortgage Corp. Note (Y)									
158. - CHL (Y)									
159. - DEO (Y)									
160. - OMC (Y)									
161. - SYY (Y)									
162.									
163.									
164.									

1. Income Gain Codes: (See Columns B1 and D4)	A =$1,000 or less F =$50,001 - $100,000	B =$1,001 - $2,500 G =$100,001 - $1,000,000	C =$2,501 - $5,000 H1 =$1,000,001 - $5,000,000	D =$5,001 - $15,000 H2 =More than $5,000,000	E =$15,001 - $50,000
2. Value Codes (See Columns C1 and D3)	J =$15,000 or less N =$250,001 - $500,000 P3 =$25,000,001 - $50,000,000	K =$15,001 - $50,000 O =$500,001 - $1,000,000	L =$50,001 - $100,000 P1 =$1,000,001 - $5,000,000 P4 =More than $50,000,000	M =$100,001 - $250,000 P2 =$5,000,001 - $25,000,000	
3. Value Method Codes (See Column C2)	Q =Appraisal U =Book Value	R =Cost (Real Estate Only) V =Other	S =Assessment W =Estimated	T =Cash Market	

FINANCIAL DISCLOSURE REPORT Page 14 of 15	Name of Person Reporting Kronstadt, John A.	Date of Report 01/05/2011

VIII. ADDITIONAL INFORMATION OR EXPLANATIONS. *(Indicate part of Report.)*

With respect to Trust #2: Trust #2 has no assets at the present time. It may be a beneficiary of a portion of the assets in Trust #1. Should Trust #2 receive assets from Trust #1, I would be the trustee of such assets when held in Trust #2.

FINANCIAL DISCLOSURE REPORT Page 15 of 15	Name of Person Reporting Kronstadt, John A.	Date of Report 01/05/2011

IX. CERTIFICATION.

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

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

Signature

NOTE: ANY INDIVIDUAL WHO KNOWINGLY AND WILFULLY FALSIFIES OR FAILS TO FILE THIS REPORT MAY BE SUBJECT TO CIVIL AND CRIMINAL SANCTIONS (5 U.S.C. app. § 104)

FILING INSTRUCTIONS

Mail signed original and 3 additional copies to:

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

John Kronstadt

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		155	000	Notes payable to banks-secured			
U.S. Government securities				Notes payable to banks-unsecured			
Listed securities – see schedule	3	622	862	Notes payable to relatives			
Unlisted securities – Round Hill Partnership		50	000	Notes payable to others – auto loans		90	000
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 – primary residence		766	600
Real estate owned – see schedule	3	600	000	Chattel mortgages and other liens payable			
Real estate mortgages receivable				Other debts-itemize:			
Autos and other personal property		310	000				
Cash value-life insurance		155	117				
Other assets itemize:							
- Annuities		210	500				
- Partnership Interest		50	000				
- California municipal bonds		315	800	Total liabilities		856	600
- California Judicial Pension Plan		784	189	Net Worth	8	396	868
Total Assets	9	253	468	Total liabilities and net worth	9	253	468
CONTINGENT LIABILITIES				GENERAL INFORMATION			
As endorser, comaker or guarantor				Are any assets pledged? (Add schedule)	NO		
On leases or contracts				Are you defendant in any suits or legal actions?	NO		
Legal Claims				Have you ever taken bankruptcy?	NO		
Provision for Federal Income Tax							
Other special debt							

FINANCIAL STATEMENT

NET WORTH SCHEDULES

Listed Securities	
American Funds Mutual Funds	$ 87,897
Allianz NFJ Mutual Fund	47,057
Black Rock Mutual Fund	104,783
Bridgeway Mutual Fund	3,854
Bruce Mutual Fund	22,310
CGM Mutual Funds	79,284
Columbia Marsico Mutual Fund	195,443
Dodge and Cox Mutual Funds	202,417
Franklin California Mutual Fund	268,613
Fairholme Funds Mutual Fund	40,536
Henderson International Mutual Fund	83,103
Los Angeles County Horizons Mutual Funds	852,850
Merrill Lynch Winton Futures Access LLC, Class C LP	105,196
Nuveen Tradewinds Mutual Fund	173,122
Oppenheimer International Mutual Fund	33,850
Oppenheimer Sweep Account	347
Power Shares Trust	104,360
TIAA CREF Mutual Funds	4,000
Union Bank of California Sweep Account	352
University of California Mutual Funds	45,200
Vanguard Mutual Funds	761,214
Abbott Laboratories stock	9484
Alcatel-Lucent stock	169
American Express Co. stock	17,144
Amgen Inc. stock	26,258
AT&T Inc. stock	6841
Bank of America Corp. stock	3,993
Chevron Corp. stock	11,239
Dow stock	11,309
Exxon Mobil Corp. stock	14,674
Home Depot	3,140
IBM stock	37,791
Intel stock	32,752
Medco Health Solutions, Inc. stock	2,960
Microsoft Corp. stock	27,970
ModusLink Global Solutions, Inc. stock	179
Monsanto Company stock	7,030
Procter & Gamble Co. stock	32,200
QUALCOMM Inc. stock	94,591
Royal Dutch Shell stock	13,998
Smucker Co. stock	262
Texas Instruments Inc. stock	6,502
UPS Inc. stock	7,268

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Wal-mart Stores, Inc. stock	32,448
Waste Management, Inc. stock	6,508
Total Listed Securities	$ 3,622,862

Real Estate Owned	
Personal residence	$ 3,500,000
Vacation home (50% interest)	100,000
Total Real Estate Owned	$ 3,600,000

STATEMENT OF VINCENT L. BRICCETTI, NOMINATED TO BE U.S. DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF NEW YORK

Mr. BRICCETTI. Thank you, Mr. Chairman. I, too, would like to express my thank you to President Obama for nominating me to this position and showing confidence in me. I'd like to thank Senator Schumer for recommending me to the President, and for his remarks which I understand are included in the written record. I also thank Senator Gillebrand for her support as well.

If I may introduce my friends and family that are there, Mr. Chairman. First of all, my wife Grace, of 32 years, a not only wonderful, but extremely wise woman who has put up with me for all these years. That maybe wasn't so wise, but in any event, she's here. Two of our three adult children are here. My oldest child, Christi, is here. She's a very hardworking young lawyer in New York City and managed to sneak out of the office for the day and come down to Washington for this hearing. My youngest child, Tom, is here. He's a senior at Syracuse University and made the trip as well, and I'm just incredibly delighted that he did that.

My middle child, my third child, is not here. That's Leslie. She's not here because she's serving her country as a Peace Corps volunteer in Central America, where she has completed almost 2 years of service, has a few more months to go. Leslie told me that she's going to try to make her way to an Internet connection—she doesn't have one where she lives—and watch the webcast. So if she's watching, we miss you, Les.

Also present today is my mother, Emanuela Briccetti, to whom I owe everything. I'm not sure what else I could say. She is a member of the greatest generation, a nurse, and worked for many years with the Postal Service. I'm just incredibly pleased that she could be here today.

My brother Mario has made his way here from his home in Indiana. He's my big brother, so he thinks that he's the person to whom I owe everything, but actually it's my mother. But I am delighted that Mario is here. And my sister Louisa, who lives in Manhattan with her family, is here with her family, her husband, my brother-in-law, Jonathan Brill, and their children Caroline and Ken Brill. Caroline actually had the shortest trip because she's a college student here in Washington.

I found out about 5 minutes before the hearing began that my father-in-law, Bob Merritt from South Hadley, Massachusetts, is here. He does have a bit of a sense of humor and didn't bother to tell anybody that he was coming. It's true. He's a World War II veteran and another member of the greatest generation, and I'm incredibly touched that he's here.

My mother-in-law, Pat Merritt, unfortunately is not here because she's a little bit under the weather, but my in-laws have been wonderful to me from the moment I met their beautiful daughter. I'm just thrilled that Bob, at least, is here. I know Pat is watching.

Finally, I think—I hope I didn't leave anybody else. But finally, my very dear friend of more than 30 years, Ruth Raisfeld, is here. Ruth and I were classmates at Fordham Law School. We were co-editors of the *Law Review*. She's been an amazing loyal and won-

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derful friend for many years and she is here today. I'm just so delighted that she's here.

I would like to mention one person who's not physically present, which is my dad, Angelo Briccetti. My dad is—both my parents were children of Italian immigrants. My dad is, and has always been, my greatest role model and will continue to be for as long as I live. He learned to speak English when he went to school. He didn't know it before that.

Although he was an A student, when he was a senior in high school his dad, my grandfather, fell on the ice and broke his arm and so he couldn't cut meat anymore, and they were in the meat business, so he turned to his son, my father, and said, OK, no more school, you've got to work with me, and he did. He didn't finish school. I've seen his transcript, so I know he was an A student. What my father has taught me, and my mother as well—I was going to say, my father was the quintessential working man. He worked, well, 7 days a week for my entire growing up. Every other Tuesday afternoon he would take off and his brother would take the other every other Tuesday afternoon off.

That's a very great example to set for one's children and grandchildren. And my mother as well has always worked. What I learned from them is the value of hard work and the necessity of being determined. So I'm delighted that my mother is here, and I certainly feel my father's presence as well. Thank you.

Senator BLUMENTHAL. Thank you, Mr. Briccetti.

Ms. Wright-Allen.

[The biographical information follows.]

UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY

QUESTIONNAIRE FOR JUDICIAL NOMINEES

PUBLIC

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

   Vincent Louis Briccetti

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

   United States District Judge for the Southern District of New York

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

   Briccetti, Calhoun & Lawrence, LLP
   81 Main Street, Suite 450
   White Plains, New York 10601

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

   1954; Mt. Kisco, New York

5. **Education**: List in reverse chronological order each college, law school, or any other institution of higher education attended and indicate for each the dates of attendance, whether a degree was received, and the date each degree was received.

   1977 – 1980, Fordham University School of Law; J.D., 1980
   1972 – 1976, Columbia University; B.A., 1976

6. **Employment Record**: List in reverse chronological order all governmental agencies, business or professional corporations, companies, firms, or other enterprises, partnerships, institutions or 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 description.

   2000 – Present
   Briccetti, Calhoun & Lawrence, LLP
   81 Main Street, Suite 450
   White Plains, New York 10601
   Partner

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1993 – 2000
Briccetti & Calhoun
140 Grand Street
White Plains, New York 10601
Partner

1992 – 1993
Law Offices of Vincent L. Briccetti, Esq.
925 Westchester Avenue
White Plains, New York 10604
Sole Practitioner

1989 – 1992
Paul, Hastings, Janofsky & Walker
1055 Washington Boulevard
Stamford, Connecticut 06901
Associate Attorney

1985 – 1989
United States Attorney's Office for the Southern District of New York
One St. Andrew's Plaza
New York, New York 10007
Deputy Chief Appellate Attorney (1988 – 1989)
Assistant United States Attorney (1985 – 1989)

1982 – 1984
Townley & Updike (since dissolved)
405 Lexington Avenue
New York, New York 10174
Associate Attorney

1980 – 1982
United States District Court for the Southern District of New York
40 Centre Street
New York, New York 10007
Law Clerk to the Honorable John M. Cannella

Summer 1979
Ford Motor Company
Office of General Counsel
1 American Road
Dearborn, Michigan 48126
Law Clerk

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1978 – 1979
Lumbard & Phelan (since dissolved)
One State Street Plaza
New York, New York 10004
Law Clerk

Summer 1977
Toots Shor Restaurant (no longer in business)
Broadway at City Hall
New York, New York 10007
Waiter

1976 – 1977
Harlow's Third Avenue Deli
Hillcroft Avenue
Houston, Texas 77057
Waiter

Summer 1976
Law Offices of Anthony J. Monteleone, Esq.
19 North Moger Avenue
Mt. Kisco, New York 10549
Law Clerk

Other Affiliations (uncompensated)

2005 – Present
Federal Defenders of New York, Inc.
52 Duane Street
New York, New York 10007
Member, Board of Directors (2005 – Present)
Treasurer and Chairman of the Audit and Finance Committee (2005 – Present)

2000 – Present
Primeview Associates, Inc.
81 Main Street, Suite 450
White Plains, New York 10601
President and Co-owner

1995 – 2008
Truesdale Lake Property Owners Association
P.O. Box 193
South Salem, New York 10590
Board of Governors (1995 – 2008)
Water Commissioner (1997 – 2007)

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1995 – 2000
Grandview Associates, Inc. (no longer in business)
140 Grand Street, Suite 401
White Plains, New York 10601
Co-owner

1992 – 1996
Presbyterian Church of Mt. Kisco
605 Millwood Road
Mt. Kisco, New York 10549
Elder and Member of Session (governing board)

1990 – 1992
Fellowship Hall, Inc.
212 Babbitt Road
Bedford Hills, New York 10507
Member, Board of Trustees

7. **Military Service and Draft Status**: Identify any service in the U.S. Military, including dates of service, branch of service, rank or rate, serial number (if different from social security number) and type of discharge received, and whether you have registered for selective service.

I have not served in the military. I registered for selective service at age 18.

8. **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.

AV-Rated, Martindale Hubbell (current)
Named New York "Super Lawyer" (2008, 2009 & 2010)
Director's Award for Superior Performance by Assistant United States Attorney, Executive Office, United States Attorneys, United States Department of Justice (1990)
Commendation from Internal Revenue Service, Criminal Investigation Division, "Honorary Special Agent" (1989)
Commendations from Federal Bureau of Investigation (1986 & 1989)
Commendation from United States Secret Service (1986)
Commendation from United States Postal Inspection Service (1986)
Full tuition scholarship, third year of law school because of my service as Articles Editor, Fordham Law Review (1979 – 1980)
Articles Editor, Fordham Law Review (1979 – 1980)

9. **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.

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American Bar Association
Criminal Justice Section (1990 – Present)
White Collar Crime Committee (1990 – Present)
Columbian Lawyers Association of Westchester County
Federal Bar Council
Westchester Committee (2009 – Present)
Legal Services of the Hudson Valley
Access to Justice Campaign (2006)
New York City Bar
Criminal Law Committee (1993 – 1995, approximate)
New York Council of Defense Lawyers
SDNY Liaison Committee (2008 – Present)
New York State Bar Association

10. **Bar and Court Admission**:

a. List the date(s) you were admitted to the bar of any state and any lapses in membership. Please explain the reason for any lapse in membership.

New York, 1981
Connecticut, 1990

There has been no lapse in membership.

b. List all courts in which you have been admitted to practice, including dates of admission and any lapses in membership. Please explain the reason for any lapse in membership. Give the same information for administrative bodies that require special admission to practice.

United States Court of Appeals for the Second Circuit, 1985
United States District Court for the District of Connecticut, 1990
United States District Court for the Eastern District of New York, 1982
United States District Court for the Northern District of New York, 1995
United States District Court for the Southern District of New York, 1981

There has been no lapse in membership.

11. **Memberships**:

a. List all professional, business, fraternal, scholarly, civic, charitable, or other organizations, other than those listed in response to Questions 9 or 10 to which you belong, or to which you have belonged, since graduation from law school. Provide dates of membership or participation, and indicate any office you held. Include clubs, working groups, advisory or editorial boards, panels, committees, conferences, or publications.

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Federal Defenders of New York, Inc.
Member, Board of Directors (2005 – Present)
Treasurer and Chairman of the Audit and Finance Committee (2005 – Present)

Truesdale Lake Property Owners Association (1995 – 2008)
Board of Governors (1995 – 2008)
Water Commissioner (1997 – 2007)

Fordham Law Alumni Association (1995 – Present)
President, Westchester-Putnam Chapter (1999 – 2001)
Vice President, Westchester-Putnam Chapter (1997 – 1999)
Director, Westchester-Putnam Chapter (1995 – Present)

Salem Golf Club (1998 – Present)
Member, Golf Committee (2009 – Present)

Presbyterian Church of Mt. Kisco (1992 – 1996)
Elder and Member of Session (governing board)

Fellowship Hall, Inc. (1990 – 1992)
Member, Board of Trustees

b. 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, or national origin. Indicate whether any of these organizations listed in response to 11a above currently discriminate or formerly discriminated on the basis of race, sex, religion or national origin 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 the best of my knowledge, no organization listed above currently discriminates, or previously discriminated, on the basis of race, sex, religion, or national origin.

12. **Published Writings and Public Statements**:

a. List the titles, publishers, and dates of books, articles, reports, letters to the editor, editorial pieces, or other published material you have written or edited, including material published only on the Internet. Supply four (4) copies of all published material to the Committee.

Prosecutor's Comment About Judges Is Absurd, New York Law Journal 2, Nov. 25, 2003. A copy is supplied.

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Governmental Action and the National Association of Securities Dealers, 47 Fordham L. Rev. 585 (1979). A copy is supplied.

As a first-year college student (1972 – 1973), I was a staff reporter for the Columbia Spectator, the college newspaper. I wrote several articles that appeared in the Spectator that year, but I have been unable to locate copies.

b. Supply four (4) copies of any reports, memoranda or policy statements you prepared or contributed in the preparation of on behalf of any bar association, committee, conference, or organization of which you were or are a member. If you do not have a copy of a report, memorandum or policy statement, give the name and address of the organization that issued it, the date of the document, and a summary of its subject matter.

None that I recall or have been able to identify.

c. Supply four (4) copies of any testimony, official statements or other communications relating, in whole or in part, to matters of public policy or legal interpretation, that you have issued or provided or that others presented on your behalf to public bodies or public officials.

None that I recall or have been able to identify.

d. Supply four (4) copies, transcripts or recordings of all speeches or talks delivered by you, including commencement speeches, remarks, lectures, panel discussions, conferences, political speeches, and question-and-answer sessions. Include the date and place where they were delivered, and readily available press reports about the speech or talk. If you do not have a copy of the speech or a transcript or recording of your remarks, give the name and address of the group before whom the speech was given, the date of the speech, and a summary of its subject matter. If you did not speak from a prepared text, furnish a copy of any outline or notes from which you spoke.

Over the past 25 years, I have spoken to and/or been a panelist at several professional conferences involving various bar groups and law enforcement groups. The subjects have usually included criminal law and procedure, evidence, trial advocacy, and the United States Sentencing Guidelines. Except as set forth below, I do not recall the details of these appearances. I do not believe there were any press reports.

Panelist for New York State Bar Association Seminar, Federal Criminal Practice: Demystifying the Process, New York, New York, April 16, 2004. Outline supplied.

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Panelist for Second Circuit Judicial Conference Seminar, Judging Under the Guidelines, New Paltz, New York, June 7, 2002. Transcript of Conference Seminar supplied.

Panelist for Pace Law School Seminar, Mastering Cross Examination, White Plains, New York, September 29, 2001. Outline supplied.

I recall speaking before the Senior Society of Nacoms, an undergraduate and alumni organization of Columbia University, in approximately 1986. I do not have a copy of my remarks. I recall that the subject matter was my experience as a federal prosecutor.

e. List all interviews you have given to newspapers, magazines or other publications, or radio or television stations, providing the dates of these interviews and four (4) copies of the clips or transcripts of these interviews where they are available to you.

Over the last 25 years, I have been interviewed and quoted many times in newspaper or magazine articles, typically about cases in which I have been involved. I have been able to locate copies of a number of the articles, which are listed below. There have been other occasions in which I have been quoted in media reports, but I have been unable to locate these reports. Copies of these articles are supplied.

"Schumer Backs Westchester Lawyer Vincent Briccetti for Federal Judge," The Journal News, June 25, 2010
"Look for Sotomayor to Add Heat," The Wall Street Journal, June 2, 2009
"Informer's Role in Bombing Plot," The New York Times, May 23, 2009
"NYC Terror Plot: A Timeline of Events," wcbstv.com, May 22, 2009
"Scarsdale Woman Might Get Dismissal," The Journal News, May 8, 2009
"Mother: Kicking Girls Out Was Error," Chicago Tribune, May 8, 2009
"Ossining Man, 71, Pleads Guilty to Bank Holdup," The Journal News, Apr. 30, 2009
"Lawyer: Woman Didn't Abandon Children," The Journal News, Apr. 25, 2009
"Mom Who Left Kids Says She Came Right Back," The Associated Press, Apr. 25, 2009
"Global Spotlight is on Scarsdale Mother Accused of 'Dumping Daughters Roadside,'" Apr. 23, 2009 (one of many articles containing the same quote)
"Mom in Drive-Off Case Allowed Contact with Kids," The Associated Press, Apr. 22, 2009
"Financial Planner, 71, Charged in Peekskill Bank Robbery," The Journal News, Jan. 23, 2009
"Former Ramapo Cop Stole $144G in Disability Benefits," The Journal News, Jan. 7, 2009

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"State Senate Aide Possessed Child Pornography, U.S. Says," The New York Times, Oct. 17, 2008
"Putnam Lawyer Charged with Possessing Child Porn," The Journal News, Oct. 16, 2008
"Friends Mourn Death of Judge Brieant at 87," The Journal News, July 22, 2008
"Local Lawyers Recall Bush's AG Nominee as Smart, Fair," The Journal News, Sept. 18, 2007
"Disappointed Buyer Loses Suit Over Bona Fides of Antique Car," New York Law Journal, May 11, 2007
"Principal Admits Bilking District," The Journal News, June 29, 2006
"New City Couple, 3 Kids Indicted in $3.5M Fraud," The Journal News, Dec. 28, 2005
"Con Suspect Made Pitch in Haverstraw," The Journal News, Dec. 3, 2005
"2 Owners of 28 Dunkin' Donut Shops Admit Evading Taxes," The Journal News, Nov. 18, 2005
"Two Dunkin Donuts Operators Plead Guilty to Tax Evasion," The Associated Press, Nov. 18, 2005.
"Defense Lawyers Like Court's Ruling," The Journal News, Jan. 13, 2005
"NYC Man Gets Conditional Discharge in Sex Sting," The Journal News, July 16, 2004
"Ex-Educator Gets 6 Weekends in Jail on Child-Porn Charges," The Journal News, July 15, 2004
"Analysis," The Journal News, Mar. 6, 2004
"Hurley Crony Gets Probation, Fine; Developer Helped to Defraud Taxpayers Living in Stony Point," The Journal News, Jan. 27, 2004
"New Sex Rap vs. Headmaster," New York Daily News, Nov. 13, 2003
"'Pervy' Preppie Master Resigns," The New York Post, Nov. 13, 2003
"Hurley Pleads Guilty," The Journal News, Oct. 8, 2003
"New Charges Added Against Stony Point Supervisor," The Associated Press, Apr. 25, 2003
"Mouse Trapped," New York Magazine, Feb. 25, 2002
"Priest Sentenced to Weekend in Jail," Advocate, Nov. 29, 2001
"More Sex Allegations Lodged Against Priest; Lawsuit Says Castaldo Assaulted Altar Boy in 1991," Greenwich Time, Oct. 27, 2001
"Priest Facing Suit in Alleged Sex Assault on Altar Boy," New Haven Register, Oct. 27, 2001
"Priest Guilty in Sex Chat," The Journal News, Sept. 8. 2001
"Humor and Wit," Westchester County Business Journal, Apr. 9, 2001
"Two at Bronx Housing Agency to be Indicted, Lawyers Say," The New York Times, Apr. 3, 2001
"Ex-Official Admits Violating Probation," The Journal News, Mar. 16, 2001
"Demons still haunt sex offender now facing parole charge," The Journal News, Mar. 5, 2001
"Albert Pirro is Sentenced to 29 Months," New York Law Journal, Nov. 2, 2000
"Pirro Faces Last Chapter in Tax Case," The Journal News, Oct. 30, 2000

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"Anti-Eviction Programs Pushed by City Hall Are in Disarray," The New York Times, Sept. 18, 2000
"Pirro Defense Rests," The Journal News, June 14, 2000
"Ex-Official Pleads Guilty to Sodomizing 2 Boys," The Journal News, June 3, 2000
"Experts: D.A. Ties Strained," The Journal News, May 28, 2000
"D.A. Not in Court with Husband," The Journal News, May 17, 2000
"'Pirro' Judge, Lawyers are Veterans of High-Profile Cases," New York Law Journal, May 8, 2000
"Swindler Faces More Jail Time," The Journal News, Oct. 6, 1999
"Broken Confidence Leads to Guilty Plea," The New York Times, Oct. 5, 1999
"Inmate Held in Plot to Kill Judge," The Journal News, July 21, 1999
"Government: Executives Shredded and Concealed Documents," The Associated Press, Apr. 22, 1998
"Taped Comment Barred in Texaco Case," Associated Press Online, Apr. 22, 1998
"'Top Dog' Often Wins Race to Cooperate with Prosecutors," The Journal Record, Apr. 2, 1998
"Untangling Texaco's Discrimination Case," The Journal News, July 21, 1997
"Texaco Papers Emerge in Probe; Executives Distrusted Lawyers in Race Case, Investigators Says," The Dallas Morning News, July 15, 1997
"Prosecutor: Parts of Texaco Tapes Erased," USA Today, July 11, 1997
"Former Texaco Treasurer Indicted in Racial Bias Case; Official Said to Order Documents Shredded," The Baltimore Sun, June 28, 1997
"Daiwa Trader Writes Tell-All Book From Jail; Banking: Former Broker Lost $1.1 Billion in Unauthorized Trades at New York Branch. He Says Managers Were Inept," Los Angeles Times, Jan. 8. 1997
"Daiwa Bank Ex-Dealer Given 4 years, 2 Mil. Dollars Fine," The Daily Yomiuri, Dec. 18, 1996
"Correction Ex-New York," Agence France Presse, Dec. 17, 1996
"Blacksburg Surgeon Heading to Prison for Tax Scheme," The Roanoke Times, Mar. 6, 1996
"Judge Denies Bail to Bank Embezzler," Albany Times-Union, Nov. 8, 1995.
"Guilty Bond Trader: Bosses Were In On It," New York Daily News, Oct. 20, 1995
"Ex-Daiwa Trader Says Bosses Knew of Fraud Banker Claims Execs Encouraged Deceptions," Watertown Daily Times, Oct. 20, 1995
"Calvi, Langella Acquitted of Fraud, Conspiracy Charges," The Herald Statesman, Apr. 14, 1994
"Paul, Hastings, Janofsky & Walker Expands Stamford-Based Operations," Fairfield County Business Journal, Feb. 19, 1990
"Mrs. Helmsley's Feffer Known for 'Making Cases Go Away,'" New York Law Journal, Aug. 10, 1989
"John Galanis' Empire Fell Before Federal Prosecutors," Westchester County Business Journal, Dec. 19, 1988

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"Galanis Surrenders in San Diego to Begin Serving 27-Year Term; Notorious Con Man Who Left a Trail of Unhappy Investors to Serve One of Stiffest Sentences Ever in White-Collar Crime," Los Angeles Times, Oct. 26, 1988
"Success Story Ends with a Prison Term," Los Angeles Times, Oct. 11, 1988
"Ex-Point Loma High Big Shot Headed for Jail in Galanis Case," The San Diego Union-Tribune, Oct. 7, 1988
"Galanis Receives Stiff Sentence in Fraud Case; Gets 27 Year for Bilking Victims of $150 Million; Attorney Vows to Appeal," Los Angeles Times, Sept. 29, 1988
"Galanis Is Given 27 Years in Prison on Fraud Charges," The Wall Street Journal, Sept. 29, 1988
"Stock Promoter Gets 27 Years," Stamford Advocate, September 29, 1988
"Banker Gets 20 Years for Bribery, Racketeering," Stamford Advocate, Sept. 21, 1988
"Convicted Greenwich Financier Galanis Insists on His Innocence," Fairfield County Business Journal, July 11, 1988
"Galanis Found Guilty in Investment Scams," The San Diego Union-Tribune, July 6, 1988
"2 Convicted, 2 Freed, in Tax-Shelter Case," The Reporter Dispatch, July 6, 1988
"Galanis Is Found Guilty of Racketeering and Fraud," Philadelphia Inquirer, July 6, 1988
"A Wizard of Finances Offers His Side of the Story," Philadelphia Inquirer, Feb. 1, 1988
"Ex-Cochecton Official Found Guilty," The Times Herald Record, Nov. 21, 1987
"New Charges in Massive Tax Fraud Case," The Associated Press, Sept. 16, 1987
"Ex-San Diegan Admits Bilking 2,500 Investors," Los Angeles Times, June 23, 1987
"Galanis, 5 Others Plead Innocent in Tax Shelter Case," Philadelphia Daily News, June 23, 1987
"Tax Shelter Promoter, Co-Defendants Plead Innocent," The Associated Press, June 22, 1987
"Galanis Associate Admits to Fraud," Philadelphia Inquirer, June 19, 1987
"6 Indicted in Galanis Tax Shelters," Philadelphia Inquirer, June 12, 1987
"Six Charged in Tax-Shelter Scam," Newsday, June 12, 1987
"New Jersey and Metro News in Brief," Philadelphia Inquirer, May 16, 1987
"Convicted Con Man is Charged in $100M Tax-Shelter Scams," Newsday, May 13, 1987
"Shelter Promoter Is Charged," The New York Times, May 13, 1987
"Feds, New York Charge Tax Shelter Promoter with Huge Fraud," The Associated Press, May 13, 1987
"Galanis Charged with Fraud in NATCO and Other Tax Deal," Philadelphia Inquirer, May 13, 1987
"Rancho Santa Fe Man Admits Evading Taxes," The San Diego Union-Tribune, Jan. 31, 1987

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"Ex-NATCO Executive Enters Plea; Will Aid in Investment-Fraud Probe," Philadelphia Inquirer, Jan. 30, 1987
"Domestic News," United Press International, Jan. 7, 1987
"Counterfeiter Gets 2 Years," The Reporter Dispatch, 1986
"3 Sentenced, Fined In Credit Card Ring," New York Newsday, Apr. 11, 1986
"Man sentenced for arranging marriages," The Reporter Dispatch, Feb. 22, 1986
"Former Yonkers postman convicted of mail fraud," The Reporter Dispatch. Feb. 11, 1986
"Admits Thefts in Bank," New York Daily News, Dec. 7, 1985

In addition, although I declined to answer any questions about my clients or my nomination, I was quoted in an article on a blog called "Future of Capitalism" on the day following my nomination as confirming I had represented certain clients.

I have also been interviewed on a radio program called "Don't Worry Murray," hosted by Murray Richman, on radio station WVOX-AM in New Rochelle, New York, on two or three occasions over the past five years. I have been unable to locate any clips of these radio interviews.

13. **Judicial Office**: State (chronologically) any judicial offices you have held, including positions as an administrative law judge, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

I have not held a judicial office.

a. Approximately how many cases have you presided over that have gone to verdict or judgment?

i. Of these, approximately what percent were:

jury trials:
bench trials:

civil proceedings:
criminal proceedings:

b. Provide citations for all opinions you have written, including concurrences and dissents.

c. For each of the 10 most significant cases over which you presided, provide: (1) a capsule summary of the nature the case; (2) the outcome of the case; (3) the name and contact information for counsel who had a significant role in the trial of the case; and (3) the citation of the case (if reported) or the docket number and a copy of the opinion or judgment (if not reported).

d. For each of the 10 most significant opinions you have written, provide: (1) citations for those decisions that were published; (2) a copy of those decisions that

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were not published; and (3) the names and contact information for the attorneys who played a significant role in the case.

e. Provide a list of all cases in which certiorari was requested or granted.

f. Provide a brief summary of and citations for all of your opinions where your decisions were reversed by a reviewing court or where your judgment was affirmed with significant criticism of your substantive or procedural rulings. If any of the opinions listed were not officially reported, provide copies of the opinions.

g. Provide a description of the number and percentage of your decisions in which you issued an unpublished opinion and the manner in which those unpublished opinions are filed and/or stored.

h. Provide 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, provide copies of the opinions.

i. Provide citations to all cases in which you sat by designation on a federal court of appeals, including a brief summary of any opinions you authored, whether majority, dissenting, or concurring, and any dissenting opinions you joined.

14. **Recusal:** If you are or have been a judge, identify the basis by which you have assessed the necessity or propriety of recusal (If your court employs an "automatic" recusal system by which you may be recused without your knowledge, please include a general description of that system.) Provide a list of any cases, motions or matters that have come before you in which a litigant or party has requested that you recuse yourself due to an asserted conflict of interest or in which you have recused yourself sua sponte. Identify each such case, and for each provide the following information:

I have not served as a judge.

a. whether your recusal was requested by a motion or other suggestion by a litigant or a party to the proceeding or by any other person or interested party; or if you recused yourself sua sponte;

b. a brief description of the asserted conflict of interest or other ground for recusal;

c. the procedure you followed in determining whether or not to recuse yourself;

d. your reason for recusing or declining to recuse yourself, including any action taken to remove the real, apparent or asserted conflict of interest or to cure any other ground for recusal.

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

a. List chronologically any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. If appointed, please include the name of the individual who appointed you. Also, state chronologically any unsuccessful candidacies you have had for elective office or unsuccessful nominations for appointed office.

I have not held public office. I have had no unsuccessful candidacies for elective office or unsuccessful nominations for appointed office.

b. List all memberships and offices held in and services rendered, whether compensated or not, to any political party or election committee. If you have ever held a position or played a role in a political campaign, identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

I am a registered Democrat. I have never held a position in a political campaign. In approximately 2003, I served as co-host for a fundraiser for Senator Joe Lieberman, who was running for President.

16. **Legal Career:** Answer each part separately.

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

i. 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;

From 1980 to 1982, I served as a law clerk to the Honorable John M. Cannella, United States District Judge for the Southern District of New York.

ii. whether you practiced alone, and if so, the addresses and dates;

I practiced alone from 1992 to 1993 at the address of 925 Westchester Avenue, White Plains, New York 10604.

iii. 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.

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1982 – 1984
Townley & Updike (since dissolved)
405 Lexington Avenue
New York, New York 10174
Associate Attorney

1985 – 1989
United States Attorney's Office for the Southern District of New York
One St. Andrew's Plaza
New York, New York 10007
Assistant United States Attorney (1985 – 1989)
Deputy Chief Appellate Attorney (1988 – 1989)

1989 – 1992
Paul, Hastings, Janofsky & Walker
1055 Washington Boulevard
Stamford, Connecticut 06901
Associate Attorney

1993 – 2000
Briccetti & Calhoun
140 Grand Street
White Plains, New York 10601
Partner

2000 – Present
Briccetti, Calhoun & Lawrence, LLP
81 Main Street, Suite 450
White Plains, New York 10601
Partner

iv. whether you served as a mediator or arbitrator in alternative dispute resolution proceedings and, if so, a description of the 10 most significant matters with which you were involved in that capacity.

I have not served as a mediator or arbitrator in alternative dispute resolution proceedings.

b. Describe:

i. the general character of your law practice and indicate by date when its character has changed over the years.

From 1982 to 1984, as an associate at Townley & Updike, I was exclusively engaged in civil litigation, including commercial litigation and products liability litigation. I handled pretrial discovery matters,

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researched and wrote motion papers, argued several motions in court, and participated in several civil trials as a second or third seat. I also handled one trial on my own. I practiced in both state and federal court.

From 1985 to 1989, I was a federal prosecutor. I concentrated on so-called "white collar" offenses, although I handled a wide variety of other types of criminal cases (e.g., bank robbery, narcotics, public corruption, counterfeiting, postal offenses). I was the sole or lead attorney on all of my cases, trials, and appeals. As Deputy Chief Appellate Attorney, I argued and supervised the argument of a wide variety of criminal appeals, and worked closely with the United States Attorney and various Unit Chiefs, as well as "line" Assistants, on litigation strategy and tactics.

From 1989 to 1992, as a senior associate at Paul, Hastings, Janofsky & Walker in Stamford, Connecticut, I was engaged primarily in civil litigation, including commercial litigation, employment litigation, bankruptcy litigation, and securities litigation. I also represented individuals and business entities charged with or being investigated for criminal offenses. I had primary responsibility for most of the matters on which I worked, and supervised the work of more junior associates. I had several trials in which I was the lead attorney on the case, and one trial in which I worked with a senior partner of the firm. I practiced in both state and federal court.

In 1992, I founded my own firm in White Plains, New York. In 1993, I formed Briccetti & Calhoun, and in 2000, we expanded to form Briccetti, Calhoun & Lawrence, LLP. Since 1992, I have been primarily engaged in criminal defense work, concentrating on "white collar" defense. The types of cases I have handled include tax fraud, bank fraud, mail and wire fraud, securities fraud, public corruption, criminal antitrust, obstruction of justice, immigration fraud, and money laundering. I have also handled a great deal of non-"white collar" cases, including, for example, cases involving terrorism, narcotics trafficking, assaults, threats, armed robbery, harassment, sexual misconduct, and driving while intoxicated. About 20 percent of my work has been civil litigation, primarily commercial and fraud litigation. I practice in both state and federal court, although the large majority of my work has been in federal court.

On several occasions in the last five years, I have served as a special prosecutor, appointed by the Administrative Judge for the Ninth Judicial District of the New York State court system, in criminal cases in which the District Attorney's office (Westchester or Putnam Counties) has recused itself.

ii. your typical clients and the areas at each period of your legal career, if any, in which you have specialized.

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From 1982 until 1984, I represented individuals and business entities in civil litigation. As an Assistant United States Attorney from 1985 until 1989, I represented the United States. On return to private practice in 1989, I represented individuals and business entities in civil litigation as well as those charged with or being investigated for criminal offenses.

Since 1992, I have been engaged in a small-firm criminal defense practice. Most of my work is in the White Plains federal court or in other courts in Westchester and nearby counties, although I have also had cases in New York City, Connecticut, and New Jersey. I primarily represent individuals charged with or being investigated for criminal offenses, mostly federal criminal offenses. I have represented a large number of professional persons, such as attorneys, doctors, and accountants, as well as government officials and law enforcement agents, whose licenses and careers are always at stake. I am also on the Criminal Justice Act Panel (CJA) in White Plains, and I average about five assignments per year for indigent defendants in federal criminal cases. My appointed cases tend to be narcotics or other "street crime" cases, although I have also received CJA assignments in fraud, public corruption, and terrorism cases.

c. Describe the percentage of your practice that has been in litigation and whether you appeared in court frequently, occasionally, or not at all. If the frequency of your appearances in court varied, describe such variance, providing dates.

One hundred percent of my practice has been in litigation. As an associate attorney early in my career, I appeared in court occasionally. As an Assistant United States Attorney and in my private practice since 1992, I have appeared in court frequently.

i. Indicate the percentage of your practice in:
   1. federal courts: 80%
   2. state courts of record: 20%
   3. other courts:
   4. administrative agencies:

ii. Indicate the percentage of your practice in:
   1. civil proceedings: 20%
   2. criminal proceedings: 80%

d. State the number of cases in courts of record, including cases before administrative law judges, you tried to verdict, judgment or final decision (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

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I have tried approximately 50 cases to verdict or judgment. I was sole counsel in approximately 35 cases, chief counsel in approximately 5 cases, and associate counsel in approximately 10 cases.

i. What percentage of these trials were:
   1. jury: 80%
   2. non-jury: 20%

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

I have not practiced before the Supreme Court of the United States.

17. **Litigation**: Describe the ten (10) most significant litigated matters which you personally handled, whether or not you were the attorney of record. 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. Texasgulf litigation. There are several reported decisions in the case, of which Woodling v. Garrett Corp., 813 F.2d 543 (2d Cir. 1987), is the principal one. Woodling was decided after I left Townley & Updike. District Judge was Gerard L. Goettel.

This was a series of related cases that I worked on when I was a junior associate at Townley & Updike, between 1982 and 1984. The cases arose out of the crash of a corporate jet at Westchester County Airport in 1981 in which the pilots and all six passengers were killed. Numerous lawsuits were filed by the estates of the victims against our client, who was the victims' employer as well as the owner/operator of the jet. Other parties were also sued. I participated extensively in the pretrial discovery and motion phases of the cases, and I also participated in two trials in federal court in a supporting role. My principal job at trial was to help prepare some of the expert witnesses we called to testify and also to prepare for the cross-examination of some of expert witnesses called by adverse parties.

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Opposing counsel: Since I was a junior associate on this case, I did not, for the most part, interact directly with counsel for opposing parties. One adversary who would be familiar with my work is Richard F. Lawler, Esq., 200 Park Avenue, New York, NY 10166, (212) 294-6700.

Co-counsel: James M. Altieri, Esq. Mr. Altieri was the attorney at Townley & Updike with whom I worked most closely on this case. His present address is: Drinker, Biddle & Reath, LLP, 500 Campus Drive, Florham Park, NJ 07932, (973) 549-7060.

2. Morganbesser v. Colonial Gold, 2: 91-1021 (JAC) (D. Conn.). District Judge was Jose A. Cabranes.

I was assigned to work on this case when I was a senior associate at Paul, Hastings, Janofsky & Walker. I had primary responsibility for the case, although I reported to a partner of the firm. We represented the trustees of a large union pension fund, who were the plaintiffs in the case. The trustees sued various promoters, attorneys, and a bank in connection with a several million-dollar investment the pension fund made in certain real estate development projects. I handled the case from the pre-complaint stage, through the drafting of the complaint, and through extensive pretrial motions and discovery. Ultimately, the case was settled after a lengthy mediation process.

Principal opposing counsel: Vincent M. Amoroso, Esq., Last known address and telephone number: One Beacon Street, Boston, MA, (617) 723-4500.

3. United States v. Sabol, 85 Cr. 842 (CLB) (S.D.N.Y.). District Judge was Charles L. Brieant (deceased).

I prosecuted this case and a related case, United States v. Anthony Giaimo, (docket no. unknown). Both cases went to trial and resulted in convictions of a total of four defendants for engaging in credit card fraud and credit card counterfeiting. The defendants received lengthy prison terms. The Sabol convictions were affirmed on appeal. 814 F.2d 654 (2d Cir. 1987). The Giaimo conviction was not appealed. These cases involved an extensive amount of investigation, through the grand jury and otherwise. The trials were challenging because the defendants were dangerous and belligerent, there were a number of difficult and uncooperative witnesses, and the evidence was not overwhelming.

Principal opposing counsel: Murray Richman, Esq., 2027 Williamsbridge Road, Bronx, NY 10461, (718) 892-8588; and Michael Keesee, Esq., 327 Irving Avenue, Port Chester, NY 10573, (914) 937-3880.

4. United States v. Galanis, 87 Cr. 520 (CLB) (S.D.N.Y.). District Judge was Charles L. Brieant (deceased).

I handled this case from its inception in the U.S. Attorney's Office, through trial and appeal. There was extensive investigation involving the FBI, the IRS, and other

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agencies. The investigation resulted in the convictions of about twenty defendants for various crimes, including racketeering, tax fraud, securities fraud, and bank fraud. Four defendants went to trial, which lasted fourteen weeks. The two principal defendants were convicted and were sentenced to lengthy prison terms. Two defendants were acquitted at trial (although one of the two later pleaded guilty to a related tax fraud charge). One defendant ultimately withdrew his appeal, and the other defendant's conviction was affirmed. 875 F.2d 857 (2d Cir. 1989). I received the Justice Department's Director's Award for Superior Performance for my work on this case.

Principal opposing counsel: John R. Wing, Esq., Lankler, Siffert & Wohl, LLP, 500 Fifth Avenue, New York, NY 10110, (212) 921-8399; Alan Levine, Esq., 1114 Avenue of the Americas, New York, NY 10036, (212) 479-6000; and John J. Byrnes, Esq., Federal Defenders of New York, Inc., 52 Duane Street, New York, NY 10007, (212) 417-8735.

Co-counsel: Stephen C. Robinson, Esq., Skadden, Arps, Slate, Meagher & Flom, LLP, Four Times Square, New York, NY 10036, (212) 735-2800.

5. United States v. Jenkins, 87 Cr. 768 (MGC) (S.D.N.Y.). District Judge was Miriam Goldman Cedarbaum.

I was assigned to this case after the District Court had dismissed one of two counts of an indictment and suppressed most of the relevant evidence in the case. The defendant, a New York State Senator, was charged with attempting to transport unlawfully a substantial sum of cash outside the United States. I handled the government's appeal of the suppression order, and the Second Circuit reversed. 876 F.2d 1085 (2d Cir. 1989). Later, after I had left the U.S. Attorney's Office, the defendant was convicted and his conviction was affirmed. 943 F.2d 167 (2d Cir. 1991). This was a significant case because of the creative appellate strategy we employed and because the defendant was a public official.

Opposing counsel: Samuel A. Abady, Esq., address unknown, (914) 337-7377.

Co-counsel: Steven A. Standiford, Esq., 8 Travis Place, Hastings, NY 10706, (914) 478-7801.

6. United States v. Walsh, 95 Cr. 978 (S.D.N.Y.) (White Plains). District Judge was Barrington D. Parker, Jr.

The defendant, a locally-prominent attorney, was indicted for bank fraud and conspiracy. He was accused of fraudulently obtaining commercial bank loans in order to invest in real estate development projects. The projects failed. After a three-week jury trial, the defendant was acquitted of six counts relating to the commercial loans, and he was convicted on a single count of submitting a false loan application to obtain a mortgage on his own house. I was retained counsel. I represented the defendant from indictment

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through trial, sentencing, and appeal. The conviction was affirmed on appeal. 119 F.3d 115 (2d Cir. 1997).

Opposing counsel: AUSAs Anthony J. Siano, 333 Westchester Avenue, White Plains, NY 10604), (914) 997-0100, and Hon. Cathy Seibel, United States District Judge, 300 Quarropas Street, White Plains, NY 10601, (914) 390-4271.

Co-counsel (on appeal): James R. DeVita, Esq., Day Pitney, LLP, Seven Times Square, New York, NY 10036, (212) 297-2429.

7. United States v. Lundwall, 97 Cr. 211 (S.D.N.Y.) (White Plains). (Disposition of pretrial motions reported at 1 F. Supp. 2d 249 (S.D.N.Y. 1998).) District Judge was Barrington D. Parker, Jr.

The defendant was an executive at Texaco who secretly tape-recorded conversations with his fellow executives discussing a race discrimination lawsuit pending against the company. He and his boss were indicted for conspiracy to obstruct justice. The government claimed that the defendant and his boss schemed to destroy evidence that was supposed to have been produced in civil discovery. The case received a great deal of publicity because of alleged racially-insensitive remarks made by Texaco executives on the tapes. I was retained counsel. After a three-week jury trial, the defendant was acquitted of all charges.

Opposing counsel: AUSAs Stanley Okula (914) 993-1900 and Elliott Jacobson (914) 993-1940. 300 Quarropas Street, White Plains, NY 10601.

Co-counsel: Ethan Levin-Epstein, Esq., Garrison, Levin-Epstein, Chimes & Richardson, P.C., 405 Orange Street, New Haven, CT 06511, (203) 777-4425.

8. Sacco v. Cooksey, 214 F.3d 270 (2d Cir. 2000). District Judge was Charles L. Brieant (deceased).

This was an appeal by the State of New York of the grant of a writ of habeas corpus to my client. I was appointed counsel in the District Court and on appeal. My client had been convicted of murder in 1991 and was sentenced to 25 years to life. I handled the habeas litigation before the magistrate judge (Hon. Mark D. Fox) and the district judge (Hon. Charles L. Brieant). The principal issue was whether the defendant had received effective assistance of counsel at his trial in 1991. In an 80-page opinion, the magistrate judge recommended that the writ be denied. The district judge then rejected the magistrate judge's recommendation and granted the writ. On appeal to the Second Circuit, the Court reversed. The Supreme Court subsequently denied my client's petition for a writ of certiorari.

Opposing counsel: Deputy Assistant Attorney General David J. Mudd (current address and telephone number unknown).

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9. United States v. Hollender, 01 Cr. 216 (S.D.N.Y., White Plains). (Appellate decisions reported at 2008 WL 162848 (2d Cir. 2008), 466 F.3d 251 (2d Cir. 2006), and 200 Fed. Appx. 15 (2d Cir. 2006). Disposition of certain motions in District Court reported at 207 F. Supp. 2d 269 (S.D.N.Y. 2002), and 162 F. Supp. 2d 261 (S.D.N.Y. 2001).) District Judge was Colleen McMahon.

This was a complex RICO fraud case, involving charges of bank fraud, mail fraud, credit card fraud, insurance fraud, and tax fraud, among other things. I was appointed counsel under the Criminal Justice Act. I represented one of the two defendants who went to trial. After a two-month jury trial, the case ended in a mistrial due to a hung jury. The case was then tried again, and lasted another two months. At the second trial, my client was convicted on approximately half the counts in the indictment. A different attorney represented the defendant on appeal.

Opposing counsel: (Then-AUSA) Hon. Cathy Seibel, United States District Judge, 300 Quarropas Street, White Plains, NY 10601, (914) 390-4271; AUSA Margery Feinzig, 300 Quarropas Street, White Plains, NY 10601, (914) 993-1912; Maria Barton, Esq.; and Sean Eskovitz, Esq.

10. United States v. Cromitie, 09 Cr. 558 (CM) (S.D.N.Y.). (Disposition of certain pretrial motions reported at 2010 WL 3025670 (S.D.N.Y. 2010), and 2009 WL 4059203 (S.D.N.Y. 2009).) District Judge was Colleen McMahon.

This was a terrorism case, involving charges of conspiracy and attempt to use weapons of mass destruction and surface-to-air missiles against synagogues and an air national guard base. I was appointed counsel under the Criminal Justice Act for the lead defendant. In October 2010, after a two-month jury trial, my client was convicted on all counts. Sentencing is pending.

Opposing counsel: AUSAs David A. Raskin (212) 637-2635, Jason P.W. Halperin (914) 993-1933, and Adam S. Hickey (212) 637-1039. One St. Andrew's Plaza, New York, NY 10007.

Counsel for other parties: Theodore S. Green, Esq., Green & Willstatter, 200 Mamaroneck Avenue, White Plains, NY 10601, (914) 948-5656; Mark B. Gombiner, Esq. and Susanne Brody, Esq., Federal Defenders of New York, Inc., 52 Duane Street, New York, NY 10007, (212) 417-8700; Samuel M. Braverman, Esq., 901 Sheridan Avenue, Bronx, NY 10451, (718) 293-1977.

18. **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 fully the nature of your participation in these activities. List any client(s) or organization(s) for whom you performed lobbying activities and describe the lobbying activities you performed on behalf of such client(s) or organizations(s). (Note: As to any facts requested in this question, please omit any information protected by the attorney-client privilege.)

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The most significant legal activities I have pursued that did not progress to trial are the several matters I have handled as a criminal defense attorney where I was able to persuade prosecutors not to charge my clients. Since none of these matters is public, information about them is protected by the attorney-client privilege. Other than these matters, all of my most significant legal matters were cases that went to trial or were litigated matters.

19. **Teaching**: What courses have you taught? For each course, state the title, the institution at which you taught the course, the years in which you taught the course, and describe briefly the subject matter of the course and the major topics taught. If you have a syllabus of each course, provide four (4) copies to the committee.

    I have not taught any courses.

20. **Deferred Income/ Future Benefits**: List the 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. Describe the arrangements you have made to be compensated in the future for any financial or business interest.

    If I am confirmed, my law firm will have to be dissolved. As part of that process, I expect that I will receive payments representing my share of fees collected after dissolution with respect to matters I originated or worked on prior to dissolution. No such arrangements or contracts have been entered into as of yet.

21. **Outside Commitments During Court Service**: 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.

22. **Sources of Income**: 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, licensing fees, honoraria, and other items exceeding $500 or more (if you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here).

    See attached Financial Disclosure Report.

23. **Statement of Net Worth**: Please complete the attached financial net worth statement in detail (add schedules as called for).

    See attached Net Worth Statement.

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24. **Potential Conflicts of Interest**:

a. Identify the family members or other persons, parties, categories of litigation, and financial arrangements that are likely to present potential conflicts-of-interest when you first assume the position to which you have been nominated. Explain how you would address any such conflict if it were to arise.

The principal potential conflict of interest that I foresee is with respect to my law firm. If confirmed, I would recuse myself from any case in which: (i) I was involved when I was in private practice; or (ii) my firm was involved while I was a member of the firm. In addition, for a period of time after taking the bench, I would recuse myself from any case in which my firm or any of its former partners or associates were involved, even if I had not been personally involved in the case and even if the matter arose after I left the firm. Thereafter, if a lawyer from my former firm appeared before me in a case, I would advise all parties and counsel of my prior relationship with the firm.

Another potential conflict of interest would be with respect to Fried, Frank, Harris, Shriver & Jacobson, LLP, where my daughter practices as an associate. If confirmed, I would recuse myself from any case in which that firm was involved.

b. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern.

I will handle all matters involving actual or potential conflicts of interest through the careful and diligent application of 28 U.S.C. § 455 and other relevant statutory provisions, the Code of Conduct for United States Judges and any other relevant Canon, and any applicable policies and procedures of the United States Courts.

25. **Pro Bono Work**: 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.

From 1993 to the present, I have been a member of the Criminal Justice Act Panel in White Plains, and I average about five assignments per year for indigent defendants in federal criminal cases. I am paid a fee for this work by the United States Courts, although at a rate which is approximately 80% less than my normal hourly rate.

On many occasions over the last twenty years, I have represented individuals who could not afford to pay me in various matters for which I did not charge a fee. These matters were usually minor criminal matters or matters that did not require a court appearance.

From 2005 to the present, I have been a member of the Board of Directors of the Federal Defenders of New York, Inc., which is a non-profit organization that is the principal

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provider of defense services to indigent defendants in the United States District Courts for the Southern and Eastern Districts of New York. I am currently serving as Treasurer and Chairman of the Audit and Finance Committee.

26. **Selection Process**:

a. Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and the interviews in which you participated). Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, please include that process in your description, as well as whether the commission recommended your nomination. List the dates of all interviews or communications you had with the White House staff or the Justice Department regarding this nomination. Do not include any contacts with Federal Bureau of Investigation personnel concerning your nomination.

In August 2001, at the suggestion of friends, colleagues, and judges with whom I am acquainted, I submitted an application to the Judicial Screening Panel for Senator Charles E. Schumer, in the form of a Confidential Questionnaire. In November 2001, I was interviewed by Senator Schumer's Judicial Screening Panel. In February 2002, after I was informed that I was a "finalist" for a district judge position for which Senator Schumer intended to make a recommendation to the White House, I was interviewed by Senator Schumer in his New York office. In March 2002, I was informed that Senator Schumer had decided to recommend a different person for that position. On several occasions between 2002 and 2010, I heard from members of Senator Schumer's Judicial Screening Panel that I was still considered a candidate for a district judge nomination, and I advised them that I remained interested in the position.

In January 2010, the Chairman of Senator Schumer's Judicial Screening Panel asked me to submit an updated Confidential Questionnaire to the Panel, and I did so. In February 2010, I interviewed with Senator Schumer for the second time. On June 3, 2010, I was advised by Senator Schumer's counsel that the Senator had submitted my name to the White House, with a recommendation that I be appointed a United States District Judge for the Southern District of New York.

Since June 8, 2010, I have been in contact with pre-nomination officials at the U.S. Department of Justice regarding the nomination process and nomination paperwork. I interviewed with attorneys from the White House Counsel's Office and the Department of Justice on August 12, 2010. The President submitted my nomination to the Senate on November 17, 2010.

b. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any currently pending or specific case, legal issue or question in a manner that could reasonably be interpreted as seeking any express or

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implied assurances concerning your position on such case, issue, or question? If so, explain fully.

No.

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FINANCIAL DISCLOSURE REPORT
NOMINATION FILING

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
Briccetti, Vincent L.	U.S. District Court for Southern District of New York	11/17/2010
4. Title (Article III judges indicate active or senior status; magistrate judges indicate full- or part-time)	**5a. Report Type (check appropriate type)**	**6. Reporting Period**
District Judge	☑ Nomination, Date 11/17/2010 ☐ Initial ☐ Annual ☐ Final 5b. ☐ Amended Report	01/01/2009 to 10/31/2010
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.**	
81 Main Street, Suite 450 White Plains, NY 10601	Reviewing Officer_____ Date_____	

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

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

☐ NONE *(No reportable positions.)*

POSITION	NAME OF ORGANIZATION/ENTITY
1. Partner	Briccetti, Calhoun & Lawrence, LLP
2. President	Primeview Associates, Inc.
3. Trustee	Trust #1
4. Director/Treasurer	Federal Defenders of New York, Inc.
5.	

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

☑ NONE *(No reportable agreements.)*

DATE	PARTIES AND TERMS
1.	
2.	
3.	

FINANCIAL DISCLOSURE REPORT Page 2 of 9	Name of Person Reporting Briccetti, Vincent L.	Date of Report 11/17/2010

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

A. Filer's Non-Investment Income

☐ NONE *(No reportable non-investment income.)*

	DATE	SOURCE AND TYPE	INCOME (yours, not spouse's)
1.	2010	Briccetti, Calhoun & Lawrence, LLP	$154,976.00
2.	2009	Briccetti, Calhoun & Lawrence, LLP	$207,508.00
3.	2008	Briccetti, Calhoun & Lawrence, LLP	$224,520.00
4.			

B. Spouse's Non-Investment Income - *If you were married during any portion of the reporting year, complete this section.*
(Dollar amount not required except for honoraria.)

☐ NONE *(No reportable non-investment income.)*

	DATE	SOURCE AND TYPE
1.	2010	Greenwich Anesthesiology Associates, P.C. - Salary
2.	2009	Greenwich Anesthesiology Associates, P.C. - Salary
3.	2009	Renaissance Monkey LLC - Seminar
4.		

IV. REIMBURSEMENTS -- *transportation, lodging, food, entertainment.*
(Includes those to spouse and dependent children; see pp. 25-27 of filing instructions.)

☐ NONE *(No reportable reimbursements.)*

	SOURCE	DATES	LOCATION	PURPOSE	ITEMS PAID OR PROVIDED
1	Exempt				
2.					
3.					
4.					
5.					

FINANCIAL DISCLOSURE REPORT Page 3 of 9	Name of Person Reporting Briccetti, Vincent L.	Date of Report 11/17/2010

V. GIFTS. *(Includes those to spouse and dependent children; see pp. 28-31 of filing instructions.)*

☐ NONE *(No reportable gifts.)*

SOURCE	DESCRIPTION	VALUE
1. Exempt		
2.		
3.		
4.		
5.		

VI. LIABILITIES. *(Includes those of spouse and dependent children; see pp. 32-33 of filing instructions.)*

☐ NONE *(No reportable liabilities.)*

CREDITOR	DESCRIPTION	VALUE CODE
1. Dovenmuehle Mortgage Inc.	Mortgage partially on rental property	M
2. Citibank	Student Loan	K
3.		
4.		
5.		

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FINANCIAL DISCLOSURE REPORT Page 4 of 9	Name of Person Reporting Briccetti, Vincent L.	Date of Report 11/17/2010

VII. INVESTMENTS and TRUSTS – *Income, value, transactions (Includes those of spouse and dependent children; see pp. 14-60 of filing instructions.)*

☐ NONE *(No reportable income, assets, or transactions.)*

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A-H)	B. (2) Type (e.g., div., rent, or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, redemption)	D. (2) Date Month - Day	D. (3) Value Code 2 (J-P)	D. (4) Gain Code 1 (A-H)	D. (5) Identity of buyer/seller (if private transaction)
1. Rental Property #1, South Salem, NY (1993, $62,458)	B	Rent	L	R	Exempt				
2. Chase Bank, Various Accounts	A	Interest	L	T					
3. Fidelity Growth Company Fund	A	Dividend	K	T					
4. Fidelity NY Muni MM Fund	A	Dividend	J	T					
5. General NY Muni MM Fund Class B	A	Interest	K	T					
6. Vanguard NY LT Tax-Exempt Fund Investor	A	Dividend	J	T					
7. IRA #1	C	Dividend	L	T					
8. - Vanguard Growth & Income Fund									
9. - Vanguard 500 Index Fund									
10. - Vanguard Windsor II Fund									
11. - Vanguard Wellington Fund									
12. IRA #2	C	Dividend	M	T					
13. - Vanguard Growth & Income Fund									
14. - Vanguard 500 Index Fund									
15. - Vanguard Windsor II Fund									
16. - Vanguard Wellington Fund									
17. 401 (K) #1	E	Dividend	N	T					

1 Income Gain Codes (See Columns B1 and D4)
2 Value Codes (See Columns C1 and D3)
3 Value Method Codes (See Column C2)

A =$1,000 or less
F =$50,001 - $100,000
J =$15,000 or less
N =$250,001 - $500,000
P3 =$25,000,001 - $50,000,000
Q =Appraisal
U =Book Value

B =$1,001 - $2,500
G =$100,001 - $1,000,000
K =$15,001 - $50,000
O =$500,001 - $1,000,000

R =Cost (Real Estate Only)
V =Other

C =$2,501 - $5,000
H1 =$1,000,001 - $5,000,000
L =$50,001 - $100,000
P1 =$1,000,001 - $5,000,000
P4 =More than $50,000,000
S =Assessment
W =Estimated

D =$5,001 - $15,000
H2 =More than $5,000,000
M =$100,001 - $250,000
P2 =$5,000,001 - $25,000,000

T =Cash Market

E =$15,001 - $50,000

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FINANCIAL DISCLOSURE REPORT Page 5 of 9	Name of Person Reporting Briccetti, Vincent L.	Date of Report 11/17/2010

VII. INVESTMENTS and TRUSTS – *income, value, transactions (includes those of spouse and dependent children; see pp. 34-68 of filing instructions.)*

☐ NONE *(No reportable income, assets, or transactions.)*

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A-H)	(2) Type (e.g., div., rent, or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	(2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, redemption)	(2) Date Month - Day	(3) Value Code 2 (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)
18. - American Funds The Growth Fund of America									
19. - Wellington Management Company Mid Cap Stock Fund									
20. - Franklin Templeton Investments International Value Fund									
21. - American Funds EuroPacific Growth Fund									
22. - American Funds American Balanced Fund									
23. - MFC Global Investment Mgmt. Small Cap Index Fund									
24. - MFC Global Investment Mgmt. Mid Cap Index Fund									
25. - PIMCO Total Return Fund									
26. - PIMCO Real Return Fund									
27. - Russell Investment Group Russell Balanced Fund									
28. 401 (K) #2	D	Dividend	M	T					
29. - Vanguard Wellington Fund									
30. Northwestern Mutual Whole Life Policy	C	Dividend	L	T					
31. Northwestern Variable Life Policy #1	A	Dividend	K	T					
32. - Northwestern MM									
33. - Northwestern Balanced									
34. - Northwestern Index 500 Stock									

1. Income Gain Codes (See Columns B1 and D4)
2. Value Codes (See Columns C1 and D3)
3. Value Method Codes (See Column C2)

A =$1,000 or less
B =$1,001 - $2,500
C =$2,501 - $5,000
D =$5,001 - $15,000
E =$15,001 - $50,000
F =$50,001 - $100,000
G =$100,001 - $1,000,000
H1 =$1,000,001 - $5,000,000
H2 =More than $5,000,000
I =$15,000 or less
K =$15,001 - $50,000
L =$50,001 - $100,000
M =$100,001 - $250,000
N =$250,001 - $500,000
O =$500,001 - $1,000,000
P1 =$1,000,001 - $5,000,000
P2 =$5,000,001 - $25,000,000
P3 =$25,000,001 - $50,000,000
P4 =More than $50,000,000
Q =Appraisal
R =Cost (Real Estate Only)
S =Assessment
T =Cash Market
U =Book Value
V =Other
W =Estimated

FINANCIAL DISCLOSURE REPORT Page 6 of 9	Name of Person Reporting Briccetti, Vincent L.	Date of Report 11/17/2010

VII. INVESTMENTS and TRUSTS -- *Income, value, transactions (includes those of spouse and dependent children; see pp. 34-60 of filing instructions.)*

☐ NONE *(No reportable income, assets, or transactions.)*

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount - Code 1 (A-H)	B. (2) Type (e.g., div., rent, or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, redemption)	D. (2) Date Month - Day	D. (3) Value Code 2 (J-P)	D. (4) Gain Code 1 (A-H)	D. (5) Identity of buyer/seller (if private transaction)
35. - Northwestern Growth Stock									
36. - Northwestern Index 400 Stock									
37. - Northwestern Small Cap Growth Stock									
38. - Russell Real Estate Securities									
39. *Northwestern Variable Life Policy #2*	B	Dividend	K	T					
40. - Northwestern MM									
41. - Northwestern Balanced									
42. - Northwestern Index 500 Stock									
43. - Northwestern Growth Stock									
44. - Northwestern Index 400 Stock									
45. - Northwestern Small Cap Growth Stock									
46. - Russell Real Estate Securities									
47. New York 529 College Savings Plan	C	Dividend	K	T					
48. - Interest Accumulation Portfolio									
49. - Aggressive Age-Based Option: Income Portfolio									
50 Trust #1	D	Int./Div.	M	T					
51. - DWS High Income Plus Fund									

1 Income Gain Codes. (See Columns B1 and D4)
2 Value Codes (See Columns C1 and D3)
3 Value Method Codes (See Column C2)

A =$1,000 or less
F =$30,001 - $100,000
J =$15,000 or less
N =$250,001 - $500,000
P3 =$25,000,001 - $50,000,000
Q =Appraisal
U =Book Value

B =$1,001 - $2,500
G =$100,001 - $1,000,000
K =$15,001 - $50,000
O =$500,001 - $1,000,000
R =Cost (Real Estate Only)
V =Other

C =$2,501 - $5,000
H1 =$1,000,001 - $5,000,000
L =$50,001 - $100,000
P1 =$1,000,001 - $5,000,000
P4 =More than $50,000,000
S =Assessment
W =Estimated

D =$5,001 - $15,000
H2 =More than $5,000,000
M =$100,001 - $250,000
P2 =$5,000,001 - $25,000,000
T =Cash Market

E =$15,001 - $50,000

FINANCIAL DISCLOSURE REPORT Page 7 of 9	Name of Person Reporting Briccetti, Vincent L.	Date of Report 11/17/2010

VII. INVESTMENTS and TRUSTS — *income, value, transactions (Includes those of spouse and dependent children; see pp. 34-60 of filing instructions.)*

☐ NONE *(No reportable income, assets, or transactions.)*

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A-H)	B. (2) Type (e.g., div., rent, or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, redemption)	D. (2) Date Month - Day	D. (3) Value Code 2 (J-P)	D. (4) Gain Code 1 (A-H)	D. (5) Identity of buyer/seller (if private transaction)
52. - DWS NY Tax Free Income Fund									
53. - Croton Harmon NY Union Free School Tax Ex Muni Bond									
54. - Monroe City NY ARPT Auth Rev Tax Ex Muni Bond									
55. - NY Insured Municipal Income Trust Series No. 190									
56. - NY Insured Municipal Income Trust Series No. 160									
57. - NY Insured Municipal Income Trust Series No. 171									
58. - Edward Jones MM									
59. - Metlife Investors Fixed Annuity									

1. Income Gain Codes: (See Columns B1 and D4)
2. Value Codes (See Columns C1 and D3)
3. Value Method Codes (See Column C2)

A =$1,000 or less
F =$99,001 - $100,000
J =$15,000 or less
N =$250,001 - $500,000
P3 =$25,000,001 - $50,000,000
Q =Appraisal
U =Book Value

B =$1,001 - $2,500
G =$100,001 - $1,000,000
K =$15,001 - $50,000
O =$500,001 - $1,000,000

R =Cost (Real Estate Only)
V =Other

C =$2,501 - $5,000
H1 =$1,000,001 - $5,000,000
L =$50,001 - $100,000
P1 =$1,000,001 - $5,000,000
P4 =More than $50,000,000
S =Assessment
W =Estimated

D =$5,001 - $15,000
H2 =More than $5,000,000
M =$100,001 - $250,000
P2 =$5,000,001 - $25,000,000

T =Cash Market

E =$15,001 - $50,000

FINANCIAL DISCLOSURE REPORT Page 8 of 9	Name of Person Reporting Bricetti, Vincent L.	Date of Report 11/17/2010

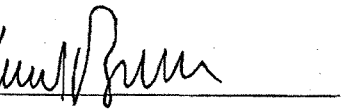
VIII. ADDITIONAL INFORMATION OR EXPLANATIONS. *(Indicate part of Report.)*

FINANCIAL DISCLOSURE REPORT Page 9 of 9	Name of Person Reporting Bricetti, Vincent L.	Date of Report 11/17/2010

IX. CERTIFICATION.

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

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

Signature 

NOTE: ANY INDIVIDUAL WHO KNOWINGLY AND WILFULLY FALSIFIES OR FAILS TO FILE THIS REPORT MAY BE SUBJECT TO CIVIL AND CRIMINAL SANCTIONS (5 U.S.C. app. § 104)

FILING INSTRUCTIONS

Mail signed original and 3 additional copies to:

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

Vincent Briccetti

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		58	457	Notes payable to banks – secured (auto loan)		24	089
U.S. Government securities				Notes payable to banks – unsecured (college loans)		17	650
Listed securities – see schedule		885	061	Notes payable to relatives			
Unlisted securities				Notes payable to others			
Accounts and notes receivable:				Accounts and bills due		5	000
Due from relatives and friends				Unpaid income tax			
Due from others				Other unpaid income and interest			
Doubtful				Real estate mortgages payable—primary residence (including rental unit)		194	957
Real estate owned—primary residence (including rental unit)		900	000	Chattel mortgages and other liens payable			
Real estate mortgages receivable				Other debts-itemize:			
Autos and other personal property		60	000				
Cash value-life insurance		142	079				
Other assets itemize:							
New York 529 College Savings Plan		24	748				
Interest in Law Firm		200	000				
Thrift Savings Plan			32	Total liabilities		241	696
				Net Worth	2	028	681
Total Assets	2	270	377	Total liabilities and net worth	2	270	377
CONTINGENT LIABILITIES				GENERAL INFORMATION			
As endorser, comaker or guarantor on leases or contracts				Are any assets pledged? (Add schedule)	NO		
Legal Claims				Are you defendant in any suits or legal actions?	NO		
Provision for Federal Income Tax				Have you ever taken bankruptcy?	NO		
Other special debt							

FINANCIAL STATEMENT

NET WORTH SCHEDULES

Listed Securities	
American Funds American Balanced Fund	$ 23,165
American Funds EuroPacific Growth Fund	6,076
American Funds The Growth Fund of America	7,423
Fidelity Growth Company Fund	15,348
Fidelity NY Municipal Money Market Fund	10,523
Franklin Templeton Investments International Value Fund	5,787
MFC Global Investment Mgmt. Small Cap Index Fund	5,764
MFC Global Investment Mgmt. Mid Cap Index Fund	4,087
NMIS General NY Municipal Money Market Fund	33,891
PIMCO Total Return Fund	13,448
PIMCO Real Return Fund	4,336
Russell Investment Group Russell Balanced Fund	394,715
Vanguard 500 Index Fund	32,185
Vanguard Growth & Income Fund	32,499
Vanguard NY Long-Term Tax-Exempt Fund	3,055
Vanguard Wellington Fund	244,433
Vanguard Windsor II Fund	38,982
Wellington Management Company Mid Cap Stock Fund	9,344
Total Listed Securities	$ 885,061

67905.570

AFFIDAVIT

I, **VINCENT LOUIS BRICCETTI**, do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

November 19, 2010
(DATE)

(NAME)

Janet Lee Ryder
(NOTARY)

JANET LEE RYDER
Notary Public State of New York
Registration No. 01RY6031978
Qualified in Westchester County
Commission Expires 10-12-2013

BRICCETTI, CALHOUN & LAWRENCE, LLP
ATTORNEYS AT LAW
81 MAIN STREET
SUITE 450
WHITE PLAINS, NEW YORK 10601

VINCENT L. BRICCETTI*
CLINTON W. CALHOUN, III**
KERRY A. LAWRENCE*

*ALSO ADMITTED IN CT
**ALSO ADMITTED IN VA & DC

(914) 946-5900
FAX (914) 946-5906

January 5, 2011

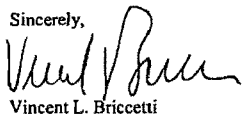
The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

I have reviewed the Senate Questionnaire I previously filed in connection with my nomination on November 17, 2010, to be United States District Judge for the Southern District of New York. I certify that the information contained in that document is, to the best of my knowledge, true and accurate.

I am also forwarding an updated Net Worth Statement and Financial Disclosure Report as requested in the Questionnaire. I thank the Committee for its consideration of my nomination.

Sincerely,



Vincent L. Briccetti

cc: The Honorable Charles Grassley
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

AO 10
Rev. 1/2008

FINANCIAL DISCLOSURE REPORT
NOMINATION FILING

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
Briccetti, Vincent L.	U.S. District Court for the Southern District of New York	01/05/2011
4. Title (Article III judges indicate active or senior status; magistrate judges indicate full- or part-time)	**5a. Report Type (check appropriate type)**	**6. Reporting Period**
District Judge	☑ Nomination, Date 01/05/2011 ☐ Initial ☐ Annual ☐ Final 5b. ☐ Amended Report	01/01/2010 to 12/22/2010
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.**	
81 Main Street, Suite 450 White Plains, NY 10601	Reviewing Officer_____ Date_____	

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

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

☐ NONE *(No reportable positions.)*

POSITION	NAME OF ORGANIZATION/ENTITY
1. Partner	Briccetti, Calhoun & Lawrence, LLP
2. President	Primeview Associates, Inc.
3. Trustee	Trust #1
4. Director/Treasurer	Federal Defenders of New York, Inc.
5.	

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

☑ NONE *(No reportable agreements.)*

DATE	PARTIES AND TERMS
1.	
2.	
3.	

FINANCIAL DISCLOSURE REPORT Page 2 of 9	Name of Person Reporting Briccetti, Vincent L..	Date of Report 01/05/2011

III. NON-INVESTMENT INCOME. *(Reporting individual and spouse: see pp. 17-24 of filing instructions.)*

A. Filer's Non-Investment Income

☐ NONE *(No reportable non-investment income.)*

	DATE	SOURCE AND TYPE	INCOME (yours, not spouse's)
1.	2010	Briccetti, Calhoun & Lawrence, LLP	$203,851.00
2.	2009	Briccetti, Calhoun & Lawrence, LLP	$307,508.00
3.			
4.			

B. Spouse's Non-Investment Income - *If you were married during any portion of the reporting year, complete this section.*
(Dollar amounts not required except for honoraria.)

☐ NONE *(No reportable non-investment income.)*

	DATE	SOURCE AND TYPE
1.	2010	Greenwich Anesthesiology Associates, P.C. - Salary
2.		
3.		
4.		

IV. REIMBURSEMENTS - *(transportation, lodging, food, entertainment.*
(Includes those to spouse and dependent children; see pp. 25-27 of filing instructions.)

☐ NONE *(No reportable reimbursements.)*

	SOURCE	DATES	LOCATION	PURPOSE	ITEMS PAID OR PROVIDED
1.	Exempt				
2.					
3.					
4.					
5.					

FINANCIAL DISCLOSURE REPORT Page 3 of 9	Name of Person Reporting	Date of Report
	Brizzetti, Vincent L.	01/05/2011

V. GIFTS. *(Includes those to spouse and dependent children; see pp. 28-31 of filing instructions.)*

☐ NONE *(No reportable gifts.)*

SOURCE	DESCRIPTION	VALUE
1 Exempt		
2.		
3.		
4.		
5.		

VI. LIABILITIES. *(Includes those of spouse and dependent children; see pp. 32-33 of filing instructions.)*

☐ NONE *(No reportable liabilities.)*

CREDITOR	DESCRIPTION	VALUE CODE
1. Dovenmuehle Mortgage Inc.	Mortgage partially on rental property	M
2. Citibank	Student Loan	K
3.		
4.		
5.		

FINANCIAL DISCLOSURE REPORT Page 4 of 9	Name of Person Reporting Briccetti, Vincent L.	Date of Report 01/05/2011

VII. INVESTMENTS and TRUSTS – *income, value, transactions (Includes those of spouse and dependent children; see pp. 34-60 of filing instructions.)*

☐ NONE *(No reportable income, assets, or transactions.)*

A Description of Assets (including trust assets) Place "(X)" after each asset exempt from price disclosure	B Income during reporting period (1) Amount Code 1 (A-H)	B (2) Type (e.g., div., rent, or int.)	C Gross value at end of reporting period (1) Value Code 2 (J-P)	C (2) Value Method Code 3 (Q-W)	D Transactions during reporting period (1) Type (e.g., buy, sell, redemption)	D (2) Date Month - Day	D (3) Value Code 2 (J-P)	D (4) Gain Code 1 (A-H)	D (5) Identity of buyer/seller (if private transaction)
1 Rental Property #1, South Salem, NY (1993, $62,458)	D	Rent	L	R	Exempt				
2. Chase Bank, Various Accounts	A	Interest	L	T					
3. Fidelity Growth Company Fund	A	Dividend	K	T					
4. Fidelity NY Muni MM Fund	A	Dividend	J	T					
5 NMIS General NY Muni MM Fund Class B		None	K	T					
6. Vanguard NY LT Tax-Exempt Fund Inves tor	A	Dividend	J	T					
7. IRA #1	B	Dividend	L	T					
8. - Vanguard Growth & Income Fund									
9. - Vanguard 500 Index Fund									
10. - Vanguard Windsor II Fund									
11 - Vanguard Wellington Fund									
12. IRA #2	B	Dividend	M	T					
13. - Vanguard Growth & Income Fund									
14. - Vanguard 500 Index Fund									
15. - Vanguard Windsor II Fund									
16. - Vanguard Wellington Fund									
17. 401 (K) #1		None	N	T					

1. Income Gain Codes (See Columns B1 and D4)
2. Value Codes (See Columns C1 and D3)
3. Value Method Codes (See Column C2)

A =$1,000 or less
F =$50,001 - $100,000
J =$15,000 or less
N =$250,001 - $500,000
P3 =$25,000,001 - $50,000,000
Q =Appraisal
U =Book Value

B =$1,001 - $2,500
G =$100,001 - $1,000,000
K =$15,001 - $50,000
O =$500,001 - $1,000,000
R =Cost (Real Estate Only)
V =Other

C =$2,501 - $5,000
H1 =$1,000,001 - $5,000,000
L =$50,001 - $100,000
P1 =$1,000,001 - $5,000,000
P4 =More than $50,000,000
S =Assessment
W =Estimated

D =$5,001 - $15,000
H2 =More than $5,000,000
M =$100,001 - $250,000
P2 =$5,000,001 - $25,000,000
T =Cash Market

E =$15,001 - $50,000

FINANCIAL DISCLOSURE REPORT Page 5 of 9	Name of Person Reporting Briccetti, Vincent L.	Date of Report 01/05/2011

VII. INVESTMENTS and TRUSTS – *income, value, transactions (Includes those of spouse and dependent children; see pp. 34-60 of filing instructions.)*

☐ NONE *(No reportable income, assets, or transactions.)*

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A-H)	B. (2) Type (e.g., div., rent, or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, redemption)	D. (2) Date Month - Day	D. (3) Value Code 2 (J-P)	D. (4) Gain Code 1 (A-H)	D. (5) Identity of buyer/seller (if private transaction)
18 - American Funds The Growth Fund of America									
19. - Wellington Management Company Mid Cap Stock Fund									
20. - Franklin Templeton Investments International Value Fund									
21 - American Funds EuroPacific Growth Fund									
22. - American Funds American Balanced Fund									
23. - MFC Global Investment Mgmt. Small Cap Index Fund									
24. - MFC Global Investment Mgmt. Mid Cap Index Fund									
25. - PIMCO Total Return Fund									
26. - PIMCO Real Return Fund									
27. - Russell Investment Group Russell Balanced Fund									
28. 401 (K) #2	C	Dividend	M	T					
29. - Vanguard Wellington Fund									
30. Northwestern Mutual Whole Life Policy	B	Dividend	L	T					
31 Northwestern Variable Life Policy #1	A	Dividend	K	T					
32. - Northwestern MM									
33 - Northwestern Balanced									
34. - Northwestern Index 500 Stock									

1. Income/Gain Codes: (See Columns B1 and D4)
A =$1,000 or less
F =$50,001 - $100,000
J =$15,000 or less
N =$250,001 - $500,000
P3 =$25,000,001 - $50,000,000
B =$1,001 - $2,500
G =$100,001 - $1,000,000
K =$15,001 - $50,000
O =$500,001 - $1,000,000
C =$2,501 - $5,000
H1 =$1,000,001 - $3,000,000
L =$50,001 - $100,000
P1 =$1,000,001 - $5,000,000
P4 =More than $50,000,000
D =$5,001 - $15,000
H2 =More than $5,000,000
M =$100,001 - $250,000
P2 =$5,000,001 - $25,000,000
E =$15,001 - $50,000

2. Value Codes (See Columns C1 and D3)

3. Value Method Codes (See Column C2)
Q =Appraisal
U =Book Value
R =Cost (Real Estate Only)
V =Other
S =Assessment
W =Estimated
T =Cash Market

FINANCIAL DISCLOSURE REPORT
Page 6 of 9

Name of Person Reporting	Date of Report
Briccetti, Vincent L.	01/05/2011

VII. INVESTMENTS and TRUSTS – *income, value, transactions (Includes those of spouse and dependent children; see pp. 34-60 of filing instructions.)*

☐ NONE *(No reportable income, assets, or transactions.)*

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A-H)	B. (2) Type (e.g., div., rent, or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, redemption)	D. (2) Date Month - Day	D. (3) Value Code 2 (J-P)	D. (4) Gain Code 1 (A-H)	D. (5) Identity of buyer/seller (if private transaction)
35. - Northwestern Growth Stock									
36. - Northwestern Index 400 Stock									
37. - Northwestern Small Cap Growth Stock									
38. - Russell Real Estate Securities									
39. Northwestern Variable Life Policy #2	B	Dividend	K	T					
40. - Northwestern MM									
41. - Northwestern Balanced									
42. - Northwestern Index 500 Stock									
43. - Northwestern Growth Stock									
44. - Northwestern Index 400 Stock									
45. - Northwestern Small Cap Growth Stock									
46. - Russell Real Estate Securities									
47. New York 529 College Savings Plan	B	Dividend	K	T					
48 - Interest Accumulation Portfolio									
49. - Aggressive Age-Based Option: Income P ortfolio									
50. Trust #1	D	Int./Div.	M	T					
51. - DWS High Income Plus Fund									

1. Income Gain Codes: (See Columns B1 and D4)
2. Value Codes (See Columns C1 and D3)
3. Value Method Codes (See Column C2)

A =$1,000 or less
F =$50,001 - $100,000
J =$15,000 or less
N =$250,001 - $500,000
P3 =$25,000,001 - $50,000,000
Q =Appraisal
U =Book Value

B =$1,001 - $2,500
G =$100,001 - $1,000,000
K =$15,001 - $50,000
O =$500,001 - $1,000,000

R =Cost (Real Estate Only)
V =Other

C =$2,501 - $5,000
H1 =$1,000,001 - $5,000,000
L =$50,001 - $100,000
P1 =$1,000,001 - $5,000,000
P4 =More than $10,000,000
S =Assessment
W =Estimated

D =$5,001 - $15,000
H2 =More than $5,000,000
M =$100,001 - $250,000
P2 =$5,000,001 - $25,000,000

T =Cash Market

E =$15,001 - $50,000

FINANCIAL DISCLOSURE REPORT Page 7 of 9	Name of Person Reporting Briccetti, Vincent L.	Date of Report 01/05/2011

VII. INVESTMENTS and TRUSTS – *income, value, transactions (Includes those of spouse and dependent children; see pp. 34-60 of filing instructions.)*

☐ NONE *(No reportable income, assets, or transactions.)*

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A-H)	B. (2) Type (e.g., div., rent, or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, redemption)	D. (2) Date Month - Day	D. (3) Value Code 2 (J-P)	D. (4) Gain Code 1 (A-H)	D. (5) Identity of buyer/seller (if private transaction)
52. - DWS NY Tax Free Income Fund									
53. - Croton Harmon NY Union Free School Tax Ex Muni Bond									
54. - Monroe Cnty NY ARPT Auth Rev Tax Ex Muni Bond									
55. - NY Insured Municipal Income Trust Series No. 190									
56. - NY Insured Municipal Income Trust Series No. 160									
57. - NY Insured Municipal Income Trust Series No. 171									
58. - Edward Jones MM									
59. - MetLife Investors Fixed Annuity									

1 Income Gain Codes. (See Columns B1 and D4)	A =$1,000 or less F =$50,001 - $100,000	B =$1,001 - $2,500 G =$100,001 - $1,000,000	C =$2,501 - $5,000 H1 =$1,000,001 - $5,000,000	D =$5,001 - $15,000 H2 =More than $5,000,000	E =$15,001 - $50,000
2 Value Codes (See Columns C1 and D3)	J =$15,000 or less N =$250,001 - $500,000 P3 =$25,000,001 - $50,000,000	K =$15,001 - $50,000 O =$500,001 - $1,000,000	L =$50,001 - $100,000 P1 =$1,000,001 - $5,000,000 P4 =More than $50,000,000	M =$100,001 - $250,000 P2 =$5,000,001 - $25,000,000	
3 Value Method Codes (See Column C2)	Q =Appraisal U =Book Value	R =Cost (Real Estate Only) V =Other	S =Assessment W =Estimated	T =Cash Market	

FINANCIAL DISCLOSURE REPORT Page 8 of 9	Name of Person Reporting Briccetti, Vincent L.	Date of Report 01/05/2011

VIII. ADDITIONAL INFORMATION OR EXPLANATIONS. *(Indicate part of Report.)*

FINANCIAL DISCLOSURE REPORT Page 9 of 9	Name of Person Reporting Briccetti, Vincent L.	Date of Report 01/05/2011

IX. CERTIFICATION.

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

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

Signature 

NOTE: ANY INDIVIDUAL WHO KNOWINGLY AND WILFULLY FALSIFIES OR FAILS TO FILE THIS REPORT MAY BE SUBJECT TO CIVIL AND CRIMINAL SANCTIONS (5 U.S.C. app. § 104)

FILING INSTRUCTIONS

Mail signed original and 3 additional copies to:

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

Vincent Bricetti

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		81	070	Notes payable to banks – secured (auto loans)		23	212
U.S. Government securities				Notes payable to banks – unsecured (college loans)		17	650
Listed securities – see schedule		904	620	Notes payable to relatives			
Unlisted securities				Notes payable to others			
Accounts and notes receivable:				Accounts and bills due		5	000
Due from relatives and friends				Unpaid income tax			
Due from others				Other unpaid income and interest			
Doubtful				Real estate mortgages payable—primary residence (including rental unit)		194	244
Real estate owned—primary residence (including rental unit)		900	000	Chattel mortgages and other liens payable			
Real estate mortgages receivable				Other debts-itemize:			
Autos and other personal property		60	000				
Cash value-life insurance		147	972				
Other assets itemize:							
New York 529 College Savings Plan		22	312				
Interest in Law Firm		200	000				
Thrift Savings Plan			33	Total liabilities		240	106
				Net Worth	2	075	901
Total Assets	2	316	007	Total liabilities and net worth	2	316	007
CONTINGENT LIABILITIES				GENERAL INFORMATION			
As endorser, comaker or guarantor on leases or contracts				Are any assets pledged? (Add schedule)	NO		
Legal Claims				Are you defendant in any suits or legal actions?	NO		
Provision for Federal Income Tax				Have you ever taken bankruptcy?	NO		
Other special debt							

FINANCIAL STATEMENT

NET WORTH SCHEDULES

Listed Securities	
American Funds American Balanced Fund	$ 24,170
American Funds EuroPacific Growth Fund	6,248
American Funds The Growth Fund of America	7,933
Fidelity Growth Company Fund	16,164
Fidelity NY Municipal Money Market Fund	10,523
Franklin Templeton Investments International Value Fund	5,936
MFC Global Investment Mgmt. Small Cap Index Fund	6,566
MFC Global Investment Mgmt. Mid Cap Index Fund	4,547
NMIS General NY Municipal Money Market Fund	36,891
PIMCO Total Return Fund	13,249
PIMCO Real Return Fund	4,214
Russell Investment Group Russell Balanced Fund	402,957
Vanguard 500 Index Fund	33,035
Vanguard Growth & Income Fund	33,341
Vanguard NY Long-Term Tax-Exempt Fund	2,934
Vanguard Wellington Fund	245,696
Vanguard Windsor II Fund	39,769
Wellington Management Company Mid Cap Stock Fund	10,447
Total Listed Securities	$ 904,620

67905.582

STATEMENT OF ARENDA L. WRIGHT-ALLEN, NOMINATED TO BE U.S. DISTRICT JUDGE FOR THE EASTERN DISTRICT OF VIRGINIA

Ms. WRIGHT-ALLEN. Thank you, Senator, Senator Grassley. I want to thank you both again for allowing me to be here this afternoon. I first have to thank God, because it's clear to me that if it weren't for him I would not be here. I'd also like to thank Senator Warner and Senator Webb and the members of their staff. It was an honor and I enjoyed the process. I also want to thank President Obama and his staff, and I enjoyed that process as well.

There are several family members and dear friends that are with me in spirit, even though they're not here physically. First, would be my father, Reuben E. Wright. He's deceased, but he's in heaven and there's no doubt in my mind he's with me this afternoon. My mother. Her name is Jewel Wright, and she's in Philadelphia and she's caring for my stepfather, Roger Wilson, who is 90 years old. So they're not here with me physically, but in spirit they are.

I'd also like to thank my in-laws, and they're either in Jamaica, England, Florida or New York. They're all pretty old, but they're rich people and I love them. So I want to thank them for all the support that they've given me throughout my 23 years of marriage.

I'd also like to thank the Assistant U.S. Attorneys in the Western District of Virginia, as well as in the Eastern District of Virginia. That would be from 1990 until December of 2005. They know who they are, and they are part of my family and they are my friends. But for their friendship and leadership, I wouldn't be sitting here today as well. And I'd also like to thank all the Federal agents that I worked with since 1990, and they know who they are as well.

I'd like to thank Frank Dunham. He's deceased and he's in heaven now, but he's the first Federal public defender for the Eastern District of Virginia, and he's the one that rekindled my interest to do defense work when he opened up the office, so I'd like to thank Frank Dunham.

Then my current supervisor, Michael Nackmenoff. He sits in Alexandria, Virginia and I'd like to thank him, as well as all my colleagues down in the Norfolk Federal Public Defenders Office.

I'd like to thank my church, First Presbyterian Church of Norfolk, as well as my neighbors on Bonitop Garden, and then also a dear friend, Walt Kelly.

Senator, if I may, I have some family and friends that are present with me physically. First, is my son Yanni. He's probably a young African-American boy, 14 years, in the audience. He's right there in the blue shirt. He's 14. He goes to Norfolk Christian, and he's quite the accomplished drummer. We named him after a musician, Yanni, who's a Greek musician that my husband and I followed, because of his diverse band and his diverse orchestra, for about 30 years.

Also, there's a seat here for my other child, Niall Anthony Allen. I have to say, it was so wonderful to be here this afternoon and hear the word "autism" three times from three different people. So, Niall is 11. He cannot be with us this afternoon because he's autistic, but his unconditional great gift of love is present with me this afternoon, so I'm introducing everyone to him as well.

My husband Delroy is sitting right there in the blue and green-striped shirt. I met him when I was 17 years old at Jacksonville University down in Jacksonville, Florida, and we were pen pals for 12 years before we dated for 2 months, and then married for 7 years before we had our two children. So he is a friend, then a brother, then my boyfriend, my husband, and now the perfect father of my two children. He left the employment field 12 years ago when Niall was diagnosed with autism to take care of my two boys, and he's the love of my life. So, thank you for being here.

Also, Rob Seidel is the gentleman that's waving there, and he is my friend, but I met him as a mentor at the U.S. Attorney's Office in the Eastern District of Virginia back in 1990 when I joined that office. So it's Rob who taught me to respect the law and understand the law and to work hard, and I never wanted to disappoint him. So I would always do that before I would go to him for questions, and there's no question that I wouldn't be here if it weren't for him.

Jannie Bazemore is the second lady back behind me in the black suit with a blue blouse. She's been working as a public servant in the Civil Rights Department first, then with the U.S. Attorney's Office for 42 years now, and she's a lawyer's lawyer and a dear friend and so I'd like to recognize her.

My pastor is here, James Wood, the guy with the white hair and tanned. He's my dear friend, and next to my husband, probably the closest man in my life.

Mr. James Metcalfe is here. He's a retired Assistant U.S. Attorney for 30 years, and he also is a retired Naval Captain, 30 years, and he's a workhorse. He retired last year from the U.S. Attorney's Office after 30 years, and he still goes back in to the office as an unpaid Special Assistant U.S. Attorney to do the people's work. So, thank you, Mr. Metcalfe, for being here.

John Pearson is right there in the light purple tie, and he's a friend from the church. He just retired last May after serving 30 years at Wilcox & Savage. We're in a small group together.

Then last but not least, is Chuck Rosenberg. Chuck is a friend of mine. When I was pregnant, his wife loaned me her maternity clothes. He was an Assistant U.S. Attorney. He rose to the ranks to be the U.S. Attorney for the Eastern District of Virginia, and he's currently in private practice. Those are all the folks that I'd like to introduce to you, and I have no other statement to make.

Senator BLUMENTHAL. Thank you very much.

Ms. WRIGHT-ALLEN. Thank you.

[The biographical information follows.]

UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY

QUESTIONNAIRE FOR JUDICIAL NOMINEES

PUBLIC

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

   Arenda Lauretta Wright Allen

   Maiden Name: Arenda Lauretta Wright

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

   United States District Judge for the Eastern District of Virginia

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

   Federal Public Defender's Office for the Eastern District of Virginia
   150 Boush Street, Suite 403
   Norfolk, Virginia 23510

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

   1960; Philadelphia, Pennsylvania

5. **Education**: List in reverse chronological order each college, law school, or any other institution of higher education attended and indicate for each the dates of attendance, whether a degree was received, and the date each degree was received.

   1982 – 1985, North Carolina Central University School of Law; J.D., 1985

   1980 – 1982, Kutztown State College; B.A., 1982

   1978 – 1979, Jacksonville University; no degree received (transferred to Kutztown State College)

6. **Employment Record**: List in reverse chronological order all governmental agencies, business or professional corporations, companies, firms, or other enterprises, partnerships, institutions or 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 description.

2005 – present
Federal Public Defender's Office for the Eastern District of Virginia
150 Boush Street, Suite 403
Norfolk, Virginia 23510
Assistant Federal Public Defender (2005 – 2006)
Supervisory Assistant Federal Public Defender (2006 – present)

1991 – 2005
United States Attorney's Office for the Eastern District of Virginia
101 West Main Street, Suite 8000
Norfolk, Virginia 23510
Assistant United States Attorney

1990 – 1991
United States Attorney's Office for the Western District of Virginia
310 First Street S.W., Room 906
Roanoke, Virginia 24011
Assistant United States Attorney

1988 – 1990
United States Navy
Naval Air and Engineering Center
Building 26, Code 00
Lakehurst, New Jersey 08733
Staff Judge Advocate

1985 – 1988
United States Navy, Judge Advocate General's Corps
Naval Legal Service Office, Building A-50
Norfolk, Virginia 23511
Defense Attorney (1985 – 1988)
Legal Intern (1985)

Summer 1984
National Legal Aid and Defender Association
1140 Connecticut Avenue NW, Suite 900
Washington, DC 20036
Legal Intern

Summer 1983
District Attorney, City of Philadelphia
Three South Penn Square
Philadelphia, Pennsylvania 19107
Clerk/Messenger

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Summer 1982
American Foundation of Negro Affairs, Inc.
117 S. 17th Street, Suite 1200
Philadelphia, Pennsylvania 19103
Student Counselor

Other Affiliations

1992 – 2005
United States Navy Reserves, Judge Advocate General's Corps
NR LSO
Mid-Atlantic 207
Raleigh, North Carolina 27615
Legal Assistance Attorney and Claims Attorney

2002 – 2005
Park Place Child Life Center
104 West Arden Circle
Norfolk, Virginia 23505
Board Member (uncompensated)

7. **Military Service and Draft Status**: Identify any service in the U.S. Military, including dates of service, branch of service, rank or rate, serial number (if different from social security number) and type of discharge received, and whether you have registered for selective service.

I served actively in the United States Navy, Judge Advocate General's Corps, from September 1985 to June 1990. I was commissioned as an Ensign in February 1985. I was promoted to Lieutenant (Junior Grade) in December 1985. I was promoted to Lieutenant in November 1986. I left active duty in June 1990 and was an inactive member of the United States Navy Reserves until June 1992.

I served as an active reservist in the United States Navy Reserves from June 1992 to December 2005. In July 1992, I was promoted to Lieutenant Commander. In November 1997, I was promoted to Commander. In December 2005, I was honorably discharged after twenty years of combined active and reserve service.

I was not required to register for selective service.

8. **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.

June 1988, Letter of Appreciation for Work Done, re: Federal Tort Claims Act and Medical Care Recovery Act, from Captain H.E. Grant, USN

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November 1988, Navy Achievement Medal for Professional Achievement in the Performance of Defense Counsel Duties, from Rear Admiral W.L. Schachte, Jr., USN

October 1993, Senior Judge Advocate Naval Reserve Commendation for Exceptional Dedication and Loyal Service to the United States Naval Reserves

September 1995, U.S. Attorney General's Special Achievement Award in Appreciation and Recognition of Meritorious Acts, U.S. Department of Justice

July 1997, U.S. Department of Justice, Recognition for Outstanding Prosecutive Skills, from Director Louis J. Freeh, Federal Bureau of Investigation

October 1997, Resolution of Appreciation from Board of Supervisors, James City County

April 1998, Sustained Superior Performance Award from United States Attorney Helen F. Fahey, United States Attorney's Office, Eastern District of Virginia

April 1999, Special Act Award from United States Attorney Helen F. Fahey, United States Attorney's Office, Eastern District of Virginia

April 2002, Performance Award from Paul J. McNulty, United States Attorney, Eastern District of Virginia

August 2002, Recognition for Outstanding Prosecutive Skills, from Director Robert S. Mueller, III, Federal Bureau of Investigation

September 2004, Cash Award, from Paul J. McNulty, United States Attorney, Eastern District of Virginia

I also have received numerous letters of appreciation and other awards for prosecutions, including from the U.S. District Court for the Eastern District of Virginia, the U.S. Attorney's Office for the Western District of Virginia, the Federal Bureau of Investigation, the U.S. Secret Service, the United States Marshals Service, the Department of Energy, the United States Customs Service, the National Aeronautics and Space Administration, the United States Postal Inspection Service, and the Commonwealth of Virginia's Judicial Inquiry and Review Commission.

9. **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, 2000 – 2001

I'Anson-Hoffman American Inn of Courts, Member, 1992 – 2000

Fourth Circuit Judicial Conference, Guest and Permanent Member, 2003 – present

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10. **Bar and Court Admission**:

a. List the date(s) you were admitted to the bar of any state and any lapses in membership. Please explain the reason for any lapse in membership.

Pennsylvania, 1985 (presently on inactive status)
Virginia, 1994

There have been no lapses in membership.

b. List all courts in which you have been admitted to practice, including dates of admission and any lapses in membership. Please explain the reason for any lapse in membership. Give the same information for administrative bodies that require special admission to practice.

United States Court of Appeals for the Fourth Circuit, 1990
United States District Court for the Eastern District of Virginia, 1991
United States District Court for the Western District of Virginia, 1990
Supreme Court of Pennsylvania, 1985
Virginia Supreme Court, 1993

There have been no lapses in membership.

11. **Memberships**:

a. List all professional, business, fraternal, scholarly, civic, charitable, or other organizations, other than those listed in response to Questions 9 or 10 to which you belong, or to which you have belonged, since graduation from law school. Provide dates of membership or participation, and indicate any office you held. Include clubs, working groups, advisory or editorial boards, panels, committees, conferences, or publications.

Park Place Family Life Center, Member of Board of Directors, 2002 – 2005

b. 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, or national origin. Indicate whether any of these organizations listed in response to 11a above currently discriminate or formerly discriminated on the basis of race, sex, religion or national origin 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, the organization listed in 11a does not presently discriminate and to the best of my knowledge, did not formerly discriminate on the basis of race, sex, religion, or national origin.

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12. **Published Writings and Public Statements**:

a. List the titles, publishers, and dates of books, articles, reports, letters to the editor, editorial pieces, or other published material you have written or edited, including material published only on the Internet. Supply four (4) copies of all published material to the Committee.

None that I recall or have been able to identify.

b. Supply four (4) copies of any reports, memoranda or policy statements you prepared or contributed in the preparation of on behalf of any bar association, committee, conference, or organization of which you were or are a member. If you do not have a copy of a report, memorandum or policy statement, give the name and address of the organization that issued it, the date of the document, and a summary of its subject matter.

None that I recall or have been able to identify.

c. Supply four (4) copies of any testimony, official statements or other communications relating, in whole or in part, to matters of public policy or legal interpretation, that you have issued or provided or that others presented on your behalf to public bodies or public officials.

None that I recall or have been able to identify.

d. Supply four (4) copies, transcripts or recordings of all speeches or talks delivered by you, including commencement speeches, remarks, lectures, panel discussions, conferences, political speeches, and question-and-answer sessions. Include the date and place where they were delivered, and readily available press reports about the speech or talk. If you do not have a copy of the speech or a transcript or recording of your remarks, give the name and address of the group before whom the speech was given, the date of the speech, and a summary of its subject matter. If you did not speak from a prepared text, furnish a copy of any outline or notes from which you spoke.

William & Mary School of Law, Lunch with Lawyers, Careers in Criminal Law, February 1, 2007. I have no notes, transcript or recording. Press report supplied. On several other occasions, I spoke to law school classes at William & Mary School of Law and Regent University School of Law on the topic of government careers, but I do not recall the dates of these informal talks. I spoke extemporaneously, and have no notes, transcripts or recordings. This talk is the only one for which I have located a press report.

U.S. Attorney's Office for the Eastern District of Virginia, introductory remarks at awards reception, June 22, 1999. I have no notes, transcript or recording. Press report supplied. These receptions were held yearly or every other year during my

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tenure in the Office. I typically introduced award recipients at these events, but I have no notes, transcript or recording. This is the only event for which I have located a press report.

Frank W. Cox High School, Federal Justice System Lecture, November 1997. I have no notes transcript or recording. The address of Cox High School is 2425 Shorehaven Drive, Virginia Beach, Virginia 23454.

I have spoken at Old Dominion University, Regent University, William and Mary Law School, and local high schools, discussing topics including the dangers of drugs and guns, threats to children on the internet, legal careers in the federal government, and legal careers in the United States Navy. I presented primarily to students attending these institutions and spoke based on my background and professional experiences. I do not have the dates of these presentations, and I do not have any notes, transcripts, or recordings of my remarks. As far as I am aware, there was no press coverage of these speeches. The addresses of the groups before whom I have spoken are:

Old Dominion University
Department of Political Science – Pre Law
3030 Batten Arts and Letters (BAL)
Old Dominion University
Norfolk, VA 23529

Regent University
School of Law
1000 Regent University Drive
Virginia Beach, VA 23464

William and Mary School of Law
613 South Henry St.
Williamsburg, VA 23185

Frank W. Cox High School
2425 Shorehaven Drive
Virginia Beach, VA 23454

Hickory High School
1996 Hawk Blvd.
Chesapeake, VA 23322

Granby High School
7101 Granby Street
Norfolk, VA 23505

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First Presbyterian Church
820 Colonial Ave
Norfolk, VA 23507

e. List all interviews you have given to newspapers, magazines or other publications, or radio or television stations, providing the dates of these interviews and four (4) copies of the clips or transcripts of these interviews where they are available to you.

Ray Cox, *Criminal Record Doesn't Cost Boyd*, The Roanoke Times, at C1, Oct. 11, 2006. Copy supplied.

Jim Washington, *He's Revered Around the World*, The Virginian-Pilot, at E1, Feb. 17, 2005. Copy supplied.

Lynn Waltz, *Brotherhood of the Gun Runners*, The Virginian-Pilot, at A1, Sept. 8, 1996. Copy supplied.

13. **Judicial Office**: State (chronologically) any judicial offices you have held, including positions as an administrative law judge, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

I have not held judicial office.

a. Approximately how many cases have you presided over that have gone to verdict or judgment? _____

i. Of these, approximately what percent were:

jury trials:	___%
bench trials:	___% [total 100%]
civil proceedings:	___%
criminal proceedings:	___% [total 100%]

b. Provide citations for all opinions you have written, including concurrences and dissents.

c. For each of the 10 most significant cases over which you presided, provide: (1) a capsule summary of the nature the case; (2) the outcome of the case; (3) the name and contact information for counsel who had a significant role in the trial of the case; and (3) the citation of the case (if reported) or the docket number and a copy of the opinion or judgment (if not reported).

d. For each of the 10 most significant opinions you have written, provide: (1) citations for those decisions that were published; (2) a copy of those decisions that

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were not published; and (3) the names and contact information for the attorneys who played a significant role in the case.

e. Provide a list of all cases in which certiorari was requested or granted.

f. Provide a brief summary of and citations for all of your opinions where your decisions were reversed by a reviewing court or where your judgment was affirmed with significant criticism of your substantive or procedural rulings. If any of the opinions listed were not officially reported, provide copies of the opinions.

g. Provide a description of the number and percentage of your decisions in which you issued an unpublished opinion and the manner in which those unpublished opinions are filed and/or stored.

h. Provide 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, provide copies of the opinions.

i. Provide citations to all cases in which you sat by designation on a federal court of appeals, including a brief summary of any opinions you authored, whether majority, dissenting, or concurring, and any dissenting opinions you joined.

14. **Recusal:** If you are or have been a judge, identify the basis by which you have assessed the necessity or propriety of recusal (If your court employs an "automatic" recusal system by which you may be recused without your knowledge, please include a general description of that system.) Provide a list of any cases, motions or matters that have come before you in which a litigant or party has requested that you recuse yourself due to an asserted conflict of interest or in which you have recused yourself sua sponte. Identify each such case, and for each provide the following information:

I have not served as a judge.

a. whether your recusal was requested by a motion or other suggestion by a litigant or a party to the proceeding or by any other person or interested party; or if you recused yourself sua sponte;

b. a brief description of the asserted conflict of interest or other ground for recusal;

c. the procedure you followed in determining whether or not to recuse yourself;

d. your reason for recusing or declining to recuse yourself, including any action taken to remove the real, apparent or asserted conflict of interest or to cure any other ground for recusal.

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

a. List chronologically any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. If appointed, please include the name of the individual who appointed you. Also, state chronologically any unsuccessful candidacies you have had for elective office or unsuccessful nominations for appointed office.

I have not held public office. I have had no unsuccessful candidacies for elective office or unsuccessful nominations for appointed office.

b. List all memberships and offices held in and services rendered, whether compensated or not, to any political party or election committee. If you have ever held a position or played a role in a political campaign, identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

None.

16. **Legal Career:** Answer each part separately.

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

i. whether you served as clerk to a judge, and if so, the name of the judge, the court and the dates of the period you were a clerk;

I have not served as a clerk to a judge.

ii. whether you practiced alone, and if so, the addresses and dates;

I have not practiced law alone.

iii. 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.

1985 – 1990
United States Navy, Judge Advocate General's Corps
Naval Air and Engineering Center
Building 26, Code 00
Lakehurst, New Jersey 08733
Staff Judge Advocate

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1990 – 1991
United States Attorney's Office for the Western District of Virginia
310 First Street South West, Room 906
Roanoke, Virginia 24011
Assistant United States Attorney

1991 – 2005
United States Attorney's Office for the Eastern District of Virginia
101 West Main Street, Suite 8000
Norfolk, Virginia 23510
Assistant United States Attorney

1992 – 2005
United States Navy Reserves, Judge Advocate General's Corps
NR LSO Mid-Atlantic 207
Raleigh, North Carolina 27615
Legal Assistance and Claims Attorney

2005 – present
Federal Public Defender's Office for the Eastern District of Virginia
150 Boush Street, Suite 403
Norfolk, Virginia 23510
Assistant Federal Public Defender (2005 – 2006)
Supervisory Assistant Federal Public Defender (2006 – present)

iv. whether you served as a mediator or arbitrator in alternative dispute resolution proceedings and, if so, a description of the 10 most significant matters with which you were involved in that capacity.

I have not served as a mediator or arbitrator in alternative dispute resolution proceedings.

b. Describe:

i. the general character of your law practice and indicate by date when its character has changed over the years.

Since December 2005, I have represented clients charged with violations of the federal criminal code, including but not limited to: capital murder; conspiracy/distribution/possession with intent to distribute and possession of cocaine, "crack" cocaine, methamphetamine, heroin, and marijuana; firearm offenses; bank fraud; wire fraud; mail fraud; money laundering; immigration matters; and the production, receipt, distribution and possession of child pornography. Since May 2006, I have also performed the duties of Supervisory Assistant Federal Public Defender. In addition

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to carrying a full caseload, I supervise six lawyers, two investigators, two paralegals, and the branch manager.

Prior to becoming a defense attorney, I was an Assistant United States Attorney in the Eastern District of Virginia for 15 years and the Western District of Virginia for a year and a half. As an Assistant United States Attorney in the Eastern District of Virginia's Norfolk office, I was an advocate for the United States and prosecuted those who had violated the federal code in cases including, but not limited to: death penalty eligible murders committed during a continuing criminal enterprise; narcotics conspiracies; money laundering; firearm offenses; mail fraud; insurance fraud; violent crime; exportation of munitions list items; tax violations; environmental crimes; and the production, receipt, distribution, and possession of child pornography. During this time, I was also the supervisor of the Special Assistant United States Attorney's Unit for two years.

As an Assistant United States Attorney in the Western District of Virginia's Roanoke office for 18 months, I handled civil cases in addition to criminal cases. During this time, I prosecuted defendants charged with violating the federal criminal code and I had 16 jury trials. All of the defendants in those cases were convicted and received appropriate sentences. I also represented various U.S. government agencies in civil matters involving: the Federal Torts Claims Act; Federal Crop Insurance Corporation; Farmer's Home Administration; Department of Energy; Small Business Administration; Veterans Administration; National Health Service Corps; and Department of Education.

Finally, while in the United States Navy from 1985 through 2005, I performed a number of roles. For two years, I defended members of the military before juries and judges in cases involving assaults, conspiracy to commit murder, mutiny, arson, forgery, thefts, and drug distribution offenses. I also defended military members being separated administratively from the Navy. Finally, I trained, evaluated and provided professional development for three trial defense attorneys. For three years, I served as the sole legal advisor to Captain J.R. McDonald, Commanding Officer of the Naval Air and Engineering Center in Lakehurst, New Jersey. While there, I handled all criminal, disciplinary, and administrative matters pertaining to the 250 military command; managed the legal assistant office and provided legal advice to active duty members, their dependents, and retirees; investigated and adjudicated personal and property claims submitted by military members; directly oversaw and coordinated the federal facilities inter-agency agreement between the naval base and the New Jersey EPA; and served as a member of the CERCLA Technical Review Committee and National Priorities List meetings. During my 15 years in the reserves, I held the positions of

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Training Officer and Executive Officer. During this time, I provided legal assistance to military dependents and retirees in civil areas, including separation and divorce, child support issues, civilian criminal matters, contract disputes, landlord-tenant disputes, adoption and name changes, debtor/creditor issues, and any other legal issues presented by military members, their dependents and retirees. I also prepared memoranda of law regarding the Federal Tort Claims Act involving medical malpractice, personal injury and negligence claims. Finally, I provided legal services and defense attorney representation to fleet and shore commands.

ii. your typical clients and the areas at each period of your legal career, if any, in which you have specialized.

As a defense attorney, I have represented indigent clients facing felony criminal prosecution.

As a prosecutor, I represented the U.S. Government in criminal prosecutions. During my later years, I specialized in prosecuting pedophiles.

As a U.S. Navy attorney, I represented the United States, including providing services to sailors, officers, military dependants, and retirees.

c. Describe the percentage of your practice that has been in litigation and whether you appeared in court frequently, occasionally, or not at all. If the frequency of your appearances in court varied, describe such variance, providing dates.

As a federal public defender since 2005, I have appeared in federal court weekly.

As a federal prosecutor for 17 years, I appeared in federal court weekly.

As a U.S. Navy attorney, for two years of my service, I appeared weekly in military courts and before administrative discharge boards.

i. Indicate the percentage of your practice in:

1. federal courts: 95%
2. state courts of record:
3. other courts: 5%
4. administrative agencies:

ii. Indicate the percentage of your practice in:

1. civil proceedings: 30%
2. criminal proceedings: 70%

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d. State the number of cases in courts of record, including cases before administrative law judges, you tried to verdict, judgment or final decision (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

I had many jury trials as a new attorney defending military members during my first two years on active duty in the U.S. Navy. As a federal prosecutor in the U.S. Attorney's Office for the Western District of Virginia in Roanoke, Virginia, I had 16 felony jury trials during my 18-month tenure. During my 15 years as a federal prosecutor in the U.S. Attorney's Office for the Eastern District of Virginia in Norfolk, Virginia, I carried approximately 30 cases per year and prosecuted, before juries, a variety of defendants charged with violating a variety of federal felonies, including death penalty eligible offenses. During this time, I estimate that I tried approximately 30 cases to verdict, acting as sole counsel in most of these cases. In addition, I second-chaired approximately 16 felony trials conducted by military attorneys in my role as supervisor of the Special Assistant United States Attorney's Unit. As a federal public defender since 2005, I have represented approximately 500 clients facing felony charges, including charges punishable by death and life imprisonment.

i. What percentage of these trials were:

1. jury: 10%
2. non-jury: 90%

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

I have not practiced before the Supreme Court of the United States.

17. **Litigation**: Describe the ten (10) most significant litigated matters which you personally handled, whether or not you were the attorney of record. 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.

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1. *United States v. Gooding*, 67 F.3d 297, 1995 U.S. App. LEXIS 32423 (4th Cir. Sept. 11, 1995) (1994-1995). I tried this case with Robert Seidel, Supervisory Assistant United States Attorney. Nine defendants were charged with murdering Alma Baker and Wayne Ashley, as the defendants distributed volumes of crack cocaine from a stash house in Norfolk, Virginia. After a 42-day trial before the Honorable Henry Coke Morgan of the U.S. District Court for the Eastern District of Virginia, all of the defendants were convicted of either conspiracy to distribute cocaine, distributing cocaine, engaging in a Continuing Criminal Enterprise ("CCE"), murder in furtherance of a CCE, making a place available for distribution of cocaine, or being a convicted felon in possession of a firearm. After conviction, I asked for the death penalty against the three death penalty eligible defendants, which the jury rejected. The defendants were sentenced to life. The Fourth Circuit affirmed the convictions and sentences in a *per curiam* decision issued by Circuit Judges Hamilton, Michael, and Motz.

   Robert J. Seidel, Co-counsel
   Supervisory Assistant United States Attorney
   8000 World Trade Center
   101 West Main Street
   Norfolk, VA 23510
   (757) 441-6331

   David Bouchard, Opposing Counsel
   3802 Poplar Hill Road, Suite A
   Chesapeake, VA 23321
   (757) 484-8388

   Lawrence Woodward, Opposing Counsel
   4525 South Boulevard, Suite 300
   Virginia Beach, VA 23452
   (757) 671-6047

   Duncan R. St. Clair, III, Opposing Counsel
   2317 East Little Creek Road
   Norfolk, VA 23518
   (757) 480-9510

   Danny Shipley, Opposing Counsel
   First Virginia Bank Building
   555 East Main Street, Suite 1410
   Norfolk, VA 23510
   (757) 627-9902

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Walter Dalton, Opposing Counsel
150 Boush Street, Suite 403
Norfolk, VA 23510
(757) 457-0800

2. *United States v. Haley*, 1993 U.S. App. LEXIS 11777 (4th Cir. May 20, 1993) (1992-1993). I represented the United States in a case in which the defendant was charged with conspiracy to assault a federal officer and aiding and abetting the use of a firearm during a crime of violence. The trial was conducted before the Honorable John A. MacKenzie of the U.S. District Court for the Eastern District of Virginia, and the jury convicted on all three counts. The Fourth Circuit affirmed the conviction in a *per curiam* decision issued by Circuit Judges Russell, Hall, and Sprouse.

James Broccoletti, Opposing Counsel
6663 Stoney Point South
Norfolk, VA 23502
(757) 466-0750

3. *United States v. Johnson*, 996 F.2d 1213, 1993 U.S. App. LEXIS 15324 (4th Cir. June 24, 1993) (1992-1993). I represented the United States in the prosecution of Mr. Johnson, who was charged in a seven-count indictment with four counts of inducing false statements to be made to a federally licensed firearms dealer and three counts of possession of a firearm by a convicted felon. Following a jury trial before the Honorable Richard B. Kellam of the U.S. District Court for the Eastern District of Virginia, the defendant was convicted on six of the seven counts. The Fourth Circuit affirmed the conviction in a *per curiam* decision issued by Circuit Judges Hall, Phillips, and Williams.

Leon Sarfan, Opposing Counsel
225 28th Street
Newport News, VA 23607
(757) 247-5861

4. *United States v. Langley*, 62 F.3d 602 (4th Cir. 1995) (1992-1995). I represented the United States in the prosecution of Mr. Langley, who was charged with making false statements to a federally licensed firearms dealer. Following a jury trial before the Honorable Robert G. Doumar the United States District Court for the Eastern District of Virginia, he was convicted. On appeal, the Fourth Circuit affirmed the conviction in a published opinion, following an *en banc* rehearing.

Walter Dalton, Opposing Counsel
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(757) 457-0800

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5. *United States v. Spruill*, 118 F.3d 221 (4th Cir. 1997) (1995-1997). I represented the United States in the prosecution of Mr. Spruill and in his subsequent appeal. The defendant was charged with three counts of violating 18 U.S.C. § 844(e), making threatening telephone calls to federal employers. Following a bench trial before the Honorable Robert G. Doumar of the U.S. District Court for the Eastern District of Virginia, the defendant was convicted. Mr. Spruill appealed and the Fourth Circuit affirmed in part and reversed in part. On an issue of first impression, the court held that a statutory element of the offense is that the threat would be carried out by means of fire or explosive; because that element was not charged in the indictment, those convictions were vacated. Circuit Judges Michael, Wilkins and Butzner heard the case.

   David Boushard, Opposing Counsel
   3802 Poplar Hill Road, Suite A
   Chesapeake, VA 23321
   (757) 484-8388

6. *United States v. Nanda*, 178 F.3d 1287, 1999 U.S. App. LEXIS 9028 (4th Cir. May 11, 1999) (1997-1999). I represented the United States in the prosecution of Mr. Nanda and in his subsequent appeal. Following a jury trial before the Honorable Raymond A. Jackson of the U.S. District Court for the Eastern District of Virginia, Mr. Nanda was convicted of knowingly receiving materials depicting minors engaged in sexually explicit conduct, and sentenced to 33 months in prison. On appeal, he contended that the district court erred in denying his motions to suppress, in admitting into evidence under Rule 404(b) additional images of child pornography and records of chat-room dialogues with purported minors found on his computer, and in denying his motion for a mistrial. Mr. Nanda also argued that the court committed various errors in calculating his sentence. The Fourth Circuit affirmed Mr. Nanda's conviction and sentence in a *per curiam* opinion issued by Circuit Judges Wilkinson, Hamilton, and Williams.

   Andrew Sacks, Opposing Counsel
   150 Boush Street, Suite 501
   Norfolk, VA 23510
   (757) 623-2753

7. *United States v. Smith*, 373 F.3d 561 (4th Cir. 2004) (2003-2004). I represented the United States in the prosecution of Mr. Smith and in his subsequent appeal. Mr. Smith was charged with embezzling, stealing, purloining, and converting to his own use funds belonging to the Social Security Administration. Following trial before the Honorable Henry Coke Morgan in the United States District Court for the Eastern District of Virginia, the defendant was convicted. The Fourth Circuit affirmed in a *per curiam* opinion issued by Circuit Judges Luttig and Michael, and Judge Quarles of the U.S. District Court for the District of Maryland sitting by designation.

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Nia Ayanna Vidal, Opposing Appellate Counsel
830 E. Main Street, Suite 1100
Richmond, VA 23219
(804) 343-0800

8. *United States v. Lavi*, 2:98cr60 (E.D. Va. Dec. 17, 1998). From February 1998 to December 1998, I prosecuted four defendants for conspiracy to attempt to export munition list items, F-14 aircraft parts, from the United States to Iran via Denmark, without first obtaining a license of approval from the Department of State. The investigation involved years of taped telephone recordings between the co-conspirators. Search warrants were executed in New York, Virginia, California, and in Denmark. Two defendants pled guilty, one was convicted by a jury, and the other remains a fugitive.

Franklin A. Swartz, Opposing Counsel
Town Point Center, Suite 800
150 Boush Street
Norfolk, VA 23514
(757) 616-2417

9. *United States v. Torrence*, 2:06cr160 (E.D. Va. Oct.9, 2007) (2006-2007). I represented Ms. Torrence who was prosecuted for the interstate murder of her boyfriend's mother. Ms. Torrence faced the federal death penalty. I negotiated a plea bargain for Ms. Torrence with the U.S. Attorney's Office for the Eastern District of Virginia which resulted in the U.S. Government agreeing not to seek the death penalty. The Honorable Raymond Jackson of the U.S. District Court for the Eastern District of Virginia sentenced Ms. Torrence to 42 years in prison.

Laura Tayman, Opposing Counsel
United States Attorney's Office
Fountain Plaza Three
721 Lake Front Commons, Suite 300
Newport News, VA 23606
(757) 591-4000

James Broccoletti, Co-counsel
6663 Stoney Point South
Norfolk, Virginia 23502
(757) 466-0750

10. *United States v. Pinder*, 2007 WL 1597787 (E.D.V.A. June 1, 2007). From February 2007 to June 2007, I represented Mr. Pinder in a case in which he was charged with possession with intent to distribute narcotics, firearm offenses, and copyright infringement. He was facing a minimum mandatory sentence of five years and a maximum of life. I filed a motion to suppress arguing that the police violated Mr. Pinder's Fourth Amendment rights. Following a lengthy motions

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hearing, which included the testimony of several police officers and Mr. Pinder (who had several felony convictions), the Honorable Raymond Jackson rejected the testimony of the police officers and found that there was no justification for the protective sweep, that the officers lacked probable cause, the officers had no reasonable belief that the evidence would be destroyed, there was no exigency, the search warrant lacked probable cause, and that the "good faith exception" did not apply. The U.S. Government dismissed the charges against Mr. Pinder. Mr. Pinder thereafter was successful in obtaining a civil judgment against the police department.

Andy Robbins (formerly with the United States Attorney's Office), Opposing Counsel
Office of the Commonwealth Attorney
430 Crawford Street
Portsmouth, VA 23704
(757) 393-8581

18. **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 fully the nature of your participation in these activities. List any client(s) or organization(s) for whom you performed lobbying activities and describe the lobbying activities you performed on behalf of such client(s) or organizations(s). (Note: As to any facts requested in this question, please omit any information protected by the attorney-client privilege.)

As a federal defense attorney, I educate my clients about the federal criminal justice system and do everything in my power to help them understand and appreciate the consequences of their future choices if they are ever returned to society and if they ever violate the state, local, or federal laws again.

As a federal prosecutor, I represented the U.S. Government and spent time outside of the office speaking to children about the dangers of violent crime and drugs. After I started prosecuting pedophiles, I focused on educating members of our community about the dangers of pedophiles who use the Internet to exploit children.

I have performed no lobbying activities on behalf of any client or organization.

19. **Teaching**: What courses have you taught? For each course, state the title, the institution at which you taught the course, the years in which you taught the course, and describe briefly the subject matter of the course and the major topics taught. If you have a syllabus of each course, provide four (4) copies to the committee.

I have not taught any courses during my career.

20. **Deferred Income/ Future Benefits**: List the sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted

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contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients or customers. Describe the arrangements you have made to be compensated in the future for any financial or business interest.

None.

21. **Outside Commitments During Court Service**: 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.

If I am confirmed, I have no plans, commitments, or agreements to pursue outside employment, with or without compensation, during my service with the court.

22. **Sources of Income**: List sources and amounts of all income received during the calendar year receding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, licensing fees, honoraria, and other items exceeding $500 or more (if you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here).

See attached Financial Disclosure Report.

23. **Statement of Net Worth**: Please complete the attached financial net worth statement in detail (add schedules as called for).

See attached Net Worth Statement.

24. **Potential Conflicts of Interest**:

a. Identify the family members or other persons, parties, categories of litigation, and financial arrangements that are likely to present potential conflicts-of-interest when you first assume the position to which you have been nominated. Explain how you would address any such conflict if it were to arise.

If confirmed, a conflict of interest would arise in any case involving any person who was my client or for whose case I had supervisory responsibility as an Assistant Federal Public Defender. A conflict would also arise in any case involving a litigant whom I previously prosecuted as an Assistant United States Attorney, though I anticipate such cases would be rare due to the passage of time. In any case that falls into these categories, I would recuse myself.

b. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern.

I would carefully evaluate each case for any conflict or potential appearance of a conflict, and I would follow the recusal statutes and Canon 3 of the Code of

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Conduct for United States Judges in determining the appropriate resolution of any such issues.

25. **Pro Bono Work**: An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

I have served the disadvantaged by participating in our church's soup kitchen lunches, by participating in the Norfolk Emergency Shelter Team (NEST) program, which provides meals and shelter to the homeless during the winter months, and by providing financial and other direct support to individuals in need.

I have assisted with the Park Place Child Life Center, which seeks to transform the lives of economically disadvantaged inner city children, through arts-based programs designed to advance literacy and encourage a lifetime love of reading and the arts.

I have participated in the Tree of Lives Program in Kenya, providing financial support, clothing, and materials for children and women infected with HIV and AIDS.

In 2010, I worked with Operation Nehemiah, serving New Orleans Katrina victims, by gutting and re-building houses and chaperoning children from my older son's school, who played jazz for Katrina victims.

As an Assistant Federal Public Defender, my full-time legal work is in serving indigent persons accused of crimes. In addition, I have sought to participate in serving the disadvantaged in our community in both legal and non-legal ways.

26. **Selection Process**:

a. Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and the interviews in which you participated). Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, please include that process in your description, as well as whether the commission recommended your nomination. List the dates of all interviews or communications you had with the White House staff or the Justice Department regarding this nomination. Do not include any contacts with Federal Bureau of Investigation personnel concerning your nomination.

Virginia does not have a judicial selection commission to recommend candidates for nomination to the federal courts. Instead, local and state bar associations interview candidates and make recommendations to Virginia's U.S. Senators.

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On April 19, 2010, I interviewed with the Virginia State Bar Judicial Nominations Committee. On May 20, 2010, I met with various staff members working for Senator James Webb and Senator Mark Warner. On June 17, 2010, I interviewed with Senator Webb and Senator Warner. On June 29, 2010, I was contacted by a member of Senator Webb's staff who informed me that I was being recommended to the President.

Since July 20, 2010, I have been in contact with pre-nomination officials at the U.S. Department of Justice. I interviewed in Washington, D.C., with attorneys from the White House Counsel's Office and the Department of Justice on September 15, 2010. On December 1, 2010, the President submitted my nomination to the Senate.

b. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any currently pending or specific case, legal issue or question in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning your position on such case, issue, or question? If so, explain fully.

No

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FINANCIAL DISCLOSURE REPORT
NOMINATION FILING

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
Wright Allen, Arenda L.	U.S. District Court for the Eastern District of Virginia	12/01/2010
4. Title (Article III judges indicate active or senior status; magistrate judges indicate full- or part-time)	**5a. Report Type (check appropriate type)**	**6. Reporting Period**
Federal District Judge	☑ Nomination, Date 12/01/2010 ☐ Initial ☐ Annual ☐ Final 5b. ☐ Amended Report	01/01/2009 to 11/01/2010
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.**	
Federal District Court 600 Granby St Norfolk, VA 23510	Reviewing Officer_____ Date_____	

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

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

☑ NONE *(No reportable positions.)*

	POSITION	NAME OF ORGANIZATION/ENTITY
1.		
2.		
3.		
4.		
5.		

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

☑ NONE *(No reportable agreements.)*

	DATE	PARTIES AND TERMS
1.		
2.		
3.		

FINANCIAL DISCLOSURE REPORT Page 2 of 6	Name of Person Reporting Wright Allen, Arenda L.	Date of Report 12/01/2010

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

A. Filer's Non-Investment Income

☑ NONE *(No reportable non-investment income.)*

	DATE	SOURCE AND TYPE	INCOME (yours, not spouse's)
1.			
2.			
3.			
4.			

B. Spouse's Non-Investment Income - *If you were married during any portion of the reporting year, complete this section.*
(Dollar amount not required except for honoraria.)

☐ NONE *(No reportable non-investment income.)*

	DATE	SOURCE AND TYPE
1.	10/31/2010	Norfolk Christian School - Salary
2.		
3.		
4.		

IV. REIMBURSEMENTS - *transportation, lodging, food, entertainment.*
(Includes those to spouse and dependent children; see pp. 25-27 of filing instructions.)

☑ NONE *(No reportable reimbursements.)*

	SOURCE	DATES	LOCATION	PURPOSE	ITEMS PAID OR PROVIDED
1.					
2.					
3.					
4.					
5.					

FINANCIAL DISCLOSURE REPORT Page 3 of 6	Name of Person Reporting Wright Allen, Arenda L.	Date of Report 12/01/2010

V. GIFTS. *(Includes those to spouse and dependents children; see pp. 28-31 of filing instructions.)*

☑ NONE *(No reportable gifts.)*

	SOURCE	DESCRIPTION	VALUE
1.			
2.			
3.			
4.			
5.			

VI. LIABILITIES. *(Includes those of spouse and dependent children; see pp. 32-33 of filing instructions.)*

☐ NONE *(No reportable liabilities.)*

	CREDITOR	DESCRIPTION	VALUE CODE
1.	Navy Federal Credit Union	Credit card	K
2.	American Express	Credit card	J
3.	Bank of America	Credit Card	J
4.	Chase	Credit Card	J
5.			

FINANCIAL DISCLOSURE REPORT Page 4 of 6	Name of Person Reporting Wright Allen, Arenda L.	Date of Report 12/01/2010

VII. INVESTMENTS and TRUSTS – *income, value, transactions (Includes those of spouse and dependent children; see pp. 34-60 of filing instructions.)*

☑ NONE *(No reportable income, assets, or transactions.)*

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 1 (A-H)	(2) Type (e.g., div., rent, or int.)	(1) Value Code 2 (J-P)	(2) Value Method Code 3 (Q-W)	(1) Type (e.g., buy, sell, redemption)	(2) Date mm/dd/yy	(3) Value Code 2 (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)
1.									
2.									
3.									
4.									
5.									
6.									
7.									
8.									
9.									
10.									
11.									
12.									
13.									
14.									
15.									
16.									
17.									

1. Income Gain Codes (See Columns B1 and D4)	A =$1,000 or less F =$50,001 - $100,000	B =$1,001 - $2,500 G =$100,001 - $1,000,000	C =$2,501 - $5,000 H1 =$1,000,001 - $5,000,000	D =$5,001 - $15,000 H2 =More than $5,000,000	E =$15,001 - $50,000
2. Value Codes (See Columns C1 and D3)	J =$15,000 or less M =$250,001 - $500,000 P3 =$25,000,001 - $50,000,000	K =$15,001 - $50,000 O =$500,001 - $1,000,000	L =$50,001 - $100,000 P1 =$1,000,001 - $5,000,000 P4 =More than $50,000,000	M =$100,001 - $250,000 P2 =$5,000,001 - $25,000,000	
3. Value Method Codes (See Column C2)	Q =Appraisal U =Book Value	R =Cost (Real Estate Only) V =Other	S =Assessment W =Estimated	T =Cash Market	

FINANCIAL DISCLOSURE REPORT Page 5 of 6	Name of Person Reporting Wright Allen, Arenda L.	Date of Report 12/01/2010

VIII. ADDITIONAL INFORMATION OR EXPLANATIONS. *(Indicate part of Report.)*

FINANCIAL DISCLOSURE REPORT Page 6 of 6	Name of Person Reporting Wright Allen, Arenda L.	Date of Report 12/01/2010

IX. CERTIFICATION.

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

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

Signature: Arenda L Wright Allen

NOTE: ANY INDIVIDUAL WHO KNOWINGLY AND WILFULLY FALSIFIES OR FAILS TO FILE THIS REPORT MAY BE SUBJECT TO CIVIL AND CRIMINAL SANCTIONS (5 U.S.C. app. § 104)

FILING INSTRUCTIONS

Mail signed original and 3 additional copies to:

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

Arenda Allen

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		2	000	Notes payable to banks-secured			
U.S. Government securities				Notes payable to banks-unsecured			
Listed securities—Pitney Bowes shares			579	Notes payable to relatives			
Unlisted securities				Notes payable to others (auto loans)		30	434
Accounts and notes receivable:				Accounts and bills due		46	500
Due from relatives and friends				Unpaid income tax			
Due from others				Other unpaid income and interest			
Doubtful				Real estate mortgages payable – personal residence		248	000
Real estate owned—personal residence		592	100	Chattel mortgages and other liens payable			
Real estate mortgages receivable				Other debts-itemize:			
Autos and other personal property		28	000				
Cash value-life insurance		6	167				
Other assets itemize:							
- Thrift Savings Plan		408	144				
				Total liabilities		324	934
				Net Worth		712	056
Total Assets	1	036	990	Total liabilities and net worth	1	036	990
CONTINGENT LIABILITIES				GENERAL INFORMATION			
As endorser, comaker or guarantor				Are any assets pledged? (Add schedule)	NO		
On leases or contracts				Are you defendant in any suits or legal actions?	NO		
Legal Claims				Have you ever taken bankruptcy?	NO		
Provision for Federal Income Tax							
Other special debt							

*On November 23, 2010, I made arrangements to refinance my mortgage and pay off my debts. I anticipate closing within the next 30 days, at which time my only liability will be my real estate mortgage.

AFFIDAVIT

I, **ARENDA LAURETTA WRIGHT ALLEN**, do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

November 29, 2010 Arenda L Wright Allen
(DATE) (NAME)

Diane Liedman
(NOTARY)

348592 exp. 4-30-2012

City/County of NORFOLK
Commonwealth of Virginia
Sworn to and subscribed before me this 29th
day of NOV 2010
Witness my hand and official seal
Notary Public

Arenda L. Wright Allen
[redacted]

January 5, 2011

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

I have reviewed the Senate Questionnaire I previously filed in connection with my nomination on December 1, 2010, to be United State District Judge for the Eastern District of Virginia. I certify that the information contained in that document is, to the best of my knowledge, true and accurate.

I also am forwarding an updated Net Worth Statement and Financial Disclosure Report as requested in the Questionnaire. I thank the Committee for its consideration of my nomination.

Sincerely,

Arenda L. Wright Allen

cc:
The Honorable Charles Grassley
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

AO 10*
Rev. 1/2010

FINANCIAL DISCLOSURE REPORT
NOMINATION FILING

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
Wright Allen, Arenda L.	U.S. District Court for the Eastern District of Virginia	01/05/2011
4. Title (Article III judges indicate active or senior status; magistrate judges indicate full- or part-time)	**5a. Report Type (check appropriate type)**	**6. Reporting Period**
Federal District Judge	☑ Nomination, Date 01/05/2011 ☐ Initial ☐ Annual ☐ Final 5b. ☐ Amended Report	01/01/2010 to 12/31/2010
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.**	
Federal District Court 600 Granby St Norfolk, VA 23510	Reviewing Officer_____ Date_____	

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

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

☑ NONE *(No reportable positions.)*

	POSITION	NAME OF ORGANIZATION/ENTITY
1.		
2.		
3.		
4.		
5.		

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

☑ NONE *(No reportable agreements.)*

	DATE	PARTIES AND TERMS
1.		
2.		
3.		

FINANCIAL DISCLOSURE REPORT Page 2 of 6	Name of Person Reporting	Date of Report
	Wright Allen, Arenda L.	01/05/2011

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

A. Filer's Non-Investment Income

☑ NONE *(No reportable non-investment income.)*

	DATE	SOURCE AND TYPE	INCOME (yours, not spouse's)
1.			
2.			
3.			
4.			

B. Spouse's Non-Investment Income - *If you were married during any portion of the reporting year, complete this section.*
(Dollar amount not required except for honoraria.)

☐ NONE *(No reportable non-investment income.)*

	DATE	SOURCE AND TYPE
1.	2010	Norfolk Christian School - Salary
2.		
3.		
4.		

IV. REIMBURSEMENTS - *transportation, lodging, food, entertainment.*
(Includes those to spouse and dependent children; see pp. 25-27 of filing instructions.)

☐ NONE *(No reportable reimbursements.)*

	SOURCE	DATES	LOCATION	PURPOSE	ITEMS PAID OR PROVIDED
1.	Exempt				
2.					
3.					
4.					
5.					

FINANCIAL DISCLOSURE REPORT Page 3 of 6	Name of Person Reporting	Date of Report
	Wright Allen, Arenda L.	01/05/2011

V. GIFTS. *(Includes those to spouse and dependent children; see pp. 28-31 of filing instructions.)*

☐ NONE *(No reportable gifts.)*

	SOURCE	DESCRIPTION	VALUE
1.	Exempt		
2.			
3.			
4.			
5.			

VI. LIABILITIES. *(Includes those of spouse and dependent children; see pp. 32-33 of filing instructions.)*

☑ NONE *(No reportable liabilities.)*

	CREDITOR	DESCRIPTION	VALUE CODE
1.			
2.			
3.			
4.			
5.			

FINANCIAL DISCLOSURE REPORT
Page 4 of 6

Name of Person Reporting	Date of Report
Wright Allen, Arenda L.	01/05/2011

VII. INVESTMENTS and TRUSTS -- *Income, value, transactions (Includes those of spouse and dependent children; see pp. 34-60 of filing instructions.)*

☑ NONE *(No reportable income, assets, or transactions.)*

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A-H)	B. (2) Type (e.g., div., rent, or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, redemption)	D. (2) Date mm/dd/yy	D. (3) Value Code 2 (J-P)	D. (4) Gain Code 1 (A-H)	D. (5) Identity of buyer/seller (if private transaction)
1.									
2.									
3.									
4.									
5.									
6.									
7.									
8.									
9.									
10.									
11.									
12.									
13.									
14.									
15.									
16.									
17.									

1. Income Gain Codes (See Columns B1 and D4)	A =$1,000 or less	B =$1,001 - $2,500	C =$2,501 - $5,000	D =$5,001 - $15,000	E =$15,001 - $50,000
	F =$50,001 - $100,000	G =$100,001 - $1,000,000	H1 =$1,000,001 - $5,000,000	H2 =More than $5,000,000	
2. Value Codes (See Columns C1 and D3)	J =$15,000 or less	K =$15,001 - $50,000	L =$50,001 - $100,000	M =$100,001 - $250,000	
	N =$250,001 - $500,000	O =$500,001 - $1,000,000	P1 =$1,000,001 - $5,000,000	P2 =$5,000,001 - $25,000,000	
	P3 =$25,000,001 - $50,000,000		P4 =More than $50,000,000		
3. Value Method Codes (See Column C2)	Q =Appraisal	R =Cost (Real Estate Only)	S =Assessment	T =Cash Market	
	U =Book Value	V =Other	W =Estimated		

FINANCIAL DISCLOSURE REPORT Page 5 of 6	Name of Person Reporting Wright Allen, Arenda L.	Date of Report 01/05/2011

VIII. ADDITIONAL INFORMATION OR EXPLANATIONS. *(Indicate part of Report.)*

FINANCIAL DISCLOSURE REPORT Page 6 of 6	Name of Person Reporting Wright Allen, Arenda L.	Date of Report 01/05/2011

IX. CERTIFICATION.

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

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

Signature Arenda L. Wright Allen

NOTE: ANY INDIVIDUAL WHO KNOWINGLY AND WILFULLY FALSIFIES OR FAILS TO FILE THIS REPORT MAY BE SUBJECT TO CIVIL AND CRIMINAL SANCTIONS (5 U.S.C. app. § 104)

FILING INSTRUCTIONS

Mail signed original and 3 additional copies to:

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

Arenda L. Wright Allen

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		5	000	Notes payable to banks-secured			
U.S. Government securities				Notes payable to banks-unsecured			
Listed securities—Pitney Bowes shares			579	Notes payable to relatives			
Unlisted securities				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 -- personal residence		375	000
Real estate owned—personal residence		485	600	Chattel mortgages and other liens payable			
Real estate mortgages receivable				Other debts-itemize:			
Autos and other personal property		28	000				
Cash value-life insurance		6	167				
Other assets itemize:							
- Thrift Savings Plan		444	378				
				Total liabilities		375	000
				Net Worth		592	724
Total Assets		967	724	Total liabilities and net worth		967	724
CONTINGENT LIABILITIES				GENERAL INFORMATION			
As endorser, comaker or guarantor				Are any assets pledged? (Add schedule)	NO		
On leases or contracts				Are you defendant in any suits or legal actions?	NO		
Legal Claims				Have you ever taken bankruptcy?	NO		
Provision for Federal Income Tax							
Other special debt							

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Senator BLUMENTHAL. Judge Urbanski.

STATEMENT OF MICHAEL FRANCIS URBANSKI, NOMINATED TO BE U.S. DISTRICT JUDGE FOR THE WESTERN DISTRICT OF VIRGINIA

Judge URBANSKI. Thank you, Senator Blumenthal, Ranking Member Senator Grassley, for convening this hearing and for considering this nomination. I'd like to thank Senators Webb and Warner for their kind introduction and for the courtesy and consideration their staff and they have shown me throughout this process. I appreciate the confidence that the President has shown in me in this nomination.

Before I introduce the many folks I have with me, I'm mindful of those who have come before me. Both of my grandfathers came over on a boat and were coal miners in eastern Pennsylvania for their whole lives. My dad was a career Army officer, served in World War II in China. My mother-in-law, Jane Givens, school teacher and town council person. Both my dad and my mother-in-law taught me the importance of public service and duty.

I have here with me a few folks I'd like to introduce. First and foremost, and I'd like them to come forward and sit behind me, is my wife Ellen, of 28 years, is my best friend, the love of my life, and she keeps my grounded.

My son Will is here. Will is a computer security analyst at Virginia Tech, and a graduate student. He is here with me today. My daughter Sarah could not be here with us. My daughter Sarah is a senior education major at Emery & Henry College. She is doing something today that I daresay is a daunting proposition: she's doing a student teaching practicum at a middle school in southwestern Virginia. So, hello, Sarah. I hope you're watching us.

My mom is here. My mom is 87 years old, Irene Urbanski. There she is. She's told me about five times today that my dad would be proud of me. Well, I'm proud of my mom and she has taught me the duty of hard work and service. My sister Terry is here, Terry MacGlennon. She's a public school teacher. My brother-in-law, John MacGlennon, is the Chairman of the Department of Government at the College of William and Mary. He has told me he's going to grade me after this session here today. Their two sons, Andrew and Colin, are also here. They're both at William & Mary in college.

I have five present and former law clerks with me. We had lunch before this session. I have to tell you, they gave me a lot of grief. They're justifiably proud of that. I have my career law clerk, Kristin Johnson, who is a tremendous asset to me. She's here. Kristin, if you would stand up.

[Laughter.]

Mr. Urbanski. Mike Showalter, who was my law clerk, practices law in Chicago. He flew in for this today. Thank you, Mike. Stacy Bordick, my law clerk, and her husband Chet who's here today as well. Stacy practices in Fredericksburg. Thank you, Stacy. Usri Omar practices down the street with a law firm here in Washington. Thank you, Usri. And Ern Ashwell practices with a law firm in Roanoke. She is also here as well.

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My court team, the two deputy clerks who I work with every single day, Becky Mills and Kristin Airsman, took a day off from work, took the train up here from Roanoke, and are here with me today to give me support. I rely on them every day and I'm grateful for their support.

A good friend of ours, Mary Kingsley. An old friend, an old neighbor, is here to support me as well. We had dinner last night and I thank her for being here.

Last but not least, my judicial assistant, Sue DePugh, could not be here today. Sue has been with me for 27 years. She has put up with me from a young lawyer to an older lawyer, and she has taught me so much about being a person, and a lawyer, and now a judge. Sue can't be here, her husband is recovering from hip surgery, but I wanted to acknowledge her and give her credit for all she has done for me. Thank you, Senator.

Senator BLUMENTHAL. Thank you. Thank you to each of you for those very compelling stories and for the pride and gratitude that you have for your families and loved ones and friends. I'm certainly impressed as I listen to you.

[The biographical information follows.]

UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY

QUESTIONNAIRE FOR JUDICIAL NOMINEES

PUBLIC

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

   Michael Francis Urbanski

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

   United States District Judge for the Western District of Virginia

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

   United States District Court for the Western District of Virginia
   Richard H. Poff United States Courthouse
   210 Franklin Road, SW
   P.O. Box 38
   Roanoke, Virginia 24011

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

   1956; Livorno, Italy. (My father was a career U.S. Army officer stationed there.)

5. **Education**: List in reverse chronological order each college, law school, or any other institution of higher education attended and indicate for each the dates of attendance, whether a degree was received, and the date each degree was received.

   1978 – 1981, University of Virginia School of Law; J.D., 1981
   1974 – 1978, College of William and Mary; A.B. (High Honors), 1978

6. **Employment Record**: List in reverse chronological order all governmental agencies, business or professional corporations, companies, firms, or other enterprises, partnerships, institutions or 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 description.

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2004 – Present
United States District Court for the Western District of Virginia
210 Franklin Road, 2nd Floor
Roanoke, Virginia 24011
United States Magistrate Judge

1984 – 2004
Woods Rogers, PLC
10 South Jefferson Street, Suite 1400
Roanoke, Virginia 24011
Principal (1989 – 2004)
Associate (1984 – 1988)

1982 – 1984
Vinson & Elkins, LLP
1455 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Associate

1981 – 1982
United States District Court for the Western District of Virginia
246 Franklin Road, Suite 220
Roanoke, Virginia 24011
Law Clerk to U.S. District Judge James C. Turk

Summers 1980 & 1981
Vinson & Elkins, LLP
1455 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Summer Clerk

Summer 1979
Marshall, Blalock, Garner & Millner
(now Jones, Blechman, Woltz & Kelly)
701 Town Center
Newport News, Virginia 23606
Summer Clerk

Summer 1978
Busch Gardens Williamsburg
One Busch Gardens Boulevard
Williamsburg, Virginia 23185
Supervisor, food and beverage

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Other Affiliations (uncompensated)

2000 – 2004
Virginia Western Community College
P.O. Box 14007
Roanoke, Virginia 24038
Local Advisory Board – Chairman (2003-04); Board Member (2000-2003)

1990 – 1999
American Red Cross
Appalachian Region Blood Services
352 Church Avenue SW
Roanoke, Virginia 24016
Chairman (1996 – 1998)

1994 – 1998
Greater Raleigh Court Civic League
P.O. Box 3092
Roanoke, Virginia 24015
President (1996 – 1998)
Vice-President (1994 – 1996)

1991 – 1999
Greenvale School, Inc.
627 Westwood Blvd., NW
Roanoke, Virginia 24017
Member, Board of Directors

1991 – 1993
Bethany Hall, Inc.
1109 Franklin Road
Roanoke, Virginia 24016
Member, Board of Directors

7. **Military Service and Draft Status**: Identify any service in the U.S. Military, including dates of service, branch of service, rank or rate, serial number (if different from social security number) and type of discharge received, and whether you have registered for selective service.

I have not served in the military. I registered for selective service when I turned 18.

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8. **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.

"Best Lawyers in America" for Business Litigation (2001 – 2002, 2003 – 2004)
Fellows Award, Virginia Bar Association Young Lawyers Section (1992)
Martindale Hubbell "AV" rating
Phi Beta Kappa
Recognition for Outstanding Efforts in Preventing Youth Substance Abuse
Danville and Pittsylvania County, Regional Alliance for Substance Abuse Prevention (2009)
Virginia Business Magazine "Legal Elite" for Civil Litigation (2002 – 2003)

9. **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
Litigation and Antitrust Sections (1982 – 2004)
District of Columbia Bar
International Association of Defense Counsel
Roanoke Bar Association
Board of Directors (1997 – 1999, 2003 – 2004)
Ted Dalton American Inn of Court - Master of the Bench (2005 – present)
Virginia Association of Defense Attorneys
Virginia Bar Association
Special Issues Committee (2010 – present)
Civil Litigation Section Council (1999 – 2001)
Young Lawyers Section – Executive Committee (1990 – 92)
Virginia State Bar
Special Committee on Bench-Bar Relations (2009 – present)
Board of Governors, Litigation Section (2003 – 2004, *ex officio* 2004 – 2009)
Chairman, Antitrust, Franchise and Trade Regulation Section (1992 – 1993)

10. **Bar and Court Admission**:

a. List the date(s) you were admitted to the bar of any state and any lapses in membership. Please explain the reason for any lapse in membership.

Virginia, 1981
District of Columbia, 1982

There has been no lapse in membership.

b. List all courts in which you have been admitted to practice, including dates of admission and any lapses in membership. Please explain the reason for any lapse

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in membership. Give the same information for administrative bodies that require special admission to practice.

Supreme Court of the United States, 1995
United States Court of Appeals for the Fourth Circuit, 1981
United States Court of Appeals for the Sixth Circuit, 1993
United States Court of Appeals for the Federal Circuit, 1991
United States District Court for the Western District of Virginia, 1981
United States District Court for the Eastern District of Virginia, 1981
United States District Court for the District of Columbia, 1983
United States Bankruptcy Court for the Western District of Virginia, 1988
Supreme Court of Virginia, 1981
District of Columbia Court of Appeals, 1982

There has been no lapse in membership.

11. **Memberships**:

a. List all professional, business, fraternal, scholarly, civic, charitable, or other organizations, other than those listed in response to Questions 9 or 10 to which you belong, or to which you have belonged, since graduation from law school. Provide dates of membership or participation, and indicate any office you held. Include clubs, working groups, advisory or editorial boards, panels, committees, conferences, or publications.

American Red Cross, Appalachian Region Blood Services (1990 – 1999)
Chairman (1996 – 1998)
Bethany Hall, Inc.
Board of Directors (1991 – 1993)
Boy Scouts of America
Eagle Scout Review Board (2010 – present)
Christ Episcopal Church, Vestry (1989 – 1990, 1991 – 1993)
Citizens' Task Force to Study Alternative Election Procedures for Roanoke City Council (1991 – 1992)
Elks Club Pool (Approx. 1988 – 1996)
Emory and Henry College
Parents Council (2009 – present)
Fishburn Park Elementary School PTA
Co-President (1998 – 2000)
Greater Raleigh Court Civic League
President (1996 – 1998)
Vice-President (1994 – 1996)
Greenvale School, Inc.
Board of Directors (1991 – 1999)
Hunting Hills Country Club (Approx. 1997 – 2002)
Jefferson Club (Approx. early 1990s)

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Roanoke College Turk Pre-Law Program Advisory Committee (2009 – present)
Roanoke Modified Election District Task Force
Chairman (1997)
Roanoke Regional Chamber of Commerce, Backbone Club (Approx. 1985 – 1989)
Roanoke Regional Chamber of Commerce, Leadership Roanoke Valley (1990)
Susan G. Komen Breast Cancer Foundation, Community Review Panel (2008 – 2009)
Virginia Western Community College
Chairman, Local Advisory Board (2003 – 2004)
Board Member (2000 – 2003)

b. 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, or national origin. Indicate whether any of these organizations listed in response to 11a above currently discriminate or formerly discriminated on the basis of race, sex, religion or national origin 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, none of the organizations with which I have been involved presently discriminates or formerly discriminated on the basis of race, sex, religion or national origin. The Boy Scouts of America, however, is an organization for boys only.

12. **Published Writings and Public Statements**:

a. List the titles, publishers, and dates of books, articles, reports, letters to the editor, editorial pieces, or other published material you have written or edited, including material published only on the internet. Supply four (4) copies of all published material to the Committee.

This list represents the published material I have identified through searches of my files and internet databases. I have tried my best to list all of them here, although there may be some that I have not been able to identify or locate.

Michael F. Urbanski and Timothy E. Kirtner, *Employee Use of Company Computers – A Privilege Waiver Mine Field*, Virginia Lawyer, Virginia State Bar (Feb. 2009). Copy supplied.

Michael F. Urbanski, *View from the Bench – A Few Thoughts on Settlement Conferences*, Litigation News, Virginia State Bar (Spring 2007). Copy supplied.

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Ellen S. Moore and Michael F. Urbanski, Update to Chapter Five, *The Interference Torts*, ABA Section of Antitrust Law, Business Torts and Unfair Competition Handbook (2d Edition 2006). Copy supplied.

Michael F. Urbanski, *Expanding the Reach of Virginia's Business Conspiracy Act*, Litigation News, Virginia State Bar (Winter 1998 – 1999). Copy supplied.

Michael F. Urbanski, *Supreme Court Lifts Ban on Vertical Maximum Price Fixing* http://library.findlaw.com/1998/Jan/1/130655.html. Copy supplied.

Mike Urbanski, *At-Large System Has Served the City Well; Should Roanoke Switch to Wards for Choosing City Council?*, The Roanoke Times, Nov. 2, 1997. Copy supplied.

Co-contributing editor, *Antitrust Law in Virginia, A Comprehensive Digest of Federal and State Antitrust Decisions and Developments 1980-1988*, Virginia State Bar Antitrust Section (1989). Copy supplied.

Between 1990 and 2001, I authored a survey on antitrust law with various co-authors. Below is a list of the publications and the years in which I worked with each author:

Michael F. Urbanski, James R. Creekmore & Ellen S. Moore, *Antitrust and Trade Regulation Law*, 38 U. Rich. L. Rev. 59 (2003). Copy supplied.

Michael F. Urbanski, James R. Creekmore & Beth G. Hungate-Noland, *Antitrust and Trade Regulation Law*, 35 U. Rich. L. Rev. 453 (2001). Copy supplied.

Michael F. Urbanski & James R. Creekmore, *Antitrust and Trade Regulation Law*, 34 U. Rich. L. Rev. 647 (2000). Copy supplied.

Michael F. Urbanski & James R. Creekmore, *Antitrust and Trade Regulation Law*, 33 U. Rich. L. Rev. 769 (1999). Copy supplied.

Michael F. Urbanski & James R. Creekmore, *Antitrust and Trade Regulation Law*, 32 U. Rich. L. Rev. 973 (1998). Copy supplied.

Michael F. Urbanski, Francis H. Casola & James R. Creekmore, *Antitrust and Trade Regulation Law*, 31 U. Rich. L. Rev. 943 (1997). Copy supplied.

Michael F. Urbanski & Francis H. Casola, *Antitrust and Trade Regulation*, 29 U. Rich. L. Rev. 789 (1995). Copy supplied.

Michael F. Urbanski & Francis H. Casola, *Antitrust and Trade Regulation*, 28 U. Rich. L. Rev. 823 (1994). Copy supplied.

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Michael F. Urbanski & Francis H. Casola, *Antitrust and Trade Regulation*, 27 U. Rich. L. Rev. 575 (1993). Copy supplied.

Michael F. Urbanski, *Antitrust and Trade Regulation*, 26 U. Rich. L. Rev. 591 (1992). Copy supplied.

Michael F. Urbanski, *Antitrust and Trade Regulation*, 25 U. Rich. L. Rev. 565 (1991). Copy supplied.

Michael F. Urbanski, *Antitrust and Trade Regulation*, 24 U. Rich. L. Rev. 463 (1990). Copy supplied.

Since 2006, I have also served as editor-at-large for the Federal Courts Law Review. Copies of the journal available upon request.

b. Supply four (4) copies of any reports, memoranda or policy statements you prepared or contributed in the preparation of on behalf of any bar association, committee, conference, or organization of which you were or are a member. If you do not have a copy of a report, memorandum or policy statement, give the name and address of the organization that issued it, the date of the document, and a summary of its subject matter.

On June 12, 1997, as Chair of the Roanoke Modified Election District Task Force, I submitted the final report of the Task Force on its behalf to the Roanoke City Council. With the report, I filed a dissent to the proposed district plan. Copies of the report and my dissent are supplied.

In 1992, I served on a citizens task force studying alternative election systems for Roanoke, and I chaired a fact-finding subcommittee. The task force as a whole released a report of its findings in July 1992. The subcommittee created a report on the fact-finding phase of our work. Copies of both reports supplied.

c. Supply four (4) copies of any testimony, official statements or other communications relating, in whole or in part, to matters of public policy or legal interpretation, that you have issued or provided or that others presented on your behalf to public bodies or public officials.

As a representative of the Greater Raleigh Court Civic League, I addressed the Roanoke City Council on a few zoning and other issues affecting the neighborhood, including the neighborhood's opposition to the rezoning of a parcel of land in the neighborhood from residential to commercial use, rezoning of another parcel for use as a drug store, and on a proposal to limit the number of cars garaged on residential property. I have no notes, transcripts or recordings.

On June 16, 1997, as Chair of the Roanoke Modified Election District Task Force, I presented an overview of the Task Force's report to the Roanoke City Council. I

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have no notes, transcript or recording. A copy of the report is supplied in response to Question 12.b.

On April 21, 1997, as a private citizen, I also spoke to the Roanoke City Council in favor of a school board candidate, F. B. Webster Day. I have no notes, transcript, or recording, but press coverage is supplied.

d. Supply four (4) copies, transcripts or recordings of all speeches or talks delivered by you, including commencement speeches, remarks, lectures, panel discussions, conferences, political speeches, and question-and-answer sessions. Include the date and place where they were delivered, and readily available press reports about the speech or talk. If you do not have a copy of the speech or a transcript or recording of your remarks, give the name and address of the group before whom the speech was given, the date of the speech, and a summary of its subject matter. If you did not speak from a prepared text, furnish a copy of any outline or notes from which you spoke.

The following is a list of speeches and panel discussions of which I have a record. To create this list, I searched my memory, personal files, and the internet. Notwithstanding my best efforts to create a list responding to this question that is as complete as possible, there may be other presentations I have given that I have been unable to identify or remember.

Virginia CLE
E-Discovery 2.0
Third Annual Advanced Business Litigation Institute
Charlottesville, Virginia
May 20, 2010
Written materials supplied.

Virginia Bar Association
Chief Justice's 2010 Pro Bono Summit
VBA address:
701 East Franklin Street, Suite 1120
Richmond, Virginia 23219
April 27, 2010
I have no notes, transcripts or recordings.

Fed Facts: High School and Middle School Drug Penalties Program
Lynchburg City Schools (March 12, 2010)
Hidden Valley High School, Roanoke County Schools (December 15, 2009)
Henry County Alternative School (November 9, 2009)
Addison, Breckinridge, Wilson and Madison Middle Schools, Roanoke (October 27-29, 2009, November 2, 2009)
Tunstall Middle School, Pittsylvania County (May 26, 2009)

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Patrick County High School (April 27, 2009, October 8, 2009)
Roanoke County / Bedford County Alternative School (March 9, 2009)

Martinsville Middle and High Schools (January 13, 2009)
Written materials supplied.

Washington and Lee School of Law / Moot Court Executive Board
Representation in Mediation Competition, Final Round
1 Denny Circle
Lexington, VA 24450
February 27, 2010
February 27, 2009
I have no notes, transcripts or recordings.

William and Mary Law School
William B. Spong Moot Court Tournament
613 South Henry Street
Williamsburg, VA 23185
February 12-13, 2010
February 13-14, 2009
February 17, 2006
February 18-19, 2005
I have no notes, transcripts or recordings.

Hollins University
Rule of Law Class, History/Politics 561, The Rule of Law: History and Traditions
Roanoke, Virginia
February 8, 2010
Written materials supplied.

University of Virginia School of Law
Trial Advocacy Workshop
580 Massie Road
Charlottesville, Virginia 22903
January 13, 2010
January 7-8, 2009
January 10-11, 2008
I have no notes, transcripts or recordings.

Roanoke Area Youth Substance Abuse Coalition Red Ribbon Candlelight Vigil
Fourteenth Annual Candlelight Vigil of Remembrance and Hope
Roanoke, Virginia
November 1, 2009
Written materials supplied.

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Virginia Women Attorneys Association
Aggressive Plaintiff v. Aggressive Defendant: Does Anyone Know a Good Mediator?
Roanoke, Virginia
October 13, 2009
Written materials supplied.

Washington and Lee School of Law
Federal Court Litigation – First 30 Days
Presented to Trial Practice Class
Lexington, Virginia
September 23, 2009
Written materials supplied.

Virginia Bar Association Foundation Rule of Law Project
R.E. Cook Alternative School
Vinton, Virginia
February 18, 2009
Written materials supplied.

Ted Dalton American Inn of Court
Ask the Judges
Salem, Virginia
January 26, 2009
I have no notes, transcripts or recordings.

Project Safe Childhood
Training for Law Enforcement
Roanoke, Virginia
PSC address:
Office of Justice Programs
Office of the Assistant Attorney General
810 Seventh Street, NW
Washington, DC 20531
September 10, 2008
I have no notes, transcripts or recordings.

Social Security Administration Judicial Conference
A View from the Bench
Savannah, Georgia
July 8, 2008
Written materials supplied.

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International Association of Defense Counsel Annual Meeting
Mediation
White Sulphur Springs, West Virginia
IADC address:
303 West Madison, Suite 925
Chicago, Illinois 60606
July 4-5, 2008
I have no notes, transcripts or recordings.

Federal Public Defender's Office for the Eastern District of Virginia
Frank Dunham Federal Criminal Defense Conference
Perspective of U.S. Magistrate Judge on Detention Issues
Charlottesville, Virginia
FPD address:
1650 King Street, Suite 500
Alexandria, Virginia 22314
April 11, 2008
I have no notes, transcripts or recordings.

Roanoke Bar Association
Trial Advocacy Program and Mock Trial
Bar Association address:
P.O. Box 18183
Roanoke, Virginia 24014
April 4, 7-8, 2008
I have no notes, transcripts or recordings. Press coverage supplied.

Virginia Bar Association
Minority Pre-Law Conference Mock Trial
Washington and Lee School of Law
VBA address:
701 East Franklin Street, Suite 1120
Richmond, Virginia 23219
April 5, 2008
I have no notes, transcripts or recordings.

Virginia Association of Defense Attorneys
Trial Tactics Workshop
770 East Main Street, Suite 1050
Richmond, Virginia 23219
March 8, 2008
I have no notes, transcripts or recordings.

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Ted Dalton American Inn of Court
Pretrial Issues Concerning Expert Witnesses
Salem, Virginia
November 26, 2007
Written materials supplied.

Virginia Association of Defense Attorneys Annual Meeting
Products Liability Breakout
Defining "Unreasonably Dangerous" in Virginia
Roanoke, Virginia
October 25, 2007
Written materials supplied.

Virginia State Bar
Professionalism Course
Roanoke, Virginia (August 23, 2007)
Charlottesville, Virginia (March 8, 2007)
Roanoke, Virginia (August 24, 2006)
Roanoke, Virginia (August 25, 2005)
Written materials from first course given in 2005 supplied.

Virginia CLE Webcast
Secrets of 30(b)(6) Depositions
Charlottesville, Virginia
June 13, 2007
Written materials supplied.

Virginia Association of Legal Secretaries Annual Meeting
Professionalism
Roanoke, Virginia
April 28, 2007
Written materials supplied.

Virginia Women's Attorney's Association
Mediation and Electronic Discovery in the Western District of Virginia
Roanoke, Virginia
March 29, 2007
Written materials supplied.

Ted Dalton American Inn of Court
Legal Issues Involving Eyewitness Identification
Lexington, Virginia
November 27, 2006
Written materials supplied.

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Citizenship & Naturalization Ceremony
Abingdon, Virginia
October 27, 2006
I have no notes, transcript or recording. Press coverage supplied.

Virginia Trial Lawyers Association
Commercial Litigation Section
Mediation and Electronic Discovery in the Western District of Virginia
Roanoke, Virginia
October 17, 2006
Written materials supplied.

Virginia Women Attorneys Association
Criminal Practice before a United States Magistrate Judge
Williamsburg, Virginia
October 13, 2006
Written materials supplied.

Virginia Bar Association
Labor and Employment Section Seminar
New Electronic Discovery Rules
Roanoke, Virginia
October 7, 2006
Written materials supplied.

Virginia CLE
New Electronic Discovery Rules
Springfield, Virginia
August 30, 2006
Written materials supplied.

Comments at Retirement Dinner for Deputy Clerk Sam Golightly
Danville, Virginia
July 14, 2006
Written materials supplied.

Virginia State Bar
Litigation Section, Annual Meeting
Preparing Clients to Testify
Virginia Beach, Virginia
June 16, 2006
Written materials supplied.

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Roanoke Bar Association
Criminal Practice before US Magistrate Judge
Roanoke, Virginia
May 24, 2006
Written materials supplied.

Blue Ridge Parkway
Legal Update: Court Procedures
May 12, 2006
Written materials supplied.

Roanoke Bar Association
Use of Depositions in Federal Court
Roanoke, Virginia
December 13, 2005
Written materials supplied.

Virginia Association of Defense Attorneys
Young Lawyers Division
Right Start Seminar
Richmond, Virginia
December 2, 2005
Written materials supplied.

Roanoke Bar Association
Memorial Resolution for Ellen Spring Moore
Roanoke, Virginia
November 8, 2005
Written materials supplied.

Virginia CLE
Use of Depositions in Federal Court
Danville, Virginia
August 21, 2005
Written materials supplied.

Comments at Retirement Luncheon for Deputy Clerk Barbara Gibson
Styled as spoof Report and Recommendation
Danville, Virginia
February 8, 2005
Written materials supplied.

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Roanoke Bar Association
Presentation to new lawyers
Practice of Law Tour
Ted Dalton Ceremonial Courtroom
P.O. Box 18183
Roanoke, Virginia 24014
December 14, 2004
I have no notes, recordings or transcripts. Press coverage supplied.

Virginia Trial Lawyers Association
Commercial Litigation Section Luncheon
Business Torts
Roanoke, Virginia
Spring 2004
Written materials supplied.

Woods Rogers & Hazlegrove Luncheon Seminar
Non-Competition Agreements & Trade Secrets
Virginia Tech Corporate Research Center
Blacksburg, Virginia
Woods Rogers & Hazlegrove address:
10 S. Jefferson St, Suite 1400
Roanoke, Virginia 24011
March 12, 2003
I have no notes, transcripts or recordings.

Virginia Accounting and Auditing Conference
Board Duties of a Director of a Private Virginia Corporation
Virginia Tech Division of Continuing Education
VAAC address:
4309 Cox Road
Glen Allen, Virginia 23060
2002
I have no notes, transcripts or recordings.

Virginia State Bar Annual Meeting
Bench-Bar Relations Committee / Litigation Section
Jury Orientation and Management: Practical and Ethical Issues and Solutions
Virginia Beach, Virginia
VSB address:
707 East Main St, Suite 1500
Richmond, Virginia 23219
June 2002
I have no notes, transcripts or recordings.

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Virginia State Bar
Intellectual Property / Antitrust Sections Fall Seminar
A Primer on Intellectual Property - Antitrust Issues
707 East Main Street, Suite 1500
Richmond, Virginia 23219
Fall 2002
I have no notes, transcripts or recordings.

Virginia State Bar Annual Meeting
Bench-Bar Relations Committee / Litigation Section
Jury Orientation and Management: Practical and Ethical Issues and Solutions
Virginia Beach, Virginia
VSB address:
707 East Main St, Suite 1500
Richmond, Virginia 23219
June 2002
I have no notes, transcripts or recordings.

Virginia Accounting and Auditing Conference
Proving Damages in a Business Case
Virginia Tech Division of Continuing Education
VAAC address:
4309 Cox Road
Glen Allen, Virginia 23060
2001
I have no notes, transcripts or recordings.

Virginia Bar Association
Labor and Employment Section
Noncompetes after *Motion Control v. East*
Charlottesville, Virginia
VBA address:
701 East Franklin Street, Suite 1120
Richmond, Virginia 23219
2001
I have no notes, transcripts or recordings.

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Virginia Accounting and Auditing Conference
Non-Competition Law in Virginia
Virginia Tech Division of Continuing Education
VAAC address:
4309 Cox Road
Glen Allen, Virginia 23060
2000
I have no notes, transcripts or recordings.

Virginia CLE
Trying Federal Cases in the Western District of Virginia
Motions Practice
Virginia CLE address:
105 Whitewood Road
Charlottesville, Virginia 22901
1999, 2001
Written materials supplied.

Virginia Accounting and Auditing Conference
Business Torts for Accountants
Virginia Tech Division of Continuing Education
VAAC address:
4309 Cox Road
Glen Allen, Virginia 23060
1999
I have no notes, transcripts or recordings.

Virginia Association of Defense Attorneys
Handling the Commercial Breach of Warranty Case
VADA address:
770 East Main Street, Suite 1050
Richmond, Virginia 23219
1999
I have no notes, transcripts or recordings.

Virginia State Corporation Commission
The Fifteenth National Regulatory Conference
Antitrust: Will it Change the Lives of Telecommunications Executives?
Williamsburg, Virginia
May 5, 1997
Transcript supplied.

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Virginia CLE
Dispositive Motions, 32 Timely and Important Issues in Your Federal Court Practice
Norfolk , Virginia and Tyson's Corner, Virginia
December 17 & 18, 1996
Written materials supplied.

Virginia CLE
How to Make Deals Pro-Competitive: Proving Cost Savings and Efficiencies, Health Care Market Dynamics: Antitrust Problems and Solutions for Hospitals, Physicians and Payers
Virginia CLE address:
105 Whitewood Road
Charlottesville, Virginia 22901
1996
I have no notes, transcripts or recordings.

Virginia CLE
Interrogatories and Requests for Admissions
105 Whitewood Road
Charlottesville, Virginia 22901
1995
Written materials supplied.

Roanoke Bar Association
Whistleblowing and Disclosure: Being Ethical on Betraying the Client?
Bar Association address:
P.O. Box 18183
Roanoke, Virginia 24014
1994
I have no notes, transcripts or recordings.

Virginia CLE
The Evolving Role of Antitrust Laws in Health Care Reform: Facilitator or Inhibitor? The Changing Health Care Market: Antitrust Issues and the Impact of Reform
Virginia CLE address:
105 Whitewood Road
Charlottesville, Virginia 22901
1993
I have no notes, transcripts or recordings.

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Virginia CLE
Antitrust Issues Arising from Negotiation of Provider Contracts with Managed Care Plans, Antitrust Law Compliance for Hospitals, Physicians and Health Care Attorneys
Virginia CLE address:
105 Whitewood Road
Charlottesville, Virginia 22901
1992
I have no notes, transcripts or recordings.

Virginia CLE
Representing the Business Client in Antitrust Investigations, Antitrust, Franchise and Trade Regulation Law, What You Need to Know About – But Were Afraid to Ask
Virginia CLE address:
105 Whitewood Road
Charlottesville, Virginia 22901
1990
I have no notes, transcripts or recordings.

Virginia Insurance Reciprocal Defense Counsel Symposium
Antitrust Litigation Against Hospitals and Physicians
4200 Innslake Drive
Glen Allen, Virginia 23060
1989
I have no notes, transcripts or recordings.

In addition, from 2004 through 2010, I attended the Roanoke Bar Association's Bench-Bar Conference, and I participated in a Q&A session with sitting judges. I have no notes, transcripts, or recordings of any of these events.

e. List all interviews you have given to newspapers, magazines or other publications, or radio or television stations, providing the dates of these interviews and four (4) copies of the clips or transcripts of these interviews where they are available to you.

I have searched my files and internet databases to refresh my memory in an effort to produce as complete a list of interviews as I could, but it is still possible there are some I was not able to locate.

A Lawyer's Duty to Virginia's Poor, The Virginian-Pilot, Apr. 30, 2010, at B6. Copy supplied.

Peter Vieth, *Standing 'Gag Order' Dropped from Final Local Rules, Says Western District of Virginia*, Virginia Lawyers Weekly, Mar. 15, 2010. Copy supplied.

VerDate Nov 24 2008 11:51 Oct 24, 2011 Jkt 067905 PO 00000 Frm 00641 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\67905.TXT SJUD1 PsN: CMORC
67905.340

Peter Vieth, *When Disputes Arise at Depositions, Who You Gonna Call?*, Virginia Lawyers Weekly, Mar. 8, 2010. Copy supplied.

Learn the Law Now or Learn it Later, Danville Register & Bee, May 29, 2009. Copy supplied.

Susan Elzey, *Judge: Drugs Not Worth the Prison Time*, Danville Register & Bee, May 27, 2009. Copy supplied.

Mickey Powell, *Kids Hear Tough Talk on Tough Issues*, Martinsville Bulletin, Jan. 14, 2009. Copy supplied.

Gregory J. Haley and Scott C. Ford, *From Courtroom to Conference Room: Reflections on Mediation*, Virginia Lawyer, Vol. 57, Feb. 2009. Copy supplied.

Travis J. Graham and James J. O'Keeffe IV, *Have You Made A Last-Ditch, Desperate, and Disingenuous Attempt to Subvert the Legal Process Today?*, Virginia Lawyer, Vol. 57, Feb. 2009. Copy supplied.

Mike Gangloff, *The Invisible Docket*, The Roanoke Times, Apr. 27, 2008, at A1. Copy supplied.

Cathy Benson, *Murray Run Greenway Completed*, The Roanoke Star-Sentinel, Nov. 21, 2007, at 1. Copy supplied.

Sharon Nelson & John Simek, *The New Federal Rules of Civil Procedure: An ESI Primer*, Law Practice, Dec. 2006, at 23. Copy supplied.

Beth Macy, *Ellen Moore Gave Her All to the Last*, The Roanoke Times, Apr. 1, 2005. Copy supplied.

Jen McCaffery, *Urbanski Sworn in as Magistrate Judge*, The Roanoke Times, Jan. 24, 2004, at B1. Copy supplied.

Beth Macy, *Still in the Race*, The Roanoke Times, June 8, 2003, at 1. Copy supplied.

Mark Berman, *Opinions Differ on Conference Wrangling; Lawsuit Against BC, Miami Open to Debate*, The Roanoke Times, June 8, 2003, at C1. Copy supplied.

Joel Turner, *Supporters Speak up for 2 Choices*, The Roanoke Times, Aug. 6, 2002, at B3. Copy supplied.

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67905.341

Jenn Burleson, *Berglund Still Wants Pulaski Dealerships; Contract 'Valid and Enforceable,' Berglund Lawyer Argues*, The Roanoke Times, May 11, 2002, at B6. Copy supplied.

Todd Jackson, *Crop of Council Hopefuls Could Stump Roanokers; Voters Must Choose Tuesday from an Unusually Strong Field of Candidates*, The Roanoke Times, May 5, 2002, at A1. Copy supplied.

Jenn Burleson, *Hudson to Proceed with Sale to Duncan; Berglund May Appeal Decision*, The Roanoke Times, Jan. 31, 2002, at NRV1. Copy supplied.

Ray Cox, *Basketball Their Favorite Language; Lithuanians Mankevicius and Norbutas Enjoying Roanoke Catholic*, The Roanoke Times, Jan.10, 2002, at C6. Copy supplied.

Jeff Sturgeon, *Lewis-Gale Sues Over Doctor' Agreement*, The Roanoke Times, Dec. 23, 2000, at A1. Copy supplied.

Tad Dickens, *Software Firm Cites E-Mail for Suit, Probe; Roanoke Company Claims Ex-Employee Took Source Code*, The Roanoke Times, Dec. 3, 2000, at B1. Copy supplied.

Richard Craver, *Furniture Manufacturers Settle Lawsuit Out of Court*, High Point Enterprise, Feb. 18, 2000. Copy supplied.

Richard Craver, *Lawsuit Targets North Carolina Furniture Firm's Hospitality Line*, High Point Enterprise, Nov. 27, 1999. Copy supplied.

Richard Craver, *Virginia Furniture Maker Sues Former Executive and His New Employer*, High Point Enterprise, Nov. 27, 1999. Copy supplied.

Todd Jackson, *Senate Race: Fralin Attacks*, The Roanoke Times, Oct. 24, 1999, at B1. Copy supplied.

Michael Hemphill, *Radford Woman's Lawsuit Against Lab Settled*, The Roanoke Times, Apr. 20, 1999, at B3. Copy supplied.

Todd Jackson, *How to Pick City Manager Splits Council; Some Roanoke City Council Members Want Residents' Input in Selection Process*, The Roanoke Times, Feb. 5, 1999, at B1. Copy supplied.

Joel Turner, *Suspect Milk Recalled from Roanoke City Schools; Principal: 'There was No Widespread Problem,'* The Roanoke Times, Oct. 1, 1998, at B3. Copy supplied.

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67905.342

Todd Jackson, *'Swiss Cheese' Zoning Gets Mixed Reviews; Rezoning Would Halt Encroachment of Multi-Family Homes in Raleigh Court*, The Roanoke Times, Sept. 11, 1998, at B1. Copy supplied.

John D. Cramer, *Residents Upset By No Spill Warning; 'Dad, Everything's Dead in the Creek,'* The Roanoke Times, Apr. 28, 1998, at C1. Copy supplied.

Todd Jackson, *Rezoning Plan Divides Residents of Raleigh Court; Home for Alzheimer's Patients at Issue*, The Roanoke Times, Dec. 12, 1997, at B1. Copy supplied.

Todd Jackson, *Wards Issue Got Its Day at The Polls; 9,440 Roanoke Voters – 46 Percent – Supported Wards*, The Roanoke Times, Nov. 6, 1997, at B1. Copy supplied.

Todd Jackson, *Would Wards Have Unifying or Divisive Effect on the City?*, The Roanoke Times, Oct. 20, 1997, at A1. Copy supplied.

Todd Jackson, *Ward Backers: Council Not Sharing Facts; Group Says Roanoke Leaders Keeping Information from Voters*, The Roanoke Times, Oct. 10, 1997, at B1. Copy supplied.

Todd Jackson, *Pro-Ward Leader in 'Lion's Den,' Addresses Attorneys with Plan; 5-District, At-Large Factions Debate*, The Roanoke Times, Sept. 10, 1997, at B1. Copy supplied.

Todd Jackson, *Roanoke Council Puts Wards Plan on Ballot with Nov. 4 Referendum Set, Campaigns For and Against the Change Can Begin*, The Roanoke Times, Aug. 19, 1997, at C1. Copy supplied.

Joel Turner, *Ward Plan Authors Denounce It; Majority of Council Would Not Be Accountable to Any One Voter, Task Force Member Says*, The Roanoke Times, July 29, 1997, at C1. Copy supplied.

Leslie Taylor, *Task Force OKs 'Modified Ward System'; City Election System Has Drawn Complaints for Two Decades*, The Roanoke Times, June 11, 1997, at B1. Copy supplied.

Dan Casey, *Rezoning to be Sought for Raleigh Court Property*, The Roanoke Times, Feb. 13, 1997, at N4. Copy supplied.

Dan Casey, *Roanokers Share Ideas on Racial Voting Districts*, The Roanoke Times, Jan. 29, 1997, at C1. Copy supplied.

Dan Casey, *Roanoke City Council Approves Drugstore*, The Roanoke Times, Sept. 17, 1996, at C3. Copy supplied.

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67905.343

Dan Casey, *Civic League Resists Drugstore Zoning*, The Roanoke Times, Sept. 14, 1996, at B1. Copy supplied.

Joel Turner, *Early Bird Gets the Parking Spot*, The Roanoke Times, Sept. 14, 1996, at B1. Copy supplied.

Dan Casey, *Projects Drop Like Dominoes; Fund Snarl Delays Plans All in a Row* The Roanoke Times, Sept. 4, 1996, at A1. Copy supplied.

Dan Casey, *Councilman Questions Drugstore Plan; Rite-Aid Would be Located Near His Home*, The Roanoke Times, Aug. 28, 1996, at C1. Copy supplied.

Dan Casey, *Roanoke Panel Starts It [sic] Work on Ward System*, The Roanoke Times, Aug. 15, 1996, at C1. Copy supplied.

Wes Allison, *Landowners Reel in Victory; Land-Grant Ruling Affirms Their Control of 3-Mile Part of Trout Stream*, The Roanoke Times, Feb. 6, 1996, at B1. Copy supplied.

Henry Christner, *A River-Lutionary War? Landowners Try to Stop Anglers*, Richmond Times Dispatch, June 4, 1995, at D14. Copy supplied.

Dorothy Giobbe, *Newspaper Sues Real Estate Firms*, Editor & Publisher, Jan. 8, 1994, at 26. Copy supplied.

John Hoke, *Roanoke Restaurant Told to Drop Hooters Name*, Richmond Times-Dispatch, Nov. 10, 1993, at C4. Copy supplied.

Spencer S. Hsu, *Centuries-Old Fishing Feud is in Court*, The Washington Post, May 27, 1993, at V1. Copy supplied.

Joel Turner, *How to Pick Council? Choice is Still Unclear*, June 1, 1992, at A3. Copy supplied.

Joel Turner, *Task Force Calls for Term Limits*, The Roanoke Times, May 28, 1992, at A1. Copy supplied.

Joel Turner, *Panel Advises Electing Mayor*, The Roanoke Times, Mar. 12, 1992, at B4. Copy supplied.

Leslie Taylor, *Antitrust Probe of Hollins Closed; 3 VA. Schools Dropped from Investigation*, Jan. 24, 1992, at A1 [quote reprinted in Richmond Times-Dispatch on Jan. 25, 1992]. Copy supplied.

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I have also been interviewed by a few local television and radio stations over the years, although I do not have any copies of any materials concerning these appearances. As I recall, I was interviewed by a local radio station sometime around 1997 concerning my work on the City of Roanoke Modified Election District Task Force prior to a referendum on this issue; by local television stations in the early 1990s following a successful defense of an antitrust challenge to a hospital merger in Roanoke; and in connection with a lawsuit I was handling concerning fishing rights on the Jackson River.

13. **Judicial Office**: State (chronologically) any judicial offices you have held, including positions as an administrative law judge, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

I was appointed United States Magistrate Judge for the Western District of Virginia on January 23, 2004.

As a United States Magistrate Judge, I hear preliminary felony criminal and civil matters pending in the Roanoke, Lynchburg and Danville Divisions of the court and may try civil cases on consent. In addition, I preside over misdemeanor trials. I have significant responsibility for the many habeas corpus and prisoner civil rights lawsuits pending in the Western District of Virginia, and I supervise a staff of pro se law clerks handling those cases. These matters represent a substantial portion of our docket. I also regularly conduct mediations of civil cases and have successfully resolved several hundred disputes. In 2010, Chief Judge Jones appointed me to chair an Advisory Committee on the new Local Rules adopted in the Western District.

a. Approximately how many cases have you presided over that have gone to verdict or judgment?

I preside over federal misdemeanor trials which are held two days each month. Since 2004, judgments were docketed in more than 1,200 cases over which I presided. In civil cases, I regularly conduct evidentiary and motion hearings. Upon consent of the parties, civil cases may be transferred to me for disposition as presiding judge. Considering my duties as a whole, I estimate that I spend roughly half of my time on civil cases and half of my time on criminal cases. The numbers below reflect the approximately 600 misdemeanor trials over which I have presided.

i. Of these, approximately what percent were:

jury trials:	
bench trials:	100 %
civil proceedings:	
criminal proceedings:	100 %

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b. Provide citations for all opinions you have written, including concurrences and dissents.

See attached list.

c. For each of the 10 most significant cases over which you presided, provide: (1) a capsule summary of the nature the case; (2) the outcome of the case; (3) the name and contact information for counsel who had a significant role in the trial of the case; and (3) the citation of the case (if reported) or the docket number and a copy of the opinion or judgment (if not reported).

1. In re Peanut Corp. of Am., No. 6:10cv027, 2010 WL 3463212 (W.D. Va. Aug. 25, 2010). I presided over the proposed settlement of personal injury claims by individuals who had consumed peanut products tainted with Salmonella. The court was required to consider approval and distribution of a $12 million fund to over 120 claimants, including review and approval of nine death claims and over 40 infant claims. After careful review of the procedure used to allocate the settlement fund and detailed evaluation of the substance of the claims and the proposed distribution, I recommended approval of the settlement. Judge Moon adopted that recommendation.

Counsel for PCA Salmonella Claimants were Bruce T. Clark, Marler Clark, L.L.P., P.S., 701 5th Avenue, Seattle, WA 98104, Tel (206) 346-1888; David B. Carson, Johnson Ayers & Matthews PLC, P.O. Box 2200, Roanoke, VA 24009, Tel (540) 767-2037; Ronald J. Simon, Simon & Luke, L.L.P., 2929 Allen Parkway, Houston, TX 77019, Tel (713) 335-4900; Gary M. Coates, Gary M. Coates, P.C., 2104 Langhorne Rd., Lynchburg, VA 24501, Tel (434) 846-5900; Brendan J. Flaherty, Pritzker Olsen, P.A., 2950 PLAZA VII, 45 South 7th Street, Minneapolis, MN 55402, Tel (612) 338-0202; and counsel for the Trustee was Richard Clifford Maxwell, Woods Rogers PLC, P.O. Box 14125, Roanoke, VA 24038, Tel (540) 983-7628.

2. Schwarz & Schwarz, LLC v. Certain Underwriters at Lloyd's London, No. 6:07cv042, 2009 WL 2882034 (W.D. Va. Aug. 31, 2009), was a multimillion dollar dispute over insurance coverage arising out of a massive fire at an industrial site in Altavista. At the time of the fire, portions of the automatic sprinkler system were shut down for repairs, causing large portions of the vacant industrial building to be engulfed by the fire. The insurance company denied coverage based on a provision in the policy requiring it to be notified if the automatic sprinkler system is shut off. The case required mastering the details of the condition and operation of the sprinkler system, the facts surrounding the origin of the fire, the terms of the insurance policy, and applicable Virginia law. I recommended granting summary judgment for the insurer based on the owner's failure to comply with the Protective Safeguards Endorsement to the insurance policy, and Judge Moon adopted that recommendation.

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The property owner was represented by Joshua F.P. Long, Woods Rogers PLC, P.O. Box 14125, Roanoke, VA 24038, Tel (540) 983-7725. The insurance company was represented by Susan B. Ayers, Wright & O'Donnell, P.C., Suite 570, 15 East Ridge Pike, Conshohocken, PA 19428, Tel (610) 940-4092.

3. Treadway v. Danieli & Co., No. 7:08cv19 (W.D. Va. Oct. 16, 2008), was a products liability case brought by a steel worker against an Italian manufacturer of a furnace used in a steel mill. Plaintiff received catastrophic burns. After presiding over preliminary discovery matters, the case was referred to me for mediation and a compromise resolution was reached after extended negotiations. The plaintiff was represented by John Lichtenstein, Lichtenstein Fishwick & Johnson PLC, P.O. Box 601, Roanoke, VA 24004, Tel (540) 343-9711. Defendant was represented by Frank Ciano, Goldberg Segalla LLP, Suite 203, 170 Hamilton Avenue, White Plains, NY 10601, Tel (914) 798-5400.

4. Wade v. Alderman, No. 4:07cv0009 (W.D. Va. Sept. 18, 2008), was a dispute over conflicting claims of access to parcels of real estate dating back to the construction of the Blue Ridge Parkway. A creative resolution to this historic controversy was reached after many hours of negotiation with the parties.

The landowners were principally represented by Philip G. Gardner, Gardner Gardner Barrow & Sharpe, 4th Floor, Fidelity Bank Building, 231 East Church Street, Martinsville, VA 24112, Tel (276) 638-2455; Glenn W. Pulley, Clement & Wheatley, P.O. Box 8200, Danville, VA 24543, Tel (434) 793-8436; and Jonathan M. Rogers, P.O. Box 136, Floyd, VA 24091, Tel (540) 745-8686. The United States was represented by Assistant United States Attorney Anthony P. Giorno, P.O. Box 1709, Roanoke, VA 24008, Tel (540) 857-2254.

5. United States v. Savoy Senior Housing Corp., No. 6:06cv00031, 2008 WL 631161 (W.D. Va. Mar. 6, 2008), was an enforcement action against a developer and several contractors brought by the United States under the Clean Water Act. After presiding over a number of preliminary matters, I brokered a mediated settlement of this dispute. The mediation was extremely challenging given the number of parties and their competing interests.

The United States was represented by David J. Kaplan and Kenneth C. Amaditz, U.S. Department of Justice, P.O. Box 23986, Washington, DC 20026, Tel (202) 514-0997. Best GC, Inc. was represented by Lori Thompson, LeClair Ryan, PC, 1800 Wachovia Tower, Drawer 1200, Roanoke, VA 24006, Tel (540) 510-3011. Acres of Virginia, Inc. was represented by James A. Downey, Jr., 819 Main Street, Lynchburg, VA 24504, Tel (434) 846-6633, and Sidney H. Kirstein, P.O. Box 8, Lynchburg, VA 24505, Tel (434) 846-6868. The Savoy defendants were represented by David C. Wrobel, Wrobel & Schatz, LLP, 1040 Avenue of the Americas, 11th Floor, New York, NY 10018, Tel (212) 421-8100.

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6. DE Techs., Inc. v. Dell, Inc., No. 7:04cv628 (W.D. Va. July 25, 2007), was a complex patent infringement case involving an interactive website for facilitating online sales, and I successfully mediated the resolution of the case.

Plaintiff was represented by William B. Poff, Woods Rogers PLC, P.O. Box 14125, Roanoke, VA 24038, Tel (540) 983-7649. Defendant was represented by Roderick B. Williams, Vinson & Elkins LLP, Suite 10C, 2801 Via Fortuna, The Terrace 7, Austin, TX 78746, Tel (512) 542-8436, and William Raymond Rakes, Gentry Locke Rakes & Moore, P.O. Box 40013, Roanoke, VA 24022, Tel (540) 983-9300.

7. Tunnell v. Ford Motor Co., No. 4:03cv074, 2006 WL 910012 (W.D. Va. Apr. 7, 2006), was a products liability case against Ford Motor Company pending in the Danville Division involving horrific burns to a passenger in a Ford Mustang that had struck a pole. I authored a series of opinions in this case on a variety of substantive issues. In the opinion referenced above, I recommended denial of plaintiff's motion for new trial, but imposed sanctions on defendant for discovery failings.

Plaintiff was represented by Fred D. Smith, P.O. Box 991, Martinsville, VA 24114, Tel (276) 638-2555, and James Haskins, Young Haskins Mann Gregory McGarry & Wall P.C., P.O. Box 72, Martinsville, VA 24114, Tel (276) 638-2367. Ford was represented by Paul G. Cereghini, Bowman & Brooke LLP, Suite 1600, 2901 North Central Avenue, Phoenix, AZ 85012, Tel (602) 643-2400, and Julie A. Childress, Seltzer Greene, PLC, Suite 1025, 707 East Main Street, Richmond, VA 23219, Tel (804) 672-4552.

8. United States ex rel. Callahan v. U.S. Oncology, Inc., No. 7:00cv350, 2005 WL 3334296 (W.D. Va. Dec. 7, 2005), concerned the contested settlement of a qui tam case brought by the United States against an oncology group in Roanoke regarding complicated allegations of overbilling the government for treatment services. After a two day hearing, I orally recommended approval of the settlement reached between the United States and the doctors, over the objection of the relator.

Counsel for the United States was Susan Lynch, Department of Justice, Commercial Litigation Branch, P.O. Box 261, Ben Franklin Station, Washington, DC 20044, Tel (202) 353-7171. The defendant was represented by Hunter W. Sims, Jr., Kaufman & Canoles, P.C., P.O. Box 3037, Norfolk, VA 23514, Tel (757) 624-3272. The relator was represented by Candace McCall, Suite 700, 11350 Random Hills Road, Fairfax, VA 22030, Tel (703) 385-5251.

9. United States v. Warren, No. 7:04cr021 (W.D. Va. Oct. 13, 2005), was a wire and mail fraud criminal prosecution involving the embezzlement of over seven million dollars by a claimed securities trader. After defendant entered a plea agreement to five felony counts, I was tasked with fashioning a restitution remedy

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for the victims of the fraud. This was a huge undertaking, involving painstaking review of extraordinary amounts of data from the crime victims and developing a mechanism for a fair and just allocation of competing claims. Copy of opinion supplied.

The United States was represented by Assistant United States Attorney Jennie L. M. Waering, P.O. Box 1709, Roanoke, VA 24008, Tel (540) 857-2905. The defendant was represented by L. Bradford Braford, P.O. Box 750, Roanoke, VA 24004, Tel (540) 342-2850.

10. United States v. Powers, 318 F. Supp. 2d 339 (W.D. Va. 2004). As United States Magistrate Judge, one of my most significant responsibilities is to conduct detention hearings for individuals charged with federal felonies. I conduct such hearings nearly every day, and each of these cases is significant to the individuals involved, as well as to the community at large. In reaching decisions in these cases, I am required to balance a defendant's individual constitutional and procedural rights against the danger he or she may pose to the community if released. Many of these cases involve serious drug and gun crimes, often with an overlay of substance abuse and mental illness. In Powers, I detained a defendant charged with being a felon in possession of firearms and explosives.

The United States was represented by Assistant United States Attorney Andrew Bassford, P.O. Box 1709, Roanoke, VA 24008, Tel (540) 857-2935. The defendant was represented by E. Scott Austin, Gentry Locke Rakes & Moore, P.O. Box 40013, Roanoke, VA 24022, Tel (540) 983-9393.

d. For each of the 10 most significant opinions you have written, provide: (1) citations for those decisions that were published; (2) a copy of those decisions that were not published; and (3) the names and contact information for the attorneys who played a significant role in the case.

1. Martinsville Cable, Inc. v. Time Warner N.Y. Cable, LLC, 445 F. Supp. 2d 668 (W.D. Va. 2006), was a dispute between the City of Martinsville and cable television companies over the ownership and control of cable television assets serving the residents of Martinsville. The city argued that it had the right to acquire and operate, through a corporate alter ego, the assets of an existing cable television provider. The decision was significant because it concluded that the city did not comply with various provisions of Virginia's Municipal Cable Law and could not lawfully own or operate the disputed cable television assets.

The city was represented by Peter S. Partee, Sr., Hunton & Williams, 200 Park Avenue, 52nd Floor, New York, NY 10166, Tel (212) 309-1056. Defendant cable companies were represented by Jon Talotta, Hogan Lovells US, Park Place II - Ninth Floor, 7930 Jones Branch Drive, McLean, VA 22102, Tel (703) 610-6156.

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2. Bryant v. Yorktowne Cabinetry, Inc., 538 F. Supp. 2d 948 (W.D. Va. 2008), concerned the issue of ex parte communications by counsel with former employees of a corporate party. I found the challenged communications to be proper under the Virginia Rules of Professional Conduct and decided cases. This decision was significant because it set clear rules for Virginia lawyers to follow in communicating with former employees of adverse parties.

Plaintiff was represented by W. Hunter Byrnes, Clement & Wheatley PC, P.O. Box 8200, Danville, VA 24543, Tel (434) 793-8200. Defendant was represented by Thomas R. Bagby, Woods Rogers PLC, P.O. Box 14125, Roanoke, VA 24038, Tel (540) 983-7766.

3. Spicer v. Universal Forest Products, No. 7:07cv462, 2008 WL 4455854 (W.D. Va. Oct. 1, 2008), dealt with a corporate party's obligations at a Rule 30(b)(6) deposition. I found that the requirements of the rule were not met. This decision was significant because the requirements of the rule had been flaunted, and practicing lawyers and parties need to have clear guidance as to the adverse consequences of flagrant noncompliance with the Federal Rules.

Plaintiff was represented by John P. Fishwick, Jr., Lichtenstein Fishwick & Johnson PLC, P.O. Box 601, Roanoke, VA 24004, Tel (540) 345-5890. Defendant was represented by Rafael E. Morell, Suite 300, 1250 24th Street NW, Washington, DC 20037, Tel (202) 467-8377.

4. Domonoske v. Bank of America, Inc., Nos. 5:08cv066, 5:09cv080, 2010 WL 329961 (W.D. Va. Jan. 27, 2010), was a proposed class action lawsuit against Bank of America under the Fair Credit Reporting Act. I found that the proposed class action settlement did not comply with the law concerning the availability of injunctive relief under the FCRA. The significance of this opinion lies in the recognition of the significant costs and burden associated with large civil cases, and the court's obligation to ensure that the integrity of the legal system is upheld and justice is done in each case.

Counsel for plaintiff were Matthew Erausquin, Consumer Litigation Associates PC, Suite 600, 1800 Diagonal Road, Alexandria, VA 22314, Tel (703) 273-7770, and Leonard Bennett, Consumer Litigation Associates, 12515 Warwick Boulevard, Suite 100, Newport News, VA 23606, Tel (757) 930-3660. Counsel for defendant was Michael Agoglia, Morrison & Foerster LLP, 425 Market Street, San Francisco, CA 94105, Tel (415) 268-6057.

5. United States v. Moore, No. 7:07mj507, 2007 WL 3172140 (W.D. Va. Oct. 26 2007), concerned a prolonged vehicle stop and subsequent search on the Blue Ridge Parkway. I found that the seizure of the driver violated the Fourth Amendment because the park ranger lacked reasonable articulable suspicion of criminal activity consistent with the requirements of Terry v. Ohio, 392 U.S. 1

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(1968). This decision was significant because of the balance it required between the rights of citizens and legitimate law enforcement efforts.

The United States was represented by Assistant United States Attorney Sharon Burnham, P.O. Box 1709, Roanoke, VA 24008, Tel (540) 857-2250. Defendant was represented by William Harrison Cleaveland, Suite 101, 40 British Woods Drive, Roanoke, VA 24019, Tel (540) 591-5959.

6. Arista Records LLC v. Does 1-14, No. 7:08cv0205, 2008 WL 5350246 (W.D. Va. Dec. 22, 2008), was an effort by a record company to compel a state university to provide information regarding the identity of alleged copyright infringers using the university's internet service. The issue in the opinion concerned whether the state university was protected by the Eleventh Amendment from having to comply with the record company's discovery demands.

The record company was represented by Katheryn Coggon, Holme Roberts & Owen LLP, Suite 4100, 1700 Lincoln Street, Denver, CO 80203, Tel (303) 861-7000. The university was represented by Mary Beth Nash, Virginia Polytechnic Institute and State University, 327 Burruss Hall, Blacksburg, VA 24061, Tel (540) 231-6293.

7. Sprenger v. Rector and Board of Visitors of Virginia Tech, No. 7:07cv502, 2008 WL 2465236 (W.D. Va. June 17, 2008), concerned the issue whether an employee using a work computer has a reasonable expectation of privacy in electronic communications with her spouse or whether use of the employer's computer waived the common law spousal privilege. While the subsequent utility of the holding in my opinion was rather narrow because of the sparse evidentiary record in the case before me, the issue of whether an employee's use of an employer's computer can waive the attorney-client or doctor-patient privilege is an important issue to the millions of people using work computers every day.

The plaintiff was represented by David G. Harrison, Harrison Firm PC, 5305 Medmont Circle, Roanoke, VA 24014, Tel (540) 777-7100. The university was represented by Mary Beth Nash, Virginia Polytechnic Institute and State University, 327 Burruss Hall, Blacksburg, VA 24061, Tel (540) 231-6293.

8. Smith v. James C. Hormel School of Virginia Institute of Autism, No. 3:08cv0030, 2009 WL 4799738 (W.D. Va. Dec. 8, 2009), was a suit brought under the Individuals with Disabilities in Education Act concerning whether a private school had obligations under the statute and whether the local school board provided the child with a free and appropriate public education. In two opinions, I found that the IDEA did not impose liability on a private school that contracted with a public agency to provide special education and that the local school board provided free and appropriate public education.

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Plaintiff proceeded pro se during these proceedings, but is now represented by George Naylor, Carter & Shands PC, Suite 530, 9030 Stony Point Parkway, Richmond, VA 23235, Tel (804) 747-7470. Defendant school board was represented by Kathleen S. Mehfoud, Reed Smith LLP, Suite 1700, Riverfront Plaza - West Tower, 901 East Byrd Street, Richmond, VA 23219, Tel (804) 344-3421. The private school was represented by Thomas Hall, Jason Burt and Maximilian Grant, Latham & Watkins LLP, Suite 1000, 555 Eleventh Street, NW, Washington, DC 20004, Tel (202) 637-2200.

9. Carr v. Hazelwood, No. 7:07cv001, 2008 WL 4556607 (W.D. Va. Oct. 8, 2008), was a claim for sexual assault brought by a female pretrial detainee under 42 U.S.C. § 1983. The opinion concerned whether the plaintiff had exhausted her administrative remedies. The case proceeded to trial at which plaintiff obtained a jury verdict in her favor.

Plaintiff was represented by Trey Sibley and Pete Johnson, Hunton & Williams LLP, Riverfront Plaza East Tower, 951 East Byrd Street, Richmond, VA 23219, Tel (804) 788-8200. Defendant was represented by John A. Gibney, Jr., Thompson & McMullan PC, Third Floor, 100 Shockoe Slip, Richmond, VA 23219, Tel (804) 698-6214.

10. Powers v. Coble, No. 7:05cv0436, 2007 WL 840114 (W.D. Va. Mar. 16, 2007), was a dispute over the termination of an auto salvage business and involved a myriad of breach of contract, business conspiracy and fiduciary duty claims. I found that material issues of fact precluded summary judgment, and the dispute was resolved at a subsequent mediation.

Plaintiff was represented by Mark D. Loftis, Woods Rogers PLC, P.O. Box 14125, Roanoke, VA 24011, Tel (540) 983-7618 and Jonathan D. Sasser, Ellis & Winters LLP, P.O. Box 33550, Raleigh, NC 27636, Tel (919) 865-7000. Defendants were represented by Kevin Oddo and Lori Thompson, LeClair Ryan P.C., 1800 Wachovia Tower, Drawer 1200, Roanoke, VA 24006, Tel (540) 510-3000.

e. Provide a list of all cases in which certiorari was requested or granted.

Williams v. Jabe, No. 7:08cv00061, 2008 WL 5427766 (W.D. Va. Dec. 31, 2008), aff'd, 339 F. App'x 317 (4th Cir. 2009), cert. denied, 130 S. Ct. 1061 (2010).

Tunnell v. Ford Motor Co., No. 4:03cv00074, 2006 WL 910012 (W.D. Va. Apr. 7, 2006), adopted by, 2006 WL 1788233 (W.D. Va. June 26, 2006), aff'd, 245 F. App'x 283 (4th Cir. 2007), cert denied, 128 S. Ct. 1447 (2008).

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Davis v. United States, No. 7:04cv00255, 2005 WL 1356032 (W.D. Va. June 7, 2005), appeal dismissed, 227 F. App'x 255 (4th Cir. 2007), cert. denied, 128 S. Ct. 416 (2007).

Cota v. Johnson, No. 7:03cv00782, 2004 WL 3334011 (W.D. Va. Nov. 5, 2004), aff'd, 126 F. App'x 642 (4th Cir. 2005), cert. denied, 126 S. Ct. 482 (2005).

f. Provide a brief summary of and citations for all of your opinions where your decisions were reversed by a reviewing court or where your judgment was affirmed with significant criticism of your substantive or procedural rulings. If any of the opinions listed were not officially reported, provide copies of the opinions.

As a United States Magistrate Judge, every decision I make is subject to review by the district court or the Fourth Circuit. The vast majority of my decisions have been adopted or affirmed on review. The following decisions have been reversed, in whole or in part, on subsequent review.

Domonoske v. Bank of America, NA, No. 5:08cv066, 2010 WL 329961 (W.D. Va. Jan. 27, 2010), aff'd on other grounds, 2010 WL 1507212 (W.D. Va. Apr. 15, 2010). I declined to approve all of the terms of a proposed class action settlement of a case under the Fair Credit Reporting Act, including a provision for proposed injunctive relief. I recommended approval of the class action settlement with this term excised. The district court agreed with my legal analysis as to the availability of injunctive relief under the FCRA, and on that basis denied overall class certification.

Canada v. Ray, No. 7:08cv219, 2010 WL 297818 (W.D. Va. Jan. 19, 2010), adopted in part, declined in part, 2010 WL 2179062 (W.D. Va. May 28, 2010). I recommended dismissal as frivolous under 28 U.S.C. §1915A(b)(1) all but one claim in a civil rights action brought by an inmate. I recommended requiring the defendant warden to respond to the claim that a skin test for tuberculosis testing is the least restrictive means of reaching a compelling governmental interest under the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc. The district court affirmed as to all but the RLUIPA claim. As to that claim, the district court did not reach the legal issue, finding that the pro se inmate alleged only that the testing violated the First Amendment and did not allege a violation of RLUIPA.

Bowen v. Astrue, No. 7:07cv00023, 2007 WL 4287735 (W.D. Va. Dec. 5, 2007), vacated, No. 7:07cv023 (W.D. Va. Dec. 20, 2008) (order vacating Report and Recommendation for factual clarification), clarified by, 2008 WL 65454 (W.D. Va. Jan. 4, 2008), aff'd, No. 7:07cv023 (W.D. Va. Jan. 18, 1008) (order adopting Report and Recommendation). The district court sought clarification of a factual issue concerning the opinion of a state agency physician. After clarification, the case was affirmed.

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Smith v. James C. Hormel School of Virginia Institute of Autism, No. 3:08cv030, 2009 WL 4799738 (W.D. Va. Dec. 8, 2009), adopted in part, declined in part, 2010 WL 1257656 (W.D. Va. Mar. 26, 2010). District court adopted Report and Recommendation ("R&R") granting summary judgment to private school and public county school board in Individuals with Disabilities in Education Act claim. District court also adopted denial of motion to dismiss defamation counterclaim, but declined to dismiss the fraud counterclaim.

Hartman v. Commissioner, No. 6:07cv044, 2008 WL 5110859 (W.D. Va. Dec. 4, 2008), declined to follow, 2009 WL 102737 (W.D. Va. Jan. 15, 2009). In this Social Security disability case, I recommended remand for a consultative medical evaluation, but the district court disagreed, finding substantial evidence to support the Commissioner's decision.

Fields v. Justus, No. 1:07cv019, 2008 WL 570951 (W.D. Va. Feb. 28, 2008), adopted, 2008 WL 863723 (W.D. Va. Mar. 31, 2008), rev'd, 566 F.3d 281 (4th Cir. 2009). District court adopted Report and Recommendation ("R&R") granting plaintiff's motion for summary judgment on qualified immunity grounds in suit alleging that a public employee was not hired due to political affiliation. The Fourth Circuit reversed, agreeing that while the First Amendment generally prohibits consideration of political affiliation during hiring, it was not clearly established for the specific position involved in this case at the time the hiring decision was made.

Fisher v. Va. Dep't of Corrections, No. 7:06cv00529, 2007 U.S. Dist. LEXIS 38487 (W.D. Va. May 25, 2007), adopted in part, rejected in part, 2007 U.S. Dist. LEXIS 48969 (W.D. Va. July 6, 2007) and 2007 U.S. Dist. LEXIS 48970 (W.D. Va. July 6, 2007). R&R recommending denial of defendants' supplemental motion for summary judgment was adopted in its entirety except as it related to one defendant, who was dismissed by the district court because prisoner made no allegation as to this particular defendant's involvement in violating prisoner's First Amendment right to free exercise of religion.

Ostrander v. Commissioner, No. 7:06cv513 (W.D. Va. June 19, 2007), declined to follow, (W.D. Va. Oct. 19, 2007). In this Social Security disability case, I recommended affirming the Commissioner's decision, but the district court remanded for further administrative consideration.

Centennial Broadcasting, LLC v. Burns, No. 6:06cv006, 2007 WL 1112672 (W.D. Va. Apr. 12, 2007), adopted in part, declined in part, 2007 WL 1472067 (W.D. Va. May 18, 2007). R&R denying award of attorney's fees adopted, but denial of costs declined.

Williams v. Bays, No. 7:07cv00019, 2007 U.S. Dist. LEXIS 41306 (W.D. Va. Mar. 20, 2007), adopted in part, rejected in part, 2007 U.S. Dist. LEXIS 37581

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(W.D. Va. May 23, 2007), appeal dismissed, 251 F. App'x 837 (4th Cir. 2007), aff'd, 274 F. App'x 284 (4th Cir. 2008). R&R recommending dismissal of all claims was adopted by district court except as to prisoner's claim regarding denial of medical care under the Eighth Amendment. The Fourth Circuit dismissed for lack of jurisdiction prisoner's appeal of the district court's Order and ultimately affirmed the district court's decision.

Montgomery v. Johnson, No. 7:05cv0131, 2006 WL 3370181 (W.D. Va. Nov. 17, 2006), adopted in part, declined in part, 2007 WL 473984 (W.D. Va. Feb 7, 2007). District court adopted R&R denying summary judgment to defendants in prisoner excessive force claim as to prolonged use of four point restraints, but declined to follow regarding the prison's initial use of force and initial placement in restraints.

Grimes v. Virginia, No. 7:05cv00036, 2005 U.S. Dist. LEXIS 44071 (W.D. Va. Dec. 20, 2005), adopted in part, 2006 U.S. Dist. LEXIS 87560 (W.D. Va. Jan. 12, 2006) (order recommitting matter for further findings of fact and conclusions of law), issue reconsidered in, 2006 U.S. Dist. LEXIS 2468 (W.D. Va. Jan. 24, 2006), adopted, 2006 U.S. Dist. LEXIS 87570 (W.D. Va. Feb. 7, 2006), aff'd, 206 F. App'x 241 (4th Cir. 2006). In this § 1983 suit, I recommended dismissing two of prisoner's claims based on statute of limitations and denying defendants' motion for summary judgment as to prisoner's third excessive force claim, finding a disputed issue of material fact as to administrative exhaustion. The district court adopted R&R with respect to the claims that were statutorily barred and recommitted the case for further findings of fact and conclusions of law on the issue of exhaustion, recognizing that prisoner had not demanded a jury and court was the ultimate trier of fact on the issue. In a second R&R, I recommended dismissing prisoner's remaining claim based on his failure to exhaust administrative remedies. District court adopted the R&R in its entirety and the Fourth Circuit affirmed.

Blount v. Johnson, No. 7:04cv429, 2005 WL 1313513 (W.D. Va. May 31, 2005), adopted, 373 F. Supp. 2d 615 (W.D. Va. Jun. 28, 2005), vacated by, 2005 WL 2246558 (W.D. Va. Sep. 15, 2005). R&R granting summary judgment to defendants due to prisoner's failure to exhaust administrative remedies adopted, and later vacated. District court allowed pro se prisoner to file additional evidence of exhaustion after R&R was entered, which created issue of fact.

Mitchell v. Commissioner, No. 6:04cv002 (W.D. Va. Feb. 3, 2005), declined to follow, (W.D. Va. Mar. 28, 2005). In this Social Security disability case, I recommended remand for additional vocational evidence, but the district court disagreed, finding substantial evidence to support the Commissioner's decision.

DirecTV, Inc. v. Swisher, No. 5:03cv079, 2004 WL 1109886 (W.D. Va. Apr. 30, 2004), declined to follow, 2004 WL 1381152 (W.D. Va. Jun. 18, 2004). R&R

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dismissing satellite television piracy suit rejected as pleadings deemed sufficient to state a claim.

g. Provide a description of the number and percentage of your decisions in which you issued an unpublished opinion and the manner in which those unpublished opinions are filed and/or stored.

Most of my decisions are not published in official reporters, but are reported on Westlaw. All orders and opinions orders issued by me are filed with our court's Electronic Case Filing (ECF) system.

h. Provide 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, provide copies of the opinions.

1. Ebersole v. Conover, 7:08cv503, 2010 WL 3629581 (W.D. Va. Aug. 27, 2010).

2. Hammonds v. Johnson, No. 7:09cv365, 2010 WL 2244389 (W.D. Va. Apr. 29, 2010).

2. Diaz v. United States, No. 7:09cv80138, 2010 WL 1005262 (W.D. Va. Mar. 1, 2010).

3. Oquinn v. Adkins, No. 7:08cv426, 2010 WL 677771 (W.D. Va. Feb. 24, 2010).

4. Whitner v. Ray, No. 7:09cv140, 2010 WL 1027418 (W.D. Va. Feb. 17, 2010).

5. Canada v. Ray, No. 7:08cv219, 2010 WL 297818 (W.D. Va. Jan. 19, 2010).

6. Jones v. Vandevander, No. 7:09cv055, 2009 WL 4709561 (W.D. Va. Dec. 8, 2009).

7. Beltran v. United States, No. 6:07cr012-001, No. 6:08cv80119, 2009 WL 3877517 (W.D. Va. Nov. 17, 2009).

8. Showalter v. Johnson, No. 7:08cv276, 2009 WL 3379146 (W.D. Va. Oct. 20, 2009).

9. Canada v. Ray, No. 7:08cv219, 2009 WL 2448557 (W.D. Va. Aug. 10, 2009).

10. Brown v. United States, No. 7:08cv80102, 2009 WL 1789121 (W.D. Va. June 23, 2009).

11. Fuentes v. United States, No. 5:08cv80101, 2009 WL 1806660 (W.D. Va. June 23, 2009).

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12. Waters v. O'Brien, No. 7:08cv555, 2009 WL 1806661 (W.D. Va. June 23, 2009).

13. Showalter v. Johnson, No. 7:08cv276, 2009 WL 1321694 (W.D. Va. May 12, 2009).

14. United States v. Porter, No. 5:08cv80023, 2009 WL 825757 (W.D. Va. Mar. 26, 2009).

15. Murray v. United States, No. 5:08cv80028, 2009 WL 675807 (W.D. Va. Mar. 11, 2009).

16. Graham v. Dunagan, No. 7:08cv260, 2009 WL 440633 (W.D. Va. Feb. 20, 2009).

17. Couch v. Mathena, No. 7:08cv518, 2009 WL 233547 (W.D. Va. Jan. 30, 2009).

18. Williams v. Jabe, No. 7:08cv061, 2008 WL 5427766 (W.D. Va. Dec. 31, 2008).

19. Arista Records L.L.C. v. Does 1-14, No. 7:08cv205, 2008 WL 5350246 (W.D. Va. Dec. 22, 2008).

20. Giarratano v. Harvey, No. 7:08cv361, 2008 WL 5082750 (W.D. Va. Nov. 25, 2008).

21. United States v. Hairston, No. 4:05cr022-001, 2008 WL 4809165 (W.D. Va. Nov. 4, 2008).

22. Graham v. United States, No. 7:07cv377, 2008 WL 4735601 (W.D. Va. Oct. 20, 2008).

23. Carr v. Hazelwood, No. 7:07cv001, 2008 WL 4556607 (W.D. Va. Oct. 8, 2008).

24. Chacon v. Ofogh, No. 7:08cv046, 2008 WL 4146142 (W.D. Va. Sept. 8, 2008).

25. Callejas-Uribe v. United States, No. 7:07cv446, 2008 WL 2844497 (W.D. Va. July 22, 2008).

26. Sprenger v. Rector and Bd. of Visitors of Virginia Tech, No. 7:07cv502, 2008 WL 2465236 (W.D. Va. June 17, 2008).

27. Turner v. Kinder, No. 7:07cv419, 2008 WL 2078094 (W.D. Va. May 15, 2008).

28. Henderson v. Virginia, No. 7:07cv266, 2008 WL 792171 (W.D. Va. Mar. 25, 2008).

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29. United States v. Gettier, No. 7:08po0024, 2008 WL 822073 (W.D. Va. Mar. 25, 2008).

30. McCain v. United States, No. 7:07cv301, No. 4:05cr011, 2008 WL 2332342 (W.D. Va. Mar. 25, 2008).

31. Guillen v. Bartee, No. 7:07cv236, 2008 WL 706536 (W.D. Va. Mar. 14, 2008).

32. Turner v. Kinder, No. 7:07cv419, 2008 WL 648982 (W.D. Va. Mar. 10, 2008).

33. Fields v. Justus, No. 1:07cv019, 2008 WL 570951 (W.D. Va. Feb. 28, 2008).

34. Henry v. United States, No. 7:07cv076, 2008 WL 552450 (W.D. Va. Feb. 27, 2008).

35. Tune v. Sandridge, No. 7:07cv347, 2008 WL 2264496 (W.D. Va. Feb. 19, 2008).

36. Williams v. Braxton, No. 7:07cv292, 2007 WL 4561295 (W.D. Va. Dec. 20, 2007).

37. Joyce v. Thomas, No. 7:07cv339, 2007 WL 4561297 (W.D. Va. Dec. 20, 2007).

38. Williams v. Bays, No. 7:07cv019, 2007 WL 4553701 (W.D. Va. Dec. 19, 2007).

39. United States v. Moore, No. 7:07mj507, 2007 WL 3172140 (W.D. Va. Oct. 26, 2007).

40. Redd v. Medical Staff, No. 7:07cv204, 2007 WL 2712956 (W.D. Va. Sept. 14, 2007).

41. Shifflett v. United States, No. 7:06cv497, 2007 WL 2463262 (W.D. Va. Aug. 28, 2007).

42. Saucedo-Gonzalez v. United States, No. 7:07cv073, 2007 WL 2319854 (W.D. Va. Aug. 13, 2007).

43. Poles v. Middle River Reg'l Jail, No. 7:07cv096, 2007 WL 2138705 (W.D. Va. July 23, 2007).

44. Odighizuwa v. Strouth, No. 7:06cv720, 2007 WL 2007337 (W.D. Va. July 6, 2007).

45. Pierson v. United States, No. 7:06cv366, 2007 WL 2021891 (W.D. Va. July 5, 2007).

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46. Smith v. Rodriguez, No. 7:06cv521, 2007 WL 1768705 (W.D. Va. June 15, 2007).

47. Fisher v. Va. Dep't of Corrections, No. 7:06cv529, 2007 WL 1552548 (W.D. Va. May 25, 2007).

48. Shifflett v. United States, No. 7:06cv497, 2007 WL 1555738 (W.D. Va. May 22, 2007).

49. Moore v. Gregory, No. 7:06cv546, 2007 WL 1555774 (W.D. Va. May 22, 2007).

50. Abdullah v. O'Brien, No. 7:07cv040, 2007 WL 1472785 (W.D. Va. May 21, 2007).

51. United States v. Scott, No. 7:06mj713, 2007 WL 1289920 (W.D. Va. Apr. 30, 2007).

52. Odighizuwa v. Strouth, No. 7:06cv720, 2007 WL 1170640 (W.D. Va. Apr. 17, 2007).

53. Smith v. United States, No. 7:06cv391, 2007 WL 990279 (W.D. Va. Mar. 29, 2007).

54. Williams v. Bays, No. 7:07cv019, 2007 WL 1553588 (W.D. Va. March 20, 2007).

55. Scales v. Bristol Va. City Jail, No. 7:06cv556, 2007 WL 777532 (W.D. Va. Mar. 13, 2007).

56. Fisher v. Va. Dep't of Corrections, No. 7:06cv529, 2007 WL 628344 (W.D. Va. Feb. 23, 2007).

57. White v. Bristol Va. City Jail, No. 7:06cv504, 2007 WL 552206 (W.D. Va. Feb. 21, 2007).

58. Alvarado-Acosta v. United States, No. 7:05cv767, 2006 WL 3392204 (W.D. Va. Nov. 22, 2006).

59. Montgomery v. Johnson, No. 7:05cv131, 2006 WL 3370181 (W.D. Va. Nov. 17, 2006).

60. Mayo v. Morris, No. 7:06cv280, 2006 WL 3337385 (W.D. Va. Nov. 15, 2006).

61. Canada v. Ray, No.706cv190, 2006 WL 2709637 (W.D. Va. Sept. 20, 2006).

62. Carpenter v. Sheriff of Roanoke City, No. 7:05cv667, 2006 WL 2709691 (W.D. Va. Sept. 20, 2006).

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63. Diaz-Rodriguez v. United States, No. 7:05cv367, 2006 WL 2553415 (W.D. Va. Sept. 1, 2006).

64. Montgomery v. Johnson, No. 7:05cv131, 2006 WL 2403305 (W.D. Va. Aug. 18, 2006).

65. Blount v. Boyd, No. 7:05cv643, 2006 WL 2381968 (W.D. Va. Aug. 17, 2006).

66. United States v. Mackey, 7:06mj149, 2006 WL 1699736 (W.D. Va. June 12, 2006).

67. Menas v. O'Brien, No. 7:06cv026, 2006 WL 1457744 (W.D. Va. May 23, 2006).

68. Sadler v. Young, No. 7:04cv580, 2006 WL 1214073 (W.D. Va. Apr. 28, 2006).

69. Carpenter v. U.S. Dep't of Justice, No. 7:05cv491, 2006 WL 1134072 (W.D. Va. Apr. 25, 2006).

70. Chase v. United States, No. 7:03cv811, 2006 WL 982006 (W.D. Va. Apr. 11, 2006).

71. Gereau-Bey v. Wallens Ridge State Prison, No. 7:05cv605, 2006 WL 840325 (W.D. Va. Mar. 29, 2006).

72. Thompson v. Simpson, No. 7:05cv503, 2006 WL 681026 (W.D. Va. Mar. 15, 2006).

73. Teal v. Braxton, No. 7:04cv406, 2006 WL 467985 (W.D. Va. Feb. 24, 2006).

74. Grimes v. Virginia, No. 7:05cv036, 2006 WL 197113 (W.D. Va. Jan. 24, 2006).

75. Fitzgerald v. Danville City Jail, No. 7:05cv434, 2006 WL 167913 (W.D. Va. Jan. 23, 2006).

76. Noesi v. Bledsoe, No. 7:05cv451, 2006 WL 167498 (W.D. Va. Jan. 20, 2006).

77. Thomas v. Mail Room Staff, No. 7:05cv242, 2006 WL 213714 (W.D. Va. Jan. 10, 2006).

78. Washington v. Proffit, No. 7:04cv671, 2006 WL 4006141 (W.D. Va. Jan. 10, 2006).

79. Perez-Fulgencio v. United States, No. 7:05cv235, 2006 WL 83407 (W.D. Va. Jan. 9, 2006).

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80. Grimes v. Virginia, No. 7:05cv036, 2005 WL 5488733 (W.D. Va. Dec. 20, 2005).

81. Washington v. Proffit, No. 7:04cv671, 2005 WL 6144294 (W.D. Va. Dec. 1, 2005).

82. Bazemore v. United States, No. 7:05cv371, 2005 WL 6156020 (W.D. Va. Dec. 1, 2005).

83. Gray v. Johnson, No. 7:04cv634, 2005 WL 3036644 (W.D. Va. Nov. 9, 2005).

84. Combs v. United States, No. 7:05cv064, 2005 WL 3019092 (W.D. Va. Nov. 8, 2005).

85. Plaster v. Brown, No. 6:05cv006, 2005 WL 3021961 (W.D. Va. Nov. 8, 2005).

86. United States v. McGavock, No. 7:05M404, 2005 WL 2675109, 68 Fed. R. Evid. Serv. 707 (W.D. Va. Oct. 18, 2005).

87. McFarlin v. Bassett, No. 7:05cv023, 2005 WL 2006962 (W.D. Va. Aug. 17, 2005).

88. Adams v. Compton, No. 7:04cv258, 2005 WL 2006975 (W.D. Va. Aug. 17, 2005).

89. Thomas v. Commonwealth, No. 7:04cv273, 2005 WL 1924170 (W.D. Va. Aug. 9, 2005).

90. Braithwaite v. United States, No. 7:03cv760, 2005 WL 1862664 (W.D. Va. Aug. 3, 2005).

91. Shuck v. Bledsoe, No. 7:05cv167, 2005 WL 1862666 (W.D. Va. Aug. 3, 2005).

92. Petty v. Bledsoe, No. 7:05cv206, 2005 WL 1806450 (W.D. Va. Aug. 1, 2005).

93. Hawkins v. Mills, No. 7:05cv216, 2005 WL 1806451 (W.D. Va. Aug. 1, 2005).

94. Harvey v. Johnson, No. 7:05cv238, 2005 WL 1812821 (W.D. Va. Aug. 1, 2005).

95. Peters v. Powers, No. 7:04cv678, 2005 WL 1801666 (W.D. Va. July 29, 2005).

96. Thomas v. Virginia, No. 7:04cv273, 2005 WL 1801672 (W.D. Va. July 28, 2005).

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97. Edwards v. Braxton, No. 7:04cv550, 2005 WL 1388746 (W.D. Va. June 10, 2005).

98. Davis v. United States, No. 7:04cv255, 2005 WL 1356032 (W.D. Va. June 7, 2005).

99. Aziz v. Central Va. Reg'l Jail, No. 7:04cv732, 2005 WL 1307964 (W.D. Va. May 31, 2005).

100. Blount v. Johnson, No. 7:04cv429, 2005 WL 1313513 (W.D. Va. May 31, 2005).

101. Caudell v. Rose, No. 7:04cv557, No. 7:04cv558, 2005 WL 1278543 (W.D. Va. May 27, 2005).

102. Moore v. Bledsoe, No. 704cv595, 2005 WL 2709279 (W.D. Va. May 27, 2005).

103. Washington v. Proffit, No. 7:04cv671, 2005 WL 1176587 (W.D. Va. May 17, 2005).

104. Henderson v. Braxton, No. 7:04cv622, 2005 WL 1106648 (W.D. Va. May 6, 2005).

105. Thomas v. Virginia, No. 7:04cv497, 2005 WL 1074333 (W.D. Va. May 5, 2005).

106. Cota v. Johnson, No. 7:03cv782, 2004 WL 3334011 (W.D. Va. Nov. 5, 2004).

107. Smith v. Bureau of Prisons, No. 7:03cv662, 2004 WL 3397938 (W.D. Va. Oct. 22, 2004).

i. Provide citations to all cases in which you sat by designation on a federal court of appeals, including a brief summary of any opinions you authored, whether majority, dissenting, or concurring, and any dissenting opinions you joined.

I have not sat by designation on a federal court of appeals.

14. **Recusal:** If you are or have been a judge, identify the basis by which you have assessed the necessity or propriety of recusal (If your court employs an "automatic" recusal system by which you may be recused without your knowledge, please include a general description of that system.) Provide a list of any cases, motions or matters that have come before you in which a litigant or party has requested that you recuse yourself due to an asserted conflict of interest or in which you have recused yourself sua sponte. Identify each such case, and for each provide the following information:

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a. whether your recusal was requested by a motion or other suggestion by a litigant or a party to the proceeding or by any other person or interested party; or if you recused yourself sua sponte;

b. a brief description of the asserted conflict of interest or other ground for recusal;

c. the procedure you followed in determining whether or not to recuse yourself;

d. your reason for recusing or declining to recuse yourself, including any action taken to remove the real, apparent or asserted conflict of interest or to cure any other ground for recusal.

The court maintains a computerized conflict system to identify financial and other conflicts of interest. In addition, I have a computer printout of all clients I billed while at Woods Rogers, my former law firm, and I refer to it as needed. For a number of years after taking the bench, I recused myself from all cases involving Woods Rogers. I have, over the past six years, recused myself from cases involving former clients, personal friends and companies in which I have a financial interest. Such recusals are infrequent, but I believe essential to the impartial administration of justice. As a judge, I must avoid even the appearance of a conflict of interest. I have not maintained a listing of cases from which I have recused myself.

Counsel have asked that I be recused twice since I took the bench, and I did not participate in either case. Each of these cases involved lawyers who were opposing parties in a case I handled in private practice, in which I represented a law firm in a dispute with several of its former partners.

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

a. List chronologically any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. If appointed, please include the name of the individual who appointed you. Also, state chronologically any unsuccessful candidacies you have had for elective office or unsuccessful nominations for appointed office.

I was appointed by Roanoke City Council to serve on the Local Advisory Board for Virginia Western Community College in 2000, and I served on that board as a member from 2000 to 2003 and as chairman from 2003 until I was appointed U.S. Magistrate Judge in 2004. From December, 1991 to June, 1992, I was appointed to a Citizens' Task Force to Study Alternative Election Procedures for Roanoke City Council. In 1997, I was appointed by Roanoke City Council to serve on the Roanoke Modified Election District Task Force, and I served as its Chairman.

I have had no unsuccessful candidacies for elective office or unsuccessful nominations for appointed office.

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b. List all memberships and offices held in and services rendered, whether compensated or not, to any political party or election committee. If you have ever held a position or played a role in a political campaign, identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

I was a Delegate to the Virginia Democratic Convention in 1978. In 1997, I was a member of a nonpartisan committee, One Roanoke, which advocated no change in the city's method of electing city council members. I have not held a position or played a significant role in any partisan political campaign. Prior to my appointment as U.S. Magistrate Judge, I volunteered in minor capacities such as poll worker or canvasser a few times.

16. **Legal Career:** Answer each part separately.

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

i. 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 served as a law clerk to the Hon. James C. Turk, Chief Judge, United States District Judge, Western District of Virginia, Roanoke (1981-1982).

ii. whether you practiced alone, and if so, the addresses and dates;

I have not practiced law alone.

iii. 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.

1982 – 1984
Vinson & Elkins, LLP
1455 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Associate

1984 – 2004
Woods Rogers, PLC
10 South Jefferson Street, Suite 1400
Roanoke, Virginia 24011
Associate (1984 – 1988)
Principal (1989 – 2004)

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iv. whether you served as a mediator or arbitrator in alternative dispute resolution proceedings and, if so, a description of the 10 most significant matters with which you were involved in that capacity.

As U.S. Magistrate Judge, I regularly mediate cases pending in the Western District, and have done so in several hundred cases pending in the Roanoke, Lynchburg, Danville, Harrisonburg and Charlottesville Divisions.

The cases I have successfully mediated span the substantive scope of the federal court docket and include many personal injury, employment discrimination, intellectual property, eminent domain, breach of contract, construction, medical malpractice, qui tam and other federal court cases. Broad categories of such cases, with significant ones noted, are identified below.

1. Interstate 81 Trucking Cases. As this high truck volume artery cuts through the Western District, I have mediated many cases involving accidents on I-81. One recent tragic case involved a young British student visiting America who was killed on I-81 shortly after his arrival in this country. See Compton v. Douglas, No. 7:09cv87 (Roanoke Div.) (settlement approved Sept. 17, 2009).

2. Eminent Domain Cases. I successfully mediated dozens of eminent domain disputes between landowners and a natural gas company concerning a pipeline constructed in southwest Virginia. These cases called for deft handling as many of the landowners were angry over the taking of their property for use by the natural gas utility. See, e.g., East Tenn. Natural Gas Co. v. 1.91 Acres, No. 4:02cv132 (Danville Div.) (settled May 30, 2007).

3. Products Liability Cases. I have mediated a number of such cases, including a case involving significant burns to a worker inside a steel mill, and others ranging from commonplace products such as ladders to unusual ones such as carnival equipment. See, e.g., Treadway v. Danieli & C. Officine Meccaniche Spa, No. 7:08cv00019 (Roanoke Div.) (settled Oct. 16, 2008).

4. Employment Cases. Employment cases make up a large component of the civil docket in the Western District, and I have successfully mediated many of these cases, involving claims of race, sex, disability, national origin and age discrimination. See, e.g., Guthrie v. Atlantic Credit & Finance, Inc., No. 7:09cv467 (Roanoke Div.) (settled following mediation Feb. 17, 2010).

5. Environmental Cases. I successfully mediated a complicated, multiparty dispute over the environmental consequences of silt in streams

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from a construction project in Lynchburg brought by the Environmental Protection Agency. See U.S. v. Savoy Senior Housing Corp., No. 6:06cv00031 (Lynchburg Div.) (settled Nov. 6, 2008).

6. Construction Litigation. I have helped parties settle a number of construction cases, including one involving the construction of the Virginia Tech football stadium. See Varney, Inc. v. Turner Construction Co., No. 7:05cv00710 (Roanoke Div.) (settled Feb. 21, 2006).

7. Intellectual Property. I have mediated a number of intellectual property disputes, including a high stakes computer patent case brought against a major domestic computer manufacturer. See DE Technologies, Inc. v. Dell, Inc., No. 7:04cv00628 (Roanoke Div.) (settled July 25, 2007).

8. Property Disputes. One extremely challenging case to settle involved a number of rather hostile landowners concerning conflicting claims of access to parcels of real estate dating back to the construction of the Blue Ridge Parkway. It took a great deal of collaboration and patience to iron out a compromise among the warring neighbors. See Wade v. Alderman, No. 4:07cv00009 (Danville Div.) (settled Aug. 18, 2008).

9. Commercial Cases. Settling disputes between commercial concerns allows me to call on my substantial practical experience in this area. One large case I mediated involved a contract between an international coal shipper and a railroad over construction costs and shipping revenue. See Norfolk Southern Railway Co. v. Drummond Coal Sales, Inc., 7:08cv00340 (Roanoke Div.) (settled Dec. 14, 2009).

10. Whistleblower Cases. One of the more interesting settlement dynamics occurs in federal qui tam cases, because there is a tension between the amount of money paid to the United States and that going to the relator and his or her counsel. I conducted a lengthy mediation a few years ago in which we were able to settle a substantial health care fraud case. See U.S. ex rel. Clarke v. Diabetes Self Care, No. 7:02cv01168 (Roanoke Div.) (settled Oct. 10, 2005).

b. Describe:

i. the general character of your law practice and indicate by date when its character has changed over the years.

My law practice primarily involved litigation. My early practice in Washington with Vinson & Elkins involved antitrust, trade regulation and administrative law. In my twenty years practicing law in Roanoke with Woods Rogers, my practice initially involved personal injury cases, including products liability, automobile, and premises liability work. My practice over time evolved to a largely commercial one, including

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substantial work in antitrust litigation, counseling and investigations, contract and business tort litigation, and intellectual property litigation. A small portion of this work was white collar criminal defense.

ii. your typical clients and the areas at each period of your legal career, if any, in which you have specialized.

From the earliest days of my practice, I have had substantial involvement with complex federal litigation, representing individuals and local, regional and national businesses. While in Washington at Vinson & Elkins, I worked on a large antitrust case involving the proposed construction of a coal slurry pipeline from the Powder River Basin in Wyoming to the Mississippi River. My client was a joint venture developing the pipeline. I also recall working on a matter pending at the Iran-US Claims Tribunal at The Hague as well as other federal administrative law issues. I also represented pro bono an individual with a Title VII claim.

After I returned to Roanoke in 1984, I did insurance defense work on personal injury cases for insurance companies such as Nationwide, Aetna and others for a time. My typical clients for this work were individuals and small businesses. This work ranged from automobile wrecks and slip and fall cases to substantial products liability cases involving personal injury, property and economic damages. One federal court case from my early practice in Roanoke that stands out involved the failure of an axle atop the head frame of one of the deepest coal mines in southwest Virginia, causing enormous property damage and claimed economic losses. My client in that Big Stone Gap Division case was a coal mining machinery manufacturer from Michigan. In another substantial products liability case pending in Harrisonburg, I represented Charles Machine Works, manufacturer of Ditch Witch trenchers, in an alleged personal injury case.

Beginning in the late 1980s and continuing throughout my tenure at Woods Rogers, I developed a substantial antitrust and trade regulation practice. Representing national and regional businesses such as Goodyear Tire and Rubber Co., Bethlehem Steel, Bayer Corp., R.J. Reynolds Tobacco Co., and Carilion Health System, I worked on a wide variety of federal antitrust cases pending in the Western District of Virginia. These civil cases ran the gamut of the federal antitrust laws, and included Sherman Act § 1 conspiracies in restraint of trade, Sherman Act § 2 monopolization and attempted monopolization, and price discrimination under the Robinson-Patman Act. In addition to representing large corporate clients on such issues, I represented many regional and local businesses and professionals in substantial antitrust and trade regulation matters pending in federal court in the Western District, including such

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clients as a small real estate firm in Charlottesville and doctors practicing in Danville.

Beyond civil antitrust cases, I represented a number of local and regional clients in criminal and civil investigations by the Antitrust Division of the United States Department of Justice and the Federal Trade Commission. These matters included allegations of soft drink and milk bid rigging, television advertising price fixing, and higher education salary, tuition and financial aid information exchanges alleged to be in violation of § 1 of the Sherman Act. Certain of these criminal prosecutions spawned additional civil suits brought by the Commonwealth of Virginia and the states of Tennessee and West Virginia, federal administrative debarment proceedings, as well as private class action suits.

In addition to antitrust work, my federal practice spanned other substantive areas. William B. Poff of Woods Rogers and I obtained a multimillion dollar verdict in a patent infringement case for GTE Products Corp. in the Roanoke Division. I successfully defended Consolidation Coal Company from a breach of contract and fraud case involving the purchase of wood products for underground mining in the Abingdon Division. I represented a small Chatham company that manufactured airplane engines in a breach of contract suit in the Lynchburg Division. I worked on federal securities litigation for Optical Cable Corporation in the Roanoke Division and Pannill Knitting, a textile manufacturer, in the Danville Division. I represented American of Martinsville, a hotel furniture manufacturer, in a trademark dispute in the Danville Division. I worked for several years on two patent infringement cases for a Pulaski manufacturer of bimetallic cylinders used in the manufacture of plastics.

As evident from these examples, while my office was located in Roanoke, my federal practice was not confined to the Roanoke Division, and I handled substantial federal cases in every division of the Western District.

In addition to federal court litigation, I handled many cases in state courts throughout the Western District on a wide variety of substantive areas. One of my more memorable cases involved representing landowners in Alleghany County in a historic dispute over fishing rights on the Jackson River. In the final years of my practice, I represented a number of small businesses and professionals in disputes over the dissolution of their businesses, including representation of real estate developers, physicians and lawyers.

c. Describe the percentage of your practice that has been in litigation and whether you appeared in court frequently, occasionally, or not at all. If the frequency of your appearances in court varied, describe such variance, providing dates.

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The vast majority of my work was civil litigation; however, I did do some white collar criminal defense work and some resulting administrative work before federal agencies.

i. Indicate the percentage of your practice in:
   1. federal courts: 60-70%
   2. state courts of record: 30-40%
   3. other courts:
   4. administrative agencies: <1%

ii. Indicate the percentage of your practice in:
   1. civil proceedings: 95%
   2. criminal proceedings: 5%

d. State the number of cases in courts of record, including cases before administrative law judges, you tried to verdict, judgment or final decision (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

I estimate that I handled more than one hundred cases which went to verdict, judgment or final decision in courts of record. I estimate that I served as chief or sole counsel in two-thirds of these cases. The vast majority of these cases were set for jury trials, but many were decided on summary judgment prior to trial.

i. What percentage of these trials were:
   1. jury: 25%
   2. non-jury: 75%

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

I have not practiced before the Supreme Court of the United States.

17. **Litigation**: Describe the ten (10) most significant litigated matters which you personally handled, whether or not you were the attorney of record. 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

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

1. Worrell Enterprises v. Charlotte Ramsey Realtors, No. 3:94cv0001 (W.D. Va. Dec. 19, 1994). I was lead counsel for Charlotte Ramsey Realtors, a local real estate firm in Charlottesville. When the Charlottesville Area Association of Realtors created a weekly real estate publication and its members began advertising in it, the established daily newspaper brought an antitrust group boycott and conspiracy claim against a number of local real estate firms. U.S. Magistrate Judge B. Waugh Crigler in Charlottesville granted summary judgment for the defendants, and the court also dismissed defendants' Noerr-Pennington sham exception counterclaim.

Counsel for the other defendant real estate firms were Thomas G. Slater, Jr., Hunton & Williams LLP, Riverfront Plaza, East Tower, 951 East Byrd Street, Richmond, VA 23219, Tel (804) 788-8475, and R. Hewitt Pate II (then of Hunton & Williams in Richmond), now Vice President and General Counsel, Chevron Corporation, 6001 Bollinger Canyon Road, San Ramon, CA 94583, Tel (925) 842-9958; Edward B. Lowry, Michie Hamlett Lowry, Rasmussen & Tweel PC, P.O. Box 298, Charlottesville, VA 22902, Tel (434) 951-7220; and Edward E. Scher, Troutman Sanders LLP, P.O. Box 1122, Richmond, VA 23218, Tel (804) 697-1200. Plaintiff was represented by Dennis S. Rooker, Suite 3, 1421 Sachem Place, Charlottesville, VA 22901, Tel (434) 977-7424, and Lee H. Simowitz, Baker & Hostetler, Suite 1100, 1050 Connecticut Avenue NW, Washington, DC 20036, Tel (202) 861-1500.

2. Supermarket of Marlinton, Inc. v. Valley Rich Dairy, 161 F.3d 3 (4th Cir. 1998). I was lead counsel for a joint venture milk producer charged with price fixing in a class action lawsuit. This civil class action suit followed a federal criminal school milk bid rigging investigation and subsequent Commonwealth of Virginia and State of West Virginia civil lawsuits. These related criminal and civil cases went on for nearly ten years. Ultimately, the class action suit was dismissed for lack of antitrust standing by U.S. District Judge Jackson L. Kiser in Roanoke, and the dismissal was affirmed by the Fourth Circuit.

A co-defendant milk producer was represented by Frank G. Smith III and Michael A. Doyle, Alston & Bird LLP, One Atlantic Center, 1201 West Peachtree Street, Atlanta, GA 30309, Tel (404) 881-7000. Plaintiff was represented by Leonard Egan, Suite 611, 1900 L Street, NW, Washington, DC 20036, Tel (202) 467-4047.

3. Beverly v. Charles Machine Works, Inc., 45 F.3d 425 (4th Cir. 1994). Albert Lee Beverly claimed that he was injured trying to clear a rock out of the digging chain on a Ditch Witch trencher. On the eve of trial in Augusta County Circuit Court, he nonsuited the case and refiled in federal court in Harrisonburg. U.S. Magistrate Judge B. Waugh Crigler dismissed the case on summary judgment, and the Fourth Circuit affirmed on appeal.

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I was lead counsel for the manufacturer of the trencher, Charles Machine Works. The co-defendant firm that rented the trencher was represented by Humes J. Franklin, Jr., now a Virginia Circuit Court Judge, 113 East Beverley Street, 2nd Floor, Staunton, VA 24401-4390, Tel (540) 332-3870. Plaintiff was represented by Martin J. McGetrick, Chandler, Franklin & O'Bryan, P.O. Box 6747, Charlottesville, VA 22906, Tel (434) 971-7273.

4. Bristol Steel & Iron Works v. Bethlehem Steel Corp., 41 F.3d 182 (4th Cir. 1994). I was co-counsel with Heman Marshall of Woods Rogers, (540) 983-7654, in this civil antitrust price discrimination trial held in Abingdon. Bristol Steel, a bridge and building steel fabricator, claimed that Bethlehem provided favorable pricing to its competitors in violation of the Robinson-Patman Act. After a two week trial, Bethlehem prevailed under the statutory meeting competition defense, and the Fourth Circuit affirmed. The case was tried before U.S. District Judge Glen M. Williams.

My co-counsel were Heman A. Marshall III and Francis H. Casola, Woods Rogers PLC, P.O. Box 14125, Roanoke, VA 24038, Tel (540) 983-7600. Principal counsel for Bristol was William W. Lanigan, 361 Vanderveer Avenue, Somerville, NJ 08876, Tel (908) 234-1155.

5. United States v. Carilion Health System, 892 F.2d 1042 (4th Cir. 1989). I was part of the trial team that successfully defended the Antitrust Division's second attempt to block a hospital merger in the United States. The government had earlier prevailed in stopping a hospital merger in Rockford, Illinois, but was not able to convince U.S. District Judge James C. Turk and an advisory Roanoke Division jury that the merger in Roanoke would be anticompetitive. The district court's judgment was affirmed by the Fourth Circuit.

My co-counsel were William B. Poff (lead trial counsel) and Heman A. Marshall III, Woods Rogers PLC, P.O. Box 14125, Roanoke, VA 24038, Tel (540) 983-7649; and William G. Kopit, Epstein, Becker & Green, 1227 25th Street, NW, Suite 700, Washington, DC 20037, Tel (202) 861-1803. Principal counsel for the United States was Robert Bloch, now with Mayer Brown, 1999 K Street, NW, Washington, DC 20006, Tel (202) 263 3203.

6. C&A Wood Products v. Consolidation Coal Co., No. 1:95cv0212 (W.D. Va. Apr. 24, 1998). In this Abingdon Division case, a supplier of crib blocks and other wood products to a leading national coal producer brought suit for breach of contract and fraud over the provision of wood products to mines in southwest Virginia. I was lead counsel for Consolidation Coal, and U.S. District Judge Glen M. Williams granted summary judgment for my client.

Lead counsel for plaintiff was J. Scott Sexton, Gentry Locke Rakes & Moore, P.O. Box 40013, Roanoke, VA 24022, Tel (540) 983-9379.

7. Patent infringement cases. I was part of the trial team for the plaintiff with William B. Poff of Roanoke, (540) 983-7649, and David G. Conlin, Dike, Bronstein, Roberts, Cushman & Pfund, 130 Water Street, Boston, MA 02109, Tel (617) 517-5515, in GTE

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Products Corp. v. Kennemetal, Inc., 772 F. Supp. 907 (W.D. Va. 1991), a patent infringement case. This case, tried over several weeks before U.S. District Judge Jackson L. Kiser in the Roanoke Division, concerned the shape of rotatable cutting bits used in the highway resurfacing industry. The jury awarded several million dollars in damages, and the case ultimately settled on appeal.

I was lead counsel for the plaintiff in two related patent infringement cases in federal court in Roanoke, in which I represented Xaloy, Inc., a Pulaski, Virginia manufacturer of bimetallic cylinders. Each case ultimately settled. J. Scott Sexton of Gentry Locke in Roanoke, Tel (540) 983-9379, represented one defendant, and the other defendant was principally represented, at different periods, by James H. Hulme of Arent Fox in Washington, Tel (202) 857-6000, and Matthew M. Neumeier of Jenner & Block, in Chicago, Tel (312) 222-9350.

8. Hoover Color Corp. v. Bayer Corp., 24 F. Supp. 2d 571 (W.D. Va. 1998). I represented Bayer in a Robinson-Patman price discrimination case in the Roanoke Division concerning Bayer's pricing of synthetic iron oxide pigment used in the construction industry as a color additive. Bayer prevailed on summary judgment in the district court before U.S. District Judge Jackson L. Kiser, the Fourth Circuit reversed, and the case settled. My co-counsel was Thomas Demitrack, Jones, Day, Reavis & Pogue, 901 Lakeside Avenue, Cleveland, OH 44114, Tel (216) 586-7141.

Lead counsel for plaintiff was Dennis P. Brumberg, Brumberg Mackey & Wall, Suite 300, 30 W Franklin Rd., Roanoke, VA 24011, Tel (540) 343-2956.

9. American Furniture Company, Inc. v. Pulaski Furniture Corp., No. 4:99cv0071 (W.D. Va. 2000). In this Danville Division case, I was lead counsel for a Martinsville, Virginia furniture manufacturer alleging trade dress infringement of its designs of hotel furniture. The case settled after a hotly contested preliminary injunction proceeding.

Defendant was represented by R. Hewitt Pate II (then of Hunton & Williams in Richmond), now Vice President and General Counsel, Chevron Corporation, 6001 Bollinger Canyon Road, San Ramon, CA 94583, Tel (925) 842-9958.

10. Kraft v. Burr, 252 Va. 273, 476 S.E.2d 715 (1996). I was co-counsel for a group of landowners who brought a trespass action against a fishing guide chartering trips on the Jackson River through our clients' property. The case was fascinating because the landowners could trace their title to a crown grant from the King of England prior to the Revolutionary War, which gave them the exclusive right to fish, fowl and hunt the property. The legal issue in the case involved the juxtaposition of that crown grant with a twentieth century federal court decision declaring the involved portion of the Jackson River navigable. Our clients prevailed in the Circuit Court of Alleghany County before Circuit Judge Duncan M. Byrd, Jr. and in the Supreme Court of Virginia.

My co-counsel was Thomas T. Lawson, now retired from Woods Rogers in Roanoke, and counsel for the defendant was Terry N. Grimes, Grimes & Williams PC, Franklin

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Commons, 320 Elm Avenue SW, Roanoke, VA 24016, Tel (540) 982-3711. Counsel for amicus curiae the Virginia Farm Bureau was R. Hewitt Pate II (then of Hunton & Williams in Richmond), now Vice President and General Counsel, Chevron Corporation, 6001 Bollinger Canyon Road, San Ramon, CA 94583, Tel (925) 842-9958.

18. **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 fully the nature of your participation in these activities. List any client(s) or organization(s) for whom you performed lobbying activities and describe the lobbying activities you performed on behalf of such client(s) or organizations(s). (Note: As to any facts requested in this question, please omit any information protected by the attorney-client privilege.)

    Given that my legal practice was principally litigation-oriented, the most significant legal activities I have been involved with during my career involved the lawsuits noted above. Outside of litigation, while at Woods Rogers, I regularly advised clients on antitrust and trade regulation issues, conducted antitrust compliance programs and provided business advice to the firm's clients on these issues and many other issues of federal and state law affecting their operations and decisions. I did not do any lobbying.

19. **Teaching**: What courses have you taught? For each course, state the title, the institution at which you taught the course, the years in which you taught the course, and describe briefly the subject matter of the course and the major topics taught. If you have a syllabus of each course, provide four (4) copies to the committee.

    None.

20. **Deferred Income/ Future Benefits**: List the 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. Describe the arrangements you have made to be compensated in the future for any financial or business interest.

    None.

21. **Outside Commitments During Court Service**: 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.

22. **Sources of Income**: 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, licensing fees, honoraria, and other items

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exceeding $500 or more (if you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here).

See attached Financial Disclosure Report.

23. **Statement of Net Worth**: Please complete the attached financial net worth statement in detail (add schedules as called for).

See attached Net Worth Statement.

24. **Potential Conflicts of Interest**:

a. Identify the family members or other persons, parties, categories of litigation, and financial arrangements that are likely to present potential conflicts-of-interest when you first assume the position to which you have been nominated. Explain how you would address any such conflict if it were to arise.

Other than immediate family members and personal friends, I am not aware of any other potential conflicts of interest.

b. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern.

I would not hear a case involving a family member, personal friend or any entity in which I have a financial interest. I adhere to conflict of interest rules in the Code of Conduct for United States Judges and would continue to do so if confirmed as U.S. District Judge.

25. **Pro Bono Work**: An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

I have tried to serve the bar and the community in a wide range of public service capacities and have spent substantial time on such pursuits over the years, as reflected in my response to questions 6, 9 and 11.a. I served as coordinator of Legal Aid conflicts referrals for pro bono cases for the Roanoke Bar Association for a period of time and worked on setting up the Barrister Book Buddies school reading program. I have done a fair amount of pro bono work for the various organizations with which I have been involved and some pro bono work for individuals.

Since taking the bench, I have worked to aid the disadvantaged involved in our system of justice, as well as to help develop programs to keep young people out of the criminal justice system and to aid those exiting the process.

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As U.S. Magistrate Judge in Roanoke, I am responsible for managing the hundreds of pro se prisoner cases filed in the Western District. Given this supervisory responsibility, I appreciate the need for pro bono representation of indigent defendants. Working with Kimberly Carpenter Emery, Assistant Dean for Pro Bono and Public Interest at the University of Virginia School of Law, and Helen Trainor of the Legal Aid Justice Center, we have developed and implemented a successful pilot program to secure pro bono counsel for prisoners in selected civil rights cases.

During my tenure on the bench, I have witnessed the impact of federal drug laws on youthful offenders. As a result, in 2008, I initiated a program to educate middle and high school students on the serious federal penalties associated with drug trafficking crimes. During 2009, the program was presented to more than 6,000 students in six school districts in our area.

Along with Judge James Jones in Abingdon and Judge Sam Wilson in Roanoke, I am participating in a pilot Reentry Court designed to assist federal felons exiting the penitentiary with the difficult transition to society. Spearheaded by the Probation Service, this program reaches out to these persons to provide support, training and employment assistance. It has been an extremely fulfilling experience for me to personally play a small part in the substantial efforts of these folks to turn their lives around.

Additionally, I was asked by the Virginia Bar Association to participate in The Chief Justice's Pro Bono Summit held on April 27, 2010, at which time I addressed the Virginia Supreme Court on pro bono initiatives in the Western District of Virginia.

26. **Selection Process**:

a. Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and the interviews in which you participated). Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, please include that process in your description, as well as whether the commission recommended your nomination. List the dates of all interviews or communications you had with the White House staff or the Justice Department regarding this nomination. Do not include any contacts with Federal Bureau of Investigation personnel concerning your nomination.

The Virginia State Bar coordinates evaluations of judicial candidates and endorsements by the eight statewide bar associations in Virginia. The Virginia State Bar requires submission of a Judicial Selection Questionnaire followed by a personal interview. The interview was conducted on April 19, 2010. I also was interviewed on that day by the Virginia Women Attorneys Association, the Old Dominion Bar Association, the Hispanic Bar Association of Virginia and the Asian Pacific American Bar Association. The Virginia Bar Association, Virginia Trial Lawyers Association, and Virginia Association of Defense Attorneys

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evaluated judicial candidates and endorsed candidates without personal interviews.

I received the highest rating from all eight statewide bar groups:

Virginia State Bar - Highly Qualified
Virginia Bar Association - Recommended
Virginia Trial Lawyers Association - Highly Qualified
Virginia Association of Defense Attorneys - Highly Qualified
Virginia Women Attorneys Association - Highly Recommended
Old Dominion Bar Association - Highly Qualified
Hispanic Bar Association of Virginia - Highly Recommended
Asian Pacific Bar Association - Highly Recommended

In addition, two local bar associations endorsed me for the vacancy in the Western District of Virginia. On April 13, 2010, the Roanoke Bar Association voted to endorse me for the vacancy, and the Salem/Roanoke County Bar Association voted to endorse me as Most Highly Qualified on April 19, 2010.

On May 15, 2010, I was interviewed by Senator Jim Webb and Senator Mark R. Warner's staff. On the same day, the Danville Bar Association met to endorse a candidate for the vacancy in the Western District. I was advised that not enough members were present to constitute a quorum under that association's bylaws, but I was permitted by the association to tell the Senators that those present unanimously recommended me for the vacancy.

On June 15, 2010, I was interviewed by Senators Webb and Warner. On June 29, 2010, Senators Webb and Warner recommended that President Obama nominate me to serve as U.S. District Judge.

Since July 2010, I have been in contact with pre-nomination officials at the U.S. Department of Justice. I interviewed with attorneys from the White House Counsel's Office and the Department of Justice on August 26, 2010.

On September 22, 2010, I was interviewed by E. Fitzgerald Parnell, III, Poyner Spruill LLP, 301 S. College St., Ste. 2300, Charlotte, NC 28208, (704) 342-5252, the Fourth Circuit Representative on the American Bar Association's Standing Committee on the Federal Judiciary.

On December 1, 2010, the President submitted my nomination to the Senate.

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b. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any currently pending or specific case, legal issue or question in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning your position on such case, issue, or question? If so, explain fully.

No.

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FINANCIAL DISCLOSURE REPORT
NOMINATION FILING

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
Urbanski, Michael F	US Dist.Ct.West.Dist. of Va.	12/01/2010
4. Title (Article III judges indicate active or senior status; magistrate judges indicate full- or part-time)	**5a. Report Type (check appropriate type)**	**6. Reporting Period**
District Judge	☒ Nomination. Date 12/01/2010 ☐ Initial ☐ Annual ☐ Final 5b. ☐ Amended Report	01/01/2009 to 11/29/2010
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.**	
P. O. Box 38 Roanoke, VA 24002-0038	Reviewing Officer_____ Date_____	

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

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

☒ NONE *(No reportable positions.)*

	POSITION	NAME OF ORGANIZATION/ENTITY
1.		
2.		
3.		
4.		
5.		

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

☒ NONE *(No reportable agreements.)*

	DATE	PARTIES AND TERMS
1.		
2.		
3.		

FINANCIAL DISCLOSURE REPORT Page 2 of 6	Name of Person Reporting	Date of Report
	Urbanski, Michael F	12/01/2010

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

A. Filer's Non-Investment Income

[X] NONE *(No reportable non-investment income.)*

	DATE	SOURCE AND TYPE	INCOME (yours, not spouse's)
1.			
2.			
3.			
4.			
5.			

B. Spouse's Non-Investment Income - *If you were married during any portion of the reporting year, complete this section.*
(Dollar amount not required except for honoraria.)

[ ] NONE *(No reportable non-investment income.)*

	DATE	SOURCE AND TYPE
1.	2010	Part-time employee - Townside Gardens, Inc. / self-employed gardener (occasional)
2.	2009	Part-time employee - Townside Gardens, Inc. / self-employed gardener (occasional)
3.	2009	Timber Sale
4.		
5.		

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

(Includes those to spouse and dependent children. See pp. 25-27 of instructions.)

[ ] NONE *(No reportable reimbursements.)*

	SOURCE	DESCRIPTION
1.	Exempt	
2.		
3.		
4.		
5.		

FINANCIAL DISCLOSURE REPORT Page 3 of 6	Name of Person Reporting Urbanski, Michael F	Date of Report 12/01/2010

V. GIFTS. *(Includes those to spouse and dependent children. See pp. 28-31 of instructions.)*

☐ NONE *(No reportable gifts.)*

	SOURCE	DESCRIPTION	VALUE
1.	Exempt		
2.			
3.			
4.			
5.			

VI. LIABILITIES. *(Includes those of spouse and dependent children. See pp. 32-34 of instructions.)*

☒ NONE *(No reportable liabilities.)*

	CREDITOR	DESCRIPTION	VALUE CODE
1.			
2.			
3.			
4.			
5.			

FINANCIAL DISCLOSURE REPORT Page 4 of 6	Name of Person Reporting Urbanski, Michael F	Date of Report 12/01/2010

VII. INVESTMENTS and TRUSTS – *Income, value, transactions (includes those of the spouse and dependent children. See pp. 14-17 of filing instructions)*

☐ NONE *(No reportable income, assets, or transactions.)*

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				
						If not exempt from disclosure			
	(1) Amount Code 1 (A-H)	(2) Type (e.g. div., rent, or int.)	(1) Value Code 2 (J-P)	(2) Value Method Code 3 (Q-W)	(1) Type (e.g. buy, sell, merger, redemption)	(2) Date: Month - Day	(3) Value Code 2 (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)
1. Wachovia Bank - Accounts	A	Interest	K	T	exempt				
2. Grayson Bankshares, Inc.	B	Dividend	K	U					
3. Shenandoah Life Insurance Co. - Whole Life	A	Interest	J	T					
4. MetLife Policyholder Trust	A	Dividend	J	T					
5. Wells Fargo Advisors - Cash Account	A	Interest	J	T					
6. Real Estate/Carroll Co.,VA (1/2 int) (see Part VIII)		None	M	S					
7. American Funds, Growth Fund of America - 529A	C	Dividend							
8. AXAEquitable/Multimanager Aggressive Equity Fund	A	Dividend	J	T					
9. Invesco Mid Cap Core Equity A Fund	A	Dividend	J	T					
10. Goldman Sachs Structured US Equity A Fund	A	Dividend	J	T					
11. American Funds, Income Fund of America - 529A	A	Dividend							
12. Northwestern Mutual - Ordinary Life	C	Dividend	K	T					
13. Northwestern Mutual - Custom Comp Life	C	Dividend	L	T					
14. Northwestern Mutual - Term to Age 65	B	Dividend	K	T					
15. Northwestern Mutual - Whole Life	A	Dividend	J	T					
16. Northwestern Mutual - 65 Life	A	Dividend	J	T					
17. Northwestern Mutual - 65 Life	A	Dividend	J	T					

1. Income Gain Codes: (See Columns B1 and D4)	A =$1,000 or less F =$50,001 - $100,000	B =$1,001 - $2,500 G =$100,001 - $1,000,000	C =$2,501 - $5,000 H1 =$1,000,001 - $5,000,000	D =$5,001 - $15,000 H2 =More than $5,000,000	E =$15,001 - $50,000
2. Value Codes (See Columns C1 and D3)	J =$15,000 or less N =$250,001 - $500,000	K =$15,001 - $50,000 O =$500,001 - $1,000,000	L =$50,001 - $100,000 P1 =$1,000,001 - $5,000,000	M =$100,001 - $250,000 P2 =$5,000,001 - $25,000,000	
3. Value Method Codes (See Column C2)	P3 =$25,000,001 - $50,000,000 Q =Appraisal U =Book Value	P4 =More than $50,000,000 R =Cost (Real Estate Only) V =Other	S =Assessment W =Estimated	T =Cash Market	

FINANCIAL DISCLOSURE REPORT Page 5 of 6	Name of Person Reporting Urbanski, Michael F	Date of Report 12/01/2010

VIII. ADDITIONAL INFORMATION OR EXPLANATIONS. *(Indicate part of Report.)*

Part VII Investment and Trusts, Line 6 -- One-half interest in real estate in Carroll County, Virginia. The assessed value of the entire parcel as of December 7, 2009 is $207,300.

FINANCIAL DISCLOSURE REPORT Page 6 of 6	Name of Person Reporting Urbanski, Michael F	Date of Report 12/01/2010

IX. CERTIFICATION.

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

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

Signature _____ Date 12/1/10

NOTE: ANY INDIVIDUAL WHO KNOWINGLY AND WILFULLY FALSIFIES OR FAILS TO FILE THIS REPORT MAY BE SUBJECT TO CIVIL AND CRIMINAL SANCTIONS (5 U.S.C. app. § 104)

FILING INSTRUCTIONS

Mail signed original and 3 additional copies to:

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

Michael Urbanski

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		27	713	Notes payable to banks-secured (auto loan)		24	790
U.S. Government securities				Notes payable to banks-unsecured			
Listed securities – see schedule		5	506	Notes payable to relatives			
Unlisted securities – see schedule		22	579	Notes payable to others			
Accounts and notes receivable:				Accounts and bills due			900
Due from relatives and friends				Unpaid income tax			
Due from others				Other unpaid income and interest			
Doubtful				Real estate mortgages payable			
Real estate owned – see schedule		492	850	Chattel mortgages and other liens payable			
Real estate mortgages receivable				Other debts-itemize:			
Autos and other personal property		90	000				
Cash value-life insurance		133	000				
Other assets itemize:							
Thrift Savings Plan		470	556				
				Total liabilities		25	690
				Net Worth	1	216	514
Total Assets	1	242	204	Total liabilities and net worth	1	242	204
CONTINGENT LIABILITIES				GENERAL INFORMATION			
As endorser, comaker or guarantor				Are any assets pledged? (Add schedule)	NO		
On leases or contracts				Are you defendant in any suits or legal actions?	NO		
Legal Claims				Have you ever taken bankruptcy?	NO		
Provision for Federal Income Tax							
Other special debt							

FINANCIAL STATEMENT

NET WORTH SCHEDULES

Listed Securities		
AXA Equitable Multimanager Aggressive Equity Fund		$ 2,594
Goldman Sachs Structured US Equity A Fund		1,204
Invesco Mid Cap Core Equity A Fund		1,708
	Total Listed Securities	$ 5,506
Unlisted Securities		
Grayson Bankshares Inc.		$ 22,579
	Total Unlisted Securities	$ 22,579
Real Estate Owned		
Personal residence		$ 389,200
Undeveloped property		103,650
	Total Real Estate Owned	$ 492,850

AFFIDAVIT

I, **MICHAEL FRANCIS URBANSKI**, do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

Nov. 29 2010
(DATE)

(NAME)

(NOTARY)

my Commission Expires:
1/31/2011
Reg # 2260623

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA

MICHAEL F. URBANSKI
United States Magistrate Judge

P.O. BOX 38
ROANOKE, VIRGINIA 24002

TELEPHONE 540 857-5124
FACSIMILE 540 857-5129

January 5, 2011

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

I have reviewed the Senate Questionnaire I previously filed in connection with my nomination on December 1, 2010, to be United States District Judge for the Western District of Virginia. Incorporating the additional information listed below, I certify that the information contained in those documents is, to the best of my knowledge, true and accurate.

Q. 13(b) – Citations

Samuels v. United States, No. 3:08cr005-01, 2010 WL 4777538 (W.D. Va. Oct. 21, 2010)
United States v. Hurdle, No. 7:08cr018-02, 2010 WL 5101433 (W.D. Va. Nov. 23, 2010)
Huff v. Astrue, No. 6:09cv042, 2010 WL 5296842 (Nov. 22, 2010)
Springer v. Deel, et al., 7:10cv256 (Dec. 9, 2010)

Q.13(h) – Citations for significant opinions on federal or state constitutional issues

Samuels v. United States, No. 3:08cr005-01, 2010 WL 4777538 (W.D. Va. Oct. 21, 2010)
United States v. Hurdle, No. 7:08cr018-02, 2010 WL 5101433 (W.D. Va. Nov. 23, 2010)
Springer v. Deel, et al., 7:10cv256 (Dec. 9, 2010)

I also am forwarding an updated Net Worth Statement and Financial Disclosure report as requested in the Questionnaire. I thank the Committee for its consideration of my nomination.

Very truly yours,

Michael F. Urbanski
United States Magistrate Judge

cc: The Honorable Charles E. Grassley
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

LEVI SPRINGER,	)	
Plaintiff,	)	**Civil Action No. 7:10cv00256**
	)	
v.	)	**REPORT AND RECOMMENDATION**
	)	
OFFICER M. DEEL, et al.,	)	**By: Michael F. Urbanski**
Defendants.	)	**United States Magistrate Judge**

This civil rights action was brought by an inmate at the Red Onion State Prison, Levi Springer, pursuant to 42 U.S.C. § 1983, against the warden and a number of correctional officers at that prison. Springer's allegations arise from two encounters with correctional officers, one at Keen Mountain Correctional Center on November 30, 2008, and one at Red Onion on October 29, 2009. Springer seeks preliminary injunctive relief, claiming that he needs protection from Correctional Officers Brian Hurley and M. Deel. Review of the pleadings and affidavits filed in this case plainly establish that Springer has not demonstrated that Springer is facing a substantial risk of serious harm that or that he is in danger of any actual and imminent harm. As such, it is **RECOMMENDED** that his requests for a temporary restraining order and preliminary injunctive relief (Docket Nos. 5 and 8) be **DENIED**.

As regards the November 30, 2008 incident, Springer claims that Hurley assaulted him in the shower at Keen Mountain by placing two fingers in his rectum. While Hurley makes these allegations here, a different result was obtained in state court arising from the events of that day. In a written plea agreement tendered to the Buchanan County Circuit Court, Springer admitted to assaulting Hurley by throwing human waste on him on that date at Keen Mountain. Hurley was struck with human feces and urine on the left side of his face, mouth, and body. Springer admitted in an Investigative Interview dated December 4, 2008 that he got a cup and threw some

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of the contents of his toilet through the side of his door and onto Hurley. In an Investigative Interview dated December 9, 2008, Springer stated that Hurley would not let him use the telephone, and that he "got mad at this and dipped a cup of piss water out of the toilet and threw it in his face."

As a result of this incident, Springer pled nolo contendere to a felony violation of Va. Code § 18.2-57, Assault and Battery of a Law Enforcement Officer, and the Buchanan County Circuit Court sentenced him to a term of incarceration of three years and seven months, to run consecutive to all sentences he was currently serving. The Buchanan County Adjudication Order also provides that "[u]pon motion made by the Commonwealth, the Court orders the Defendant to be held in protective custody."[1]

Springer's allegations of sexual assault on November 30, 2008 in the shower at Keen Mountain were investigated by Special Agent D.K. Crowell of the Special Investigations Unit of the Virginia Department of Corrections, Office of the Inspector General. Special Agent Crowell interviewed Springer, Hurley, and others, reviewed video of the housing unit, and examined Springer's medical record. Although Springer was seen by medical staff on November 30, 2008, he made no claim at that time of being sexually assaulted by Hurley. Indeed, in the Investigative Interview dated December 9, 2008, Hurley stated that "I told staff that I wanted to see a doctor or psychologist but did not tell anyone that Hurley put his fingers up my ass until I spoke to Sgt. Hatfield." Special Agent Crowell found no evidence to substantiate Springer's allegations of sexual assault by Hurley, but nevertheless sent Springer's complaint to the Buchanan County Commonwealth's Attorney's office, which declined to prosecute Hurley.

[1] Hurley contends that Red Onion's failure to protect him from Hurley violates the "protective custody" provision of his November 18, 2009 Buchanan County Adjudication Order. Hurley claims that this provision of the Order was added to protect him from Hurley, to which defendants respond that Springer has been assigned a single cell, which keeps him away from other inmates. To the extent that Springer's claim is that this provision of his Buchanan County Order is not being followed, his remedy is not to bring a civil rights action in federal court; rather, he should pursue his claim in state court.

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Shortly thereafter, on January 22, 2009, Springer was transferred from Keen Mountain to Red Onion. Sometime after his arrival at Red Onion, Springer alleges that he again encountered Hurley.[2] Springer alleges that Hurley threatened him "with the shotgun in the Control Tower." Springer further alleges that on August 22, 2009, Hurley threatened him with five point restraints and told another officer to put feces in Springer's food. Springer also claims that on September 3, 2009, Hurley entered his housing unit with Correctional Officer Deel and told Deel to "hurt him if you get a chance."

The next incident occurred on October 29, 2009. At that time, Deel and Correctional Officer Bray were escorting Springer to see the doctor. Instead of taking him directly to the doctor, Springer alleges that Deel made derogatory comments about him to other inmates, calling him a "faggot" and a "snitch." Springer then claims that Deel pulled violently on the security strap on his handcuffs, cutting his hand and wrist. Defendants paint a different picture, stating that when Correctional Officers Bray and Deel attempted to remove Springer's handcuffs, Springer tried to reach through a tray slot and grab their shirts. It was then that the officers grabbed the security strap to control Springer. Immediately thereafter, Springer was placed in a wheelchair to be transported to the medical unit for evaluation, at which time he again became disruptive and spit on correctional staff. After a spit mask was obtained and placed on Springer, he was taken to the medical unit for treatment.[3]

Springer has filed a motion for Temporary Restraining Order or Preliminary Injunction apparently asking the court to enforce the "protective custody" provision of the Buchanan

[2] Defendants assert that Hurley began working at Red Onion in April 2009, and that he has not had any direct contact with Springer there. In response to Springer's motions, defendants sat that Hurley is assigned to a separate housing unit at Red Onion and the chances of his coming into contact with Springer are remote.

[3] Red Onion Correctional Sergeant and Institutional Investigator T. Adams investigated Springer's claims of excessive force regarding the October 29, 2009 handcuff incident, including review of videotape footage of the incident. His affidavit recounts that as the officers pulled on the security strap, Springer was facing the door pulling back as if he was playing tug of war. Adams found that there was no excessive force used. Springer received disciplinary charges and was found guilty of attempting to commit simple assault on a non-inmate and attempting to spit on a person.

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County Adjudication Order and expressing concern over further threats of physical harm from defendants Hurley and Deel. The court has reviewed all of the filings in this case, and finds that there is no circumstance requiring the issuance of a Temporary Restraining Order or Preliminary Injunction.

Preliminary injunctive relief is an extraordinary remedy that courts should apply sparingly. See Direx Israel, Ltd. v. Breakthrough Med. Corp., 952 F.2d 802, 811 (4th Cir. 1991). As a preliminary injunction temporarily affords an extraordinary remedy prior to trial that can be granted permanently after trial, the party seeking the preliminary injunction must demonstrate: (1) by a "clear showing," that he is likely to succeed on the merits at trial; (2) that he is likely to suffer irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in his favor; and (4) that an injunction is in the public interest. See Winter v. Natural Res. Def. Council, Inc., 129 S. Ct. 365, 374-376 (2008).[4] To justify an injunction before trial on the merits, it is incumbent upon the plaintiff to make a clear showing that he is likely to succeed at trial on the merits and that he is likely to suffer irreparable harm in the absence of the preliminary injunction. Id. at 374-76. The plaintiff must show that the irreparable harm he faces in the absence of relief is "neither remote nor speculative, but actual and imminent." Direx Israel, Ltd., 952 F.2d at 812. Without a showing that plaintiff will suffer imminent, irreparable harm, the court cannot grant interlocutory injunctive relief. Rum Creek Coal Sales, Inc. v. Caperton, 926 F.2d 353, 360 (4th Cir. 1991). "The possibility that adequate compensatory or other corrective relief will be available at a later date . . . weighs heavily against a claim of irreparable harm." Va. Chapter, Associated Gen. Contractors, Inc. v. Kreps, 444 F. Supp. 1167,

[4] The court notes that the Fourth Circuit's previously-established balance-of-hardships test set out in Blackwelder Furniture Co. of Statesville v. Seilig Manufacturing Co., 550 F.2d 189 (4th Cir. 1977), is no longer applicable. Real Truth About Obama, Inc. v. FEC, 575 F.3d 342 (4th Cir. 2009) ("Because of its differences with the Winter test, the Blackwelder balance-of-hardship test may no longer be applied in granting or denying preliminary injunctions in the Fourth Circuit . . . .")

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1182 (W.D. Va. 1978) (quoting Va. Petroleum Jobbers Ass'n. v. Fed. Power Comm'n, 259 F.2d 921 (1958)).

The Constitution "does not mandate comfortable prisons," Rhodes v. Chapman, 452 U.S. 337, 349 (1981), but "neither does it permit inhumane ones." Farmer v. Brennan, 511 U.S. 825, 832 (1994). "[P]rison officials have a duty . . . to protect prisoners from violence at the hands of other prisoners," but a claim alleging failure to protect is viable only when the inmate establishes that (1) "he is incarcerated under conditions posing a substantial risk of serious harm," and (2) the prison's officials had a "sufficiently culpable state of mind," i.e., that it constitutes deliberate indifference to the inmate's health or safety. Farmer, 511 U.S. at 833-34; Weatherholt v. Bradley, 316 F. App'x. 300, 301-02 (4th Cir. 2009); Burks v. Pate, 119 F. App'x 447, 449-50 (4th Cir. 2005); De'Lonta v. Angelone, 330 F.3d 630, 634 (4th Cir. 2003).

Under this standard, it cannot be said that Springer has made a clear showing that he is likely to prevail on the merits. Both of Springer's allegations of assault have been investigated and found to lack any merit. As to his claim of sexual assault by Hurley in the shower at Keen Mountain on November 30, 2008, Springer's allegations lie in stark contrast to his guilty plea in Buchanan County Circuit Court for assaulting Hurley, his alleged attacker, with human waste. Springer's claim of fear of future attacks from Deel arising from the October 29, 2009 handcuff incident are undermined by his own disruptive conduct, including grabbing the officer's clothes and spitting, and by the fact that Deel no longer works at Red Onion. In short, Springer has failed to demonstrate credibly that he faces any substantial risk of serious harm and that defendants are deliberately indifferent to that risk.

Further, it is plain that Springer has not demonstrated that he will suffer any actual and imminent irreparable harm if injunctive relief is denied. Springer alleges that he is afraid that two correctional officers, Deel and Hurley, may assault him and that he does not trust the

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remaining defendants to protect him from these officers. There are no allegations of any assault by Hurley at Red Onion nor are any threats alleged over the course of the last year. Further, defendants assert that Hurley is not assigned to Springer's housing unit and the chance of him coming into contact with Springer is remote.

The case for a preliminary injunction as regards correctional Officer Deel is even more attenuated. Springer alleges one episode with Deel in which Deel jerked on the security strap on Springer's handcuffs, causing some bleeding and bruising. Defendants report that Springer tried to grab their shirts through the tray slot, causing them to pull on the security strap. Springer became disruptive again when being transported to the medical unit for evaluation and spit on the officers. In the responses filed by defendants to the request for preliminary injunctive relief, defendants indicate that Officer Deel has not been on duty at Red Onion since July 2010. As Deel is not working at Red Onion, he poses no threat to Springer. Further, while Springer alleges a plot between Deel and Hurley to harm him, both Deel and Hurley deny that they even know each other.

Under such circumstances, Springer fails to establish both that defendants are deliberately indifferent to a substantial risk of serious harm from Hurley and Deel and that any such harm is either actual or imminent. Upon review of Springer's motions and the defendants' response, the court finds no reasonable basis for granting preliminary injunctive relief and, therefore, **RECOMMENDS** denial of Springer's motion.

The Clerk is directed to transmit the record in this case to Honorable Samuel G. Wilson, United States District Judge. Plaintiff is reminded that pursuant to Rule 72(b), he is entitled to note any objections to this Report and Recommendation within fourteen (14) days hereof. Any adjudication of fact or conclusion of law rendered herein by the undersigned that is not specifically objected to within the period prescribed by law may become conclusive. Failure to

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file specific objections pursuant to 28 U.S.C. § 636(b)(1)(C) as to factual recitations or findings as well as to the conclusion reached by the undersigned may be construed by any reviewing court as a waiver of such objection.

The Clerk of the Court is directed to send a certified copy of this Report and Recommendation to plaintiff.

Entered: December 9, 2010.

/s/ Michael F. Urbanski

Michael F. Urbanski
United States Magistrate Judge

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AO 10
Rev. 1/2006

FINANCIAL DISCLOSURE REPORT
NOMINATION FILING

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
Urbanski, Michael F	US Dist.Ct.West.Dist. of Va.	01/05/2011
4. Title (Article III judges indicate active or senior status; magistrate judges indicate full- or part-time)	**5a. Report Type (check appropriate type)**	**6. Reporting Period**
District Judge	☒ Nomination, Date 01/05/2011 ☐ Initial ☐ Annual ☐ Final 5b. ☐ Amended Report	01/01/2010 to 12/31/2010
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.**	
P. O. Box 38 Roanoke, VA 24002-0038	Reviewing Officer_____ Date_____	

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

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

☒ NONE *(No reportable positions.)*

	POSITION	NAME OF ORGANIZATION/ENTITY
1.		
2.		
3.		
4.		
5.		

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

☒ NONE *(No reportable agreements.)*

	DATE	PARTIES AND TERMS
1.		
2.		
3.		

FINANCIAL DISCLOSURE REPORT Page 2 of 6	Name of Person Reporting Urbanski, Michael F	Date of Report 01/05/2011

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

A. Filer's Non-Investment Income

[X] NONE *(No reportable non-investment income.)*

	DATE	SOURCE AND TYPE	INCOME (yours, not spouse's)
1.			
2.			
3.			
4.			
5.			

B. Spouse's Non-Investment Income - *If you were married during any portion of the reporting year, complete this section.*
(Dollar amount not required except for honoraria.)

[ ] NONE *(No reportable non-investment income.)*

	DATE	SOURCE AND TYPE
1.	2010	Part-time employee - Townside Gardens, Inc. / self-employed gardener (occasional)
2.		
3.		
4.		
5.		

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

(Includes those to spouse and dependent children. See pp. 25-27 of instructions.)

[ ] NONE *(No reportable reimbursements.)*

	SOURCE	DESCRIPTION
1.	Exempt	
2.		
3.		
4.		
5.		

FINANCIAL DISCLOSURE REPORT Page 3 of 6	Name of Person Reporting Urbanski, Michael F	Date of Report 01/05/2011

V. GIFTS. *(Includes those to spouse and dependent children. See pp. 30-31 of instructions.)*

☐ NONE *(No reportable gifts.)*

	SOURCE	DESCRIPTION	VALUE
1.	Exempt		
2.			
3.			
4.			
5.			

VI. LIABILITIES. *(Includes those of spouse and dependent children. See pp. 32-34 of instructions.)*

☒ NONE *(No reportable liabilities.)*

	CREDITOR	DESCRIPTION	VALUE CODE
1.			
2.			
3.			
4.			
5.			

FINANCIAL DISCLOSURE REPORT Page 4 of 6	Name of Person Reporting Urbanski, Michael F	Date of Report 01/05/2011

VII. INVESTMENTS and TRUSTS – *Income, value, transactions (Includes those of the spouse and dependent children. See pp. 34-37 of filing instructions)*

☐ NONE *(No reportable income, assets, or transactions.)*

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				
						If not exempt from disclosure			
	(1) Amount Code 1 (A-H)	(2) Type (e.g. div., rent, or int.)	(1) Value Code 2 (J-P)	(2) Value Method Code 3 (Q-W)	(1) Type (e.g. buy, sell, merger, redemption)	(2) Date Month - Day	(3) Value Code 2 (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)
1. Wachovia Bank - Accounts	A	Interest	K	T	exempt				
2. Grayson Bankshares, Inc.	A	Dividend	K	U					
3. Shenandoah Life Insurance Co. - Whole Life	A	Interest	J	T					
4. MetLife Policyholder Trust	A	Dividend	J	T					
5. Wells Fargo Advisors - Cash Account	A	Interest	J	T					
6. Real Estate/Carroll Co.,VA (1/2 int) (see Part VIII)		None	M	S					
7. American Funds, Growth Fund of America - 529A	A	Dividend							
8. AXA Equitable/Multimanager Aggressive Equity Fund	A	Dividend	J	T					
9. Invesco Mid Cap Core Equity A Fund	A	Dividend	J	T					
10. Goldman Sachs Structured US Equity A Fund	A	Dividend	J	T					
11. Northwestern Mutual - Ordinary Life	B	Dividend	K	T					
12. Northwestern Mutual - Custom Comp Life	B	Dividend	L	T					
13. Northwestern Mutual - Term to Age 65	B	Dividend	K	T					
14. Northwestern Mutual - Whole Life	A	Dividend	J	T					
15. Northwestern Mutual - 65 Life	A	Dividend	J	T					
16. Northwestern Mutual - 65 Life	A	Dividend	J	T					
17.									

1. Income Gain Codes: (See Columns B1 and D4)	A =$1,000 or less F =$50,001 - $100,000	B =$1,001 - $2,500 G =$100,001 - $1,000,000	C =$2,501 - $5,000 H1 =$1,000,001 - $5,000,000	D =$5,001 - $15,000 H2 =More than $5,000,000	E =$15,001 - $50,000
2. Value Codes (See Columns C1 and D3)	J =$15,000 or less N =$250,001 - $500,000	K =$15,001 - $50,000 O =$500,001 - $1,000,000	L =$50,001 - $100,000 P1 =$1,000,001 - $5,000,000	M =$100,001 - $250,000 P2 =$5,000,001 - $25,000,000	
3. Value Method Codes (See Column C2)	P3 =$25,000,001 - $50,000,000 Q =Appraisal	R =Cost (Real Estate Only) V =Other	P4 =More than $50,000,000 S =Assessment	T =Cash Market	
	U =Book Value		W =Estimated		

FINANCIAL DISCLOSURE REPORT Page 5 of 6	Name of Person Reporting	Date of Report
	Urbanski, Michael F	01/05/2011

VIII. ADDITIONAL INFORMATION OR EXPLANATIONS. *(Indicate part of Report.)*

Part VII Investment and Trusts, Line 6 – One-half interest in real estate in Carroll County, Virginia. The assessed value of the entire parcel as of December 7, 2009 is $207,300.

FINANCIAL DISCLOSURE REPORT Page 6 of 6	Name of Person Reporting	Date of Report
	Urbanski, Michael F	01/05/2011

IX. CERTIFICATION.

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

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

Signature _____ Date 1-5-2011

NOTE: ANY INDIVIDUAL WHO KNOWINGLY AND WILFULLY FALSIFIES OR FAILS TO FILE THIS REPORT MAY BE SUBJECT TO CIVIL AND CRIMINAL SANCTIONS (5 U.S.C. app. § 104)

FILING INSTRUCTIONS

Mail signed original and 3 additional copies to:

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

Michael Urbanski

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		26	007	Notes payable to banks-secured		24	647
U.S. Government securities				Notes payable to banks-unsecured			
Listed securities—see schedule		5	506	Notes payable to relatives			
Unlisted securities—see schedule		22	579	Notes payable to others			
Accounts and notes receivable:				Accounts and bills due		1	200
Due from relatives and friends				Unpaid income tax			
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Total Assets	1	244	322	Total liabilities and net worth	1	244	322
CONTINGENT LIABILITIES				GENERAL INFORMATION			
As endorser, comaker or guarantor				Are any assets pledged? (Add schedule)	No		
On leases or contracts				Are you defendant in any suits or legal actions?	No		
Legal Claims				Have you ever taken bankruptcy?	No		
Provision for Federal Income Tax							
Other special debt							

FINANCIAL STATEMENT

NET WORTH SCHEDULES

Listed Securities		
AXA Equitable Multimanager Aggressive Equity Fund		$ 2,594
Goldman Sachs Structured US Equity A Fund		1,204
Invesco Mid Cap Core Equity A Fund		1,708
	Total Listed Securities	$ 5,506
Unlisted Securities		
Grayson Bankshares Inc.		$ 22,579
	Total Unlisted Securities	$ 22,579
Real Estate Owned		
Personal residence		$ 389,200
Undeveloped property		103,650
	Total Real Estate Owned	$ 492,850

I have just a few questions, and then we'll turn to Senator Grassley.

First, to Judge Kronstadt, as you know, your jurisdiction on the U.S. District Court would be criminal as well as civil. I believe that your authority now is primarily, if not exclusively, civil. I wonder if you could tell us a little bit about how you would prepare yourself in how you see your past experience as being relevant and important to being on the U.S. District Court.

Judge KRONSTADT. Thank you, Senator. During the first, about one year that I was a judge in the Los Angeles County Superior Court, I oversaw criminal cases, I oversaw preliminary hearings, I oversaw criminal trials and misdemeanors. I oversaw a number of criminal-related motions, both pre-trial, during time, and post-trial. I handled search warrants, probable cause determinations, and other things. Now, during that time it as a learning experience. I had to work hard to learn the areas with which I was not familiar. I think I would apply exactly the same energy and approach to the criminal issues that will come before me, if confirmed. I'll work hard. I'll learn what I don't know and try to master that area.

Senator BLUMENTHAL. Thank you.

Mr. Briccetti, you've made some comments, I believe, about Federal sentencing guidelines. I wonder if you could tell the Committee what your role was in making those comments and how you feel about the current sentencing process.

Mr. BRICCETTI. Thank you for the question, Senator. I think I failed to thank the Chairman and the Ranking Member for holding the hearing and allowing me to appear when I was thanking various people.

Sentencing guidelines. Well, I've had a lot of experience with the sentencing guidelines since really the moment they were enacted back in the 1980s, and they were litigated for a while and then eventually the Supreme Court, in the *Mistretta* case in 1989 determined that the guidelines were constitutional.

At the time I was Deputy Chief Appellate Attorney at the U.S. Attorney's Office, and the U.S. Attorney at the time asked me if I would be the point man within the office to essentially figure out how these things work and teach the other attorneys in the office about it. So I've had a lot of experience with them.

Of course they've changed over the years, and the biggest change that's occurred occurred in 2005, about 5 years ago exactly, because I think it was February of 2005 when the Supreme Court decided that the *Booker* case, which basically concluded that the guidelines were constitutional, but that they should no longer be mandatory. In other words, once a guideline range was determined, a District judge would have to consider the guideline, but would also have some measure of discretion to impose a sentence outside the guideline range.

I have spoken on more than one CLE panel about the guidelines. I think it was in 2002, I was invited by the Second Circuit Judicial Conference to sit on a panel, and there were several judges, including the then-chairman of the Sentencing Commission, Judge Sessions from Vermont was on that panel.

One of the things that Judge Newman from the Second Circuit, who chaired the panel, wanted to know—because he said the mem-

bers of the audience, which were all judges, wanted to know—they wanted to know about whether there were times when sentencing judges were not being given all the facts relating to sentencing.

The members of the panel, including myself, generally agreed that that was true from time to time. Again, at the time the guidelines were mandatory and, therefore, by definition, somewhat rigid. Most lawyers, in my experience—not just defense lawyers, but prosecutors, including when I was a prosecutor—want to try and negotiate pleas in most cases, and because of the rigidity of the mandatory guidelines, it made it difficult to do that.

So what would happen, is that both sides would negotiate in good faith—there's no bad faith involved, not in my experience, anyway—and agree on certain facts. That did have the tendency from time to time to perhaps keep some of the relevant facts—arguably relevant facts, I suppose—from the sentencing court. But it was done by both prosecutors and defense lawyers in not all cases, in some cases, in order to achieve a just outcome, an outcome that was agreed upon by both sides, and also agreed upon by the judge.

So I did make comments along those lines at that time which were generally agreed with by the assembled judges and attendants. The relevance of *Booker*, of course, is that *Booker* changes that whole rubric in the sense that they're no longer mandatory. Now, I've always thought the guidelines were good in the sense that they were guidelines and that they would tend to reduce the disparity amongst sentences for similarly situated defendants, no matter which judge imposed sentence or where in the country that sentence was imposed.

Under *Booker*, that goal of the guidelines is definitely still in effect, because now what has to happen is that judges have to first consider or calculate the applicable guideline, then they have to determine, under the guidelines, whether there's an upward or a downward departure, and then finally they have to apply the factors set forth in the statute—passed by Congress, of course—Title 18, Section 3553(a) of the U.S. Code, which lists a number of very specific factors that a judge is required to consider in ultimately determining the final sentence. I believe that that is the way the system now works, and of course that is different from how it worked before.

There is at least some measure of flexibility, although at the same time most judges—and if I were so fortunate to be confirmed, certainly I—would greatly defer to the guideline range, because after all those guidelines were promulgated by the Sentencing Commission, which is essentially a panel of experts that take into consideration data about cases and sentences from all over the country and try to come up with consensus ranges for particular offenses and particular defendants. Therefore, those guidelines deserve great respect, but at the same time, as the Supreme Court has said, and this is precedent that certainly I would, if confirmed, would be bound by, has said that the District Court, the sentencing court, would have the ability to impose a sentence outside the guidelines if that was compelled by the circumstances, by the factors set forth in Section 3553(a).

Senator BLUMENTHAL. Thank you.

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Ms. Wright-Allen, first of all, thank you for your service to our Nation as a member of the U.S. Navy and the U.S. Navy Reserve in the Judge Advocate General Corps. You've had a very impressive career as both a Federal prosecutor and a Federal public defender, obviously as an advocate, as a litigator. I wonder if you could tell us how you view that role as different from the one that you would have as a member of the U.S. District Court.

Ms. WRIGHT-ALLEN. Thanks, Yanni. Yanni keeps me straight. Thank you for your question. I think, if I'm fortunate enough to be a Federal District Court judge, I think my role is different in that I wouldn't be fighting for any of the litigants or their positions. But my sole role would be to review their pleadings, review their facts, understand their positions, and then to look to the law, the Supreme Court for its Circuit, and then the decisions of my fellow brothers and sisters down in Norfolk on the Federal bench.

Senator BLUMENTHAL. And do you think your past experience would be useful to you on the bench, and if so, how?

Ms. WRIGHT-ALLEN. I think it's been very useful, sir. I've been in front of Federal judges my entire career in the Navy, commanders and captains, in the Western District, those Federal judges that were there for my 18-month tenure, and then here in the Eastern District of Virginia, both as a prosecutor and a defense attorney.

So I've been watching them and I write down what they say, and I study it and keep it in my back pocket. So I say yes, I think the transition would be very smooth. I, if given the opportunity, plan to behave in a way that's consistent with the judges down in Norfolk and follow the precedent that's in place.

Senator BLUMENTHAL. Thank you.

Magistrate Judge Urbanski, you've had extensive experience in the Federal courts, and also experience as a litigator. I wonder if you could tell us how the roles of magistrate judge and U.S. District Court judge are different, and perhaps how the appointment of magistrate judges might relieve some of the backlog and burden on the U.S. District Court.

Mr. URBANSKI. Thank you for that question, Senator Blumenthal. It has been my privilege to be a magistrate judge in the Western District of Virginia for seven years. During that period of time I have held thousands of hearings in civil and criminal cases, written 400 opinions, roughly, mediated hundreds of cases, and it is also important to note that I work for six district judges. I have had the opportunity to work closely with them, to watch them, to learn from them.

The magistrate judge track I've been on and the work I've been doing is very much a valuable learning experience for the District Court bench and a proving ground for the District Court bench. The things that I can't do now that a District Court judge can do are, the magistrate judge does not have statutory authority to do injunctions. The magistrate judge does not have statutory authority to do felony trials. I can do civil trials, but only on consent. The District judges have that as a matter of right. Those are the principal differences.

I think one way that the District Courts can use magistrate judges, and one thing we have done a lot in the Western District

of Virginia, is to use the magistrate judges to mediate cases. I've mediated 300 or 400 cases. It is a very timely, expeditious, and cost-effective way to resolve disputes between parties. Thank you.

Senator BLUMENTHAL. Thank you very much.

I'm going to yield to Senator Grassley.

Senator GRASSLEY. Mr. Briccetti, I was going to lead with the same question on sentencing, but since you've covered that well I will ask you one question that deals with the issue of terrorism. You represented James Curmidy in a terrorist plot to blow up synagogues in New York City. The FBI learned of a plot through an informant. You argued that the FBI and its informant entrapped the defendant.

Detecting and preventing acts of terrorism remain the highest priority of the Federal Government. These threats are not likely to subside in the near term. One area in which Congress and the executive branch continue to disagree is where terrorists should be tried, whether civilian courts or military commissions. The administration has put forth a protocol that includes a presumption that terrorist cases should be tried in Article 3 courts. Do you support the use of military commissions to prosecute terrorists?

Mr. BRICCETTI. Thank you for the question, Senator. Honestly, I don't have an opinion on that one way or the other. It seems to me that's a quintessential policymaker decision. In other words, the elected representatives, the Congress and President would have to make that decision. Therefore, I really don't have an opinion.

Senator GRASSLEY. I could ask you whether you believe that trials in military commissions violate any constitutional rights that people have. If so, which amendments would they apply to?

Mr. BRICCETTI. Well, thank you for the question, Senator. Again, although I am certainly aware that the Supreme Court has spoken I think four times in the last 10 years on issues related to the ones you've just discussed, I am not an expert in that area and I really don't have an opinion about it.

All I could say is that if I were confirmed, and if I had a case in front of me which implicated some of those decisions by the Supreme Court, I absolutely would be bound by them and follow them and would take my role as a District judge very seriously, namely that I am bound by precedent from the Supreme Court and from, in my case, the Second Circuit Court of Appeals.

Senator GRASSLEY. I think I will submit the rest of my questions for answer in writing.

Senator BLUMENTHAL. Thank you, Senator Grassley. I understand Senator Grassley will be submitting the remainder of his questions in writing. I have no further questions, and so this Committee will conclude this hearing.

Again, I want to thank all the nominees, their families, friends, loved ones for being here today. This has been a very informative and important hearing. I know I speak for the Committee, and especially for Senator Leahy as chairman, in thanking you all for being here today, coming, some of you, very long distances. But it's been well worth it. Thank you very, very much. I'm going to say, finally, that we're going to hold the record open for additional questions like Senator Grassley's that will be submitted to you in writing.

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Thank you.
[Whereupon, at 4:40 p.m., the hearing was adjourned.]
[Questions and answers and submissions for the record follow.]

QUESTIONS AND ANSWERS

Responses of Arenda Wright Allen
Nominee to be District Judge for the Eastern District of Virginia
to the Written Questions of Senator Charles E. Grassley

1. **In 2007, you were quoted in an edition of William and Mary Law School's newspaper, *The Advocate*. You stated that you had a desire to serve "those considered 'undesirable' by society." Additionally, you said, "I believe there's hope in everyone, and I believe in hope, even if I don't see the change."**

   a. **What did you mean by this statement?**

   Response: My experiences as an Assistant United States Attorney for fifteen years caused me to believe that defendants are sometimes deemed undesirable by society. As an Assistant Federal Public Defender, it is my job to provide zealous representation for indigent defendants, which includes giving them hope about their futures and rehabilitative potential, notwithstanding their crimes or whether I actually have the opportunity to witness the positive changes made in their lives once serving their sentences and successfully completing supervised release. My hope was to try to deter my clients from committing further crimes and to encourage them to become productive members of our society. That is what I meant by the statements.

   b. **How did this desire/belief affect your work as a public defender?**

   Response: This desire and belief allows me to passionately and zealously represent my clients. I provide them with effective assistance of counsel, which includes revealing to them positive attributes about themselves and their lives as I try to humanize them before the trier of fact and sentencing judge. I have a duty to them, according to my oath of office, to highlight positive facts for them, which they need to know, if they were going to remain law abiding productive citizens after serving their sentences.

   c. **As a judge, how do you believe this view would influence your decisions?**

   Response: I hold this view while serving as a defense advocate and it would not influence my decisions if I were to be confirmed. As a judge, I would respect and understand that I would be prohibited from being an advocate for any litigant and that I would be required to be a fair and impartial arbiter of the facts as I applied them to the law.

   d. **How would this view impact your sentencing decisions?**

   Response: This view would not impact my sentencing decisions. The Supreme Court and Fourth Circuit precedent, the advisory sentencing guidelines and the statutory sentencing factors would be relied upon in aiding me to render any and all sentencing decisions.

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2. **You have had experience with sentencing issues as both a prosecutor and defense attorney. Given that background:**

   a. **Do you agree that the sentence a defendant receives for a particular crime should not depend on the judge he or she happens to draw?**

      Response: Yes.

   b. **If confirmed, how much deference will you afford the Sentencing Guidelines?**

      Response: If confirmed, I would afford the Sentencing Guidelines substantial deference.

   c. **Under what circumstances do you believe it is appropriate for a district court judge to depart downward from the sentencing guidelines?**

      Response: I believe it is appropriate for a district court judge to depart downward (or upward) from the sentencing guidelines if a particular section permits a departure and if the facts and Fourth Circuit precedent support the departure requested.

3. **In 2008, President Obama said,**

   "We need somebody who's got the heart, the empathy, to recognize what it's like to be a young teenage mom. The empathy to understand what it's like to be poor, or African-American, or gay, or disabled, or old. And that's the criteria by which I'm going to be selecting my judges."

   Do you agree with the President's statement?

   Response: No, I do not agree with the President's statement. I believe that judges must apply the law to the facts.

4. **Have you ever expressed an opinion regarding whether the death penalty constitutes cruel and unusual punishment under the Constitution? If so, what opinion did you express?**

   Response: No, I have never expressed an opinion regarding whether the death penalty constitutes cruel and unusual punishment under the Constitution.

5. **What is your personal view regarding whether the death penalty is constitutional?**

   Response: I have asked jurors to recommend the imposition of the death penalty on three defendants. I have also defended several death penalty eligible clients. My personal beliefs at no time interfered with me executing my assigned duties and responsibilities. If

confirmed, I would have no hesitation in sentencing a defendant to death, a penalty held to be constitutional by the Supreme Court of the United States.

6. **Do you believe that the death penalty is an acceptable form of punishment?**

Response: Yes, I do believe that the death penalty is an acceptable form of punishment. More importantly, the Supreme Court has stated that the death penalty is constitutional and if confirmed, I would follow that precedent without reservation or hesitation.

7. **Do you hold any personal views that would preclude you from enforcing the death penalty?**

Response: I do not hold any personal views that would preclude me from enforcing the death penalty.

8. **Do you believe that when Congress enacts a law that is contrary to the Constitution or takes action not authorized by some enumerated power therein, a court must either invalidate the Congressional action or, where appropriate, limit its application on an "as applied" basis?**

Response: Yes.

9. **In your hearing, you stated you had been in front of Federal Judges during your entire career, and that you have been watching them, writing down what they say, studying it, and "keeping it in your back pocket."**

   a. **From the judges you have observed, what positive role models stand out?**

   Response: All of the judges whom I have had the honor of appearing before, either while in the Navy or while practicing in the Western District of Virginia and the Eastern District of Virginia, have stood out, in one way or another, as being positive role models. Collectively, I have witnessed them all display efficiency and exhibit appropriate judicial temperament, fairness, integrity and objectivity.

   b. **What lessons have you learned from the judges you have observed regarding courtroom management, fidelity to the law, professional competence, and personal integrity?**

   Response: I have learned to prosecute and defend my cases in a competent, efficient and expeditious manner. The Eastern District of Virginia has a reputation for being a very efficient district and I am thankful for having been given the opportunity to work in this district. I have also learned the value of being a public servant who works hard and does whatever is necessary to provide the public with a quality product. I have always respected the law, as all of our judges do, regardless of which side of the aisle I am sitting on. All of the judges I

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have appeared before have continually displayed personal integrity, with a commitment to administering equal justice and providing due process of law to everyone.

c. What negative characteristics or poor temperament, if any, have you observed that would serve as a lesson to potential judges?

Response: My observations have allowed me to conclude that the federal courtroom belongs to the public. Potential judges should never forget that, even during bad days or tough trials. Everyone entering into a federal courtroom for any reason at all should always be treated with the utmost dignity and respect. In my view, a judge can sentence someone to the death penalty, in a calm, respectful and polite manner.

10. If confirmed, how would you plan to use Federal Magistrates to help with your docket and workload?

Response: If confirmed, I would use the Federal Magistrates in a manner that is consistent with the present practice used in the Eastern District of Virginia. The Federal Magistrates are seasoned jurists and over the years have always been very approachable and respectful to me while I carried out my various duties. I plan to use their wisdom, experience and historical knowledge in a manner that will enable me to continue with carrying on the traditions and judicial reputation of our district.

11. What is the most important attribute of a judge, and do you possess it?

Response: I believe the most important attribute of a judge is being able to be fair and impartial to all parties while applying the law to the facts. I do believe I have these attributes and will always exhibit them if I am confirmed.

12. Please explain your view of the appropriate temperament of a judge. What elements of judicial temperament do you consider the most important, and do you meet that standard?

Response: I believe a judge should always exhibit a pleasant disposition, reflective of patience and politeness, as he or she treats everyone with dignity and respect. Judges should listen very carefully to the parties and ensure that everyone has had the opportunity to be heard before rendering a decision. I do believe that I meet these standards.

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

Response: Yes.

14. At times, judges are faced with cases of first impression. If there were no controlling precedent that dispositively concluded an issue with which you were presented, to what sources would you turn for persuasive authority? What principles will guide you, or what methods will you employ, in deciding cases of first impression?

Response: In a case of first impression, if there were no controlling precedent, I would review prior rulings of the Supreme Court and Fourth Circuit to see if analogies and guidance could be made from those cases to my case. I would also look at the plain wording of the statute, consider any legislative history and consult with my colleagues for their thoughts and opinions.

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

Response: I would apply the decision of the Supreme Court or the Court of Appeals and not use my own judgments of the merits.

16. As you know, the federal courts are facing enormous pressures as their caseload mounts. If confirmed, how do you intend to manage your caseload?

Response: If confirmed, I plan to manage my caseload, in the same manner I have managed my caseload: by adhering to the timely disposition of all matters that are tried in the Eastern District of Virginia and by working with the Federal Magistrates, the Court Clerks and the litigants.

17. Do you believe that judges have a role in controlling the pace and conduct of litigation and, if confirmed, what specific steps would you take to control your docket?

Response: Yes, I do believe that judges have a role in controlling the pace and conduct of litigation. If confirmed, I along with my law clerks, will work whatever hours and days are necessary to quickly sift through cases and files to ascertain the facts, the law and the positions of the parties, with the goal of proceeding towards pretrial resolution or trial and disposition.

18. Under what circumstances do you believe it appropriate for a federal court to declare a statute enacted by Congress unconstitutional?

Response: When Congress exceeds its authority, it is appropriate for a federal court to declare a statute enacted by Congress unconstitutional.

19. Please describe with particularity the process by which these questions were answered.

Response: I received the questions on February 24, 2011. I prepared responses on February 25, 2011. I also consulted with representatives of the Department of Justice regarding my responses, and then finalized them before authorizing their transmittals to the Committee.

20. Do these answers reflect your true and personal views?

Response: Yes.

Responses of Vincent Briccetti
Nominee to be District Judge for the Southern District of New York
to the Written Questions of Senator Charles E. Grassley

1. **At your hearing, Senator Blumenthal asked you about the Federal Sentencing Guidelines. You said, "I've always thought the Guidelines were good in the sense that they were guidelines and that they would tend to reduce the disparity amongst the sentences for similarly situated defendants, no matter which judge imposed that sentence, or where in the country that sentence was imposed. Under *Booker*, that goal is definitely still in effect." You also said you were "greatly defer" to the Guideline range.**

   In 2002, you said the Federal Sentencing Guidelines "pigeonhole" all or most cases.

   a. **In your opinion, how do the Guidelines "pigeonhole" cases? Please provide examples of the types of cases where this is true.**

      Response: The Sentencing Guidelines are, as the Supreme Court said in *Gall v. United States*, the "product of careful study based on extensive empirical evidence derived from the review of thousands of individual sentencing decisions." Each sentencing range represents the considered judgment of the United States Sentencing Commission, which studies sentencing practices nationwide, as to the appropriate range for every federal criminal offense and every defendant, taking into account numerous specific offense characteristics as well as the defendant's criminal history. That was true prior to *Booker*, and it is still true today. However, prior to *Booker*, once a sentencing court calculated the applicable sentencing range, the court was mandated to impose a sentence within that range, with very limited exceptions. It was in that sense that I said the Guidelines "pigeonhole" a majority of cases. I went on to suggest it would be better to keep the Guidelines in place -- because they did represent the considered judgment of experts and because they did further the laudable purpose of reducing unwarranted sentencing disparities among similarly-situated defendants -- but to make them advisory rather than mandatory. In that way, sentencing judges would still have to consider and defer to the Guidelines, but they would retain some measure of discretion to fashion an individualized sentence. This is what the Supreme Court, in *Booker*, decided to do when it upheld the constitutionality of the Guidelines, but made them advisory rather than mandatory. If confirmed as a district judge, I would be bound by and would therefore follow this precedent, as well as any other related precedent of the Supreme Court or the Court of Appeals for the Second Circuit.

   b. **Do you still believe that they do so?**

      Response: Please see my response to Question 1(a).

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c. Under what circumstances do you believe it is appropriate for a district court judge to depart downward from the sentencing guidelines?

Response: Under the Sentencing Reform Act and governing case law, a district court judge must first calculate the applicable sentencing range, and consider as well any applicable policy statements in the Guidelines. The law also requires the judge to consider any applicable upward or downward departures as set forth in the Sentencing Guidelines. Finally, the law requires the judge to consider all of the sentencing factors set forth in 18 U.S.C. § 3553(a). If confirmed, I would follow the law in all of the foregoing respects. Because, as the Supreme Court has stated, the Guidelines are the "product of careful study based on extensive empirical evidence," and also because one of the central purposes of the Guidelines is to reduce unwarranted sentencing disparities among similarly-situated defendants, I would give great deference to the applicable sentencing range. A judge may depart downward from the applicable sentencing range only when permitted to do so by an applicable downward departure provision of the Guidelines as applied to the facts of a particular case.

2. In 2008, President Obama said,

> **"We need somebody who's got the heart, the empathy, to recognize what it's like to be a young teenage mom. The empathy to understand what it's like to be poor, or African-American, or gay, or disabled, or old. And that's the criteria by which I'm going to be selecting my judges."**

Do you agree with the President's statement?

Response: I believe that judges must not allow empathy or their personal feelings about a case or the participants in a case to affect the decisions they make. Judges must base their decisions on a fair and impartial application of the law to the facts.

3. Have you ever expressed an opinion regarding whether the death penalty constitutes cruel and unusual punishment under the Constitution? If so, what opinion did you express?

Response: To the best of my recollection, I have not expressed a public opinion as to whether the death penalty constitutes cruel and unusual punishment under the Constitution. The Supreme Court has clearly held that the death penalty does not constitute cruel and unusual punishment (except under narrow circumstances such as those addressed in *Kennedy v. Louisiana*, *Roper v. Simmons*, and *Atkins v. Virginia*) and I would follow that precedent.

4. What is your personal view regarding whether the death penalty is constitutional?

Response: If confirmed as a district judge, my personal view regarding whether the death penalty is constitutional would be irrelevant. The Supreme Court has held that the death penalty is constitutional and I would follow that precedent.

5. Do you believe that the death penalty is an acceptable form of punishment?

Response: Yes. Congress has enacted statutes that provide for the imposition of the death penalty upon conviction of certain federal crimes, and the Supreme Court has upheld the constitutionality of the death penalty. I would follow the law regarding the imposition of the death penalty as directed by statute and in accordance with the binding precedent of the Supreme Court and the Court of Appeals for the Second Circuit.

6. Do you hold any personal views that would preclude you from enforcing the death penalty?

Response: No.

7. Do you believe that when Congress enacts a law that is contrary to the Constitution or takes action not authorized by some enumerated power therein, a court must either invalidate the Congressional action or, where appropriate, limit its application on an "as applied" basis?

Response: Yes.

8. What is the most important attribute of a judge, and do you possess it?

Response: The most important attribute of a judge is to have a strong commitment to the due administration of justice, meaning that he or she must possess the integrity to apply the law to the facts, carefully and thoughtfully and with fairness and impartiality, while treating all participants in the process with courtesy and respect. I believe I possess that attribute.

9. Please explain your view of the appropriate temperament of a judge. What elements of judicial temperament do you consider the most important, and do you meet that standard?

Response: The most important elements of judicial temperament are that a judge be consistently fair, respectful, courteous, impartial, patient, evenhanded, objective, and decisive. I believe I meet that standard.

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

Response: Yes.

11. At times, judges are faced with cases of first impression. If there were no controlling precedent that dispositively concluded an issue with which you were presented, to what sources would you turn for persuasive authority? What principles will guide you, or what methods will you employ, in deciding cases of first impression?

Response: If faced with a case of first impression for which there was no controlling precedent, I would carefully and thoroughly review any analogous Supreme Court or Circuit Court rulings. I would also review all constitutional and statutory provisions that might bear on the issue. I would also exercise my authority narrowly and with restraint, and would decide only those issues that necessarily require resolution.

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

Response: Recognizing that, as a district judge, I would be bound by the precedents of the higher courts, I would apply the decision of the Supreme Court or the Court of Appeals.

13. As you know, the federal courts are facing enormous pressures as their caseload mounts. If confirmed, how do you intend to manage your caseload?

Response: I would set reasonable and firm deadlines for pretrial discovery and motions, and I would enforce those deadlines. I would decide pretrial motions expeditiously. I would encourage settlement and the use of mediation. I would rely on magistrate judges to handle some aspects of the cases assigned to me, consistent with their statutory authority. I would set firm trial dates, and I would preside over trials as efficiently as possible. I would also endeavor to learn about and use the best practices of fellow judges in my district to manage the caseload effectively.

14. Do you believe that judges have a role in controlling the pace and conduct of litigation and, if confirmed, what specific steps would you take to control your docket?

Response: Yes. Judges have an important role in controlling the pace and conduct of litigation because a critical aspect of the due administration of justice is making sure that disputes are resolved promptly and without undue expense. Please see my response to Question 13 with respect to the specific steps I would take to control my docket if confirmed.

15. Under what circumstances do you believe it appropriate for a federal court to declare a statute enacted by Congress unconstitutional?

Response: It is appropriate for a federal court to declare a statute enacted by Congress unconstitutional when Congress has exceeded its constitutional authority or enacted a statute in contravention of a constitutional provision. In this regard, I would follow the

precedents of the higher courts, including the Supreme Court and the Court of Appeals for the Second Circuit.

16. Please describe with particularity the process by which these questions were answered.

Response: I prepared my responses after receiving these questions on February 23, 2011. I then reviewed my responses with representatives of the Department of Justice, after which I finalized my responses. I then authorized their transmittal to the Committee.

17. Do these answers reflect your true and personal views?

Response: Yes.

Responses of Vincent Briccetti
Nominee to be District Judge for the Southern District of New York
to the Written Questions of Senator Jeff Sessions

1. **In 2002 remarks before the Second Circuit Judicial Conference, you stated that the U.S. Sentencing Guidelines have the unintended consequence of encouraging prosecutors and defense attorneys to bargain over the facts, rather than pursue the correct result. You stated that the Guidelines try too hard to "pigeonhole" all cases, when they should instead serve only as guidelines and allow judges more discretion in sentencing.**

   a. **Under the Supreme Court's decision in *United States v. Booker*, the federal sentencing guidelines are now advisory, rather than mandatory. Do you think that disparity in sentencing is less pronounced post-*Booker*? Or do you think that there is a greater potential for disparate or erroneous sentencing now that the Guidelines are advisory?**

   Response: I am not familiar with any empirical data as to whether disparity in sentencing is less pronounced post-*Booker*. In my personal experience, I do not think that unwarranted disparity is either more or less pronounced post-*Booker* than it was pre-*Booker*. I do not think there is a greater potential for disparate or erroneous sentencing now that the Guidelines are advisory, so long as sentencing judges, in accordance with the law, calculate the applicable sentencing range and apply the sentencing factors set forth in 18 U.S.C. § 3553(a).

   b. **Under what circumstances do you believe it appropriate for a district court judge to depart downward from the sentencing guidelines?**

   Response: Under the Sentencing Reform Act and governing case law, a district court judge must first calculate the applicable sentencing range, and consider as well any applicable policy statements in the Guidelines. The law also requires the judge to consider any applicable upward or downward departures as set forth in the Sentencing Guidelines. Finally, the law requires the judge to consider all of the sentencing factors set forth in 18 U.S.C. § 3553(a). If confirmed, I would follow the law in all of the foregoing respects. Because, as the Supreme Court has stated, the Guidelines are the "product of careful study based on extensive empirical evidence," and also because one of the central purposes of the Guidelines is to reduce unwarranted sentencing disparities among similarly-situated defendants, I would give great deference to the applicable sentencing range. A judge may depart downward from the applicable sentencing range only when permitted to do so by an applicable downward departure provision of the Guidelines as applied to the facts of a particular case.

2. **According to an October 28, 2010 article in the *Legal Intelligencer*, there is a recent trend among federal judges to reject the federal sentencing guidelines for child**

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pornography crimes as "too harsh." What are your views with respect to these particular guidelines?

Response: I do not have any personal views as to the federal sentencing guidelines for child pornography crimes. In any event, if confirmed, any personal views I might have would be irrelevant. I would apply these particular guidelines in accordance with the law, as I would apply all other aspects of the sentencing guidelines.

3. **In 2004, you represented John Dexter, the former headmaster of an elite Manhattan prep school, who was charged with possession of child pornography. As part of an Internet sting operation, an investigator with the Westchester District Attorney's office posed as a 14-year old girl, and then as that girl's 15-year old friend. The investigator then carried on a series of explicit chats with the defendant. Mr. Dexter planned to meet the 14-year old girl, but cancelled. After his arrest, a search of his home and office exposed more than a dozen images of children younger than 16 engaging in sexual acts. Mr. Dexter was sentenced to ten years of probation and six weekends in jail.**

In 2001, you represented Reverend John Castaldo, a priest at Trinity Catholic High School, who was convicted of engaging in a sexually explicit Internet conversation with someone he thought was a 14-year old boy and sentenced to one weekend in jail and five years probation. At sentencing, you asked the judge for leniency because there was no "real" victim, no pornographic evidence on the defendant's computer, and the defendant never followed through with his proposed meeting with the boy.

Is it your view that, in cases such as these, where there is no known child victim but rather a law enforcement officer on the other end of an Internet communication, a defendant should receive a lesser sentence?

Response: No. It should be noted that in these and in every other case I have handled for a client over the past thirty years, whether as a federal prosecutor when my client was the United States or in private practice, and whether I was retained by the client or appointed by the court to represent the client, I have advocated for the client based on the facts and the law, and in accordance with my ethical and professional responsibilities.

4. **In 2001, you represented Nicholas Puner, a prominent attorney, who pled guilty to third-degree sodomy charges after he abused two 15-year old boys. He also engaged in sexually explicit Internet conversations with young boys. After serving 40 days of his 60-day sentence, authorities released him. Not long after his release, investigators learned that he still visited certain Internet sites. Posing as a 14-year old boy, investigators discussed sexually explicit topics with Mr. Puner and subsequently arrested him for violating his probation. He was sentenced to one to four years in prison. You were quoted in the *Journal News* as saying that "[Mr. Puner] has a very powerful illness which is not controllable."**

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a. While I understand that Mr. Puner was sentenced according to New York's sentencing guidelines, what factors should a U.S. District Court judge consider in determining whether a person convicted of a child sex crime has a mental or emotional condition that warrants a variance or downward departure from his or her applicable Sentencing Guidelines range?

Response: As required by law, a district judge must consider the guidelines and policy statements contained in the Sentencing Guidelines, both as to the applicable sentencing range and as to any applicable upward or downward departures provided for in the Guidelines. The judge must also consider all of the sentencing factors set forth in 18 U.S.C. § 3553(a), in accordance with the law of the Supreme Court and of the Circuit Court of Appeals having jurisdiction for the district in which the judge presides. A variance or downward departure from the applicable sentencing range would be warranted only if the facts and law supported that variance or departure. Please also see my response to Question 1(b).

b. If Mr. Puner was before a federal district judge, do you believe that his "powerful illness" would have been a sufficient basis for a variance or downward departure?

Response: Although it is very difficult to answer a hypothetical question like this one, because a federal court would be required to apply the sentencing methodology described above (please see my responses to Questions 1(b) and 4(a)) to the particular facts of the case, I do not believe his particular illness, which was documented in court, would have been a sufficient basis for a variance or downward departure.

c. The December 2008 Bourke-Hernandez study of federal inmates convicted of child pornography offenses found 85% of the participating inmates admitted in confidential sessions that they had gone beyond mere child pornography possession crimes and had physically abused a child. The 115 inmates with no prior known history of hands-on abuse admitted an average of 8.7 victims. What role should the specter of recidivism play in a judge's decisions about sentencing child sex offenders?

Response: As set forth in 18 U.S.C. § 3553(a), the sentencing court must consider, among other things, the "history and characteristics of the defendant," and the need for the sentence imposed "to protect the public from further crimes of the defendant." Thus, the specter, or likelihood, of recidivism would be an important consideration in a judge's decisions about sentencing child sex offenders.

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Responses of John A. Kronstadt
Nominee to be District Judge for the Central District of California
to the Written Questions of Senator Charles E. Grassley

1. **In *Greenberg*, you awarded the defendant, the City of La Canada Flintridge, $104,000 in attorney's fees. You were reversed on appeal. The Court concluded that you had not made the necessary findings that the plaintiff's case was "frivolous, unreasonable, or groundless." Therefore, the appellate court concluded that you had abused your discretion.**

   a. **Please explain the reasoning for your decision.**

      Response: My decision in *Greenberg* was a follow-on to the decision of my predecessor, Judge Grimes. She granted summary judgment in favor of the City of La Canada, concluding that the claims advanced by the plaintiffs failed. When I took over the case, the sole issue remaining was whether attorney's fees should be awarded to the City as the prevailing party under Judge Grimes' decision, and, if so, in what amount. My decision in the matter that fees should be awarded was based on my review of the record of the decision made by Judge Grimes, the briefs of the parties, and the contentions raised during oral argument. My decision as to the amount of fees that should be awarded was based on my review of the billing statements of counsel for the City, my knowledge of the reasonable rates charged for legal services in Los Angeles, and my assessment of the scope and appropriateness of the services provided. I have decided hundreds of attorney's fees awards while on the Superior Court using these criteria. As a result of my analysis, I concluded to grant only a portion of the $174,733.30 in fees sought by the City.

   b. **Do you agree with the appellate court's conclusion?**

      Response: Yes.

2. **In 2008, President Obama said,**

   "We need somebody who's got the heart, the empathy, to recognize what it's like to be a young teenage mom. The empathy to understand what it's like to be poor, or African-American, or gay, or disabled, or old. And that's the criteria by which I'm going to be selecting my judges."

   Do you agree with the President's statement?

   Response: I do not believe that empathy has a role in judicial decision-making. Judges are to apply the law to the facts. Judges should also be courteous, respectful and patient in dealing with those who appear before them.

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3. **Have you ever expressed an opinion regarding whether the death penalty constitutes cruel and unusual punishment under the Constitution? If so, what opinion did you express?**

   Response: No, to the best of my knowledge, I have not expressed an opinion on this issue.

4. **What is your personal view regarding whether the death penalty is constitutional?**

   Response: The Supreme Court has ruled that the death penalty is constitutional except under certain narrow circumstances. I would adhere to the law in this area.

5. **Do you believe that the death penalty is an acceptable form of punishment?**

   Response: Yes. The Supreme Court has so held.

6. **Do you hold any personal views that would preclude you from enforcing the death penalty?**

   Response: No.

7. **Do you believe that when Congress enacts a law that is contrary to the Constitution or takes action not authorized by some enumerated power therein, a court must either invalidate the Congressional action or, where appropriate, limit its application on an "as applied" basis?**

   Response: Yes. Thus, if a constitutional issue is properly framed for a court it is obligated to decide it consistent with the applicable principles of constitutional law established by the Supreme Court.

8. **What is the most important attribute of a judge, and do you possess it?**

   Response: I cannot single out one attribute as the most important for a judge to possess. I believe that, among the most important attributes for judges to have are: courtesy, patience, a strong work ethic, integrity, impartiality, respectfulness for all who appear before them and thoroughness in their decision-making. Through this combination of attributes, judges can perform well by correctly determining the facts and the law as required by the cases before them. In addition, through their courtesy, patience, respectfulness, impartiality and thoroughness, judges can inspire confidence in the judiciary in those whose disputes are resolved there. Throughout my judicial career, I have worked hard to meet these standards of performance and to maintain and improve these attributes.

9. **Please explain your view of the appropriate temperament of a judge. What elements of judicial temperament do you consider the most important, and do you meet that standard?**

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Response: As stated in response to Question 8, patience, courtesy, impartiality and respectfulness are among the important attributes of temperament of a successful judge. Those who appear before a judge want to be heard and treated with courtesy and respect. A judge whose temperament features these critical attributes will inspire respect for, and confidence in, the judiciary. I aspire to meet these standards in court every day.

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

Response: Yes, without any reservation.

11. **At times, judges are faced with cases of first impression. If there were no controlling precedent that dispositively concluded an issue with which you were presented, to what sources would you turn for persuasive authority? What principles will guide you, or what methods will you employ, in deciding cases of first impression?**

Response: I will look to available Supreme Court and Circuit Court precedents in analogous settings. Where the issue is one of statutory interpretation, I will study the words of a statute to seek to determine its meaning, and, if appropriate, will seek to determine the legislative purpose from legislative materials. In short, I will work hard to seek to determine the correct answer to the issue that is presented.

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

Response: I would apply that decision.

13. **As you know, the federal courts are facing enormous pressures as their caseload mounts. If confirmed, how do you intend to manage your caseload?**

Response: I would work hard to stay on top of all matters pending before me. I would work with counsel to manage cases in a manner that achieves fair, efficient and timely proceedings from filing to final disposition. Some of the manners in which I would do so are the techniques that I have used in my current judicial assignment; these are discussed in response to Question 14.

14. **Do you believe that judges have a role in controlling the pace and conduct of litigation and, if confirmed, what specific steps would you take to control your docket?**

Response: I do think that judges have a significant role in controlling the pace and conduct of litigation. If confirmed, I would continue to use the methods that I have used as a judge over the last several years. These include an early status conference with counsel or self-represented parties to discuss the planned course of the litigation and the establishment of firm deadlines for the completion of pre-trial phases, the setting of firm dates for hearings on significant pre-trial motions and trial, and a discussion of the means through which the case might be resolved through some form of alternative dispute resolution. In addition, by setting periodic follow-up status conferences, and by having the parties file status reports with respect to their progress, cases can be well-managed and concluded in a reasonable amount of time. I would continue to work cooperatively with counsel and parties in finding efficient and cost-effective means of resolving disputes over discovery and other pre-trial issues. Such techniques include conference telephone calls. In addition, I would continue to work with counsel and parties in efforts to settle cases through settlement conferences at which a judge presides.

15. **Under what circumstances do you believe it appropriate for a federal court to declare a statute enacted by Congress unconstitutional?**

Response: A federal court should find that a statute is in conflict with the Constitution under circumstances prescribed by Supreme Court precedent. Thus, if a statute is in clear conflict with an express provision of the Constitution, including an unambiguous limitation on the powers of the legislative branch, it should be found unconstitutional by a federal court. In considering such a challenge to a statute, a district court judge must follow the precedent of the Supreme Court as well as governing circuit court authority. The Supreme Court has recognized certain limitations on the exercise of Congress' legislative powers. In *United States v. Lopez,* 514 U.S. 549 (1995) and *United States v. Morrison,* 529 U.S. 598 (2000), for example, the Supreme Court determined the scope of such powers under the Commerce Clause.

16. **Please describe with particularity the process by which these questions were answered.**

Response: I prepared my answers after carefully considering the questions. I then reviewed my responses with representatives of the Department of Justice. I then finalized my answers and forwarded my written work to the Department of Justice for submission to the Judiciary Committee.

17. **Do these answers reflect your true and personal views?**

Response: Yes.

Responses of Jimmie V. Reyna
Nominee to be Circuit Judge for the Federal Circuit
to the Written Questions of Senator Charles E. Grassley

1. **You were asked at your hearing how you would increase diversity on the bar, if confirmed. You said, "...diversity on the judiciary is extremely important and I think it's vital to our judiciary and our system of justice." Please expand upon your belief.**

   Response: My testimony concerning diversity in the legal profession reflected the work and programs undertaken by bar associations throughout the country. For example, in early 2010, the ABA Presidential Initiative Commission on Diversity issued a report entitled, "Diversity in the Legal Profession: The Next Steps." The recommendations set out in the report were directed to all segments of the legal profession and were based on four rationales:

   - Lawyers and judges have a unique responsibility for sustaining democracy.
   - The profession must be diverse to thrive in a global and domestically inclusive business environment.
   - Diversity is critical if the profession wishes to maintain a societal leadership role.
   - Changing demographics in society compel the profession to change its own demographics.

2. **At your hearing, I asked whether you personally believe the Constitution is a "living document." You said the Constitution "stands on its own text" and "says what it says." If confirmed and if faced with a constitutional issue, you said you would first apply precedent, then text, and then law, or perhaps the purpose of the originators of the Constitution.**

   a. **In applying the text of the Constitution, do you believe it is appropriate to attempt to determine the original meaning of the words in the document?**

      Response: Yes, if the text is not clear and precedent does not resolve the issue.

   b. **How would you go about to determine the purpose of the originators?**

      Response: If confirmed, as a lower court judge, I would be guided by the precedent of the Supreme Court and of the Federal Circuit. If necessary and appropriate, I would consult the relevant historical materials in an effort to determine the original meaning of the framers of the Constitution.

   c. **Do you personally believe the Constitution is a "living document?"**

      Response: No.

3. **With regard to statutory interpretation, please discuss the following:**

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a. What is your view of the role of a Judge in interpreting a law? Is it ever appropriate for a Judge to interpret a law in an effort to accelerate social change?

Response: The role of the judge in interpreting a law is to apply binding precedent. It is not appropriate for a judge to interpret a law in an effort to accelerate social change.

b. Do you believe a judge should consider his or her own values or policy preferences in determining what the law means? If so, under what circumstances?

Response: No.

c. In interpreting statutes, what tools will you use? What weight will you give Congressional findings, reports, and other statements of Congressional intent?

Response: In interpreting statutes, I would read the text and structure of the statute and apply binding legal precedent and, if required, analogous legal precedent. As appropriate, I would apply the rules of statutory construction as set forth by the Supreme Court.

d. Does the Federal Circuit have the authority to circumvent the plain language of a statute and the stated Congressional intent of the Whistleblower Protection Act? May the Federal Circuit narrow the broad definitions Congress intended?

Response: No.

e. If confirmed, will you uphold Federal Circuit precedent, even if it clearly conflicts with a statute's plain language?

Response: Yes. I would uphold all Federal Circuit precedent until the precedent is overturned either by the Supreme Court or by the Federal Circuit in accordance with its Internal Operating Procedures governing hearings *en banc*.

4. In 2008, when you were the Senior Editor of the Hispanic National Bar Association Journal of Law and Policy, the Journal published an article that argued a Latino Supreme Court Justice may come to different conclusions on certain issues. The article reasoned a Latino Justice would arrive at different conclusions "[b]ecause of personal experiences, as well as an appreciation of the diversities of the Lantina/o community in the United States."

a. Although you did not author that article, do you agree with that statement?

Response: No, I do not agree with that statement.

b. In your personal view, how should an individual's personal experiences affect the decision making process of a Judge?

Response: Personal experiences should not affect the decision making process of a judge.

c. During her confirmation hearings, Justice Sotomayor rejected President Obama's so-called "empathy standard" stating, "We apply the law to facts. We don't apply feelings to facts." Do you agree with Justice Sotomayor?

Response: Yes.

5. You have been significantly involved in a number of trade issues and organizations including NAFTA, WTO, and the Free Trade Agreement to the Americas (FTAA). In addition you have represented clients before the U.S. International Trade Commission and before the Court of International Trade. Do any of these activities give you any concern about potential or actual conflicts of interest or other recusal issues that might arise because of your prior activities? If so, how do you intend to resolve them?

Response: If confirmed, I will address conflicts of interest issues in all cases that come before me. In doing so, I will strictly adhere to all ethical requirements and obligations applicable to a Circuit Judge of the CAFC, including applicable Codes of Conduct such as the Code of Conduct for United States Judges.

6. As an attorney for *Williams Mullen* you authored a letter responding to a request by the Department of Commerce on the applicability of countervailing duty law to China. In your letter you argued that the Federal Circuit's ruling in *Georgetown Steel* did not prohibit applying countervailing duty law to nonmarket economies, such as China. Do you still believe countervailing duty laws should apply to all imports from all countries, including China?

Response: As an attorney for Williams Mullen, I acted as an advocate on issues such as the one addressed in the question. If confirmed, I would apply binding precedent and existing law to the specific facts of a case, including with respect to the applicability of U.S. countervailing duty laws to non-market economies.

a. What legal restrictions, if any, prevent the Commerce department from placing countervailing duties on nonmarket economies, including China?

Response: The Commerce Department is authorized to conduct countervailing duty investigations involving non-market economies, including China, and to assess countervailing duties in accordance with applicable laws and regulations.

b. Do you agree that the determination as to what imports from China, or another non-market economy country, can or cannot be assessed countervailing duties remains within the discretion of the Department of Commerce – and should be determined on a case-by-case basis?

Response: As noted above, the authority to determine whether specific imports from China or other non-market economies are subject to countervailing duties resides within the Department of Commerce. The determination of whether countervailing duties apply to specific imports from non-market economies should be made on a case-by-case basis, and on the basis of applicable law and regulations.

7. In *GPX International Tire Corp. v. U.S,* the U.S. Court of International Trade appears to have placed a road block in the way the Commerce Department imposing countervailing duties in conjunction with antidumping remedies against Chinese imports.

a. In your personal view, how does the ruling in this case limit administrative action aimed at combating unfair trade practices by China?

Response: In the GPX cases, the CIT addressed the potential for "double-counting" countervailing duties where antidumping investigations involve non-market economies and companion countervailing duty investigations on the same product. Given that issues that were before the CIT in the GPX cases are now before the CAFC, and in light of my own status as a nominee to the CAFC, it would be inappropriate for me to comment on any issues related to the cases.

b. Are you aware of any method that could be used by the Commerce Department that would address the Court of International Trade's concerns about double counting when applying both countervailing duties and antidumping remedies to the same product?

Response: Given that issues that were before the CIT in the GPX cases are now before the CAFC, and in light of my own status as a nominee to the CAFC, it would be inappropriate for me to comment on any issues related to the cases.

8. Please identify what experience you have with respect to other issues that come before the Federal Circuit:

a. Patent law

Response: I have worked with partners who are patent lawyers on patent law issues affecting my clients, including patent applications and patent prosecution. I have also advised clients on Section 337 matters; enforcement and protection of

intellectual property rights in connection with activities in foreign countries; and the negotiation and interpretation of the TRIPS Agreement.

b. Trademark law

Response: Generally, I have assisted clients with trademark issues in matters involving investments, mergers and acquisitions, and in the context of imports of goods from foreign countries.

c. Government contracts

Response: I have assisted in the preparation of responses for proposals and bids. I have assisted clients with export controls and customs matters involved in government contracts. In addition, I have assisted in the negotiation and preparation of Administrative Agreements that resulted from government contracts.

d. Claims against the government

Response: I have limited experience with matters involving claims against the government.

9. If confirmed, what will you do to prepare yourself to handle the issues listed in Question number 8?

Response: I have a healthy respect for the challenges that, if confirmed, I will encounter in addressing the range of subject matters that would come before me. I also recognize that no single person is expert in all the technical and complex issues inherent in the cases that come before the CAFC. If confirmed, I will work diligently to understand the legal and technical issues of each case. I will read all briefs and submissions of the parties and utilize oral argument to focus on specific issues for which I require additional clarity. If confirmed, I will maintain a staff of dedicated and able law clerks that possess the intellectual capacity, rigor and stamina that will be required to work with me as a team.

10. What is the most important attribute of a judge, and do you possess it?

Response: I believe that impartiality is the most important attribute of a judge. A chief component of impartiality is independence. I believe that I possess the ability, strength and character to shield my work as a judge from outside pressures and public clamor, to respectfully listen to all parties that come before me, and to render decisions based on binding precedent and applicable law in a manner free from whatever personal views and opinions I may have on the issues or of the parties before me.

11. Please explain your view of the appropriate temperament of a judge. What elements of judicial temperament do you consider the most important, and do you meet that standard?

Response: A judge should demonstrate integrity in his or her personal and professional conduct, undertake the business of the court with respect for the litigants and the demeanor of the court, have an unwavering commitment to rule of law and due process, fairly consider both sides of a controversy, and possess the ability to exercise judgment that is independent and free from outside pressures and personal bias. I believe that I possess the appropriate temperament to serve on the CAFC.

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

Response: Yes.

13. At times, judges are faced with cases of first impression. If there were no controlling precedent that dispositively concluded an issue with which you were presented, to what sources would you turn for persuasive authority? What principles will guide you, or what methods will you employ, in deciding cases of first impression?

Response: In situations where no controlling Supreme Court or Federal Circuit precedent exists, I would carefully review case law involving the same or similar facts and law as established in prior decisions of the Supreme Court and the Federal Circuit, followed by consideration of precedent and prior decisions of the other Circuit Courts.

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

Response: I would be bound by any precedent established by the Supreme Court.

15. Under what circumstances do you believe it appropriate for a federal court to declare a statute enacted by Congress unconstitutional?

Response: A federal court should strike down a statute that violates the clear provisions of the U.S. Constitution, or that exceeds the boundary of congressional authority under the U.S. Constitution.

16. Under what circumstances, if any, do you believe an appellate court should overturn precedent within the circuit? What factors would you consider, in making this decision?

Response: I would uphold all Federal Circuit precedent until the precedent is overturned either by the Supreme Court or by the Federal Circuit in accordance with its Internal Operating Procedures governing hearings *en banc*.

17. Please describe with particularity the process by which these questions were answered.

Response: I reviewed and carefully considered each question and answer. In addition, I reread the cited CIT opinion and the Williams Mullen letter in preparation of my answers to the questions that involved those materials. I reviewed my draft responses with officials of the Department of Justice and then submitted a final draft.

18. Do these answers reflect your true and personal views?

Response: Yes.

Responses of Jimmie V. Reyna
Nominee to be Circuit Judge for the Federal Circuit
to the Written Questions of Senator Jeff Sessions

1. **In a September 2007 press release on behalf of the Hispanic National Bar Association, you voiced your support for the Dream Act.**

   a. **Do you believe that people whose presence in this country violates our immigration laws should be rewarded with citizenship simply because they attended school in the United States? Please explain your answer.**

   Response: As National President of the Hispanic National Bar Association (HNBA), I served as the chief spokesperson and advocate on behalf of the Board of Directors and the HNBA members. HNBA press releases, such as the one cited in the question, were issued to express the official positions and views of the HNBA and do not necessarily reflect my personal views.

   b. **Do you believe that the Constitution guarantees people who are here illegally a right to education, healthcare and other welfare benefits? Please explain your answer.**

   Response: While I am not a constitutional scholar, I do not believe that the Supreme Court has addressed all of those issues.

2. **In a December 2006 press release by the Hispanic National Bar Association, you called for a moratorium on "raids" conducted by Immigration and Customs Enforcement that resulted in the detention of 1,283 workers in meat packing plants in six states. You called these raids "'drag net enforcement' that entraps on the basis of race or color.'" What tools would you suggest the government use to identify and prosecute illegal workers and their employers?**

   Response: I do not have a suggestion or recommendation on the tools the government should use to identify which persons to investigate for prosecution under our immigration laws.

3. **During your hearing, you testified that you believe that "diversity in the judiciary is very important," one of the "very significant challenges facing the judiciary," and is "vital . . . to our system of justice." Please take this opportunity to explain your testimony.**

   Response: My testimony concerning diversity in the legal profession reflected the work and programs undertaken by bar associations throughout the country. For example, in early 2010, the ABA Presidential Initiative Commission on Diversity issued a report entitled, "Diversity in the Legal Profession: The Next Steps." The recommendations set out in the report were directed to all segments of the legal profession and were based on four rationales:

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- Lawyers and judges have a unique responsibility for sustaining democracy.
- The profession must be diverse to thrive in a global and domestically inclusive business environment.
- Diversity is critical if the profession wishes to maintain a societal leadership role.
- Changing demographics in society compel the profession to change its own demographics.

a. What role do a judge's background and/or personal beliefs have on a judge's decisionmaking and how do these relate to the application of the law to the facts in a given case?

Response: A judge's background and/or personal beliefs should have no role in the judge's decision making and should bear no relation to the application of the law to the facts in a given case.

b. How can litigants know that they are being treated fairly if a judge's background and/or personal beliefs, rather than the application of the law to the facts, affect legal decisions?

Response: Litigants are not being fairly treated in any instance where a judge's background and/or personal beliefs, rather than the application of the law to the facts, affect legal decisions.

c. Do you believe that an individual's background and/or personal beliefs have an effect on the quality of their decisionmaking?

Response: Judges should check their personal views and beliefs outside the courthouse door and conduct legal proceedings and render decisions solely on the basis of binding precedent and the application of law to the specific facts of a case.

4. As you may know, President Obama has described the types of judges that he would nominate to the federal bench as follows:

"We need somebody who's got the heart, the empathy, to recognize what it's like to be a young teenage mom. The empathy to understand what it's like to be poor, or African-American, or gay, or disabled, or old. And that's the criteria by which I'm going to be selecting my judges."

a. Do you believe that you fit President Obama's criteria for federal judges, as described in his quote? Please explain your answer.

Response: I am not sure whether or not I fit the criteria articulated above. I assume that President Obama nominated me on the basis of my legal and professional qualifications and my professional reputation.

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b. What role do you believe empathy should play in a judge's consideration of a case?

Response: None.

c. Do you think that it is ever proper for a judge to indulge his or her own subjective sense of empathy in determining what the law means or how it should be applied to a particular set of facts? If so, under what circumstances?

Response: No.

d. During her confirmation hearing, Justice Sotomayor plainly rejected President Obama's empathy standard, stating: "We apply law to facts. We don't apply feelings to facts." Justice Kagan responded similarly, stating: "It's the law all the way down." Do you agree with Justices Sotomayor and Kagan?

Response: Yes.

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Responses of Michael F. Urbanski
Nominee to be District Judge for the Western District of Virginia
to the Written Questions of Senator Charles E. Grassley

1. **In February 2009, you held a training session for lawyers and judges on behalf of the Virginia Bar Association Foundation's "Rule of Law Project." In your notes from that presentation, you listed examples of circumstances where there is no rule of law. You included Jim Crow laws and Saddam Hussein's efforts to suppress a national vote in Iraq. But you also included the United States' detention of enemy combatant terrorists at Guantanamo Bay, Cuba.**

   Response: I apologize if my inclusion of the Virginia Bar Association's Rule of Law Project training materials in response to Question 12(d) of the Committee's Questionnaire gave the impression that I conducted the training session or authored the training notes and discussion materials. In fact, I did not hold a training session for judges and lawyers on behalf of the VBA's Rule of Law Project or author the notes referenced above.

   My participation in the VBA Rule of Law Project consisted of the following. In early February, 2009, I attended a volunteer training session conducted by G. Michael Pace, Jr., immediate past president of the Virginia Bar Association, concerning the Rule of Law Project. Mr. Pace outlined the goals of the program, presented a video to be shown to the students, provided instructions and handed out written materials to the assembled volunteer judges and lawyers. I played no role in the training, other than listening to the presentation. Nor did I author the training notes. These materials were provided by Mr. Pace to all of the volunteers participating in this project.

   Following the training session, I was assigned to the R.E. Cook Alternative School and spoke to a group of students about the rule of law on February 18, 2009. Other volunteer lawyers and judges were assigned to different schools throughout the Roanoke Valley. In my talk to the students, I focused on my experience as a United States Magistrate Judge and on how the rule of law plays out in my courtroom on a daily basis. I did not speak from a prepared text and have no notes of my discussion with this class.

   Again, I apologize for any confusion resulting from my inclusion of the VBA's training notes in the materials I sent to the Committee. Erring on the side of completeness, I provided the four pages from the training session to the Committee because I had been given them by the VBA at the training session and had them in my files.

   a. **Do you believe the United States policy with regard to prisoners at Guantanamo Bay is analogous to Saddam Hussein's actions and Jim Crow laws?**

      Response: No.

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b. Do you believe that criminal charges, provision of counsel, and some prospect of release is required by Due Process for foreign terrorists captured on the battlefield and detained outside the United States?

Response: In my role as United States Magistrate Judge, I have not had occasion to consider this issue, nor have I formed a view on the subject. If confirmed as a district judge, I would follow Supreme Court and Fourth Circuit precedent and apply established law to the facts of the case before me.

c. Do you believe that the detention of enemy-combatants at a United States military facility must be governed by civilian judges in order to conform to the Rule of Law?

Response: In my role as United States Magistrate Judge, I have not had occasion to consider this issue, nor have I formed a view on the subject. If confirmed as a district judge, I would follow Supreme Court and Fourth Circuit precedent and apply established law to the facts of the case before me.

i. If yes, how do you think the usual rules of criminal procedure, such as the rule requiring Miranda warnings, will be applied to these cases?

Response: Not applicable.

d. How did President Obama "apply" the rule of law by announcing he would close Guantanamo Bay?

Response: In my role as United States Magistrate Judge, I have not had occasion to consider this issue, nor have I formed a view on the subject. If confirmed as a district judge, I would follow Supreme Court and Fourth Circuit precedent and apply established law to the facts of the case before me.

e. Do you believe the rule of law "in effect" by virtue of the process going on now through Combatant Status Review Tribunals, the Military Commission charges, and even the *habeas corpus* proceedings allowed by the Supreme Court in *Boumediene v. Bush*?

Response: In my position as United States Magistrate Judge, I have not had occasion to consider this issue, nor have I formed a view on the subject. If confirmed as a district judge, I would follow Supreme Court and Fourth Circuit precedent and apply established law to the facts of the case before me.

2. In 2008, President Obama said,

"We need somebody who's got the heart, the empathy, to recognize what it's like to be a young teenage mom. The empathy to understand what it's like to

be poor, or African-American, or gay, or disabled, or old. And that's the criteria by which I'm going to be selecting my judges."

Do you agree with the President's statement?

Response: Judges should not make decisions based on empathy or heart. When I put on my robe as a United States Magistrate Judge, I put my personal feelings aside.

3. **Have you ever expressed an opinion regarding whether the death penalty constitutes cruel and unusual punishment under the Constitution? If so, what opinion did you express?**

Response: No.

4. **What is your personal view regarding whether the death penalty is constitutional?**

Response: The Supreme Court has held that the death penalty is constitutional. If confirmed, I would follow Supreme Court precedent.

5. **Do you believe that the death penalty is an acceptable form of punishment?**

Response: The Supreme Court has held that the death penalty is constitutional. If confirmed, I would follow Supreme Court precedent.

6. **Do you hold any personal views that would preclude you from enforcing the death penalty?**

Response: No.

7. **Do you believe that when Congress enacts a law that is contrary to the Constitution or takes action not authorized by some enumerated power therein, a court must either invalidate the Congressional action or, where appropriate, limit its application on an "as applied" basis?**

Response: Yes.

8. **What is the most important attribute of a judge, and do you possess it?**

Response: In my view, a judge must possess integrity and be dedicated to the impartial application of the law to the facts of the case before the court. I believe my track record as a United States Magistrate Judge demonstrates that I have the ability to do so.

9. **Please explain your view of the appropriate temperament of a judge. What elements of judicial temperament do you consider the most important, and do you meet that standard?**

Response: As a public servant, a judge must work hard to decide the case before the court in a timely, fair and impartial manner, and to treat all who appear before the court with dignity and respect. I believe my track record as a United States Magistrate Judge demonstrates that I meet this standard.

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

Response: Yes.

11. At times, judges are faced with cases of first impression. If there were no controlling precedent that dispositively concluded an issue with which you were presented, to what sources would you turn for persuasive authority? What principles will guide you, or what methods will you employ, in deciding cases of first impression?

Response: Cases should be decided narrowly based on their facts. If there is no controlling precedent, I would look to the text of the constitutional or statutory provision involved and analogous Supreme Court, Fourth Circuit and other federal precedent.

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

Response: It is the district court's obligation to follow binding precedent, and I would do so.

13. As you know, the federal courts are facing enormous pressures as their caseload mounts. If confirmed, how do you intend to manage your caseload?

Response: As a United States Magistrate Judge, I keep track of all cases referred to me for decision or mediation through the court's electronic filing system and through monthly reports prepared by my staff. If confirmed, I will employ this docket management system along with pretrial scheduling orders to make sure that cases are resolved in a timely manner.

14. Do you believe that judges have a role in controlling the pace and conduct of litigation and, if confirmed, what specific steps would you take to control your docket?

Response: I believe that judges have an important role in controlling the pace and conduct of litigation. If confirmed, I will continue my present practice of issuing a pretrial scheduling order in each civil case, setting deadlines for discovery, Rule 56 and other pretrial motions, and scheduling a timely trial date.

15. Under what circumstances do you believe it appropriate for a federal court to declare a statute enacted by Congress unconstitutional?

Response: It is appropriate for a federal court to declare an act of Congress unconstitutional when the statute contravenes the Constitution or if Congress exceeds its constitutional authority in enacting such a law. In making any such decision, I would be guided by Supreme Court precedent.

16. Please describe with particularity the process by which these questions were answered.

Response: I received the Committee's questions on February 23, 2011 and drafted my responses to them. I discussed my responses with a Justice Department official, finalized my responses and authorized their communication to the Committee.

17. Do these answers reflect your true and personal views?

Response: Yes.

SUBMISSIONS FOR THE RECORD

The Honorable Harry Reid
522 Hart Senate Office Building
Washington, DC 20510

The Honorable Mitch McConnell
361-A Russell Senate Office Building
Washington, DC 20510

February 15, 2011

Dear Senators Reid and McConnell:

The undersigned organizations, who represent the interests of everyday Americans, strongly urge you to work to ensure that judicial nominees are given timely confirmation votes in the Senate during the 112th Congress.

In the 111th Congress, filibuster threats, anonymous "holds," and the failure to hold regular votes created a troubling backlog of judicial nominees, resulting in widespread unfilled vacancies on the bench that are hindering the important work of our judicial branch - particularly in the many areas of our nation that now face judicial emergencies. We cannot tolerate a repeat of these obstructionist practices, as they led to the lowest percentage of a president's nominees being confirmed at this point in his presidency than any president in American history.

Since taking office, President Obama has worked with home state Senators on a bipartisan basis to select extraordinarily well-qualified judicial nominees who could easily be confirmed by wide margins and begin serving the public, if their nomination were only brought to a vote before the full Senate. Yet a troubling number of these nominees, many of whom were cleared by the Committee on the Judiciary in the 111th Congress with little or no opposition, were blocked from up-or-down confirmation votes for reasons that defy explanation. Indeed, many of President Obama's judicial nominees languished for many months on the Senate floor, raising significant doubts about the legitimacy of the ongoing delays in confirmation proceedings. This is not the way nominations have been treated by prior Congresses.

Due to arcane floor procedures that allow a single member to impede the important business of the Senate, our judicial branch has reached a state of crisis. Out of 875 federal judgeships, 101 are currently vacant, with 44 of those vacancies now characterized as "judicial emergencies" in which courts are being overwhelmed by filings. As a result, a growing number of Americans, from all walks of life and across all economic strata, are finding it increasingly more difficult to assert their legal rights and to have their fair day in court.

We write to you at a time when our nation faces numerous challenges that cry out for bipartisan cooperation, including major economic challenges and continued international threats. We strongly believe that the continued obstruction of nominations would further

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poison the political atmosphere, needlessly heighten partisan tensions, and make it far more difficult for the federal government to serve the public interest.

For these reasons, as the 112th Congress gets under way, we strongly urge you to continue to work together in a bipartisan fashion to proceed with prompt confirmation votes on judicial nominees who have been approved by the Committee on the Judiciary. Floor votes should be taken on nominees shortly after they have been reported out of committee, so that the process can work in a regular manner.

Thank you for your consideration.

AIDS United
Alliance for Justice
American Association of People with Disabilities
American Association of University Women (AAUW)
American Constitution Society
American Federation of Labor and Congress of Industrial Organizations (AFL-CIO)
American Rivers
Asian American Justice Center, a member of the Asian American Center for Advancing Justice
Asian Pacific American Legal Center, a member of the Asian American Center for Advancing Justice
Brady Campaign to Prevent Gun Violence
Business and Professional People for the Public Interest
Campaign for America's Future
Center for Inquiry
Center for Law and Social Policy (CLASP)
Coalition to Stop Gun Violence
Communications Workers of America (CWA)
Consumer Action
Defenders of Wildlife
Earthjustice
Environmental Working Group (EWG)
Equal Justice Society
Friends of the Earth
Hispanic Federation
Hispanic National Bar Association
Hispanics for a Fair Judiciary
Human Rights Campaign (HRC)
Interfaith Alliance
Jewish Reconstructionist Federation
Judge David L. Bazelon Center for Mental Health Law
Justice at Stake
Lambda Legal Defense and Education Fund
LatinoJustice PRLDEF
League of Conservation Voters

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League of United Latin American Citizens (LULAC)
Legal Momentum
Mexican American Legal Defense and Educational Fund (MALDEF)
National Asian Pacific American Bar Association (NAPABA)
National Association for the Advancement of Colored People (NAACP)
National Black Justice Coalition (NBJC)
National Center for Lesbian Rights
National Council of Jewish Women (NCJW)
National Council on Independent Living
National Disability Rights Network
National Employment Lawyers Association
National Fair Housing Alliance
National Gay and Lesbian Task Force Action Fund
National Health Law Program
National Latina Institute for Reproductive Health (NLIRH)
National Native American Bar Association
National Organization for Women
National Partnership for Women and Families
National Senior Citizens Law Center
National Urban League
National Women's Law Center (NWLC)
Natural Resources Defense Council
Open Society Policy Center
People For the American Way
Planned Parenthood Federation of America
Progress Michigan
Project Vote
Public Advocates, Inc.
Public Citizen
Sargent Shriver National Center on Poverty Law
Secular Coalition for America
Service Employees International Union
Sierra Club
TASH
The Advocacy Fund
The Brennan Center for Justice at New York University School of Law
The Lawyers' Committee for Civil Rights Under Law
The Leadership Conference on Civil and Human Rights
The Wilderness Society
Tides
Union for Reform Judaism
Voices for Progress
Women's Law Project

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James R. Silkenat
Sullivan & Worcester LLP
1290 Avenue of the Americas
New York, NY 10104
(212)660-3052
jsilkenat@sandw.com

American Bar Association
Section of International Law

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November 1, 2010

Via Email and First Class Mail
The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Re: Nomination of Jimmie V. Reyna to the U.S. Court of Appeals for the Federal Circuit

Dear Chairman Leahy:

As former Chairs of the 24,000 member ABA Section of International Law, we write to express our support for the timely confirmation of **Mr. Jimmie V. Reyna** of Washington, D.C., to the U.S. Court of Appeals for the Federal Circuit.

Mr. Reyna's professional record as an international trade practitioner is one of significant success and distinction. He currently is an equity partner and on the board of directors of his distinguished law firm and has served as National President of the Hispanic National Bar Association. He currently serves on the Board of Directors of the National Hispanic Leadership Agenda, where he helps shape U.S. Hispanic/Latino national policy issues. He has an impeccable reputation within the international legal community and a demonstrated commitment both to the law and to the legal profession. On September 29, 2010, the ABA Standing Committee on the Judiciary issued a unanimous opinion that Mr. Reyna is "Well Qualified" for a position on the Court of Appeals for the Federal Circuit. We believe he has the professional credentials, the experience and skills, the appropriate temperament, and the fair and sound judgment that would enable him to serve on the Court of Appeals for the Federal Circuit with distinction and honor.

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The Honorable Patrick J. Leahy

We thank you for the opportunity to share our views on this important appointment.

Sincerely,

James R. Silkenat

Don S. DeAmicis

A. Joshua Markus

Deborah Enix-Ross

Prof. Robert E. Lutz II

Aaron Schildhaus

Kenneth B. Reisenfeld

Michael H. Byowitz

Glenn P. Hendrix

cc: Jimmie V. Reyna
The Honorable Robert F. Bauer

This letter was sent to the following members of the Committee on the Judiciary, United States Senate, 224 Dirksen Senate Office Building, Washington D.C. 20510-6275 on November 1, 2010.

Majority: Hon. Patrick Leahy, Chairman
Hon. Herbert Kohl
Hon. Dianne Feinstein
Hon. Russell D. Feingold
Hon. Charles E. Schumer
Hon. Richard J. Durbin
Hon. Benjamin L. Cardin
Hon. Sheldon Whitehouse
Hon. Amy Klobuchar

{N0233067; 1}

The Honorable Patrick J. Leahy

Hon. Edward E. Kaufman
Hon. Arlen Specter
Hon. Al Franken

Minority: Hon. Jeff Sessions, Ranking Member
Hon. Orrin G. Hatch
Hon. Charles E. Grassley
Hon. Jon Kyl
Hon. Lindsey O. Graham
Hon. John Cornyn
Hon. Tom Coburn

{N0233067; 1}

OPENING STATEMENT OF SENATOR BENJAMIN J. CARDIN

SENATE JUDICIARY COMMITTEE

NOMINATION OF JIMMIE V. REYNA

US CIRCUIT JUDGE FOR THE COURT OF APPEALS FOR THE FEDERAL CIRCUIT

FEBRUARY 16, 2011

I was pleased to recommend Jimmie Reyna to President Obama for the United States Court of Appeals for the Federal Circuit.

Mr. Reyna comes to this committee with 23 years of experience in international trade law. Mr. Reyna currently is a partner in the Washington, D.C. office of Williams Mullen. Mr. Reyna directs the firm's Trade and Customs Practice Group, as well as the firm's Latin America Task Force, and has also served for several years on his firm's Board of Directors, where he currently serves as vice president.

In his practice, Mr. Reyna handles matters before the various federal agencies, and represents clients before the Court of International Trade, the U.S. Court of Appeals for the Federal Circuit, and foreign governmental, administrative, and judicial bodies. He also serves on the roster of dispute settlement panelists for trade disputes under the North American Free Trade Agreement and the World Trade Organization Dispute Settlement Mechanism.

Mr. Reyna has also authored several articles and two books on international trade issues, and his third book on the subject is due to be published this spring. His experience in trade law would bring important expertise to the Federal Circuit, a unique court with nationwide jurisdiction that deals with many trade law issues and yet currently lacks a trade specialist.

Mr. Reyna was admitted to the New Mexico Bar in 1979, and the District of Columbia bar in 1994. He received his J.D. from University of New Mexico School of Law, and his BA from University of Rochester. The American Bar Association's Standing Committee on the

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Federal Judiciary evaluated Mr. Reyna's nomination, and rated him unanimously well qualified, the highest possible rating.

Mr. Reyna's personal history is compelling. Born in New Mexico to a modest family, his missionary parents instilled in him a belief that all people are equal, a principle he has exemplified in his work to ensure that all people are treated fairly in our legal system. After law school, he worked as a litigator at a firm in Albuquerque, and later established his own practice dealing with domestic relations, civil rights, tort, and criminal defense matters. In his practice, he often represented clients *pro bono*, devoting a large portion of his time to providing advice and representing individuals who could not afford legal assistance.

A few years later, Mr. Reyna moved with his family to Washington, D.C. metro area, where he built his well-regarded career in international trade.

Mr. Reyna has continually proven that he is an outstanding and civic-minded person. Mr. Reyna is a well-known national leader in U.S. Hispanic affairs. He has held various leadership positions in the Hispanic National Bar Association ("HNBA"), including national president, vice president of regional affairs, regional president, and chair of the International Law Committee. During his term as National President of HNBA, Mr. Reyna launched the association's first-every community outreach program called "The Promise in the Law," which was designed to instill trust and confidence in the U.S. legal system by the Hispanic communities. Mr. Reyna also created "The HNBA Journal of Law and Policy," the HNBA's first law journal, which addresses policy and legal issues affecting the Hispanic community. Currently, he serves on the board of directors of the National Hispanic Leadership Agenda, an organization that includes the country's 29 largest leading Hispanic organizations.

Mr. Reyna is also a founder and a member of the board of directors of the U.S.-Mexico Law Institute. He has received multiple awards for his service to the Hispanic community, including the 2009 Ohtli Medal Award, Mexico's highest award for a non-Mexican citizen. Through his work, Mr. Reyna has strived to ensure that members of disadvantaged communities are informed about the law, that the legal community is prepared to handle the legal challenges facing the

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growing Latino community, and that the judiciary remains strongly independent, impartial, and accessible to all.

Mr. Reyna's civil service is not limited to his work for the Hispanic community. He has been recognized by the Court of International Trade for his extensive *pro bono* work before that court. He also serves on the board of directors of the Community Services for Autistic Adults and Children Foundation.

Mr. Reyna's nomination would also bring much-needed diversity to the Federal Circuit. Throughout his career, Mr. Reyna has shown a strong commitment to diversity and racial equality, not only through his service to the Hispanic community, but also through his service on the ABA Presidential Commission on Diversity in the Legal Profession, and as chair of the Williams Mullen Diversity Committee. If Mr. Reyna is confirmed, he would be the first minority to serve on the Federal Circuit in its history. With the nomination of Mr. Reyna, the Senate has another opportunity to further increase the diversity of the federal bench.

Because of his vast qualifications, Mr. Reyna's nomination has received support from various organizations and individuals, including the HNBA and the Congressional Hispanic Caucus. Additionally, seven former Chairs of the American Bar Association Section on International Law wrote a letter of endorsement for Mr. Reyna, affirming that Mr. Reyna has "the professional credentials, the experience and skills, the appropriate temperament, and the fair and sound judgment" to serve on the Federal Circuit.

And, last but certainly not least, Mr. Reyna is a resident of Silver Spring, Maryland, and a constituent of mine.

In conclusion I urge this Committee to favorably approve Mr. Reyna's nomination to be a US Circuit Judge for Court of Appeals for the Federal Circuit, and to send his nomination to the full Senate for consideration on the floor. Thank you.

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citba.org

Customs & International Trade Bar Association

55 W 39th Street, 6th Floor, New York, New York 10018 ▪ 212 944-7333 ▪ Fax 212 719-1828 ▪ msor888@rode-qualey.com

November 30, 2010

Senator Patrick J. Leahy
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Re: Nomination of Jimmie V. Reyna to the United States Court of Appeals for the Federal Circuit

Dear Chairman Leahy:

The Customs and International Trade Bar Association (CITBA) herewith submits its views concerning the fitness of Mr. Jimmie V. Reyna to serve as a Judge on the U.S. Court of Appeals for the Federal Circuit (CAFC). For the reasons set forth below, CITBA strongly endorses the nomination of Mr. Reyna to the CAFC and looks forward to a speedy confirmation.

CITBA was founded in 1926. Its members consist of over 400 attorneys who concentrate in the field of customs law, international trade law and related matters. CITBA members represent United States importers, exporters and domestic parties as well as governmental agencies concerned with matters that involve the United States customs laws, antidumping, countervailing duties and other international trade laws, and related laws and regulations of federal agencies concerned with international commerce. Active, regular membership in CITBA requires membership in the bar of the U.S. Court of International Trade, a court whose decisions are subject to CAFC, and many members practice before the CAFC as well.

Summary of CITBA Views

In order to assess the fitness of Mr. Reyna for a position, CITBA reviewed Mr. Reyna's published writings, solicited the opinions of CITBA members familiar with Mr. Reyna and his many years of practice to the court, and interviewed Mr. Reyna. Mr. Reyna is well-qualified to serve on the CAFC, in terms of temperament, integrity and experience in the relevant laws, procedures, and standards of review applied by the court to matters before it.

Michael S. O'Rourke, President ▪ James R. Cannon, Jr., Vice President ▪ Joseph W. Dorn, Secretary ▪ Munford Page Hall, II, Treasurer ▪ Jay A. Eizenstat, Chairman, Continuing Legal Education & Professional Responsibility ▪ Beth C. Ring, Chairman, Meeting & Special Events ▪ Brenda A. Jacobs, Chairman, Customs ▪ Kathleen W. Cannon, Chairman, International Trade ▪ Melvin S. Schwechter, Chairman, Export ▪ Gary N. Horlick, Chairman, Judicial Selection ▪ Lawrence M. Friedman, Chairman, Trial & Appellate Practice ▪ Claire R. Kelly, Chairman, Liaison with Other Bar Associations ▪ Kevin J. Sullivan, Chairman, Membership ▪ Frances P. Hadfield, Chairman Publications ▪ Victor S. Mroczka, Chairman, Technology ▪ Patrick C. Reed, Past President ▪ Jeanne Davidson, At Large

Consideration of Fitness

As a matter both of principle and practice, CITBA strongly believes that it is appropriate and desirable to appoint judges to the CAFC who possess a depth of experience in one or more of the relevant fields of law within the jurisdiction of the CAFC.

The CAFC has jurisdiction over diverse matters involving import transactions. Since 1890, the Board of General Appraisers, which became the Customs Court, and later the CIT, has been responsible for reviewing the rate and amount of duty imposed on imported merchandise, as well as the classification and value of such merchandise. In 1980, the CIT was created to clarify and expand the jurisdiction of the Customs Court. "The Court of International Trade was created by Congress in the Customs Courts Act of 1980 as a nationwide forum to review and resolve disputes involving the importation of goods and the payment of customs duties."[1] The CAFC was created in 1982 to review, *inter alia*, decisions of the CIT.

Among other things, the 1980 Act clarified that the CIT had jurisdiction to review antidumping and countervailing duty determinations by the Department of Commerce and the International Trade Commission, in addition to its traditional jurisdiction over Customs classification, valuation and related matters. Importantly, Congress bestowed on the CIT residual jurisdiction to decide any civil action against the United States arising out of any law pertaining to international trade. The House Report articulated the purpose of the 1980 Act to create

> a comprehensive system of judicial review of civil actions arising from import transactions, utilizing the specialized expertise of the United States Customs Court [now Court of International Trade] and the United States Court of Customs and Patent Appeals [now Federal Circuit].[2]

As noted above, the United States has used specialized tribunals to adjudicate customs law disputes since 1890. Administration of the law involves numerous legal issues arising from import transactions. The CIT must interpret the classification of imported articles under the Harmonized Tariff Schedule of the United States (HTSUS). The court must also interpret and apply the laws concerning the valuation of imported merchandise, drawback, antidumping and countervailing duty laws as well as a host of other trade and customs laws.

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[1] H.R. Rep. No. 99-390 at 2, *reprinted in* 1985 USCCAN 2453-54.

[2] H.R. Rep. No. 96-1235 at 20, *reprinted in*, 1980 USCCAN 3729, 3731.

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The international trade laws also have a long history. The first general law imposing countervailing duties on subsidized imports was enacted in 1897. In 1921, the United States enacted the Antidumping Act. Over the years, the 1921 Act was regularly updated and amended, until being replaced by the current antidumping statute enacted in 1979. The 1979 Act, as amended in 1984, 1988, 1992 and 1994, is the law today. The Act itself implements the U.S. obligations found in the World Trade Organization's Anti-dumping Agreement and the Subsidies and Countervailing Measures Agreement.

The work of the CAFC in these areas consists of reviewing agency determinations—made by the Bureau of Customs and Border Protection ("Customs"), the Commerce Department or the U.S. International Trade Commission – and CIT decisions under various and different standards of review. Questions of customs classification and penalty decisions are entitled to *de novo* review by the CIT.[3] Questions of fact, such as the actual use or application of an imported article, must be established on the basis of positive evidence before a judge of the CIT. These issues typically involve presentation of expert and other testimony and documentary and physical evidence.

Legal issues in customs cases are sometimes decided on motions for summary judgment.[4] But, unlike the standard of review applied by appellate courts under the Administrative Procedures Act, the CIT often does not apply *Chevron*[5] deference. The Supreme Court, in *United States v. Mead Corp.*,[6] held that a Customs tariff classification ruling is not entitled to judicial deference under *Chevron*.[7] Rather, a Customs classification ruling is entitled to a degree of deference that is "proportional to its 'power to persuade.'"[8] Application of such a standard presumes an expert judiciary, fully capable of interpreting and applying the HTSUS as intended by Congress, and not simply ascertaining whether Customs' interpretation was "reasonable."

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[3] Customs' classification decisions are subject to *de novo* review pursuant to 28 U.S.C. § 2640 (1994). Penalty cases are reviewed *de novo* pursuant to 19 U.S.C. § 1592(e).

[4] *See, e.g., E.M. Chem. v. United States*, 920 F.2d 910, 912 (Fed. Cir. 1990).

[5] *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984)

[6] 533 U.S. 218, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001).

[7] 533 U.S. at 227.

[8] *Mead Corp. v. United States, 283 F.3d 1342, 1345* (Fed. Cir. 2002), (*quoting Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S.Ct. 161, 89 L.Ed. 124 (1944)).

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Questions presented by appeals from antidumping and countervailing duty cases are governed by a standard of review that is quite similar to the Administrative Procedures Act standards.[9] The matters before the court, though, will typically involve a voluminous evidentiary record including accounting documents, statistical evidence, economic analyses, as well as testimony by witnesses and economic or other experts.

In order to provide relief in matters covered by its broad subject matter jurisdiction, the CIT has complete powers in law and equity. That is, the court is an Article III court of the United States. The court may grant any relief appropriate to the particular case before it, including, but not limited to, money judgments, writs of mandamus, and preliminary or permanent injunctions.

Moreover, the geographical jurisdiction of the CIT and CAFC is nationwide. These courts decide cases that arise anywhere in the country.

U.S. imports subject to Customs' jurisdiction and, potentially, jurisdiction of the CAFC amounted to $1.57 trillion in 2009.[10] The CAFC confronts disputes that are national, economically and politically substantial, technical, and subject to complicated and differing standards of review involving diverse categories of imports including but not limited to oil, steel, semiconductors, textiles and lumber.

Given the importance, uniqueness and diversity of the CAFC's role, CITBA believes that the most outstanding feature of Mr. Reyna's qualifications is his unique history and experience with the CAFC and the customs and international trade laws it reviews. Given the specialized nature of these laws and the diverse standards of review applied by the CIT and CAFC, Mr. Reyna's background would serve him well on the court.

Mr. Reyna has obtained a thorough understanding of the subject matter, administrative procedures and vocabulary employed in the fields of customs and international trade law. His resume indicates that he has been in private practice for 31 years, in Albuquerque, New Mexico and Washington, DC. Since 1998 he has been a shareholder and member of the board of directors at Williams Mullen, a leading U.S. law firm. He directs the firm's Trade and Customs Practice Group and its Latin America Task Force.

Approximately half of his practice focuses on laws, regulations, and governmental measures that affect cross-border movement of goods and services. He advises clients on foreign

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[9] Pursuant to 19 U.S.C. § 1516a(b)(1), the CIT reviews certain agency determinations under the "arbitrary, capricious" standard and other determinations under the "substantial evidence" standard.

[10] See http://www.census.gov/foreign-trade/PressRelease/current_press_release/exh5s.pdf

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investment; U.S. and foreign trade policy; international treaties, pacts, and accords; trade negotiations; international trade agreements; and multilateral trade-related organizations. Mr. Reyna provides representation on trade relief cases (antidumping, countervailing duty, and safeguard actions) including trade cases involving U.S. interests that are brought before foreign governments. In addition, he has extensive experience with business regulation matters including compliance, export controls, Section 337, Trade Adjustment Assistance, Foreign Trade Zones, FCPA, trade in services, rules of origin, customs law, product standards, food safety, and homeland and border security issues.

Mr. Reyna has argued two appeals before the CAFC, and has served as counsel on over two dozen cases in which the CAFC or the CIT published opinions. He has been a member of a NAFTA panel, and has litigated more than 20 jury trials. He is on the U.S. roster of dispute settlement panelists for trade disputes under Chapter 19 of the North American Free Trade Agreement (NAFTA), and the U.S. roster of non-governmental panelists for the World Trade Organization (WTO), Dispute Settlement Mechanism. His work involves matters before the U.S. International Trade Commission, Department of Commerce; Office of the U.S. Trade Representative, Department of State; Department of Defense; Department of Homeland Security; Department of the Treasury; Department of Justice; Federal Highway Administration; Federal Drug Administration; Federal Trade Commission; and the U.S. Congress. He represents clients before the Court of International Trade, the U.S. Court of Appeals for the Federal Circuit, and assists with the representation of U.S. clients before foreign governmental, administrative and judicial bodies. Mr. Reyna has been commended by the Court of International Trade for his *pro bono* work before that court.

Mr. Reyna is the author of two major books on international trade law and a number of articles on international trade issues. He is currently editing/authoring a book on the international trade laws and customs regulations in Latin America that is scheduled for publication in late 2010 (Kluwer International). He is also the founder and co-editor of the Hispanic National Bar Association *Journal of Law and Policy.* He is a frequent speaker on trade issues before U.S. and foreign legal and business audiences.

Mr. Reyna is a well-known national leader in U.S. Hispanic affairs. Mr. Reyna is a former national president of the Hispanic National Bar Association (HNBA) (2006-07); and served as HNBA's national president-elect (2005-06), national vice-president of regional affairs (2005), regional president for Region V (MD, DC, VA, WVA) (2004), and chair of the International Law Committee (1999-2004). He served (2007-2010) on the board of directors of the National Hispanic Leadership Agenda, an organization that includes the country's 29 largest leading Hispanic organizations. He also serves on the Nationwide Hispanic Advisory Council, Big Brothers Big Sisters of America, and on the board of advisors for the Mid-Atlantic Hispanic Chamber of Commerce.

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He is a member of the ABA Section on International Law and the Section on Dispute Resolution. He is also a member of the International Bar Association, the Customs and International Bar Association, and the Inter-American Bar Association. He served on the ABA Presidential Commission on Diversity in the Legal Profession (2007), as chair of the Williams Mullen Diversity Committee (2006-08) and on the Williams Mullen board of directors (2006-08, vice-president; 2009- vice-president). He is a founder and a member of the board of directors of the U.S.-Mexico Law Institute and serves on the board of directors of the Community Services for Autistic Adults and Children Foundation. Mr. Reyna speaks and writes fluent Spanish. He is a member of the bar of the Supreme Court of the United States, U.S. Court of Appeals for the Federal Circuit, U.S. Court of International Trade, U.S. Court of Appeals for the 10th Circuit, U.S. District Court for the District of New Mexico, District of Columbia Court of Appeals, and Supreme Court of the State of New Mexico.

We note that the American Bar Association Standing Committee on the Federal Judiciary has unanimously found him "well qualified" for the appointment. Finally, Mr. Reyna's temperament is ideal. He is fair and focused and he has dedicated his life not just to practice in this field of law, but to scholarly writing in this field. He is admired among members of the bar as someone who listens attentively, explains thoroughly and is generous with his time. In his practice he has represented U.S. and foreign producers in trade remedy cases, without bias in either direction.

Comments Regarding Scope and Methodology

In considering Mr. Reyna's fitness to assume a position on the bench, and in keeping with CITBA's mission as an association of customs and international trade practitioners, CITBA focused on the prior experience, public records, and peer review of Mr. Reyna. CITBA did not conduct a detailed review of Mr. Reyna's personal background, finances, or political affiliations.

Conclusion

On behalf of the Customs and International Trade Bar Association, we respectfully submit these views on the fitness of Mr. Jimmie V. Reyna for the position of Judge of the U.S. Court of Appeals for the Federal Circuit. We also wish to thank the Committee for its

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consideration of our views in a matter of great interest and importance to the lawyers practicing before the CAFC. For the reasons given above, CITBA strongly supports the nomination of Jimmie V. Reyna to the U.S. Court of Appeals for the Federal Circuit.

Respectfully submitted,

Michael S. O'Rourke
President, CITBA

cc: Senator Jeff Sessions, Ranking Minority Member
Honorable Robert F. Bauer, White House Counsel
Jimmie V. Reyna, Esq.
Gary N. Horlick, Chair, Judicial Selection Committee
James E. Brookshire, Esq., Federal Circuit Bar Association

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JANET DiFIORE
DISTRICT ATTORNEY

February 15, 2011

Senator Patrick J. Leahy
Chairman, Judiciary Committee
United States Senate
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Senator Chuck Grassley
Ranking Member, Judiciary Committee
United States Senate
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Re: Nomination of Vincent L. Briccetti for District Court Judge

Dear Senators Leahy and Grassley:

It gives me great pleasure to enthusiastically endorse the nomination of Vincent L. Briccetti for District Court Judge in the Southern District of New York. I have known Mr. Briccetti, both personally and professionally for many years and I have had the opportunity to observe him in the practice of law both, as District Attorney of Westchester County and as a sitting New York State Supreme Court Justice. Mr. Briccetti is well regarded by his professional colleagues and it is my opinion that he is possessed of the highest moral character and integrity.

If confirmed by this committee, Mr. Briccetti will be an exceptional Judge who will be an asset to the Southern District of New York and the people served by this important Court. Once again, I endorse his nomination without reservation.

Very truly yours,

Janet DiFiore
District Attorney
Westchester County

NEW YORK CITY BAR

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February 10, 2011

The Honorable Patrick J. Leahy
Chairman, Senate Judiciary Committee
433 Russell Senate Office Building
United States Senate
Washington, D.C. 20510

Dear Senator Leahy:

We are pleased to inform you that the Committee on the Judiciary of the New York City Bar has found Vincent Briccetti, Esq., APPROVED for appointment to the United States District Court for the Southern District of New York.

Very truly yours,

Elizabeth Donoghue
Chairman

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Statement of Senator Charles Grassley
Ranking Member
Committee on the Judiciary
United States Senate

Before the Committee on the Judiciary

On the Nominations of:

Jimmie V. Reyna, to be United States Circuit Judge for the Federal Circuit
Vincent L. Briccetti, to be United States District Judge for the Southern District of New York
John A. Kronstadt, to be United States District Judge for the Central District of California
Michael Francis Urbanski, to be United States District Judge for the Western District of Virginia
Arenda L. Wright Allen, to be United States District Judge for the Eastern District of Virginia

February 16, 2011

Mr. Chairman,

I join you in welcoming the nominees who are here today with their families and friends.

This week, we confirmed two more nominees to vacancies in the federal judiciary – both judicial emergencies. We have now confirmed five nominees during this new Congress. We have taken positive action, in one way or another, on nearly half of the 50 judicial nominees submitted during this Congress. So we are moving forward, as I indicated I would do, on consensus nominees.

On today's agenda are four District Court nominations, and a United States Circuit Judge for the Federal Circuit.

Mr. Chairman, I will not take the time here to repeat the full biographical information on our nominees, but will take a minute or two to comment on our nominees.

I would note that all of our District Judge nominees have some sort of prior federal experience. I commend them for their public service.

Mr. Vincent L. Briccetti is the President's nominee for the United States District Court for the Southern District of New York. This vacancy has been designated a judicial emergency. Mr. Briccetti has been in private practice for most of his legal career but also served four years as a federal prosecutor.

Judge John Kronstadt currently serves as a Judge on the Los Angeles County Superior Court, where he has served since

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2002. He is nominated for the Central District of California. This is the same District where he clerked for Judge William Gray, after graduating from Yale Law School. This vacancy has been designated a judicial emergency as well.

Judge Michael F. Urbanski has been nominated to the District Court in the Western District of Virginia. This is the same court where he currently serves as a Magistrate Judge. He was appointed to this position in 2004.

Arenda L. Wright Allen has been nominated to be United States District Judge for the Eastern District of Virginia. Since 2005, Ms. Wright Allen has been an Assistant Federal Public Defender in the Eastern District of Virginia. Prior to joining the Public Defender's office, she served for approximately 15 years as an Assistant U.S. Attorney, first in the Western District of Virginia and then in the Eastern District of Virginia. She also served as a Defense Attorney in the Judge Advocate General's Corps, United States Navy, from 1985 to 1990.

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Jimmie V. Reyna, nominated to the Federal Circuit, has significant experience in international trade issues, one of the major concerns of the Circuit.

The Federal Circuit is unique among the Courts of Appeals. It is not geographical based but has nationwide subject matter jurisdiction in designated areas. In addition to international trade, the Court hears cases on patents, trademarks, government contracts, certain money claims against the United States government, veterans' benefits, and public safety officers' benefits claims. Of particular interest to me, the U.S. Court of Appeals for the Federal Circuit has exclusive jurisdiction over cases related to federal personnel matters. That includes exclusive jurisdiction over appeals from the Merit Systems Protection Board (MSPB) which hears whistleblower cases under the whistleblower protection act.

Thank you, Mr. Chairman, for your courtesy. Again, I welcome the nominees, congratulate them on their nominations, and look forward to their testimony.

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Statement of

The Honorable Patrick Leahy

United States Senator
Vermont
February 16, 2011

Statement Of Senator Patrick Leahy (D-Vt.),
Chairman, Senate Judiciary Committee,
On Judicial Nominations
February 16, 2011

Today, the Judiciary Committee holds its second confirmation hearing of the 112th Congress, welcoming five more outstanding nominees for lifetime appointments to the Federal bench. All of these nominees were first nominated by President Obama last year and have been re-nominated.

I thank Senator Blumenthal for chairing this important confirmation hearing. I also want to thank Senator Grassley, the Committee's ranking member, and all the members of the Committee for working with me at the start of this Congress to establish a fair and timely schedule for holding confirmation hearings and considering nominations in this Committee.

We started this week in the Senate by considering two of President Obama's judicial nominations that were reported unanimously by this Committee last year but were not then considered by the Senate. When finally considered, they were both confirmed unanimously. I have been seeking a return to regular order in which this Committee holds periodic hearings and then promptly considers nominees, and in which the Senate then proceed without delay to consider the nominations for which a majority of this Committee has endorsed.

I ask that a letter sent to the Senate leaders, Senator Reid and Senator McConnell, be made part of the Record. This February 15, 2011, letter is from 76 public interest organizations urging the leaders to work together in a bipartisan fashion to proceed with prompt confirmation votes on judicial nominees who have been approved by the Committee on the Judiciary. These groups include disability groups, environmental organizations, labor, and many, many others. They note: "[A] growing number of Americans, from all walks of life and across all economic strata, are finding it increasingly more difficult to assert their legal rights and to have their fair day in court."

The Senate should consider noncontroversial nominations without unnecessary delays. There remain before the Senate another six judicial nominees unanimously reported by the Judiciary Committee to fill vacancies in Georgia, California, North Carolina and the District of Columbia. These nominees are ready for final consideration and final action by the Senate and there is no

reason they could not all be considered before the Presidents' Day recess.

When I was Chairman of the Judiciary Committee during 17 months of President Bush's first two years in office with a Democratic majority, we favorably reported 100 of his Federal circuit and district court nominees. All 100 were confirmed. I continued to work hard to make progress considering President Bush's circuit and district court nominations as Ranking Member during President Bush's third and fourth years in office when Senator Hatch was the Committee chairman, and the Senate confirmed another 105. During the four years of President Bush's first term the Senate considered and confirmed 205 Federal judicial nominations.

Overall, judicial vacancies were reduced during the Bush administration from more than 10 percent to less than four percent. During the Bush administration, the Federal court vacancies were reduced from 110 to 34 and Federal circuit court vacancies were reduced from a high of 32 down to single digits. Regrettably, this progress has not continued with a Democratic President in office. Instead, the minority has only allowed votes on 65 of President Obama's Federal circuit and district court nominees favorably reported by the Judiciary Committee and vacancies have again skyrocketed and remained over 100.

We must do better. Tomorrow the Committee has the opportunity to consider five more judicial nominees. I hope that we will be able to complete our consideration, vote on them, and report all of them favorably to the Senate without unnecessary delay. I trust that the nominees participating at this hearing today will be allowed to be promptly considered by the Committee and by the Senate.

The real costs of these unnecessary delays fall on Americans who depend on our Federal courts.

The nominations we consider today demonstrate President Obama's commitment to working with home state Senators to select well qualified nominees and his commitment to increase diversity on the Federal bench.

Jimmie Reyna has been nominated to fill a vacancy on the U.S. Court of Appeals for the Federal Circuit. Mr. Reyna has excelled in private practice for 30 years, specializing in international trade law. He was unanimously rated by the American Bar Association (ABA) Standing Committee on the Federal Judiciary as well qualified to serve on this court—its highest possible rating.

The Committee has received letters of support for Mr. Reyna's nomination from the Customs and International Trade Bar Association (CITBA) and from the former Chairs of the ABA Section of International Law. In its letter, CITBA described Mr. Reyna's temperament as "ideal" and commented that "[h]e is fair and focused and he has dedicated his life not just to practice in this field of law, but to scholarly writing in this field." The former Chairs of the ABA Section of International Law write that they "believe he has the professional credentials, the experience and skills, the appropriate temperament, and the fair and sound judgment that would enable him to serve on the Court of Appeals for the Federal Circuit with distinction and honor."

Mr. Reyna earned his B.A. from the University of Rochester and his J.D. from the University of

New Mexico School of Law. If confirmed, Mr. Reyna will become the first Latino to serve on the U.S. Court of Appeals for the Federal Circuit.

Judge John Kronstadt has been nominated to fill a judicial emergency vacancy in the Central District of California. He currently serves on the Los Angeles County Superior Court and previously spent 24 years in private practice. Judge Kronstadt earned his B.A. from Cornell University and his J.D. from Yale Law School.

Vincent Briccetti has been nominated to fill a judicial emergency vacancy in the Southern District of New York. An attorney for the past 30 years, Mr. Briccetti has spent time in private practice and as a Federal prosecutor. He was unanimously rated by the ABA Standing Committee on the Federal Judiciary as well qualified to serve on the district court. Mr. Briccetti earned his B.A. from Columbia University and his J.D. from Fordham University School of Law.

Arenda Wright Allen has been nominated to fill a vacancy in the Eastern District of Virginia. Currently a Supervisory Assistant Federal Public Defender in the Eastern District of Virginia, Ms. Allen was previously an Assistant U.S. Attorney and actively served in the U.S. Navy's Judge Advocate General's Corps. After leaving active duty, Ms. Allen continued her service in the JAG Corps as a reserve member until 2005. She earned her B.A. from Kutztown University of Pennsylvania and her J.D. from North Carolina Central University School of Law. If confirmed, Ms. Allen will be the first African-American woman to serve on a Federal district court bench in Virginia.

Judge Michael Urbanski has been nominated to fill a vacancy on the U.S. District Court for the Western District of Virginia, where he has served as a magistrate judge since 2004. Judge Urbanksi previously spent more than 20 years in private practice. He was unanimously rated by the ABA Standing Committee on the Federal Judiciary as well qualified to serve on the district court. Judge Urbanksi earned his A.B., with high honors, from the College of William and Mary and his J.D. from the University of Virginia School of Law.

I welcome the nominees and their families to this hearing.

Barbara A. Mikulski

NOMINATION OF JIMMIE REYNA, OF MARYLAND, TO BE US CIRCUIT JUDGE

Ms. MIKULSKI. Mr. Chairman, today the Senate Judiciary committee is taking up the nomination of Maryland's own Jimmie Reyna. I am proud to introduce Mr. Reyna, a sharp and very well respected attorney who has been nominated by President Obama to serve on the United States Court of Appeals for the Federal Circuit. Having considered Mr. Reyna's professional and civic background, I am positive that the President has made an excellent selection.

As a United States Senator, I take my "advise and consent" responsibilities very seriously. When I consider nominees for the federal bench, I have four criteria: absolute integrity, judicial competence and temperament, a commitment to core constitutional principles, and a history of civic engagement in Maryland. Mr. Reyna meets and exceeds these high standards, just as he met the high standards American Bar Association, who gave them their highest rating of "Unanimously Well Qualified."

Having practiced law in a variety of capacities for over 30 years, Mr. Reyna is well equipped to tackle the challenges of the federal bench. He is admitted to practice before the Supreme Court, as well as the U.S. Courts of Appeals for the Federal and Tenth Circuit, the U.S. Court of International Trade, and the U.S. District Court for the District of New Mexico. Mr. Reyna is also a Past President of the National Hispanic Bar Association, having served that organization in some capacity since 1999. But what most impressed me about Mr. Reyna is his service---to his community and beyond. He is a member of the Board of Directors for the Community Services for

Autistic Adults and Children in Montgomery Village, Maryland, an organization that he has served for many years. He also serves the Big Brothers and Big Sisters of America, an organization that continues to be a beacon of light for young people around the country. A look at his record shows the unique perspective that he will bring to the bench, one that has an understanding of what ordinary people face, and the role of the courts in delivering justice every day.

I am confident that Mr. Reyna is an excellent addition to the Federal Circuit. His accolades and honors are too many to name—having been honored at the local, regional, and national levels for his advocacy, leadership, and service. I urge my colleagues to move swiftly on his nomination, and bring to the Senate floor in a timely manner.

Statement by Senator Charles E. Schumer (D.-N.Y.)

Nomination of Vincent L. Briccetti for the United States District Court, Southern District of New York

February 16, 2011

I am proud to introduce to the committee Vincent L. Briccetti, a superb lawyer who will be a brilliant and experienced addition to the bench of the Southern District of New York.

Vince has reached the apex of his profession through shear hard work and raw intelligence. The son and grandson of Italian butchers, Vince was born in Mt. Kisco, New York and grew up working in the butcher shop while he went to school, eventually graduating from Columbia University and Fordham University School of Law. He spent many of his summers working as a waiter.

After graduating from law school, he earned a prestigious clerkship with Judge John M. Cannella in the Southern District of New York, and then entered private practice for two years. Vince's dedication to the rule of law had already begun, but his public service commenced when he entered the U.S. Attorney's office in the Southern District of New York in 1985. For four years, he tried an impressive array of cases, including a sweeping tax fraud cases that earned him too many awards to list here today. He then became the Deputy Chief of the Appellate Division of the United States Attorneys' office and defended the office's convictions and practices on appeal.

Following a distinguished career at the prestigious law firm of Paul, Hastings, Janofsky & Walker, he steered his practice back to White Plains and established his own law firm there. For the last 17 years, he has practiced as a criminal defense lawyer in state and federal court. He has tried approximately 50 cases to verdict or judgment. I have heard from judges and practitioners alike that Vince is a lawyer whose involvement invariably improves the outcome of any specific case with which he is involved, and who has in general been one of the Bar's great assets. He has treated his duty as a lawyer to dedicate time to *pro bono* work (through serving on the local Criminal Justice Act panel) not as an obligation, but as a calling. To quote former federal district court Judge Stephen C. Robinson's letter to this committee:

"On at least three separate occasions, when I had some doubt as to whether a party before me was receiving adequate and appropriate counsel, I asked Vince to take up the representation. Vince always stood ready to respond to my requests for assistance in the name of justice. I can tell you that all of the judges in our courthouse held Vince in the highest regard."

While he ran his own firm and represented clients, Vince also continued to assist the government by serving as a special prosecutor at the behest of the Westchester County District Attorney when he or she was conflicted out of a prosecution. The current District Attorney in Westchester County has commended him as "possessed of the highest moral character and integrity."

Everywhere you go in and around New York, you hear superlatives about Vince Briccetti: That he is the very model of an ethical, fair, dedicated lawyer; that while he is a terrific advocate, there is no one you

would rather see on the opposite side of a case to ensure a full and fair hearing of the issues at stake; and that he is a dedicated member of the New York community. It will be a tribute not just to Vince but to the bench when we add "thoughtful and brilliant federal judge" to the encomia.

Thank you Chairman Blumenthal, Ranking Member Grassley, and to the nominees and their families.

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February 16, 2011

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Chuck Grassley
Ranking Member
Committee on the Judiciary
United States Senate
135 Dirksen Senate Office Building
Washington, DC 20510

Dear Gentlemen,

I write to strongly recommend to you the confirmation of Vincent Briccetti as U.S. District Judge for the Southern District of New York. I have known Vince for more than 20 years and hold him in the highest regard both professionally and personally. I do not know a more deserving candidate for the federal bench.

I am a former federal district court judge, having been nominated to District Court for the Southern District of New York by President George W. Bush. I served on the Southern District bench until August 2010. Before my appointment to the bench my government service included stints as the U.S. Attorney for the District of Connecticut (nominated by President Clinton) and as the Principal Deputy General Counsel and Special Assistant to the Director of the FBI. I am now a partner in the law firm of Skadden, Arps, Slate, Meagher & Flom, LLP.

Vince and I first met in 1987 when we were both Assistant U.S. Attorneys. As an AUSA Vince's reputation was impeccable. He was known to be a smart and zealous prosecutor. His work was careful and thorough -- leaving no stone unturned in the search for the truth and in the protection of the citizens of the United States. Vince was known as a tough but fair prosecutor who showed balance and wisdom in the exercise of his duties.

Soon after I joined the U.S. Attorneys Office for the SDNY I was assigned as the second seat in U.S. vs. Galanis, et al., John Galanis was a famed white collar criminal and tax cheat. Vince Briccetti was the lead prosecutor in the case having indicted Galanis and his cohorts in a massive 68 count indictment that covered what presiding Judge Charles Brieant later called the most complicated scheme he had seen in his over 30 years on the bench. During this four month trial (and in the preceding 2 months of preparation) I had the opportunity to work closely with Vince. He proved himself to be one of the most conscientious public servants I would ever meet and a fantastic role model for me. Vince was a thorough, fair and tough-minded prosecutor. His skill as a trial lawyer for the government was awe inspiring. His patience in mentoring me was boundless.

While I served as a district court judge Vince appeared before me regularly. His skill as an advocate won him universal praise from my colleagues on the bench. He was always well prepared with a complete grasp of the legal issues and relevant facts important to the matter before the court. He is a careful and thoughtful advocate. Vince was always prepared to raise appropriate legal arguments to best support his client's position. Vince's work on the Criminal Justice Act panel and as a pro bono advocate was exemplary. On at least three separate occasions, when I had some doubt as to weather a party before me was receiving adequate and appropriate counsel, I asked Vince to take up the representation. Vince always stood ready to respond to my requests for assistance in the name of justice. I can tell you that all of the judges in our courthouse held Vince in the highest regard.

In summary, for all the above reasons and many more, I implore the Senate to confirm the nomination of Vincent Briccetti as a District Court judge for the Southern District of New York. Vince is smart, careful, and courteous. He is a highly respected lawyer and would be an outstanding federal judge. I recommend him to you without reservation. Should you have any questions concerning any of the above information, please do not hesitate to contact me.

Sincerely,

Stephen C. Robinson

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67905.686

BART M. SCHWARTZ
COUNSELOR AT LAW

February 16, 2011

The Honorable Patrick J. Leahy
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Charles Grassley
Ranking Member, Committee on the Judiciary
135 Hart Senate Office Building
Washington, D.C. 20510

Dear Chairman Leahy and Ranking Member Grassley:

I write this letter in support of the nomination of Vincent Briccetti to be a District Court Judge in the Southern District of New York. I served as Chief of the Criminal Division in the U.S. Attorney's Office for the Southern District of New York under United States Attorney Rudolph W. Giuliani. Vincent Briccetti was an Assistant United States Attorney during my tenure.

I had and continue to have the utmost confidence in Vince. He was a tough but fair prosecutor with excellent judgment and demeanor. He was a fair and vigorous advocate for the United States. As a defense lawyer, he has demonstrated his same commitment to our system. And I have every confidence that as Judge, he will do the same.

Let me put it this way, if he is on the Bench, I have no doubt that the government and citizens will know that they got a fair hearing in his courtroom and that they were before a Judge who made his decisions on the merits.

Perhaps I should add that I am a life long Republican with a deep respect for and dedication to law enforcement in general and, specifically, to the men and women who risk their lives daily to protect us. I would not be writing this letter if I had any doubts but that Vince Briccetti shares those same values

I hope this letter is of assistance to the Committee

Very truly yours,

Bart M. Schwartz

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CHRIS VAN HOLLEN
8TH DISTRICT, MARYLAND

COMMITTEE ON THE BUDGET

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Statement of Congressman Chris Van Hollen (D-MD)
in support of
The Nomination of Mr. Jimmie V. Reyna
to
The United States Court of Appeals for the Federal Circuit
February 16, 2011

Dear Chairman Leahy and Ranking Member Grassley:

I am honored to urge the confirmation of Mr. Jimmie V. Reyna to the United States Court of Appeals for the Federal Circuit. Mr. Reyna will be an outstanding addition to this court.

The U.S. Court of Appeals for the Federal Circuit is the only federal circuit court whose jurisdiction is defined by subject matter, including the highly specialized and complex cases that arise from the U.S. Court of International Trade and the U.S. International Trade Commission. It has nationwide jurisdiction in a variety of subject areas, including international trade, government contracts, patents, trademarks, certain money claims against the United States government, federal personnel, and veterans' benefits.

Over the past 23 years, Mr. Reyna has compiled a distinguished record in the type of trade matters that come before the U.S. Court of Appeals for the Federal Circuit, including antidumping and countervailing duty matters and a broad range of other trade issues. He has written extensively on trade and has participated in free trade negotiations in which the U.S. has been a party.

Mr. Reyna has also developed an exceptional record of leadership and dedication to the legal profession. As a former National President of the Hispanic National Bar Association, Mr. Reyna is known to possess great integrity and sound judgment. He also serves as a member of his firm's Board of Directors.

Finally, as the father of a child with autism, Mr. Reyna has committed his time and resources to autism issues. He has served as a member of the Board of Directors of Community Services for Autistic Adults and Children (CSAAC) and of the CSAAC Foundation, Inc. CSAAC provides services in my congressional district and is an internationally renowned provider of services to individuals with autism.

In conclusion, I urge you to recommend my constituent Mr. Jimmie V. Reyna for confirmation to the United States Court of Appeals for the Federal Circuit.

THIS STATIONERY PRINTED ON PAPER MADE OF RECYCLED FIBERS

Senator Mark R. Warner
Statement for the Record
February 16, 2011

Chairman Leahy and Ranking Member Grassley, thank you for holding this nominations hearing today. And thank you, Senator Blumenthal, for presiding over this hearing.

It is a pleasure for me to help introduce Arenda Wright Allen, nominated to serve as the next U.S. District Judge for the Eastern District of Virginia, and Judge Michael Urbanski, nominated to serve as the U.S. District Judge in the Western District of Virginia.

Many months ago, Senator Webb and I had the opportunity to interview several highly qualified candidates to fill these vacancies. Identifying candidates to recommend to the President is a serious and difficult job. It is always helpful when a candidate emerges from the crowd for their exemplary credentials, commitment to public service and strong support from the legal community. This was my experience in first meeting Ms. Allen and Judge Urbanski.

Ms. Arenda Wright Allen has given more than two decades of service to the people of the Commonwealth of Virginia. She honorably served her country as a member of the U.S. Navy Judge Advocate General's Corps where she ultimately attained the rank of Commander. In this role she provided legal services and defense attorney representation to fleet and shore commands.

Ms. Allen also has the unique experience of serving as both a prosecutor and as a public defender. She was an Assistant U.S. Attorney in the Eastern District of Virginia and is now a Supervisory Assistant Public Defender in Norfolk. It is not surprising that the Virginia State Bar Judicial Nominations Committee ranked Ms. Allen as "highly qualified."

In addition to her experience, her questionnaire included a long list of honors and awards that only confirms her excellent reputation in the legal community. I am very pleased to support her nomination for what will be a groundbreaking appointment.

Judge Michael Urbanski also has impressive credentials and strong ties to Virginia. He began his legal career in the Western District of Virginia as a Law Clerk for the Honorable James Turk. Today he serves as a U.S. Magistrate Judge for the Western District of Virginia.

As a Magistrate Judge, Judge Urbanski is responsible for managing all of the pro se prisoner cases filed in the Western District. Recently, in cooperation with Chief Judge James Jones in Abingdon, and Judge Sam Wilson in Roanoke, Judge Urbanski began participating in a pilot Reentry Court program designed to assist federal felons exiting the penitentiary system with the difficult transition to society.

In 2008, he initiated a program to educate middle school and high school students on the federal penalties associated with drug trafficking. During 2009, this program was presented to more than 6,000 students in six school districts in the Roanoke area.

His combination of extensive civil practice and his judicial experience makes him an ideal candidate for the seat.

I hope that our leadership brings both these nominations to the floor as quickly as possible. I look forward to casting my vote in support of Ms. Allen and Judge Urbanski's nominations and encourage my colleagues on both sides of the aisle to do the same.

Senator Webb Commends District Court Nominees Arenda L. Wright Allen and Judge Michael Urbanski at Senate Confirmation Hearing

I am pleased to join my colleague from Virginia, Senator Mark Warner, for the purpose of introducing to this Committee two outstanding attorneys from Virginia, Arenda L. Wright Allen and Judge Michael Urbanski, whom the President has nominated for seats on the United States District Courts for the Eastern and Western Districts of Virginia, respectively.

These two individuals represent the highest degree of integrity, competence and commitment to the rule of law. Each in their own way exemplifies the best of the Virginia bar. Every time a vacancy has occurred on the Virginia federal bench, Senator Warner and I have conducted a thorough and extensive review of the candidates for the vacant position. This review process includes interviews and recommendations by Virginia's bar associations, and in-person interviews with the candidates. The candidate pool from which we had to choose was excellent and deep. It included judges, legal scholars, and skilled trial attorneys. Both candidates before you received the highest rating of the Virginia State Bar.

From this very competitive field, Senator Warner and I recommended Ms. Wright Allen and Judge Urbanski. I will start with describing how Ms. Wright Allen distinguished herself as the premiere candidate for the vacancy on the Eastern District.

As a former Secretary of the Navy, and a combat Marine, I personally appreciate and understand the sacrifices that veterans have made to serve their country. Ms. Wright Allen is a veteran and initially stood out because of her service in the United States Navy. She served for five years as an active duty JAG officer and continued her service as a Reserve JAG officer until she retired as a Commander in 2005. Her record of service is excellent, and her extensive court experience in that environment will be valuable to her in her capacity as a federal judge.

Ms. Wright Allen has dedicated her civilian career to serving her community, first as a Federal Prosecutor and since 2005 as a Federal Public Defender. Unanimously, prosecutors and defenders who have worked with or have been on the opposing side to Ms. Wright Allen have attested to her talent, dedication, and above all her exceptional character. Upon meeting Ms. Wright Allen it was clear to me that she possesses the judicial temperament and dedication to make an excellent Judge.

Arenda Wright Allen graduated from North Carolina Central University, School of Law in 1985 and Kutztown State College in 1982. She is joined here today by her husband Delroy Anthony Allen, her son, Yanni Anthony Allen, and a number of very close family friends.

I am very proud to say that our nominee for the Western District of Virginia is a product of Virginia's public universities. Judge Urbanski graduated from the University of Virginia School

of Law in 1981 and the nation's oldest public University, The College of William and Mary in 1978.

Judge Urbanski currently serves as a Magistrate Judge for the Western District of Virginia. Prio to be becoming a Magistrate Judge, he practiced in Roanoke, Virginia from 1989 to 2004 and was the head of the litigation section at the law firm of Woods Rogers'. Judge Urbanski's candidacy was overwhelmingly supported by the bar associations which he covers as a magistrate judge. He has a reputation for dedication, good temperament, and bringing energy to his job, which has resulted in the efficient administration of justice for many citizens in the Western District of Virginia.

Prior to becoming a federal magistrate judge, Judge Urbanski earned the reputation as one of the top trial attorneys in Western Virginia. I am convinced he embodies the judicial temperament, intelligence and dedication to make an excellent District Court Judge.

Judge Urbanski is joined today by his wife Ellen Urbanski, his son Will Urbanski, his mother Irene Urbanski, his sister Terry McGlennon, his brother-in-law, John McGlennon, and his nephews Andrew and Colin. I understand he also has a large contingent of law clerks and staff members from the Western District here today to support him.

I have every confidence that the committee will find these two fine Virginian citizen-attorneys well qualified for the federal bench and that we can move their nominations to the floor with all due haste.

NOMINATION OF BERNICE BOUIE DONALD, OF TENNESSEE, NOMINEE TO BE CIRCUIT JUDGE FOR THE SIXTH CIRCUIT; J. PAUL OETKEN, OF NEW YORK, NOMINEE TO BE DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF NEW YORK; PAUL A. ENGELMAYER, OF NEW YORK, NOMINEE TO BE DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF NEW YORK; AND RAMONA VILLAGOMEZ MANGLONA, OF THE NORTHERN MARIANA ISLANDS, NOMINEE TO BE JUDGE FOR THE DISTRICT COURT OF THE NORTHERN MARIANA ISLANDS

WEDNESDAY, MARCH 16, 2011

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 2:28 p.m., in room SD–226, Dirksen Senate Office Building, Hon. Charles E. Schumer, presiding.

Present: Senators Schumer, Coons, and Grassley.

OPENING STATEMENT OF HON. CHARLES E. SCHUMER, A U.S. SENATOR FROM THE STATE OF NEW YORK

Senator SCHUMER. Good afternoon, everybody, and we are 2 minutes ahead of schedule, which, as Senator Alexander will tell you, does not happen that often when I am chairing something. So it is a wonderful occasion. I am glad he could share in it.

Anyway, I want to welcome all the nominees who are here today. I thank Chairman Leahy for the opportunity of chairing this hearing. I want to welcome the families and friends who have come to support them and thank Senator Grassley for serving as Ranking Member and being so diligent, as he always is.

I am going to recognize Senator Grassley for an opening statement because he has to go somewhere else briefly, and he will be back. And then we will get on with the rest of it.

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PRESENTATION OF J. PAUL OETKEN, NOMINEE TO BE DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF NEW YORK, BY HON. CHUCK GRASSLEY, A U.S. SENATOR FROM THE STATE OF IOWA

Senator GRASSLEY. I am going to take 10 minutes off after my statement for the Lone Tree High School students who are here to ask me a few questions. In my opening statement—I am going to put the whole thing in the record, but I would like——

Senator SCHUMER. Without objection.

Senator GRASSLEY. I usually give an update, and then I would like to speak about one of the people that have an Iowa background that you nominated. That is why you nominated him.

Senator SCHUMER. We have a lot of great Iowans in New York. We do.

Senator GRASSLEY. Over the past few days, we have confirmed five more nominees to vacancies in the Federal judiciary. In the short time we have been in session, we have confirmed 12 judicial nominees, more than in the same period of any of the previous four Presidents. Nine of those confirmations were for seats designated "judicial emergencies." This year, we have reported 22 nominees out of Committee. With this hearing, our fourth hearing, we will have heard from 17 judicial nominees this year. In total, we have taken positive action on 33 of 58 judicial nominations submitted to the Senate.

The person that you have nominated that I wanted to bring up is Paul Oetken, nominated to be U.S. District Judge for the Southern District of New York. He graduated from the University of Iowa in 1988, has a Yale Law School law degree in 1991, and he was brought up in Cedar Rapids, Iowa, has family still in Iowa.

Mr. Oetken after law school spent 3 years clerking for Federal judges, beginning with Judge Cudahy, Seventh Circuit; Judge Oberdorfer in the D.C. Circuit; finally, with Justice Harry Blackmun, Supreme Court. Following his clerkship, Mr. Oetken entered private practice. In 1997, he became attorney-adviser with the Department of Justice Office of Legal Counsel. In 1999, he joined the White House Counsel's Office as Associate Counsel to President Clinton. In 2001, he moved to New York and returned to private practice. In 2004, he joined the legal department of Cablevision Systems. Currently, he is senior vice president and associate general counsel of Cablevision. Congratulations, Mr. Oetken.

I will put the rest of my statement in the record.

Senator SCHUMER. Without objection.

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

Senator SCHUMER. Now let me call on Senator Alexander, who is here to introduce our second nominee.

PRESENTATION OF BERNICE BOUIE DONALD, NOMINEE TO BE CIRCUIT JUDGE FOR THE SIXTH CIRCUIT, BY HON. LAMAR ALEXANDER, A U.S. SENATOR FROM THE STATE OF TENNESSEE

Senator ALEXANDER. Thank you, Mr. Chairman and Senator Grassley, for letting me come. I am here today to introduce Judge

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Bernice Donald, who has been nominated by the President to be United States Circuit Judge for the Sixth Circuit.

Judge Donald has been a judge for 28 years, and I am certain this Committee will do its usual thorough job in assessing her professional credentials, which are considerable. But what I would like to say briefly in introducing her is something the Committee may not be as likely to know about, and that is her reputation as a person in Memphis and in Shelby County.

Judge Donald came from humble beginnings, the daughter of a domestic worker and a self-taught mechanic. She is the sixth of ten children. She began working as a dispatch supervisor with the telephone company before she got her law degree at Memphis State University, what was then called Memphis State University. She has been a pioneer for African-Americans in Memphis and Shelby County as a student, as a bankruptcy judge, as the first black female district court judge, first woman of color to serve as an officer of the American Bar Association in its 130-year history. She has been a community leader with at-risk youth; especially she works with young people, and she has been very active at the University of Memphis. She is here with her husband, W.L. She is here with a number of her other friends and supporters from Memphis and Shelby County, and I am delighted to introduce her to the Committee and recommend her nomination and especially let the Committee know about this extraordinary record of community service and personal achievement in our largest county and biggest city.

Senator SCHUMER. Well, thank you. Thank you very much, Senator Alexander. And I know how busy you are and I know it speaks extremely well of our nominee that you came to be here to introduce her. So thank you for being here, and I know you have a busy schedule, so feel free to move on.

Now I would like to introduce Delegate Sablan to introduce Judge Ramona Villagomez Manglona for the Northern Mariana Islands.

PRESENTATION OF RAMONA VILLAGOMEZ MANGLONA, NOMINEE TO BE JUDGE FOR THE DISTRICT COURT FOR THE NORTHERN MARIANA ISLANDS, BY HON. GREGORIO SABLAN, A DELEGATE IN CONGRESS FROM THE NORTHERN MARIANA ISLANDS

Mr. SABLAN. Thank you very much, Mr. Chairman. Thank you for the opportunity to speak for a few minutes in support of Judge Ramona Villagomez Manglona, the nominee for the United States District Court for the Northern Mariana Islands.

This is a historic moment for the people of the Northern Mariana Islands. We have only been a part of the United States for 33 years. Judge Manglona, myself, and many of us became U.S. citizens by Executive order of President Reagan in 1986. We have only been represented in the U.S. Congress for 27 months, and we have never had someone from our islands presiding on the United States District Court. So to have Judge Manglona confirmed to the bench would truly be a milestone in our political maturity.

You have ready access to Judge Manglona's academic credentials, her resume, her record in the superior court in the Northern Mari-

anas, but let me speak to her character, which was the basis for my decision to recommend her nomination to President Obama.

Opportunity for education has improved for the people of the Northern Mariana Islands, but within my lifetime, getting an education meant leaving home, often at an early age. I went off island for high school at 11. Judge Manglona left home at age 12 to attend school on the Mainland. She is the 11th of a dozen children, but her parents, Manuel and Luisi Villagomez recognized their daughter's intelligence and, in a family of hard workers, her capacity for achievement. Judge Manglona excelled at school, earning her undergraduate degree at Berkeley.

This may seem an ordinary accomplishment to you, but for someone from the islands, and especially for a woman from our islands, 20 years ago this was not the norm.

Judge Manglona, of course, returned home, married, and started a family. Her husband, our Supreme Court Justice John Manglona, and their two children, Dencio and Savana, are here today.

But judge Manglona's hunger for education continued. She made the extraordinary decision, with the support of her family, to leave home again to attend law school at the University of New Mexico, and you can imagine how tough a choice that was and how difficult that was for being away from her family as she charged through law school in 2–1/2 years and returned home with another degree in her name.

Judge Manglona's mother and father were quite successful business people. Their daughter could have easily been taking a place in the family's commercial enterprises. Instead, she chose to employ her education and energy in public service. In the process, she has been a groundbreaker for island women, the first to be confirmed as Attorney General, the first to be confirmed to our local court, and now the first woman or man from the islands to be nominated to the Federal bench.

I recommend Judge Manglona to you not only as a person of talent and drive, not only as a trailblazing woman; most importantly, Mr. Chairman, she is someone of integrity and impeccable character who will serve with distinction as judge on the United States District Court for the Northern Mariana Islands.

I would like, Mr. Chairman, with your consent to include in the statement—and we are joined today by Hon. Madeleine Bordallo from Guam, and with your consent I would like to insert into the record her statement of support.

Senator SCHUMER. Without objection.

[The prepared statement of Ms. Bordallo appears as a submission for the record.]

Senator SCHUMER. Thank you, Delegate Sablan.

Mr. SABLAN. Thank you very much for this privilege, Mr. Chairman.

Chairman SCHUMER. Thank you.

PRESENTATION OF J. PAUL OETKEN, NOMINEE TO BE DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF NEW YORK, AND PAUL. A. ENGELMAYER, NOMINEE TO BE DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF NEW YORK, BY HON. CHARLES E. SCHUMER, A U.S. SENATOR FROM THE STATE OF NEW YORK.

Senator SCHUMER. It is now my turn to introduce two nominees: J. Paul Oetken, whom Senator Grassley spoke so nicely about; and Paul A. Engelmayer. They are both uniquely qualified, talented, and esteemed nominees for the United States District Court for the Southern District of New York.

Now, we have a very deep bench of legal talent in New York, but as I think my colleagues will see, the two nominees are the lawyer's equivalent of Joe DiMaggio and Mickey Mantle as they entered the major leagues.

Paul Oetken is not, alas, originally a New Yorker, as we heard. He was raised in Iowa, the beautiful home of the Ranking Member of the Committee, and he graduated from the University of Iowa. He then went to Yale Law School and after graduation earned the distinction of clerking for three renowned Federal judges: Judge Richard Cudahy on the Seventh Circuit Court of Appeals, Judge Louis Oberdorfer on the District Court for the District of Columbia, and, of course, Justice Harry Blackmun on the U.S. Supreme Court.

Paul has worked in two of the three branches of Government, which I consider to be invaluable experience to the bench. He served in the prestigious Office of Legal Counsel during the Clinton administration, went on to serve as an Associate Counsel to the President. Most recently, he worked at the New York law firm of Debevoise & Plimpton and now serves as senior vice president of Cablevision Systems in Bethpage, one of the largest cable companies in the country. In this capacity he manages the company's wide array of litigation and has developed expertise in employment discrimination, which he teaches at Fordham Law School.

His qualifications speak for themselves, but in addition to the first two traits that I look for in judicial candidates—excellence, they should be legally excellent; moderation, I do not like judges too far right or too far left because they tend to make law, not interpret law. I also look for candidates who bring diverse views and backgrounds to the bench. Paul is the first openly gay man to go through an Article III confirmation process in this country, which makes this moment historic. But long after today, what the history books will note about Paul is certain to be his achievement as a fair and brilliant judge.

Second, I have the privilege of introducing another distinguished lawyer, Paul Engelmayer, who has been a respected and revered member of the New York legal community since his graduation from law school. Unlike Mr. Oetken, Paul was born in Brooklyn, where his mother was a remedial reading teacher in Brooklyn's public schools. Paul's father went to night law school in Brooklyn and dedicated his career to working as a sole practitioner representing clients throughout the city.

Paul left Brooklyn and went to Harvard College. Luckily for all of us who are looking forward to his service on the bench, Paul

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abandoned an early career as a journalist for the Wall Street Journal to attend Harvard Law School, where he graduated magna cum laude. He also earned prestigious clerkships: one for Patricia M. Wald on the District of Columbia Circuit, and the second for Justice Thurgood Marshall on the U.S. Supreme Court.

Immediately after clerking, Paul followed his calling to public service and joined the United States Attorney's Office for the Southern District. He rose quickly to become deputy chief of the Appellate Division, then returned to Washington where he served as an Assistant Solicitor General. But the U.S. Attorney's Office apparently had a grip on Paul, where he returned there to become chief of the Major Crimes Unit, where he worked until joining the New York office of Wilmer, Cutler, Pickering, Hale & Dorr. He is now the partner in charge of that office and has set a laudable example for young lawyers by dedicating a substantial amount of time to pro bono work on behalf of clients who need lawyers. I would venture to say there is no one in the New York Bar who would rate Paul's legal skills, judgment, and dedication to the law at less than a perfect 10.

So thank you, and I look forward to today's hearing.

Next we are going to call up Judge Donald. Judge Donald, welcome, and I have to swear you in. Judge Donald, please raise your right hand. Do you affirm 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 DONALD. I do.

Senator SCHUMER. Thank you. Please have a seat.

OK. So you may now introduce your family and friends who are with you today because I know it is a proud moment for them.

Judge DONALD. Thank you, Chairman Schumer. First, I would like to express publicly my thanks to President Obama for his confidence in nominating me for this position. I would also thank the senior Senator from Tennessee, Senator Lamar Alexander, for his generous introduction, and Senator Corker in his absence. And I certainly want to thank you, Mr. Chair, and this Committee for scheduling this hearing.

I do have a number of friends and family this afternoon, but I understand that time is short, so I may ask a number of them to stand. But I do want to express my thanks for the presence of these family and friends: my husband, W.L. Donald; my sister, Virginia Bouie Wilson; her husband, Reverend Bobby Wilson; my niece, Carolyn Adams; and my niece, Cassandra Bouie. Several friends: Attorney Sheila Slocum Hollis, who is here in the front row, from Duane Morris; the general counsel of the Commercial Law Development Program, a part of the Commerce Department, Steve Gardner, who is here; Attorney Marie-Flore Kouame from the CCIPS Unit of the Department of Justice; and other members of that staff: Katrina Osonovo, Elise Yobikoff, and the senior attorney, Namde Azero.

I also have other friends: Attorney Mary Smith, Attorney Don Bivens, Attorney Shelly Hayes, Attorney Larry Miller, Matt Surego; Marilyn Queen from the Federal Judicial Center; a former law clerk, Alicia Black; and Attorney Ashley Sills, along with the former Special Agent in Charge of the Federal Bureau of Investiga-

tions from Memphis, Attorney My Harris, and her daughter, Robbie Harris. And also Attorney Charlotte Collins is present, and especially my former law clerk who is now a magistrate judge, Charmiane Claxton, is here today, and I am so grateful. And, obviously, a number of my clerks and former clerks are watching this on TV, and I acknowledge the great help of my immediate staff—Tyler Brooks, Janica White, and Stevie Phillips.

Thank you.

Senator SCHUMER. Well, thank you, Judge Donald. That is a lot of people to stand up, but would all of you who were introduced please stand so we may acknowledge and welcome you. Thank you all for being here.

Judge DONALD. Thank you. And I saw my niece, Cassandra Bouie, who is back in the back.

Senator SCHUMER. Welcome to Ms. Cassandra Bouie as well. OK. No more, no less than all the others.

I have a few questions for you, Judge. You have been a United States district court judge for 16 years. Many of my colleagues on this Committee have expressed concern about the lack of courtroom experience of some of our appellate nominees, but clearly you make the grade. You have a lot of experience. Why do you want to be a court of appeals judge? And what do you think your having been a district judge will allow you to bring to the table?

STATEMENT OF HON. BERNICE BOUIE DONALD, NOMINEE TO BE CIRCUIT JUDGE FOR THE SIXTH CIRCUIT

Judge DONALD. Mr. Chair, thank you so very much for that question. I have served as a trial judge for 28½ years, 16 of those on the district court, and in that time I have had a opportunity to see litigation up close and make the critical decisions about facts coming before the court. I have had the opportunity to apply settled principles of law, and I have had the opportunity to watch the drama of trials unfold.

I think that I bring a particular degree of experience by virtue of having had those 28 years of seeing trials play out, and now at this point I believe that that experience can help inform decisions that I would make as an appellate court judge. I think that is an important perspective.

Senator SCHUMER. Thank you.

Now, Judge Donald, in a number of speeches over the years, you have referred to the need to be conscious of one's own race and the perspective that race gives each of us, as well as the need to be aware of other people's racial experiences. One report characterized you as having said that you apply "a vastly different" standard than your white counterparts in discrimination cases. Could you please clarify your remarks? And have you ever or would you ever apply a legal standard to a case that is dictated by anything other than the rule of law?

Judge DONALD. Thank you for that opportunity to clarify, Mr. Chair. I would certainly never apply a different standard in deciding a summary judgment or any other cases. My goal as a judge is always to apply the law, to look to existing precedents, and to decide the facts before me free from bias, prejudice, or partiality.

That statement was taken out of context. It was in a panel that I participated on in an American Bar Foundation program, and that particular comment was related to a particular case that I worked on when I sat by designation at the court of appeals. And I was speaking to how my experience allowed me to bring a different and diverse perspective to an assessment of the facts in that case. But I would always apply precedent and settled principles of law. I believe that a judge has to leave race and other personal philosophies at the door.

Senator SCHUMER. Thank you. I think that does clarify that very well.

Next, you decided a case called *Robinson* v. *Shelby County Board of Education*. That was a 40-year-long case that involved a complex set of circumstances regarding school desegregation. In that case, when the parties came before you to ask that the consent decree be dissolved, you granted their request as to significant areas: facilities, transportation, and staffing. You denied it as to others. Your lengthy fact-bound decision was overturned in a closely divided 2–1 decision by the Sixth Circuit. After the Sixth Circuit's decision, did you have any hesitation at all in complying with that decision? And would you in future cases have any trouble complying with existing law in any way?

Judge DONALD. Senator Schumer, I would never have any problems complying with existing law. Indeed, in that case my effort was to comply with existing settled principles of law. You are right, that was a case that was filed in the courts when I was 12 years old. It came to me—it was as class action case. It came to me on a motion to dismiss and declare the school system unitary, declare that all vestiges of discrimination have now been removed.

In a class action case, under Rule 23 of the Federal Rules of Procedure, I have a duty as a judge to conduct a fairness hearing, and in conducting that fairness hearing, I am obliged to apply in a school desegregation case the green factors to make certain that there has been compliance with Supreme Court law. And you are right, I found that Shelby County had made tremendous progress in three of those areas, but in other areas they had not made such progress.

I also have to look at whether or not there has been good-faith compliance with all of the orders of the court, and based upon an assessment of the law applied to those facts, I found that in three areas unitary status had been earned and three others had not. And, of course, when the Sixth Circuit issued their ruling, I promptly complied and dismissed the case.

Senator SCHUMER. OK. So thank you, Judge Donald. That completes my time for questioning. I thank you for being here, and I thank all of your relatives, friends, law clerks, nieces, and everyone else who came.

Judge DONALD. Thank you. Mr. Chair, may I and my friends be excused?

Senator SCHUMER. Please.

Judge DONALD. Thank you.

[The biographical information follows.]

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UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY
QUESTIONNAIRE FOR JUDICIAL NOMINEES

PUBLIC

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

   Bernice Bouie Donald
   previous married name: Bernice Bouie Finley
   maiden name: Bernice Bouie

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

   United States Circuit Judge for the Sixth Circuit

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

   Clifford Davis/Odell Horton Federal Building
   167 North Main Street, Suite 951
   Memphis, Tennessee 38103

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

   1951; Desoto County, Mississippi

5. **Education**: List in reverse chronological order each college, law school, or any other institution of higher education attended and indicate for each the dates of attendance, whether a degree was received, and the date each degree was received.

   1975 – 1979, Memphis State University Cecil C. Humphreys School of Law (now University of Memphis Cecil C. Humphreys School of Law); J.D., 1979
   1974 – 1975, Memphis State University (now University of Memphis); no degree
   1969 – 1974, Memphis State University (now University of Memphis); B.A., 1974

6. **Employment Record**: List in reverse chronological order all governmental agencies, business or professional corporations, companies, firms, or other enterprises, partnerships, institutions or 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 description.

67905.688

1996 – Present
United States District Court for the Western District of Tennessee
Clifford Davis/Odell Horton Federal Building
167 North Main Street, Suite 951
Memphis, Tennessee 38103
United States District Judge (judicial commission signed December 1995)

1988 – 1995
United States Bankruptcy Court for the Western District of Tennessee
200 Jefferson Avenue, Suite 625
Memphis, Tennessee 38103
United States Bankruptcy Judge

1985 – 1988
University of Memphis School of Law
1 North Front Street
Memphis, Tennessee 38103
Adjunct Professor

1982 – 1988
Shelby County General Sessions Court, Criminal Division
201 Poplar Avenue
Memphis, Tennessee 38103
General Sessions Judge

1981 – 1984
Shelby State Community College (now Southwest Tennessee Community College)
P.O. Box 780
Memphis, Tennessee 38134
Adjunct Professor

1980 – 1982
Shelby County Public Defender's Office
201 Poplar Avenue
Memphis, Tennessee 38103
Assistant Public Defender

1980
Memphis Area Legal Services
109 North Main Street, Suite 200
Claridge House Building
Memphis, Tennessee 38103
Staff Attorney

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1979 – 1980
Bernice B. Donald, Esq.
1750 Madison Avenue
Memphis, Tennessee 38104
Sole practitioner

1971 – 1980
South Central Bell Telephone Company
1544 Madison Avenue
Memphis, Tennessee 38104
Clerk and Manager

Other affiliations (uncompensated)

2007 – Present
University of Memphis School of Law Alumni Chapter
1 North Front Street
Memphis, Tennessee 38103
Director

2005 – Present
Soulsville Foundation (STAX Museum & Academy)
926 East McLemore Avenue
Memphis, Tennessee 38106
Director

1995 – Present
Tennessee Women's Forum
No physical address
Treasurer

1993 – 1996, 2007 – 2009
Leadership Memphis, Inc.
119 South Main Street, Suite 425
Memphis, Tennessee, 38103
Trustee

1994 – 2000
University of Memphis Alumni Association
3720 Alumni Street
Memphis, Tennessee 38152
Director

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1994 – 1999
Memphis Race Relations & Diversity Institute
22 North Front Street
Memphis, Tennessee 38103
Director

1990 – 1992, 1994 – 1997
Memphis in May International Festival
88 Union Avenue, Suite 301
Memphis, Tennessee 38103
Director

1990 – 1992, 1994 – 1996
Midtown Mental Health
152 Beale Street, Suite 300
Memphis, Tennessee 38103
Director

1992 – 1995
Memphis Brooks Museum of Art
Overton Park
1934 Poplar Avenue
Memphis, Tennessee 38104
Trustee

1983 – 1984
Tennessee Association of Women in Office
No address available
Vice-President

7. **Military Service and Draft Status**: Identify any service in the U.S. Military, including dates of service, branch of service, rank or rate, serial number (if different from social security number) and type of discharge received, and whether you have registered for selective service.

I have not served in the U.S. Military. I was not required to register for selective service.

8. **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.

Spirit of Excellence Award, ABA Committee on Diversity (to be awarded February 12, 2011)
Honorary Doctor of Law, Suffolk University (2010)
African American Hall of Fame (2010)
Memphis Living Legend Award, New Sardis Baptist Church (2009)

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Honoree of the Year, National Association of Women Judges (2008)
Candle on the Bluff Award, Morehouse College (2008)
Liberty Achievement Award, ABA Tort Trial & Insurance Practice Section (2008)
Keeper of the Dream Award, St. Mark Baptist Church (2007)
Friend of the Family Lifetime Achievement Award, ABA Family Law Section (2007)
William M. Leech, Jr. Public Service Award, ABA Fellows of the Young Lawyers Division (2007)
Presidential Achievement Award, National Bar Association (2006)
Women of Achievement Award, Phi Beta Sigma Fraternity (2003)
Civil Rights Trailblazer Award, University of Tennessee Civil Rights Symposium (2002)
Benjamin F. Hooks Award, Memphis Bar Foundation (2002)
Hero in the Law Award, Memphis Bar Association (2001)
Excellence in Service Award, National Association of Women Judges (2000)
Women of Achievement Determination Award (2000)
Judge Bernice B. Donald Scholarship, University of Memphis Zeta Phi Beta Sorority (1999)
Jurist Award, National Bar Association Women Lawyers (1998)
Arabella Babb Mansfield Award, National Association of Women Lawyers (1997)
Allies for Justice Award, National Lesbian and Gay Law Association (1995)
Marion Griffin-Francis Loring Award, Association for Women Attorneys (1994)
Woman of the Year, Big Brothers & Big Sisters of Greater Memphis (1990)
Distinguished Alumni Award, Memphis State University (1990)
Ten Outstanding Young Tennesseans, Memphis Jaycees (1990)
America's Best & Brightest, *Dollars and Sense Magazine* (1988)
Judge of the Year, Shelby County Deputy Sheriff's Association (1987)
Judge of the Year, Criminal Law Section, Memphis Bar Association (1986)
Community Services Award: Youth, National Conference of Christians and Jews (1986)
Citizen of the Year, Excelsior Chapter of Eastern Star (1998)
Martin Luther King Community Service Award (1999)
Woman of the Year, Pentecostal Temple Church of God in Christ (1995)
Business and Professional National Award Winner (1982)
Young Careerist Award State of Tennessee, Raleigh Bureau of Professional Women (Raleigh Chapter) (1982)
Who's Who Among Memphians, *Memphis Magazine* (1987)
"She Knows Where She's Going," Girls Club of Memphis (1998)

9. **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 (ABA)
Member, ABA Journal Board of Editors (2004 – present)
Member, Litigation Section Council (2003 – 2006)
Member, Business Law Section

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Member, Individual Rights and Responsibilities Section
Member, Intellectual Property Section
Member, General Practice Section
Vice Chair, Bankruptcy Committee (1988 – 1990)

ABA Board of Governors
Chair, Program and Planning Committee (2001 – 2002)
Member, Executive Committee, Board of Governors (2001 – 2002; 2004 - present)
Liaison, ABA Africa, Africa Legal Technical Assistance Project (2000 – 2002, 2010 – 2011)
Liaison, Appellate Judges Conference (1999 – 2000)
Liaison, Labor and Employment Law Section (1999 – 2002)
Liaison, Law Library of Congress (1999 – 2002)
Secretary, Executive Committee, Board of Governors (2008 – 2011)

ABA Commissions, Task Forces, Standing Committees, and Special Projects
Chair, Commission on College and University Legal Studies (1993 – 1994)
Chair, Commission on Opportunities for Minorities in the Profession (1994 – 1997)
Co-Chair, Federal Law Clerks Education Program, Labor & Employment Law Section (2002 – Present)
Director, ABA Museum of Law (2003 – 2006)
Member, ABA Standing Committee on Gavel Awards (1989 – 1992)
Member, Advisory Committee, Central & Eastern European Law Initiative (1999 – 2001)
Member, Council on Racial and Ethnic Bias (1994 – 1996)
Member, Dues Cycle Committee (2001 – 2002)
Member, House of Delegates (1993 – 1995, 1999 – 2002, 2008 – Present)
Member, Legal Opportunity Scholarship Committee (1999 – 2002, 2005)
Member, Public Perceptions Task Force, Litigation Section (2002 – Present)
Member, SCOPE Committee (2001 – 2002)
Member, Standing Committee on Membership (1997 – 1999)
Member, Standing Committee on Strategic Communications (1997 – 1999)
Member, Steering Committee on Gun Violence (1994)
Member, Steering Committee on Unmet Legal Needs of Children (1993)

ABA Judicial Administration Division Committees
Chair, Courts and Communities and Law Related Education Committees (1985)
Chair, JAD Task Force on Opportunities for Minorities in the Judiciary (1993 – 1994)
District Representative (mid 1980s)
Executive Board (late 1980s)
Liaison, JAD and Conference of State Trial Judges (2000 – 2002)
Member, ABA/UNDP Legal Resources Unit Advisory Committee (2000 – Present)
Member, Budget Committee (1992 – 1993)
Member, Continuing Judicial Education Committee (1992 – 1993)
Member, Coordinating & Planning Committee (1992 – 1993)

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Member, Criminal Justice Section (1987 – 1988)
Member, Judicial Council (1993 – Present)
Member, Literacy and Courts Committee (1990 – 1993)
Member, Long Range Planning Committee (1991 – 1994)
Member, Program and Annual Meeting Committee (1992 – 1993)
ABA National Conference of Special Court Judges
Chair, African American Involvement Committee (1984 – 1985)
Chair (1993 – 1994)
Chair-Elect (1992 – 1993)
Vice-Chair (1991 – 1992)
Secretary (1989 – 1991)
Chair, Occupational Stress in the Judiciary Planning Conference (1989 – 1992)
Chair, Media Relations & Fair Trial (1988 – 1989)
Chair, Publicity Committee (1986)
Member, Nominating Committee (1985)
District Representative, District 5 (1983 – 1985)
American Bar Foundation
Member (2002 – Present)
Vice President (2008 – Present)
Secretary (2006 – 2008)
Chair, Nominating/Orientation committee (2008 – 2010)
Member, Executive Committee (2006 – present)
American Judges Association
Member (1984 – 1989)
Delegate, AJA House of Delegates (1985 – 1989)
Chair, National Project on Domestic Violence (1985)
Member, Court Security & Legislation Committee
American Trial Lawyers Association
Association for Women Attorneys
Member (1983 – Present)
President (1991)
President-Elect (1990)
Committee on Excellence in Legal Education
Federal Judicial Center
Member, Board of Directors (2004 – 2007)
Faculty (1989 – Present)
Member, Advisory Committee on District Judge Education (2004 – 2007)
General Sessions Judges' Conference Education
Chair (1987)
International Association of Judges (2006 – present)
Co-Vice-President, Fourth Commission (2008 – present)
Judicial Conference Advisory Committee on Bankruptcy Rules
Member (1996 – 2002)
Leo Bearman Inn of Court, Master (1995 – present)
Memphis Area Legal Services Access to Justice Summit
Chair (2002)

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Memphis Area Legal Services Association
Board Member (1986 – 1988)
Memphis Bar Association
Member (1981 – Present)
Chair, Bench Bar Conference (2002)
Director (1993)
Co-Chair, Guidelines for Professional Conduct Committee (1988 – 1989)
Lawyers Helping Lawyers
Morris Dees Final Award Selection Committee
Member (2010)
Multi-Disciplinary Conference on Rule of Law
Chair (2007)
National Association of Women Judges
Member (1983 – Present)
Member, Federal Courts Committee (2008 – 2010)
President (1990 – 1991)
President-Elect (1989 – 1990)
Vice President (1988 – 1989)
Secretary (1987 – 1988)
Treasurer (1986 – 1987)
ABA Delegate (1991 – 1995)
Member, Nominating Committee (1985)
District Director (1983 – 1985)
National Bar Association
Member (1986 – Present)
National Bar Association, Ben F. Jones Chapter
Member (1980 – Present)
Chair, CLE Committee (1994)
Director (1993 – 1995)
Secretary (late 1980s)
National Center for State Courts
Associate Member (1986 – 1988)
National Conference of Bankruptcy Judges
Member (1988 – 1996)
Member, NAWJ Liaison Committee (1994 – 1996)
Member, Board of Directors (1993 – 1996)
Member, ABA Liaison Committee (1993 – 1996)
Member, Election Committee (1991, 1994)
National Conference of Women's Bar Associations
Board of Directors (1988 – 1990)
National Judicial College
Faculty (1993 – 1995, 1997 – 1999, 2001, 2003 – 2004, 2006)
Tennessee Bar Association
Member (1985 – present) (currently an honorary member)
Board of Governors (1997 – 1998)

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U.S. Bankruptcy Court for the Western District of Tennessee
Chair, Committee for Rules Revision (1990)
Women Judges Fund for Justice (1986 – 1992)
Board of Directors

10. **Bar and Court Admission**:

a. List the date(s) you were admitted to the bar of any state and any lapses in membership. Please explain the reason for any lapse in membership.

Tennessee, 1979

There has been no lapse in membership.

b. List all courts in which you have been admitted to practice, including dates of admission and any lapses in membership. Please explain the reason for any lapse in membership. Give the same information for administrative bodies that require special admission to practice.

Supreme Court of the United States, 1989
United States District Court for the Western District of Tennessee, 1979

There have been no lapses in membership.

11. **Memberships**:

a. List all professional, business, fraternal, scholarly, civic, charitable, or other organizations, other than those listed in response to Questions 9 or 10 to which you belong, or to which you have belonged, since graduation from law school. Provide dates of membership or participation, and indicate any office you held. Include clubs, working groups, advisory or editorial boards, panels, committees, conferences, or publications.

Big Brothers & Big Sisters (1986 – 1987)
Business & Professional Women Clubs (1981 – 1984)
Calvary Street Ministry (1981 – 1982)
Criminal Justice Panel (1981)
Family Service (1986 – 1988)
Girls Club of Memphis (1986 – 1990)
Grace House of Memphis (1994)
Greater Middle Baptist Church
Member, Board of Trustees (2009 – present)
Kiwanis Club (1987 – 1992)
Leadership Memphis
Member (1986 – 1987)
Trustee (1993 – 1998, 2007 – 2009)

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Lupus Foundation (1983 – 1984)
Memphis Brooks Museum of Art (1992 – 1995)
Director (1992 – 1995)
Education Committee (1992 – 1995)
Memphis in May International Festival
Director (1990 – 1992, 1994 – 1996)
Memphis Literacy Council (early 1980s)
Memphis Race Relations & Diversity Institute
Director (1994 – 1998)
Memphis Street Law (1980 – 1986)
President (1985 – 1986)
Secretary (1981 – 1982)
Midtown Mental Health
Director (1990 – 1992, 1994 – 1997)
National Association for the Advancement of Colored People (NAACP)
(1984 – Present)
National Conference of Christians and Jews (1983 – 1988)
National Conference of Negro Women (1983 – early 1990s)
Network (late 1980s)
Peter & Patricia Gruber Foundation (2004 – present)
Justice Prize Committee (2008 – Present)
Women's Rights Prize Committee (2004 – 2008)
Positive Mental Attitude Association (1981 – 1986)
Raleigh Business and Professional Women (1981 – 1983)
Shelby State Community College Advisory Panel (1985)
Soulsville Foundation, STAX Museum & Academy
Board of Directors (2005 – Present)
Tennessee Association of Women in Office (1983 – 1984)
Vice-President (1983 – 1984)
Tennessee Women's Forum (1995 – present)
Treasurer
University of Memphis Alumni Association
Member (1984 – 1987)
Director (1994 – 2000)
University of Memphis Law Alumni Association
Member (1983 – present)
Director (2007 – present)
Women in the Political Process (1980 – 1981)
YWCA (1987 – 1988)
Zeta Phi Beta Sorority, Inc., Alpha Eta Zeta Chapter (1983 – Present)

b. 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, or national origin. Indicate whether any of these organizations listed in response to 11a above currently discriminate or formerly discriminated on the basis of race, sex, religion

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or national origin 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 Zeta Phi Beta Sorority, which limits its membership to women only. To the best of my knowledge, none of the other organizations listed above currently discriminates or formerly discriminated on the basis of race, sex, religion, or national origin either through formal membership requirements or the practical implementation of membership policies.

12. **Published Writings and Public Statements**:

a. List the titles, publishers, and dates of books, articles, reports, letters to the editor, editorial pieces, or other published material you have written or edited, including material published only on the Internet. Supply four (4) copies of all published material to the Committee.

This list represents the published material I have identified through searches of my files and internet databases. I have tried my best to list all of them here, although there may be some that I have not been able to identify or locate.

Questionnaire 2010 on Aspects of Data Protection in Employment Relationships, Fourth Study Commission on Public & Service Law (2010). Copy supplied.

Questionnaire 2009 on Age Discrimination, Fourth Study Commission on Public & Service Law (2009). Copy supplied.

Issues Re: Counterfeiting of Pharmaceuticals (2009). Copy supplied.

A Journey to Justice, 17 Persp. 3 (Fall 2009). Copy supplied.

Bernice B. Donald & Brennan Tyler Brooks, *Immigrants and Other Cultural Minorities as Non-Traditional Plaintiffs: Culture as a Factor in Determining Tort Damages*, 92 Judicature 220 (2008 – 2009). Copy supplied.

Disparate Impact Under the ADEA, American Bar Association, Apr. 2005. Copy supplied.

Bernice B. Donald & Diane K. Vescovo, *The Ten Commandments for Invoking, Preserving and Sustaining Claims of Privilege and Protection*, American Bar Association Labor & Employment Law Section – BNA Books (2005). Copy supplied.

A Comparative Justice Project: The United States, Germany, and Chinese Trial Demonstration, 40 Judges J. 30 (2001). Copy supplied.

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Bernice B. Donald & William C. Plouffe Jr., *The Summary Judgment Process: When the Solution Becomes Part of the Problem*, 194 F.R.D. 262 (Aug. 2000). Copy supplied.

Bernice B. Donald & Jennie D. Latta, *The Dischargeability of Property Settlement and Hold Harmless Agreements in Bankruptcy: An Overview of 523(a)(15)*, 31 Fam. L.Q. 409 (1997 – 1998). Copy supplied.

Women Lawyers Progress, but Face Battles, Commercial Appeal, Aug. 3, 1997, at B7. Copy supplied.

Collateral Estoppel in Section 523(c) Dischargeability Proceedings: When is a Default Judgment Actually Litigated?, 12 Bankr. Dev. J. 321 (1995 – 1996). Copy supplied.

Fraud Imputation Under § 523(A)(2)(A): Is a Partner Always Liable for Wrongdoing by the Partnership?, 24 Mem. St. U. L. Rev. 651 (Summer 1994). Copy supplied.

25 Years on the Cutting Edge of Judicial Administration, 33 Judges' J. 20, 47 (Summer 1994). Copy supplied.

The Art of Judging, 33 Judges' J. 17 (Spring 1994). Copy supplied.

The Future of Justice, 33 Judges' J. 24, 43 (Winter 1994). Copy supplied.

Start Spreading the News, 32 Judges' J. 22, 51 (1993). Copy supplied.

Cameras in the Supreme Court: Should Supreme Court Proceedings be Televised, 75 A.B.A. J. 34 (Mar. 1989). Copy supplied.

In 2004, I served as a reviewer of Chapter 8 of the ABA Family Legal Guide, which addressed Consumer Bankruptcy. A copy of the chapter is supplied.

Between Fall 1994 and Fall 1997, I served as chair of the ABA Commission on Opportunities for Minorities in the Profession and wrote a column for each quarterly edition of the Commission's publication, Goal IX. The columns were titled, "Letter from the Chair." All copies of my column are supplied. The dates of my columns are listed below:

Summer 1997
Winter/Spring 1997
Fall 1996
Summer 1996
Winter/Spring 1996
Fall 1995

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Summer 1995
Spring 1995
Winter 1995
Fall 1994

Since 2008, I have served on the Board of Editors for the American Bar Association Journal. Copies available upon request.

Rights and Responsibilities, Commercial Appeal. I have been unable to obtain a copy or recall when I wrote this article. This was a short article that urged citizens to embrace their responsibilities such as serving on juries, voting, and initiating and participating in activities that keep the community healthy and whole.

b. Supply four (4) copies of any reports, memoranda or policy statements you prepared or contributed in the preparation of on behalf of any bar association, committee, conference, or organization of which you were or are a member. If you do not have a copy of a report, memorandum or policy statement, give the name and address of the organization that issued it, the date of the document, and a summary of its subject matter.

This list represents the reports, memoranda and policy statements I have identified through searches of my files and internet databases. I have tried my best to list all such documents to which I contributed, although there may be some that I have not been able to identify or locate.

On September 30, 2009, I sent a letter on behalf of the American Bar Association to U.S. Representative John Conyers, Jr., Chair of the Committee on the Judiciary. The letter addressed prohibited attorney actions under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. A copy of the letter is supplied.

Analysis of the Ethical Rules for Judges in the Republic of Lithuania, ABA Central and East European Law Initiative, June 28, 1999. Copy supplied.

Report of the Hispanic National Bar Association Presented Jointly with the Steering Committee on the Unmet Legal Needs of Children; National Asian Pacific American Bar Association; Section of Individual Rights and Responsibilities; National Association of Women Lawyers; Coordinating Committee on Immigration Law, Commission on Opportunities for Minorities in the Profession; Section of Litigation; and the Section of International Law and Practice, 120 No. 1 Ann. Rep. A.B.A. 517 (1995). Copy supplied.

Report No. 2 of the Commission on Women in the Profession, 120 No. 1 Ann. Rep. A.B.A. 517 (1995). Copy supplied.

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In 1991, I chaired Mayor-Elect Herenton's Transition Law Enforcement and Judiciary Committee, which created a report on issues in Memphis. The committee consisted of attorneys and judges throughout the Memphis area chosen by Mayor Herenton. The report was issued by Mayor Herenton's Transition Law Enforcement and Judiciary Committee in 1992, and it briefed the Mayor on topics such as the role of the Courts, the Mayor's power to appoint judges, and procedures to handle citizen's complaints under the Civil Service Rule with regard to the police. I have been unable to obtain a copy of the report. Memphis City Hall is located at 125 North Main Street, Memphis, TN 38103.

In 1988, I served on the Memphis Bar Association's Committee on Professionalism, which created Guidelines for Professional Courtesy and Conduct for attorneys. A copy of the guidelines is supplied.

I have been a member of the ABA House of Delegates which regularly prepares resolutions on various issues and policies. I have regularly recused myself on issues that might come before the court. In July 1991, I was the primary sponsor of a proposal to amend the ABA Constitution, a copy of which is supplied. I have also been able to identify the following resolutions for which I am listed as a co-sponsor:

Proposed Amendments to the Constitution and Bylaws, ABA Annual Meeting Report (2010).
Proposed Amendments to the Constitution and Bylaws, August 2009 text of the amendment.
Proposed Amendments to the Constitution and Bylaws, 94 A.B.A.J. 67 (Aug. 2008).
Proposed Amendments to the Constitution and Bylaws 92 A.B.A.J. 72 (July 2006).
Proposed Amendments to the Constitution and Bylaws, 91 A.B.A.J. 64 (July 2005).
Proposed Amendments to the Constitution and Bylaws, 84 A.B.A.J. 103 (July 1998).
Proposed Amendments to the Constitution and Bylaws, 82 A.B.A.J. 96 (July 1996).
Proposed Amendments to the Constitution and Bylaws, A.B.A.J. 97 (July 1995).

I have supplied a copy of the ABA notice of the proposals, except for those made in 2010 and 2009, which I have been unable to locate. I have also supplied the text of the proposals, except I was unable to obtain the text of the 1998 and 1995 proposals.

c. Supply four (4) copies of any testimony, official statements or other communications relating, in whole or in part, to matters of public policy or legal

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interpretation, that you have issued or provided or that others presented on your behalf to public bodies or public officials.

This list represents the testimony, official statements, and other communications relating to matters of public policy or legal interpretation that I have identified through searches of my files and internet databases. I have tried my best to list all such documents to which I contributed, although there may be some that I have not been able to identify or locate.

In February 2004, I attended an ABA Board of Governors meeting to present a report on the ABA's Africa Law Initiative. I spoke on behalf of the chair, Hon. Nathaniel R. Jones, who was unable to attend. Minutes supplied.

On March 18, 1998, I testified before the Subcommittee on Commercial and Administrative Law of the U.S. House Committee on the Judiciary in Washington, D.C., on proposed reforms to consumer bankruptcy laws as outlined in H.R. 3150, H.R. 2500 and H.R.3146. Testimony supplied.

On December 19, 1995, I testified before the United States Senate Judiciary Committee during a hearing on my nomination to be United States District Judge for the Western District of Tennessee. Testimony supplied.

In 1989, I testified before the Executive Committee of the Judicial Division of the American Bar Association about including magistrate judges and bankruptcy judges as members of the Federal Trial Judges Conference. This was an informal oral presentation for which there were no written remarks, notes or recordings.

d. Supply four (4) copies, transcripts or recordings of all speeches or talks delivered by you, including commencement speeches, remarks, lectures, panel discussions, conferences, political speeches, and question-and-answer sessions. Include the date and place where they were delivered, and readily available press reports about the speech or talk. If you do not have a copy of the speech or a transcript or recording of your remarks, give the name and address of the group before whom the speech was given, the date of the speech, and a summary of its subject matter. If you did not speak from a prepared text, furnish a copy of any outline or notes from which you spoke.

This list represents the speeches and talks I have identified through searches of my files and internet databases. I have tried my best to list all such events, although there may be some that I have not been able to identify or locate.

September 26, 2010: Speaker, Annual Women's Day celebration, New Salem Baptist Church, Memphis, Tennessee. Speech supplied.

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August 12, 2010: Presenter, Eighth Circuit Judicial Conference in Minneapolis, Minnesota. My presentation was entitled, "Implicit Bias: What We Can Learn from the Latest Research." Presentation supplied.

August 9, 2010: Speaker, House of Delegates meeting, American Bar Association Annual Meeting. A transcript of the meeting is supplied.

June 10, 2010: Panelist, Diversity for Success Seminar, sponsored by Voice of Defense Bar, Swissotel, Chicago, Illinois. The panel topic was "Diversity on the Bench – Should it Matter?" I have no notes, transcripts or recordings. The Voice of Defense Bar is located at 55 West Monroe, Suite 2000, Chicago, Illinois 60603.

April 30, 2010: Panelist, Alaska Bar Association Conference, Dena'ina Civic & Convention Center, Anchorage, Alaska. I gave remarks about the media and the courts. Panel summary supplied.

April 18, 2010: Judge, American Mock Trial Association, National Championship Tournament Final Round. Materials supplied.

April 15, 2010: Presenter, Tennessee Bar Association's Leadership Law class, Memphis, Tennessee. I have no notes, transcripts or recordings. The Bar Association is located at 221 Fourth Avenue, Suite 400, Nashville, Tennessee 37219.

March 26, 2010: Panelist, American Society of International Law Spring Meeting, Washington, DC. My panel was entitled, "Lost in Translation: Cross-Cultural Issues in the Courts." I have no notes, transcripts or recordings. ABA coverage supplied. The Society is located at 2223 Massachusetts Avenue NW, Washington, D.C. 20008.

March 20, 2010: Speaker, Dar es Salaam, Tanzania. My presentation was entitled, "Intellectual Property Rights Enforcement and the Process of Mediation." Presentation supplied.

March 4, 2010: Panelist, International Association of Lawyers Conference, Park City, Utah. I gave a presentation entitled, "Using Mediation to Resolve Cross-Cultural Conflicts." Presentation supplied.

February 2010: Speaker, House of Delegates meeting, ABA Mid-Year Meeting. A transcript of the meeting is supplied.

January 30-31, 2010: Judge, ABA Labor & Employment Law 6th Annual Student Trial Advocacy Competition, Washington, D.C. I have no notes, transcripts or recordings. ABA report supplied. The address for the ABA is 321 North Clark Street, Chicago, Illinois 60610.

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January 21, 2010: I presided over the opening gala of the University of Memphis' new Cecil C. Humphreys School of Law campus in downtown Memphis. Video recording supplied.

November 7, 2009: Speaker, ABA Section of Labor & Employment Law's 3rd Annual CLE Conference, Washington, D.C. My remarks were delivered during an informal gathering designed to allow attorneys to speak with and ask questions of the participating judges. I also presided over a mock trial. I have no notes, transcripts or recordings. The ABA is located at 321 North Clark Street, Chicago, Illinois 60610.

September 24, 2009: Moderator, Gruber Foundation Justice Prize ceremony, Cumberland School of Law, Birmingham, Alabama. The topic of the symposium was "Access to Justice for Underserved Populations." Video recording supplied.

August 3, 2009: Speaker, House of Delegates meeting, ABA Annual Meeting. I presented two Informational and Transmittal Reports. A transcript of the meeting is supplied.

August 1, 2009: Panelist, ABA Section of International Law Annual Meeting, Chicago, Illinois. The panel on which I served was entitled, "Lost in Translation: Cross-Cultural Issues in the Courts." I, along with the other panelists, discussed case scenarios from the book by Professor Alison Renteln. Case scenarios supplied.

July 24, 2009: I was scheduled to speak on a panel at the National Black Prosecutors Association Annual Conference in Memphis, Tennessee. Due to plane delays, I arrived late and was only able to speak for five minutes. During that time, I apologized and welcomed the group to the conference rather than give my presentation, which was entitled, "Evidence of Unconscious Bias." Presentation supplied.

July 15-17, 2009: I gave a presentation at the Workshop for U.S. Magistrate Judges II, Milwaukee, Wisconsin. My presentation covered "Unintended Bias," or how unintentional bias impacted the courtroom and how it could be addressed. Presentation supplied.

June 20, 2009: Panelist, CLE session, Tennessee Bar Association. The presentation was entitled, "Dealing with Juror Bias During Voir Dire." Presentation supplied.

June 15-16, 2009: Speaker, ABA Judicial Division National Conference of Federal Trial Judges & Lawyers Conference and Administrative Office of Illinois Courts, "Judicial Decision Making in a Democratic Society." I have no notes,

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transcripts, or recording. The ABA is located at 321 North Clark Street, Chicago, Illinois 60610.

May 6, 2009: Panel moderator, Sixth Circuit Judicial Conference, Hilton Head Island, South Carolina. My panel discussed recent developments in civil procedure and evidence. As moderator, I introduced the panelists. Other than biographies of the panelists, I have no notes, transcripts or recordings. The Sixth Circuit Court of Appeals is located at 540 Potter Stewart U.S. Courthouse, 100 East Fifth Street, Cincinnati, Ohio 45202.

May 1, 2009: Panelist, Ethics & Professionalism Committee, ABA Section of Litigation Annual Conference, Atlanta, Georgia. My panel was entitled, "'So What Do I Do Now?' Ethical and Professionalism Predicaments in Litigation." Panel outline supplied.

April 24, 2009: Panel moderator, Best Lawyers' 25th Anniversary event, Atlanta, Georgia. The panel was entitled, "Civility and the Law." The panel used materials prepared by attorney and panel member Lucian Pera. Materials supplied.

April 17, 2009: Panelist, Continuing Legal Education program, ABA Business Law Section Spring Meeting. My panel was entitled, "Global Business Confidential: Data Privacy Issues in Cross-Border Investigations and Litigation." Presentation materials supplied. Additionally, an audio recording is available at http://www.abanet.org/buslaw/meetings/audio/2009/spring/vancouver/1767.mp3.

March 25-27, 2009: Faculty, Intellectual Property Colloquium on IPR Enforcement, Monterey, Mexico, sponsored by U.S. Department of Justice. I have no notes, transcript or recording.

March 6, 2009: Commentator, 22nd Annual Advanced ALI-ABA Course of Study/Live Video Webcast for Plaintiffs' and Defendants' Bars. The event was released under the title, "Litigating Employment Discrimination and Employment-Related Claims and Defenses in Federal and State Courts." I have been unable to obtain the video for this event. If I am able to do so, I will supply it. The ABA is located at 321 North Clark Street, Chicago, Illinois 60610.

February 20, 2009: Judge, Semi-final and Final rounds of National First Amendment Moot Court Competition, First Amendment Center. Moot court case materials and First Amendment Center coverage supplied.

February 16, 2009: Speaker, House of Delegates meeting, ABA Midyear Meeting. I formally presented two reports on the Board of Governors' Informational & Legislative Priorities, but did not otherwise offer any commentary. The ABA report on the meeting is supplied.

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February 8, 2009: Speaker, event to establish the African American Museum Hall of Fame. My remarks primarily highlighted portions of Bishop William H. Graves' biography. I have no notes, transcripts or recordings. Press coverage supplied.

January 2, 2009: Speaker, Reverend Benjamin L. Hooks' retirement. I do not recall where the event took place. Transcript supplied.

December 2008: Speaker, seminar entitled, "Intellectual Property Law, Enforcement and Dispute Settlement for Economic Development," Amman, Jordan. I used the same mediation materials used for the March 4, 2010 presentation.

November 14-15, 2008: Speaker, First South African Judicial Workshop for the Proper Adjudication of Intellectual Property Cases, Riverside Sun Hotel, Vaal River, Gauteng, South Africa. The workshop was sponsored by the Association of Regional Magistrates of Southern Africa (ARMSA); South Africa Department of Trade & Industry; U.S. Department of State; U.S. Department of Justice; and U.S. Department of Commerce. On Nov. 14, I presented on copyright pointers for judges. The session also included a trademarks roundtable; trademark pointers for judges; illustrative role play on a trademark trial in the courtroom; and a question and answer session. The second roundtable of Nov. 14 was on "Expert Witnesses, Trade Secrets, Fast Tracking and Beyond." It included an illustrative role play session on expert witnesses and trade secrets in the courtroom as well as a question and answer session. On Nov. 15, I presented on Remedies in Civil Infringement Cases. The presentation included pointers on civil remedies for judges; role play on civil remedies in the courtroom; and a question and answer session. The second part of the day included discussion of sentencing issues in intellectual property cases; sentencing pointers for judges; role play on sentencing in the courtroom; and a question and answer session. I have no notes, transcripts or recordings. The address for ARMSA is Private Bag X61, Pretoria, 0001. The address for the U.S. Department of State is 2201 C Street NW, Washington, D.C. 20520.

October 27-28, 2008: Panelist, Workshop for Public Prosecutors on IPR Enforcement during Global Intellectual Property Academy, U.S. Patent & Trademark Office, Kuwait City, Kuwait. The topics of my panels were as follows: "Effective Strategies in Prosecuting Internet Piracy"; "Judicial Perspectives on Criminal IPR Cases"; "Trial and Sentencing Issues in Criminal IPR Cases: Judicial Perspective"; and "Discussion of Case Study." I have no notes, transcripts or recordings. The address for the U.S. PTO is 600 Dulany Street, Alexandria, Virginia 22314.

October 16, 2008: Panelist, 30th Annual National Association of Women Judges Conference, Portland, Oregon. My panel was entitled, "Keeping the Promise of the Rule of Law." I generally described the ABA's Rule of Law initiatives, and

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talked about opportunities for judicial involvement. I have no notes, transcripts or recordings. The Association is located at 1341 Connecticut Avenue NW, Suite 42, Washington, D.C. 20036.

October 1, 2008: Panelist, 2008 Annual Federal Practice Seminar, hosted by the Memphis/Mid-South Chapter of the Federal Bar Association. The first panel included Chief U.S. Bankruptcy Judge David Kennedy as well as local attorneys, and addressed bankruptcy law for non-bankruptcy lawyers. The second panel addressed best practices in federal court and included most of the U.S. district court judges and federal magistrate judges in the Western District of Tennessee. I have no notes, transcripts or recordings. The address of the Association is 1220 North Fillmore Street, Suite 444, Arlington, Virginia 22201.

September 19, 2008: Panelist, 2008 Federal Bar Association Annual Convention, Huntsville, Alabama. The panel on which I appeared discussed civil rights and employment cases decided by the U.S. Supreme Court in 2007-2008. Notes supplied.

August 7, 2008: Panelist, ABA Annual Meeting Day of Equality, New York, New York. I participated in a panel entitled, "Women on the Bench: Looking Back, Looking Forward." I have no notes, transcripts or recordings. The ABA is located at 321 North Clark Street, Chicago, Illinois 60610.

August 2008: Speaker, ABA Tort Trial & Insurance Practice Section. I gave an acceptance speech during a ceremony at which I received the Liberty Achievement Award. I have no notes, transcripts or recordings. ABA coverage supplied. The ABA is located at 321 North Clark Street, Chicago, Illinois 60610.

May 16, 2008: Speaker, U.S. District Court Judge James D. Todd Retirement Ceremony, District Courthouse, Jackson, Tennessee. I have no notes, transcripts or recordings. Press coverage supplied. The address of the courthouse is 111 South Highland Avenue, Jackson, Tennessee 38301.

May 2, 2008: Panelist, National Institute on E-Discovery program, sponsored by the ABA Section of Litigation, Chicago, Illinois. I gave a presentation entitled, "Discovery on Discovery: The New Battleground in the Quest for ESI." Presentation supplied.

April 28, 2008: Speaker, Memphis Bar Association, Annual Memorial Service for judges and attorneys, Calvary Episcopal Church, Memphis, Tennessee. I have no notes, transcripts or recordings. The Bar Association is located at Brinkley Plaza, 80 Monroe, Suite 220, Memphis, Tennessee 38103.

April 4, 2008: Award recipient, Candle on the Bluff Awards Ceremony, hosted by the Morehouse College Alumni Association and the New Olivet Baptist Church. Video recording supplied.

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March 18-19, 2008: Panelist, 11th Annual Employment Law Workshop for the Federal Judiciary, New York University School of Law. On March 18, I gave remarks on case management issues and, on March 19, I participated on a panel entitled, "The Evidence of Unconscious Discrimination." I have no notes, transcripts or recordings. NYU coverage is supplied. The School of Law is located at 40 Washington Square South, New York, New York 10012.

February 28 – March 2, 2008: Judge, Cardozo BMI Moot Court Competition, Final Round. Competition materials supplied.

February 21-22, 2008: Judge, National First Amendment Moot Court Competition, First Amendment Center. Moot court case materials and First Amendment Center coverage supplied.

February 20, 2008: Presenter with Mark Curriden, Memphis Bar Association CLE program. The program was entitled, "Contempt of Court," and dealt with the case that gave rise to modern day habeas corpus. I have no notes, transcripts or recordings. The Bar Association is located at Brinkley Plaza, 80 Monroe, Suite 220, Memphis, Tennessee 38103.

February 9, 2008: Panelist, American Bar Foundation Fellows Research Seminar, Los Angeles, California. The panel addressed what the profession could do to bring down the cost of litigation and increase the satisfaction of involved parties. I have no notes, transcripts or recordings. ABF coverage is supplied. The Foundation is located at 750 North Lake Shore Drive, Chicago, Illinois 60611.

February 8, 2008: Panelist, ABA Midyear Meeting, CLE program. The panel was entitled, "Stranger in a Strange Land: Cross-Cultural Issues in the Courts." I have no notes, transcripts or recordings. The ABA is located at 321 North Clark Street, Chicago, Illinois 60610.

January 1, 2008: Inauguration of Memphis City government elected officials, Cannon Center, Memphis, Tennessee. I have no notes, transcripts or recordings. Press coverage supplied. Additionally, a video news clip of the event is posted at http://www.myfoxmemphis.com/dpp/news/Memphis_City_Council_Gets_Fresh_Faces.

2008: Faculty member, ABA Tort Trial & Insurance Practice Leadership Academy. I have no notes, transcripts or recordings. The ABA is located at 321 North Clark Street, Chicago, Illinois 60610.

October 12, 2007: Award recipient, ABA Tort Trial & Insurance Practice Section. Video excerpts of my acceptance speech are posted at http://www.myfoxmemphis.com/dpp/news/Judge_Honored_With_Prestigious_Award.

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August 25, 2007: Speaker, Unveiling Ceremony of the Judge Odell Horton Sr. marquee at the Federal Office Building. I have no notes, transcripts or recordings. Press coverage supplied. The building is located at 167 North Main Street, Memphis, Tennessee 38103.

August 11, 2007: Panelist, ABA Section of International Law Annual Conference, San Francisco, California. The panel was entitled, "When Different Cultures Meet: Mastering Cross-Cultural Considerations in Business and Litigation." I have no notes, transcripts or recordings. The ABA is located at 321 North Clark Street, Chicago, Illinois 60610.

June 27-30, 2007: Presenter, 18th Annual Convention of National Employment Lawyers' Association, San Juan, Puerto Rico. The presentation was entitled, "Obtaining & Using Electronic Evidence." Although NELA recorded the event, I have been unable to obtain a copy. However, I have supplied a presentation by fellow presenter Kathryn Burkett Dickson, which served as the basis for all the participants' presentations. I did not prepare materials for the event.

June 3-9, 2007: Presenter, ABA Section of Litigation's Darfur Legal Training Program, Marriott Grosvenor House Hotel, London, England. On June 4, I gave a presentation entitled, "Judicial Perspective on Substantive Law." Additionally, I spoke on a panel on case study, focusing on themes, marshalling and organizing evidence. On June 7, I co-presented with Brad Brian on advocacy training. I have no notes, transcripts or recordings. Press coverage supplied. The ABA is located at 321 North Clark Street, Chicago, Illinois 60610.

May 18, 2007: Speaker, National Federation of Paralegals Association Region III Meeting, Memphis Paralegals Association. I spoke on professionalism, my experience with paralegals as well as trial practices for attorneys. I did not prepare any formal remarks or materials for the event. Bar news coverage supplied.

May 5, 2007: Commentator, AIA-ABA Course of Study in Boston, Massachusetts. The session focused on employment discrimination and other employment claims litigation. I have no notes, transcripts or recordings. The ABA is located at 321 North Clark Street, Chicago, Illinois 60610.

April 2007: Presenter, seminar entitled, "Seminar for Public Prosecutors and Criminal Court Judges on Intellectual Property Enforcement," Hanoi, Vietnam, sponsored by the U.S. Patent and Trademark Office. I have no notes, transcript or recording.

March 12, 2007: Panelist, 10th Annual Workshop on Employment Law for the Federal Judicial Center, New York University School of Law. The panel discussed case management issues, specifically pro se cases, summary judgment

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and technology. I have no notes, transcripts or recordings. Press coverage supplied. New York University is located at 70 Washington Square South, New York, New York 10012.

February 22, 2007: Speaker, Universitat Oberta de Catalunya, Barcelona, Spain. My lecture was entitled, "Protecting Intellectual Property Rights in the Age of the Internet: The U.S. Experience." I have no notes, transcripts or recordings. The university is located at Avinguda del Tibidabo, 39, 08035.

January 27, 2007: Speaker, NAACP Race Relations Summit. I spoke on the importance of diversity. I have no notes, transcripts or recordings. The NAACP is located at 4805 Mt. Hope Drive, Baltimore, Maryland 21215.

December 2006: Participant, Middle East Partnership Initiative and U.S. Patent & Trademark Office, "Workshop on the Adjudication of Intellectual Property Rights," Muscat, Oman. Materials supplied.

August 2006: I participated in the creation of a video entitled, "Choose Law," which was created by the ABA Young Lawyers Division. Video recording supplied.

August 5, 2006: Panelist, ABA Section of Administrative Law & Regulatory Practice Annual Meeting, Waikiki Beach Marriott Hotel, Honolulu, Hawaii. My panel was entitled, "What Do Judges Do? Being a Judge in America." I have no notes, transcripts or recordings. The ABA is located at 321 North Clark Street, Chicago, Illinois 60610.

July 26, 2006: Presenter, Applied Discovery Webinar Series. My presentation was entitled, "E-Discovery: What Every Judge Wants to Know." Presentation supplied.

July 19, 2006: Speaker, Memphis Bar Association's Law Inspires lecture series. My speech was entitled, "A Threat to Justice Anywhere, is a Threat to Justice Everywhere." Speech supplied.

June 16, 2006: Panelist, 125th Tennessee Bar Association Convention. I participated in a panel discussion entitled, "Practice and Procedure in Federal Court in the Western District." I have no notes, transcripts or recordings. The Bar Association is located at 221 Fourth Avenue North, Suite 400, Nashville, Tennessee 37219.

Late April 2006: Presenter, ABA Section of Litigation Annual Meeting in Los Angeles, California. The materials for the presentation were entitled, "Help is On the Way...Sort Of: How the Civil Rules Advisory Committee Hopes to Fill the E-Discovery Void" and "A Case Study in the Developing Law of Spoliation." Materials, prepared by John Barkett, supplied.

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April 29, 2006: Speaker, 26th Annual Gertrude E. Rush Awards Dinner, National Bar Association. I have no notes, transcripts or recordings. The Bar Association is located at 1225 11th Street NW, Washington, D.C. 20001.

April 28, 2006: Speaker, Heman Marion Sweatt Awards Luncheon, National Bar Association Mid-Year Conference. I made remarks after receiving an award from the Bar Association. I have no notes, transcripts, or recordings. The Bar Association is located at 1225 11th Street NW, Washington, D.C. 20001.

March 22, 2006: Presenter, National Conference on EEO Law, La Jolla, California. My presentation was entitled, "True Challenges in EEO Lawsuits – Dealing with Compensatory and Punitive Damages in EEO Litigation." Presentation supplied.

March 16, 2006: Speaker, 9th Annual Workshop on Employment Law, New York University Law School. I began the workshop with a presentation on "Using Technology in the Courtroom" and later participated in a panel discussion on Electronic Discovery. I have no notes, transcripts or recordings. Press coverage supplied. The law school is located at 40 Washington Square South, 507, New York, New York 10012.

February 24, 2006: Judge, National First Amendment Moot Court Competition, First Amendment Center. Moot court case materials and First Amendment Center coverage supplied.

February 17, 2006: Speaker, "Law School for Journalists" Workshop, University of Memphis. I have no notes, transcripts or recordings. The university is located at 3720 Alumni Avenue, Memphis, Tennessee 38152.

February 12, 2006: Speaker, ABA Nominating Commission, ABA Midyear Meeting. I gave a candidate speech before the Commission and other Association members for consideration as ABA Secretary for the 2008-2011 term. I have no notes, transcripts or recordings. ABA memorandum supplied. The ABA is located at 321 North Clark Street, Chicago, Illinois 60610.

November 5, 2005: Panelist, National Conference of Bankruptcy Judges, 9th Annual Meeting, San Antonio, Texas. My panel was entitled, "Circuit Splits," and we discussed splits in the circuits concerning bankruptcy issues. Materials supplied.

September 15, 2005: I administered the citizenship oath to a group and also gave remarks at the federal courthouse in Memphis, Tennessee. I have no notes, transcripts or recordings. Press coverage supplied. The courthouse is located at 167 North Main Street, Memphis, Tennessee 38103.

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August 8, 2005: Speaker, ABA Annual Meeting. My session was entitled, "When the Scale Tips: A Judicial Reading of Juries." I have no notes, transcripts or recordings. The ABA is located at 321 North Clark Street, Chicago, Illinois 60610.

April 6-9, 2005: Panelist, ABA Section of Labor & Employment Law National Conference on Equal Employment Opportunity Law, Naples, Florida. My first panel was held on April 6 and was entitled, "The Federal Bench Speaks About EEO Claims and Litigation." On April 8, I spoke on a panel entitled, "Curveballs in EEO Litigation: The Tough Issues You Would Rather Learn About Here Than Encounter in Discovery or Court for the First Time." On April 8, I also spoke on a panel entitled, "Track 1: Disparate Impact: The Most Recent Word on this Long-Standing Discrimination Theory, Including the New Ways of Proving Disparate Impact and Whether it is Available in All Discrimination Areas, Including Age Discrimination." I have no notes, transcripts or recordings. The ABA is located at 321 North Clark Street, Chicago, Illinois 60610.

August 25-26, 2004: Speaker, Jordan Intellectual Property Week, sponsored by International Intellectual Property Institute and Jordan Intellectual Property Association, Grand Hyatt Hotel, Amman, Jordan. I spoke on the subjects of criminal prosecutions and civil infringement actions, with a special look at compensation issues. I have no notes, transcripts or recordings. Press coverage supplied. The IIPI is located at 2301 M Street NW, Suite 420, Washington, D.C. 20037.

July 29, 2004: Speaker, CJA Attorneys event, Peabody Hotel, Memphis Tennessee. I spoke on criminal justice. Transcript supplied.

June 4, 2004: Panelist, Fogelman Conference Center of the University of Memphis. The panel topic was entitled, "Judges are from Mars, Lawyers are from Venus, and Journalists are from Pluto." I have no notes, transcripts or recordings. The University is located at 3720 Alumni Avenue, Memphis, Tennessee 38152.

May 30, 2004: Panelist, National Civil Rights Museum. The panel was entitled, "Lessons from South Africa." I have no notes, transcripts or recordings. The museum is located at 450 Mulberry Street, Memphis, Tennessee 38103.

April 30-May 1, 2004: Participant, re-enactment of portions of the *Brown v. Board of Education* trial, ABA Young Lawyers Division Spring National Public Service Conference, Memphis, Tennessee. I have no notes, transcripts or recordings. The ABA is located at 321 North Clark Street, Chicago, Illinois 60610.

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March 16, 2004: Speaker, U.S. District Court Celebration of the 50th anniversary of the *Brown v. Board of Education* decision, Memphis, Tennessee. Remarks supplied.

February 26-27, 2004: Judge, National First Amendment Moot Court Competition, First Amendment Center. Moot court case materials and First Amendment Center coverage supplied.

December 10, 2003: Award presenter, Gruber Foundation Women's Rights Award Ceremony. I have no notes, transcripts or recordings. Press coverage supplied. The Foundation is located at 140 West 57th Street, #10C, New York, New York 10019.

November 5, 2003: Speaker, Women's Day event, Greater Middle Baptist Church. I have no notes, transcripts or recordings. The church is located at 4982 Knight Arnold Road, Memphis, Tennessee 38118.

April 28, 2003: Speaker, 9th Annual Crime Victims Rights Week, Rhodes College. I have no notes, transcripts or recordings. The College is located at 2000 N. Parkway, Memphis, Tennessee 38112.

March 30, 2003: Panelist, LeMoyne-Owen College. The discussion was entitled, "If Dr. King Was Alive Today, What Would He Say About Our Justice System?" I have no notes, transcripts or recordings. The college is located at 807 Walker Avenue, Memphis, Tennessee 38126.

January 24, 2003: Speaker, South Carolina Bar seminar to update attorneys and judges on civil law changes, Charleston, South Carolina. I have no notes, transcripts or recordings. The South Carolina Bar is located at 950 Taylor Street, Columbia, South Carolina 29201.

October 23, 2002: Speaker, U.S. Attorneys training program, Federal Corrections Institute, Memphis, Tennessee. My presentation was entitled, "Ethics and Professionalism: Staying at the Top of Your Game." Outline and transcript supplied.

October 9, 2002: Speaker, Memphis Area Legal Services meeting, Plaza Club. My remarks discussed the need for increased funding for and more legal pro bono work to meet the legal needs of low-income residents. I have no notes, transcripts or recordings. Press coverage supplied. MALS is located at 109 N. Main, Suite 200, Claridge House Building, Memphis, Tennessee 38103.

September 2002: Speaker, First Equal Justice Summit. The summit was held to highlight the need for additional funding for Memphis Area Legal Services and increased pro bono services. I have no notes, transcripts or recordings. MALS

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report supplied. MALS is located at 109 N. Main, Suite 200, Claridge House Building, Memphis, Tennessee 38103.

July 18, 2002: I spoke at a citizenship and naturalization ceremony at the federal courthouse in Memphis. I have no notes, transcripts or recordings. Press coverage is supplied. The courthouse is located at 167 North Main Street, Memphis, Tennessee 38103.

May 2002: Speaker, U.S. Department of State, Sao Paulo, Brazil. I spoke on civil and comparative rights. I have no notes, transcripts or recordings. The address for the U.S. Department of State is 2201 C Street NW, Washington, D.C. 20520.

April 5, 2002: Speaker, ABA Labor & Employment EEO Seminar, Fogelman Conference Center, Memphis, Tennessee. My speech was on public confidence in the justice system. Speech supplied.

February 28, 2002: Speaker, Civil Rights Symposium, University of Tennessee at Martin. My remarks were entitled, "Then and Now: Civil Rights & Voting." Transcript supplied.

November 13, 2001: Speaker, Memphis City Council Chambers. My speech was entitled, "Professionalism in the Practice of Law." Transcript supplied.

September 20, 2001: I administered the citizenship oath to a group of new citizens and gave brief remarks at the Clifford David Federal Building. I have no notes, transcripts or recordings. Press coverage supplied. The building is located at 167 North Main Street, Suite 951, Memphis, Tennessee 38103.

August 7, 2001: Panelist and reception speaker, ABA Annual Meeting, Fairmont Hotel, Chicago, Illinois. My panel was entitled, "Closing the Case with Style and Success." The reception celebrated the 15th Anniversary of the Commission on Racial and Ethnic Diversity in the Profession. I have no notes, transcripts or recordings. Press coverage supplied. The ABA is located at 321 North Clark Street, Chicago, Illinois 60610.

May 2001: Speaker, Memphis Bar Association, Law Day Celebration. Transcript supplied.

March 31, 2001: Judge, Final Round of National Criminal Justice Trial Advocacy Competition, sponsored by the ABA Criminal Justice Section and John Marshall Law School. I have no notes, transcripts or recordings. The ABA is located at 321 North Clark Street, Chicago, Illinois 60610.

February 2001: Presenter, Spirit of Excellence Awards Ceremony, San Diego, California. I presented the Nelson Mandela International Award to the ABA

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Commission on Racial and Ethnic Diversity Chair. I have no notes, transcripts or recordings. Press coverage supplied. The ABA is located at 321 North Clark Street, Chicago, Illinois 60610.

May 9, 2000: Speaker, Memphis National Teachers' Day Banquet, Memphis Marriott Hotel. Transcript supplied.

March 2000: Speaker, U.S. Department of State, Ankara and Istanbul, Turkey. I spoke on the Violence Against Women Act and domestic violence. I have no notes, transcripts or recordings. The address for the U.S. Department of State is 2201 C Street NW, Washington, D.C. 20520.

August 29, 1999: Speaker, Women's Day celebration, Ward Chapel AME Church. I introduced keynote speaker City Court Administrative Judge Ernestine Hunt Dorse. I have no notes, transcripts or recordings. Press coverage is supplied. The chapel is located at 1125 South Parkway E, Memphis, Tennessee 38106.

May 16, 1999: Speaker, Missionary Day celebration, Ward Chapel AME Church. I have no notes, transcripts or recordings. Press coverage supplied. The chapel is located at 1125 South Parkway E, Memphis, Tennessee 38106.

April 30, 1999: Commencement speaker, Shelby State Community College. I have no notes, transcripts or recordings. The college is now known as Southwest Tennessee Community College and is located at 737 Union Avenue, Memphis, Tennessee 38103.

1999: Faculty, National Judicial College, Reno, Nevada; Kazan, Russia; and Nizhny Novgorod, Russia. I spoke on gender bias studies; creating gender bias task forces; the role of justice in providing equal legal protection for women; and overcoming gender bias in the workplace and society and educating the public. I have no notes, transcripts or recordings. Press coverage is supplied. The NJC headquarters is located in the Judicial College Building/MS 358, Reno, Nevada 89557.

October 1998: Keynote speaker, ABA Leadership Forum, Dana Point, CA. I have no notes, transcripts or recordings. Press coverage supplied. The ABA is located at 321 North Clark Street, Chicago, Illinois 60610.

October 11, 1998: Speaker, National's Women's Day Celebration, St. Augustine Catholic Church. I have no notes, transcripts or recordings. The church is located at 1169 Kerr Avenue, No. 2, Memphis, Tennessee 38106.

September 26, 1998: Panelist, Just the Beginning Foundation event in Detroit, Michigan. I and other panel members discussed how we had adjusted to our roles

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as federal judges. I have no notes, transcripts or recordings. The Foundation is located at 233 South Wacker Drive, Suite 6600, Chicago, Illinois 60606.

August 1998: Panelist, ABA Annual Meeting, Toronto, Canada. The panel discussed minorities in the legal profession. I have no notes, transcripts or recordings. Press coverage supplied. The ABA is located at 321 North Clark Street, Chicago, Illinois 60610.

May 1998: Faculty, National Judicial College, Chemonics International and U.S. Department of State program, Moscow and Sochi, Russia. Between May 21 and 23, I participated in a commercial court workshop on "Calculation of Damages, Federal Claims and the Enforcement of Judgments" in Moscow. Between May 25 and 27, I presented the same workshop to judges in Sochi, Russia. I have no notes, transcripts or recordings. USAID report supplied. The NJC headquarters is located in the Judicial College Building/MS 358, Reno, Nevada 89557.

1998: Faculty, National Judicial College's Russian Women's Leadership Program, Reno, Nevada. I presented on gender bias studies in the United States. I have no notes, transcripts or recordings. The NJC headquarters is located in the Judicial College Building/MS 358, Reno, Nevada 89557.

1998: Speaker, US Agency for International Development program. I spoke on federal courts and creating gender bias task forces. I have no notes, transcripts or recordings. USAID is located in the Ronald Reagan Building, Washington, D.C. 20523.

October 1997: Speaker, Midwest Regional Conference on State-Federal Judicial Relationships, sponsored by the American Judicature Society, Oakbrook, Illinois. Transcript supplied.

August 1997: Award recipient, Arabella Babb Mansfield Award, American Bar Association Annual Meeting, San Francisco, California. I have no notes, transcripts or recordings. Press coverage, with excerpts of speech, supplied. The ABA is located at 321 North Clark Street, Chicago, Illinois 60610.

July 10, 1997: I participated in the Reading Enlightens and Develops You Project by reading to students in Memphis-area schools. I have no notes, transcripts or recordings. Press coverage is supplied.

May 1997: Speaker, Mt. Pisgah Missionary Baptist Church, Memphis, Tennessee. I spoke about the church's program for youths. I have no notes, transcripts or recordings. Press coverage is supplied. The church is located at 964 Fields Road, Memphis, Tennessee 38109.

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March 27, 1997: Panelist, Yale University School of Law. The panel was entitled, "Gender and the Bench." I have no notes, transcripts or recordings. The University is located at 127 Wall Street, New Haven, Connecticut 06511.

January 29 – February 4, 1997: Speaker, American Bar Association Mid-Year Meeting, San Antonio, Texas. I have no notes, transcripts or recordings. Press coverage is supplied. The ABA is located at 321 North Clark Street, Chicago, Illinois 60610.

1997: Faculty, National Judicial College, Almaty, Kazakhstan and Osh, Kyrgyzstan. I lectured on taxes, custom issues, and drug enforcement laws in the United States. I have no notes, transcripts or recordings. The NJC headquarters is located in the Judicial College Building/MS 358, Reno, Nevada 89557.

June 1996: Faculty, National Judicial College, Reno, Nevada. I have no notes, transcripts or recordings. Press coverage is supplied. The NJC headquarters is located in the Judicial College Building/MS 358, Reno, Nevada 89557.

May 19, 1996: Speaker, Peace with Justice, Grace United Methodist Church. I have no notes, transcripts or recordings. The church is located at 1619 East Raines Road, Memphis, Tennessee 38116.

May 10, 1996: Commencement speaker, University of Memphis. I have no notes, transcripts or recordings. Press coverage supplied. The University is located at 3720 Alumni Avenue, Memphis, Tennessee 38152.

March 16, 1996: Keynote speaker, Zeta Phi Beta Finer Womanhood Award Luncheon, Fogelman Executive Center, Memphis, Tennessee. I have no notes, transcripts or recordings. Press coverage supplied. The address for Zeta Phi Beta is 1734 New Hampshire Avenue, NW, Washington, D.C. 20009.

March 13, 1996: Speaker, Olive Branch Chamber of Commerce Monthly Luncheon. I have no notes, transcripts or recordings. Press coverage supplied. The Chamber is located at 9123 Pigeon Roost Road, Olive Branch, Mississippi 38654.

February 3, 1996: Speaker, First Spirit of Excellence Awards Ceremony, ABA Mid-Year Meeting, Baltimore, Maryland. I have no notes, transcripts or recordings. Press coverage supplied. The ABA is located at 321 North Clark Street, Chicago, Illinois 60610.

January 22, 1996: Speaker, National Civil Rights Museum, "Little Girls Aim High White Glove Reception." I have no notes, transcripts or recordings. Press coverage supplied. The museum is located at 450 Mulberry Sreeet, Memphis, Tennessee 38103.

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1996: Faculty, National Conference of Bankruptcy Judges, Atlanta, Georgia. I taught Russian judges about bankruptcy and case management issues. I have no notes, transcripts or recordings. The Conference is located at 241 Aristides Drive, Irmo, South Carolina 29063.

November 1995: Speaker, Memphis Bar Association. I gave remarks about professional ethics. I have no notes, transcripts or recordings. The Bar Association is located at Brinkley Plaza, 80 Monroe, Memphis, Tennessee 38103.

October 1995: Speaker, Hispanic National Bar Association. I spoke about the process for appointment to U.S. Bankruptcy Court. I have no notes, transcripts or recordings. The Bar Association is located at 1900 L Street NW, Suite 700, Washington, D.C. 20036.

May 1995: Speaker, American Bankruptcy Institute Annual Meeting, Washington, D.C. I spoke about the Bankruptcy Reform Act of 1994. I have no notes, transcripts or recordings. Press coverage supplied. The Institute is located at 44 Canal Center Plaza, Suite 400, Alexandria, Virginia 22314.

February 16, 1995: Speaker, Lane Chapel CME Church, Black History event. I have no notes, transcripts or recordings. The chapel is located at 6128 Fox Island Road, Tunica, Mississippi 38676.

January 7, 1995: Panelist, Harvard Law School. The panel's topic was "Racial Bias in the Courts." I have no notes, transcripts or recordings. Press coverage supplied. The Law School is located at 1563 Massachusetts Avenue, Cambridge, Massachusetts 02138.

January 1995: Participant, ABA Leadership Forum, Dallas, Texas. The forum consisted of small groups of bar leaders discussing ways to improve the judicial system. I have no notes, transcripts or recordings. Press coverage supplied. The ABA is located at 321 North Clark Street, Chicago, Illinois 60610.

1995: Faculty, National Judicial College, Moscow, Russia. I lectured on bankruptcy and basic contract law. I have no notes, transcripts or recordings. The NJC headquarters is located in the Judicial College Building/MS 358, Reno, Nevada 89557.

1995: Speaker, National Conference of Bankruptcy Judges, Memphis, Tennessee. I spoke before a group of Japanese judges about judicial decision-making and the rule of law. I have no notes, transcripts or recordings. The Conference is located at 241 Aristides Drive, Irmo, South Carolina 29063.

October 27, 1994: Award Recipient, Marion Griffin-Frances Loring Award, Association of Women Attorneys, Racquet Club, Memphis, Tennessee. I have no

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notes, transcripts or recordings. The Association is located at 200 Jefferson Avenue, Suite 1000, Memphis, Tennessee 38103.

August 1994: Host, ABA Commission on Racial & Ethnic Diversity in the Profession and Women Judges' Fund for Justice, New Orleans, Louisiana. I hosted a program entitled, "Achieving Justice in a Diverse America: What Color is Justice?" Although the ABA recorded the program, I was unable to obtain a copy and I have no other notes or materials. The ABA is located at 321 North Clark Street, Chicago, Illinois 60610.

March 30-31, 1994: Participant, ABA conference entitled, "Achieving Justice in a Diverse America: Summit on Racial and Ethnic Bias in the Justice System." I have no notes, transcripts or recordings. Press coverage supplied. The ABA is located at 321 North Clark Street, Chicago, Illinois 60610.

March 5, 1994: Keynote speaker, Peacemakers Award Dinner, Mid-South Peace & Justice Center, Christian Brothers University. I have no notes, transcripts or recordings. The Center is located at 1000 S. Cooper, Memphis, Tennessee 38104.

1994: Faculty National Judicial College, Reno, Nevada. I taught judges from Moldova and Ukraine. I have no notes, transcripts or recordings. The NJC headquarters is located in the Judicial College Building/MS 358, Reno, Nevada 89557.

August 7, 1993: Honoree, "Women of Color in the Judiciary" program, ABA Annual Meeting, Sheraton Hotel, New York, New York. I have no notes, transcripts or recordings. Press coverage supplied. The ABA is located at 321 North Clark Street, Chicago, Illinois 60610.

August 1993: Presentation co-chair, ABA Annual Meeting, New York, New York. During the program, "Ethnic Bias in Jury Selection," I discussed the case of *Batson v. Kentucky* and other cases dealing with jury selection. I have no notes, transcripts or recordings. Judges' Journal report is supplied. The ABA is located at 321 North Clark Street, Chicago, Illinois 60610.

March 19, 1993: Keynote speaker, 75th Anniversary Celebration Dinner of the Progressive Missionary Baptist Church. I have no notes, transcripts or recordings. The church is located at 394 Vance Avenue, Memphis, Tennessee 38126.

January 1993: Panelist, ABA's Central and East Europe Law Initiative, Bucharest, Romania. During the panel on judicial ethics, I discussed the code of conduct that governs judges in the United States. I have no notes, transcripts or recordings. USAID report supplied. The ABA is located at 321 North Clark Street, Chicago, Illinois 60610.

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Oct. 20, 1992: Speaker, Castalia Missionary Baptist Church. I have no notes, transcripts or recordings. The church is located at 1540 Castalia Street, Memphis, Tennessee 38114.

August 1992: Participant, ABA Awards Ceremony honoring Justice Thurgood Marshall, San Francisco, California. I have no notes, transcripts or recordings. Judges' Journal report is supplied. The ABA is located at 321 North Clark Street, Chicago, Illinois 60610.

March 29, 1992: Host, Women of Achievement Awards Ceremony, Memphis, Tennessee. I have no notes, transcripts or recordings. Press coverage is supplied. Women of Achievement, Inc. is located at P.O. Box 830353, Memphis, Tennessee 38182.

1992: Commencement Speaker, Middle College High School. I have no notes, transcripts or recordings. The school is located as 120 White Bridge Pike, Nashville, Tennessee 37209.

September 8, 1991: I played a judge during the Memphis Symphony's staging of a mock trial on Mozart's death entitled, "Trial of Salieri." I have no notes, transcripts or recordings. The Symphony is located at 585 S. Mendenhall Road, Memphis, Tennessee 38117.

Early 1990s: Speaker, "Preparing Youth for Leadership," Zeta Phi Beta Sorority, Memphis Tennessee. I have no notes, transcript or recording.

Early 1990s: Speaker, "The Automatic Stay -- For Protection When You Need It Most," Federal Bar Association, Memphis, Tennessee. I have no notes, transcript or recording. The address of the organization is 1220 North Fillmore Street, Suite 444 Arlington, Virginia 22201.

Early 1990s: Speaker, "Gender and Race Bias," University of Memphis, Department of Sociology. I have no notes, transcript or recording. The address of the University is 101 Wilder Tower, Memphis, Tennessee 38152.

Late 1980s: Speaker, "Issues on Comparable Worth," Department of Energy, Knoxville, Tennessee. I do not recall the sponsor of the event. I have no notes, transcript, or recording.

Late 1980s: Speaker, "Domestic Violence: A Blue Print for Action," presented to the American Judges Association, New Orleans, Louisiana. I have no notes, transcript or recording. The address of the organization is 300 Newport Avenue, Williamsburg, Virginia 23185.

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December 1987: I gave a speech to high school students on the rights and responsibilities of teenagers. Over the years, I have given similar talks to student groups from time to time. I have no notes, transcript or recording.

1987: Speaker, "Presiding in a Criminal Court, a Workshop," National Institute of Justice, Phoenix, Arizona. I have no notes, transcript or recording. The address of the organization is 810 7th Street, NW, Washington, DC 20531.

Mid-1980s: Speaker, "Getting Women Elected to Office." I spoke about the process of campaigning and how to get elected. I do not recall the sponsor of the event, and I have no notes, transcript or recording.

Mid-1980s: Speaker, Women's Political Caucus, Nashville, Tennessee. I have no notes, transcript or recording.

July 15, 1984: Luncheon Speaker, 15th National Training Program sponsored by Federally Employed Women. I have no notes, transcripts, or recordings. The address for FEW is 700 N. Fairfax Street, #510, Alexandria, Virginia 22314.

1982: I hosted a radio program first called "Lawscope" and later called "Studio 97" for local radio station K97. I did approximately five shows, discussing topical legal issues. The station no longer has recordings of these shows, and I have no notes, transcript or recording.

Each year since 1999, I have been invited to speak at the University of Memphis to present the Bernice B. Donald Scholarship to a student. I have only presented on four occasions: 1999, 2000, 2002 and 2003. My remarks are always extemporaneous. A Zeta Phi Beta release about the scholarship is supplied. The address of the University of Memphis is 3720 Alumni Avenue, Memphis, Tennessee 38152.

Since 1989, I have been on the faculty for the Federal Judicial Center. In addition to the presentations specifically listed here, I have taught courses on Avoiding Powers; Jury Trials; and Race & Gender Fairness Issues. I do not have materials for these courses and I do not recall the dates they were given. The address for the Federal Judicial Center is One Columbus Circle NE, Washington, D.C. 20002.

1981 to 1986: I worked with lawyers through Memphis Street Law to prepare high school students for mock trial competitions. I have no notes, transcripts or recordings. Memphis Street Law operated under the auspices of Memphis Area Legal Services and does not have an address. The address for Memphis Area Legal Services is 109 North Main, Suite 200, Claridge House Building, Memphis, Tennessee 38103.

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Speaker, Oakland County Bar Association, Southfield, Michigan. The speech focused on eliminating discrimination and bias in the legal system. I cannot recall when I gave this speech. Transcript supplied.

Speaker, South Carolina Bar Association. The speech is entitled, "National Trends: The Next Big Thing." I cannot recall when I gave this speech. Transcript supplied.

Presenter, Domestic Violence Issues. I cannot recall when or where I gave this presentation, but it was at an event sponsored by the National Judicial College. Outline supplied. The NJC headquarters is located in the Judicial College Building/MS 358, Reno, Nevada 89557.

Speaker, "Perception is Important." I spoke on the history of arbitration. I cannot recall when or where I gave this presentation. Transcript supplied.

Presenter, employment law. My presentation included background on relevant statutes and several case studies. I cannot recall when or where I gave this presentation. Outline supplied.

Presenter with Chief Judge Jon P. McCalla, "Reducing Bias through Effective Voir Dire," Memphis, Tennessee. I cannot recall when I gave this presentation, but the sponsor of the event was the Tennessee Bar Association. Outline supplied.

Speaker, "Trial Advocacy." My remarks were on how attorneys should present themselves and their cases during trial. I cannot recall when or where I gave this presentation. Transcript supplied. I do not recall the sponsor for this seminar.

c. List all interviews you have given to newspapers, magazines or other publications, or radio or television stations, providing the dates of these interviews and four (4) copies of the clips or transcripts of these interviews where they are available to you.

I have searched my files and Internet databases to refresh my memory in an effort to produce as complete a list of interviews as I could, but it is still possible there are some I was not able to locate.

Interview with Just the Beginning Foundation, Date Unknown [quote-reprinted in the *ABA Journal*, Dec. 1, 2010]. Copy supplied.

Bartholomew Sullivan, *Obama Nominates Judge Bernice Donald for Sixth Circuit Court of Appeals*, Commercial Appeal, Dec. 1, 2010. Copy supplied.

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Zack McMillin & Cindy Wolff, *Civil Rights Pioneer Benjamin Hook Fought for Justice, Compassion*, Scripps Howard News Service, Apr. 15, 2010, at B1. Copy supplied.

Interview during the University of Memphis' gala for the opening of its new law school building, Jan. 21, 2010. Video supplied.

Michael Donahue, *Grand Gala; Students Kick Up Their Heels at Opening of New University of Memphis Law School*, Commercial Appeal, Jan. 19, 2010, at M3. Copy supplied.

A Prized Fighter for Equal Justice, New York University School of Law Magazine, Fall 2009, at 10. Copy supplied.

Jeffrey B. Tracy, *U.S. Supreme Court Defines "Probability of Bias" Standard*, Litigation News, Aug. 6, 2009. Copy supplied.

Press Release, *Attorney and Advocacy Group to Share a $500K Gruber Foundation International Justice Prize on 10th Anniversary of Prize Program*, Gruber Foundation, June 10, 2009. Copy supplied.

Tom Bailey Jr., *Legal Eagles Mark 25 Years of Best Lawyers*, Commercial Appeal, Apr. 16, 2009, at D2. Copy supplied.

Interviewed for a video about Best Lawyers, which was shown at the organization's 25th Anniversary event, Apr. 2009. A copy of the video is posted at http://vimeo.com/4630345.

Christopher Sheffield, *Former Supreme Court Justice O'Connor Heads Association of Women Judges Conference*, Memphis Business Journal, Feb. 13, 2009. Copy supplied.

Buck Lewis, *What's So Great About Diversity?*, 45 Tenn. B.J. 3 (Feb. 2009). Copy supplied.

Benjamin Hooks Stepping Down as Pastor, Tennessee Tribune, Jan. 8, 2009, at 1A. Copy supplied.

Cathryn Stout, *Her Honor; Bernice Donald is Still Breaking Barriers, and is Being Lauded for Doing So*, Commercial Appeal, Aug. 19, 2008, at M1. Copy supplied.

Interview with Westblog, Aug. 8, 2008. I spoke about receiving the ABA Liberty Achievement Award. A copy of the interview is posted at http://tnalcorpcomm.wordpress.com/tag/tips/.

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Interview with Fox News 13, Apr. 2, 2008. I spoke about receiving the Candle on the Bluff award. A copy of the video is posted at http://www.myfoxmemphis.com/dpp/about_us/Candle_on_the_Bluff_Awards.

Lawrence Buser, *Professor's Double Life Serves as Caveat*, Commercial Appeal, Oct. 22, 2007, at B1. Copy supplied.

Interview with Fox News 13, Oct. 12, 2007. I spoke about receiving the Liberty Achievement Award. The interview is posted at http://www.myfoxmemphis.com/dpp/news/Judge_Honored_With_Prestigious_Award.

James Podgers, *Into Africa: Encounters with Sudanese Colleagues Prove Moving for U.S. Lawyers at Litigation Section Program*, 93 A.B.A.J. 65 (Oct. 2007). Copy supplied.

Mid-South Memories – Playing the Role, Commercial Appeal, Sept. 1, 2007, at B2. Copy supplied.

Lindsay Melvin, *Judge to Rule on Desegregation Order*, Commercial Appeal, July 24, 2007, at B1. Copy supplied.

Sharon E. Dobbins, *A Flower of Justice, Odell Horton Sr.*, Tri-State Defender, Mar. 15, 2006, at 9A. Copy supplied.

Chris Conley, *City Settles ADA Suit*, Commercial Appeal, Jan. 6, 2006, at A1. Copy supplied.

Wendy Isom, *Legendary Judge Leaves Indelible Mark*, Black Enterprise, Jan. 1, 2006, at 30. Copy supplied.

Choose Law: A Profession for All, ABA Young Lawyers Division, 2006, at 18. Copy supplied.

Shirley Downing, *Diversity on Bench Hailed*, Commercial Appeal, Apr. 5, 2004, at B1. Copy supplied.

Wayne Risher, *Federal Court Remembers Brown Decision*, Commercial Appeal, Mar. 17, 2004, at B6. Copy supplied.

Charisse R. Lillie, *Diversity in the Legal Profession*, Legal Intelligencer, July 22, 2002, at S2. Copy supplied.

Press Release, *Alumni Association to Bestow Highest Honors March 2*, University of Memphis, Jan. 24, 2002. Copy supplied.

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Bill Dries & Louis Graham, *Judge Admits Guilt for Misconduct*, Commercial Appeal, Aug. 30, 2001, at A1. Copy supplied.

Cindy Wolff, *Ceremonies Naturalize Foreign Children Adopted by Americans*, Commercial Appeal, Nov. 14, 2000, at B3. Copy supplied.

Yolanda Jones, *Help Provided by Legal Aid Agency Praised by Workers, Beneficiaries*, Commercial Appeal, Nov. 10, 2000, at B2. Copy supplied.

Peggy Burch, *All Rise: There's Work to Do*, Commercial Appeal, May 14, 2000, at G1. Copy supplied.

Peggy Burch, *Donald Helps Russian Women Recognize Gender Bias, Abuse*, Commercial Appeal, May 14, 2000, at G7. Copy supplied.

Laura Castro Trognitz, *Bench Talk*, 86 A.B.A.J. 56 (Mar. 2000). Copy supplied.

José Gaitán, *Letter from the Chair*, 5 Goal IX 2 (Spring 1999). Copy supplied.

Wiley Henry, *Judge Thomas Weathers Protest Storm*, Commercial Appeal, Aug. 5, 1998, at 1A. Copy supplied.

Chris Klein, *He Hands Out Bootstraps*, Nat'l L.J. A1 (col. 2) (Feb. 2, 1998). Copy supplied.

David Segal, *For Minority Attorneys, Big Law Firms Prove Trying*, Washington Post, Jan. 16, 1998, at A01. Copy supplied.

Native American Bar Offers New Directory, Fla. B. News 15 (Sept. 1, 1997). Copy supplied.

Lisa Jennings, *Who Are 'Model' Women?*, Commercial Appeal, Nov. 10, 1996, at 1E. Copy supplied.

Nate Hobbs, *Summit on Female Judges Set to Start*, Commercial Appeal, Sept. 23, 1996, at 1B. Copy supplied.

Tammy Brady, *Another First, Another Challenge for Bernice Donald of Memphis*, Tennessee Tribune, Sept. 11, 1996, at 6. Copy supplied.

Richard C. Reuben & Debra Cassens Moss, *Affirmative Inaction*, 82 A.B.A.J. 18 (Sept. 1996). Copy supplied.

Jodi Rave, *Native Americans Lauded for Legal Work*, Boulder Daily Camera, Feb. 3, 1996, at 1A. Copy supplied.

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Anna Marie Kukec, *Hispanic Executive Directors Provide Service to Bar Associations; Pave Leadership Path*, 20 B. Leader 23 (Winter 1995). Copy supplied.

Michael Kelley, *Judge Bernice Donald, a Judge for and from the People*, Commercial Appeal, Dec. 28, 1995, at 1C. Copy supplied.

James W. Brosnan, *Donald Nominated for U.S. Dist. Court*, Commercial Appeal, Dec. 8, 1995, at 1A. Copy supplied.

Laurie Asseo, *Washington Today: Bar Groups Give Minority Lawyers a Voice*, AP Online, Nov. 24, 1995. Copy supplied.

Faye A. Silas, *Reports Offer Status of Women, Minorities in ABA Leadership*, 20 B. Leader 4 (Fall 1995). Copy supplied.

ABA Endorses Affirmative Action, 4 Goal IX 1 (Fall 1995). Copy supplied.

Kirke Kickingbird, *Diversity is Our Great Strength*, 4 Goal IX 1 (Fall 1995). Copy supplied.

Nate Hobbs, *Donald's Career a Series of 'Firsts'*, Commercial Appeal, July 20, 1995, at 1B. Copy supplied.

Nate Hobbs, *Ford to Propose Bernice Donald for U.S. Judgeship*, Commercial Appeal, July 19, 1995, at 1A. Copy supplied.

Stephanie B. Goldberg, *Rewards in Diversity*, 81 A.B.A.J. 96 (July 1995). Copy supplied.

Jill Schachner Chanen, *Reaching Out to Women of Color*, 81 A.B.A.J. 105 (May 1995). Copy supplied.

Portia C. McCaskill, *Judge Bernice Donald Speaks on Black History*, Tri-State Defender, Feb. 19, 1995, at 11A. Copy supplied.

Chris Conley, *Order in the Court; Lawyer-Mentors Seek to Tame 'Rambos'*, Commercial Appeal, Jan. 26, 1995, at B1. Copy supplied.

Chris Conley, *U.S. Court Groundbreaker Overcame Racial Obstacles*, Commercial Appeal, Dec. 6, 1994, at 1B. Copy supplied.

James Chisum, *Let's Dig In, Uproot Crime, Says U.S. Atty Coleman*, Commercial Appeal, Oct. 19, 1993, at B1. Copy supplied.

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Anna Byrd Davis & Quintin Robinson, *Some Houses, Apts. Aren't Worth Fixing, Landlords Say*, Commercial Appeal, Aug. 1, 1993, at A11. Copy supplied.

Chris Conley & James W. Brosnan, *Nashvillian Leads Race for Appeals Court*, Commercial Appeal, July 9, 1993, at A1. Copy supplied.

Terry Keeter, *Mathews Endorses Donald for Appeals Slot*, Commercial Appeal, May 29, 1993, at B1. Copy supplied.

Terry Keeter, *Court Needs West Tenn. Judge, Say Contenders*, Commercial Appeal, May 23, 1993, at B1. Copy supplied.

James W. Brosnan & Terry Keeter, *Donald and Bailey Win Backing for 6th Circuit Court*, Commercial Appeal, May 7, 1993, at B1. Copy supplied.

Paul Zelewsky, *Women Judges Seek Increase in Numbers*, Chicago Lawyer, Apr. 1, 1991. Copy supplied.

Anissa Tarver, *Project Preparing Teens for Careers*, Commercial Appeal, Aug. 9, 1990, at E9. Copy supplied.

Additionally, I have been interviewed on several local television stations. While I have been unable to obtain recordings or transcripts for these appearances, the dates and times of the interviews are listed below:

Good Morning Memphis on Fox 13
11/29/07 at 00:05:30
1/9/2009 at 8:55:02
2/23/2009 at 8:58:15

Fox News 13
3/18/2010 at 17:00:10

News Channel 3
1/25/2006 at 6pm at 22:00:00
8/2/2007 at 6pm at 00:10:56

13. **Judicial Office**: State (chronologically) any judicial offices you have held, including positions as an administrative law judge, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

Shelby County General Sessions Court, Criminal Division (1982 – 1988)

I was elected in a non-partisan election from a field of nine candidates. As a General Session Judge, I presided over trials of state misdemeanor offenses, and the preliminary hearings of state felony cases involving alleged crimes against persons and property. I

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conducted bail hearings, suppression hearings, hearings on unlawful searches and seizures, and made indigency determinations for the appointment of the public defender. I also conducted probation violation hearings. I routinely reviewed search warrant applications and reviewed citizen requests for the issuance of arrest warrants. Jurisdiction includes all such matters in criminal cases in accord with Tenn. Code Ann. §§ 16-15-401, 16-15-402, 16-15-501, 40-1-107, and 40-1-109 in Shelby County, Tennessee.

U.S. Bankruptcy Court, Western District of Tennessee (1988 – 1996)

In 1988, I was appointed by the Sixth Circuit to a fourteen-year term on the Bankruptcy Court. As a Bankruptcy Judge, I presided over complex and simple Chapter 11 cases, as well as cases under Chapters 7, 12, and 13 of the Bankruptcy Code, 11 U.S.C. § 101 et seq. Jurisdiction of this Article I Court includes motions pursuant to F.R.B.P. 9014 and adversary proceedings arising under or related to Title 11 of the United States Code. As a bankruptcy judge, I administered commercial and consumer cases under all relevant chapters of the Bankruptcy Code.

United States District Court, Western District of Tennessee (1996 – Present)

As an Article III federal judge and pursuant to 28 U.S.C. § 1331, 28 U.S.C. § 1332, and 18 U.S.C. § 3231, I preside over cases of crimes covered by statutes enacted by Congress; cases involving other federal laws and regulations; as well as matters involving interstate and international commerce, securities and commodities regulation, admiralty cases, and international trade law. I also preside over intellectual property, patent, copyright, trademark, and unfair compensation cases. My jurisdiction also includes cases involving rights under treaties, bankruptcy appeals, Social Security appeals, and habeas corpus actions.

a. Approximately how many cases have you presided over that have gone to verdict or judgment?

I have presided over approximately 3000 trials during my career on the bench.

i. Of these, approximately what percent were:

jury trials:	5%
bench trials:	95%
civil proceedings:	25%
criminal proceedings:	75%

b. Provide citations for all opinions you have written, including concurrences and dissents.

See attached list.

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c. For each of the 10 most significant cases over which you presided, provide: (1) a capsule summary of the nature the case; (2) the outcome of the case; (3) the name and contact information for counsel who had a significant role in the trial of the case; and (3) the citation of the case (if reported) or the docket number and a copy of the opinion or judgment (if not reported).

1. United States v. Mardis, Case No. 2:08-cr-20021, 670 F. Supp. 2d 696 (W.D. Tenn. 2009); see also Docket Entry ("D.E.") No. 165, entered on June 3, 2009; D.E. No. 171, entered on June 24, 2009.

This case is a prosecution of a Caucasian defendant for the alleged murder of an African-American code enforcement officer due to the officer's race. The defendant previously pled nolo contendere in state court to second degree murder and received a sentence of fifteen years. The United States subsequently brought federal charges. Although the Department of Justice has since decided not to seek the death penalty, this was originally a capital case. The case has involved a number of constitutional questions, including whether the prosecution is untimely, whether the Dual Sovereignty Exception to the Double Jeopardy Clause applies and thus permits the federal prosecution, and whether the Constitution's separation of powers was violated by a Congressman who allegedly contacted the Department of Justice to advocate for the initiation of federal charges. Currently pending before the Court is the Magistrate Judge's report and recommendation on the defendant's motions to suppress evidence, including a statement by the defendant.

This case is set for trial in early 2011. On an interlocutory appeal filed by the defendant, the Sixth Circuit affirmed the Court's finding that the Double Jeopardy Clause does not bar this prosecution. United States v. Mardis, 600 F.3d 693 (6th Cir. 2010), cert. denied, __ S. Ct. __, 2010 WL 3321494 (Oct. 4, 2010). No appellate opinions have yet been issued addressing the Court's other rulings.

Counsel for the United States: AUSA Stephen Parker and DOJ Trial Attorney Jonathan Skrmetti, U.S. Attorney's Office, 167 N. Main Street, Suite 800, Memphis, TN 38103, 901-544-4231

Counsel for Defendant: Howard Manis, Manis & Solomon PC, 6373 N. Quail Hollow Road, Suite 101A, Memphis, TN 38120, 901-682-0069; Blake D. Ballin, Ballin, Ballin & Fishman, 200 Jefferson Avenue, Suite 1250, Memphis, TN 38103, 901-525-6278; and Coleman W. Garrett, Garrett & Associates, 212 Adams Avenue, Memphis, TN 38103, 901-529-0022

2. United States v. Shields, Case No. 2:04-20254 (D.E. No. 557, entered on May 11, 2009; see also D.E. No. 555, entered on April 29, 2009; D.E. No. 582, entered July 14, 2009; and D.E. No. 603, entered on August 28, 2009).

The United States indicted four defendants for federal crimes arising out of an alleged kidnapping and murder. Initiated as a death penalty case, the Government ultimately decided to pursue the death penalty as to two defendants. One of them filed a motion

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arguing that he was ineligible for the death penalty on the grounds of mental retardation. The Government's psychologists opined that he was not mentally retarded. The defense produced an expert who opined otherwise and another psychologist concurred. Over the course of a hearing that lasted several days, the Court heard testimony from psychological experts and individuals familiar with the defendant. Based upon the evidence, the Court then found that he was mentally retarded and therefore ineligible for the death penalty under both 18 U.S.C. § 3596(c) and Atkins v. Virginia, 36 U.S. 304 (2002). (D.E. No. 557.) The Government declined to appeal the Court's ruling.

The defendant was convicted following a jury trial in 2009 and sentenced in January 2010 to life in prison with no parole plus fifteen years. His appeal to the Sixth Circuit is currently pending. One co-defendant previously pled guilty and is scheduled to be sentenced at the end of November 2010. The other two defendants are awaiting trial.

Counsel for the United States: AUSA Tony Arvin and AUSA Lorraine Craig, U.S. Attorney's Office, 167 N. Main Street, Suite 800, Memphis, TN 38103, 901-544-4231

Counsel for Defendant Shannon Shields: Howard L. Wagerman and Jeff C. Woods, Wagerman Law Firm, 200 Jefferson Avenue, Suite 1313, Memphis, TN 38103, 901-527-0644

3. United States v. Tennessee, Case No. 2:92-2062, reported decisions at 632 F. Supp. 2d 795 (W.D. Tenn. 2009) and 256 F. Supp. 2d 768 (W.D. Tenn. 2003); unreported decisions available at 2010 WL 1212077 (W.D. Tenn. Mar. 23, 2010) and 2009 WL 3614614 (W.D. Tenn. Oct. 27, 2009); see also D.E. No. 2328, entered on February 18, 2009.

The United States filed suit in 1992 against the State of Tennessee and others to remedy grossly substandard and life-threatening conditions at a state facility for developmentally disabled individuals. The case has grown to include a class of mentally retarded individuals throughout West Tennessee. The Court continues to monitor compliance with the remedial orders. Recently, the Court approved a change in service providers, permitting the state of Tennessee to transition class members into a program administered by Blue Cross Blue Shield of Tennessee.

This case has formally been closed since 1995, but action relating to the remedial orders continues. In 2005, the Sixth Circuit reversed the Court's decision to reject a proposed settlement as fair and reasonable. United States v. Tennessee, 143 F. App'x 656 (6th Cir. 2005). More recently, the Court denied a motion by the State of Tennessee to dismiss the case, and an appeal of that decision remains pending with the Sixth Circuit.

The primary counsel during my time handling this litigation have been the following:

Counsel for the United States: Jonas Geissler, U.S. Department of Justice, Civil Rights Division, 950 Pennsylvania Avenue NW, Special Litigation Section, Washington, D.C.

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20530, 202-353-8866; and Matthew Donnelly, U.S. Department of Justice, 950 Pennsylvania Avenue NW, Washington, D.C. 20530, 202-514-6255

Counsel for Intervenor Plantiff Class: Earl Schwarz, 2157 Madison Ave., Memphis, TN 38104, 901-216-4790 Jack Derryberry, Jr., Ward, Derryberry & Thompson, 404 James Robertson Parkway, Suite 1720, Nashville, TN 37219, 615-244-0554; and Judith Gran, Reisman Carolla Gran, LLP, 19 Chestnut Street, Haddonfield, NJ 08033, 856-354-0061

Counsel for State of Tennessee et al: Michael W. Kirk, Cooper & Kirk PLLC, 1523 New Hampshire Avenue NW, Washington, D.C. 20036, 202-220-9600; Dianne Dycus, Office of the Tennessee Attorney General and Reporter, Civil Division, P.O. Box 20207, Nashville, TN 37202-0207, 615-741-6420; Jonathan Lakey, Pietrangelo Cook, 6410 Poplar, Suite 190, Memphis, TN 38119, 901-685-2662; and Derek Shaffer, Cooper & Kirk PLLC, 1523 New Hampshire Avenue NW, Washington, D.C. 20036, 202-220-9600

Counsel for Intervenor Defendants: William F. Sherman, Law Offices of William F. Sherman, 809 North Palm Street, Little Rock, AR 72205, 501-372-3148

4. Ford v. Beavers, Case No. 2:06-cv-02031 (D.E. No. 30, entered on February 1, 2006).

This litigation arose from an election contest following a special election to fill a vacant state senate seat. The central question for the Court was the preservation of the due process and equal protection rights of the voters who had cast ballots in the election and were subsequently having the validity of their votes challenged by the losing candidate in proceedings before the state senate. The proceedings were to determine whether the results of the elections should be voided on account of voter fraud. The plaintiffs ultimately received declaratory relief from the Court protecting the rights of voters who cast ballots in the special election.

The defendants appealed to the Sixth Circuit, which held that the appeal was by that point moot and remanded the case for a determination of whether the plaintiffs were entitled to attorney fees. Ford v. Wilder, 469 F.3d 500 (6th Cir. 2006). The Court then awarded plaintiff attorney fees, Ford v. Tennessee Senate, 2007 WL 5659414 (W.D. Tenn. Aug. 15, 2007), and the case thereafter settled.

Counsel for Plaintiffs: David J. Cocke, Theodore T. Kitai, Matthew P. Cavitch, and Andrew Wohlfarth, 1000 Ridgeway Loop Road, Suite 200, Memphis, TN 38120, 901-767-1234; Steven J. Mulroy, Law Office of Steven J. Mulroy, 1035 Perkins Terrace, Memphis, TN 38117, 901-678-4494; and Richard H. Pildes, New York University School of Law, 40 Washington Square South, 507, New York, NY 10012, 212-998-6377

Counsel for Defendants: William N. Helou, 2525 West End Avenue, Suite 1475, Nashville, TN 37203, 615-846-8000; Janet M. Kleinfelter, Office of the Tennessee Attorney General and Reporter, P.O. Box 20207, Nashville, TN 37202, 615-741-7403; Timothy D. Patterson and John L. Ryder, Harris Shelton Hanover Walsh, PLLC, One Commerce Square, Suite 2700, Memphis, TN 38103, 901-525-1455; Eugene Gaerig and

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Robert Rolwing, Shelby County Attorney, 160 N. Main Street, Suite 660, 6th Floor, Memphis, TN 38103, 901-545-4320

5. Robinson v. Shelby Cnty. Bd. of Educ., Case No. 2:63-cv-4916 (D.E. No. 460, entered on July 26, 2007).

Filed in 1963 as a class action alleging racial segregation by the Shelby County Schools, this case came before the Court in 2006 on a joint motion of the parties to dissolve the Court's prior orders and terminate the litigation. The Court found that the school system had satisfied the requirements for unitary status as to issues of staff, transportation and facilities, but not as to issues of extra-curricular activities, student assignment and faculty integration. The Court granted in part and denied in part the motion to dismiss and imposed a plan for obtaining unitary status, which would thereby end the vestiges of racial segregation.

With one judge dissenting, the Sixth Circuit reversed and ordered the case dismissed. Robinson v. Shelby County Bd. of Educ., 566 F.3d 642 (6th Cir. 2009).

Primary counsel during my handling of this case were the following:

Counsel for the individual Plaintiffs: Richard B. Fields, The Law Office of Richard B. Fields, 688 Jefferson Avenue, Memphis, TN 38105, 901-543-4299

Counsel for the United States: John R. Moore, U.S. Department of Justice, Civil Rights Division, Educational Opportunity Section, 601 D Street NW, Suite 4114, Washington, D.C. 20530, 202-514-4092

Counsel for Defendants: Richard Winchester, The Winchester Law Firm, 6060 Poplar Avenue, Suite 295, Memphis, TN 38119, 901-685-9222; and Valerie Speakman, Shelby County Schools, 160 S. Hollywood Street, Room 250, Memphis, TN 38112, 901-321-2526

Counsel for amicus Operation Rainbow Push: Javier Bailey, Walter Bailey & Associates, 100 N. Main Street, Suite 3002, Memphis, TN 38103, 901-575-8702

6. In re MacDonald, Case Nos. 2:04-cv-02764, 2:04-cv-02766, 2:04-cv-02979 BBD, 2:04-cv-02765 BBD, 356 B.R. 416 (W.D. Tenn. 2006).

This case involved several bankruptcy appeals that were consolidated in order for the Court to consider the question of venue for filing a petition for bankruptcy. The cases presented a complex issue of statutory construction, which had sharply divided the bankruptcy courts in the Western District of Tennessee.

On appeal, the Sixth Circuit affirmed the Court's decision. Thompson v. Greenwood, 507 F.3d 416 (6th Cir. 2007). The U.S. Supreme Court denied certiorari. 129 S. Ct. 193 (2008), reh'g denied, 129 S. Ct. 675.

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Counsel: Sean M. Haynes, U.S Trustee, 200 Jefferson Avenue, Suite 400, Memphis, TN 38103, 901-544-3251; B. David Sweeney, 5108 Stage Road, Suite 2, Memphis, TN 38134, 901-386-3662; John L. Ryder, Harris Shelton Hanover Walsh, PLLC, One Commerce Square, Suite 2700, Memphis, TN 38103, 901-525-1455; Steven F. Bilsky, Law Office of Steven F. Bilsky, 100 N. Main Street, Suite 405, Memphis, TN 38103, 901-525-6692; and Holly W. Schumpert, Law Office of Holly W. Schumpert, 100 N. Main Street, Suite 948, Memphis, TN 38103, 901-201-5938

7. Federal Express Corp. v. U.S. Postal Serv., Case No. 2:96-cv-3151, reported decisions available at 75 F. Supp. 2d 807 (W.D. Tenn. 1999); 55 F. Supp. 2d 813 (W.D. Tenn. 1999); 40 F. Supp. 2d 943 (W.D. Tenn. 1999); 959 F. Supp. 832 (W.D. Tenn. 1997); see also D.E. No. 53, entered on March 10, 1999; D.E. No. 86, entered on July 28, 1999; D.E. No. 98, entered on November 22, 1999.

   This was a case brought by FedEx, initially against the U.S. Postal Service and, later, against other defendants as well. The case arose out of allegations of false advertising and unfair competition. The case presented a number of sophisticated issues, including whether Congress had waived sovereign immunity under the Postal Reorganization Act such that a private company could directly sue the Postal Service under the Lanham Act. The Court answered this question in the affirmative, and permitted an interlocutory appeal.

   The Sixth Circuit affirmed. Federal Express Corp. v. U.S. Postal Serv., 151 F.3d 536 (6th Cir. 1998). The case ultimately settled.

   Counsel for Plaintiff: Dwayne S. Byrd and Lester A. Bishop, FedEx Corporation, Legal Department, 3620 Hacks Cross Road, 3rd Floor, Building B, Memphis, TN 38125, 901-434-8600; and R. Larry Brown, Jackson Lewis LLP, 999 Shady Grove Road, Suite 110, Memphis, TN 38120, 901-462-2600

   Counsel for Defendants: Joe A. Dycus, Resolute Systems, Inc., 50 N. Front Street, Suite 650, Memphis, TN 38103, 901-523-2930; Brendan J. O'Rourke, Proskauer Rose, LLP, 1585 Broadway, New York, NY 10036, 212-969-3120; Charles F. Morrow, Butler, Snow, O'Mara, Stevens & Cannada, PLLC, 6075 Poplar Avenue, Suite 500, Memphis, TN 38119, 901-680-7317; Dana L. Dorgan-McCarren, 1740 Broadway, New York, NY 10019, 212-468-4800; Kevin J. Perra, Proskauer Rose, LLP, 1585 Broadway, New York, NY 10036, 212-969-3454, Lawrence I. Weinstein, Proskauer Rose, LLP, 1585 Broadway, New York, NY 10036, 212-969-3240; Douglas F. Halijan, Burch, Porter & Johnson, PLLC, 130 N. Court Avenue, Memphis, TN 38103, 901-524-5123; and Jeff Feibelman Burch, Porter & Johnson, PLLC, 130 N. Court Avenue, Memphis, TN 38103, 901-524-5109

8. United States v. Haynes, Case No. 2:01-cr-20247, reported decision available at 269 F. Supp. 2d 970 (W.D. Tenn. 2003); see also United States v. Haynes, 265 F. Supp. 2d 914 (W.D. Tenn. 2003); United States v. Haynes, 242 F. Supp. 2d 540 (W.D. Tenn. 2003).

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This was a death penalty prosecution of individuals for a murder that occurred during the course of a bank robbery. The Court considered motions from the defense that the death penalty should be declared unconstitutional as applied based on race, which the Court denied. Specifically, the Court considered application of the Supreme Court's then-recent decision in Ring v. Arizona, 536 U.S. 584, 122 (2002). The Court also considered other substantial issues of law relating the trial of a capital case.

Two defendants pled guilty, but the third (Defendant Haynes) proceeded to trial and was found guilty of all counts. After deliberation in the penalty phase, the jury was unable to reach a unanimous verdict, and the Court imposed a sentence of life imprisonment plus ten years. All three defendants are now serving life sentences. In an appeal by one of the defendants, the Sixth Circuit affirmed. United States v. Johnson, 416 F.3d 464 (6th Cir. 2005), cert. denied, 546 U.S. 1191 (2006). The same defendant subsequently filed a pro se habeas petition, which the Court denied on October 30, 2009 and which is now on appeal. See Terance Johnson v. United States of America, Case No. 2:07-cv-02014 (W.D. Tenn.).

Counsel for the United States: AUSA Tony Arvin, U.S. Attorney's Office, 167 N. Main Street, Suite 800, Memphis, TN 38103, 901-544-4231; and (former AUSA) Thomas L. Parker, Baker Donelson, First Tennessee Bank Building, 165 Madison Avenue, Suite 2000, Memphis, TN 38103, 901-577-2179

Counsel for Defendant Aaron Haynes: Howard L. Wagerman, Wagerman Law Firm, 200 Jefferson Avenue, Suite 1313, Memphis, TN 38103, 901-527-0644; Jacob E. Erwin, 2000 Jefferson Avenue, Suite 700, Memphis, TN 38103, 901-522-1365; and Robert C. Brooks, 100 N. Main Street, Suite 2601, Memphis, TN 38103, 901-763-2832

Counsel for Defendant Terance Johnson: Robert L. Hutton, Glanker Brown, One Commerce Square, Suite 1700, Memphis, TN 38103, 901-525-1322; and William D. Massey, 3074 East Street, Memphis, TN 38128, 901-384-4004

Counsel for Defendant William O. Maxwell: Arthur E. Quinn, 62 N. Main Street, Memphis, TN 38103, 901-302-4868; and (now Criminal Court Judge) Paula Skahan, 201 Poplar Avenue, Suite 519, Memphis, TN 38103, 901-545-5850

9. Alley v. Bell, Case No. 2:97-cv-03159, 101 F. Supp. 2d 588 (W.D. Tenn. 2000); see also D.E. No. 97, entered on November 4, 1999.

This case was filed by a petitioner in state custody, who had been sentenced to death in state court following his convictions for kidnapping, rape, and murder. The petition sought federal habeas relief on a number of grounds, none of which the Court found to have merit.

The Sixth Circuit affirmed the Court's denial of habeas relief. Alley v. Bell, 307 F.3d 380 (6th Cir. 2002), reh'g denied, Dec. 20, 2002, cert. denied, 540 U.S. 839 (2003), reh'g denied, 540 U.S. 1086 (2003).

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Counsel for Petitioner: Paula R. Bottei, Office of the Federal Public Defender, 810 Broadway, Suite 200, Nashville, TN 37203, 615-736-5047; and Robert L. Hutton, Glankler Brown, One Commerce Square, Suite 1700, Memphis, TN 38103, 901-525-1322

Counsel for Respondent: Glenn R. Pruden, 425 5th Avenue North, Nashville, TN 37243, 615-741-3491

10. Spinks v. Perkins, Johnson & Settle, PLLC, Case No. 2:03-cv-02568 (D.E. No. 384, entered on March 22, 2007).

This case is representative of several I handled at approximately the same time that involved allegations of "predatory lending" practices by the defendants. In Spinks, the plaintiff alleged that the defendants acted in concert to lure African-American homeowners into exploitative mortgage loans in violation of RICO, the Fair Housing Act, the Truth-in-Lending Act, the Real Estate Settlement Procedures Act, the Equal Credit Opportunity Act, and state law. Cases over which I presided raising similar claims included the following: Tyson v. Equity Title and Escrow Co. (Case No. 2:00-02559); Carr v. Home Tech Servs. Co., Inc. (Case No. 2:03-cv-02569); Johnson v. Home Tech Servs. Co., Inc. (Case No. 2:03-cv-02567); Beard v. Home Tech Servs. Co., Inc. (Case No. 2:04-cv-02183); Willingham v. Worldwide Mortg. Corp. (Case No. 2:04-cv-02391); Bowen v. Worldwide Mortg., (Case No. 2:04-cv-2575); Pitchford v. Worldwide Mortg. (Case No. 2:04-cv-02743); and Lewis v. Memphis Fin. Servs., Inc. (Case No. 2:05-cv-02524).

The Court's main substantive ruling in Spinks was the order granting in part and denying in part the motion to dismiss filed by one of the defendants. The plaintiff ultimately settled some of her claims and received a default judgment as to the defendants that did not appear. The other predatory lending cases had similar results.

Counsel: Margaret R. Barr-Myer, 1770 Kirby Parkway, Suite 105, Germantown, TN 38138; Sapna V. Raj, Memphis Area Legal Services, Inc., 109 N. Main Street, Suite 200, Claridge House Building, Memphis, TN 38103, 901-523-8822; Webb A. Brewer, 109 North Mid America Mall, Suite 200, Memphis, TN 38103; Evan Nahmias, Lisa Ann Overall and Loys A. Jordan, Pembroke Square, 119 South Main Street, Suite 400, Memphis, TN 38103, 901-526-0606; Bruce E. Alexander, Weiner Brodsky Sidman Kider, P.C., 1300 19th Street NW, 5th Floor, Washington, D.C. 20036, 202-557-3257; Jennifer Shorb Hagerman, Burch Porter & Johnson, 130 N. Court Avenue, Memphis, TN 38103, 901-524-5162; Mitchel H. Kider, Weiner Brodsky Sidman Kider, P.C., 1300 19th Street NW, 5th Floor, Washington, D.C. 20036, 202-557-3511; Roscoe Porter Field, Burch Porter & Johnson, 130 N. Court Avenue, Memphis, TN 38103, 901-524-5126; Louis F. Allen, Glankler Brown, One Commerce Square, Suite 1700, Memphis, TN 38103, 901-576-1783; Robert B. Hale, Glankler Brown, One Commerce Square, Suite 1700, Memphis, TN 38103, 901-576-1849

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d. For each of the 10 most significant opinions you have written, provide: (1) citations for those decisions that were published; (2) a copy of those decisions that were not published; and (3) the names and contact information for the attorneys who played a significant role in the case.

1. Blanc v. Morgan, __ F. Supp. 2d __, No. 2:10-cv-2314, 2010 WL 2696791 (W.D. Tenn. July 9, 2010).

Counsel for Petitioner: C. Suzanne Landers, The Landers Firm, 65 Union Avenue, 9th Floor, Memphis, TN 38103, 901-522-1010; and Lucie K. Brackin, The Landers Firm, 65 Union Avenue, 9th Floor, Memphis, TN 38103, 901-522-1010

Counsel for Respondent: Lauren Pasley-Ward, Law Office of Lauren Pasley-Ward, 242 Polar Avenue, Memphis, TN 38103, 901-526-1088

2. Jacobs v. Memphis Convention and Visitors Bureau, __ F. Supp. 2d __, No. 2:09-cv-02599, 2010 WL 1840890 (W.D. Tenn. May 10, 2010).

Counsel for Plaintiff: Michelle Howard-Flynn, The Howard-Flynn Law Group, 119 S. Main Street, Suite 500, Memphis, TN 38103, 901-322-8025

Counsel for Defendants: Mildred L. Sabbatini, Spicer Rudstrom, PLLC, 175 Toyota Plaza, Suite 800, Memphis, TN 38103, 901-523-1333; Eric E. Hudson, Butler, Snow, O'Mara, Stevens & Cannada, PLLC, 6075 Poplar Avenue, Suite 500, Memphis, TN 38119, 901-680-7200; Kenneth R. Besser, Besser Law Firm, 100 N. Main Street, Suite 2909, Memphis, TN 38103, 901-216-4770; Adam Calhoun Simpson, Martin Tate Morrow & Marston, P.C., 6410 Poplar Avenue, Memphis, TN 38119, 901-522-9000; Amy T. McConnell, Office of the Tennessee Attorney General and Reporter, P.O. Box 20207, Nashville, TN 37243, 615-741-3491; and Joshua D. Baker, Office of the Tennessee Attorney General and Reporter, P.O. Box 20207, Nashville, TN 37243, 615-741-1481

3. United States v. Mardis, 670 F. Supp. 2d 696 (W.D. Tenn. 2009).

Counsel for the United States: AUSA Stephen Parker, U.S. Attorney's Office, 167 N. Main Street, Suite 800, Memphis, TN 38103, 901-544-4231 and DOJ Trial Attorney Jonathan Skrmetti, U.S. Attorney's Office, 167 N. Main Street, Suite 800, Memphis, TN 38103, 901-544-4231

Counsel for Defendant: Howard Manis, Manis & Solomon PC, 6373 N. Quail Hollow Road, Suite 101A, Memphis, TN 38120, 901-682-0069; Blake D. Ballin, Ballin, Ballin & Fishman, 200 Jefferson Ave., Ste. 1250, Memphis, TN 38103, 901-525-6278, and Coleman W. Garrett, Garrett & Associates, 212 Adams Avenue, Memphis, TN 38103, 901-529-0022

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4. Tennessee Scrap Recyclers Ass'n v. Bredesen, No. 2:08-cv-02073, 2008 WL 6708174 (W.D. Tenn. June 3, 2008), aff'd, 556 F.3d 442 (6th Cir. 2009).

   Counsel for Plaintiff: John McQuiston II, Evans Petree, PC, 1000 Ridgeway Loop Road, Suite 200, Memphis, TN 38120, 901-525-6781

   Counsel for Defendants: Steven A. Hart, Office of the Attorney General, Special Litigation, P.O. Box 20207, Nashville, TN 37202, 615-741-2009; and Philip Eric Oliphant, City Attorney's Office, 125 N. Main Street, Suite 336, Memphis, TN 38103, 901-576-6531

5. In re MacDonald, 356 B.R. 416 (W.D. Tenn. 2006), aff'd, 507 F.3d 416 (6th Cir. 2007), cert. denied, 129 S. Ct. 193 (2008), reh'g denied, 129 S. Ct. 675 (2008).

   Counsel: Sean M. Haynes, U.S. Trustee, 200 Jefferson Avenue, Suite 400, Memphis, TN 38103, 901-544-3251; B. David Sweeney, 5108 Stage Road, Suite 2, Memphis, TN 38134, 901-386-3662; John L. Ryder, Harris Shelton Hanover Walsh, PLLC, One Commerce Square, Suite 2700, Memphis, TN 38103, 901-525-1455; Steven F. Bilsky, 100 N. Main Street, Suite 405, Memphis, TN 38103, 901-525-6692; and Holly W. Schumpert, 100 N. Main Street, Suite 948, Memphis, TN 38103, 901-201-5938

6. United States v. Haynes, 269 F. Supp. 2d 970 (W.D. Tenn. 2003).

   Counsel for the United States: AUSA Tony Arvin, U.S. Attorney's Office, 167 N. Main Street, Suite 800, Memphis, TN 38103, 901-544-4231; and (former AUSA) Thomas L. Parker, Baker Donelson Bearman Caldwell and Berkowitz, P.C., First Tennessee Bank Building, 165 Madison Avenue, Suite 2000, Memphis, TN 38103, 901-577-2179

   Counsel for Defendant Aaron Haynes: Howard L. Wagerman, Wagerman Law Firm, 200 Jefferson Avenue, Suite 1313, Memphis, TN 38103, 901-527-0644; Jacob E. Erwin, 200 Jefferson Avenue, Suite 700, Memphis, TN 38103, 901-522-1365; and Robert C. Brooks, 100 N. Main Street, Suite 2601, Memphis, TN 38103, 901-763-2832

   Counsel for Defendant Terance Johnson: Robert L. Hutton, Glanker Brown, One Commerce Square, Suite 1700, Memphis, TN 38103, 901-525-1322; and William D. Massey, 3074 East Street, Memphis, TN 38128, 901-384-4004

   Counsel for Defendant William O. Maxwell: Arthur E. Quinn, 62 N. Main Street, Memphis, TN 38103, 901-302-4868; and (now Criminal Court Judge) Paula Skahan, 201 Poplar Avenue, Suite 519, Memphis, TN 38103, 901-545-5850

7. Federal Express Corp. v. U.S. Postal Serv., 959 F. Supp. 832 (W.D. Tenn. 1997), aff'd, 151 F.3d 536 (6th Cir. 1998).

   Counsel for Plaintiff: Dwayne S. Byrd and Lester A. Bishop, FedEx Corporation, Legal Department, 3620 Hacks Cross Road, 3rd Floor, Building B, Memphis, TN 38125, 901-

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434-8600; and R. Larry Brown, Jackson Lewis LLP, 999 Shady Grove Road, Suite 110, Memphis, TN 38120, 901-462-2600

Counsel for Defendants: Joe A. Dycus, Resolute Systems, Inc., 50 N. Front Street, Suite 650, Memphis, TN 38103, 901-523-2930; Brendan J. O'Rourke, Proskauer Rose, LLP, 1585 Broadway, New York, NY 10036, 212-969-3120; Charles F. Morrow, Butler, Snow, O'Mara, Stevens & Cannada, PLLC, 6075 Poplar Avenue, Suite 500, Memphis, TN 38119, 901-680-7317; Dana L. Dorgan-McCarren, 1740 Broadway, New York, NY 10019, 212-468-4800; Kevin J. Perra, Proskauer Rose, LLP, 1585 Broadway, New York, NY 10036, 212-969-3454; Lawrence I. Weinstein, Proskauer Rose, LLP, 1585 Broadway, New York, NY 10036, 212-969-3240; Douglas F. Halijan, Burch, Porter & Johnson, PLLC, 130 N. Court Avenue, Memphis, TN 38103, 901-524-5123; and Jeff Feibelman Burch, Porter & Johnson, PLLC, 130 N. Court Avenue, Memphis, TN 38103, 901-524-5109

8. United States v. Elkins, 95 F. Supp. 2d 796 (W.D. Tenn. 2000), aff'd in part, rev'd in part, 300 F.3d 638 (6th Cir. 2002).

Counsel for the United States: AUSA Christopher E. Cotten, U.S. Attorney's Office, 167 N. Main Street, Suite 800, Memphis, TN 38103, 901-544-4231

Counsel for Defendants James Elkins and Carol Elkins: Elbert E. Edwards, III, 44 N. Second Street, Suite 300, Memphis, TN 38103, 901-521-1067; James R. Garts, Jr., 369 N. Main Street, Memphis, TN 38103, 901-834-8911; Michael J. Stengel, 62 N. Main Street, Suite 401, Memphis, TN 38103; Paul D. Petruzzi, 169 East Flagler Street, Suite 1241, Miami, FL 33131, 305-373-6773; William D. Massey, 3074 East Street, Memphis, TN 38128, 901-384-4004; Lorna S. McClusky, 3074 East St., Memphis, TN 38128, 901-384-4004; (now Mayor) AC Wharton, Jr., 147 Jefferson Avenue, Suite 1205, Memphis, TN 38103, 901-525-5771; Gerald F. Easter, 369 N. Main Street, Memphis, TN 38103, 901-575-9998; and Marty B. McAfee, 246 Adams Avenue, Memphis, TN 38103, 901-328-7000

9. Uttilla v. City of Memphis, 40 F. Supp. 2d 968 (W.D. Tenn. 1999), aff'd sub nom., Uttilla v. Tennessee Highway Dept., 208 F.3d 216 (Table), 2000 WL 245476 (6th Cir. 2000).

Counsel for Plaintiffs (on this motion): Sherri A. McDonough, Lane, Muse, Arman & Pullen, 201 Market Street, P.O. Box 758, Hot Springs National Park, AR 71902, 501-623-3356; and L. Oneal Sutter, Harrill & Sutter, PLLC, P.O. Box 2012, Benton, AR 72018, 501-315-1910

Counsel for Defendant (on this motion): Leslie A. Bridges, Office of the Tennessee Attorney General and Reporter, P.O. Box 20207, Nashville, TN 37243, 615-741-3491

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10. In re Pyramid Operating Auth., Inc., 144 B.R. 795 (Bankr. W.D. Tenn. 1992).

Counsel: William C. Gosnell, 100 N. Main Street, Suite 3300, Memphis, TN 38103, 901-521-1455; Bruce S. Kramer, Borod & Kramer, Brinkley Plaza, 80 Monroe Avenue, Suite G1, Memphis, TN 38103, 901-524-0200; J. Robert Walker, 719 Andy Holt Tower, Knoxville, TN 37996; William E. Young, 1 Cameron Hill Circle, Chattanooga, TN 37402, 423-535-5600; William Jeter, Jeter & Nahmias PLLC, 35 Union Avenue, Suite 300, Memphis, TN 38103, 901-544-1556; John Ryder, Harris Shelton Hanover Walsh PLLC, One Commerce Square, Suite 2700, Memphis, TN 38103, 901-525-1455; Julie Chinn (formerly of Baker Donelson Bearman Caldwell & Berkowitz, PC, 165 Madison Avenue, Memphis, TN 38103, 901-577-8251 – no current contact information able to be obtained from former firm); Louis R. Lucas (deceased); Monice Hagler, Fearnley Califf Martin McDonald & Hagler, 6389 N. Quail Hollow Road, Suite 202, Memphis, TN 38120; Brian Kuhn, Shelby County Attorney, 160 N. Main Street, Suite 660, Memphis, TN 38103, 901-545-4230; David Blaylock, Glankler Brown, One Commerce Square, Suite 1700, Memphis, TN 38103, 901-576-1727; and Richard T. Doughtie, III, 239 Adams Avenue, Memphis, TN 38103, 901-525-0257

e. Provide a list of all cases in which certiorari was requested or granted.

Granted:

Oakley v. City of Memphis, 315 F. App'x 500 (6th Cir. 2008), vacated and remanded by 129 S. Ct. 2860 (2009).

United States v. Barnett, 398 F.3d 516 (6th Cir. 2005), cert. dismissed, 545 U.S. 1163 (2005).

United States v. Herndon, 393 F.3d 665 (6th Cir. 2005), vacated and remanded by 544 U.S. 1029 (2005).

Denied:

Ramon Laroi Shorter v. United States, Case No. 09-5760 (6th Cir.), cert. denied, __ S. Ct. __, 2010 WL 4393182 (Dec. 6, 2010).

Dink Clark v. Juan Castillo, Case No. 09-6076 (6th Cir.), cert. denied, __ S. Ct. __, 2010 WL 4220412 (Nov. 29, 2010).

United States v. Mardis, 600 F.3d 693 (6th Cir. 2010), cert. denied, __ S. Ct. __, 2010 WL 3321494 (Oct. 4, 2010).

United States v. Morrison, 594 F.3d 543 (6th Cir. 2010), cert. denied, __ S. Ct. __, 2010 WL 3017715 (Oct. 4, 2010).

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Webb v. United States, Case No. 09-5777 (6th Cir. June 4, 2010), cert. denied, __ S. Ct. __, 2010 WL 3073766 (Oct. 4, 2010).

Noel v. United States, 372 F. App'x 586 (6th Cir. 2010), cert. denied, __ S. Ct. __, 2010 WL 2753910 (Oct. 4, 2010).

West v. United States, 371 F. App'x 625 (6th Cir. 2010), cert. denied, __ S. Ct. __, 2010 WL 2771441 (Oct. 4, 2010).

Mitchell v. Castillo, Case No. 09-5545 (6th Cir. Jan. 26, 2010), pet. for cert. dismissed, __ S. Ct. __, 2010 WL 2989676 (Oct. 4, 2010).

United States v. Robert Bohn, 281 F. App'x 430 (6th Cir. 2008), cert denied, 129 S. Ct. 426 (2008).

Thompson v. Greenwood, 507 F.3d 416 (6th Cir. 2007), cert. denied, 129 S. Ct. 193 (2008).

United States v. Rayborn, 495 F.3d 328 (6th Cir. 2007), cert. denied, 552 U.S. 1310 (2008).

Nailor v. United States, 487 F.3d 1018 (6th Cir. 2007), cert. denied, 552 U.S. 937 (2007).

United States v. Jackson, 466 F.3d 537 (6th Cir. 2006), cert. denied, 549 U.S. 1290 (2007).

Alley v. Bell, 178 F. App'x 538 (6th Cir. 2006), cert. denied, 548 U.S. 921 (2006).

Abdus-Samad v. Bell, 420 F.3d 614 (6th Cir. 2005), cert. denied, 549 U.S. 952 (2006).

United States v. Phillips, 143 F. App'x 667 (6th Cir. 2005), cert. denied, 547 U.S. 1041 (2006).

Payne v. Bell, 418 F.3d 644 (6th Cir. 2005), cert. denied, 548 U.S. 908 (2006).

United States v. Johnson, 416 F.3d 464 (6th Cir. 2005), cert. denied, 546 U.S. 1191 (2006).

Vershish v. United States Parole Comm'n, 405 F.3d 385 (6th Cir. 2005), cert. denied, 546 U.S. 1094 (2006).

United States v. McCraven, 401 F.3d 693 (6th Cir. 2005), cert. denied, 546 U.S. 1010 (2005).

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Rush v. Ill. Cent. R.R. Co., 399 F.3d 705 (6th Cir. 2005), cert. denied, 546 U.S. 1172 (2006).

United States v. Titterington, 374 F.3d 453 (6th Cir. 2004), cert. denied, 543 U.S. 1153 (2005).

Johnson v. Bell, 344 F.3d 567 (6th Cir. 2003), cert. denied, 541 U.S. 1010 (2004).

United States v. Pennington, 328 F.3d 215 (6th Cir. 2003), cert. denied, 540 U.S. 1112 (2004).

Alley v. Bell, 307 F.3d 380 (6th Cir. 2002), cert. denied, 541 U.S. 963 (2004).

United States v. Baggett, 251 F.3d 1087 (6th Cir. 2001), cert. denied, 534 U.S. 1167 (2002).

Cooper v. Parrish, 203 F.3d 937 (6th Cir. 2000), cert. denied, 531 U.S. 877 (2000).

United States v. Talley, 194 F.3d 758 (6th Cir. 1999), cert. denied, 528 U.S. 1180 (2000).

United States v. Coker, No. 98-3731/98-3758, 1999 U.S. App. LEXIS 34583 (6th Cir. 1999), cert. denied, 530 U.S. 1283 (2000).

United States v. Talley, 164 F.3d 989 (6th Cir. 1999), cert. denied, 526 U.S. 1137 (1999).

Salehpour v. Univ. of Tenn., 159 F.3d 199 (6th Cir. 1998), cert. denied, 526 U.S. 1115 (1999).

United States v. Gibson, 135 F.3d 1124 (6th Cir. 1998), cert. denied, 524 U.S. 922 (1998).

Coupe v. Federal Express Corp., 121 F.3d 1022 (6th Cir. 1997), cert. denied, 523 U.S. 1020 (1998).

f. Provide a brief summary of and citations for all of your opinions where your decisions were reversed by a reviewing court or where your judgment was affirmed with significant criticism of your substantive or procedural rulings. If any of the opinions listed were not officially reported, provide copies of the opinions.

I do not have a uniform system for tracking or cataloging a list of opinions or orders in which I was reversed by an appellate court. In compiling my response to this question, I

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shepardized the subsequent history of my reported opinions and also searched for Sixth Circuit opinions that mentioned my name in the LexisNexis and Westlaw databases. Other than the reversals listed below, I have been unable to identify or recall any other reversals.

Reversals – Change in Law:

United States v. Williams, No. 2:04-cr-20074 (W.D. Tenn. 2004), rev'd, 411 F.3d 675 (6th Cir. 2005). In September 2004, I sentenced the defendant for two counts of possession of child pornography under U.S.S.G. § 2G2.2. On October 25, 2004, the Sixth Circuit held in United States v. Farrelly, 389 F.3d 649 (6th Cir. 2004), that a defendant who possesses, but does not transmit, child pornography must be sentenced under U.S.S.G. § 2G2.4 rather than § 2G2.2. Accordingly, the Court of Appeals reversed and remanded for resentencing, while affirming another ruling related to the defendant's sentence.

Mujihadeen v. Tenn. Bd. of Prob. & Paroles, No. 03-2044-D/A, 2003 U.S. Dist. LEXIS 2302 (W.D. Tenn. Feb. 18, 2003), rev'd, 79 F. App'x 143 (6th Cir. 2003). The Court of Appeals reversed my order dismissing a pro se prisoner's 42 U.S.C. § 1983 claim and remanded the case for further consideration in light of the then-recent decision in Dotson v. Wilkinson, 329 F.3d 463 (6th Cir. 2003), which was issued after my decision.

Orr v. Hawk, No. 96-02747 (W.D. Tenn. 1996), rev'd, 156 F.3d 651 (6th Cir. 1998). The Court of Appeals reversed my dismissal of a petition for writ of habeas corpus by a prisoner seeking a reduction of his prison sentence due to an intervening change in Bureau of Prisons policy, which amended the relevant regulations on which I based my dismissal.

Partial Reversals:

United States v. Lazar, No. 04-20017-DV (W.D. Tenn. 2008), aff'd in part, vacated in part, 604 F.3d 230 (6th Cir. 2010). The Court of Appeals affirmed in part and vacated in part my order to adopt a report and recommendation from the United States Magistrate Judge and grant defendant's motion to suppress evidence seized from defendant's medical offices. The Court of Appeals affirmed the suppression of non-patient file evidence, but ruled that the language in the search warrant could have incorporated a list of patient files if such a list was presented to the United States Magistrate Judge. The Court of Appeals also reversed my finding regarding the probable cause as to the location of patient files.

Oakley v. City of Memphis, No. 06-cv-2276 (W.D. Tenn. 2007), aff'd, 315 F. App'x 500 (6th Cir. 2008), vacated, 129 S. Ct. 2860 (2009). The Court of Appeals affirmed my decision granting defendant's motion for summary judgment and thereby dismissed police lieutenant plaintiffs' discrimination claims against the City of Memphis. The Supreme Court of the United States granted certiorari and remanded the case to the Court of Appeals for further consideration in light of Ricci v. DeStefano, 129 S. Ct. 2658

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(2009). The Court of Appeals, in turn, remanded the case to me for further proceedings consistent with Ricci. Relief has now been entered in accordance with Ricci.

United States v. Armstead, No. 2:04-cr-20400 (W.D. Tenn. 2005), aff'd in part, vacated in part, 467 F.3d 943 (6th Cir. 2006). The Court of Appeals affirmed the defendant's conviction, but reversed my enhancement of the defendant's sentence based upon his prior conviction for "attempted child abuse" under Tennessee law. The Court of Appeals remanded for resentencing.

United States v. Paulette, No. 2:03-cr-20091 (W.D. Tenn. 2005), aff'd in part, vacated in part, 457 F.3d 601 (6th Cir. 2006). The Court of Appeals affirmed my denial of the defendant's motion to suppress and my ruling that the Government had presented sufficient evidence from which the jury could find the defendant guilty. The Court of Appeals remanded for resentencing based on an enhancement of obstruction of justice for the defendant's perjury at trial.

United States v. Robert Bohn, No. 02-cr-20165 (W.D. Tenn. 2005), aff'd in part, rev'd in part, 281 F. App'x 430 (6th Cir. 2008), cert. denied, 129 S. Ct. 426 (2008). The Court of Appeals affirmed my decision as to charges of racketeering, etc., but reversed my entry of a preliminary order of forfeiture, finding that the Government had not shown that the property was subject to forfeiture. On remand, I denied the Government's motion for re-entry of an order of preliminary forfeiture. The Government appealed the decision and subsequently voluntarily dismissed its appeal.

Moorer v. Baptist Mem'l Health Care Sys., No. 99-0243 (W.D. Tenn. 2003), aff'd in part, rev'd in part, 398 F.3d 469 (6th Cir. 2005). The Court of Appeals affirmed my judgment in favor of an employee on his claim of discriminatory discharge in violation of the Americans with Disabilities Act. The Court reversed the grant of summary judgment as to the employee's Family Medical Leave Act claim.

Payne v. Bell, 194 F. Supp. 2d 739 (W.D. Tenn. 2002), rev'd, 399 F.3d 768 (6th Cir. 2005), reh'g granted, amended opinion at Payne v. Bell, 418 F.3d 644 (6th Cir. 2005). The Court of appeals reversed my denial of a prisoner's petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. After the United States Supreme Court granted certiorari in a similar case, Cone v. Bell, 359 F.3d 785 (6th Cir. 2004), rev'd, 543 U.S. 447 (2005), the Court of Appeals entered an amended opinion in my case, which affirmed my decision.

United States v. Elkins, 95 F. Supp. 2d 796 (W.D. Tenn. 2000), aff'd in part, rev'd in part, 300 F.3d 638 (6th Cir. 2002). This case arose from a police search and seizure of hydroponic marijuana grown in several commercial buildings controlled by defendants, and addressed whether police use of thermal imaging constituted a search. I found – prior to the U.S. Supreme Court's ruling in Kyllo v. United States, 533 U.S. 27 (2001) – that the thermal imaging of a commercial building constituted a search under the Fourth Amendment, but the Court of Appeals declined to address this issue on appeal. The Court of Appeals affirmed my suppression order insofar as it held that the search of one

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building was justified by consent and that a redacted search warrant affidavit established probable cause for another building. The Court of Appeals reversed my finding that exigent circumstances did not exist for the warrantless search of one building and that several redacted search warrants were invalid.

United States v. Saucedo, No. 98-20074 (W.D. Tenn. 1999), aff'd in part, rev'd in part, 226 F.3d 782 (6th Cir. 2000). The Court of Appeals affirmed defendant's conviction and sentence, but remanded the matter for resentencing without a downward departure.

United States v. Ponnapula, No. 95-02643 (W.D. Tenn. 1999), aff'd in part, rev'd in part, 246 F.3d 576 (6th Cir. 2001). I entered a judgment awarding roughly half of an earnest money deposit paid at a foreclosure auction to lienholders and the rest to the bidder who made the deposit. The Court of Appeals ordered entry of judgment for the entire amount of the deposit in favor of the lienholders.

Woodruff v. Ohman, No. 93-2449 (W.D. Tenn. 1999), rev'd, 29 F. App'x 337 (6th Cir. 2002). The Court of Appeals vacated the judgment against defendant for gender discrimination under Title VII, for punitive damages, and for injunctive relief. The Court of Appeals also reversed the grant of judgment as a matter of law on plaintiff's defamation claim. The Court of Appeals found that plaintiff was not a public official such that the heightened standard of proof was required and reversed on the issue of defamation. On remand, I found defendant liable for defamation and awarded actual and punitive damages, which the Court of Appeals affirmed in Woodruff v. Ohman, 166 F. App'x 212 (6th Cir. 2006).

Cooper v. Parrish, 20 F. Supp. 2d 1204 (W.D. Tenn. 1998), aff'd in part, rev'd in part, 203 F.3d 937 (6th Cir. 2000), cert. denied, 531 U.S. 877 (2000). The Court of Appeals affirmed my dismissal of federal § 1983 claims against state prosecutors and investigators, but reversed my decision to dismiss state law claims.

Reversals with Dissents:

Robinson v. Shelby County Bd. of Educ., No. 63-4916, (W.D. Tenn. 2007), rev'd, 566 F.3d 642 (6th Cir. 2009). This case was filed in 1963 as a class action, alleging racial segregation by the Shelby County Schools. With one judge dissenting, the Court of Appeals reversed my finding that the school system had not satisfied all of the requirements for unitary status. The Court of Appeals ordered the case dismissed.

Sea Wright v. Amn. Gen. Fin. Servs., Inc., No. 06-2339 DV, 2006 U.S. Dist. LEXIS 97467 (W.D. Tenn. Dec. 22, 2006), rev'd, 507 F.3d 967 (6th Cir. 2007). The Court of Appeals reversed my denial of defendant employer's motion to compel arbitration. While I found no enforceable agreement to arbitrate, the Court of Appeals held that plaintiff's continuation of employment after the effective date of the arbitration program constituted acceptance of a valid and enforceable contract to arbitrate. Judge Boyce F. Martin, Jr. dissented, stating that it was unreasonable to hold plaintiff to the agreement's

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terms when she never performed any action indicating that she knowingly and voluntarily entered into the agreement.

United States v. Anthony, No. 99-20170 (W.D. Tenn. 2000), vacated, 280 F.3d 694 (6th Cir. 2002). I sentenced a defendant who pled guilty to making a materially false statement to a federal investigator and enhanced the sentence, finding that the defendant was the leader or organizer of an offense that "involved five or more participants or was otherwise extensive." The Court of appeals vacated and remanded, holding that the enhancement was improper. Judge Karen Nelson Moore dissented.

Lawson v. Shelby County, 7 F. Supp. 2d 985 (W.D. Tenn. 1998), rev'd, 211 F.3d 331 (6th Cir. 2000). The Court of Appeals reversed my decision finding that the claims of plaintiffs, who were denied the right to vote, were barred by the 11th Amendment to the U.S. Constitution and by the statute of limitations. The Court of Appeals ruled that 11th Amendment immunity did not apply to suits brought by a private party under the Ex Parte Young exception and held that the statute of limitations did not bar plaintiffs' claims. Judge Richard F. Suhrheinrich dissented, agreeing that the statute of limitations barred the action.

United States v. Johnson, No. 96-20143 (W.D. 1997), vacated, 152 F.3d 553 (6th Cir. 1998). The Court of Appeals vacated and remanded the matter for resentencing, holding that the use of a weapon or dangerous instrumentality had been accounted for in the sentencing guidelines and, thus, an upward departure was unwarranted.

Straight Reversals:

600 Marshall Entm't Concepts, LLC v. City of Memphis, No. 05-02865 (W.D. Tenn. 2008), vacated, 2010 U.S. App. LEXIS 8664 (6th Cir. 2010). The Court of Appeals reversed my denial of injunctive and declaratory relief to an adult-oriented business, which was denied a use and occupancy permit by the City of Memphis. The Court remanded the case for additional fact finding and legal conclusions.

Shelby County Health Care Corp. v. Majestic Star Casino, LLC, No. 06-2549 (W.D. Tenn. 2008), rev'd, 581 F.3d 355 (6th Cir. 2009). The Court of Appeals reversed an award of attorney fees to the prevailing plaintiff under the Employee Retirement Income Security Act.

Hudson v. Hudson, No. 04-2662 (W.D. Tenn. 2005), rev'd, 475 F.3d 741 (6th Cir. 2007). The Court of Appeals reversed my order denying police officers' motion to dismiss the plaintiff's constitutional claims based on qualified immunity. The Court of Appeals found that qualified immunity applied because, under Tennessee law, the enforcement of a protective order is discretionary rather than operational. The Court found that the officers did not violate a federal right in failing to arrest a man against whom plaintiff had multiple protective orders or in failing to prevent him from murdering plaintiff and injuring a child. The Court ordered the case dismissed.

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Sutton v. St. Jude Med., Inc., 292 F. Supp. 2d 1005 (W.D. Tenn. 2003), rev'd, 419 F.3d 568 (6th Cir. 2005). The plaintiff brought this case as a putative products liability class action concerning a medical device used in cardiac bypass surgery. I dismissed the suit on the grounds that an increased risk of harm from a product that had not yet malfunctioned or caused injury did not constitute an injury sufficient to confer Article III standing to sue. Noting that the case presented an issue of first impression for the Court of Appeals, the appellate court reversed and reinstated the plaintiff's case. The case settled after remand.

United States v. Tennessee, No. 2:92-2062, 256 F. Supp. 2d 768 (W.D. Tenn. 2003), vacated, 143 F. App'x 656 (6th Cir. 2005). The United States filed suit in 1992 against the State of Tennessee and others to remedy grossly substandard and life-threatening conditions at a state facility for persons with disabilities. The case was later expanded to include claims by a plaintiff class. The parties jointly moved to approve the mediated settlement agreement. After an evidentiary hearing, I rejected the proposed settlement, finding that it was not fair, adequate and reasonable and was not in the best interests of the plaintiff class members. The Sixth Circuit vacated my decision and conducted additional evidentiary hearings.

United States v. Galloway, No. 2:02-cr-20355 (W.D. Tenn. 2004), rev'd, 439 F.3d 320 (6th Cir. 2006). This case dealt with whether a conviction for attempt to commit a felony could be a predicate offense for purposes of U.S.S.G. §4B1.1. The appeals court found that it was a qualifying offense.

United States v. Riddick, No. 1:01-cr-10005 (W.D. Tenn. 2004), rev'd, 134 F. App'x 813 (6th Cir. 2005). After a Franks hearing, I found that the confidential informant provided false information used to obtain search warrants. I granted the defendant's motion to suppress. The Court of Appeals reversed, finding the confidential informant credible.

Vershish v. U.S. Parole Commission, No. 2:03-cv-02858 (W.D. Tenn. 2003), vacated, 405 F.3d 385 (6th Cir. 2005), cert. denied, 546 U.S. 1094 (2006). I denied a parolee's habeas petition, finding that the U.S. Parole Commission's eight year delay in issuing a warrant was reasonable. The Sixth Circuit reversed.

United States v. Bassett, No. 02-20175111 (W.D. Tenn. 2003), vacated, 111 F. App'x 841 (6th Cir. 2004). I concluded that the cross-reference provision of the U.S. Sentencing Guidelines Manual § 2K2.1 was not applicable, relying on United States v. Stubbs, 279 F.3d 402, where defendant admitted to possessing a firearm in connection with a drug trafficking offense. The Court of Appeals vacated defendant's sentence because Stubbs was no longer controlling pursuant to Harris v. United States, 536 U.S. 545 (2002), which held that the constitutional mandates of Apprendi did not apply to the Guidelines when a defendant's sentence remained below the maximum sentence authorized by the statute.

United States v. Titterington, No. 2-20165, 2003 U.S. Dist. LEXIS 8887 (W.D. Tenn. May 22, 2003), rev'd, 374 F.3d 453 (6th Cir. 2004), reh'g denied, 2004 U.S. App. LEXIS 19286 (6th Cir. Sept. 10, 2004), cert. denied, 543 U.S. 1153 (2005). I granted

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defendants' motion to dismiss for failure to allege that an offense occurred within the applicable statute of limitations. The Court of Appeals reversed, reasoning that the statute of limitations for mail-fraud, RICO, and smuggling did not impose a pleading requirement on the Government to argue that the limitations period had been tolled or that the indictment covered offenses that occurred within the extended limitations period.

Memphis, Tenn. Area Local, Am. Postal Workers Union v. City of Memphis, No. 01-03011 (W.D. Tenn. 2002), rev'd, 361 F.3d 898 (6th Cir. 2004). The Court of Appeals, relying on the liberal pleading standard of Federal Rule of Civil Procedure 8(a), reversed my judgment dismissing a civil rights action for failure to state a cause of action.

Sec'y of Labor v. 3re.com, No. 01-02350 (W.D. 2001), rev'd, 317 F.3d 534 (6th Cir. 2003). I converted a preliminary injunction on the shipment of goods to a permanent injunction and ordered payment to the court for violations of the Fair Labor Standards Act ("FLSA"). The Court of Appeals reversed and remanded for further determination of, among other things, whether the goods constituted "hot goods" under the FLSA.

United States v. Rayborn, 138 F. Supp. 2d 1029 (W.D. Tenn. 2001), rev'd, 312 F.3d 229 (6th Cir. 2002). The Court of Appeals reversed my order dismissing the defendant's indictment for church arson under 18 U.S.C. § 844(i) for lack of subject matter jurisdiction.

United States v. Baggett, No. 99-20120 (W.D. Tenn. 2001), rev'd, 251 F.3d 1087 (6th Cir. 2001), cert. denied, 534 U.S. 1167 (2002). The Court of Appeals reversed my judgment of acquittal on the interstate domestic violence charge, finding that the government's evidence was legally sufficient to support a verdict of guilty.

Herman v. Hosp. Staffing Servs., 236 B.R. 377 (W.D. Tenn. 1999), rev'd sub nom., Chao v. Hosp. Staffing Servs., Inc., 270 F.3d 374 (6th Cir. 2001). The Secretary of Labor sought an injunction to prohibit the trustee of a bankrupt corporation from moving in commerce certain records that the Secretary deemed "hot goods" under the Fair Labor Standards Act. I denied the trustee's motion to dismiss for lack of subject matter jurisdiction. The Court of Appeals reversed the judgment and vacated the orders.

Williams v. Int'l Paper Co., No. 98-02044 (W.D. Tenn. 1998), rev'd, 227 F.3d 706 (6th Cir. 2000). The Sixth Circuit reversed the grant of summary judgment as to plaintiff's claim that defendant violated 29 U.S.C. § 1132(a)(1)(B) of the Employee Retirement Income Security Act, by denying plaintiff disability retirement benefits.

In re Brengettcy, 177 B.R. 271 (Bankr. W.D. Tenn. 1995), vacated, 223 B.R. 684 (W.D. Tenn. 1998). The district court reversed my order vacating a foreclosure sale. The district court reasoned that the misconduct of the debtor's attorney in failing to appear at hearing on a motion to vacate or to prevent the entry of a default judgment was not grounds for relief from judgment under the "excusable neglect" theory.

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In re Prof'l Dev. Corp., 129 B.R. 522 (Bankr. W.D. Tenn. 1991), rev'd, 140 B.R. 467 (W.D. Tenn. 1992). The district court reversed my decision to disqualify a law firm from representing the corporation, its sole stockholder and CEO in a jointly administered Chapter 11 case, finding that no actual or potential conflict existed.

In re Hays Builders, Inc., 96 B.R. 142 (Bankr. W.D. Tenn. 1989), rev'd, 144 B.R. 778 (W.D. Tenn. Apr. 30, 1992). The district court reversed my decision disallowing the United States Trustee in a Chapter 11 case from collecting disbursements by a third party in connection with the sale of assets of the estate. The district court held that a trustee's compensation in a Chapter 11 case is calculated based on all disbursements made, whether directly by a debtor or indirectly through a third party.

g. Provide a description of the number and percentage of your decisions in which you issued an unpublished opinion and the manner in which those unpublished opinions are filed and/or stored.

My policy is generally to only publish opinions that address a significant legal issue on which I have not previously published. Therefore, I publish less than 15% of my opinions. All opinions are stored in the Chambers internal case file and many are posted on the U.S. District Court website.

h. Provide 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, provide copies of the opinions.

Entm't Prods., Inc. v. Shelby County, 2009 U.S. Dist. LEXIS 59121 (W.D. Tenn. July 10, 2009), aff'd, 588 F.3d 372 (6th Cir. 2009), cert. denied, __ S. Ct. __, 2010 WL 2191215 (Oct. 4, 2010).

Tenn. Scrap Recyclers Ass'n v. Bredesen, 2008 U.S. Dist. LEXIS 107138 (W.D. Tenn. June 3, 2008), aff'd, 556 F.3d 442 (6th Cir. 2009).

Robinson v. Shelby County Bd. of Educ., No. 63-4916 (W.D. Tenn. 2007), rev'd, 566 F.3d 642 (6th Cir. 2009).

Pitchford v. Worldwide Mortg. Corp., No. 04-2743 (W.D. Tenn. 2007).

Carr v. Home Tech Servs. Co., 2007 U.S. Dist. LEXIS 19483 (W.D. Tenn. Mar. 6, 2007).

Spinks v. Home Tech Servs., No. 03-2568 (W.D. Tenn. 2007).

Johnson v. Home Tech Servs., No. 03-2567 (W.D. Tenn. 2007).

Lewis v. Memphis Fin. Servs., Inc., No. 05-2524 (W.D. Tenn. 2007).

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Willingham v. NovaStar Mortg., Inc., 2006 U.S. Dist. LEXIS 97149 (W.D. Tenn. Feb. 7, 2006).

Robert N. Clemens Trust v. Morgan Stanley DW, Inc., 2006 U.S. Dist. LEXIS 96184 (W.D. Tenn. Mar. 8, 2006).

Isabel v. Velsicol Chem. Co., 327 F. Supp. 2d 915 (W.D. Tenn. 2004).

Johnson v. City of Memphis, No. 04-2017 (W.D. Tenn. 2004).

Billingsley v. City of Memphis, No. 04-2013 (W.D. Tenn. 2004).

Tyson v. Equity Title & Escrow Co. of Memphis, LLC, 282 F. Supp. 2d 829 (W.D. Tenn. 2003).

United States v. Rayborn, 138 F. Supp. 2d 1029 (W.D. Tenn. 2001), rev'd, 312 F.3d 229 (6th Cir. 2002).

Echols v. A-USA Mortg. Corp., 2001 U.S. Dist. LEXIS 25878 (W.D. Tenn. Aug. 28, 2001).

Overnite Transp. Co. v. Int'l Bhd. of Teamsters, 168 F. Supp. 2d 826 (W.D. Tenn. 2001).

United States v. Mask, 154 F. Supp. 2d 1344 (W.D. Tenn. 2001).

Johnson v. City of Memphis, No. 00-2608 (W.D. Tenn. 2000).

Friends of Shelby Farms Inc. v. Slater, No. 99-2631 (W.D. Tenn. 2000).

W. Tenn. Chptr. of Assoc. Builders & Contrs., Inc. v. City of Memphis, 138 F. Supp. 2d 1015 (W.D. Tenn. 2000), interlocutory app. denied, 293 F.3d 345 (6th Cir. 2002).

Becton v. Thomas, 48 F. Supp. 2d 747 (W.D. Tenn. 1999).

Uttilla v. City of Memphis, 40 F. Supp. 2d 968 (W.D. Tenn. 1999), aff'd, 208 F.3d 216 (6th Cir. Tenn. 2000).

Banking Consultants v. Office of the Compt., No. 97-2791 (W.D. Tenn. 1998).

Cooper v. Parrish, 20 F. Supp. 2d 1204 (W.D. Tenn. 1998), aff'd in part, rev'd in part, 203 F.3d 937 (6th Cir. 2000), reh'g denied, 2000 U.S. App. LEXIS 11054 (6th Cir. May 12, 2000), cert. denied, 531 U.S. 877 (2000).

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Federal Express Corp. v. United States Postal Serv., 959 F. Supp. 832 (W.D. 1997), aff'd, 151 F.3d 536 (6th Cir. 1998).

i. Provide citations to all cases in which you sat by designation on a federal court of appeals, including a brief summary of any opinions you authored, whether majority, dissenting, or concurring, and any dissenting opinions you joined.

Brilliance Audio, Inc. v. Haights Cross Commc'n, Inc., 474 F.3d 365 (6th Cir. 2007).

E.E.O.C. v. Watkins Motor Lines, Inc., 463 F.3d 436 (6th Cir. 2006).

In re Oswalt, 444 F.3d 524 (6th Cir. 2006).

Nader v. Land, 433 F.3d 496 (6th Cir. 2006).

Hughes v. Birkett, 173 F. App'x 448 (6th Cir. 2006).

United States v. Adkins, 169 F. App'x 961 (6th Cir. 2006).

Bergman v. Baptist Healthcare Sys., Inc., 167 F. App'x 441 (6th Cir. 2006).

Williams v. Bagley, 166 F. App'x 176 (6th Cir. 2006).

Amptech, Inc. v. N.L.R.B., 165 F. App'x 435 (6th Cir. 2006).

Clonch v. Southern Ohio Coal Co., No. 05-3133, 2006 WL 3409880 (6th Cir. 2006) (I wrote the opinion reversing the Benefit Review Board's decision regarding black lung benefits, remanding for reconsideration, and affirming the Benefit Review Board's decision regarding the widow's survivor's black lung benefits).

Frazier v. Honda of Am. Mfg., Inc., 431 F.3d 563 (6th Cir. 2005).

United States v. Navarro-Diaz, 420 F.3d 581 (6th Cir. 2005).

United States v. Gardner, 417 F.3d 541 (6th Cir. 2005).

United States v. Whitehead, 415 F.3d 583 (6th Cir. 2005).

Nawrocki v. United Methodist Retirement Communities, Inc., 174 F. App'x 334 (6th Cir. 2005) (I wrote the opinion affirming the district court's grant of summary judgment in favor of defendant employer against the employee's claim under the Family Medical Leave Act because the medical certification the employee submitted did not provide adequate notice to her employer that there was a medical reason for her absence).

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Martin v. Wal-Mart Stores, Inc., 159 F. App'x 626 (6th Cir. 2005).

James v. Jones, 156 F. App'x 790, 2005 WL 3304018 (6th Cir. 2005).

Skirko v. Gonzales, 153 F. App'x 958 (6th Cir. 2005).

Hampton v. Dana Corp., 152 F. App'x 441 (6th Cir. 2005).

Ndiaye v. Gonzales, 150 F. App'x 407 (6th Cir. 2005) (I wrote the opinion granting an alien's petition for review, vacating the Board of Immigration Appeals' decision, and remanding the case for further proceedings to determine whether the alien was entitled to asylum and the withholding of removal under the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42)(A) and for protection under the Convention Against Torture).

Bah v. Gonzales, 144 F. App'x 525 (6th Cir. 2005) (I wrote the opinion vacating decision of Board of Immigration Appeals that affirmed Immigration Judge's denial of application for asylum and remanding for further proceedings).

United States v. Phillips, 143 F. App'x 667 (6th Cir. 2005).

Gojcevic v. Gonzales, 142 F. App'x 257 (6th Cir. 2005) (I wrote the opinion denying petition for review of Board of Immigration Appeals decision to affirm decision of Immigration Judge rejecting requests for asylum).

Gjoka v. Gonzales, 138 F. App'x 788 (6th Cir. 2005).

United States v. O'Malley, 332 F.3d 361 (6th Cir. 2003).

United States v. Lucas, 282 F.3d 414 (6th Cir. 2002) (Donald, J., concurring in part and dissenting in part) (The majority affirmed the defendant's conviction but remanded for resentencing. I agreed with the majority's analysis as to the defendant's sentencing, but dissented from the majority's holding that the defendant's guilty plea was knowing and voluntary.)

United States v. O'Malley, 265 F.3d 353 (6th Cir. 2001) (I wrote the opinion vacating sentences and remanding for resentencing because record did not contain sufficient findings to support conclusion that it was reasonably foreseeable to defendant that her co-conspirators would steal an illegal semi-automatic rifle from a licensed firearms store).

United States v. Hamilton, 263 F.3d 645 (6th Cir. 2001).

Thompson v. Budd Co., 23 F. App'x 239 (6th Cir. 2001).

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Spicer v. Apfel, 15 F. App'x 227 (6th Cir. 2001).

Stambough v. Apfel, 14 F. App'x 563 (6th Cir. 2001).

Perkins v. Apfel, 14 F. App'x 593 (6th Cir. 2001) (I wrote the opinion affirming district court's judgment affirming Administrative Law Judge's denial of Social Security benefits and denying "sentence six remand" under 42 U.S.C. § 405(g)).

Stafford v. First Tennessee Nat'l Bank, 230 F.3d 1360 (Table), No. 98-6391, 2000 WL 1359631 (6th Cir. 2000) (I wrote the opinion affirming district court's summary judgment to plaintiff and thereby permitting plaintiff to collect appropriate life insurance benefits following her husband's death).

Hill v. City of Southfield, 210 F.3d 371 (Table), 2000 WL 331980 (6th Cir. 2000).

In re: Sol Bergman Estate Jewelers, Inc., v. Diamoncut, Inc., 208 F.3d 215 (Table) No. 98-4405, 2000 WL 263338 (6th Cir. 2000) (I wrote the opinion affirming the Bankruptcy Appellate Panel's order permitting the Chapter 7 trustee to avoid preferential transfers and its admission of certain summaries and records as evidence).

Hatcher v. General Electric, 208 F.3d 213 (Table), No. 98-6304, 2000 WL 245515 (6th Cir. 2000) (I wrote the opinion affirming district court's summary judgment for employer, finding that no genuine issues of material fact existed as to employee's age discrimination, retaliation, and breach of contract claims).

N.L.R.B v. Grand Rapids Press, 208 F.3d 214 (Table), No. 98-6108, 2000 WL 125684 (6th Cir. 2000) (I wrote the opinion denying respondents' petition for review and enforcing the order of the NLRB, finding that substantial evidence existed to support the Board's finding that respondents violated their duty to bargain pursuant to the National Labor Relations Act).

Pouillon v. City of Owosso, 206 F.3d 711 (6th Cir. 2000).

United States v. Coker, No. 98-3731/98-3758, 1999 U.S. App. LEXIS 34583 (6th Cir. 1999), aff'd per curium, cert. denied, 530 U.S. 1283 (2000) (I wrote the opinion upholding the conviction, holding that the defendant did not move for substitution of counsel and there was no prosecutorial misconduct).

United States v. Coker, 202 F.3d 270 (Table), 1999 WL 1281788 (6th Cir. 1999).

Boyle v. Million, 201 F.3d 711 (6th Cir. 2000).

Javens v. City of Royal Oak, 201 F.3d 440 (Table), 1999 WL 1204787 (6th Cir. 1999) (per curiam).

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Darr v. New York Life Ins. Co., 201 F.3d 440 (Table), 1999 WL 1204748 (6th Cir. 1999).

United States v. Quisenberry, 198 F.3d 248 (Table), 1999 WL 1073659 (6th Cir. 1999).

United States v. Williams, 198 F.3d 248 (Table), 1999 WL 993997 (6th Cir. 1999)

United States v. Salinski, 194 F.3d 1315 (Table), No. 98-1694, 1999 WL 824809 (6th Cir. 1999).

Vercheres v. Wilkinson, 194 F.3d 1315 (Table), 1999 WL 801542 (6th Cir. 1999).

Sterkey v. Hamilton Cnty. Justice Ctr., 194 F.3d 1314 (Table), 1999 WL 824826 (6th Cir. 1999).

Tucker v. Victor Gelb, Inc., 194 F.3d 1314 (Table), 1999 WL 801544 (6th Cir. 1999).

Swartz v. Eastman & Smith, 194 F.3d 1314 (Table), 1999 WL 801570 (6th Cir. 1999).

Still v. Wilkinson, 194 F.3d 1314 (Table), 1999 WL 801577 (6th Cir. 1999).

Lyle v. U.S.D.A. Rural Dev., 194 F.3d 1313 (Table), 1999 WL 801569 (6th Cir. 1999).

In re Marzocco, 194 F.3d 1313 (Table), 1999 WL 968945 (6th Cir. 1999).

Eames v. Collins, 194 F.3d 1312 (Table), 1999 WL 968946 (6th Cir. 1999).

Freeman v. Lebanon Corr. Inst. Superintendent, 194 F.3d 1312 (Table), 1999 WL 801573 (6th Cir. 1999).

14. **Recusal:** If you are or have been a judge, identify the basis by which you have assessed the necessity or propriety of recusal (If your court employs an "automatic" recusal system by which you may be recused without your knowledge, please include a general description of that system.) Provide a list of any cases, motions or matters that have come before you in which a litigant or party has requested that you recuse yourself due to an asserted conflict of interest or in which you have recused yourself sua sponte. Identify each such case, and for each provide the following information:

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a. whether your recusal was requested by a motion or other suggestion by a litigant or a party to the proceeding or by any other person or interested party; or if you recused yourself sua sponte;

b. a brief description of the asserted conflict of interest or other ground for recusal;

c. the procedure you followed in determining whether or not to recuse yourself;

d. your reason for recusing or declining to recuse yourself, including any action taken to remove the real, apparent or asserted conflict of interest or to cure any other ground for recusal.

Our Court has a conflicts review system. I regularly provide information to the assignment clerk of entities in which I have either a financial interest or a leadership role. Since 2008, I have owned stock in First Horizon and have recused myself in cases involving its subsidiary, First Tennessee Bank. I also own stock in Ford Motor Company, Procter & Gamble, and Reynolds American and have listed them on my recusal list.

I was asked to recuse in the case of Madison v. Consolidated Freightways, No. 94-2429 (W.D. Tenn.), after a jury had been sworn and the proof was well underway. The basis asserted for recusal was that my brother had been a longtime employee, a truck driver, of the defendant. As my brother was separated from the company at the time due to a cerebral aneurysm, and because he had never exercised managerial authority nor impacted defendant's policy, I declined to recuse. However, because of the timing of the request, I declared a mistrial and transferred the case to another judge.

The attorney who requested recusal made a similar request in another Consolidated Freightways case. I cannot recall the style of this case. I wrote an opinion denying recusal, and this attorney never sought my recusal again.

In Becton v. Thomas, No. 98-cv-2977-D (W.D. Tenn.), counsel for Defendant Thomas made an oral motion requesting that I recuse based on a mistaken belief that I was friends with the plaintiff, an African-American woman. As I had no friendship with Ms. Becton and had never socialized with her, I determined that there was no basis for recusal.

I sua sponte recused in Turner v. Walmart, No. 10-cv.2071 (W.D. Tenn.) because my nephew's stepdaughter was counsel for Walmart.

In Ford v. Beavers, the chair of the local Republican party asserted in the media that I should recuse from this high profile case because plaintiff's brother, Congressman Harold Ford, Sr., recommended me to President Clinton for appointment to the U.S. District Court. No party to the case moved or asked for my recusal. I evaluated the situation and determined that no cause for recusal existed.

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In general, I evaluate each situation in light of the canons of judicial ethics and the individual circumstances of the case, and take appropriate action. I routinely sua sponte recuse in any case where I have a financial interest or feel that I cannot be fair and impartial.

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

a. List chronologically any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. If appointed, please include the name of the individual who appointed you. Also, state chronologically any unsuccessful candidacies you have had for elective office or unsuccessful nominations for appointed office.

None

b. List all memberships and offices held in and services rendered, whether compensated or not, to any political party or election committee. If you have ever held a position or played a role in a political campaign, identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

None.

16. **Legal Career:** Answer each part separately.

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

i. whether you served as clerk to a judge, and if so, the name of the judge, the court and the dates of the period you were a clerk;

I have never served as a judicial law clerk.

ii. whether you practiced alone, and if so, the addresses and dates;

From approximately October 1979 to April 1980, I had a part-time solo practice, approximately 8 to 10 hours per week. I handled cases for friends and family and handled some limited worker's compensation cases. I had office space at 1750 Madison Avenue, Memphis, Tennessee 38104.

iii. 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.

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1979 – 1980
Bernice B. Donald, Esq.
1750 Madison Avenue
Memphis, Tennessee 38104
Self Employed-Part-Time Attorney

1980
Memphis Area Legal Services
109 North Main Street, Suite 200
Claridge House Building
Memphis, Tennessee 38103
Staff Attorney

1980 – 1982
Shelby County Public Defender's Office
201 Poplar Avenue
Memphis, Tennessee 38103
Assistant Public Defender

iv. whether you served as a mediator or arbitrator in alternative dispute resolution proceedings and, if so, a description of the 10 most significant matters with which you were involved in that capacity.

I have never served as a mediator or arbitrator in an alternative dispute resolution proceeding.

b. Describe:

i. the general character of your law practice and indicate by date when its character has changed over the years.

October 1979 to April 1980: I had a part-time solo practice, approximately 8 to 10 hours per week. I handled cases for friends and family and handled some limited worker's compensation cases.

April 1980 to November 1980: During this time, I worked as a staff attorney for the Memphis Area Legal Services ("MALS"). The first year of my legal practice was exclusively civil law practice. I handled public interest legal matters in the consumer law area, and performed some limited work in employment law and Title VII (discrimination) areas. More specifically, I conducted initial client interviews, engaged in fact gathering, and evaluated the cases to determine if there was any legal merit. In many instances, resolution of matters occurred after explaining the law or making telephone calls on the complainant's behalf. I administered, among other matters, landlord tenant cases, breach of contract actions, actions to recover personal property, wrongful

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termination cases, Social Security claims, and unemployment compensation cases before administrative bodies. I also handled workers compensation, personal injury, and small commercial law cases, as well as represented parties in mental competency hearings. I evaluated numerous Title VII cases, where clients turned to MALS for relief after getting their Right to Sue letter from the EEOC.

November 1980 to June 1982: During this time, I worked as an Assistant Public Defender in the Shelby County Public Defender's Office. My practice was exclusively criminal defense, and under the direction and supervision of Chief Public Defender, A.C. Wharton. I handled trial and plea negotiations of state misdemeanor cases, felony preliminaries, arraignments, bail and suppression hearings, revocation of probation hearings, dismissal motions and traffic matters. Additionally, I represented parties in competency hearings. Further, I worked on search and seizure issues, where I challenged searches on Fourth Amendment grounds. I sought to exclude statements from cases in which my clients had not been properly administered Miranda warnings.

I was assigned to multiple divisions of court on a daily basis and had a heavy caseload, so my practice was highly involved in the courtroom and in trials. I was typically in court representing clients five days a week. Because General Sessions Court was a "high volume" court, I represented clients in forty to sixty cases per week. Of these cases, approximately eight to ten percent went to trial. I represented one client in a felony jury trial.

ii. your typical clients and the areas at each period of your legal career, if any, in which you have specialized.

During my employment at Memphis Area Legal Services, I served low-income individuals and elderly clients in civil matters.

As an Assistant Public Defender for Shelby County, my clients were indigent defendants who I represented in criminal matters.

c. Describe the percentage of your practice that has been in litigation and whether you appeared in court frequently, occasionally, or not at all. If the frequency of your appearances in court varied, describe such variance, providing dates.

The bulk of my practice was in County small claims courts (jurisdiction under $25,000), and county criminal courts (criminal misdemeanors trials and felony preliminary hearings). As an attorney for Memphis Area Legal Services, I was in court as frequently as once per week. As a Public Defender I was in court daily where I was responsible for between 10-20 cases per day. Once per week, I

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worked a double shift, handling a daily caseload and handling the evening docket during night court.

i. Indicate the percentage of your practice in:
   1. federal courts: 1%
   2. state courts of record: 10%
   3. other courts: 80%
   4. administrative agencies: 9%

ii. Indicate the percentage of your practice in:
   1. civil proceedings: 15%
   2. criminal proceedings: 85%

d. State the number of cases in courts of record, including cases before administrative law judges, you tried to verdict, judgment or final decision (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

I tried three cases to verdict in courts of record, two were criminal matters, and one was a divorce case. While the bulk of my trial work was in courts not of record (county and municipal courts), the same rules of evidence and procedure applicable to courts of record applied.

i. What percentage of these trials were:
   1. jury: 33%
   2. non-jury: 67%

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

I did not practice before the Supreme Court of the United States.

17. **Litigation**: Describe the ten (10) most significant litigated matters which you personally handled, whether or not you were the attorney of record. 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

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

The cases described below represent the most significant litigated matters that I have handled. As these cases were litigated many years ago, I have been unable to obtain records or documents, despite a thorough search, which would enable me to provide all requested information.

1) United States v. Riley, (W.D. Tenn. 1980) (Unreported) – Along with co-counsel, I represented the defendant on a federal drug charge. Before U.S. District Court Judge Harry Wellford, we argued a motion to suppress or dismiss because the probable cause to stop and search Ms. Riley was based on the "drug courier profile." This case was significant because the "drug courier" profile was being challenged on constitutional grounds at the same time we brought this case. Our motion was denied by Judge Wellford. We selected a jury, and just before the jury was sworn, Ms. Riley entered a plea of guilty. I do not recall the name of opposing counsel.

Court: Hon. Harry Wellford
67 North Main Street
Memphis, Tennessee 38103

Co-Counsel: William L. Johnson
50 North Front Street
Memphis, Tennessee 38103
(901) 576-8050

2) In re Banks (1981) (Unreported) – In the Shelby County Circuit Court, I represented a complainant who suffered a back injury on the job and sought compensation benefits. The provider sought to deny benefits because, *inter alia*, the bulk of the complainant's treatment was provided by a chiropractor. I was employed at the Public Defender's Office at the time, but I obtained special permission to represent Mr. Banks, who is my cousin. I did not conclude the matter, and I referred Mr. Banks to attorney Anthony Deal. I do not recall the name of the judge for this case.

Anthony Deal
238 Poplar Avenue
Memphis, Tennessee 38103
(901) 523-2222

3) Mississippi v. Bowie (Southaven Justice Court 1981) (Unreported) – I represented the defendant in the Southaven Justice Court for violation of probation. This case is significant because I challenged practices in the Justice of the Peace Court that violated basic due process requirements. In this case, the defendant was placed "on probation" ex parte without notice at the request of the landlord, and ordered to refrain from visiting his girlfriend in a certain apartment complex. The court had no jurisdiction over the defendant and no charges were ever filed. The defendant was

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never served with any pleading, nor was the defendant ever notified of the "probationary status." Subsequently, during an emergency evacuation of the premises, the defendant was arrested and held without bond for violation of "probation," flowing from this ex parte action.

The matter was tried before Judge William Bailey of Southaven. I successfully argued violation of due process, among other things, and obtained a dismissal of all charges. No civil suit was filed.

4) Coburn v. Tennessee Dep't of Employment Security (1980) (Unreported) – This was an unemployment compensation matter before an administrative law judge. The matter involved an alleged wrongful termination. My client prevailed at the hearing and was reinstated. The matter was appealed, and due to my changed employment status, another attorney from MALS handled the appeal. I cannot recall the name of the administrative judge who presided over this matter, nor do I recall the name of opposing counsel.

5) Tennessee v. Motamedi (Memphis City Court Division 4) (1981) (Unreported) – In the Memphis City Court, Division IV, I represented an Iranian woman charged with assault on a police officer. The defendant was new to the South and to Memphis in particular. A police officer stopped her for speeding, and when the officer approached her, she allegedly attempted to run him over with her automobile. Ms. Motamedi claimed she was fearful because she had heard that southern police officers harbored racial prejudices and she felt she would be stereotyped based on her alienage. She was convicted of a misdemeanor offense.

I tried the case before the Honorable C. Anthony Johnson, who is now deceased. Assistant District Attorney Tony Jones prosecuted the case. Jones is retired and information regarding him can be obtained at (901) 545-5150.

6) Donald v. Big Buck Resort (1980) (Unreported) – I represented myself and my husband in a damage action against resort property developers for breach of conditions governing the design and construction of the resort in which we invested. The sales contracts and warranties provided that a club house would be constructed, which would become the common property of the property owners. Subsequently, the developers proposed to abandon construction of the club house. I initiated an informal action to compel compliance with HUD regulations and certain contractual provisions. The matter was resolved out of court and our money refunded through an informal settlement agreement. The developers were represented by Al Thomas, Al H. Thomas & Associates 100 North Main Street #2901, Memphis, TN 38103, (901) 526-0000.

7) Saulsberry v. Walgreens (1979) (Unreported) – I initiated an action on the part of a plaintiff who purchased a candy bar at Walgreen's Drug store. After eating a tainted candy bar, she became ill and nauseated. I served Walgreens with a letter of intent to

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sue. The matter was settled out of court with Aetna insurance for a nominal amount. I do not recall the name of opposing counsel.

8) Tennessee v. Unknown Defendant(s) (Memphis City Court Division 3) (1980 – 1982) (Unreported) – During the time I served as an assistant public defender, one of the cases I tried was an assault and battery charge in which I argued a defendant's right to refuse medical treatment. The matter was tried before City Court Judge Nancy Sorak. I represented a defendant charged with assault and battery on a police officer and disorderly conduct. The defendant had been drinking, and it was alleged that he subsequently violently provoked another individual. During this altercation, the defendant was injured. The police placed the defendant under arrest for public drunkenness and disorderly conduct and sought to transport the defendant to a local hospital for treatment. Although the defendant repeatedly refused treatment, he was restrained and medical treatment imposed. In the process, the defendant struck the officer. As his counsel, I maintained that the defendant had a right to refuse treatment. I argued that since this was not a life threatening injury, those seeking to treat the defendant committed a battery upon him and that the defendant had the right to defend himself against the continuing battery.

   I do not recall the name of the defendant in this case. Although Judge Sorak acknowledged the validity of the affirmative defense which I presented, my client was found guilty of assault and battery.

9) As an Assistant Public Defender, I tried many cases involving the use, possession, manufacture, or distribution of controlled substances. I frequently challenged the probable cause for stops, searches, and arrests.

   In one particular case, I represented a client in Shelby County General Sessions Court at a preliminary hearing for possessing and concealing a controlled substance. I challenged the probable cause for the stop. The alleged basis for the stop was a burned out tail light on the defendant's car. After stopping the vehicle, the police conducted a full search of the vehicle and found illegal drugs. I was able to get the evidence suppressed because the client was not charged with the traffic offense. I do not recall the name of opposing counsel.

10) In 1980, as a staff attorney for Memphis Area Legal Services, I filed two Title VII employment discrimination cases in federal court. During one of the cases, I attended a settlement conference before U.S. District Judge Odell Horton. Due to my change in employment to the Public Defender's Office, I was not able to see either case to completion. I do not recall the names of any of the parties involved, nor do I remember the name of opposing counsel.

18. **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 fully the nature of your participation in these activities. List any client(s) or organization(s) for whom you performed lobbying

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activities and describe the lobbying activities you performed on behalf of such client(s) or organizations(s). (Note: As to any facts requested in this question, please omit any information protected by the attorney-client privilege.)

I have been very active in bar activities designed to enhance the legal profession and the practice of law. Locally, through the Memphis Bar Association, as co-chair of the Bench Bar Committee, I, along, with attorney Charles Walker, developed the educational program for the 1990 Annual Bench-Bar Program. Additionally, through the Bar Association, I have served as a frequent lecturer on topics including Bankruptcy, Ethics, Professional Responsibility, and Court Rules.

In 1990, for the U.S. Bankruptcy Court for the Western District, I chaired the Committee for Revision of the local bankruptcy rules. In 1994 and 1995, I served as Vice Chair of the Continuing Legal Education Committee of the National Bar Association, Ben F. Jones Chapter.

I have performed no lobbying activities.

19. **Teaching**: What courses have you taught? For each course, state the title, the institution at which you taught the course, the years in which you taught the course, and describe briefly the subject matter of the course and the major topics taught. If you have a syllabus of each course, provide four (4) copies to the committee.

From August 1985 to May 1988, I served as adjunct faculty at the Cecil C. Humphreys School of Law in Memphis. I taught Legal Research and Writing and Professional Responsibility. I also co-taught a Trial Advocacy for one semester. I have not retained copies of my syllabi.

20. **Deferred Income/ Future Benefits**: List the 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. Describe the arrangements you have made to be compensated in the future for any financial or business interest.

None.

21. **Outside Commitments During Court Service**: 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.

22. **Sources of Income**: 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, licensing fees, honoraria, and other items

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exceeding $500 or more (if you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here).

See attached Financial Disclosure Report.

23. **Statement of Net Worth**: Please complete the attached financial net worth statement in detail (add schedules as called for).

See attached Net Worth Statement.

24. **Potential Conflicts of Interest**:

a. Identify the family members or other persons, parties, categories of litigation, and financial arrangements that are likely to present potential conflicts-of-interest when you first assume the position to which you have been nominated. Explain how you would address any such conflict if it were to arise.

I own a small amount of stock in Ford Motor Company, First Horizon National Bank, Procter & Gamble, and Gillette Company. I will recuse in any cases involving these companies.

b. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern.

I would handle all matters involving actual or potential conflicts of interest through the careful application of the Code of Conduct for United States Judges, as well as other relevant canons and statutory provisions. Specifically, I would apprise the assignment clerk and my colleagues of areas of conflict, and perform my own conflicts check. I would also recuse in any matter where I or my spouse have a financial interest. Furthermore, I would disclose any potential conflict to the parties before me.

25. **Pro Bono Work**: 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 work with bar associations, speak to nonprofit and community groups, and work with children to help them develop life skills. As a judge, I am limited in the type of pro bono work that I can do. I am permitted, however, to speak, teach, and work with Bar Associations to improve the administration of justice.

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67905.763

26. **Selection Process**:

a. Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and the interviews in which you participated). Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, please include that process in your description, as well as whether the commission recommended your nomination. List the dates of all interviews or communications you had with the White House staff or the Justice Department regarding this nomination. Do not include any contacts with Federal Bureau of Investigation personnel concerning your nomination.

In December 2009, an attorney, who is also a personal friend, contacted me and advised me of an upcoming vacancy on the Sixth Circuit Court of Appeals and encouraged me to consider allowing my name to be submitted for consideration. In late February 2010, a state judicial officer also contacted me and urged me to allow my name to be submitted for consideration. Thereafter, I agreed to allow my name and resume to be submitted and confirmed my interest to Congressman Steve Cohen (D-TN) as there is no selection committee in Tennessee.

Since July 8, 2010, I have been in contact with pre-nomination officials at the Department of Justice. On September 10, 2010, I interviewed in Washington, D.C., with representatives of the White House Counsel's Office and the Department of Justice. On December 1, 2010, the President submitted my nomination to the Senate.

b. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any currently pending or specific case, legal issue or question in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning your position on such case, issue, or question? If so, explain fully.

No.

VerDate Nov 24 2008 11:51 Oct 24, 2011 Jkt 067905 PO 00000 Frm 00863 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\67905.TXT SJUD1 PsN: CMORC

67905.764

AO 10
Rev. 1/2010

FINANCIAL DISCLOSURE REPORT
NOMINATION FILING

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
Donald, Bernice B.	U.S. Court of Appeals for the Sixth Circuit	12/1/2010
4. Title (Article III judges indicate active or senior status; magistrate judges indicate full- or part-time)	**5a. Report Type** (check appropriate type)	**6. Reporting Period**
Circuit Judge	☑ Nomination. Date 12/1/2010 ☐ Initial ☐ Annual ☐ Final 5b. ☑ Amended Report	01/01/2009 to 11/30/2010
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.**	
167 N. Main Street, #951 Memphis, TN 38103	Reviewing Officer_____ Date_____	

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

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

☐ NONE *(No reportable positions.)*

	POSITION	NAME OF ORGANIZATION/ENTITY
1.	Secretary	American Bar Association
2.	Member, Advisory Committee - Justice Prize	Peter and Patricia Gruber Foundation
3.	Vice-President	American Bar Foundation
4.	Board Member	American Bar Journal Magazine
5.	Board Member	Stax Museum
6.	Director	University of Memphis Law Alumni Association

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

☑ NONE *(No reportable agreements.)*

	DATE	PARTIES AND TERMS
1.		
2.		
3.		

FINANCIAL DISCLOSURE REPORT Page 2 of 6	Name of Person Reporting Donald, Bernice B.	Date of Report 12/1/2010

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

A. Filer's Non-Investment Income

☐ NONE *(No reportable non-investment income.)*

	DATE	SOURCE AND TYPE	INCOME (yours, not spouse's)
1.	2009	Peter and Patricia Gruber Foundation	$2,500.00
2.			
3.			
4.			

B. Spouse's Non-Investment Income - *If you were married during any portion of the reporting year, complete this section.*
(Dollar amount not required except for honoraria.)

☑ NONE *(No reportable non-investment income.)*

	DATE	SOURCE AND TYPE
1.		
2.		
3.		
4.		

IV. REIMBURSEMENTS – *transportation, lodging, food, entertainment.*
(Includes those to spouse and dependent children; see pp. 25-27 of filing instructions.)

☐ NONE *(No reportable reimbursements.)*

	SOURCE	DATES	LOCATION	PURPOSE	ITEMS PAID OR PROVIDED
1.	Exempt				
2.					
3.					
4.					
5.					

FINANCIAL DISCLOSURE REPORT Page 3 of 6	Name of Person Reporting Donald, Bernice B.	Date of Report 12/1/2010

V. GIFTS. *(Includes those to spouse and dependent children; see pp. 28-31 of filing instructions.)*

☐ NONE *(No reportable gifts.)*

	SOURCE	DESCRIPTION	VALUE
1.	Exempt		
2.			
3.			
4.			
5.			

VI. LIABILITIES. *(Includes those of spouse and dependent children; see pp. 32-33 of filing instructions.)*

☑ NONE *(No reportable liabilities.)*

	CREDITOR	DESCRIPTION	VALUE CODE
1.			
2.			
3.			
4.			
5.			

FINANCIAL DISCLOSURE REPORT Page 4 of 6	Name of Person Reporting Donald, Bernice B.	Date of Report 12/1/2010

VII. INVESTMENTS and TRUSTS – *income, value, transactions (Includes those of spouse and dependent children; see pp. 34-60 of filing instructions.)*

☐ NONE *(No reportable income, assets, or transactions.)*

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A-H)	B. Income during reporting period (2) Type (e.g., div., rent, or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. Gross value at end of reporting period (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, redemption)	D. Transactions during reporting period (2) Date mm/dd/yy	D. Transactions during reporting period (3) Value Code 2 (J-P)	D. Transactions during reporting period (4) Gain Code 1 (A-H)	D. Transactions during reporting period (5) Identity of buyer/seller (if private transaction)
1. First Horizon	A	Dividend	J	T	Exempt				
2. Proctor and Gamble	D	Dividend	J	T					
3. Reynolds American Inc	C	Dividend	J	T					
4. Ford Motor Company	B	Dividend	J	T					
5. Pioneer Cash Reserve	C	Dividend	J	T					
6.									
7.									
8.									
9.									
10.									
11.									
12.									
13.									
14.									
15.									
16.									
17.									

1. Income Gain Codes: (See Columns B1 and D4)	A =$1,000 or less F =$50,001 - $100,000	B =$1,001 - $2,500 G =$100,001 - $1,000,000	C =$2,501 - $5,000 H1 =$1,000,001 - $5,000,000	D =$5,001 - $15,000 H2 =More than $5,000,000	E =$15,001 - $50,000
2. Value Codes (See Columns C1 and D3)	J =$15,000 or less N =$250,001 - $500,000 P3 =$25,000,001 - $50,000,000	K =$15,001 - $50,000 O =$500,001 - $1,000,000	L =$50,001 - $100,000 P1 =$1,000,001 - $5,000,000 P4 =More than $50,000,000	M =$100,001 - $250,000 P2 =$5,000,001 - $25,000,000	
3. Value Method Codes (See Column C2)	Q =Appraisal U =Book Value	R =Cost (Real Estate Only) V =Other	S =Assessment W =Estimated	T =Cash Market	

FINANCIAL DISCLOSURE REPORT Page 5 of 6	Name of Person Reporting Donald, Bernice B.	Date of Report 12/1/2010

VIII. ADDITIONAL INFORMATION OR EXPLANATIONS. *(Indicate part of Report.)*

FINANCIAL DISCLOSURE REPORT Page 6 of 6	Name of Person Reporting Donald, Bernice B.	Date of Report 12/1/2010

IX. CERTIFICATION.

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

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

Signature Bernice Louise Donald

NOTE: ANY INDIVIDUAL WHO KNOWINGLY AND WILFULLY FALSIFIES OR FAILS TO FILE THIS REPORT MAY BE SUBJECT TO CIVIL AND CRIMINAL SANCTIONS (5 U.S.C. app. § 104)

FILING INSTRUCTIONS

Mail signed original and 3 additional copies to:

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

Bernice Donald

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		79	374	Notes payable to banks-secured		14	172
U.S. Government securities–Series EE bonds		110	000	Notes payable to banks-unsecured			
Listed securities – see schedule		22	630	Notes payable to relatives			
Unlisted securities				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-see schedule			
Real estate owned – see schedule		805	000	Chattel mortgages and other liens payable			
Real estate mortgages receivable				Other debts-itemize:			
Autos and other personal property		225	000	Credit card		7	116
Cash value-life insurance		150	000				
Other assets itemize:							
Certificates of Deposit		35	294				
Thrift Savings Account		250	478				
				Total liabilities		21	288
				Net Worth	1	656	488
Total Assets	1	677	776	Total liabilities and net worth	1	677	776
CONTINGENT LIABILITIES				GENERAL INFORMATION			
As endorser, comaker or guarantor				Are any assets pledged?	NO		
On leases or contracts				Are you defendant in any suits or legal actions?	NO		
Legal Claims				Have you ever taken bankruptcy?	NO		
Provision for Federal Income Tax							
Other special debt							

FINANCIAL STATEMENT

NET WORTH SCHEDULES

Listed Securities	
Ford Motor Company	$ 2,448
First Horizon	2,601
Reynolds American Inc.	3,919
Proctor and Gamble	10,494
Pioneer Cash Reserve	3,168
Total Listed Securities	$ 22,630
Real Estate Owned	
Personal residence	$ 600,000
50 Acre farm land	200,000
Vacant lot	5,000
Total Real Estate Owned	$ 805,000

AFFIDAVIT

I, Bernice Bouie Donald, do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

November 30, 2010
(DATE)

(NAME)

LYNN DUDLEY
STATE OF TENNESSEE
NOTARY PUBLIC
SHELBY COUNTY

(NOTARY)

MY COMMISSION EXPIRES:
February 19, 2012

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
167 NORTH MAIN STREET
MEMPHIS, TENNESSEE 38103

BERNICE B. DONALD
JUDGE

January 5, 2011

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Chairman Leahy:

I have reviewed the Senate Questionnaire I previously filed in connection with my December 1, 2010 nomination to be United States Circuit Judge for the Sixth Circuit. Incorporating the additional information below, I certify that the information contained in my prior submissions is, to the best of my knowledge, true and accurate.

- The order that was subject to appeal in Sec'y of Labor v. 3re.com, No. 01-02350 (W.D. 2001), rev'd, 317 F.3d 534 (6th Cir. 2003), under question 13(f) was authored by, and is the case of Judge Jon McCalla. The case and order were mistakenly added to my list of reversals. (Question 13f)

- On December 17, 2010, I administered the oath of office to the incoming U.S. Attorney, Ed Stanton, and gave brief remarks congratulating him and recognizing his family.

- On January 5 and January 11, 2011, I am scheduled to give a lecture to Northside High School students on life skills. The lecture will discuss oral and written communication skills, image, and the need to prepare for future career goals.

- I have been selected to receive an award from the University of Memphis on February 1, 2011. I will make brief remarks accepting the award. (Questions 8 & 12d)

- I have been selected to receive the "Spirit of Excellence Award" from the American Bar Association at a luncheon on February 12, 2011. I will make brief remarks accepting the award. (Question 8 & 12d)

Sincerely,

Bernice B. Donald
U.S. District Court Judge

cc:
The Honorable Charles Grassley
Ranking Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

AO 10
Rev. 1/2010

FINANCIAL DISCLOSURE REPORT
NOMINATION FILING

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
Donald, Bernice B.	U.S. Court of Appeals for the Sixth Circuit	1/5/2011
4. Title (Article III judges indicate active or senior status; magistrate judges indicate full- or part-time)	**5a. Report Type** (check appropriate type)	**6. Reporting Period**
Circuit Judge	☑ Nomination, Date 1/5/2011 ☐ Initial ☐ Annual ☐ Final 5b. ☐ Amended Report	01/01/2010 to 1/4/2011
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.**	
167 N. Main Street, #951 Memphis, TN 38103	Reviewing Officer_____ Date_____	

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

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

☐ NONE *(No reportable positions.)*

POSITION	NAME OF ORGANIZATION/ENTITY
1. Secretary	American Bar Association
2. Member, Advisory Committee - Justice Prize	Peter and Patricia Gruber Foundation
3. Vice-President	American Bar Foundation
4. Board Member	American Bar Journal Magazine
5. Board Member	Stax Museum
6. Director	University of Memphis Law Alumni Association

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

☑ NONE *(No reportable agreements.)*

DATE	PARTIES AND TERMS
1.	
2.	
3.	

FINANCIAL DISCLOSURE REPORT Page 2 of 6	Name of Person Reporting	Date of Report
	Donald, Bernice B.	1/5/2011

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

A. Filer's Non-Investment Income

☐ NONE *(No reportable non-investment income.)*

	DATE	SOURCE AND TYPE	INCOME (yours, not spouse's)
1.	2010	Peter and Patricia Gruber Foundation	$2,500.00
2.			
3.			
4.			

B. Spouse's Non-Investment Income - *If you were married during any portion of the reporting year, complete this section.*
(Dollar amount not required except for honoraria.)

☑ NONE *(No reportable non-investment income.)*

	DATE	SOURCE AND TYPE
1.		
2.		
3.		
4.		

IV. REIMBURSEMENTS – *transportation, lodging, food, entertainment.*
(Includes those to spouse and dependent children; see pp. 25-27 of filing instructions.)

☐ NONE *(No reportable reimbursements.)*

	SOURCE	DATES	LOCATION	PURPOSE	ITEMS PAID OR PROVIDED
1.	Exempt				
2.					
3.					
4.					
5.					

FINANCIAL DISCLOSURE REPORT Page 3 of 6	Name of Person Reporting Donald, Bernice B.	Date of Report 1/5/2011

V. GIFTS. *(Includes those to spouse and dependent children; see pp. 28-31 of filing instructions.)*

☐ NONE *(No reportable gifts.)*

	SOURCE	DESCRIPTION	VALUE
1.	Exempt		
2.			
3.			
4.			
5.			

VI. LIABILITIES. *(Includes those of spouse and dependent children; see pp. 32-33 of filing instructions.)*

☑ NONE *(No reportable liabilities.)*

	CREDITOR	DESCRIPTION	VALUE CODE
1.			
2.			
3.			
4.			
5.			

FINANCIAL DISCLOSURE REPORT Page 4 of 6	Name of Person Reporting Donald, Bernice B.	Date of Report 1/5/2011

VII. INVESTMENTS and TRUSTS – *income, value, transactions (Includes those of spouse and dependent children; see pp. 34-60 of filing instructions.)*

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A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A-H)	B. (2) Type (e.g., div., rent, or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, redemption)	D. (2) Date mm/dd/yy	D. (3) Value Code 2 (J-P)	D. (4) Gain Code 1 (A-H)	D. (5) Identity of buyer/seller (if private transaction)
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3. Reynolds American Inc	C	Dividend	J	T					
4. Ford Motor Company	B	Dividend	J	T					
5. Pioneer Cash Reserve	C	Dividend	J	T					
6.									
7.									
8.									
9.									
10.									
11.									
12.									
13.									
14.									
15.									
16.									
17.									

1. Income Gain Codes: (See Columns B1 and D4)	A =$1,000 or less F =$50,001 - $100,000	B =$1,001 - $2,500 G =$100,001 - $1,000,000	C =$2,501 - $5,000 H1 =$1,000,001 - $5,000,000	D =$5,001 - $15,000 H2 =More than $5,000,000	E =$15,001 - $50,000
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FINANCIAL DISCLOSURE REPORT Page 5 of 6	Name of Person Reporting Donald, Bernice B.	Date of Report 1/5/2011

VIII. ADDITIONAL INFORMATION OR EXPLANATIONS. *(Indicate part of Report.)*

FINANCIAL DISCLOSURE REPORT Page 6 of 6	Name of Person Reporting Donald, Bernice B.	Date of Report 1/5/2011

IX. CERTIFICATION.

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

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

Signature

NOTE: ANY INDIVIDUAL WHO KNOWINGLY AND WILFULLY FALSIFIES OR FAILS TO FILE THIS REPORT MAY BE SUBJECT TO CIVIL AND CRIMINAL SANCTIONS (5 U.S.C. app. § 104)

FILING INSTRUCTIONS

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

Bernice Donald

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			
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Unlisted securities				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-see schedule			
Real estate owned – see schedule		805	000	Chattel mortgages and other liens payable			
Real estate mortgages receivable				Other debts-itemize:			
Autos and other personal property		225	000	Credit card		7	116
Cash value-life insurance		150	000				
Other assets itemize:							
Certificates of Deposit		35	294				
Thrift Savings Account		250	478				
				Total liabilities		21	288
				Net Worth	1	656	488
Total Assets	1	677	776	Total liabilities and net worth	1	677	776
CONTINGENT LIABILITIES				GENERAL INFORMATION			
As endorser, comaker or guarantor				Are any assets pledged?	NO		
On leases or contracts				Are you defendant in any suits or legal actions?	NO		
Legal Claims				Have you ever taken bankruptcy?	NO		
Provision for Federal Income Tax							
Other special debt							

FINANCIAL STATEMENT

NET WORTH SCHEDULES

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Ford Motor Company	$ 2,448
First Horizon	2,601
Reynolds American Inc.	3,919
Proctor and Gamble	10,494
Pioneer Cash Reserve	3,168
Total Listed Securities	$ 22,630
Real Estate Owned	
Personal residence	$ 600,000
50 Acre farm land	200,000
Vacant lot	5,000
Total Real Estate Owned	$ 805,000

67905.780

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
167 NORTH MAIN STREET
MEMPHIS, TENNESSEE 38103

BERNICE B. DONALD
JUDGE

March 11, 2011

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

The Honorable Charles Grassley
Ranking Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Chairman Leahy and Senator Grassley:

I write to provide the Committee with a correction to the questionnaire I submitted in connection with my December 1, 2010 nomination to the United States Court of Appeals for the Sixth Circuit.

In preparing for my hearing, I have been reviewing the materials related to my Senate Questionnaire and realized that I made an inadvertent mistake that requires me to amend my answer to Question 13(c). On Case No. 8, United States v. Haynes, the words "as applied based on race" should be removed. In summarizing this case, I accidentally conflated Haynes with United States v. Wilson, another death penalty case I was handling at the same time. Both cases involved murder in the perpetration of a bank robbery and included motions to declare the death penalty unconstitutional. The defendant in Wilson alleged a systematic pattern of racial discrimination in the prosecution's requests for the death penalty. The Wilson case was transferred for the sake of judicial economy, and the motion was ultimately decided by another judge.

Please accept my sincerest apologies. I appreciate the Committee's consideration of my nomination and regret any confusion or inconvenience that my error might have caused.

Sincerely,

Bernice B. Donald
U.S. District Court Judge

Senator SCHUMER. We are just going to reset the table, but in the meantime, I am going to ask Mr. Engelmayer, Mr. Oetken, and Judge Manglona to come forward because I want to swear them in.

Will you please stand to be sworn? Do you each affirm 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. OETKEN. I do.

Mr. ENGELMAYER. I do.

Judge MANGLONA. I do.

Senator SCHUMER. Thank you.

OK, first I have a few questions for all of you. I have always said that moderation and judicial modesty are two qualities that are important to me in a potential judge—oh, sorry. I did not let you introduce your families and guests, so let me do that. Mr. Oetken, if you have any people you would like to introduce here?

STATEMENT OF J. PAUL OETKEN, NOMINEE TO BE DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF NEW YORK

Mr. OETKEN. Thank you, Mr. Chairman. I would like to thank you, Senator Schumer, for convening this hearing and also Senator Grassley. I would also like to thank briefly President Obama for this nomination, which is a great honor, and you, Senator Schumer, for recommending me for this position.

I would like to introduce a few of my family members and friends who are here. I would ask them to stand very briefly. First of all, my partner, "Makky" Pratayot, is here. I am very happy he was able to come down from Manhattan where we live. My brother is here from Iowa City, John, and his wife, Carla; and their two kids, Luke and Ben, who are 15 and 13. They are on spring break this week from school in Iowa City. I am delighted that they are able to be here.

I also want to acknowledge briefly my sister, Sara, who is watching on the webcast from home in St. Charles, Illinois, with her husband, Matt, my brother-in-law, and my niece and nephew, Katie and Ian, who are 11 and 9, and they are all watching and were not able to be here, but I appreciate their support.

Finally, I just want to acknowledge my mom and dad, Jim and Betty Oetken, who very much wanted to be here but were not able to because my father had to have surgery yesterday, which everything went fine, I am happy to say.

Senator SCHUMER. Praise God.

Mr. OETKEN. And they are watching on the webcast, and I am extremely grateful to them for their love and support over the years. They have been the most amazing, warm, loving, supportive parents anyone could hope for, and I really owe them everything.

Senator SCHUMER. Thank you, and——

Mr. OETKEN. If I could also briefly acknowledge just a few friends who are here.

Senator SCHUMER. Yes. We like that. That is the nice part of these hearings.

Mr. OETKEN. I have several friends who were able to come down from New York and friends from D.C. and several friends, including my great friends at Cablevision, who are able to watch on the

webcast. So I just want to thank all of them for their support as well.

Senator SCHUMER. Great. Well, thank you all, and would the friends—since the family stood up, would the friends of Mr. Oetken please rise so we can say hello and greet you? Thank you all for being here. Great.

[The biographical information follows.]

UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY

QUESTIONNAIRE FOR JUDICIAL NOMINEES

PUBLIC

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

   James Paul Oetken

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

   United States District Judge for the Southern District of New York

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

   Cablevision Systems Corporation
   1111 Stewart Avenue
   Bethpage, New York 11714

   [redacted]

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

   1965; Louisville, Kentucky

5. **Education**: List in reverse chronological order each college, law school, or any other institution of higher education attended and indicate for each the dates of attendance, whether a degree was received, and the date each degree was received.

   1988 – 1991, Yale Law School; J.D., 1991

   1985 – 1988, University of Iowa; B.A. (with highest distinction), 1988

   1984 – 1985, Catholic University of America; no degree awarded

6. **Employment Record**: List in reverse chronological order all governmental agencies, business or professional corporations, companies, firms, or other enterprises, partnerships, institutions or 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 description.

2004 – Present
Cablevision Systems Corporation
1111 Stewart Avenue
Bethpage, New York 11714
Senior Vice President and Associate General Counsel (2007 – Present)
Vice President and Associate General Counsel (2004 – 2007)

2009 – 2010
Fordham Law School
140 West 62nd Street
New York, New York 10023
Adjunct Professor of Law

2001 – 2004
Debevoise & Plimpton
919 Third Avenue
New York, New York 10022
Counsel (2003 – 2004)
Associate (2001 – 2003)

1999 – 2001
The White House
Office of Counsel to the President
Eisenhower Executive Office Building
1650 Pennsylvania Avenue, NW
Washington, DC 20506
Associate Counsel to the President

1997 – 1999
United States Department of Justice
Office of Legal Counsel
950 Pennsylvania Avenue, NW
Washington, DC 20530
Attorney-Advisor

1995 – 1997
Jenner & Block
1099 New York Avenue, NW
Washington, DC 20001
Associate

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1993 – 1994
Hon. Harry A. Blackmun
United States Supreme Court
One First Street, NE
Washington, DC 20543
Law Clerk

1992 – 1993
Hon. Louis F. Oberdorfer
United States District Court for the District of Columbia
333 Constitution Avenue, NW
Washington, DC 20001
Law Clerk

1991 – 1992
Hon. Richard D. Cudahy
United States Court of Appeals for the Seventh Circuit
219 South Dearborn Street
Chicago, Illinois 60604
Law Clerk

Summer 1991
Morrison & Foerster
1290 Avenue of the Americas
New York, New York 10104
Summer Associate

Summer 1990
McCutchen, Doyle, Brown & Enersen
Three Embarcadero Plaza
San Francisco, California 94111
Summer Associate

1989 – 1990
Professor Joseph Goldstein
Yale Law School
P.O. Box 208215
New Haven, Connecticut 06520
Research Assistant

Summer 1989
Sidley & Austin
1 South Dearborn Street
Chicago, Illinois 60603
Summer Associate

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Summer 1988
University of Iowa
Orientation Services
107 Calvin Hall
Iowa City, Iowa 52242
Graduate Assistant

7. **Military Service and Draft Status**: Identify any service in the U.S. Military, including dates of service, branch of service, rank or rate, serial number (if different from social security number) and type of discharge received, and whether you have registered for selective service.

   I have not served in the military. I have registered for selective service.

8. **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.

   Rhodes Scholarship finalist, 1987
   Phi Beta Kappa, 1987 – 1988
   Mortar Board, 1987 – 1988
   E.R. Johnson Prize for highest academic achievement, University of Iowa, 1988
   Hancher-Finkbine Medallion, University of Iowa, 1988
   Presidential Scholarship, University of Iowa, 1984
   Archdiocesan Scholarship, Catholic University of America, 1984

9. **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, Business Law Section
   District of Columbia Bar Association
   Gay, Lesbian, Bisexual and Transgender Attorneys of Washington (GAYLAW)
   National LGBT Bar Association
   New York City Bar Association, Media Law Committee
   New York State Bar Association

10. **Bar and Court Admission**:

    a. List the date(s) you were admitted to the bar of any state and any lapses in membership. Please explain the reason for any lapse in membership.

       Maryland, 1995
       District of Columbia, 1996
       New York, 2002

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There have been no lapses in membership.

b. List all courts in which you have been admitted to practice, including dates of admission and any lapses in membership. Please explain the reason for any lapse in membership. Give the same information for administrative bodies that require special admission to practice.

Supreme Court of the United States, 2000
United States Court of Appeals for the Fourth Circuit, 1995
United States District Court for the Southern District of New York, 2002
United States District Court for the Eastern District of New York, 2002
United States District Court for the District of Maryland, 1995
District of Columbia Court of Appeals, 1996
New York Court of Appeals, 2002

There have been no lapses in membership.

11. **Memberships**:

a. List all professional, business, fraternal, scholarly, civic, charitable, or other organizations, other than those listed in response to Questions 9 or 10 to which you belong, or to which you have belonged, since graduation from law school. Provide dates of membership or participation, and indicate any office you held. Include clubs, working groups, advisory or editorial boards, panels, committees, conferences, or publications.

American Civil Liberties Union LGBT Project (2001 – Present)
American Constitution Society (2002 – Present)
DOJ Pride (1997 – 1999)
Human Rights Campaign (1995 – 2001)
Lambda Legal (1995 – Present)

b. 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, or national origin. Indicate whether any of these organizations listed in response to 11a above currently discriminate or formerly discriminated on the basis of race, sex, religion or national origin 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 the best of my knowledge, none of these organizations discriminates or formerly discriminated on the basis of race, sex, religion, or national origin, either through formal membership requirements or the practical implementation of membership policies.

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12. **Published Writings and Public Statements**:

a. List the titles, publishers, and dates of books, articles, reports, letters to the editor, editorial pieces, or other published material you have written or edited, including material published only on the Internet. Supply four (4) copies of all published material to the Committee.

Assisted Suicide and Democracy: Why an Oregon Federal Judge Was Right to Overturn Attorney General Ashcroft's Assisted Suicide Decision, Findlaw.com (Apr. 23, 2002). Re-published in *Assisted Suicide*, a book compiled by Karen Balkin. Copy supplied.

Review of *The Crusader* by Michael Eisner, Amazon.com, Oct. 19, 2001. Copy supplied.

Note, *Form and Substance in Critical Legal Studies*, 100 Yale L.J. 2209 (May 1991). Copy supplied.

b. Supply four (4) copies of any reports, memoranda or policy statements you prepared or contributed in the preparation of on behalf of any bar association, committee, conference, or organization of which you were or are a member. If you do not have a copy of a report, memorandum or policy statement, give the name and address of the organization that issued it, the date of the document, and a summary of its subject matter.

None that I can recall or have been able to identify.

c. Supply four (4) copies of any testimony, official statements or other communications relating, in whole or in part, to matters of public policy or legal interpretation, that you have issued or provided or that others presented on your behalf to public bodies or public officials.

None that I can recall or have been able to identify.

d. Supply four (4) copies, transcripts or recordings of all speeches or talks delivered by you, including commencement speeches, remarks, lectures, panel discussions, conferences, political speeches, and question-and-answer sessions. Include the date and place where they were delivered, and readily available press reports about the speech or talk. If you do not have a copy of the speech or a transcript or recording of your remarks, give the name and address of the group before whom the speech was given, the date of the speech, and a summary of its subject matter. If you did not speak from a prepared text, furnish a copy of any outline or notes from which you spoke.

April 19, 2006 – Panel entitled "Supreme Court Update" at 2006 "SuperConference" sponsored by *Inside Counsel* magazine in Chicago, Illinois.

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Together with two other panelists, I discussed the most significant Supreme Court decisions of the 2005 – 2006 Term. I have no notes, transcript or recording. Press and Jenner & Block coverage is supplied. The address of *Inside Counsel* is 222 South Riverside Plaza, Suite 620, Chicago, Illinois 60606.

April 21, 2003 – Panel entitled "On the Verge: Progress and Promise in Sexual Orientation and Gender Identity Law" at Pace University Law School. I discussed the *Lawrence v. Texas* case and the amicus brief I had co-authored in that case. I have no notes, transcript or recording. The address of Pace University Law School is 78 North Broadway, White Plains, New York 10603.

April 1, 2003 – Panel entitled "From *Hardwick* to *Lawrence*: Sodomy Laws and GLBT Equality in the New Century" at Ohio State University Moritz College of Law. I discussed the *Lawrence v. Texas* case and the amicus brief I had co-authored in that case. I have no notes, transcript or recording. An archived webcast of this panel discussion is available online at http://moritzlaw.osu.edu/news/newsrel.php?ID=39.

June 21, 2000 – GAYLAW "Job Talk" panel discussion held at Arnold & Porter, 555 Twelfth Street, NW, Washington, DC 20004. This panel discussion was a question-and-answer session for LGBT law students, summer associates, and legal interns focusing on career and workplace issues. I have no notes, transcript or recording. GAYLAW coverage supplied. The address of the organization is P.O. Box 34072, Washington, DC 20043.

e. List all interviews you have given to newspapers, magazines or other publications, or radio or television stations, providing the dates of these interviews and four (4) copies of the clips or transcripts of these interviews where they are available to you.

Joyce Murdoch and Deb Price, *Courting Justice: Gay Men and Lesbians v. The Supreme Court*, New York: Basic Books, 2001. Copy supplied.

John Heilprin, *Pizza, Music, Sleeping Bags: Not an Average Night at Supreme Court*, Associated Press, Dec. 1, 2000. Copy supplied.

Telephone Interview with Albert A. Foer for his article, *The Politics of Antitrust in the United States: Public Choice and Public Choices*, 62 U. PITT. L. REV. 475 (Spring 2001). Copy supplied.

Kara Swisher, *Work Around the Clock; Is Managing 'The Job' and 'A Life" Really Possible?*, Washington Post, Mar. 7, 1994. Copy supplied.

13. **Judicial Office**: State (chronologically) any judicial offices you have held, including positions as an administrative law judge, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

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I have never held a judicial office.

a. Approximately how many cases have you presided over that have gone to verdict or judgment? _____

   i. Of these, approximately what percent were:

jury trials:	___%
bench trials:	___% [total 100%]
civil proceedings:	___%
criminal proceedings:	___% [total 100%]

b. Provide citations for all opinions you have written, including concurrences and dissents.

c. For each of the 10 most significant cases over which you presided, provide: (1) a capsule summary of the nature the case; (2) the outcome of the case; (3) the name and contact information for counsel who had a significant role in the trial of the case; and (3) the citation of the case (if reported) or the docket number and a copy of the opinion or judgment (if not reported).

d. For each of the 10 most significant opinions you have written, provide: (1) citations for those decisions that were published; (2) a copy of those decisions that were not published; and (3) the names and contact information for the attorneys who played a significant role in the case.

e. Provide a list of all cases in which certiorari was requested or granted.

f. Provide a brief summary of and citations for all of your opinions where your decisions were reversed by a reviewing court or where your judgment was affirmed with significant criticism of your substantive or procedural rulings. If any of the opinions listed were not officially reported, provide copies of the opinions.

g. Provide a description of the number and percentage of your decisions in which you issued an unpublished opinion and the manner in which those unpublished opinions are filed and/or stored.

h. Provide 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, provide copies of the opinions.

i. Provide citations to all cases in which you sat by designation on a federal court of appeals, including a brief summary of any opinions you authored, whether majority, dissenting, or concurring, and any dissenting opinions you joined.

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14. **Recusal:** If you are or have been a judge, identify the basis by which you have assessed the necessity or propriety of recusal (If your court employs an "automatic" recusal system by which you may be recused without your knowledge, please include a general description of that system.) Provide a list of any cases, motions or matters that have come before you in which a litigant or party has requested that you recuse yourself due to an asserted conflict of interest or in which you have recused yourself sua sponte. Identify each such case, and for each provide the following information:

    a. whether your recusal was requested by a motion or other suggestion by a litigant or a party to the proceeding or by any other person or interested party; or if you recused yourself sua sponte;

    b. a brief description of the asserted conflict of interest or other ground for recusal;

    c. the procedure you followed in determining whether or not to recuse yourself;

    d. your reason for recusing or declining to recuse yourself, including any action taken to remove the real, apparent or asserted conflict of interest or to cure any other ground for recusal.

    I have never been a judge.

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

    a. List chronologically any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. If appointed, please include the name of the individual who appointed you. Also, state chronologically any unsuccessful candidacies you have had for elective office or unsuccessful nominations for appointed office.

    1999 – 2001: Associate Counsel to the President, Office of Counsel to the President, The White House (appointed by President Clinton)

    I have not had any unsuccessful candidacies for elective office or unsuccessful nominations for appointed office.

    b. List all memberships and offices held in and services rendered, whether compensated or not, to any political party or election committee. If you have ever held a position or played a role in a political campaign, identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

    I have not held an office or position with a political party, election committee, or political campaign, but I have participated as a volunteer in campaigns for John

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Kerry (co-hosted a fundraising event) and Al Gore (door-to-door leafleting and phone-banking).

16. **Legal Career:** Answer each part separately.

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

i. 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 served as a law clerk to the following three judges:

Hon. Harry A. Blackmun
United States Supreme Court
1993 – 1994

Hon. Louis F. Oberdorfer
United States District Court for the District of Columbia
1992 – 1993

Hon. Richard D. Cudahy
United States Court of Appeals for the Seventh Circuit
1991 – 1992

ii. whether you practiced alone, and if so, the addresses and dates;

I have not practiced law alone.

iii. 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.

Summer 1991
Morrison & Foerster
1290 Avenue of the Americas
New York, New York 10104
Summer Associate

1995 – 1997
Jenner & Block
1099 New York Avenue, NW
Washington, DC 20001
Associate

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1997 – 1999
United States Department of Justice
Office of Legal Counsel
950 Pennsylvania Avenue, NW
Washington, DC 20530
Attorney-Advisor

1999 – 2001
The White House
Office of Counsel to the President
Eisenhower Executive Office Building
1650 Pennsylvania Avenue, NW
Washington, DC 20506
Associate Counsel to the President

2001 – 2004
Debevoise & Plimpton
919 Third Avenue
New York, New York 10022
Counsel (2003 – 2004)
Associate (2001 – 2003)

2004 – Present
Cablevision Systems Corporation
1111 Stewart Avenue
Bethpage, New York 11714
Senior Vice President and Associate General Counsel (2007 – Present)
Vice President and Associate General Counsel (2004 – 2007)

iv. whether you served as a mediator or arbitrator in alternative dispute resolution proceedings and, if so, a description of the 10 most significant matters with which you were involved in that capacity.

I have not served as a mediator or arbitrator in alternative dispute resolution proceedings.

b. Describe:

i. the general character of your law practice and indicate by date when its character has changed over the years.

Following my graduation from law school in 1991, I spent three years clerking for federal judges: Judge Richard D. Cudahy on the U.S. Court of Appeals for the Seventh Circuit (1991 – 1992), Judge Louis F. Oberdorfer on the U.S. District Court for the District of Columbia (1992 – 1993), and Justice Harry A. Blackmun on the U.S. Supreme Court (1993 –

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1994). I then worked as a litigation associate at Jenner & Block in Washington, DC, until 1997. My work there involved a variety of subject matters, including telecommunications, First Amendment, contract, product liability, employment discrimination, bankruptcy, and voting rights.

In 1997, I became a lawyer for the Federal Government, first as an attorney-advisor with the U.S. Department of Justice, Office of Legal Counsel. In that position I worked on advice and legal opinions for agencies of the Executive Branch and the White House, covering a wide range of statutory and constitutional issues. In 1999, I joined the White House Counsel's Office as Associate Counsel to the President, where I served until the end of President Clinton's Administration in January 2001.

In 2001, I moved to New York and returned to private practice, joining Debevoise & Plimpton's litigation department. While at Debevoise, I again worked on a variety of matters, principally commercial litigations and arbitrations. I also worked on pro bono matters including amicus briefs in two Supreme Court cases, *Lawrence v. Texas* and *Rumsfeld v. Padilla*. In June 2004, I joined the legal department of Cablevision Systems Corporation, a media and entertainment company, as the head of litigation. In that position I have overseen the litigation involving all the divisions of the company, including corporate shareholder class actions and derivation actions, commercial contract disputes, copyright, patent, antitrust, tax, and defamation/First Amendment cases. In 2006, I also took over management of the employment law group within the company's legal department.

ii. your typical clients and the areas at each period of your legal career, if any, in which you have specialized.

During my years in private practice at Jenner & Block (1995 – 1997) and Debevoise & Plimpton (2001 – 2004), my clients typically were U.S. corporations, and in some cases non-U.S. corporations. I also worked on a number of matters for government entities and organizations such as unions and professional associations. These matters involved a wide variety of subject matters, including contract, defamation, First Amendment, voting rights, employment law, bankruptcy, and telecommunications law.

At the Office of Legal Counsel, my client was the United States, with the Office exercising the function of providing legal advice and legal opinions to the President and the Executive Branch agencies. At the White House Counsel's Office, my client was the President in his official capacity. In these positions, the subject matters were principally constitutional law –

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including the First Amendment, separation of powers, the Appointments Clause, and the Equal Protection Clause – as well as various federal statutory issues and legal ethics.

c. Describe the percentage of your practice that has been in litigation and whether you appeared in court frequently, occasionally, or not at all. If the frequency of your appearances in court varied, describe such variance, providing dates.

At Jenner & Block and Debevoise & Plimpton, my practice was in civil litigation. I appeared in court on a few occasions while at Jenner & Block, including arguing an appeal before the U.S. Court of Appeals for the Fourth Circuit in 1997 and participating on a trial team in a voting rights case in federal district court in Chicago in 1996. At Debevoise & Plimpton, I appeared in court on a number of occasions, including arguing motions in federal bankruptcy court in Chicago in 2003 and in New York Supreme Court in Manhattan in 2004. I also participated in two arbitration hearings in 2003 and 2004.

As an attorney with the Department of Justice Office of Legal Counsel and the White House Counsel's Office, I was not directly involved in litigation, although I was involved in analyzing and advising with respect to legal issues that later became, and previously had been, the subject of litigation.

As head of litigation at Cablevision, I am primarily responsible for overseeing all the civil litigation involving the company. I frequently appear in court and at depositions as the representative of the company, although outside counsel typically represents the company in court proceedings.

i. Indicate the percentage of your practice in:
   1. federal courts: 45%
   2. state courts of record: 35%
   3. other courts: 10%
   4. administrative agencies: 10%

ii. Indicate the percentage of your practice in:
   1. civil proceedings: 95%
   2. criminal proceedings: 5%

d. State the number of cases in courts of record, including cases before administrative law judges, you tried to verdict, judgment or final decision (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

At Jenner & Block, I assisted on the trial team in a voting rights case that was tried to judgment in the U.S. District Court for the Northern District of Illinois. At Debevoise & Plimpton, I assisted on the trial team in two arbitration hearings. At Cablevision, I have been part of the trial team in three cases that went to trial:

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one in the U.S. District Court for the Southern District of New York, one in the U.S. Bankruptcy Court for the District of Delaware, and one in New York Supreme Court for New York County. I did not serve as chief counsel or sole counsel in any of these cases.

i. What percentage of these trials were:
   1. jury:
   2. non-jury:

Two of these cases were bench trials; two were jury trials; two were arbitration hearings.

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

I have not appeared as counsel for a party in any case before the Supreme Court of the United States. I have worked on the following amicus briefs in cases before the Supreme Court:

Amicus brief in *Rumsfeld v. Padilla*, 542 U.S. 426 (2004), on behalf of Professor Louis Henkin, Professor Harold Hongju Koh, and Michael Posner. Copy supplied.

Amicus brief in *Lawrence v. Texas*, 539 U.S. 558 (2003), on behalf of the National Gay and Lesbian Law Association and other groups (co-authored with Chai Feldblum). Copy supplied.

I also assisted in the preparation of the opposition to a petition for certiorari in *Cartoon Network v. CSC Holdings*, No. 08-448. Copy supplied.

17. **Litigation**: Describe the ten (10) most significant litigated matters which you personally handled, whether or not you were the attorney of record. 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.

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1) *Lippe v. Bairnco*, 249 F. Supp. 2d 357 (S.D.N.Y. 2003) (Chin, J.), *aff'd*, 99 F. App'x 274 (2d Cir. 2004) (Meskill, Katzmann, Wesley, JJ.). This was a complex case involving fraudulent conveyance and related claims against a U.S. corporation that had filed for bankruptcy following the filing of over 100,000 asbestos-related product liability claims. On behalf of the company, we filed summary judgment motions in 2002-2003, prevailing on summary judgment and on appeal. Co-counsel: John Hall, Steve Klugman, and Jeremy Feigelson, Debevoise & Plimpton LLP, 919 Third Avenue New York, NY 10022, (212) 909-6000. Opposing Counsel: Stanley Levy, Levy, Phillips & Konigsburg LLP, 800 Third Avenue, 11th Floor, New York, NY 10022, (212) 605-6200.

2) *International Arbitration for non-U.S. Corporation.* In 2001-2003, I represented a non-U.S. corporation with my Debevoise & Plimpton colleagues in a major confidential arbitration conducted under the auspices of the American Arbitration Association. The arbitration included document discovery and depositions, with various phases of the case taking place in Japan, Brazil, and London, and an arbitration hearing before a panel of three arbitrators in New York. The claims involved allegations of breach of the duty of good faith and fair dealing in connection with a bid for a mining company. We prevailed at the hearing on behalf of the defendant company. Co-counsel: Donald F. Donovan and Steve Klugman, Debevoise & Plimpton LLP, 919 Third Avenue, New York, NY 10022, (212) 909-6000. Opposing counsel: Fred Davis, Shearman & Sterling LLP, 599 Lexington Avenue, New York, NY 10022 (currently at Debevoise & Plimpton LLP, 21 Avenue George V, Paris, France 75008, +33 1 40 73 13 10).

3) *Barnett v. City of Chicago*, 969 F. Supp. 1359 (N.D. Ill. 1997) (Duff, J.), *aff'd in part, vacated in part, and remanded*, 141 F.3d 699 (7th Cir. 1998) (Posner, Ripple, Kanne, JJ.). This case involved a challenge under the Voting Rights Act to the 1990 redistricting of the City of Chicago's alderman ward map. I served on the trial team during the 48-day trial in federal district court in Chicago during 1996, serving principally as the brief-writer and legal expert on the team. Our client, the City of Chicago, prevailed in the bench trial when Judge Brian Barnett Duff upheld the legality of the ward map. The case was later appealed to the Seventh Circuit, when I was no longer involved in it. The Seventh Circuit affirmed in part, reversed in part, and remanded for further proceedings. Co-counsel: Jerry Solovy, Joel Pelz, and Paul Smith, Jenner & Block LLP, 353 N. Clark Street, Chicago, IL 60654, (312) 222-9350. Opposing counsel: Judson Miner, Miner Barnhill & Galland, 14 West Erie Street, Chicago, IL 60610, (312) 751-1170; Maria Valdez, Mexican-American Legal Defense and Education Fund (currently United States Magistrate Judge, U.S. District Court for the Northern District of Illinois, 219 South Dearborn Street, Chicago, Illinois, 60604, (312) 435-5690).

4) *Heyman v. M.L. Marketing*, 116 F.3d 91 (4th Cir. 1997) (Michael, Motz, Goodwin, JJ.) (argued). This appeal, which I argued in 1997, involved the interpretation of Rule 60(b) of the Federal Rules of Civil Procedure, specifically the standard for "excusable neglect" to obtain relief from a judgment in the context of a bankruptcy trustee seeking substitution of counsel. I represented the appellant seeking relief. The Fourth Circuit held that the district court had not abused its discretion under Fourth

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Circuit case law and affirmed. Co-counsel: Carl Nadler, Jenner & Block LLP, Washington, DC (currently at Arnold & Porter LLP, 555 Twelfth Street NW, Washington, DC, 20004, (202) 942-6130). Opposing counsel: Robert Marino, Reed Smith (currently at Redmon, Peyton & Braswell LLP, 510 King Street, Alexandria, VA 22314, (703) 684-2000).

5) *KPERS v. Reimer & Koger Assocs.*, 941 P.2d 1321 (Kan. 1997) (Larson, J.). I assisted in the briefing of the constitutional issues in this appeal in 1996-1997, which involved due process and equal protection challenges to retroactive state legislation extending a statute of limitations for a specific class of claims. The Kansas Supreme Court ultimately ruled in favor of the plaintiff, the Kansas Public Employees Retirement System, on alternative grounds and without reaching the federal constitutional questions. Co-counsel: David Sanders, Jenner & Block LLP, 353 N. Clark Street, Chicago, IL 60654, (312) 222-9350. Opposing counsel: Frank Rice, Schroer Rice P.A., 214 SW 6th Avenue Suite 305, Topeka, KS 66603, (785) 357-0333.

6) *Official Committee of Unsecured Creditors of TW, Inc. v. Cablevision Sys. Corp.*, No. 05-50585 (U.S. Bankruptcy Court for the District of Delaware). A former Cablevision subsidiary that had operated The Wiz retail electronics business filed a Chapter 11 bankruptcy petition, and in 2005 the Creditors Committee filed claims against Cablevision and several of its officers and directors, including fraudulent conveyance, preferential transfer, and breach of fiduciary duty claims, seeking recovery of over $300 million. A trial on the central solvency issues in the case took place in November 2007, resulting in a judgment in favor of the Cablevision defendants on those issues. The case subsequently was settled. As in-house counsel for the defendants, I worked closely with outside counsel in preparing witnesses for depositions and trial, drafting papers, and ultimately reaching settlement. Co-counsel: Richard Werder, Quinn Emanuel Urquhart & Sullivan LLP, 51 Madison Avenue, New York, NY 10010, (212) 849-7000; Paul Harner, Paul, Hastings, Janofsky & Walker LLP, 191 North Wacker Drive, Chicago, IL 60606, (312) 499-6060. Opposing counsel: Steven J. Mandelsberg, Robert J. Malatak, and Mark T. Power, Hahn & Hessen LLP, 488 Madison Avenue, New York, NY 10022, (212) 478-7200.

7) *Cartoon Network v. CSC Holdings*, 478 F. Supp. 2d 607 (S.D.N.Y. 2007) (Chin, J.), *rev'd*, 536 F.3d 121 (2d Cir. 2008) (Walker, Sack, Livingston, JJ.). This was a significant copyright case involving the lawfulness under the Copyright Act of an innovative remote-server digital video recorder system developed by Cablevision. I was not listed as counsel on the case, but I was involved as an in-house lawyer for Cablevision from 2006 to 2009 in the litigation, including the briefing of the summary judgment motions and the appeal. Although Cablevision lost on summary judgment in the district court, the Second Circuit reversed, concluding that the system did not violate the Copyright Act. I was also involved in preparing the opposition to the certiorari petition filed by the plaintiffs in the United States Supreme Court. The Supreme Court denied certiorari. Co-counsel: Jeffrey Lamken, Molo Lamken LLP, 600 New Hampshire Avenue, NW, Washington, DC 20037, (202) 556-2000; and Timothy Macht, Macht, Schapiro, Arato & Isserles LLP, The Grace Building, 1114 Avenue of the Americas, 45th

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Floor, New York, NY 10036, (212) 479-6724. Opposing counsel: Katherine B. Forrest, Cravath, Swaine & Moore LLP (currently Deputy Assistant Attorney General, U.S. Department of Justice, Antitrust Division, 950 Pennsylvania Avenue, NW, Washington, DC 20530, (202) 514-2000), Robert Garrett, Arnold & Porter LLP, 555 Twelfth Street, NW, Washington, DC 20004, (202) 942-5444, and (in-house) Edward J. Weiss, Senior Vice President and Deputy General Counsel, Time Warner, Inc. (currently General Counsel, New England Sports Ventures LLC, 480 Arsenal Street, Watertown, MA 02472, (617) 536-9233).

8) *Lawrence v. Texas*, 539 U.S. 558 (2003). This was a federal constitutional challenge to the Texas statute criminalizing same-sex sodomy. In 2003, I co-wrote an amicus brief on behalf of the National Gay and Lesbian Law Association and several other organizations in support of the petitioners, who were represented by Lambda Legal and Jenner & Block. The Supreme Court reversed the petitioners' convictions, overruling *Bowers v. Hardwick* and striking down the Texas sodomy statute. Co-counsel (for plaintiffs): Paul M. Smith, Jenner & Block, 1099 New York Avenue, NW, Suite 900, Washington, DC 20001, (202) 639-6060; and Ruth Harlow, Legal Director, Lambda Legal (currently at Linklaters LLP, 1345 Avenue of the Americas, New York, NY 10105, (212) 903-9210). Opposing counsel: Charles Rosenthal, District Attorney, Harris County, Texas; William J. Delmore III and Scott A. Durfee, Assistant District Attorneys, 1201 Franklin Street, Houston, TX 77002, (713) 755-5800.

9) *Campbell v. Sundquist*, 926 S.W.2d 255 (Tenn. Ct. App. 1996). This case involved an earlier challenge to the State of Tennessee's statute criminalizing sodomy under the Tennessee State Constitution's equal protection clause. In 1995, I worked on an amicus brief with my colleagues at Jenner & Block on behalf of the American Psychological Association in support of the petitioner. The Tennessee Court of Appeals struck down the statute under the Tennessee Constitution. Co-counsel (for plaintiffs): Abby Rubenfeld, Rubenfeld Law Office, 2409 Hillsboro Road, Nashville, TN 37212, (615) 386-9077; (for APA) Paul M. Smith, Jenner & Block, 1099 New York Avenue, NW, Suite 900, Washington, DC 20001, (202) 639-6060. Opposing counsel: Jerry L. Smith, Office of the Tennessee Attorney General (currently Judge, Tennessee Court of Criminal Appeals, 200 Supreme Court Building, 401 Seventh Avenue North, Nashville, TN 37219, (615) 741-2681).

10) *VOOM HD Holdings LLC v. EchoStar Satellite LLC*, No. 600292/08 (New York Supreme Court, New York County). This is a breach of contract action filed by a Cablevision subsidiary seeking over $2 billion in damages. In 2008, EchoStar Satellite LLC terminated a 15-year contract for high-definition programming, and VOOM HD Holdings LLC claims that its termination violated the terms of the parties' agreement. As in-house counsel for the plaintiff, I have worked closely with outside counsel in preparing witnesses for depositions, drafting substantive and procedural motions, and preparing for the jury trial in the case, which has not yet occurred. Co-counsel: Orin Snyder, Gibson Dunn & Crutcher, 200 Park Avenue, New York, NY 10166, (212) 351-2400; Miguel Estrada and Thomas Dupree, Gibson Dunn & Crutcher, 1050 Connecticut Avenue NW,

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Washington, DC 20036, (202) 955-8500. Opposing counsel: Chet Kerr, Morrison & Foerster, 1290 Avenue of the Americas, New York, NY 10104, (212) 468-8043.

18. **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 fully the nature of your participation in these activities. List any client(s) or organization(s) for whom you performed lobbying activities and describe the lobbying activities you performed on behalf of such client(s) or organizations(s). (Note: As to any facts requested in this question, please omit any information protected by the attorney-client privilege.)

During my time working at the Department of Justice, Office of Legal Counsel, and in the White House Counsel's office, I worked on several significant legal matters that did not involve litigation. At OLC, I reviewed numerous draft and proposed congressional bills, focusing on potential constitutional issues that they raised. I advised on various constitutional and statutory questions before they involved litigation, including questions involving whether physician-assisted suicide was prohibited by the Controlled Substances Act – an issue that was subsequently resolved by the Supreme Court, consistent with the statutory position we had taken on behalf of the Justice Department, in *Gonzales v. Oregon*, 546 U.S. 243 (2006). In the White House Counsel's office, I provided advice on constitutional issues (working with OLC), including First Amendment and Appointments Clause issues.

During the past six years as head of litigation at Cablevision, I have been involved in various matters that implicated significant legal issues but did not directly involve litigation. I have been involved in a range of business projects and plans with an eye toward minimizing litigation risk and recommending actions that will avoid legal disputes. I have also been involved in corporate compliance and serve on the company's Compliance Committee, overseeing the development and implementation of company policies that are designed to ensure compliance with the law. In addition, I have been involved with SEC and other government regulatory investigations for the company.

19. **Teaching**: What courses have you taught? For each course, state the title, the institution at which you taught the course, the years in which you taught the course, and describe briefly the subject matter of the course and the major topics taught. If you have a syllabus of each course, provide four (4) copies to the committee.

Employment Discrimination, Fordham Law School, Fall 2009. This course focused on the major federal statutes prohibiting discrimination in employment, including Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, and the Americans with Disabilities Act. Syllabus supplied.

20. **Deferred Income/ Future Benefits**: List the 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

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customers. Describe the arrangements you have made to be compensated in the future for any financial or business interest.

As part of my compensation package at Cablevision, I have been awarded stock options and restricted stock.

21. **Outside Commitments During Court Service**: 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 present plan, commitment, or agreement with respect to outside employment during any service with the court.

22. **Sources of Income**: 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, licensing fees, honoraria, and other items exceeding $500 or more (if you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here).

See attached Financial Disclosure Report.

23. **Statement of Net Worth**: Please complete the attached financial net worth statement in detail (add schedules as called for).

See attached Net Worth Statement.

24. **Potential Conflicts of Interest**:

a. Identify the family members or other persons, parties, categories of litigation, and financial arrangements that are likely to present potential conflicts-of-interest when you first assume the position to which you have been nominated. Explain how you would address any such conflict if it were to arise.

I am not aware of any likely conflicts of interest based on family members. Based on my six years of work as an in-house lawyer for Cablevision, cases involving Cablevision would be the only category of cases I am aware of that may present a potential conflict of interest. I would handle any matters involving actual or potential conflicts of interest by applying the Code of Conduct for United States Judges and any other relevant ethical canons or rules.

b. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern.

I would handle any matters involving actual or potential conflicts of interest by applying the Code of Conduct for United States Judges and any other relevant ethical canons or rules.

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25. **Pro Bono Work**: 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.

As an attorney at Jenner & Block in Washington and Debevoise & Plimpton in New York, I participated in several pro bono activities.

In 1995, through the court's pro bono program, I was requested by Judge Peter Messitte of the United States District Court for the District of Maryland to provided research analyzing the Title VII claims raised by a *pro se* plaintiff, including the retroactivity of recent Title VII decisions.

In 2003, on a pro bono basis, I co-wrote an amicus brief in *Lawrence v. Texas*, 539 U.S. 558 (2003), a federal constitutional challenge to the Texas statute criminalizing same-sex sodomy. The brief was on behalf of the National Gay and Lesbian Law Association and several other organizations and was written in support of the petitioners, who were represented by Lambda Legal. The Supreme Court reversed the petitioners' convictions, overruling *Bowers v. Hardwick* and striking down the Texas sodomy statute.

In 1995, I worked on an amicus brief on behalf of the American Psychological Association in support of the petitioner in *Campbell v. Sundquist*, 926 S.W.2d 255 (Tennessee Court of Appeals 1996), which involved a challenge to the State of Tennessee's statute criminalizing sodomy under the Tennessee State Constitution's equal protection clause. The Tennessee Court of Appeals struck down the statute under the Tennessee Constitution.

In 2003, I worked on an amicus brief in *Rumsfeld v. Padilla,* 542 U.S. 426 (2004), on behalf of Professor Louis Henkin, Professor Harold Hongju Koh, and Michael Posner. The case involved a habeas corpus petition challenging the detention of a U.S. citizen as an enemy combatant.

I have also participated in other pro bono and fundraising activities in connection with the ACLU, Lambda Legal, the Human Rights Campaign, and other organizations

26. **Selection Process**:

    a. Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and the interviews in which you participated). Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, please include that process in your description, as well as whether the commission recommended your nomination. List the dates of all interviews or communications you had with the White House staff or the Justice Department

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regarding this nomination. Do not include any contacts with Federal Bureau of Investigation personnel concerning your nomination.

I was contacted by an acquaintance and former Justice Department colleague in early July 2010 and asked whether I would be interested in being considered for a district court judgeship. Shortly thereafter, I received a questionnaire for judicial position from an assistant in the office of a member of Senator Schumer's Judicial Screening Committee. On July 28, 2010, I submitted the completed questionnaire to the assistant who had provided it and to a member of Senator Schumer's staff. On August 30, 2010, I had an interview with Senator Schumer's Judicial Screening Committee. On September 12, 2010, I had an interview with Senator Schumer.

Since September 28, 2010, I have been in contact with pre-nominations officials from the Department of Justice. On December 8, 2010, I interviewed with attorneys from the White House Counsel's Office and the Department of Justice in Washington, DC. On January 26, 2011, the President submitted my nomination to the Senate.

b. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any currently pending or specific case, legal issue or question in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning your position on such case, issue, or question? If so, explain fully.

No.

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FINANCIAL DISCLOSURE REPORT
NOMINATION FILING

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
Oetken, James Paul	Southern District of New York	01/26/2011
4. Title (Article III judges indicate active or senior status; magistrate judges indicate full- or part-time)	**5a. Report Type** (check appropriate type)	**6. Reporting Period**
District Judge	☑ Nomination, Date 01/26/2011 ☐ Initial ☐ Annual ☐ Final 5b. ☐ Amended Report	01/01/2010 to 12/31/2010
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.	
500 Pearl Street New York, NY 10007	Reviewing Officer_____ Date_____	

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

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

☐ NONE *(No reportable positions.)*

	POSITION	NAME OF ORGANIZATION/ENTITY
1.	Senior Vice President, Associate General Counsel	Cablevision Systems Corporation
2.	Adjunct Professor of Law	Fordham University
3.		
4.		
5.		

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

☑ NONE *(No reportable agreements.)*

	DATE	PARTIES AND TERMS
1.		
2.		
3.		

FINANCIAL DISCLOSURE REPORT Page 2 of 7	Name of Person Reporting	Date of Report
	Oetken, James Paul	01/26/2011

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

A. Filer's Non-Investment Income

☐ NONE *(No reportable non-investment income.)*

	DATE	SOURCE AND TYPE	INCOME (yours, not spouse's)
1.	2010	Cablevision Systems Corporation - salary and bonus	$834,036.00
2.	2009	Cablevision Systems Corporation - salary and bonus	$760,405.00
3.	2009	Fordham University - salary	$3,000.00
4.			

B. Spouse's Non-Investment Income - *If you were married during any portion of the reporting year, complete this section.*
(Dollar amount not required except for honoraria.)

☑ NONE *(No reportable non-investment income.)*

	DATE	SOURCE AND TYPE
1.		
2.		
3.		
4.		

IV. REIMBURSEMENTS - *transportation, lodging, food, entertainment.*
(Includes those to spouse and dependent children; see pp. 25-27 of filing instructions.)

☐ NONE *(No reportable reimbursements.)*

	SOURCE	DATES	LOCATION	PURPOSE	ITEMS PAID OR PROVIDED
1.	Exempt				
2.					
3.					
4.					
5.					

FINANCIAL DISCLOSURE REPORT Page 3 of 7	Name of Person Reporting Oetken, James Paul	Date of Report 01/26/2011

V. GIFTS. *(Includes those to spouse and dependent children; see pp. 28-31 of filing instructions.)*

☐ NONE *(No reportable gifts.)*

	SOURCE	DESCRIPTION	VALUE
1.	Exempt		
2.			
3.			
4.			
5.			

VI. LIABILITIES. *(Includes those of spouse and dependent children; see pp. 32-33 of filing instructions.)*

☑ NONE *(No reportable liabilities.)*

	CREDITOR	DESCRIPTION	VALUE CODE
1.			
2.			
3.			
4.			
5.			

FINANCIAL DISCLOSURE REPORT
Page 4 of 7

Name of Person Reporting	Date of Report
Oetken, James Paul	01/26/2011

VII. INVESTMENTS and TRUSTS – *income, value, transactions (Includes those of spouse and dependent children; see pp. 34-60 of filing instructions.)*

☐ NONE *(No reportable income, assets, or transactions.)*

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A-H)	B. (2) Type (e.g., div., rent, or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, redemption)	D. (2) Date mm/dd/yy	D. (3) Value Code 2 (J-P)	D. (4) Gain Code 1 (A-H)	D. (5) Identity of buyer/seller (if private transaction)
1. Cablevision Systems Corporation	C	Dividend	N	T	Exempt				
2. Madison Square Garden, Inc.		None	L	T					
3. General Electric	A	Dividend	J	T					
4. Hewlett-Packard Company	A	Dividend	J	T					
5. NASDAQ Group Inc.		None	J	T					
6. BlackRock Global Opportunities Equity Trust	B	Dividend	J	T					
7. American Funds Investment Co. of America - B	A	Dividend	J	T					
8. Invesco Prime Interest Trust Fund	A	Dividend	J	T					
9. Vanguard 500 Index Fund	B	Dividend	L	T					
10. Federated Enhanced Treasury Income Fund	A	Dividend	J	T					
11. Invesco Van Kampen Dynamic Credit Opportunities Fund	A	Dividend	J	T					
12. Claymore Delta Global Agriculture UIT	A	Dividend	K	T					
13. Claymore Health Care Portfolio UIT	A	Dividend	J	T					
14. Van Kampen IPOX 30 Index Portfolio UIT	A	Dividend	J	T					
15. HSBC Bank USA, N.A. NTS B/E Structure Product	C	Interest	L	T					
16. UBS AG 100% PPN ARBN S&P 500 Structured Product		None	J	T					
17. ABM AMRO Income Plus Fund	A	Dividend	K	T					

1. Income Gain Codes: (See Columns B1 and D4)	A =$1,000 or less F =$50,001 - $100,000	B =$1,001 - $2,500 G =$100,001 - $1,000,000	C =$2,501 - $5,000 H1 =$1,000,001 - $5,000,000	D =$5,001 - $15,000 H2 =More than $5,000,000	E =$15,001 - $50,000
2. Value Codes (See Columns C1 and D3)	J =$15,000 or less N =$250,001 - $500,000 P3 =$25,000,001 - $50,000,000	K =$15,001 - $50,000 O =$500,001 - $1,000,000	L =$50,001 - $100,000 P1 =$1,000,001 - $5,000,000 P4 =More than $50,000,000	M =$100,001 - $250,000 P2 =$5,000,001 - $25,000,000	
3. Value Method Codes (See Column C2)	Q =Appraisal U =Book Value	R =Cost (Real Estate Only) V =Other	S =Assessment W =Estimated	T =Cash Market	

FINANCIAL DISCLOSURE REPORT
Page 5 of 7

Name of Person Reporting	Date of Report
Oetken, James Paul	01/26/2011

VII. INVESTMENTS and TRUSTS — *income, value, transactions (Includes those of spouse and dependent children; see pp. 34-60 of filing instructions.)*

☐ NONE *(No reportable income, assets, or transactions.)*

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A-H)	B. (2) Type (e.g., div., rent, or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, redemption)	D. (2) Date mm/dd/yy	D. (3) Value Code 2 (J-P)	D. (4) Gain Code 1 (A-H)	D. (5) Identity of buyer/seller (if private transaction)
18. AllianceBernstein International Style Blend Collective Trust		None	K	T					
19. EB Diversified Stock Fund		None	K	T					
20. Target Small Cap Value Portfolio Fund Class T	A	Dividend	J	T					
21. Vanguard Institutional Index Fund Institutional Plus Shares	A	Dividend	J	T					
22. Vanguard Strategic Equity Fund - Inv	A	Dividend	K	T					
23. Columbia Acorn USA New York 529 Fund Class B		None	M	T					
24. Citibank N.A. cash accounts	B	Interest	L	T					
25. GE Interest Plus cash account	B	Interest	K	T					
26. Fieldpoint Private Bank and Trust cash account	A	Interest	K	T					
27. UBS Bank USA cash account	A	Interest	J	T					

1. Income Gain Codes: (See Columns B1 and D4)	A =$1,000 or less	B =$1,001 - $2,500	C =$2,501 - $5,000	D =$5,001 - $15,000	E =$15,001 - $50,000
	F =$50,001 - $100,000	G =$100,001 - $1,000,000	H1 =$1,000,001 - $5,000,000	H2 =More than $5,000,000	
2. Value Codes (See Columns C1 and D3)	J =$15,000 or less	K =$15,001 - $50,000	L =$50,001 - $100,000	M =$100,001 - $250,000	
	N =$250,001 - $500,000	O =$500,001 - $1,000,000	P1 =$1,000,001 - $5,000,000	P2 =$5,000,001 - $25,000,000	
	P3 =$25,000,001 - $50,000,000		P4 =More than $50,000,000		
3. Value Method Codes (See Column C2)	Q =Appraisal	R =Cost (Real Estate Only)	S =Assessment	T =Cash Market	
	U =Book Value	V =Other	W =Estimated		

FINANCIAL DISCLOSURE REPORT Page 6 of 7	Name of Person Reporting Oetken, James Paul	Date of Report 01/26/2011

VIII. ADDITIONAL INFORMATION OR EXPLANATIONS. *(Indicate part of Report.)*

FINANCIAL DISCLOSURE REPORT Page 7 of 7	Name of Person Reporting Oetken, James Paul	Date of Report 01/26/2011

IX. CERTIFICATION.

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

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

Signature

NOTE: ANY INDIVIDUAL WHO KNOWINGLY AND WILFULLY FALSIFIES OR FAILS TO FILE THIS REPORT MAY BE SUBJECT TO CIVIL AND CRIMINAL SANCTIONS (5 U.S.C. app. § 104)

FILING INSTRUCTIONS

Mail signed original and 3 additional copies to:

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

J. Paul Oetken

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		120	821	Notes payable to banks-secured			
U.S. Government securities				Notes payable to banks-unsecured			
Listed securities – see schedule		920	943	Notes payable to relatives			
Unlisted securities				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 – personal residence	1	470	000
Real estate owned – personal residence	2	450	000	Chattel mortgages and other liens payable			
Real estate mortgages receivable				Other debts-itemize:			
Autos and other personal property		10	000				
Cash value-life insurance							
Other assets itemize:							
				Total liabilities	1	470	000
				Net Worth	2	031	764
Total Assets	3	501	764	Total liabilities and net worth	3	501	764
CONTINGENT LIABILITIES				GENERAL INFORMATION			
As endorser, comaker or guarantor				Are any assets pledged? (Add schedule)	NO		
On leases or contracts				Are you defendant in any suits or legal actions?	NO		
Legal Claims				Have you ever taken bankruptcy?	NO		
Provision for Federal Income Tax							
Other special debt							

FINANCIAL STATEMENT

NET WORTH SCHEDULES

Listed Securities	
Cablevision Systems Corporation	$ 357,610
Madison Square Garden, Inc.	71,062
General Electric	6,009
Hewlett-Packard Company	1,464
NASDAQ Group Inc.	7,368
BlackRock Global Opportunities Equity Trust	9,019
American Funds Investment Co. of America -B	3,069
Invesco Prime Income Trust Fund	7,782
Vanguard 500 Index Fund	99,003
Federated Enhanced Treasury Income Fund	8,584
Invesco Van Kampen Dynamic Credit Opportunities Fund	3,356
Claymore Delta Global Agriculture UIT	15,045
Claymore Health Care Portfolio UIT	3,795
Van Kampen IPOX 30 Index Portfolio UIT	4,766
HSBC Bank, USA, N.A. NTS B/E Structured Product	89,625
UBS AG 100% PPN ARBN S&P 500 Structured Product	9,890
ABM AMRO Income Plus Fund	31,841
AllianceBernstein International Style Blend Collective Trust	19,843
EB Diversified Stock Fund	22,386
Target Small Capitalization Value Portfolio fund Class T	1,609
Vanguard Institutional Index Fund Institutional Plus Shares	11,502
Vanguard Strategic Equity Fund –Inv	21,695
Columbia Acorn USA New York 529 Fund Class B	114,620
Total Listed Securities	$ 920,943

AFFIDAVIT

I, T. Paul Outka, do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

1/24/2011
(DATE)

(NAME)

(NOTARY)

DAVID DUNN
Notary Public, State of New York
No. 02DU6165409
Qualified in New York County
Commission Expires May 7, 2011

OK. Mr. Engelmayer.

STATEMENT OF PAUL A. ENGELMAYER, NOMINEE TO BE DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF NEW YORK

Mr. ENGELMAYER. Good afternoon, Senator, and thank you very much. I want to begin by thanking you for those very, very generous words of introduction, for the honor of recommending me for this job, and for the confidence you have shown in me. I also want to thank the Ranking Member and the other members of the Committee for their consideration. And I want to thank President Obama for the singular honor of nominating me for this job and for the opportunity to serve my country in this fashion.

I appreciate very much the opportunity to introduce family and friends. First and foremost, I would like to introduce my wife, Emily, who is my best friend, the love of my life, and the person who, by her example every day, teaches me to do the right thing.

Senator SCHUMER. Please stand up. With that introduction you have to stand up.

[Applause.]

Mr. ENGELMAYER. I would like to introduce my children, Caroline and William. They are each on furlough, a 1-day furlough from school today, from seventh and fourth grade at the Trinity School, and they are on the condition that they each bring back a civics lesson, which they have promised to do.

Senator SCHUMER. Well, my daughter went to the Trinity School, so it is a very fine school, and it is worth it to miss a day to see your father here, but not by much. It is that good a school.

[Laughter.]

Mr. ENGELMAYER. Also, I am very pleased to have here my sister, Jean; my brother-in-law, Jan; my nephews Sasha and Peter; my brother-in-law, Pete; and my sister-in-law, Dawn; my mother-in-law, Gloria Mandelstam, herself an extremely accomplished lawyer and a trailblazer for women in the law. I am very honored to have Chief Judge Patricia Wald of the D.C. Circuit for whom I clerked.

Senator SCHUMER. Very nice. Thank you, Judge Wald. Thank you for being here.

Mr. ENGELMAYER. And she is both a mentor and a dear friend. And I am honored to have here a number of my law partners, who I also count as my friends—Howard Shapiro, Randy Moss, and Dave Bowker; and a number of my dear friends—Eric Washburn, Chuck Lane, and I believe Tony Lincoln.

Finally, I would like to acknowledge my parents. They did not live to see this day, but I think of them every day. They loved this country in that special way that immigrants or, in their case, the children of immigrants do. They were enormously proud that I spent the first 12 years of my career in public service, primarily as a prosecutor in Manhattan, and I know they would be very proud today.

Thank you.

Senator SCHUMER. Well, thank you. That is wonderful.

And now we have Judge Manglona to introduce her family and friends who came a little bit of a further distance, I suppose, than either of the other nominees here.

[The biographical information follows.]

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UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY

QUESTIONNAIRE FOR JUDICIAL NOMINEES

PUBLIC

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

   Paul Adam Engelmayer

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

   United States District Judge for the Southern District of New York.

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

   Wilmer Cutler Pickering Hale and Dorr
   399 Park Avenue
   New York, New York 10022

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

   1961; New York, New York.

5. **Education**: List in reverse chronological order each college, law school, or any other institution of higher education attended and indicate for each the dates of attendance, whether a degree was received, and the date each degree was received.

   1984 – 1987, Harvard Law School; J.D. (*magna cum laude*), 1987
   1979 – 1983, Harvard College; B.A. (*summa cum laude*), 1983

6. **Employment Record**: List in reverse chronological order all governmental agencies, business or professional corporations, companies, firms, or other enterprises, partnerships, institutions or 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 description.

   2000 – Present
   Wilmer Cutler Pickering Hale and Dorr
   399 Park Avenue
   New York, New York 10022
   Partner (2000 – Present)
   Partner-in-Charge of New York Office (2005 – Present)

1996 – 2000
United States Attorney's Office for the Southern District of New York
One Saint Andrew's Plaza
New York, New York 10007
Chief, Major Crimes Unit

1994 – 1996
Office of the Solicitor General of the United States
United States Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20036
Assistant to the Solicitor General

1989 – 1994
United States Attorney's Office for the Southern District of New York
One Saint Andrew's Plaza
New York, New York 10007
Deputy Chief Appellate Attorney (1994)
Assistant United States Attorney (1989 – 1994)

1988 – 1989
Supreme Court of the United States
One First Street, N.E.
Washington, D.C. 20543
Law Clerk to the Honorable Thurgood Marshall

1987 – 1988
United States Court of Appeals for the District of Columbia Circuit
333 Constitution Avenue, N.W.
Washington, D.C. 20001
Law Clerk to the Honorable Patricia M. Wald

Summer 1987
Paul Weiss Rifkind Wharton & Garrison
1285 Avenue of the Americas
New York, New York 10019
Summer Associate

Summer 1986
Cravath, Swaine & Moore
Worldwide Plaza
825 Eighth Avenue
New York, New York 10019
Summer Associate

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Summer 1985
Kirkland & Ellis
655 Fifteenth Street, N.W.
Washington, D.C. 20005
Summer Associate

1983 – 1984
The Wall Street Journal
200 Liberty Street
New York, New York 10281
Staff Reporter (Philadelphia Bureau)

7. **Military Service and Draft Status**: Identify any service in the U.S. Military, including dates of service, branch of service, rank or rate, serial number (if different from social security number) and type of discharge received, and whether you have registered for selective service.

I have not served in the military. I have registered for selective service.

8. **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.

Selected for inclusion in *The Best Lawyers in America* (2005-2011)

Selected by AbovetheLaw.com as a Top Partner to Work For (2010)

Selected for inclusion in *The LawDragon: Leading Lawyers in America* (2010)

Selected for inclusion in *Benchmark Litigation* (2010).

Recognized in *Chambers USA: America's Leading Lawyers for Business*, as a leader in litigation/white-collar defense (2007-2010)

Listed in *Super Lawyers* (2006-2010)

Recipient, "Amicus Curiae" Award from the National Association of Criminal Defense Lawyers for my brief in *Leocal v. Ashcroft* (2004)

Recipient, Chief Postal Inspector's Special Award, in connection with prosecution of *United States v. Lawrence X. Cusack* (1999)

Recipient, United States Department of Justice Director's Award for Superior Performance (1998)

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Recipient, Federal Deposit Insurance Corporation, Office of Inspector General, Award for "Outstanding Prosecution" in *United States v. William Duker* (1997)

Recipient, United States Customs Service Award, in recognition for "outstanding leadership and successful efforts relating to the investigation and prosecution of The Spy Factory, Inc., et al" (1997)

Recipient, United States Department of Labor, Office of Inspector General, Award, for "aggressive prosecution of fraud and corruption in federal labor programs, 1990-1994" (1994)

Recipient, New York City Department of Investigation Award for Outstanding Contribution, in connection with "the successful operation and prosecution of 'Operation Tightrope,' 1991-1994" (1994)

Recipient, Joint Award from Federal Bureau of Investigation (Public Corruption Unit) and Internal Revenue Service (Criminal Investigation Division), in connection with prosecution of "corrupt court-appointed attorneys" (1993)

Finalist, Ames Moot Court Competition, Harvard Law School, and Best Oralist in the semifinal round (1986)

Member, Phi Beta Kappa, Harvard College (elected junior year) (1982)

Winner, Bonaparte Prize in Government, Harvard College (1982) (highest cumulative grades in the department, freshman through junior years)

Winner, Detur Prize, Harvard College (1980) (freshman year academic performance)

9. **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
District of Columbia Bar
Federal Bar Council
New York City Bar
Judiciary Committee (2001 – 2002)
Supreme Court Historical Society

10. **Bar and Court Admission**:

a. List the date(s) you were admitted to the bar of any state and any lapses in membership. Please explain the reason for any lapse in membership. .

New York, 1988

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District of Columbia, 1990

There have been no lapses in membership.

b. List all courts in which you have been admitted to practice, including dates of admission and any lapses in membership. Please explain the reason for any lapse in membership. Give the same information for administrative bodies that require special admission to practice.

Supreme Court of the United States, 1994
United States Court of Appeals for the Second Circuit, 1991
United States Court of Appeals for the Third Circuit, 2002
United States Court of Appeals for the Fifth Circuit, 2005
United States Court of Appeals for the Ninth Circuit, 2010
United States Court of Appeals for the Eleventh Circuit, 2002
United States Court of Appeals for the District of Columbia Circuit, 2001
United States District Court for the Southern District of New York, 1994
United States District Court for the Eastern District of New York, 2003

There have been no lapses in membership.

11. **Memberships**:

a. List all professional, business, fraternal, scholarly, civic, charitable, or other organizations, other than those listed in response to Questions 9 or 10 to which you belong, or to which you have belonged, since graduation from law school. Provide dates of membership or participation, and indicate any office you held. Include clubs, working groups, advisory or editorial boards, panels, committees, conferences, or publications.

Member, Advisory Board of the Bronx Lab School (Bronx Lab is an innovative public high school that is a member of the New York City Board of Education's "Small Schools Initiative") (approximately 2007 – Present)

Member, Dinner Committee, Brennan Center for Justice annual fundraiser (approximately 2006 – Present)

b. 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, or national origin. Indicate whether any of these organizations listed in response to 11a above currently discriminate or formerly discriminated on the basis of race, sex, religion or national origin 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.

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None of the organizations listed above currently discriminates or formerly discriminated on the basis of race, sex, religion or national origin, either through formal membership requirements or the practical implementation of membership policies.

12. **Published Writings and Public Statements**:

a. List the titles, publishers, and dates of books, articles, reports, letters to the editor, editorial pieces, or other published material you have written or edited, including material published only on the Internet. Supply four (4) copies of all published material to the Committee.

The following list is complete, to be the best of my knowledge, based on my recollection and thorough searches of my files and electronic databases.

"A Fresh Take on the New Deal Which Makes the 100 Days Come to Life" (February 4, 2009) (Amazon book review of NEW YORK TIMES editorial page writer Adam Cohen's book, "Nothing to Fear"). Copy supplied.

"A Riveting and Meticulously Researched Account of the Colfax Massacre and its Legal Aftermath" (March 23, 2008) (Amazon book review of WASHINGTON POST reporter Charles Lane's book, "The Day Freedom Died"). Copy supplied.

"Proving Bribery Isn't Easy," THE WALL STREET JOURNAL (March 2, 2001). Copy supplied.

Note, "The Modification of Consent Decrees in Institutional Reform Litigation," 99 HARV. L. REV. 1020 (March 1986) (unsigned student law review note). Copy supplied.

"New Dean," THE HARVARD CRIMSON (September 20, 1985) (letter to the editor, written with Jeffrey Toobin). Copy supplied.

"Island Off Virginia Is So Remote It Has Its Own Language," THE WALL STREET JOURNAL (July 17, 1984). Copy supplied.

"ARA Attempts Revival Using A High Profile," THE WALL STREET JOURNAL (June 8, 1984). Copy supplied.

"Guess Which Ex-Interior Secretary Describes New Clients as 'Losers,'" THE WALL STREET JOURNAL (May 4, 1984). Copy supplied.

"Retailer Agrees To Be Acquired For $220 Million," THE WALL STREET JOURNAL (May 1, 1984). Copy supplied.

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67905.817

"A 28-Year-Old Is Said To Be Heir To Top Job In Philadelphia Mafia," THE WALL STREET JOURNAL (April 19, 1984). Copy supplied.

"Bloom Is Off Rose As Effort To Package Ballplayer Lags," THE WALL STREET JOURNAL (April 12, 1984). Copy supplied.

"Campbell Plans To Drop Its Tin Soup Can, Reflecting New Emphasis On Convenience," THE WALL STREET JOURNAL (March 28, 1984). Copy supplied.

"Big-Brother-Is-Listening Dept.: Device May Detect Thieves, Liars," THE WALL STREET JOURNAL (March 21, 1984). Copy supplied.

"Paper Concerns' 'Super Trees' Promise Greater Productivity," THE WALL STREET JOURNAL (March 9, 1984). Copy supplied.

"Infiltrating Dogfight and Cockfight Rings Take Guile and Guts," THE WALL STREET JOURNAL (March 2, 1984). Copy supplied.

"The Capital Crowd Is Set On Its Ear By This Rug-Chewing Ball Of Fur," THE WALL STREET JOURNAL (February 9, 1984). Copy supplied.

"Cemetery Companies Aggressively Market Burial Plots As Costs Soar And Business Falls," THE WALL STREET JOURNAL (January 24, 1984). Copy supplied.

"Unimed High Hope For Marinol Drug Nears FDA Hurdle," THE WALL STREET JOURNAL (January 5, 1984). Copy supplied.

"While You Toast The Start of 1984, Some Are Plotting Millennium Bash," THE WALL STREET JOURNAL (December 30, 1983). Copy supplied.

"New Jersey, Resorts, Agree On Rail Line For Atlantic City," THE WALL STREET JOURNAL (December 29, 1983). Copy supplied.

"Developer Of Festival Marketplaces Sets Up Foundation To Renovate Inner-City Homes," THE WALL STREET JOURNAL (December 29, 1983). Copy supplied.

"After-Hours Police Use Walking A Beat As A Change Of Pace," THE WALL STREET JOURNAL (December 21, 1983). Copy supplied.

"Black & Decker Agrees To Acquire A GE Operation," THE WALL STREET JOURNAL (December 19, 1983). Copy supplied.

"The Annapolis Mess: It's No Fun Feeding Future Admirals," THE WALL STREET JOURNAL (December 14, 1983). Copy supplied.

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"At These Homes, A For-Sale Sign Will Talk To You For Three Minutes," THE WALL STREET JOURNAL (December 5, 1983). Copy supplied.

"Campus Crime: Violence By Students, From Rape To Racism, Raises College Worries," THE WALL STREET JOURNAL (November 21, 1983). Copy supplied.

"Pennsylvania Resort Area Debates Placing Slot Machines, Video Blackjack In Hotels," THE WALL STREET JOURNAL (November 17, 1983). Copy supplied.

"Interracial Politics: Roy A. West, Richmond's Black Mayor, Is Facing Major Problems Because Most Blacks Dislike Him," THE WALL STREET JOURNAL (November 2, 1983). Copy supplied.

"Directors Vote 11-1 To Fire Philadelphia Suburban President," THE WALL STREET JOURNAL (October 27, 1983). Copy supplied.

"After Aggressive Expansion, James River Debates Ability To Maintain Rate Of Growth," THE WALL STREET JOURNAL (October 21, 1983). Copy supplied.

"Food Concerns Rush To Serve More Quality Frozen Dinners," THE WALL STREET JOURNAL (Oetober 20, 1983). Copy supplied.

"Scott Paper's Major Energy-Saving Plan Is Latest Effort To Help Company Compete," THE WALL STREET JOURNAL (October 18, 1983). Copy supplied.

"Safety Prompts Computer Use In Drugstores," THE WALL STREET JOURNAL (September 28, 1983). Copy supplied.

"Before You Discard That Soda Can, You Might Look For This Machine," THE WALL STREET JOURNAL (September 7, 1983). Copy supplied.

"Scott Paper Plans to Shed Some Operations," THE WALL STREET JOURNAL (August 24, 1983). Copy supplied.

"Scott Paper Expected To Announce Plans To Shed Some Operations In Bid To Streamline Business," THE WALL STREET JOURNAL (August 22, 1983) (Heard on the Street column). Copy supplied.

"Worked Owned And Operated Supermarket Yields Financial Success, Personal Rewards," THE WALL STREET JOURNAL (August 18, 1983). Copy supplied.

"'Short Shorts' and Other Garments Are A Fashion Risk In Fort Lee, Virginia," THE WALL STREET JOURNAL (August 10, 1983). Copy supplied.

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67905.819

"If George Flick Can Get $25,000, He Might Win The War On Fish Slime," THE WALL STREET JOURNAL (August 5, 1983). Copy supplied.

"Brascan Seeks To Lift Stake In Scott Paper To 50% From 23.7%, Altering '81 Accord," THE WALL STREET JOURNAL (July 26, 1983). Copy supplied.

"Campbell Soup Image On Line In Union Fight," THE WALL STREET JOURNAL (July 21, 1983). Copy supplied.

"Passing Out The Bucks," THE HARVARD CRIMSON (June 9, 1983). Copy supplied.

"Christopher Forman: Scholar Opts For Business," THE HARVARD CRIMSON (June 9, 1983). Copy supplied.

"Rosovsky Announces Plans To Resign Next June – Search For Successor," THE HARVARD CRIMSON (May 18, 1983). Copy supplied.

"Nukes Without Illusions," THE HARVARD CRIMSON (May 6, 1983). Copy supplied.

"How Not To Beat Reagan," THE HARVARD CRIMSON (April 23, 1983). Copy supplied.

"Statesman," THE HARVARD CRIMSON (April 22, 1983). Copy supplied.

"Reject ROTC, Not Its Friends," THE HARVARD CRIMSON (co-signer of plurality editorial) (April 11, 1983). Copy supplied.

"Jeane's Example," THE HARVARD CRIMSON (co-signer of dissenting editorial) (April 9, 1983). Copy supplied.

"Roar Of The Greasepaint," THE HARVARD CRIMSON (February 23, 1983). Copy supplied.

"A Terrible Thing To Waste," THE HARVARD CRIMSON (January 28, 1983). Copy supplied.

"Back On The Trail," THE HARVARD CRIMSON (January 13, 1983). Copy supplied.

"Students Plan To Picket Controversial Law Class," THE HARVARD CRIMSON (January 3, 1983). Copy supplied.

"Harvard Ex-Veep: Man With A Heart," THE HARVARD CRIMSON (January 3, 1983). Copy supplied.

"Overseers Eye Faculty Hiring," THE HARVARD CRIMSON (December 17, 1982). Copy supplied.

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67905.820

"Harvard Ties Hinder New President," THE HARVARD CRIMSON (December 1, 1982). Copy supplied.

"Carter And The Politics Of Faith," THE HARVARD CRIMSON (November 12, 1982). Copy supplied.

"Of Wimps And Toughs," THE HARVARD CRIMSON (November 2, 1982). Copy supplied.

"The Same Old Song," THE HARVARD CRIMSON (October 22, 1982). Copy supplied.

"Carter's Maligned Mastermind," THE HARVARD CRIMSON (October 19, 1982). Copy supplied.

"A Carter Apologist," THE HARVARD CRIMSON (October 19, 1982). Copy supplied.

"Labor Board Settles Case For Harvard," THE HARVARD CRIMSON (October 15, 1982). Copy supplied.

"The Veepstakes: Daniel Steiner: Bok's Troubleshooter," THE HARVARD CRIMSON (October 12, 1982). Copy supplied.

"Ground Zero At Lowell," THE HARVARD CRIMSON (October 12, 1982). Copy supplied.

"Bok Raps Boycott Tactic Used By Law Students," THE HARVARD CRIMSON (October 8, 1982). Copy supplied.

"Bok Taps Steiner As Vice President," THE HARVARD CRIMSON (October 7, 1982). Copy supplied.

"An Incentive To Gab," THE HARVARD CRIMSON (October 5, 1982). Copy supplied.

"$5 Million To Spare? Harvard May Have A Library For You?," THE HARVARD CRIMSON (October 5, 1982). Copy supplied.

"Sound And Fury," THE HARVARD CRIMSON (September 28, 1982). Copy supplied.

"No Return," THE HARVARD CRIMSON (September 24, 1982). Copy supplied.

"Professor Won't Drop Palimony Suit," THE HARVARD CRIMSON (September 21, 1982). Copy supplied.

"Bad News For Women," THE HARVARD CRIMSON (September 21, 1982). Copy supplied.

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"Philly Bistro's Links to Mob Hurt Image But Not Patronage," THE WALL STREET JOURNAL (September 20, 1982). Copy supplied.

"Professor Will Drop Suit If Defendant Fathers Child," THE HARVARD CRIMSON (September 17, 1982). Copy supplied.

"Professor Brings Suit For Palimony," THE HARVARD CRIMSON (September 16, 1982). Copy supplied.

"The Commodore: John H. Parry, 1914-1982," THE HARVARD CRIMSON (September 13, 1982). Copy supplied.

"Schools Out Forever," THE HARVARD CRIMSON (September 13, 1982). Copy supplied.

"The Unhappy Aftermath of One City's School Strikes," THE WALL STREET JOURNAL (September 1, 1982). Copy supplied.

"To Survive Hard Times, More City Dwellers Plant Vegetable Gardens Amid Tenements," THE WALL STREET JOURNAL (August 25, 1982). Copy supplied.

"For Some, Rotten Old Crab Shells Are The Political Issue Of The Year," THE WALL STREET JOURNAL (August 20, 1982). Copy supplied.

"An Embarrassing Shortage of Tenants," THE WALL STREET JOURNAL (August 18, 1982). Copy supplied.

"Stranger In A Strange House," THE HARVARD CRIMSON (August 13, 1982). Copy supplied.

"Dershowitz On The Stand," THE HARVARD CRIMSON (July 30, 1982). Copy supplied.

"This Summer's Must Celebration: The Martin Van Buren Bicentennial," THE WALL STREET JOURNAL (July 29, 1982). Copy supplied.

"U.S. Mushroom Growers Getting Mauled By Flood of Low-Cost Imports From China," THE WALL STREET JOURNAL (July 23, 1982). Copy supplied.

"Vaccine To Prevent Most Tooth Decay May Be Ready In 1990," THE WALL STREET JOURNAL (July 20, 1982). Copy supplied.

"A Jaded Journeyman," THE HARVARD CRIMSON (July 13, 1982). Copy supplied.

"Moral Majority Finds A Way To Fill Its Coffers Off The Devil's Sabotage," THE WALL STREET JOURNAL (July 6, 1982). Copy supplied.

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67905.822

"Another Look At Hinckley," THE HARVARD CRIMSON (June 29, 1982). Copy supplied.

"A Tough Guy In University Hall 4," THE HARVARD CRIMSON (June 10, 1982). Copy supplied.

"To Close The Gaps," THE HARVARD CRIMSON (May 28, 1982). Copy supplied.

"Police Plan Arraignment Of Scalise," THE HARVARD CRIMSON (May 28, 1982). Copy supplied.

"House Disparities May Lead College To Reassess Lottery," THE HARVARD CRIMSON (May 26, 1982). Copy supplied.

"Seniors Plan Protest To Back Nuclear Freeze," THE HARVARD CRIMSON (May 24, 1982). Copy supplied.

"Finley, 'Immortal' Scholar, To Speak At Commencement," THE HARVARD CRIMSON (May 21, 1982). Copy supplied.

"A Fortnight To Remember," THE HARVARD CRIMSON (May 12, 1982). Copy supplied.

"Terminals In Houses Raise Privacy Issue," THE HARVARD CRIMSON (May 7, 1982). Copy supplied.

"A Question Of Tolerance," THE HARVARD CRIMSON (May 3, 1982). Copy supplied.

"A Question Of Propriety," THE HARVARD CRIMSON (April 20, 1982). Copy supplied.

"An Equivocal Statement," THE HARVARD CRIMSON (April 17, 1982). Copy supplied.

"Reagan's Balancing Act," THE HARVARD CRIMSON (April 12, 1982). Copy supplied.

"George The Third," THE HARVARD CRIMSON (April 9, 1982). Copy supplied.

"Turning The Law On Its Head," THE HARVARD CRIMSON (March 15, 1982). Copy supplied.

"Rosovsky and Deans Plan Visit To China For Summer," THE HARVARD CRIMSON (March 15, 1982). Copy supplied.

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67905.823

"When Two Lives Collide," THE HARVARD CRIMSON (March 10, 1982). Copy supplied.

"Law Student Found Dead In Apartment," THE HARVARD CRIMSON (March 10, 1982). Copy supplied.

"Matina And The Jets," THE HARVARD CRIMSON (February 20, 1982). Copy supplied.

"Houses Divided," *The Harvard Crimson* (February 8, 1982). Copy supplied.

"Horner Lobbied For Sale Of Planes To Saudi Arabia," THE HARVARD CRIMSON (February 4, 1982). Copy supplied.

"Study Finds Disparities Among Houses," THE HARVARD CRIMSON (January 22, 1982). Copy supplied.

"Faculty Age Of Retirement Rises To 70," THE HARVARD CRIMSON (January 14, 1982). Copy supplied.

"Back In The Saddle," THE HARVARD CRIMSON (January 4, 1982). Copy supplied.

"Some Faculty See Obstacles To Effecting Pre-Registration," THE HARVARD CRIMSON (December 16, 1981). Copy supplied.

"A Critique," THE HARVARD CRIMSON (December 12, 1981). Copy supplied.

"Council Weighs Pre-Registration Plans," THE HARVARD CRIMSON (December 10, 1981). Copy supplied.

"Albany Judge Dismisses Charges Against Estis," THE HARVARD CRIMSON (December 9, 1981). Copy supplied.

"New WEAL Brief Criticizes K-School," THE HARVARD CRIMSON (December 7, 1981). Copy supplied.

"A Pleasant Surprise," THE HARVARD CRIMSON (December 5, 1981). Copy supplied.

"CUE Inaugurates Review Of Rules On Study Abroad," THE HARVARD CRIMSON (December 3, 1981). Copy supplied.

"An Untenable Proposition," THE HARVARD CRIMSON (December 3, 1981). Copy supplied.

"Graham Appointed Dean Of Ed School," THE HARVARD CRIMSON (December 1, 1981). Copy supplied.

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67905.824

"Harvard Ties Hinder Mexican Leader," THE HARVARD CRIMSON (November 30, 1981). Copy supplied.

"Committee To Advise Sociology Dept.," THE HARVARD CRIMSON (November 19, 1981). Copy supplied.

"Core Nearing Goal For Total Courses," THE HARVARD CRIMSON (November 17, 1981). Copy supplied.

"Loeb Grant To Fund Junior Professors," THE HARVARD CRIMSON (November 16, 1981). Copy supplied.

"Professors In Soc Anal 12 To Take Leave," THE HARVARD CRIMSON (November 14, 1981). Copy supplied.

"Hiring Investigation Finds Deficiencies," THE HARVARD CRIMSON (November 14, 1981). Copy supplied.

"Decisions, Decisions," THE HARVARD CRIMSON (November 14, 1981). Copy supplied.

"Nothin' But A Party," THE HARVARD CRIMSON (November 12, 1981). Copy supplied.

"Grade Slump Sends More To Ad Board," THE HARVARD CRIMSON (November 12, 1981). Copy supplied.

"Bio Split, Conflicts Policy Win Approval Of Faculty," THE HARVARD CRIMSON (November 11, 1981). Copy supplied.

"Professors Criticize Constitution Planks," THE HARVARD CRIMSON (November 10, 1981). Copy supplied.

"Conflicts Policy, Biology Split Likely To Win Faculty Approval," THE HARVARD CRIMSON (November 10, 1981). Copy supplied.

"Report By Klitgaard Nears Completion," THE HARVARD CRIMSON (November 9, 1981). Copy supplied.

"Up And Up," THE HARVARD CRIMSON (November 7, 1981). Copy supplied.

"Dean Notes Surplus In Budget Message," THE HARVARD CRIMSON (November 7, 1981). Copy supplied.

"College Costs May Surpass $12,000; Officials Blame Energy, Salary Hikes," THE HARVARD CRIMSON (November 6, 1981). Copy supplied.

"Bok Urging Aid To Minorities," THE HARVARD CRIMSON (November 5, 1981). Copy supplied.

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"Masters To Review Alcohol Regulations," THE HARVARD CRIMSON (November 4, 1981). Copy supplied.

"Alcohol Rules Draw Protest From Assembly," THE HARVARD CRIMSON (November 3, 1981). Copy supplied.

"College To Consider Early Registration," THE HARVARD CRIMSON (November 2, 1981). Copy supplied.

"Epps Cites Need To Obey Booze Rules," THE HARVARD CRIMSON (October 31, 1981). Copy supplied.

"Considering The Constitution," THE HARVARD CRIMSON (October 31, 1981). Copy supplied.

"Dean Plans New Report On Hiring," THE HARVARD CRIMSON (October 29, 1981). Copy supplied.

"Alcohol Rule Angers Q-House Students," THE HARVARD CRIMSON (October 28, 1981). Copy supplied.

"Joint Unit To Weigh Constitution Draft," THE HARVARD CRIMSON (October 27, 1981). Copy supplied.

"Computer Revolution Comes To Harvard," THE HARVARD CRIMSON (October 26, 1981). Copy supplied.

"Another Nobel," THE HARVARD CRIMSON (October 24, 1981). Copy supplied.

"$1M Repairs Planned For Chem Lab," THE HARVARD CRIMSON (October 24, 1981). Copy supplied.

"Student Unit To Confer On Soc Stud," THE HARVARD CRIMSON (October 23, 1981). Copy supplied.

"Faculty Council Members Cite Objections To New Constitution," THE HARVARD CRIMSON (October 22, 1981). Copy supplied.

"University To Renovate Sever," THE HARVARD CRIMSON (October 21, 1981). Copy supplied.

"Physics Professor Wins Nobel Prize," THE HARVARD CRIMSON (October 20, 1981). Copy supplied.

"Historian Will Testify In Voting Rights Dispute," THE HARVARD CRIMSON (October 19, 1981). Copy supplied.

"Estís Charged," THE HARVARD CRIMSON (October 19, 1981). Copy supplied.

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"Going Their Separate Ways," THE HARVARD CRIMSON (October 17, 1981). Copy supplied.

"Faculty Council To Discuss Proposal For Constitution," THE HARVARD CRIMSON (October 16, 1981). Copy supplied.

"Bok's Undergraduate Legacy," THE HARVARD CRIMSON (October 16, 1981). Copy supplied.

"CUE Begins Study Of Academic Rules," THE HARVARD CRIMSON (October 15, 1981). Copy supplied.

"WEAL May Sue Department Of Labor," THE HARVARD CRIMSON (October 14, 1981). Copy supplied.

"Faculty Council Expected To Approve Split Of Biology Department Tomorrow," THE HARVARD CRIMSON (October 13, 1981). Copy supplied.

"Trying To Regain 'Civility'," THE HARVARD CRIMSON (October 10, 1981). Copy supplied.

"On The Cutting Edge," THE HARVARD CRIMSON (October 10, 1981). Copy supplied.

"Decision Due On Addition To K-School," THE HARVARD CRIMSON (October 10, 1981). Copy supplied.

"Cox Argues Before Supreme Court," THE HARVARD CRIMSON (October 9, 1981). Copy supplied.

"Soc Studs Organize," THE HARVARD CRIMSON (October 8, 1981). Copy supplied.

"Masters Reminded Of Rules On Alcohol," THE HARVARD CRIMSON (October 8, 1981). Copy supplied.

"A Fair Chance," THE HARVARD CRIMSON (co-signer of dissenting editorial). (October 7, 1981). Copy supplied.

"Bok Cites Concern Over Student Life," THE HARVARD CRIMSON (October 6, 1981). Copy supplied.

"Professors Say New Consulting Codes Will Increase Caution Among Faculty," THE HARVARD CRIMSON (October 5, 1981). Copy supplied.

"University Dedicates Biochem Building; Ceremony Marks Fairchild Opening," THE HARVARD CRIMSON (October 3, 1981). Copy supplied.

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"University Dedicates Biochem Building; End Of An Odyssey," THE HARVARD CRIMSON (October 3, 1981). Copy supplied.

"Conflicts Of Interest," THE HARVARD CRIMSON (October 3, 1981). Copy supplied.

"Council OKs New Policy On Conflicts," THE HARVARD CRIMSON (October 1, 1981). Copy supplied.

"Protester Terms His Arrest Political," THE HARVARD CRIMSON (September 30, 1981). Copy supplied.

"Council Likely To Approve Conflicts Statement Today," THE HARVARD CRIMSON (September 30, 1981). Copy supplied.

"Behind Closed Doors," THE HARVARD CRIMSON (September 30, 1981). Copy supplied.

"Innovative Teaching," THE HARVARD CRIMSON (September 29, 1981). Copy supplied.

"Gov Department Searches," THE HARVARD CRIMSON (September 29, 1981). Copy supplied.

"Bott, Dunster House Master, To Take Sabbatical In Spring," THE HARVARD CRIMSON (September 29, 1981). Copy supplied.

"Glicklich To Resume Malpractice Fight," THE HARVARD CRIMSON (September 28, 1981). Copy supplied.

"Alumnus of K-School Selected As The Next President Of Mexico," THE HARVARD CRIMSON (September 26, 1981). Copy supplied.

"Homage To The Future," THE HARVARD CRIMSON (September 25, 1981). Copy supplied.

"Covering The National Drama," THE HARVARD CRIMSON (September 25, 1981). Copy supplied.

"Wall, Elected GSA President, Asks Non-Discrimination Policy," THE HARVARD CRIMSON (September 24, 1981). Copy supplied.

"Language Requirement May Increase," THE HARVARD CRIMSON (September 24, 1981). Copy supplied.

"New Bunting Institute Director Vows To Increase Fellowships For Women," THE HARVARD CRIMSON (September 23, 1981). Copy supplied.

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"False Alarm Clears Mem Hall," THE HARVARD CRIMSON (September 22, 1981). Copy supplied.

"5000 Expected At Registration Today; Administration Revises Packet Policy," THE HARVARD CRIMSON (September 21, 1981). Copy supplied.

"Danger Zones," THE HARVARD CRIMSON (September 18, 1981). Copy supplied.

"Catalogue's Blank Spaces Irk Language Professors," THE HARVARD CRIMSON (September 18, 1981). Copy supplied.

"Harvard Assesses Its International Role; Klitgaard's Role," THE HARVARD CRIMSON (September 17, 1981). Copy supplied.

"Harvard Assesses Its International Role; Review Analyzes Activities Abroad," THE HARVARD CRIMSON (September 17, 1981). Copy supplied.

"Brattle St. Station Eyed As Site Of K-School Wing," THE HARVARD CRIMSON (September 14, 1981). Copy supplied.

"An Empty Room," THE HARVARD CRIMSON (September 14, 1981). Copy supplied.

"Life In The Long Lane," THE HARVARD CRIMSON (July 17, 1981). Copy supplied.

"Slow Motion On A Tenure Track," THE HARVARD CRIMSON (June 4, 1981). Copy supplied.

"Affirmative Action Hits Home...At the K-School," THE HARVARD CRIMSON (June 4, 1981). Copy supplied.

"Bound For Calcutta," THE HARVARD CRIMSON (June 4, 1981). Copy supplied.

"Athletes, Alumni Discuss Sports At Harvard," THE HARVARD CRIMSON (June 3, 1981). Copy supplied.

"History Department Tenures A Woman," THE HARVARD CRIMSON (June 2, 1981). Copy supplied.

"Council Condemns Harassment Of Gays," THE HARVARD CRIMSON (June 1, 1981). Copy supplied.

"Watson Will Speak At Commencement," THE HARVARD CRIMSON (May 22, 1981). Copy supplied.

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"Landes Faces Stiff Challenges As Chairman Of Social Studies," THE HARVARD CRIMSON (May 22, 1981). Copy supplied.

"Decision-Making," THE HARVARD CRIMSON (May 22, 1981). Copy supplied.

"Council Denies GSA Request For Non-Discrimination Policy," THE HARVARD CRIMSON (May 15, 1981). Copy supplied.

"GSA Policy Draws Debate In Council," THE HARVARD CRIMSON (May 7, 1981). Copy supplied.

"Students Criticize Dowling Vote Delay," THE HARVARD CRIMSON (May 1, 1981). Copy supplied.

"Council Weighs GSA Proposal," THE HARVARD CRIMSON (April 30, 1981). Copy supplied.

"Yamani Urges Cooperation Between U.S. And OPEC," THE HARVARD CRIMSON (April 25, 1981). Copy supplied.

"Security Tight For Yamani Visit Today," THE HARVARD CRIMSON (April 24, 1981). Copy supplied.

"Council Tables Bill On Faculty Conflicts," THE HARVARD CRIMSON (April 23, 1981). Copy supplied.

"Neo-Conservative Group Calls For Non-Discrimination Policy," THE HARVARD CRIMSON (April 22, 1981). Copy supplied.

"Arab Sheik Will Speak Here Friday," THE HARVARD CRIMSON (April 21, 1981). Copy supplied.

"Dean's Report Discusses Fiscal Woes But Fails To Recommend New Cures," THE HARVARD CRIMSON (April 20, 1981). Copy supplied.

"Report By Rosovsky Examines Tenure," THE HARVARD CRIMSON (April 18, 1981). Copy supplied.

"Social Studies Faces Struggle To Uphold Academic Standards," THE HARVARD CRIMSON (April 17, 1981). Copy supplied.

"Committees Debate Dowling Proposal," THE HARVARD CRIMSON (April 16, 1981). Copy supplied.

"P&SR May Tenure Female Professor," THE HARVARD CRIMSON (April 15, 1981). Copy supplied.

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"Lewis Receives Tenured Chair After Seven Years At Harvard," THE HARVARD CRIMSON (April 14, 1981). Copy supplied.

"Soc Stud May Have Problems Filling Junior Faculty Positions," THE HARVARD CRIMSON (April 13, 1981). Copy supplied.

"Council Continues Discussion Of Proposal On Faculty Duties," THE HARVARD CRIMSON (April 9, 1981). Copy supplied.

"Negotiations On Hiring Report Delayed," THE HARVARD CRIMSON (April 1, 1981). Copy supplied.

"Council Calls For Changes In Soc. Stud.," THE HARVARD CRIMSON (March 19, 1981). Copy supplied.

"Study Lauds Admissions At K-School," THE HARVARD CRIMSON (March 18, 1981). Copy supplied.

"Haven't Had Enough, Huh?," THE HARVARD CRIMSON (March 17, 1981). Copy supplied.

"A Possible First Step," THE HARVARD CRIMSON (co-signer of dissenting editorial) (March 17, 1981). Copy supplied.

"GSA Official To Ask Faculty Council To Adopt Non-Discrimination Policy," THE HARVARD CRIMSON (March 14, 1981). Copy supplied.

"Faculty Disagrees On Gomes Proposal," THE HARVARD CRIMSON (March 11, 1981). Copy supplied.

"A Respite From Politics – Former Senator John Culver: Thinking About The Future," THE HARVARD CRIMSON (March 9, 1981). Copy supplied.

"Not Good Enough," THE HARVARD CRIMSON (March 7, 1981). Copy supplied.

"Sheik Yamani May Address Ec. Seminar," THE HARVARD CRIMSON (March 6, 1981). Copy supplied.

"Faculty Council Weighs New Proposal Detailing Responsibilities Of Professors," THE HARVARD CRIMSON (March 5, 1981). Copy supplied.

"Harvard's Revolving Door – Six Former Faculty Members Look Back With Pleasure ... And Pain," THE HARVARD CRIMSON (Sidebars On Catherin Auspitz and David Kaiser) (March 4, 1981). Copy supplied.

"Federal Study Cites Hiring 'Deficiencies'," THE HARVARD CRIMSON (March 3, 1981). Copy supplied.

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"A Choice Between Two Futures," THE HARVARD CRIMSON (February 27, 1981). Copy supplied.

"Gomes Report Sent To Faculty After Debate In Faculty Council," THE HARVARD CRIMSON (February 26, 1981). Copy supplied.

"The Social Studies Manifesto," THE HARVARD CRIMSON (February 21, 1981). Copy supplied.

"Social Studies Instructors Laud Report On Program," THE HARVARD CRIMSON (February 20, 1981). Copy supplied.

"Landes Named Social Studies Head; Report Urges Concentration Changes," THE HARVARD CRIMSON (February 18, 1981). Copy supplied.

"The Policy Of The University?," THE HARVARD CRIMSON (February 14, 1981). Copy supplied.

"Faculty Gets Grading Studies," THE HARVARD CRIMSON (February 13, 1981). Copy supplied.

"CUE Hears Study On Make-Up Test," THE HARVARD CRIMSON (February 12, 1981). Copy supplied.

"Faculty Weighs Minority Study," THE HARVARD CRIMSON (February 11, 1981). Copy supplied.

"IOP's New Fellows Tell Of Their Political Roots," THE HARVARD CRIMSON (February 5, 1981). Copy supplied.

"Affirmative Progress," THE HARVARD CRIMSON (January 16, 1981). Copy supplied.

"K-School Students Win On Admissions," THE HARVARD CRIMSON (January 13, 1981). Copy supplied.

"K-School May Add Woman To Faculty," THE HARVARD CRIMSON (January 9, 1981). Copy supplied.

"Into The Energy Abyss," THE HARVARD CRIMSON (January 8, 1981). Copy supplied.

"Culver, Ousted From Senate, Accepts Fellowship At IOP," THE HARVARD CRIMSON (January 6, 1981). Copy supplied.

"Students, Faculty Cite Need For K-School To Eliminate Bias," THE HARVARD CRIMSON (December 17, 1980). Copy supplied.

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"Group Seeks Change In K-School Policy," THE HARVARD CRIMSON (December 16, 1980). Copy supplied.

"48 Congressmen Arrive For K-School Conference," THE HARVARD CRIMSON (December 13, 1980). Copy supplied.

"Nye Book Suggests Plans To Cut Oil Vulnerability," THE HARVARD CRIMSON (December 12, 1980). Copy supplied.

"Anderson Assails Two-Party System, Calls Himself Uncertain On 1984 Race," THE HARVARD CRIMSON (December 8, 1980). Copy supplied.

"Campaign Managers, Anderson Highlight Conference At IOP," THE HARVARD CRIMSON (December 6, 1980). Copy supplied.

"Carter Aide May Become IOP Fellow," THE HARVARD CRIMSON (December 5, 1980). Copy supplied.

"Recruiter Describes CIA Posts To Kennedy School Students," THE HARVARD CRIMSON (December 3, 1980). Copy supplied.

"U.S. Agencies Give K-School Research Grant," THE HARVARD CRIMSON (December 1, 1980). Copy supplied.

"Professors Call 1984 Election Unpredictable, Say Outcome Hinges On Reagan's Success," THE HARVARD CRIMSON (November 22 1980). Copy supplied.

"Democrats Urged To Invigorate Policies," THE HARVARD CRIMSON (November 20, 1980). Copy supplied.

"Election Seen As Rejection Of Carter," THE HARVARD CRIMSON (November 17, 1980). Copy supplied.

"GOP Sweep Toughens Brown's Job," THE HARVARD CRIMSON (November 15, 1980). Copy supplied.

"Affirmative Pressures," THE HARVARD CRIMSON (November 15, 1980). Copy supplied.

"K-School Officials Defend Facts In Hiring Report," THE HARVARD CRIMSON (November 11, 1980). Copy supplied.

"K-School Cited For Inaccurate Report," THE HARVARD CRIMSON (November 10, 1980). Copy supplied.

"Students Ask Input In K-School Hiring," THE HARVARD CRIMSON (November 7, 1980). Copy supplied.

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"The Trouble With Reform," THE HARVARD CRIMSON (November 3, 1980). Copy supplied.

"Don't Throw Away Your Vote," THE HARVARD CRIMSON (co-signer of dissenting editorial) (October 23, 1980). Copy supplied.

"A Great Leap Westward: Three Freshmen Contrast Harvard and China," THE HARVARD CRIMSON (October 22, 1980). Copy supplied.

"K-School Officials Dispute Allegations," THE HARVARD CRIMSON (October 20, 1980). Copy supplied.

"Not-So-Affirmative Actions," THE HARVARD CRIMSON (October 18, 1980). Copy supplied.

"Women's Group Registers Complaint Charging K-School With Discrimination," THE HARVARD CRIMSON (October 17, 1980). Copy supplied.

"Experts Disagree On Liberal Agenda," THE HARVARD CRIMSON (October 7, 1980). Copy supplied.

"'Advocates' Weigh Policy On Russia," THE HARVARD CRIMSON (October 2, 1980). Copy supplied.

"K-School Gets New Dean To Bolster Job Placement," THE HARVARD CRIMSON (October 1, 1980). Copy supplied.

"Seeing Sites," THE HARVARD CRIMSON (September 27, 1980). Copy supplied.

"Great Cities' Conference Concludes At IOP Session," THE HARVARD CRIMSON (September 27, 1980). Copy supplied.

"Solutions to Economic Woes Debated At 'Advocates' Taping," THE HARVARD CRIMSON (September 24, 1980). Copy supplied.

"Bloch Takes Long Route To Cambridge," THE HARVARD CRIMSON (September 22, 1980). Copy supplied.

"IOP Fellows Laud Political Activism," THE HARVARD CRIMSON (September 12, 1980). Copy supplied.

"Father's Facelift," THE HARVARD CRIMSON (September 10, 1980). Copy supplied.

"Grendel's Fights State Appeal In Quest For Liquor License," THE HARVARD CRIMSON (September 8, 1980). Copy supplied.

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"State Senate Recommends South Africa Divestiture," THE HARVARD CRIMSON (May 2, 1980). Copy supplied.

"John Montgomery Named Government Dept. Head," THE HARVARD CRIMSON (April 29, 1980). Copy supplied.

"Corporation Abstains On S. Africa Sales," THE HARVARD CRIMSON (April 28, 1980). Copy supplied.

"A Major By Any Other Name – English," THE HARVARD CRIMSON (April 24, 1980). Copy supplied.

"Bush Beats Gov. Reagan in Pennsylvania Primary," THE HARVARD CRIMSON (April 23, 1980). Copy supplied.

"Wilson Speaks On Aftermath of '60s Turmoil," THE HARVARD CRIMSON (April 22, 1980). Copy supplied.

"Commencement," THE HARVARD CRIMSON (April 18, 1980). Copy supplied.

"Authorities Split On Boycott; Few Forecast Immediate Gains," THE HARVARD CRIMSON (April 14, 1980). Copy supplied.

"Most Seniors Purchasing Coop's Alternative Gowns -- 75 Per Cent Support Boycott," THE HARVARD CRIMSON (April 13, 1980). Copy supplied.

"Brown's Lewalski To Head History And Lit In 1982," THE HARVARD CRIMSON (April 11, 1980). Copy supplied.

"Carter Cuts Ties With Iran," THE HARVARD CRIMSON (April 8, 1980). Copy supplied.

"Assembly Discusses Concert, GLAD – Pousette-Dart," THE HARVARD CRIMSON (April 7, 1980). Copy supplied.

b. Supply four (4) copies of any reports, memoranda or policy statements you prepared or contributed in the preparation of on behalf of any bar association, committee, conference, or organization of which you were or are a member. If you do not have a copy of a report, memorandum or policy statement, give the name and address of the organization that issued it, the date of the document, and a summary of its subject matter.

I have not prepared or contributed to any such report.

c. Supply four (4) copies of any testimony, official statements or other communications relating, in whole or in part, to matters of public policy or

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legal interpretation, that you have issued or provided or that others presented on your behalf to public bodies or public officials.

June 25, 2010: I signed a joint letter from former assistants to the Solicitor General and Deputy Solicitors General to the Senate Judiciary Committee in support of the nomination of Elena Kagan to be a Justice for the Supreme Court of the United States. I have been unable to obtain a copy of the letter.

September 13, 2002: I signed a letter to Senators Patrick J. Leahy and Orrin G. Hatch in support of the nomination of Miguel Estrada to be a Circuit Judge for the District of Columbia Circuit. Copy supplied.

d. Supply four (4) copies, transcripts or recordings of all speeches or talks delivered by you, including commencement speeches, remarks, lectures, panel discussions, conferences, political speeches, and question-and-answer sessions. Include the date and place where they were delivered, and readily available press reports about the speech or talk. If you do not have a copy of the speech or a transcript or recording of your remarks, give the name and address of the group before whom the speech was given, the date of the speech, and a summary of its subject matter. If you did not speak from a prepared text, furnish a copy of any outline or notes from which you spoke.

January 13, 2011. Client education panel on effective defense strategies. Newark, New Jersey. Remarks and presentation materials supplied.

December 7, 2010. Training session for WilmerHale lawyers on application of attorney-client privilege and work-product doctrines to documents from an actual case. New York, New York. I have no notes, transcript, or recording, and presentation materials are privileged. The address of WilmerHale is 399 Park Avenue, New York, New York 10022.

July 15, 2010. Introduction, at training session for WilmerHale lawyers, of outside experts, who presented on the basics of derivatives and structured products. New York, New York. I have no notes, transcript, or record of my remarks. The address of WilmerHale is 399 Park Avenue, New York, New York 10022.

September 15, 2009. Deposition training workshop for WilmerHale attorneys. Washington, D.C. Materials supplied.

June 1, 2009. Speech to members of New York Office of WilmerHale, on occasion of the fifth anniversary of the merger between Wilmer Cutler & Pickering and Hale and Dorr. New York, New York. Remarks supplied.

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March 10, 2009. Training session for WilmerHale lawyers on trial preparation and pretrial conferences. New York, New York. Materials supplied.

December 9, 2008. Training session for WilmerHale lawyers on sentencing advocacy for individuals. New York, New York. Materials supplied.

November 4, 2008. Street Law, Inc. Seminar for New York City public school history teachers about the process by which cases are taken and resolved by the Supreme Court of the United States. New York, New York. Topics include the certiorari process, merits briefing, the nature of oral argument, the Justices' post-argument conference, and the process by which majority and dissenting opinions are developed. I have no notes, transcript, or recording. The address for Street Law, Inc. is 1010 Wayne Avenue, Suite 870, Silver Spring, Maryland 20910.

October 30, 2008. Training session for WilmerHale lawyers on conducting witness interviews. New York, New York. I have no notes, transcript, or recording. While I do not have the materials for this session, I believe them to be substantially similar to those supplied below for same class given on February 26, 2008. The address of WilmerHale is 399 Park Avenue, New York, New York 10022.

October 21, 2008. Training session for WilmerHale lawyers on application of attorney-client privilege and work-product doctrines to documents from an actual client representation. New York, New York. I have no notes, transcript, or recording, and materials are privileged. The address of WilmerHale is 399 Park Avenue, New York, New York 10022.

February 26, 2008. Training session for WilmerHale lawyers on trial preparation and pretrial conferences. New York, New York. Materials supplied.

December 4, 2007. Training session for WilmerHale lawyers on conducting witness interviews. New York, New York. Materials supplied.

November 6, 2007. Street Law, Inc. Election Day seminar for New York City public school history teachers. New York, New York. Topics as described above for the November 4, 2008 seminar. I have no notes, transcript, or recording. The address for Street Law, Inc. is 1010 Wayne Avenue, Suite 870, Silver Spring, Maryland 20910.

October 18, 2007. Training session for WilmerHale lawyers on the attorney-client privilege and work-product doctrines. Washington, D.C. Outline supplied as well as WilmerHale's publication, "The Attorney-Client Privilege: A Practitioner's Guide," which I referenced in my presentation.

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October 12, 2007. Training session for WilmerHale lawyers on the attorney-client privilege and work-product doctrines. New York, New York. I used the same materials supplied for the October 18, 2007 sessions.

March 20, 2007. Introduction of then-Senator Joseph R. Biden at a fundraising luncheon for his presidential campaign. New York, New York. Although I spoke without notes, the draft remarks I prepared in advance of the event are supplied.

March 2, 2007. Training session for WilmerHale lawyers on trial preparation and pretrial conferences. New York, New York. I have no notes, transcript, or recording. While I do not have the materials for this session, I believe them to be identical or virtually identical to those used for same classes given on March 10, 2009, and February 26, 2008. The address of WilmerHale is 399 Park Avenue, New York, New York 10022.

February 7, 2007. Introduction at client education panel on healthcare fraud enforcement against pharmaceutical and medical device manufacturers. New York, New York. I have no notes, transcript, or recording. The panel was held at the Harvard Club of New York City, 35 West 44th Street, New York, New York.

November 15, 2006. Panel discussion for WilmerHale lawyers on attorney-client privilege and work product doctrines. Washington, D.C. Materials supplied.

July 20, 2006. Commentator, evaluating associates' performances, at mock-trial competition for WilmerHale associates. New York, New York. I have no notes, transcript, or recording. The address of WilmerHale is 399 Park Avenue, New York, New York 10022.

June 15, 2006. Panel discussion for WilmerHale lawyers on settling securities matters. I have no notes, transcript, or recording, and the presentation materials are privileged. The address of WilmerHale is 399 Park Avenue, New York, New York 10022.

June 14, 2006. Client education panel on privilege waivers, parallel proceedings, and data preservation. Boston, Massachusetts. Materials supplied.

June 7, 2006. Panel discussion on privilege waivers, parallel proceedings, and data preservation. New York, New York. I used the same materials as those supplied for the June 14, 2006 panel.

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March 28, 2006. Training session for WilmerHale lawyers on trial preparation and pretrial conferences. New York, New York. Materials supplied.

December 5, 2005. Commentator, evaluating associates' performances, at mock-trial competition for WilmerHale associates. New York, New York. I have no notes, transcript, or recording. The address of WilmerHale is 399 Park Avenue, New York, New York 10022.

November 8, 2005. Street Law, Inc. Election Day seminar for New York City public school history teachers. New York, New York. Topics as described above for the November 4, 2008 seminar. I have no notes, transcript, or recording. The address for Street Law, Inc. is 1010 Wayne Avenue, Suite 870, Silver Spring, Maryland 20910.

October 7, 2005. Training session for WilmerHale lawyers on legal writing pointers for litigators. New York, New York. Materials supplied.

July 25, 2005. Commentator, evaluating associates' performances, at mock-trial competition for WilmerHale associates. New York, New York. I have no notes, transcript, or recording. The address of WilmerHale is 399 Park Avenue, New York, New York 10022.

June 24, 2005. Deposition-training workshop for WilmerHale attorneys. New York, New York. I have no notes, transcript, or recording. While I do not have the materials for this session, I believe them to be substantially the same as for the deposition-training workshop held on September 15, 2009. The address of WilmerHale is 399 Park Avenue, New York, New York 10022.

June 10, 2005. Panel discussion for WilmerHale lawyers on "Crisis Management." Materials supplied.

March 15, 2005. Guest lecture on "Mail and Wire Fraud," Harvard Law School (guest lecture was for class on "Federal Criminal Law" taught by my U.S. Attorney's Office colleague Ira Feinberg, Esq.) Cambridge, Massachusetts. I have no notes, transcript, or recording. The address of Harvard Law School is 1563 Massachusetts Avenue, Cambridge, Massachusetts 02138.

November 2, 2004. Election Day seminar for New York City public school history teachers. New York, New York. Topics as described above for the November 4, 2008 seminar. I have no notes, transcript, or recording. The address for Street Law, Inc. is 1010 Wayne Avenue, Suite 870, Silver Spring, Maryland 20910.

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October 27, 2004. Guest speaker on appellate advocacy at then-United States Court of Appeals Judge Sonia Sotomayor's Columbia Law School class on appellate advocacy. New York, New York. I have no notes, transcript, or recording. The class was held in Judge Sotomayor's jury room. The address of Columbia Law School is 435 West 116th Street, Mail Code 4004, New York, New York 10027.

July 14, 2004. Deposition-training workshop for WilmerHale attorneys. New York, New York. Materials supplied.

October 16, 2003. Speech tribute to Hon. Patricia M. Wald on the occasion of the unveiling of Judge Wald's portrait, United States Court of Appeals for the District of Columbia Circuit, Washington, D.C. Remarks supplied.

May 17, 2003. Deposition-training workshop for WilmerHale attorneys. New York, New York. I have no notes, transcript, or recording. While I do not have the materials for this session, I believe them to be substantially the same as for the deposition-training workshop held on September 15, 2009. The address of WilmerHale is 399 Park Avenue, New York, New York 10022.

May 28, 2003. Training sessions for UBS Paine Webber legal and compliance personnel on the attorney-client privilege and work-product doctrine. Stamford, Connecticut. Materials supplied.

January 29, 2002. Training sessions for UBS Paine Webber legal and compliance personnel on conducting internal investigations. Stamford, Connecticut. I have no notes, transcript, or recording. The address of UBS Paine Webber is 750 Washington Boulevard, Stamford, CT 06901.

June 22, 2001. Deposition training workshop for WilmerHale attorneys. I have no notes, transcript, or recording. While I do not have the materials for this session, I believe them to be substantially the same as for the deposition-training workshop held on September 15, 2009. The address of WilmerHale is 1875 Pennsylvania Avenue, N.W. Washington, D.C. 20006.

January 10, 2001. Guest lecture on "Extortion and Bribery," Harvard Law School (guest lecture was for class on "Federal Criminal Law" taught by my U.S. Attorney's Office colleague Ira Feinberg, Esq.). Cambridge, Massachusetts. I have no notes, transcript, or recording. The address of Harvard Law School is 1563 Massachusetts Avenue, Cambridge, Massachusetts 02138.

May 1, 2000. Association of the Bar of the City of New York panel, "Developing A Theory of Your Case And Its Preparation For Trial – The Plaintiffs' Perspective." New York, New York. Outline supplied.

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April 25, 2000. Client education panel addressing developments relating to anti-money-laundering law and enforcement. New York, New York. I have no notes, transcript, or recording. The address of WilmerHale is 399 Park Avenue, New York, New York 10022.

November 17, 1999. Guest speaker on role of the government lawyer at then-United States Court of Appeals Judge Sonia Sotomayor's Columbia Law School class. New York, New York. I have no notes, transcript, or recording. The address of Columbia Law School is 435 West 116th Street, Mail Code 4004, New York, New York 10027.

e. List all interviews you have given to newspapers, magazines or other publications, or radio or television stations, providing the dates of these interviews and four (4) copies of the clips or transcripts of these interviews where they are available to you.

These articles and other materials are the ones I have been able to find based on a search of my personal records and electronic databases. I have not included articles that quoted statements I made in court or in publicly filed papers such as legal briefs.

Approx. May-June 2010: I gave one or two interviews discussing the nomination of then-Judge Sotomayor to be an Associate Justice of the Supreme Court. I do not recall the names of the reporters to whom I spoke, and to my knowledge, none of my quotes were ever published.

Press Release, "WilmerHale Hires Former New York State Executive Deputy Attorney General for Criminal Justice," WILMER, CUTLER & PICKERING (May 18, 2010). Copy supplied.

"Best Places To Work: #19 – WilmerHale," CRAIN'S NEW YORK BUSINESS (December 7, 2009). Copy supplied.

Chelsea L. Shover, "Solomon Amendment Met with Student Apathy," THE HARVARD CRIMSON (June 1, 2008). Copy supplied.

Alan Feuer and Benjamin Weiser, "Sure Hands At Helm For Spitzer's Legal Fight," THE NEW YORK TIMES (March 14, 2008). Copy supplied.

Michael Abramowitz and Dan Eggen, "Ex-Judge Is Said To Be Pick At Justice; Democrats Likely To Accept Him As Attorney General," THE WASHINGTON POST (September 17, 2007). Copy supplied.

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Tricia Bishop, "Ex-Officer Of SafeNet Indicted In Stock Plot; Options Allegedly Re-Dated For Profit," THE BALTIMORE SUN (July 26, 2007) (quoted in other sources). Copy supplied.

Jason Horowitz, "Burkl'd: How Billionaire And Page Sixer Both Got Stung," THE NEW YORK OBSERVER (April 17, 2006). Copy supplied.

Thomas Adcock, "Moving Outside The Beltway," NEW YORK LAW JOURNAL (March 31, 2006). Copy supplied.

Stephanos Bibas and Richard A. Bierschbach, "Integrating Remorse And Apology Into Criminal Procedure, 114 YALE L.J. 85, at nn. 157, 245 (October 2004). Copy supplied.

Press Release, "Experienced Litigator Joins Wilmer, Cutler & Pickering," WILMER, CUTLER & PICKERING (January 5, 2004). Copy supplied.

David Montgomery, "A Man On Hold: While The Senate Debates, Judicial Nominee Miguel Estrada Waits. And Waits," THE WASHINGTON POST (March 14, 2003). Copy supplied.

Jan Crawford Greenburg, "From Humble Beginnings To Senate Storm," CHICAGO TRIBUNE (March 2, 2003). Copy supplied.

Charles Lane, "An Unlikely Law Bolsters Sniper Case Prosecution," THE WASHINGTON POST (October 31, 2002). Copy supplied.

Randal C. Archibold, "Investigation Into Commuting Of Sentences For Four Hasidim Raises Thorny Legal Issues," THE NEW YORK TIMES (March 23, 2001). Copy supplied.

"Interview with Paul A. Engelmayer," CORPORATE CRIME REPORTER (March 19, 2001). Copy supplied.

Susan Schmidt and Dan Eggen, "Pardons Probe Course A Mystery; Case Could Be Huge If N.Y. Prosecutor Pursues Aggressively," THE WASHINGTON POST (March 14, 2001). Copy supplied.

Susan Baer, "2 Justices In 'Swing' Position Hold Key; Kennedy, O'Connor 'Can Surprise You,'" THE BALTIMORE SUN (December 12, 2000). Copy supplied.

Charles Lane, "Historic – And Divisive; Bitter Dispute To Give Supreme Court Another Test Of Political, Legal Skills," THE WASHINGTON POST (December 9, 2000). Copy supplied.

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Charles Lane and Serge Kovaleski, "Bush Legal Fight Faces Uncertain Future; Judge's Ruling Reflects Courts' Traditional Reluctance To Intervene In Elections," THE WASHINGTON POST (November 14, 2000).

Ilana DeBare, "Upstate N.Y. Takes on Big Apple in Football Finale," SACRAMENTO BEE (January 25, 1991). Copy supplied.

13. **Judicial Office**: State (chronologically) any judicial offices you have held, including positions as an administrative law judge, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

I have not served as a judge.

a. Approximately how many cases have you presided over that have gone to verdict or judgment?

i. Of these, approximately what percent were:

jury trials:	___%
bench trials:	___%
civil proceedings:	___%
criminal proceedings:	___%

b. Provide citations for all opinions you have written, including concurrences and dissents.

c. For each of the 10 most significant cases over which you presided, provide: (1) a capsule summary of the nature the case; (2) the outcome of the case; (3) the name and contact information for counsel who had a significant role in the trial of the case; and (3) the citation of the case (if reported) or the docket number and a copy of the opinion or judgment (if not reported).

d. For each of the 10 most significant opinions you have written, provide: (1) citations for those decisions that were published; (2) a copy of those decisions that were not published; and (3) the names and contact information for the attorneys who played a significant role in the case.

e. Provide a list of all cases in which certiorari was requested or granted.

f. Provide a brief summary of and citations for all of your opinions where your decisions were reversed by a reviewing court or where your judgment was affirmed with significant criticism of your substantive or procedural rulings. If any of the opinions listed were not officially reported, provide copies of the opinions.

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g. Provide a description of the number and percentage of your decisions in which you issued an unpublished opinion and the manner in which those unpublished opinions are filed and/or stored.

h. Provide 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, provide copies of the opinions.

i. Provide citations to all cases in which you sat by designation on a federal court of appeals, including a brief summary of any opinions you authored, whether majority, dissenting, or concurring, and any dissenting opinions you joined.

14. **Recusal:** If you are or have been a judge, identify the basis by which you have assessed the necessity or propriety of recusal (If your court employs an "automatic" recusal system by which you may be recused without your knowledge, please include a general description of that system.) Provide a list of any cases, motions or matters that have come before you in which a litigant or party has requested that you recuse yourself due to an asserted conflict of interest or in which you have recused yourself sua sponte. Identify each such case, and for each provide the following information:

I have not served as a judge.

a. whether your recusal was requested by a motion or other suggestion by a litigant or a party to the proceeding or by any other person or interested party; or if you recused yourself sua sponte;

b. a brief description of the asserted conflict of interest or other ground for recusal;

c. the procedure you followed in determining whether or not to recuse yourself;

d. your reason for recusing or declining to recuse yourself, including any action taken to remove the real, apparent or asserted conflict of interest or to cure any other ground for recusal.

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

a. List chronologically any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. If appointed, please include the name of the individual who appointed you. Also, state chronologically any unsuccessful candidacies you have had for elective office or unsuccessful nominations for appointed office.

I have not held public office. I have had no unsuccessful candidacies for elective office or unsuccessful nominations for appointed office.

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b. List all memberships and offices held in and services rendered, whether compensated or not, to any political party or election committee. If you have ever held a position or played a role in a political campaign, identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

In 2007 and 2008, I served as a member of then-Senator Biden's New York Finance Committee during his presidential campaign. I hosted one fundraising event and attended a number of others in conjunction with this role, and subsequently participated in a number of fundraising events for the Obama-Biden general election campaign.

In January 2010, I served as one of a large number of co-hosts for a fundraising lunch for U.S. Senator Michael Bennet of Colorado.

Many years ago, I did limited volunteer campaign work for presidential candidates whom I supported, including Vice President Mondale in 1984, and Rep. Morris Udall in 1976.

16. **Legal Career:** Answer each part separately.

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

i. 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;

1987 – 1988; I served as a law clerk to The Honorable Patricia M. Wald, Chief Judge of the United States Court of Appeals for the District of Columbia Circuit.

1988 – 1989; I served as a law clerk to The Honorable Thurgood Marshall, Associate Justice of the United States Supreme Court.

ii. whether you practiced alone, and if so, the addresses and dates;

I have never practiced law alone.

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iii. 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.

1989 – 1994
United States Attorney's Office for the Southern District of New York
One Saint Andrew's Plaza
New York, New York 10007
Deputy Chief Appellate Attorney (1994)
Assistant United States Attorney (1989 – 1994)

1994 – 1996
Office of the Solicitor General of the United States
United States Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20036
Assistant to the Solicitor General

1996 – 1999
United States Attorney's Office for the Southern District of New York
One Saint Andrew's Plaza
New York, New York 10007
Chief, Major Crimes Unit

2000 – Present
Wilmer Cutler Pickering Hale and Dorr
399 Park Avenue
New York, New York 10022
Partner (2000 – Present)
Partner-in-Charge of New York Office (2005 – Present)

iv. whether you served as a mediator or arbitrator in alternative dispute resolution proceedings and, if so, a description of the 10 most significant matters with which you were involved in that capacity.

I have never served as a mediator or an arbitrator.

b. Describe:

i. the general character of your law practice and indicate by date when its character has changed over the years.

In November 1989, I joined the United States Attorney's Office for the Southern District of New York, as an Assistant United States Attorney (AUSA). I served in the Office's Criminal Division. Following one year in the General Crimes Unit, I served for 3 ¼ years in the Public

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Corruption Unit, investigating and prosecuting public officials or private parties based on their dealings with the public sector. I then served for seven months as Deputy Chief Appellate Attorney, where I served as a legal counselor to prosecutors in the Office, edited appellate briefs and other submissions, and mooted AUSAs in advance of appellate arguments.

In September 1994, I left the U.S. Attorney's Office to take a job as Assistant to the Solicitor General of the United States. I was responsible for briefing numerous cases, in areas involving, among others, admiralty law, labor law, Indian tax, the then-extant federal welfare statute, criminal procedure, the construction of a federal criminal statute, and the Fourth Amendment. In addition, because the Solicitor General has statutory responsibility for authorizing (or declining to authorize) appeals taken not only by the Justice Department but also by most federal departments and agencies, I was responsible for advising the Solicitor General on potential appeals covering a variety of areas of law.

In August 1996, I returned to the United States Attorney's Office for the Southern District of New York, this time as Chief of the Major Crimes Unit. I (along with a co-chief) headed up the Office's largest white-collar crime unit, which brought substantial cases in areas including financial-institutions fraud, computer crime, health-care fraud, and Internet crime. I also continued to try cases.

In January 2000, I joined the law firm of Wilmer Cutler & Pickering, as a partner, in the firm's New York office, which had recently opened. My practice at the firm has been a blend of white-collar criminal defense and internal investigations work, appellate work, civil litigation, securities enforcement, and pro bono work. In late 2001, I was named administrative partner for the New York Office. In June 2004, the firm merged with Boston-based Hale and Dorr, creating Wilmer Cutler Pickering Hale and Dorr (WilmerHale), and the two legacy firms' New York offices were combined that fall. In 2005, I was named Partner-in-Charge of the New York Office. The office today has approximately 170 lawyers. I have played an integral role in growing and managing the office and mentoring our young lawyers.

ii. your typical clients and the areas at each period of your legal career, if any, in which you have specialized.

During my two tours of duty as a prosecutor, I represented the federal government exclusively in criminal prosecutions. I did both trial and appellate work.

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At the Solicitor General's Office, I represented the federal government, exclusively handling appellate cases, covering, as noted, a wide range of areas of law.

At WilmerHale, my work falls into four broad categories: (1) I do a substantial amount of criminal defense and internal investigative/ advisory work, largely for corporate clients; I also represent individuals (often corporate executives or employees) in criminal cases or investigations. (2) I do a substantial amount of appellate work, largely in the areas of representing criminal defendants on appeal and pro bono immigration cases or cases in support of work of the Brennan Center for Justice. (3) I have a substantial civil litigation practice, focused on securities, financial institution, and complex commercial litigation, largely for corporate clients. And, (4) I do securities enforcement work, both for institutions and individuals.

c. Describe the percentage of your practice that has been in litigation and whether you appeared in court frequently, occasionally, or not at all. If the frequency of your appearances in court varied, describe such variance, providing dates.

My practice as a prosecutor was exclusively a litigation practice. I appeared before numerous district judges in the Southern District of New York and before the United States Court of Appeals for the Second Circuit. My practice there consisted entirely of criminal work. In my first few years at the office (1989 – early 1994), I generally appeared in court at least once a week and often several times a week, whether handling arraignments, pretrial conferences or hearings. During trials, I appeared in court daily. After I became a supervisor at the United States Attorney's Office (February 1994 – August 1994, as deputy chief of appeals; and August 1996 – December 1999, as Chief of the Major Crimes Unit), my district court caseload (and therefore the pace of court appearances) diminished. However, I did handle several trials during this period; a several-day probation-violation hearing; occasional appeals; and I also appeared in court occasionally for hearings or conferences.

My practice at the Solicitor General's Office was exclusively a litigation practice. The only court before which I appeared was the United States Supreme Court. I argued four cases there.

My practice at WilmerHale, as described above, consists partly of true litigation work and partly of internal investigative work or work aimed at dissuading a prosecutor or regulator from bringing charges. I estimate that, over my 11-plus years at the firm, approximately 50% of my time has been spent on investigating allegations or defending investigations conducted by federal or state regulators, including the Department of Justice, the Securities and Exchange Commission, and the New York State Attorney General's

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Office. Overall, I estimate that my caseload during my time at the firm has been about 50% criminal (including internal investigations) and 50% civil. I occasionally appear in court. My court appearances tend to consist of appearances in commercial or other civil litigation and appearances in the courts of appeals. For the most part, my practice has been in the federal courts, but I appear from time to time in New York state court, most notably a two-week trial in state supreme court (Westchester County) in 2009.

i. Indicate the percentage of your practice in:

1. federal courts:	90%
2. state courts of record:	5%
3. other courts:	
4. administrative agencies:	5%

ii. Indicate the percentage of your practice in:

1. civil proceedings:	50%
2. criminal proceedings:	50%

d. State the number of cases in courts of record, including cases before administrative law judges, you tried to verdict, judgment or final decision (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

My trial experience as a prosecutor exclusively consisted of criminal cases tried to a jury. I recall seven jury trials in which I was either sole counsel (1) or chief counsel (6). In addition, I estimate that I second-chaired approximately six trials in which I actively counseled and assisted new AUSAs who were trying the cases, but in which they did the bulk of the trial work. I also handled or co-handled several trial-like hearings before judges. I have had one trial while at WilmerHale, involving a commercial dispute.

i. What percentage of these trials were:

1. jury:	90%
2. non-jury:	10%

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

In response to this question, I have provided all briefing that I could locate through online research services and in my personal records. There may be additional briefing, particularly petitions for certiorari or oppositions to

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petitions for certiorari, to which I contributed but that I have been unable to identify or locate.

Between September 1994 and August 1996, I practiced in front of the Supreme Court, as a member of the Solicitor General's Office. During that time, I argued four cases before the Supreme Court, in each of which I had been the principal drafter of the Government's brief. These cases are listed below:

(1) *Anderson v. Edwards*, 514 U.S. 143 (1995) (construction of the Aid to Families With Dependent Children statute and regulations thereunder). Brief and transcript supplied.

(2) *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450 (1995) (Mareh 27, 1995) (constitutionality of state's imposition of a motor fuels excise tax on fuel sold on tribal trust land, and of an income tax on tribal members employed by the tribe but residing outside of tribal land). Brief and transcript supplied.

(3) *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199 (1996) (tort remedies available in cases of fatalities of non-seamen occurring in territorial waters). Brief and transcript supplied.

(4) *Carlisle v. United States*, 517 U.S. 416 (1996) (authority of a federal district court to grant a motion for a judgment of acquittal filed outside the time limits prescribed by Fed. R. Crim. P. 29(c)). Brief and transcript supplied.

In addition, while at the Solicitor General's Office, I was the principal drafter of the Government's merits briefs in five other cases listed below:

(1) *Wilson v. Arkansas*, 514 U.S. 927 (1995) (whether and to what degree the common-law requirement that an officer "knock and announce" before entering a residence has been incorporated into the Fourth Amendment). Brief supplied.

(2) *National Labor Relations Board v. Town & Country Electric Inc.*, 516 U.S. 85 (1995) (definition of "employee" under the National Labor Relations Act). Briefs supplied.

(3) *United States v. Wells and Steele*, 519 U.S. 482 (1997) (whether the materiality of a false statement is an element of 18 U.S.C. § 1014, which makes it a felony to make a false statement to a federally insured bank). Briefs supplied.

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(4) *Whren v. United States*, 517 U.S. 806 (involving the constitutionality of "pretext" traffic stops, in which a law-enforcement officer has a valid basis to make a traffic stop but is motivated to do so because of suspicion of a different offense). Brief supplied.

(5) *Ohio v. Robinette*, 519 U.S. 33 (1996) (whether law-enforcement officer has a Fourth Amendment duty, in course of a valid traffic stop, to affirmatively notify the motorist, before questioning commences on unrelated issues, that he/she is free to leave). Brief supplied.

While at WilmerHale, I have authored or co-authored briefs, or petitions for certiorari or oppositions to such petitions, in ten cases to the Supreme Court. These briefs are listed below:

(1) *Calcano-Martinez v. INS*, 533 U.S. 348 (2001) (briefs for petitioner, challenging court of appeals' decision that it lacked jurisdiction to hear statutory and constitutional challenges to order of removal). Briefs supplied.

(2) *INS v. St. Cyr*, 533 U.S. 289 (2001) (brief for respondent, defending court of appeals' decision that it had habeas corpus jurisdiction over his challenge to his final removal order). Brief supplied.

(3) *Benitez v. Mata*, 544 U.S. 998 (2005) (amicus brief on behalf of American Civil Liberties Union, arguing that 8 U.S.C. § 1231(a)(6) does not authorize the indefinite and potentially permanent detention of Mariel "boat-lift" Cuban parolees). Brief supplied.

(4) *Cogswell v. City of Seattle*, 541 U.S. 1043 (2004) (petition for writ of certiorari, presenting question whether a Seattle ordinance that provided that a candidate's written "campaign statement" could not discuss the candidate's opponent was constitutional). Brief supplied.

(5) *Leocal v. Ashcroft*, 543 U.S. 1 (2004) (May 10, 2004) (amicus brief on behalf of National Association of Criminal Defense Lawyers, Immigrant Defense Project, Defending Immigrants Partnership, American Immigration Lawyers Association, and American Civil Liberties Union, on question whether the state offense of driving under the influence constitutes a "crime of violence" under 18 U.S.C. § 16(a), necessitating the removal of an alien who commits that offense). Brief supplied.

(6) *United States v. Fanfan*, 543 U.S. 220 (2005) (opposition to petition for writ of certiorari, arguing that case was inappropriate vehicle for determining constitutionality of United States Sentencing Guidelines). Brief supplied.

(7) *New York State Board of Elections v. Lopez Torres*, 552 U.S. 196 (2008) (July 13, 2007) (amicus brief by Brooklyn District Attorney Charles Hynes, in

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support of Brennan Center for Justice's First Amendment challenge to process by which state supreme court judges are chosen in New York State; amicus brief provided prosecutor's account of documented corruption created by the party-dominated judicial electoral process). Brief supplied.

(8) *Brown v. McKithen*, 552 U.S. 1179 (2008) (opposition to petition for writ of certiorari, arguing that case, which involved claim of access to DNA testing, did not implicate circuit split on the procedural issues identified by petitioner). Brief supplied.

(9) *District Attorney's Office for Third Judicial District v. Osborne*, 129 S. Ct. 2308 (2009) (amicus brief in case raising the issue of whether there is a post-conviction right to access to potentially exculpatory DNA evidence; we represented 10 amici individuals who had previously been exonerated, after years in prison, by post-conviction DNA testing). Brief supplied.

(10) *Morrison v. National Australia Bank Ltd.*, No. 08-1191, 130 S. Ct. 2869 (2010) (amicus brief in case raising issue of the extraterritorial scope, if any, of Section 10(b) of the Securities Exchange Act). Brief supplied.

17. **Litigation**: Describe the ten (10) most significant litigated matters which you personally handled, whether or not you were the attorney of record. 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. *United States v. Altman*, 48 F.3d 96 (2d Cir. 1995) (affirming in part and reversing in part and remanding for resentencing), 107 F.3d 4 (2d Cir. 1996) (affirming sentence imposed upon remand); Southern District of New York; Hon. Whitman Knapp; September 1993 - December 1996.

While in the Public Corruption Unit, I led an investigation into corruption in the Surrogates Court of New York County, which resulted in indictments of several attorneys and other fiduciaries. One person indicted was Altman, a Surrogates Court practitioner who had been appointed to numerous guardianships and conservatorships by a Manhattan Surrogate. He was convicted after a six-week jury trial in September and October 1993 before Hon. Whitman Knapp, United States District Judge

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(S.D.N.Y.), of mail fraud, tax fraud, witness tampering, and tax evasion. The evidence established that Altman had defrauded a mentally handicapped man; had defrauded an estate he served as executor; had subscribed to false tax returns; and had tampered with a witness before the witness's testimony for a grand jury. I was lead counsel at trial, which entailed delivering the government's opening statement and rebuttal summation; presenting testimony from numerous witnesses; cross-examining the defendant and other witnesses; and playing the lead role in our legal submissions to the Court. I was also lead counsel on appeal. Altman's conviction was affirmed in part and reversed in part on appeal; his sentence upon resentencing was upheld in a subsequent appeal. I argued both appeals.

Co-counsel:

Christopher Reynolds, Esq. (then an AUSA)
General Counsel of Toyota Motor Sales
19001 South Western Avenue
Torrance, California 90501
Telephone: 310-468-2922

Opposing counsel at trial:

Michael S. Ross, Esq.
Law Offices of Michael S. Ross
60 East 42d Street, 47th Floor
New York, New York 10165
Telephone: 212-505-4060

Opposing counsel on appeal:

Gerald L. Shargel, Esq.
Law Offices of Gerald L. Shargel
570 Lexington Avenue, 45th Floor
New York, New York 10022
Telephone: 212-446-2323

2. *United States v. Jackson*, 180 F.3d 55 (2d Cir. 1999) (overturning conviction); 196 F.3d 383 (2d Cir. 1999) (reinstating conviction); Southern District of New York; Hon. Barbara S. Jones; January 1997 - December 1999.

While Chief of the Major Crimes Unit, I led the investigation and prosecution of three defendants for attempting to extort $40 million from the actor Bill Cosby, by threatening to disclose to the media their claim that Cosby was defendant Jackson's out-of-wedlock father. All three were convicted following a three-week jury trial in July 1997 before Hon. Barbara Jones, United States District Judge (S.D.N.Y.), of conspiracy, extortion, and violating the Travel Act. The evidence at trial established that the defendants had carried out an elaborate scheme to threaten Cosby—directly

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and through corporations and a network affiliated with him—with disclosure of Jackson's paternity claim if Cosby did not pay them millions of dollars. I was lead counsel at trial. This entailed, among other things, delivering the government's opening statement and main summation and presenting the testimony of numerous witnesses. I was also lead counsel on appeal, and argued for the government. The defendants' convictions were upheld on appeal: the Second Circuit initially reversed on the ground of instructional error; after we moved for panel rehearing, the panel reversed itself and affirmed the convictions.

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3. *United States v. Duker*, Dkt. No. 97-CR-00822; Southern District of New York; Hon. Sonia Sotomayor; January 1997 - December 1997.

In 1997, while head of the Major Crimes Unit, I led an investigation and prosecution of defendant Duker, the managing partner of the Manhattan law firm then known as Duker and Barrett. The investigation resulted in Duker's guilty plea to several felony counts, including mail fraud, false claims, false statements, and obstruction of a Federal Deposit Insurance Corporation (FDIC) audit. These offenses all arose from Duker's having submitted false and inflated bills to the FDIC and the Resolution

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Trust Corporation, which had hired his firm to do litigation work in connection with the early 1990s savings and loan bailout. Sentencing was held in December 1997 before then-District Judge Hon. Sonia A. Sotomayor (S.D.N.Y.), who imposed a sentence of 33 months' imprisonment. I was sole counsel for the investigation and prosecution, and represented the government at the sentencing hearing. For my work on the case, I was awarded the Justice Department's Director's Award for Superior Performance in 1998, and was also honored by the FDIC. Because the case resulted in a guilty plea, there are no reported decisions in the case.

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4. *United States v. Cusack*, 229 F.3d 344 (2d Cir. 2000); Southern District of New York; Hon. Denise L. Cote; 1997 - 1999.

While Chief of the Major Crimes Unit, I led the investigation and prosecution of Cusack. Cusack forged between 250 and 300 historical documents that bore the purported handwriting of President Kennedy and, in a few instances, of Senator Robert F. Kennedy and Marilyn Monroe. Cusack sold these documents, through a network of historical document dealers, for between $7 million and $8 million. Cusack was convicted after a three-week jury trial in April 1999 before Hon. Denise Cote, United States District Judge (S.D.N.Y.). I was lead counsel at trial. This entailed delivering the government's opening statement and rebuttal summation and presenting the testimony of numerous witnesses. Cusack's conviction was affirmed (I did not participate in the appeal, having left the USAO by that time.)

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5. *United States v. Alter*, 788 F. Supp. 756 (1992) (district court's findings following sentencing hearing); 985 F.2d 105 (1993) (remanding for resentencing); 825 F. Supp. 550 (1993) (resentencing); 17 F.3d 391 (1993) (affirming resentencing); Southern District of New York; Hon. Kenneth Conboy; 1990 - 1993.

While in the Public Corruption Unit, I prosecuted Alter, who was the head of Manhattan House, a federal halfway-house on West 43d Street in Manhattan to which federal prisoners was assigned to serve the final months of their prison sentences. Following an extensive investigation, Alter was charged with offenses, including bribery and sexual abuse, arising from his having bribed, threatened, or coerced prisoners to engage in sexual relations with him. He pled guilty to a single count of bribery involving a single inmate, with the government reserving the right to prove at a sentencing (or *Fatico*) hearing other episodes of misconduct and the particular facts relating to the episode to which he had pled guilty. The hearing lasted five days, and took place in January 1992. Along with AUSA Peter Vigeland, I jointly represented the government at that hearing. The hearing focused on testimony from former Manhattan House residents, and evidence corroborating their accounts of predations by Alter. Following the hearing, Judge Conboy, in a lengthy written decision, found that Alter had engaged in misconduct with respect to three inmates, and found other aggravating factors. Along with AUSA Vigeland, I represented the government at sentencing and on the two appeals that Alter took from his sentence of five years' imprisonment, and argued the first of those appeals.

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6. *United States v. Fuhs*, reported *sub nom. United States v. Brown*, 459 F.3d 509 (5th Cir. 2006); United States Court of Appeals for the Fifth Circuit; 2004 - 2006.

Along with my partner, Seth Waxman, I represented Fuhs on appeal of his criminal conviction. Fuhs was a junior Merrill Lynch banker who played a role in documenting the "Nigerian barge transaction" between Enron and Merrill. The

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Justice Department alleged that that transaction had been a sham designed to enable Enron to boost its 2001 year-end earnings, and that various participants at Merrill, including Fuhs, had known at the time that the transaction was a sham. Fuhs and four others were convicted in federal district court in Houston of conspiracy and securities fraud. Fuhs was sentenced to serve 37 months' imprisonment; the district court refused to grant his release pending appeal. I principally drafted our brief on appeal. We argued that Fuhs was, as a matter of law, actually innocent, because there was insufficient evidence that he had been aware of the feature that made the transaction a sham: an alleged oral side agreement between leaders of Enron and Merrill. The Fifth Circuit agreed with our analysis. Its panel, in fact, did not ask Mr. Waxman, who argued the case, any questions during argument, while actively questioning government counsel about the evidence as to Fuhs. On the strength of oral argument, we moved again for bail pending appeal. The Fifth Circuit granted that motion; it directed that Fuhs immediately be released from prison. I flew the next morning to Oklahoma City (near the federal prison where Fuhs had been serving), and negotiated the terms of his release on bail; he was freed that day. Several months later, the Fifth Circuit reversed Fuhs' conviction, on the grounds of insufficient evidence, and directed that a judgment of acquittal be entered in his case. The Circuit also reversed and remanded for retrial the convictions of several co-defendants, on the basis of instructional errors involving the "honest services" theory of mail fraud.

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7. *de Kwiatkowski v. Bear Stearns & Co., Inc.*, 306 F.3d 1293 (2d Cir. 2002); United States Court of Appeals for the Second Circuit; 2000 - 2002.

In spring 2000, Bear Stearns lost a $164.5 million jury verdict for negligence in the Southern District of New York to de Kwiatkowski, a billionaire currency trader who alleged, in essence, that his massive trading losses betting long on the dollar had been attributable to Bear's failure to furnish him with contrary investment advice. Our firm was hired to represent Bear on appeal. I was the principal drafter of our post-trial motion papers and our appellate brief to the Second Circuit. (My partner Lou Cohen argued the appeal.) A unanimous panel of the Second Circuit reversed and directed that judgment be entered for Bear Stearns. The Court held that Bear Stearns did not have any affirmative duty to furnish investment advice to de Kwiatkowski, who had a non-discretionary account with Bear Stearns, and that Bear Stearns's conduct in counseling de Kwiatkowski had not been negligent. The decision has become a significant and often-cited decision as to the duties of securities brokers.

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8. *Pearce v. UBS Paine Webber Inc.*, 2003 WL 25518056 (D.S.C. 2003) (denying motion to dismiss); 2003 WL 25518056 (D.S.C. 2004) (denying motion for class certification); District of South Carolina; Hon. Joseph F. Anderson Jr. 2002 - 2004.

Between 2002 and 2004, I led our firm's representation of UBS PaineWebber, Inc., and its affiliate UBS Warburg, which had been sued in a putative class action. The lawsuit alleged, in essence, that for a period of several years, PaineWebber had been able secretly to mark up the prices on its customers' Nasdaq trades by approximately two cents a share above the "best execution" price, by routing all of these trades to its affiliate, Warburg, for execution. The case was litigated in federal district court in South Carolina. I had several oral arguments before Judge Anderson. I first succeeded in getting two related lawsuits brought by the client's former PaineWebber broker dismissed. (The broker had sued PaineWebber for defamation and for an alleged breach of an employment contract.) Those decisions are unreported. I then argued our motion to dismiss the class action complaint; the district court denied that motion. The case then proceeded to extensive fact and expert discovery and briefing relating to class-certification. In July 2004, a day-long oral argument on class certification was held, which I (along with my then-partner Charles Davidow, Esq.) handled. Following argument, the district court issued a decision denying class certification, on the grounds that at trial, individualized issues as to the adequacy of the prices quoted by PaineWebber to individual customers would predominate over common issues, and that class certification was therefore inappropriate under Fed. R. Civ. P. 23(b)(3).

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9. *In re Insurance Brokerage Antitrust Multi-District Litigation*, Civ. Nos. 04-5184, 05-1079, 2007 WL 2533989 (D.N.J. Aug. 31, 2007) (dismissing Sherman Act claims); *In re Insurance Brokerage Antitrust Litigation*, Civ. Nos. 04-5184, 05-1079, 2007 WL 2892700 (D.N.J. Sept. 28, 2007) (dismissing RICO claims); *In re Insurance Brokerage Antitrust MDL*, No. 07-4046 (3d Cir. August 16, 2010) (affirming dismissal of substantial majority of the case, including all federal claims as to The Hartford). District of New Jersey; Hon. Faith Hochberg, later, Hon. Garrett Brown. 2004-2010.

Between 2004 and 2011, I have served as lead counsel for the insurance company The Hartford in a massive multi-district class-action litigation. The litigation was initiated as a series of class actions following the filing of a number of individual criminal cases by then-New York Attorney General Eliot Spitzer against individual employees of insurers and brokers, alleging bid-rigging and related misconduct. The class actions alleged, among other things, a nationwide market-allocation conspiracy among the nation's leading insurers and brokers in violation of the Sherman Act, facilitated by contingent commission agreements, and a conspiracy to violate the RICO statute. The cases were consolidated by the MDL panel in the District of New Jersey, and were originally assigned to Judge Hochberg and were later transferred to Chief Judge Brown. There were approximately two dozen insurers or brokers named as defendants in the consolidated litigation. Ultimately, after several rounds of briefing on the defense's motions to dismiss and re-pleading by plaintiffs, Chief Judge Brown granted the defense's motions to dismiss, with prejudice. The case was argued before the Third Circuit in April 2009 and decided on August 16, 2010; the Third Circuit affirmed the dismissal of all federal claims as to The Hartford (and affirmed the dismissal of the overwhelming majority of federal claims as to the other defendants). Throughout the litigation, I played an active leadership role in the defense group, with particular attention to (a) briefing on the motion to dismiss; (b) briefing on class-certification; (c) development of the factual record through discovery; and (d) active participation in the process of appellate briefing and argument preparation (argument was conducted by Mr. Waxman, from our firm, on behalf of the defense group). As leader of WilmerHale's team on this matter, I was also responsible for all aspects of the representation. These included overall strategy; briefing on all merits and discovery issues; retention and use of experts; and management of the offensive and defensive discovery process, which across the case entailed the production of approximately tens of millions of pages of documents and—as of the date the motion to dismiss was granted—the taking of approximately 200 depositions. I also actively participated in the discovery process.

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10. *United States v. Stein*, 541 F.3d 130 (2d Cir. 2008); United States Court of Appeals for the Second Circuit; 2007-2008.

In 2007 and 2008, our firm successfully defended on appeal the pretrial dismissal by Hon. Lewis A. Kaplan (SDNY) of the tax-evasion indictments of various KPMG partners. Judge Kaplan held that prosecutors had violated the defendants' Sixth Amendment rights by pressuring KPMG to retract its promise to indemnify the defendants for their legal fees, and that the proper remedy for this misconduct, under the circumstances, was dismissal of the indictment. Seth Waxman and I represented seven of the defendant-appellees, defending the dismissal on appeal. Our appellate brief argued that the government's conducted violated by the Fifth and Sixth Amendments, and, importantly, emphasized that the Sixth Amendment violation was a procedural due process violation, not solely a substantive due process violation (which had been the emphasis of the decision below). Within our team, I was actively involved in developing our legal arguments, shaping our eventual brief, and preparing Mr. Waxman for oral argument before the Second Circuit.

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18. **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 fully the nature of your participation in these activities. List any client(s) or organization(s) for whom you performed lobbying activities and describe the lobbying activities you performed on behalf of such

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client(s) or organizations(s). (Note: As to any facts requested in this question, please omit any information protected by the attorney-client privilege.)

United States Attorney's Office: My most significant legal activities as a line AUSA (apart from handling the cases identified in my response to the previous question and other trials) involved conducting investigations and negotiating guilty pleas. Much of my work involved investigating and building cases, determining (in conjunction with colleagues and supervisors) whether the evidence and equities merit bringing charges in a particular case, and, where charges were appropriate, attempting to negotiate a resolution that was consistent with the Justice Department's charging policy and appropriately reflected the facts and equities.

My most significant legal activities as Chief of the Major Crimes Unit (apart from the cases I personally handled) were twofold. First, I devoted a great amount of time to supervising and training the AUSAs in the Unit. Second, I was deeply involved in overseeing investigations involving allegations of crimes by corporate entities. Under Justice Department guidelines, the decision whether to charge a corporation requires consideration of a range of factors. These include the nature and duration of the criminal conduct, the number and rank of the corporate officials involved in the conduct, the quality of the corporation's compliance procedures and historical track record, the corporation's response upon becoming aware of the potential crime (including remedial steps, if any), the corporation's cooperation with the government's investigation, the adequacy of civil remedies, the likely deterrent impact of bringing criminal charges against the corporate entity, and the collateral consequences to others (including employees, shareholders, and the public) of bringing a criminal charge. In each of these cases, I spent a great deal of time trying to immerse myself in the facts; listening to and closely questioning counsel who presented to the Office on these issues; and making sure that the U.S. Attorney (Mary Jo White) and other leaders of the Office were apprised of the facts and arguments in each direction.

WilmerHale: My most significant legal activities (other than the cases described in the previous answer, and other litigations) have involved the part of my practice that entails conducting internal investigations and representing companies and individuals who are under investigation by federal prosecutors and/or regulators. These include various United States Attorney's Offices, the Justice Department in Washington, D.C., the Securities and Exchange Commission, and various state attorneys general. The institutional clients whom I have represented in such matters include prominent financial institutions, securities firms, pharmaceutical and computer-technology companies, a Big Four accounting firm, an Ivy League university, and a prominent New York City not-for-profit organization. These cases typically call upon lawyers to obtain a rapid mastery of the facts, the organization's history and culture and leadership, and the regulatory landscape. They also put a premium on developing and sustaining one's credibility—with clients and their executives and directors, for whom such cases often present uniquely delicate and difficult challenges; and with prosecutors and regulators, who are apt to see the words and deeds of the corporate

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institution's outside counsel as a key indication of whether the institution is cooperative and "gets it." My institutional clients have very rarely been charged, criminally or civilly.

An active part of my practice has also involved representing individuals in connection with white-collar or regulatory inquiries. I have represented individuals in criminal cases investigated by prosecutors in New York (the Southern and Eastern Districts), New Jersey, Pennsylvania, Massachusetts, Connecticut, South Carolina, and California, among others, as well as in cases investigated by the Department of Justice in Washington, D.C., and by the Securities and Exchange Commission. The dozens of executives I have represented have been the subjects of investigations into such matters as accounting fraud, various forms of securities fraud, market timing of mutual funds, the backdating of stock options, insider trading, violations of the Foreign Corrupt Practices Act, Medicaid fraud, and violations of the antitrust laws.

As to lobbying, I have not engaged in any lobbying activities at any time.

19. **Teaching**: What courses have you taught? For each course, state the title, the institution at which you taught the course, the years in which you taught the course, and describe briefly the subject matter of the course and the major topics taught. If you have a syllabus of each course, provide four (4) copies to the committee.

I have not taught courses.

20. **Deferred Income/ Future Benefits**: List the 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. Describe the arrangements you have made to be compensated in the future for any financial or business interest.

I will receive payments, upon retirement, from the Federal Employees Retirement System.

21. **Outside Commitments During Court Service**: 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, with or without compensation, during my service with the Court.

22. **Sources of Income**: 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, licensing fees, honoraria, and other items exceeding $500 or more (if you prefer to do so, copies of the financial

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disclosure report, required by the Ethics in Government Act of 1978, may be substituted here).

See attached Financial Disclosure Report.

23. **Statement of Net Worth**: Please complete the attached financial net worth statement in detail (add schedules as called for).

See attached Net Worth Statement.

24. **Potential Conflicts of Interest**:

a. Identify the family members or other persons, parties, categories of litigation, and financial arrangements that are likely to present potential conflicts-of-interest when you first assume the position to which you have been nominated. Explain how you would address any such conflict if it were to arise.

Cases in which my current law firm, WilmerHale, represented a party or appeared would present a potential conflict of interest. To avoid such a conflict or the appearance of one, I would recuse myself for a period of at least several years from all cases in which WilmerHale represented a party or appeared. In addition, cases in which prior clients of mine were parties would present a potential conflict of interest. I would follow the guidance of the recusal statutes and the Code of Conduct for United States Judges and recuse myself where appropriate to avoid even an appearance of conflict.

My sister is a partner at the law firm of Arnold & Porter, specializing in international arbitration. A filing in federal court involving my sister will be rare and easily identifiable. I do not believe other family members are likely, either in the capacity of a party or counsel, to have cases in the federal courts.

At the present time, I cannot think of a category of litigation which, by its nature, would present a conflict-of-interest problem for me. I would, of course, recuse myself from any case in which a credible claim of a financial interest on my part or my family's part could be made.

b. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern.

If confirmed, I will handle all matters involving actual or potential conflicts of interest through the careful and diligent application of the Code of Conduct for United States Judges as well as other relevant Canons and statutory provisions, e.g., 28 U.S.C. § 455. I am also a strong believer in full disclosure. Upon becoming alert to a situation that any party or the public might conceivably identify as a potential conflict of interest, I would alert the

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parties to the issue in question, and offer them the opportunity to express their views. I would also offer the lawyers in the case the opportunity, if they thought it useful, to brief any recusal or conflict-of-interest issue. Finally, as noted, I would, as appropriate, consult my judicial colleagues on these issues.

25. **Pro Bono Work**: An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

I have been actively involved in pro bono work since joining WilmerHale in January 2000. In seven of my 11 years at the firm, I have devoted between 100 and 200 hours per year to pro bono work. Although I have handled pro bono work in various areas, my pro bono work has largely fallen into three broad categories, set forth below. Many of these cases have involved appellate work. I have focused my pro bono time heavily on appellate work, both because I enjoy it, and also because it has proven a wonderful way to give our superb associates training and oral argument opportunities (which are harder to find for associates in cases for paying clients). Through appellate pro bono work, our associates in the firm's New York Office have handled at least 10 oral arguments in the federal courts of appeals, with me often playing the role of mooter and oral-argument second chair.

First, I have worked on a number of matters for, or in support of efforts of, the Brennan Center for Justice. (a) In December 2002, I submitted an amicus brief to the United States Court of Appeals for the Eleventh Circuit, in support of the Brennan Center, which had brought a lawsuit seeking to invalidate Florida's constitutional provision providing for lifetime disenfranchisement of felons. Our brief was on behalf of a large group of former prosecutors, headed by former Deputy Attorney General (now Attorney General) Eric Holder. The brief argued that a policy of permanent felon-disenfranchisement does not further any valid law-enforcement interest. The panel's decision is reported in *Johnson v. Bush*, 353 F.3d 1287 (11th Cir. 2003); the *en banc* circuit's decision, upholding Florida's felon-disenfranchisement provision, is reported in *Johnson v. Bush*, 405 F.3d 1214 (11th Cir. 2005). (b) In December 2006, I submitted an amicus brief to the United States Court of Appeals for the Tenth Circuit, on behalf of the Brennan Center. The brief sought reversal of a lower court decision which had invalidated, under the First Amendment, several of Kansas's judicial canons, including Kansas Supreme Court Rule 601A, which prohibited judicial candidates from "mak[ing] pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office ... [or] statements that commit or appear to commit the candidate with respect to cases, controversies, or issues that are likely to come before the court." The amicus brief analyzed this canon in light of the applicable precedents, and set out facts relating to the increasing politicization of judicial elections. The panel's decision, certifying related questions to the Kansas Supreme Court, is reported in *Kansas Judicial Review v. Stout*, 519 F.3d 1109 (10th Cir. 2008). (c) As noted

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earlier, in August 2007, I submitted an amicus brief to the United States Supreme Court in *New York State Board of Elections v. Lopez Torres*, 128 S. Ct. 791 (2008), on behalf of Brooklyn District Attorney Charles Hynes. (d) In March 2010, I submitted an amicus brief to the United States Court of Appeals for the Ninth Circuit, on behalf of the Brennan Center, in *Kirk v. Carpeneti*, No. 09-35860. The brief sought affirmance of a lower court decision which had rejected a separation-of-powers challenge to Alaska's merit-selection process for selecting state court judges.

Second, I have worked on a large number of matters relating to immigration issues. (a) As noted earlier, I have submitted briefs three times to the United States Supreme Court on immigration issues: a brief for the petitioner in *Calcano-Martinez v. INS*, 533 U.S. 348 (2001), challenging the court of appeals' decision that it lacked jurisdiction to hear statutory and constitutional challenges to order of removal; a brief for the respondent in *INS v. St. Cyr*, 533 U.S. 289 (2001), defending the court of appeals' decision that it had habeas corpus jurisdiction over his challenge to his final removal order; and an amicus brief in *Leocal v. Ashcroft*, 543 U.S. 1 (2004), on behalf of various immigrants' rights and criminal defense organizations, on the question whether the state offense of driving under the influence constitutes a "crime of violence" under 18 U.S.C. § 16(a). (b) I have submitted party or amicus briefs in eight to ten appellate cases in which aliens faced deportation. These include: *Rankine v. Reno*, 319 F.3d 93 (2d Cir. 2003); *Dickson v. Ashcroft*, 346 F.3d 44 (2d Cir. 2003); *Olivera-Garcia v. INS*, No. 01-70643 (9th Cir. 2003); *Jobson v. Ashcroft*, 326 F.3d 367 (2d Cir. 2003); *Bell v. Ashcroft*, 2003 WL 2235800 (S.D.N.Y. 2003) (appellate brief filed but appeal later mooted by administrative grant of relief); *Edwards v. INS* (decided along with *Falconi v. INS*, in which we also represented the petitioner), 393 F.3d 299 (2d Cir. 2004); *Chambers v. Reno*, 307 F.3d 284 (4th Cir. 2004); and *Yusupov v. Mukasey*, 518 F.3d 185 (3d Cir. 2008). (c) I have also represented several individual immigrants in administrative proceedings. In 2001, a colleague and I won asylum status for a Buddhist monk, Kalsang Jimpa, who feared retaliation in his home country for his political and religious beliefs. In 2003-2004, a colleague and I won citizenship for an immigrant, Maribel Prado, who was facing deportation; we persuaded immigration authorities that Ms. Prado, although not living with her mother at the time, as a matter of law had derivatively obtained citizenship at age 16 when her mother had been naturalized.

Third, I have submitted three briefs to federal appellate courts on important issues relating to post-conviction access to DNA evidence. (a) At the request of the Second Circuit, and on the recommendation of Professor Daniel Meltzer of Harvard Law School whom the panel had solicited for assistance, I took on the pro bono representation of Frank McKithen, a New York state prisoner who was seeking exculpatory DNA evidence. The case raised issues of first impression in the Second Circuit as to whether a state prisoner's § 1983 claim for access to DNA evidence is barred by *Heck v. Humphrey*, 512 U.S. 477 (1994) or the *Rooker-Feldman* doctrine, as well as whether there is a post-conviction right of access to DNA evidence and what the contours of that right are. We persuaded the Second Circuit that no such procedural bars blocked McKithen's claim, and the Court remanded to the district

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court for resolution of the substantive constitutional issue. *See McKithen v. Brown*, 481 F.3d 89 (2d Cir. 2007). (b) As noted, I submitted an amicus brief to the Supreme Court in *District Attorney's Office for Third Judicial District v. Osborne*, 129 S. Ct. 2309 (2009), which addressed the substantive issue of whether there is a post-conviction right to access to potentially exculpatory DNA evidence. Our brief, in the form of a "Brandeis brief," presented accounts from 10 amici individuals who had previously been exonerated, after years in prison, by post-conviction DNA testing. (c) I submitted an amicus brief to the Sixth Circuit on behalf of the Innocence Network in *In re Frederick Smith*, No. 07-1220. The brief addressed the procedural bar issues resolved by the Second Circuit in *McKithen*.

A final noteworthy pro bono matter of mine was *Shields v. Madigan*, in which, along with colleagues at the firm and at two other New York City law firms, I represented 10 same-sex couples who had been denied marriage licenses in New York State and who petitioned in New York State Supreme Court, challenging that denial. Petitioners' suit was brought under the New York State Domestic Relations Law and under the New York State Constitution. The Supreme Court denied the petition, *see* 5 Misc. 3d 901, 783 N.Y.S.2d 270 (2004), and the Appellate Division affirmed, *see* 32 A.D.3d 1036, 820 N.Y.S.2d 890 (2d Dept. 2006). A suit in which other same-sex couples made the same state constitutional claims reached the New York Court of Appeals in 2006; the Court of Appeals ruled, 4-3, against the petitioners in that case. *See Hernandez v. Robles*, 7 N.Y.3d 338, 885 N.E.2d 1, 821 N.Y.S.2d 770 (2006).

26. **Selection Process**:

a. Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and the interviews in which you participated). Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, please include that process in your description, as well as whether the commission recommended your nomination. List the dates of all interviews or communications you had with the White House staff or the Justice Department regarding this nomination. Do not include any contacts with Federal Bureau of Investigation personnel concerning your nomination.

I submitted a completed questionnaire to Senator Charles E. Schumer's judicial selection committee, which recommends candidates for nomination to the federal courts to the Senator. I was interviewed by that committee in June 2009. I was interviewed by Senator Schumer in November 2009.

Since June 2010, I have been in contact with pre-nomination officials at the U.S. Department of Justice. I interviewed with attorneys from the White House Counsel's Office and the Department of Justice on November 10, 2010. The President submitted my nomination to the Senate on February 2, 2011.

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b. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any currently pending or specific case, legal issue or question in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning your position on such case, issue, or question? If so, explain fully.

No.

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FINANCIAL DISCLOSURE REPORT
NOMINATION FILING

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
Engelmayer, Paul A.	US District Court for the Southern District of New York	02/03/2011
4. Title (Article III judges indicate active or senior status; magistrate judges indicate full- or part-time)	**5a. Report Type (check appropriate type)**	**6. Reporting Period**
United States District Judge	☑ Nomination, Date 02/02/2011 ☐ Initial ☐ Annual ☐ Final 5b. ☐ Amended Report	01/01/2010 to 01/28/2011
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.**	
Wilmer Cutler Pickering Hale and Dorr LLP 399 Park Avenue New York, NY 10022	Reviewing Officer_____ Date_____	

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

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

☐ NONE *(No reportable positions.)*

	POSITION	NAME OF ORGANIZATION/ENTITY
1.	Partner	Wilmer Cutler Pickering Hale & Dorr LLP (WCPHD)
2.	Trustee	Trust #1
3.	Trustee	Trust #2
4.	Co-Executor	Estate #1
5.		

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

☐ NONE *(No reportable agreements.)*

	DATE	PARTIES AND TERMS
1.	2003	WCPHD Defined Benefit Plan
2.	2000	WCPHD Partner's Capital
3.		

FINANCIAL DISCLOSURE REPORT Page 2 of 16	Name of Person Reporting Engelmayer, Paul A.	Date of Report 02/03/2011

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

A. Filer's Non-Investment Income

☐ NONE *(No reportable non-investment income.)*

	DATE	SOURCE AND TYPE	INCOME (yours, not spouse's)
1.	2009	Partner Income from WCPHD	$1,600,000.00
2.	2010	Partner Income from WCPHD	$1,056,289.00
3.	2011	Partner Income from WCPHD	$320,381.00
4.			

B. Spouse's Non-Investment Income - *If you were married during any portion of the reporting year, complete this section.*
(Dollar amount not required except for honoraria.)

☑ NONE *(No reportable non-investment income.)*

	DATE	SOURCE AND TYPE
1.		
2.		
3.		
4.		

IV. REIMBURSEMENTS -- *transportation, lodging, food, entertainment.*
(Includes those to spouse and dependent children; see pp. 25-27 of filing instructions.)

☐ NONE *(No reportable reimbursements.)*

	SOURCE	DATES	LOCATION	PURPOSE	ITEMS PAID OR PROVIDED
1.	Exempt				
2.					
3.					
4.					
5.					

FINANCIAL DISCLOSURE REPORT Page 3 of 16	Name of Person Reporting Engelmayer, Paul A.	Date of Report 02/03/2011

V. GIFTS. *(Includes those to spouse and dependent children; see pp. 28-31 of filing instructions.)*

☐ NONE *(No reportable gifts.)*

	SOURCE	DESCRIPTION	VALUE
1.	Exempt		
2.			
3.			
4.			
5.			

VI. LIABILITIES. *(Includes those of spouse and dependent children; see pp. 32-33 of filing instructions.)*

☐ NONE *(No reportable liabilities.)*

	CREDITOR	DESCRIPTION	VALUE CODE
1.	American Express	Credit Card	J
2.			
3.			
4.			
5.			

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Name of Person Reporting	Date of Report
Engelmayer, Paul A.	02/03/2011

VII. INVESTMENTS and TRUSTS -- *Income, value, transactions (includes those of spouse and dependent children; see pp. 54-60 of filing instructions.)*

☐ NONE *(No reportable income, assets, or transactions.)*

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A-H)	B. (2) Type (e.g., div., rent, or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, redemption)	D. (2) Date mm/dd/yy	D. (3) Value Code 2 (J-P)	D. (4) Gain Code 1 (A-H)	D. (5) Identity of buyer/seller (if private transaction)
1. IRA #1	A	Dividend	K	T	Exempt				
2. - ING Senior Income Cl A									
3. - MFS Emerging Markets Debt Fund Class I									
4. - Ivy Global Natrual Resources Fund Cl Y									
5. IRA #2	A	Dividend	J	T					
6. - MFS Emerging Markets Debt Fund Class I									
7. - Templeton Global Bond Fund Cl A									
8. IRA #3	A	Dividend	K	T					
9. - ING Senior Income Cl A									
10. - MFS Emerging Markets Debt Fund Class I									
11. - Ivy Global Natural Resources Fund Cl Y									
12. Trust #1	D	Dividend	M	T					
13. - Acadian Emerging Markets									
14. - Eaton Vance Structured Emerging Markets A									
15. - GRT Value Fund Advisor Class									
16. - ING Senior Income Cl A									
17. - ING Senior Income Fund Cl Q									

1. Income Gain Codes: (See Columns B1 and D4)
A =$1,000 or less
B =$1,001 - $2,500
C =$2,501 - $5,000
D =$5,001 - $15,000
E =$15,001 - $50,000
F =$50,001 - $100,000
G =$100,001 - $1,000,000
H1 =$1,000,001 - $5,000,000
H2 =More than $5,000,000

2. Value Codes (See Columns C1 and D3)
J =$15,000 or less
K =$15,001 - $50,000
L =$50,001 - $100,000
M =$100,001 - $250,000
N =$250,001 - $500,000
O =$500,001 - $1,000,000
P1 =$1,000,001 - $5,000,000
P2 =$5,000,001 - $25,000,000
P3 =$25,000,001 - $50,000,000
P4 =More than $50,000,000

3. Value Method Codes (See Column C2)
Q =Appraisal
R =Cost (Real Estate Only)
S =Assessment
T =Cash Market
U =Book Value
V =Other
W =Estimated

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Name of Person Reporting	Date of Report
Engelmayer, Paul A.	02/03/2011

VII. INVESTMENTS and TRUSTS — *income, value, transactions (Includes those of spouse and dependent children; see pp. 34-60 of filing instructions.)*

☐ NONE *(No reportable income, assets, or transactions.)*

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A-H)	B. (2) Type (e.g., div., rent, or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, redemption)	D. (2) Date mm/dd/yy	D. (3) Value Code 2 (J-P)	D. (4) Gain Code 1 (A-H)	D. (5) Identity of buyer/seller (if private transaction)
18. - iShares Tr MSCI EAGE Index Fd									
19. - iShares Tr S&P 400 BARRA Mideap Growth									
20. - Ivy Asset Strategy Fund Class A									
21. - Loomis Sayles Strategic Income A									
22. - PIMCO Funds Total Return Fund Instl #35									
23. - Schwab Tax Exempt Money Fund									
24. - T.Rowe Price Emerging Market Bond Fund									
25. - Wisdomtree Large Cap Dividend									
26. - WisdomTree MidCap Dividend									
27. - Berkshire Hathaway Inc Del B									
28. - Ivy Global Natural Resources Fund Cl Y									
29. Trust #2	C	Dividend	M	T					
30. - Acadian Emerging Markets									
31. - Eaton Vance Structured Emerging Markets A									
32. - ING Senior Income Cl A									
33. - iShares Tr MSCI EAFE Index Fd									
34. - iShares Tr S&P 400 BARRA Mideap Growth									

1. Income Gain Codes: (See Columns B1 and D4)
A =$1,000 or less; B =$1,001 - $2,500; C =$2,501 - $5,000; D =$5,001 - $15,000; E =$15,001 - $50,000
F =$50,001 - $100,000; G =$100,001 - $1,000,000; H1 =$1,000,001 - $5,000,000; H2 =More than $5,000,000
2. Value Codes (See Columns C1 and D3)
J =$15,000 or less; K =$15,001 - $50,000; L =$50,001 - $100,000; M =$100,001 - $250,000
N =$250,001 - $500,000; O =$500,001 - $1,000,000; P1 =$1,000,001 - $5,000,000; P2 =$5,000,001 - $25,000,000
P3 =$25,000,001 - $50,000,000; P4 =More than $50,000,000
3. Value Method Codes (See Column C2)
Q =Appraisal; R =Cost (Real Estate Only); S =Assessment; T =Cash Market
U =Book Value; V =Other; W =Estimated

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Name of Person Reporting	Date of Report
Engelmayer, Paul A.	02/03/2011

VII. INVESTMENTS and TRUSTS – *income, value, transactions (Includes those of spouse and dependent children; see pp. 34-60 of filing instructions.)*

☐ NONE *(No reportable income, assets, or transactions.)*

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A-H)	B. (2) Type (e.g., div., rent, or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, redemption)	(2) Date mm/dd/yy	(3) Value Code 2 (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)
35. - Ivy Asset Strategy Fund Class A									
36. - Loomis Sayles Strategic Income A									
37. - PIMCO Funds Total Return Fund Instl #35									
38. - Schwab Tax Exempt Money Fund									
39. - T.Rowe Price EMerging Market Bond Fund									
40. - Wisdomtree Large Cap Dividend									
41. - WisdomTree MidCap Dividend									
42. - Berkshire Hathaway Inc Del B									
43. - Ivy Global Natural Resources Fund Cl Y									
44. Brokerage #1									
45. Eaton Vance Structured Emerging Markets I	D	Dividend	N	T					
46. ING European Bank Loan	B	Dividend	M	T					
47. ING Senior Income Cl A	B	Dividend							
48. ING Senior Income Fund Cl Q	C	Dividend							
49. iShares Tr S&P 600 BARRA Small Cap Growth	A	Dividend	K	T					
50. MFS Emerging Markets Debt Fund Class I	B	Dividend	K	T					
51. New York Port Authority	B	Dividend							

1. Income Gain Codes (See Columns B1 and D4): A = $1,000 or less; B = $1,001 - $2,500; C = $2,501 - $5,000; D = $5,001 - $15,000; E = $15,001 - $50,000; F = $50,001 - $100,000; G = $100,001 - $1,000,000; H1 = $1,000,001 - $5,000,000; H2 = More than $5,000,000; J = $15,000 or less; K = $15,001 - $50,000; L = $50,001 - $100,000; M = $100,001 - $250,000; N = $250,001 - $500,000; O = $500,001 - $1,000,000; P1 = $1,000,001 - $5,000,000; P2 = $5,000,001 - $25,000,000; P3 = $25,000,001 - $50,000,000; P4 = More than $50,000,000

2. Value Codes (See Columns C1 and D3): Q = Appraisal; R = Cost (Real Estate Only); S = Assessment; T = Cash Market; U = Book Value; V = Other; W = Estimated

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Name of Person Reporting	Date of Report
Engelmayer, Paul A.	02/03/2011

VII. INVESTMENTS and TRUSTS — *Income, value, transactions (Includes those of spouse and dependent children; see pp. 34-60 of filing instructions.)*

☐ NONE *(No reportable income, assets, or transactions.)*

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A-H)	B. (2) Type (e.g., div., rent, or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, redemption)	D. (2) Date mm/dd/yy	D. (3) Value Code 2 (J-P)	D. (4) Gain Code 1 (A-H)	D. (5) Identity of buyer/seller (if private transaction)
52. Prudential Jennison Natural Resources Cl A	B	Dividend							
53. Schwab NY Tax Ex Money Sweep Shares	A	Dividend	J	T					
54. Aria Consumer Fund		None	N	W					
55. Berkshire Hathaway Inc Del B		None	L	T					
56. Deutsche Bank AG London 307 US CMS		None	L	W					
57. Ivy Global Natural Resources Fund Cl Y		None	N	T					
58. JLP Credit Opportunity Fund		None	M	W					
59. Prudential Jennison Natural Resources Fund Cl Z		None	M	T					
60. Brokerage #2									
61. Schwab NY Tax Ex Money Sweep Shares	A	Dividend	M	T					
62. Brokerage #3									
63. Consumer Stap spdr	A	Dividend	K	T					
64. Consumers Dis SS Spdr	A	Dividend	K	T					
65. Energy Select Sector SPDR	A	Dividend	K	T					
66. Healthcare SS Spdr Fd	A	Dividend	K	T					
67. Materials SS Spdr Fd	A	Dividend	K	T					
68. Schwab NY Tax Ex Money Sweep Shares	A	Dividend	J	T					

1. Income Gain Codes: (See Columns B1 and D4)
A =$1,000 or less; B =$1,001 - $2,500; C =$2,501 - $5,000; D =$5,001 - $15,000; E =$15,001 - $50,000; F =$50,001 - $100,000; G =$100,001 - $1,000,000; H1 =$1,000,001 - $5,000,000; H2 =More than $5,000,000

2. Value Codes (See Columns C1 and D3)
J =$15,000 or less; K =$15,001 - $50,000; L =$50,001 - $100,000; M =$100,001 - $250,000; N =$250,001 - $500,000; O =$500,001 - $1,000,000; P1 =$1,000,001 - $5,000,000; P2 =$5,000,001 - $25,000,000; P3 =$25,000,001 - $50,000,000; P4 =More than $50,000,000

3. Value Method Codes (See Column C2)
Q =Appraisal; R =Cost (Real Estate Only); S =Assessment; T =Cash Market; U =Book Value; W =Other; W =Estimated

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Name of Person Reporting	Date of Report
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VII. INVESTMENTS and TRUSTS -- *income, value, transactions (includes those of spouse and dependent children; see pp. 14-60 of filing instructions.)*

☐ NONE *(No reportable income, assets, or transactions.)*

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A-H)	B. (2) Type (e.g., div., rent, or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, redemption)	D. (2) Date mm/dd/yy	D. (3) Value Code 2 (J-P)	D. (4) Gain Code 1 (A-H)	D. (5) Identity of buyer/seller (if private transaction)
69. Select Sector Spdr Amex Industrial	A	Dividend	K	T					
70. Select Sector Spdr Financial	A	Dividend	K	T					
71. Select Sector SPDR Technology	A	Dividend	K	T					
72. Utilities Sel Spdr	A	Dividend	K	T					
73. Brokerage #4									
74. Acadian Emerging Markets	B	Dividend	M	T					
75. Causeway International Value Fund Invest	A	Dividend	L	T					
76. Elmira County NY School District	A	Dividend							
77. GRT Value Fund Advisor Class	A	Dividend	L	T					
78. iShares Tr MSCI EAFE Index Fd	D	Dividend	N	T					
79. iShares Tr S&P 400 BARRA Midcap Value	C	Dividend	M	T					
80. iShares Tr S&P 600 BARRA Small Cap Growth	A	Dividend	L	T					
81. MFS Emerging Markets Debt Fund Class I	C	Dividend	L	T					
82. Microsoft Corp Com	B	Dividend							
83. Pfizer Inc	A	Dividend							
84. PIMCO Funds Total Return Fund Instl #35	C	Dividend	L	T					
85. Prudential Jennison Natural Resources Cl A	C	Dividend							

1. Income Gain Codes (See Columns B1 and D4)
A =$1,000 or less
B =$1,001 - $2,500
C =$2,501 - $5,000
D =$5,001 - $15,000
E =$15,001 - $50,000
F =$50,001 - $100,000
G =$100,001 - $1,000,000
H1 =$1,000,001 - $5,000,000
H2 =More than $5,000,000
J =$15,000 or less
K =$15,001 - $50,000
L =$50,001 - $100,000
M =$100,001 - $250,000
N =$250,001 - $500,000
O =$500,001 - $1,000,000
P1 =$1,000,001 - $5,000,000
P2 =$5,000,001 - $25,000,000
P3 =$25,000,001 - $50,000,000
P4 =More than $50,000,000

2. Value Codes (See Columns C1 and D3)

3. Value Method Codes (See Column C2)
Q =Appraisal
R =Cost (Real Estate Only)
S =Assessment
T =Cash Market
U =Book Value
V =Other
W =Estimated

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Name of Person Reporting	Date of Report
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VII. INVESTMENTS and TRUSTS – *Income, value, transactions (Includes those of spouse and dependent children; see pp. 34-68 of filing instructions.)*

☐ NONE *(No reportable income, assets, or transactions.)*

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A-H)	B. (2) Type (e.g., div., rent, or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, redemption)	D. (2) Date mm/dd/yy	D. (3) Value Code 2 (J-P)	D. (4) Gain Code 1 (A-H)	D. (5) Identity of buyer/seller (if private transaction)
86. Schwab NY Tax Ex Money Sweep Shares	A	Dividend	N	T					
87. Wisdomtree Large Cap Dividend	E	Dividend	O	T					
88. Berkshire Hathaway Inc Del B		None	L	T					
89. Berkshire Hathaway Inc Del Cl A		None	Pf	T					
90. Ivy Global Natural Resources Fund Cl Y		None	M	T					
91. Landmark Value Strategics QP		None	J	W					
92. Prudential Jennison Natural Resources Fund Cl Z		None	N	T					
93. 401(k) #1									
94. Acadian Emerging Markets	C	Dividend	M	T					
95. Brandes Inst Intl Equity Fund	C	Dividend	J	T					
96. ING Senior Income Fund Cl W	D	Dividend	N	T					
97. UTMA #1									
98. Eaton Vance Structured Emerging Markets A	A	Dividend	J	T					
99. ING Senior Income Cl A	A	Dividend	J	T					
100. iShares Tr MSCI EAGE Index Fd	A	Dividend	K	T					
101. Loomis Sayles Global Bond Instl	A	Dividend	J	T					
102. Wisdomtree Large Cap Dividend	A	Dividend	J	T					

1. Income Gain Codes (See Columns B1 and D4)	A =$1,000 or less F =$50,001 - $100,000	B =$1,001 - $2,500 G =$100,001 - $1,000,000	C =$2,501 - $5,000 H1 =$1,000,001 - $5,000,000	D =$5,001 - $15,000 H2 =More than $5,000,000	E =$15,001 - $50,000
2. Value Codes (See Columns C1 and D3)	J =$15,000 or less N =$250,001 - $500,000 P3 =$25,000,001 - $50,000,000	K =$15,001 - $50,000 O =$500,001 - $1,000,000	L =$50,001 - $100,000 P1 =$1,000,001 - $5,000,000 P4 =More than $50,000,000	M =$100,001 - $250,000 P2 =$5,000,001 - $25,000,000	
3. Value Method Codes (See Column C2)	Q =Appraisal U =Book Value	R =Cost (Real Estate Only) V =Other	S =Assessment W =Estimated	T =Cash Market	

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Name of Person Reporting	Date of Report
Engelmayer, Paul A.	02/03/2011

VII. INVESTMENTS and TRUSTS -- *Income, value, transactions (includes those of spouse and dependent children; see pp. 34-60 of filing instructions.)*

☐ NONE *(No reportable income, assets, or transactions.)*

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A-H)	B. (2) Type (e.g., div., rent, or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, redemption)	D. (2) Date mm/dd/yy	D. (3) Value Code 2 (J-P)	D. (4) Gain Code 1 (A-H)	D. (5) Identity of buyer/seller (if private transaction)
103. WisdomTree MidCap Dividend	A	Dividend	J	T					
104. Ivy Global Natural Resources Fund Cl Y		None	J	T					
105. UTMA #2									
106. Eaton Vance Structured Emerging Markets A	A	Dividend	J	T					
107. ING Senior Income Cl A	A	Dividend	J	T					
108. ING Senior Income Fund Cl Q	A	Dividend							
109. iShares Tr MSCI EAFE Index Fd	A	Dividend	J	T					
110. Loomis Sayles Global Bond Instl	A	Dividend	J	T					
111. Wisdomtree Large Cap Dividend	A	Dividend	J	T					
112. WisdomTree MidCap Dividend	A	Dividend	J	T					
113. Berkshire Hathaway Inc Del B		None	K	T					
114. Ivy Global Natural Resources Fund Cl Y		None	J	T					
115. UTMA #3									
116. Eaton Vance Structured Emerging Markets A	A	Dividend	J	T					
117. ING Senior Income Cl A	A	Dividend	J	T					
118. iShares Tr MSCI EGE Index Fd	A	Dividend	K	T					
119. Loomis Sayles Global Bond Instl	A	Dividend	J	T					

1. Income Gain Codes: (See Columns B1 and D4) A =$1,000 or less; B =$1,001 - $2,500; C =$2,501 - $5,000; D =$5,001 - $15,000; E =$15,001 - $50,000
F =$50,001 - $100,000; G =$100,001 - $1,000,000; H1 =$1,000,001 - $5,000,000; H2 =More than $5,000,000
2. Value Codes (See Columns C1 and D3) J =$15,000 or less; K =$15,001 - $50,000; L =$50,001 - $100,000; M =$100,001 - $250,000
N =$250,001 - $500,000; O =$500,001 - $1,000,000; P1 =$1,000,001 - $5,000,000; P2 =$5,000,001 - $25,000,000
P3 =$25,000,001 - $50,000,000; P4 =More than $50,000,000
3. Value Method Codes (See Column C2) Q =Appraisal; R =Cost (Real Estate Only); S =Assessment; T =Cash Market
U =Book Value; V =Other; W =Estimated

FINANCIAL DISCLOSURE REPORT Page 11 of 16	Name of Person Reporting Engelmayer, Paul A.	Date of Report 02/03/2011

VII. INVESTMENTS and TRUSTS – *income, value, transactions (includes those of spouse and dependent children; see pp. 34-60 of filing instructions.)*

☐ NONE *(No reportable income, assets, or transactions.)*

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A-H)	B. (2) Type (e.g., div., rent, or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, redemption)	(2) Date mm/dd/yy	(3) Value Code 2 (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)
120. Wisdomtree Large Cap Dividend	A	Dividend	J	T					
121. WisdomTree MidCap Dividend	A	Dividend	J	T					
122. Ivy Global Natural Resources Fund Cl Y		None	J	T					
123. UTMA #4									
124. Eaton Vance Structured Emerging Markets A	A	Dividend	J	T					
125. ING Senior Income Cl A	A	Dividend	J	T					
126. iShares Tr MSCI EAFE Index Fd	A	Dividend	J	T					
127. Loomis Sayles Global Bond Instl	A	Dividend	J	T					
128. Wisdomtree Large Cap Dividend	A	Dividend	J	T					
129. WisdomTree MidCap Dividend	A	Dividend	J	T					
130. Berkshire Hathaway Inc Del B		None	K	T					
131. Ivy Global Natural Resources Fund Cl Y		None	J	T					
132. 529 Plan #1									
133. New York Saves Bond Market Index Portfolio		None	K	T					
134. New York Saves Growth Stock Index Portfolio		None	K	T					
135. New York Saves Mid Cap Stock Index Portfolio		None	J	T					
136. New York Saves Small Cap Stock Index Portfolio		None	J	T					

1. Income Gain Codes (See Columns B1 and D4)	A =$1,000 or less F =$50,001 - $100,000 J =$15,000 or less N =$250,001 - $500,000 P3 =$25,000,001 - $50,000,000	B =$1,001 - $2,500 G =$100,001 - $1,000,000 K =$15,001 - $50,000 O =$500,001 - $1,000,000	C =$2,501 - $5,000 H1 =$1,000,001 - $5,000,000 L =$50,001 - $100,000 P1 =$1,000,001 - $5,000,000 P4 =More than $50,000,000	D =$5,001 - $15,000 H2 =More than $5,000,000 M =$100,001 - $250,000 P2 $5,000,001 - $25,000,000	E =$15,001 - $50,000
2. Value Codes (See Columns C1 and D3)					
3. Value Method Codes (See Column C2)	Q =Appraisal U =Book Value	R =Cost (Real Estate Only) V =Other	S =Assessment W =Estimated	T =Cash Market	

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Name of Person Reporting	Date of Report
Engelmayer, Paul A.	02/03/2011

VII. INVESTMENTS and TRUSTS – *Income, value, transactions (Includes those of spouse and dependent children; see pp. 34-60 of filing instructions.)*

☐ NONE *(No reportable income, assets, or transactions.)*

A. Description of Assets (including trust assets). Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A-H)	B. (2) Type (e.g., div., rent, or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, redemption)	D. (2) Date mm/dd/yy	D. (3) Value Code 2 (J-P)	D. (4) Gain Code 1 (A-H)	D. (5) Identity of buyer/seller (if private transaction)
137. New York Saves Value Stock Index Portfolio		None	K	T					
138. 529 Plan #2									
139. New York Saves Developed Markets Income Portfolio		None	L	T					
140. New York Saves Interest Accumulation Portfolio		None	J	T					
141. New York Saves Mid Cap Stock Index Portfolio		None	K	T					
142. New York Saves Growth Stock Index Portfolio		None	J	T					
143. New York Saves Inflation Protected Portfolio		None	L	T					
144. New York Saves Value Stock Index Portfolio		None	K	T					
145. 529 Plan #3									
146. New York Saves Developed Markets Income Portfolio		None	K	T					
147. New York Saves Mid Cap Stock Index Portfolio		None	J	T					
148. New York Saves Inflation Protected Portfolio		None	L	T					
149. New York Saves Small Cap Stock Index Portfolio		None	J	T					
150. 529 Plan #4									
151. New York Saves Bond Market Index Portfolio		None	J	T					
152. New York Saves Developed Markets Income Portfolio		None	J	T					
153. New York Saves Growth Stock Index Portfolio		None	K	T					

1. Income Gain Codes: (See Columns B1 and D4)
A =$1,000 or less
B =$1,001 - $2,500
C =$2,501 - $5,000
D =$5,001 - $15,000
E =$15,001 - $50,000
F =$50,001 - $100,000
G $100,001 - $1,000,000
H1 =$1,000,001 - $5,000,000
H2 =More than $5,000,000
2. Value Codes (See Columns C1 and D3)
J =$15,000 or less
K =$15,001 - $50,000
L =$50,001 - $100,000
M =$100,001 - $250,000
N =$250,001 - $500,000
O =$500,001 - $1,000,000
P1 =$1,000,001 - $5,000,000
P2 =$5,000,001 - $25,000,000
P3 =$25,000,001 - $50,000,000
P4 =More than $50,000,000
3. Value Method Codes (See Column C2)
Q =Appraisal
R =Cost (Real Estate Only)
S =Assessment
T =Cash Market
U =Book Value
V =Other
W =Estimated

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VII. INVESTMENTS and TRUSTS — *income, value, transactions (includes those of spouse and dependent children; see pp. 34-68 of filing instructions)*

☐ NONE *(No reportable income, assets, or transactions.)*

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A-H)	 (2) Type (e.g., div., rent, or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	 (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, redemption)	 (2) Date mm/dd/yy	 (3) Value Code 2 (J-P)	 (4) Gain Code 1 (A-H)	 (5) Identity of buyer/seller (if private transaction)
154. New York Saves Mid Cap Stock Index Portfolio		None	K	T					
155. New York Saves Inflation Protected Portfolio		None	J	T					
156. New York Saves Small Cap Stock Index Portfolio		None	K	T					
157. New York Saves Value Stock Index Portfolio		None	K	T					
158. Brokerage #5									
159. BHP Billiton Limited (BHP)		None	J	T					
160. Fidelity Select Energy Fund		None	J	T					
161. Fidelity Select Energy Service		None	J	T					
162. General Electric (GE)		None	J	T					
163. Travelers Cos Inc Com (TRV)		None	J	T					
164. United Parcel SVC Inc Cl B (UPS)		None	J	T					
165. IRA #4		None	M	T					
166. - Vanguard Value Index Fund Admiral Shares									
167. - Vanguard Wellington Fund Admiral Shares									
168. - Vanguard Extended Market Index Fund Admiral Shares									
169. IRA #5		None	L	T					
170. - Fidelity Cash Reserves									

1. Income Gain Codes: (See Columns B1 and D4)	A =$1,000 or less	B =$1,001 - $2,500	C =$2,501 - $5,000	D =$5,001 - $15,000	E =$15,001 - $50,000
	F =$50,001 - $100,000	G =$100,001 - $1,000,000	H1 =$1,000,001 - $5,000,000	H2 =More than $5,000,000	
2. Value Codes (See Columns C1 and D3)	J =$15,000 or less	K =$15,001 - $50,000	L =$50,001 - $100,000	M =$100,001 - $250,000	
	N =$250,001 - $500,000	O =$500,001 - $1,000,000	P1 =$1,000,001 - $5,000,000	P2 =$5,000,001 - $25,000,000	
	P3 =$25,000,001 - $50,000,000		P4 =More than $50,000,000		
3. Value Method Codes (See Column C2)	Q =Appraisal	R =Cost (Real Estate Only)	S =Assessment	T =Cash Market	
	U =Book Value	V =Other	W =Estimated		

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Name of Person Reporting	Date of Report
Engelmayer, Paul A.	02/03/2011

VII. INVESTMENTS and TRUSTS – *Income, value, transactions (Includes those of spouse and dependent children; see pp. 34-60 of filing instructions.)*

☐ NONE *(No reportable income, assets, or transactions.)*

A. Description of Assets (including trust assets). Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period: (1) Amount Code 1 (A-H)	B. (2) Type (e.g., div., rent, or int.)	C. Gross value at end of reporting period: (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period: (1) Type (e.g., buy, sell, redemption)	D. (2) Date mm/dd/yy	D. (3) Value Code 2 (J-P)	D. (4) Gain Code 1 (A-H)	D. (5) Identity of buyer/seller (if private transaction)
171. - Fidelity Contrafund									
172. - Fidelity Growth & Income									
173. - Fidelity Select Defense & Aerospace									
174. WCPHD Defined Benefits Plan		None	N	W					
175. Teachers Retirement System of NY 403(b) #1									
176. Diversified Equity		None	M	T					
177. Stable Value		None	L	T					
178. International Equity		None	L	T					
179. Inflation Protection		None	L	T					
180. Citigroup Checking Account		None	L	T					
181. Chase Checking Account		None	J	T					
182. Westchester County Real Estate Parcel #1		None	L	W					
183. Westchester County Real Estate Parcel #2		None	L	W					
184.									

1. Income Gain Codes: (See Columns B1 and D4)	A =$1,000 or less	B =$1,001 - $2,500	C =$2,501 - $5,000	D =$5,001 - $15,000	E =$15,001 - $50,000
	F =$50,001 - $100,000	G =$100,001 - $1,000,000	H1 =$1,000,001 - $5,000,000	H2 =More than $5,000,000	
2. Value Codes (See Columns C1 and D3)	J =$15,000 or less	K =$15,001 - $50,000	L =$50,001 - $100,000	M =$100,001 - $250,000	
	N =$250,001 - $500,000	O =$500,001 - $1,000,000	P1 =$1,000,001 - $5,000,000	P2 =$5,000,001 - $25,000,000	
	P3 =$25,000,001 - $50,000,000		P4 =More than $50,000,000		
3. Value Method Codes (See Column C2)	Q =Appraisal	R = Cost (Real Estate Only)	S =Assessment	T =Cash Market	
	U =Book Value	V =Other	W =Estimated		

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VIII. ADDITIONAL INFORMATION OR EXPLANATIONS. *(Indicate part of Report.)*

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IX. CERTIFICATION.

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

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

Signature Paul A. Engelmayer

NOTE: ANY INDIVIDUAL WHO KNOWINGLY AND WILFULLY FALSIFIES OR FAILS TO FILE THIS REPORT MAY BE SUBJECT TO CIVIL AND CRIMINAL SANCTIONS (5 U.S.C. app. § 104)

FILING INSTRUCTIONS

Mail signed original and 3 additional copies to:

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

Paul Engelmayer

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		106	672	Notes payable to banks-secured			
U.S. Government securities				Notes payable to banks-unsecured			
Listed securities – see schedule	10	266	649	Notes payable to relatives			
Unlisted securities – see schedule		769	541	Notes payable to others			
Accounts and notes receivable:				Accounts and bills due		128	000
Due from relatives and friends				Unpaid income tax			
Due from others		692	000	Other unpaid income and interest			
Doubtful				Real estate mortgages payable – personal residence		7	142
Real estate owned – see schedule	4	925	608	Chattel mortgages and other liens payable			
Real estate mortgages receivable				Other debts-itemize:			
Autos and other personal property		15	000				
Cash value-life insurance							
Other assets itemize:							
- WilmerHale Capital Account		744	850				
- WilmerHale Defined Benefit Account		334	334				
- New York State 529 College Savings Plans – see schedule		516	868	Total liabilities		285	142
				Net Worth	18	086	380
Total Assets	18	371	522	Total liabilities and net worth	18	371	522
CONTINGENT LIABILITIES				GENERAL INFORMATION			
As endorser, comaker or guarantor on leases or contracts				Are any assets pledged? (Add schedule)	NO		
Legal Claims				Are you defendant in any suits or legal actions?	NO		
Provision for Federal Income Tax		150	000	Have you ever taken bankruptcy?	NO		
Other special debt							

FINANCIAL STATEMENT

NET WORTH SCHEDULES

Listed Securities		
Acadian Emerging Markets	$	335,100
Berkshire Hathaway Inc Del B	$	326,158
Berkshire Hathaway Inc Del Cl A	$	4,904,960
Brandes Inst Intl Equity Fund	$	14,529
Causeway International Value Fund Invest	$	56,958
Consumer Stap spdr	$	23,619
Consumers Dis SS Spdr	$	23,299
Deutsche Bank AG London 307 US CMS	$	57,690
Eaton Vance Structured Emerging Markets A	$	23,256
Eaton Vance Structured Emerging Markets I	$	331,567
Energy Select Sector SPDR	$	24,604
GNMA II 000644	$	76
GRT Value Fund Advisor Class	$	60,770
Healthcare SS Spdr Fd	$	23,328
ING Senior Income Cl A	$	70,703
ING Senior Income Fund Cl W	$	442,671
iShares Tr MSCI EAFE Index Fd	$	312,662
iShares Tr S&P 400 BARRA Midcap Growth	$	6,772
iShares Tr S&P 400 BARRA Midcap Value	$	114,411
iShares Tr S&P 600 BARRA Small Cap Growth	$	100,430
Ivy Asset Strategy Fund Class A	$	43,670
Ivy Global Natural Resources Fund Cl Y	$	470,671
Loomis Sayles Global Bond Instl	$	21,530
Loomis Sayles Strategic Income A	$	11,541
Materials SS Spdr Fd	$	23,329
MFS Emerging Markets Debt Fund Class I	$	110,426
PIMCO Funds Total Return Fund Instl #35	$	63,174
Prudential Jennison Natural Resources Fund Cl Z	$	388,178
Schwab NY Tax Ex Money Sweep Shares	$	483,952
Schwab Tax Exempt Money Fund	$	5,813
Select Sector Spdr Amex Industrial	$	24,042
Select Sector Spdr Financial	$	23,709
Select Sector SPDR Technology	$	23,738
T. Rowe Price Emerging Market Bond Fund	$	10,276
Templeton Global Bond Fund Cl A	$	4,505
Utilities Sel Spdr	$	23,706
Wisdomtree Large Cap Dividend	$	605,623
WisdomTree MidCap Dividend	$	11,076
Fidelity Cash Reserves	$	2,016
Fidelity Contrafund	$	71,584
Fidelity Growth & Income	$	6,367
Fidelity Select Defense & Aerospace	$	13,773

BHP Billiton Limited	$	8,817
Citigroup	$	950
Fidelity Select Energy	$	10,597
Fidelity Select Energy Service	$	3,627
General Electric Co	$	4,034
AT&T Inc Com	$	371
Travelers Cos Inc Com	$	2,420
United Parcel SVC Inc Cl B	$	7,073
Vanguard Value Index Fund Admiral Shares	$	14,567
Vanguard Wellington Fund Admiral Shares	$	174,666
Vanguard Extended Market Index Fund Admiral Shares	$	45,684
Teacher's Retirement System of NY Diversified Equity Fund	$	121,339
Teacher's Retirement System of NY Stable Value Fund	$	57,109
Teacher's Retirement System of NY International Equity Fund	$	61,440
Teacher's Retirement System of NY Inflation Protection Fund	$	57,695
Total Listed Securities	$	10,266,649
Unlisted Securities		
Aria Consumer Fund	$	355,490
ING European Bank Loan	$	206,661
JLP Credit Opportunity Fund	$	180,454
Landmark Value Strategies QP	$	26,936
Total Unlisted Securities	$	769,541
Real Estate Owned		
Personal residence	$	3,500,000
Secondary residence	$	499,932
Vacation home	$	750,000
Undeveloped land #1	$	82,489
Undeveloped land #2	$	93,187
Total Real Estate Owned	$	4,925,608
New York State 529 College Savings Plans		
New York Saves Bond Market Index Portfolio	$	24,142
New York Saves Developed Markets Income Portfolio	$	96,315
New York Saves Growth Stock Index Portfolio	$	69,381
New York Saves Interest Accumulation Portfolio	$	8,316
New York Saves Mid Cap Stock Index Portfolio	$	60,098
New York Saves Growth Stock Index Portfolio	$	8,400
New York Saves Inflation Protected Portfolio	$	128,702
New York Saves Small Cap Stock Index Portfolio	$	34,866
New York Saves Value Stock Index Portfolio	$	86,648
Total New York State 529 College Savings Plans	$	516,868

AFFIDAVIT

I, **PAUL ADAM ENGELMAYER**, do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

February 1, 2011
(DATE)

Paul A. Engelmayer
(NAME)

Susan D'Alessandro
(NOTARY)

SUSAN A. DALESSANDRO
NOTARY PUBLIC, State of New York
No. 01DA4954866
Qualified in Richmond County
Commission Expires Aug. 21, 2013

US1DOCS 7838461v1

STATEMENT OF HON. RAMONA VILLAGOMEZ MANGLONA, NOMINEE TO BE JUDGE FOR THE DISTRICT COURT FOR THE NORTHERN MARIANA ISLANDS

Judge MANGLONA. Yes. Thank you, Mr. Chairman, and also thank you to Senator Grassley for convening this session this afternoon, and I also would like to publicly and openly say thank you to President Obama for giving me this honor and the privilege of having been nominated to serve as the next judge for the U.S. District Court for the Northern Mariana Island.

I also want to think Congressman Kilili, or Congressman Gregorio Kilili Sablan from the Northern Mariana Islands who introduced me, as well as Congresswoman Madeleine Bordallo from Guam who is present and has also submitted her statement in support.

At this time I would like to introduce the family members that are here with me today who made the 10,000-mile trek, starting with my husband, John Manglona. My husband and I just celebrated our 20th wedding anniversary 2 weeks ago today, so we are very happy.

Senator SCHUMER. Many more.

Judge MANGLONA. I am looking forward to that. As well, our son, Dencio Manglona. He flew in from the University of Michigan in Ann Arbor—he is sophomore there—just to make it here today. And I also have our daughter, Savana Manglona. She is a senior at Mount Carmel High School in Saipan, and we are looking forward to her attending university. The University of Michigan is on the list.

With us as well is my brother, David Villagomez—he flew in from Honolulu—as well as my brother-in-law, Paul Manglona. He was here fortuitously for other business matters, but was able to be here. And as a representative for my siblings, I also have my two nephews, Walter and Jason Wesley, who are currently residents of the State of Virginia, and they are able to make the short trip up.

Allow me also please to recognize the individuals or my family members that really wanted to be here but could not under the situation, and they are here otherwise through the webcast, and I know they are all tuned in at about 4 in the morning Saipan time, starting with my father, Manuel Villagomez, and my siblings and my in-laws, as well as my father-in-law, Prudencio Manglona, out of the island of Rota, and my in-laws as well as my other in-laws that are in Guam, Vincent as well as my sister-in-law President in Saipan. Without them, I would not be here.

Then, finally, I do want to also recognize two individuals that could not be here because they are no longer with us on this Earth: my mother, Luisi, as well as my mother-in-law Bernaditz Manglona. They have been the inspiration of my life, and I know they are here with us. So thank you for allowing me to introduce them.

I also would like to just recognize that there are three Senators who are also from the CNMI. They were previously scheduled for some business meetings here, and they made the time to be here to attend the session. That is Senator Hofschneider from Tinian, Senator Cruz from Tinian, and Senator Ralph Torres from Saipan.

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Thank you, Mr. Chairman.

Senator SCHUMER. Great. Well, thank you. These were great rounds of introductions.

[The biographical information follows.]

UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY

QUESTIONNAIRE FOR JUDICIAL NOMINEES

PUBLIC

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

   Ramona Villagomez Manglona (also known as "Mona V. Manglona")
   (Formerly: Ramona Emma Pangelinan Villagomez)

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

   Territorial District Judge for the United States District Court for the Northern Mariana Islands

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

   Superior Court, Commonwealth of the Northern Mariana Islands
   House of Justice/Guma Hustisia/Imwaal Aweewe, Susupe
   P.O. Box 500307
   Saipan, Northern Mariana Islands 96950

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

   1967; Saipan, Northern Mariana Islands

5. **Education**: List in reverse chronological order each college, law school, or any other institution of higher education attended and indicate for each the dates of attendance, whether a degree was received, and the date each degree was received.

   1994 – 1996, University of New Mexico School of Law; J.D., 1996

   1985 -- 1990, University of California at Berkeley; B.A. (double major), 1990

6. **Employment Record**: List in reverse chronological order all governmental agencies, business or professional corporations, companies, firms, or other enterprises, partnerships, institutions or 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 description.

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2003 – Present
Superior Court, Commonwealth of the Northern Mariana Islands
House of Justice/Guma Hustisia/Imwaal Aweewe, Susupe
P.O. Box 500307
Saipan, Northern Mariana Islands 96950
Associate Judge

2004 – 2008
Guam Supreme Court and Guam Superior Court
Guam Judicial Center
120 West O'Brien Drive
Hagatna, Guam 96910
Justice *Pro Tempore* & Judge *Pro Tempore*

1998 – 2003
CNMI Office of the Attorney General
Juan A. Sablan Building, Capital Hill
P.O. Box 10007
Saipan, Northern Mariana Islands 96950
Attorney General (2002 – 2003)
Deputy Attorney General (2002)
Assistant Attorney General, Civil Division (2001 – 2002)
Assistant Attorney General, Criminal Division (1998 – 2001)

1997 – 1998
Superior Court, Commonwealth of the Northern Mariana Islands
House of Justice/Guma Hustisia/Imwaal Aweewe, Susupe
P.O. Box 500307
Saipan, Northern Mariana Islands 96950
Law Clerk

Fall 1996
U.S. District Court
500 Gold Avenue, SW
Albuquerque, New Mexico 87102
Judicial Extern to the Hon. C. Leroy Hansen

Summer 1995
CNMI Third Constitutional Convention
CNMI Legislative Building
Capital Hill
Saipan, Northern Mariana Islands 96950
Law Intern

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1994
Law Office of John A. Manglona
P.O. Box 502852
Saipan, Northern Mariana Islands 96950
Office Manager (part-time)

1993 – 1994
M.S. Villagomez, Inc.
P.O. Box 500007
Saipan, Northern Mariana Islands 96950
President

1990 – 1993
M.S. Villagomez Enterprises
P.O. Box 500007
Saipan, Northern Mariana Islands 96950
President

Other Affiliations (uncompensated except as noted)

2008 – present
Manuel S. and Luise P. Villagomez Family Trust
P.O. Box 500007
Saipan, Northern Mariana Islands 96950
Co-Trustee (receive stipend)

1993 – 2001
Pacific Sky Travel Services, Inc.
P.O. Box 500774
Saipan, Northern Mariana Islands 96950
Vice-President (1993 – 2001)
Board Member (1993 – 1994)

1991 – 1997
Saipan Cattle Company
(dissolved 1998)
Saipan, Northern Mariana Islands 96950
Board Member

1994
CNMI Library Council
Joeten-Kiyu Public Library
P.O. Box 501092
Saipan, Northern Mariana Islands 96950
Chairperson

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1990 – 1994
San Roque Beach Development Corporation
P.O. Box 500007
Saipan, Northern Mariana Islands 96950
Director

7. **Military Service and Draft Status**: Identify any service in the U.S. Military, including dates of service, branch of service, rank or rate, serial number (if different from social security number) and type of discharge received, and whether you have registered for selective service.

   I have not served in the military. I have not registered for selective service, as I was not eligible to do so.

8. **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.

   University of New Mexico School of Law – Dean's List (1996), Honor Roll (1995)

9. **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
   Advanced Science and Technology Adjudication Resource Center
   National Resource Judge Program
   Fellow (2009 – present)
   Northern Marianas Bar Examination
   Grader (2003 – present)
   Northern Mariana Islands Criminal Justice Information System Network
   Chairperson (2006 – present)
   Northern Mariana Islands Traffic Records Coordinating Committee
   Chairperson (2008 – present)
   Northern Mariana Islands Superior Court Judiciary Case Management System Selection Committee
   Chairperson (2006 – 2007)
   Northern Mariana Islands Court Rules Committee on the Commonwealth Rules of Juvenile Delinquency Procedures and Juvenile Practice
   Chairperson (2002 – 2003)
   Guam Committee on Judicial Disciplinary Enforcement
   New Mexico Bar Association
   Northern Mariana Islands Bar Association
   President (2001 – 2003)
   Treasurer (2000 – 2001)
   Director (1999 – 2000)

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10. **Bar and Court Admission**:

a. List the date(s) you were admitted to the bar of any state and any lapses in membership. Please explain the reason for any lapse in membership.

New Mexico Bar, 1997 (presently on inactive status)
Northern Mariana Islands Bar, 1997 (inactive since 2003, as required of all judges by local law)

There have been no lapses in membership.

b. List all courts in which you have been admitted to practice, including dates of admission and any lapses in membership. Please explain the reason for any lapse in membership. Give the same information for administrative bodies that require special admission to practice.

United States Court of Appeals for the Ninth Circuit, 2002
United States District Court for the Northern Mariana Islands, 2001
New Mexico Supreme Court, 1997
Northern Mariana Islands Supreme Court, 1997

There have been no lapses in membership.

11. **Memberships**:

a. List all professional, business, fraternal, scholarly, civic, charitable, or other organizations, other than those listed in response to Questions 9 or 10 to which you belong, or to which you have belonged, since graduation from law school. Provide dates of membership or participation, and indicate any office you held. Include clubs, working groups, advisory or editorial boards, panels, committees, conferences, or publications.

Center for Civic Education's "We The People: The Citizen and the Constitution" Program in the Northern Mariana Islands
Volunteer coach (2009 – present)
Manuel S. and Luise P. Villagomez Family Trust
Co-Trustee (2008 – present)
Northern Mariana Islands High School Mock Trial Program
Volunteer attorney coach, juror, presiding judge (2000 – 2009)
Saipan Cattle Company
Board Member (1991 – 1997)
Saipan Community School Parents Association
President (1997 – 1998)
Western Pacific Region National Forensic League
Volunteer judge, coach (2005 – 2009)

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b. 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, or national origin. Indicate whether any of these organizations listed in response to 11a above currently discriminate or formerly discriminated on the basis of race, sex, religion or national origin 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.

None of the organizations listed in 11a above currently discriminates or formerly has discriminated on the basis of race, sex, religion, or national origin either through formal membership requirements or the practical implementation of membership policies.

12. **Published Writings and Public Statements**:

a. List the titles, publishers, and dates of books, articles, reports, letters to the editor, editorial pieces, or other published material you have written or edited, including material published only on the Internet. Supply four (4) copies of all published material to the Committee.

I have searched my recollection, files and various Internet databases and have not identified any published material I have written or edited.

b. Supply four (4) copies of any reports, memoranda or policy statements you prepared or contributed in the preparation of on behalf of any bar association, committee, conference, or organization of which you were or are a member. If you do not have a copy of a report, memorandum or policy statement, give the name and address of the organization that issued it, the date of the document, and a summary of its subject matter.

September 22, 2009: CNMI Judiciary, proclamation reaffirming the Judiciary's support for CNMI and Guam soldiers. Copy of the proclamation supplied.

April 2003: worked with House legal counsel to revise HB 13-252, a financing plan for the Prison Project, which ultimately passed the legislature as Public Law 13-56. Copy of the legislation supplied.

c. Supply four (4) copies of any testimony, official statements or other communications relating, in whole or in part, to matters of public policy or legal interpretation, that you have issued or provided or that others presented on your behalf to public bodies or public officials.

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May 30, 2003: CNMI Senate Public Hearing, made statement at hearing for my appointment to the position of associate judge of the Commonwealth Superior Court. Copy supplied.

April 29, 2003: Signatory to letter from members of National Association of Attorneys General to Senators John McCain and Fritz Hollings and to Representatives W.J. Tauzin and John Dingell re: S. 877, CAN-SPAM Act of 2003. Copy supplied.

April 9, 2003: Northern Mariana Islands Senate Committee on Resources, Economic Development and Programs, testimony as CNMI Attorney General in support of legislation regarding CNMI's settlement agreement with Marine Revitalization Corporation regarding a submerged lands lease agreement. I was unable to obtain a transcript or recording of my testimony.

November 8, 2002: CNMI Senate Public Hearing, made statement at hearing for my appointment to the position of attorney general of the CNMI. Copy supplied.

November 5, 2002: Northern Mariana Islands Attorney General Legal Opinion No. 02-014 to Governor re: authority to borrow funds for the limited purpose of paying rebates and refunds. Copy supplied.

October 29, 2002: CNMI Bar Association, letter written as CNMI Bar President to the Chief Justice of the CNMI Supreme Court, regarding a Guam public law and the NMI Bar Association's opposition to the adoption of a reciprocity rule to effectuate the Guam statute. Copy supplied.

September 24, 2002: Northern Mariana Islands Attorney General Legal Opinion No. 02-013 to Director of Personnel, Office of Personnel Management re: rehiring of individuals who have retired and received a 30% bonus under Commonwealth law. Copy supplied.

September10, 2002: Northern Mariana Islands Attorney General Legal Opinion No. 02-12 to Commonwealth Utilities Corporation legal counsel re: CUC Board members' entitlement to compensation for attendance at committee meetings. Copy supplied.

August 7, 2002: Northern Mariana Islands Attorney General Legal Opinion No. 02-09 to Secretary of Department of Commerce re: propriety of insurance companies denying third party claims. Copy supplied.

July 2, 2002: Northern Mariana Islands Attorney General Legal Opinion No. 02-08 to Director of Personnel, Office of Personnel Management re: employees of 8th Rota Municipal Council. Copy supplied.

d. Supply four (4) copies, transcripts or recordings of all speeches or talks delivered by you, including commencement speeches, remarks, lectures, panel discussions, conferences, political speeches, and question-and-answer sessions. Include the date and place where they were delivered, and readily available press reports about the speech or talk. If you do not have a copy of the speech or a transcript or recording of your remarks, give the name and address of the group before whom the speech was given, the date of the speech, and a summary of its subject matter.

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If you did not speak from a prepared text, furnish a copy of any outline or notes from which you spoke.

January 7, 2010, January 10, 2008, and January 5, 2006: Commonwealth Supreme Court & NMI Judiciary Historical Society, presenter on statutory construction at "The Law & Freshman Legislator" seminar. Copy of my presentation slides supplied.

October 27-29, 2009: Pacific Judicial Council Conference, Saipan, panelist on Handling *Pro Se* Litigants in Domestic Violence Cases, panelist on Courts as Cultural Mediators in Domestic Violence, and presenter on Island Judiciary Presentation: Northern Mariana Islands Superior Court. Presentation slides for the Island Judiciary supplied, and press coverage on the Mediation panel supplied.

May 30, 2009: Mount Carmel High School, Saipan, commencement speaker. Copy of my remarks supplied.

November 24, 2008: Criminal Justice Planning Agency Supervisory Council Meeting, presented status of Northern Mariana Islands Criminal Justice Information System project. Copy of my presentation supplied.

November 7, 2008: Marianas Baptist Academy Civics Class, Saipan, presented remarks to class. Copy of my presentation supplied.

October 16, 2008: Saipan Society for Human Resources Management Meeting, presented remarks on diversity. Copy of my presentation slides supplied.

June 3, 2008: Kagman High School, Saipan, commencement speaker. Copy of my remarks supplied.

May 30, 2008: Marianas Baptist Academy, Saipan, commencement speaker. Copy supplied.

November 4, 2007: San Vicente Elementary School, informal campaigning for retention as judge at polling location. I have no notes, transcript or recording but press coverage is supplied. The address of the school is P.O. Box 1370 CK, Saipan, Northern Mariana Islands 96950.

October 20, 2007: 10th Youth Congress, administered the Oath of Office. I did not prepare any remarks and only administered the oath. Press coverage supplied. The address of the Youth Congress is Capitol Hill, P.O. Box 500586, Saipan, Northern Mariana Islands 96950.

January 12, 2006: Saipan Chamber of Commerce, administered Oath of Office to new officers. I have no notes, transcript or recording, but press coverage is supplied. The address of the Chamber is P.O. Box 500806 CK, Saipan, Northern Mariana Islands 96950.

February 17, 2005: CNMI Bar Association, Saipan, guest speaker re: statistics of Superior Court and E-Filing. I have no notes, transcript or recording. The address of the Bar Association is P.O. Box 504539, Saipan, Northern Mariana Islands 96950.

December 3, 2004: Domestic Violence Conference, Saipan, presented remarks on "Giving Full Faith & Credit to Protection Orders: Protection Beyond the Commonwealth's Shores." Copy of my remarks supplied.

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November 5, 2004: Tinian High School, Tinian, made community outreach presentation. I have no notes, transcript or recording. The address of the school is P. O. Box 400, Tinian, Northern Mariana Islands 96952.

July 2004: Justice Teaching Institute, Commonwealth Supreme Court, guest lecturer on CNMI juvenile laws and procedures. I have no notes, transcript or recording. The Institute is sponsored by the Supreme Court whose address is P.O. Box 502165, Saipan, Northern Mariana Islands 96950.

June 4, 2004: Saipan Southern High School, commencement speaker. Copy of my remarks supplied.

March 29, 2004: Kagman Elementary School, Saipan, made community outreach presentation. Copy of my remarks supplied.

March 18, 2004: CNMI Women's Affairs Office, inspirational speaker at 2004 Women's History Month meeting; spoke on "Women Inspiring Hope & Possibility." I have no notes, transcript or recording, but press coverage is supplied. The WAO is part of the Governor's Office whose address is Juan A. Sablan Memorial Building, Capitol Hill, Caller Box 10007, Saipan, Northern Mariana Islands 96950.

March 6, 2004: CNMI International Women's Day Celebration, featured speaker. Copy of my remarks supplied.

January 8, 2004: Kagman Juvenile Detention and Correctional Facility, gave remarks at ribbon cutting ceremony. Copy of my remarks supplied.

November 21, 2003: Mt. Carmel High School, Saipan, gave remarks on "Women's Affairs, Opportunities & Issues in the CNMI." Copy of my remarks supplied.

June 20, 2003: Address at my Judicial Investiture as Associate Judge of the Commonwealth Superior Court, Saipan. Copy of my remarks and press coverage supplied.

June 13, 2003: Hopwood Junior High School, Saipan, keynote speaker. Copy of my remarks supplied.

April 17, 2003: CNMI Juvenile Justice Task Force's Juvenile Justice Training Conference, panelist at conference, addressed youth issues, domestic violence, and juvenile offenses. I have no notes, transcript or recording, but press coverage is supplied. The Task Force is part of the Criminal Justice Planning Agency whose address is P.O. Box 501133, 1315 Anatahan Drive, Saipan, Northern Mariana Islands 96950.

October 7, 2002: CNMI Attorney Admission Ceremony, brief welcoming statement as CNMI Bar President to newly admitted attorneys. Copy of my remarks supplied.

July 30, 2002: Justice Teaching Institute Conference, presenter on Juvenile Justice. I have no notes, transcript or recording. The Institute is sponsored by the Supreme Court whose address is P.O. Box 502165, Saipan, Northern Mariana Islands 96950.

March 16, 2002: CNMI High School Mock Trial Championship, final round judge. I have no notes, transcript or recording, but press coverage is

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supplied. The CNMI Bar Association sponsors the event and its address is P.O. Box 504539, Northern Mariana Islands 96950.

2002: "History of CNMI's Women: HerStory," sponsored by the CNMI Women's Affairs Office, Saipan, made a personal statement of how I became the fourth NMI descent woman to be licensed as an attorney in the CNMI. I have no notes, transcript or recording. The WAO is part of the Governor's Office whose address is Juan A. Sablan Memorial Building, Capitol Hill, Caller Box 10007, Saipan, Northern Mariana Islands 96950.

May 25, 2001: Marianas Baptist Academy, commencement speaker. I have no notes, transcript or recording. The address of the Academy is P.O. Box 500904, Saipan, Northern Mariana Islands 96950.

May 2001: Hopwood Junior High School, Saipan, community outreach presentation for Law Day. I have no notes, transcript or recording. The address of the school is P.O. Box 746 CK, Saipan, Northern Mariana Islands 96950.

March 31, 2001: CNMI High School Mock Trial Championship, final round judge. I have no notes, transcript or recording, but press coverage is supplied. The CNMI Bar Association sponsors the event and its address is P.O. Box 504539, Saipan, Northern Mariana Islands 96950.

1999: Northern Marianas College, Saipan, Northern Mariana Islands. I was a guest lecturer at the Northern Mariana Islands Police Academy on criminal laws covering traffic laws and juvenile delinquency. I have no notes, transcript or recording. The address of the police academy is Caller Box 10007, Saipan, Northern Mariana Islands 96950.

February 3-4, 1998: Family Court Symposium speaker. I have no notes, transcript or recording. The Family Court Division of the Superior Court sponsored the event and its address is P.O. Box 500307, Saipan, Northern Mariana Islands 96950.

e. List all interviews you have given to newspapers, magazines or other publications, or radio or television stations, providing the dates of these interviews and four (4) copies of the clips or transcripts of these interviews where they are available to you.

The list below includes material I have identified from my recollection, my files and my search of Internet databases and newspaper archives. Despite my searches, there may be other items I have been unable to identify, find, or recall.

Television & Radio Interviews

Television station KSPN2, March 14, 2007 – interviewed during International Women's Month regarding my role as the only sitting female jurist in the Northern Mariana Islands. I am providing copies of the recording of the portion of this interview that was televised on the news.

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Television station KSPN2, May 30, 2003 – interviewed after the CNMI Senate confirmed my judicial appointment to the Superior Court of the Northern Mariana Islands. I am providing copies of the recording of the portion of this interview that was televised on the news.

Television station KSPN2, May 20, 2003 – brief statement made to press after the Governor's announcement of his two judicial nominations to the Superior Court. I am providing copies of the recording of the portion of this interview that was televised on the news.

Television station KMCV (now KSPN2) (approx. 2003) – interview regarding the issue of an elected attorney general for the Northern Mariana Islands. I have no recording or transcript of this interview, an excerpt of which was televised on the news.

Television station KMVC (now KSPN2), November 5, 2002 – brief statement made to press after I was selected by the Governor to be the next Attorney General of the Northern Mariana Islands. I am providing copies of the recording of the portion of this interview that was televised on the news.

Television station KMVC (now KSPN2) (on or about 1998) – interviewed by talk show host regarding traffic laws in the CNMI. I have no recording or transcript of this interview, excerpts of which were televised on the news.

Newspaper Interviews

There are two main local newspapers published on the island of Saipan, the Saipan Tribune and the Marianas Variety. The following articles are mainly from the Saipan Tribune because it has online archives, whereas Marianas Variety lost its archives during a transfer of their website. Past articles in the Marianas Variety are available only through a manual search with precise dates. The following contain a list of articles that were found by using the Saipan Tribune dates. Despite my search, there may be other interviews I have been unable to identify, find, or remember.

Quoted in article on New Dawn Tech web site, Oct. 28, 2009. Copy supplied.

Ferdie de la Torre, *Justice Manglona Given Top Marks*, SAIPAN TRIBUNE, Oct. 26, 2007. Copy supplied.

Marconi Calindas, *Manglona, Chavez Shine in Int'l Debate*, SAIPAN TRIBUNE, May 1, 2007. Copy supplied.

Ulysses Torres Sabuco, *NMI Judiciary Prepares for 2004*, MARIANAS VARIETY, June 4, 2003. Copy supplied.

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Marian A. Maraya, *Will the Next AG Be Pam Brown*, SAIPAN TRIBUNE, June 1, 2003. Copy supplied.

Marian A. Maraya, *Manglona, Govendo Confirmed as Judge*, SAIPAN TRIBUNE, May 31, 2003. Copy supplied.

Ulysses Torres Sabuco, *Immigration Now Under AGO*, MARIANAS VARIETY, May 14, 2003. Copy supplied.

Jayvee L. Vallejera, *Registrar of Corporations to be Transferred*, SAIPAN TRIBUNE, May 13, 2003. Copy supplied.

Jayvee L. Vallejera, *Labor, Immigration Now Fully Separate*, SAIPAN TRIBUNE, May 13, 2003. Copy supplied.

John Ravelo, *NMI Gets $435k from Tobacco Firms*, SAIPAN TRIBUNE, Apr. 21, 2003. Copy supplied.

Marian A. Maraya, *AG Touts Need to Protect Consumers*, SAIPAN TRIBUNE, Apr. 18, 2003. Copy supplied.

Ulysses Torres Sabuco, *NMI Bans Entry of Visitors from SARS Hotspots*, MARIANAS VARIETY, April 18, 2003. Copy supplied

John Ravelo, *NMI, States File Position on Tobacco Bond Appeal*, SAIPAN TRIBUNE, Apr. 10, 2003. Copy supplied.

Marian A. Maraya, *House initiative calls for elected AG*, SAIPAN TRIBUNE, Mar. 20, 2003. Copy supplied.

Jojo Dass, *Manglona: Gov't Lawsuit vs. Verizon "Activated"*, MARIANAS VARIETY, March 20, 2003. Copy supplied.

Jojo Dass, *Torres Says NMI Should Have Elected AG*, MARIANAS VARIETY, March 20, 2003. Copy supplied.

Staff, *Suspects in CNMI's First Ever Bank Robber Nabbed*, UNITED NEWS OF BANGLADESH, Feb. 13, 2003. Copy supplied.

Staff, *Manglona May Opt to be Judge*, SAIPAN TRIBUNE, Jan. 22, 2003. Copy supplied.

Ulysses Torres Sabuco, *Manibusan to Retire; Manglona Considered as Replacement*, MARIANAS VARIETY, Jan. 21, 2003. Copy supplied.

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Marian A. Maraya, *AG Designate Introduced to Cabinet*, SAIPAN TRIBUNE, Nov. 6, 2002. Copy supplied.

Ulysses Torres Sabuco, *Sachs Named Deputy AG; Lynch Chief Prosecutor Again*, MARIANAS VARIETY, Nov. 6, 2002. Copy supplied.

Ulysses Torres Sabuco, *Manglona is Next AG*, MARIANAS VARIETY, Nov. 1, 2002. Copy supplied.

Jayvee L. Vallejera, *When There's Nobody Else to Blame, Media's Always There*, SAIPAN TRIBUNE, Sept. 13, 2002. Copy supplied.

Ulysses Torres Sabuco, *Manglona: Lemons Resigned Over Media Comments*, MARIANAS VARIETY, Sept. 13, 2002. Copy supplied.

Jayvee L. Vallejera, *No Shortlist Yet on New AG*, SAIPAN TRIBUNE, Aug. 28, 2002. Copy supplied.

Jayvee L. Vallejera, *Deputy AG Supports Elected AG Proposal*, SAIPAN TRIBUNE, Aug. 28, 2002. Copy supplied.

Ulysses Torres Sabuco, *Lemons Threatens to Resign*, MARIANAS VARIETY, Aug. 28, 2002. Copy supplied.

Ulysses Torres Sabuco, *Peterson Resigns From AGO*, MARIANAS VARIETY, Aug. 27, 2002. Copy supplied.

Jayvee L. Vallejera, *Attorney General Quits*, SAIPAN TRIBUNE, Aug. 24, 2002. Copy supplied.

Marian A. Maraya, *Bar Association Swears In New Officers*, SAIPAN TRIBUNE, Mar. 16, 2001. Copy supplied.

Staff, *Autopsy Shows Infant 'Harmed' by Baby Sitter*, SAIPAN TRIBUNE, Nov. 17, 2000. Copy supplied.

13. **Judicial Office**: State (chronologically) any judicial offices you have held, including positions as an administrative law judge, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

In May 2003, I was confirmed by the Northern Marianas Senate to serve as an Associate Judge of the Northern Mariana Islands Superior Court. I passed a retention election in November 2007 to serve another six-year term beginning May 2009. The Superior Court has general jurisdiction over all civil cases (including small claims and probate actions) and criminal cases (including traffic and juvenile).

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In 2004, after beginning my service with the Superior Court, I became a Justice *Pro Tem* of the Guam Supreme Court. In this capacity, I am appointed on a case by case basis by the Chief Justice of the Guam Supreme Court to sit on a panel. Cases argued before and decided by me have included criminal, probate, and divorce cases.

Similarly, since 2004, I have also served as a Judge *Pro Tem* of the Guam Superior Court. I was appointed on a case by case basis by the Chief Justice of the Guam Supreme Court, and have presided over three cases pertaining to the issue of judicial disqualification.

a. Approximately how many cases have you presided over that have gone to verdict or judgment?

I have presided over 150 cases to verdict.

i. Of these, approximately what percent were:

jury trials:	4%
bench trials:	96%
civil proceedings:	72%
criminal proceedings:	28%

b. Provide citations for all opinions you have written, including concurrences and dissents.

See attached list of opinions.

c. For each of the 10 most significant cases over which you presided, provide: (1) a capsule summary of the nature the case; (2) the outcome of the case; (3) the name and contact information for counsel who had a significant role in the trial of the case; and (3) the citation of the case (if reported) or the docket number and a copy of the opinion or judgment (if not reported).

1. *In re Extradition Matter of Kazuyoshi Miura*, Crim. No. 08-0030C (N.M.I. Super. Ct. Sept. 15, 2008), *aff'd*, 2010 MP 12. Dubbed "the OJ Simpson case of Japan," this was an extradition case of a Japanese citizen detained in Saipan pursuant to a California arrest warrant for the 1985 murder of his Japanese wife while vacationing in Los Angeles, California. Petitioner filed a writ of habeas corpus to release him from the arrest warrant and concurrently fought the validity of the arrest warrant in a California Superior Court. I denied the writ, and authorized Petitioner's extradition to California. My decision was affirmed on appeal by the CNMI Supreme Court. Petitioner filed a writ of habeas corpus in the U.S. District Court for the Northern Mariana Islands, which was later withdrawn. He was subsequently extradited to California. Opinion supplied.

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Counsel for the prosecution were Chief Prosecutor Jeffrey L. Warfield, Sr., now with the Guam Alternate Public Defender's Service Corporation, Suite 902, DNA Building, 238 AFC Flores Street, Hagatna, Guam 96910 USA; (671) 475-3234; and Assistant Attorney General Mike Nisperos, now with the Guam Public Defender's Service Corporation, 2nd Floor Judiciary Annex, 110 West O'Brien Drive, Hagatña, Guam 96910; (671) 475-3100. Counsel for the defendant were William M. Fitzgerald, Esq., Law Office of William M. Fitzgerald, Second Floor, Macaranas Building, Beach Road, Garapan, P.O. Box 909, Saipan, Northern Mariana Islands 96950; (670) 234-7241; Bruce Berline, Esq., Law Office of Bruce Berline, Second Floor, Macaranas Building, Beach Road, Garapan, P.O. Box 5682 CHRB, Saipan, Northern Mariana Islands 96950; (670) 233-3663; and Mark B. Hanson, Esq., Law Office of Mark B. Hanson, Second Floor, Macaranas Building, Beach Road, Garapan, PMB 738, P.O. Box 10,000, Saipan, Northern Mariana Islands 96950; (670) 233-8600.

2. *Commonwealth Dev. Auth. v. Sy's Corp. et al.*, Civ. No. 01-0442 (N.M.I. Super. Ct. Dec. 15, 2005), appeal dismissed by stipulation. Commonwealth agency brought civil complaint for money judgment and foreclosure of multiple mortgages on several real properties, including an old and locally popular hotel and restaurant. The foreclosure claim required the joinder of several parties with multiple subordinate interests. Prior to handling the case, another judge granted Plaintiff's motion for an appointment of a third party as the receiver to maintain the assets of the hotel and restaurant. I granted judgment in favor of Plaintiff mortgagee, and during Defendant's appeal, Plaintiff mortgagee and Defendant mortgagor settled. The receiver closed the business operations and became delinquent in submitting reports to the court. A default was entered against the receiver by the local department of labor. The receiver's reports were finally produced after several order to show cause hearings, and the case closed. Opinion supplied.

Plaintiff's counsel was F. Matthew Smith, Esq., Law Office of F. Matthew Smith, LLC, 2nd Floor, MIC Building, Chalan Monsignor Guerrero, San Jose Village, P.O. Box 501127, Saipan, Northern Mariana Islands 96950; (670) 234-7455. Counsel for co-defendants was G. Anthony Long, Esq., Law Office of G. Anthony Long, P. O. Box 504970, Second Floor, Lim's Building, San Jose, Saipan, Northern Mariana Islands 96950; (670) 235-4802. Other co-defendants' counsel were Robert J. O'Connor, Esq., O'Connor Berman Dotts & Banes, Second Floor, Nauru Building, P.O. Box 501969, Saipan, Northern Mariana Islands 96950; (670) 234-5684. Counsel for lienholder Department of Finance, Division of Revenue and Taxation was Deborah L. Covington, Assistant Attorney General, now with the Office of the Attorney General; 287 W. O'Brien Drive, Hagatña, Guam 96910; (671) 475-3324; and Bruce L. Mailman, Esq., now with Law Offices of Mailman and Kara, LLC, Beach Road, Garapan, PMB 238 PPP, Box 10000, Saipan, Northern Mariana Islands 96950; (670) 233-0081. Receiver's counsel was Timothy H. Bellas, Esq., Bank of Hawaii Building, Suite 203, P.O. Box 502845, Saipan, Northern Mariana Islands 96950; (670) 323-2115.

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3. *Commonwealth v. Macabalo*, Crim. No. 06-0110 (N.M.I. Super. Ct. Dec. 26, 2007), App. No. 2008-SCC-0004-CRM (N.M.I. Sup. Ct. Jan. 23, 2008). In this criminal case, defendant was charged with multiple counts of theft by deception against a large local company. Another individual, the defendant's manager, was charged for the same series of transactions and pleaded guilty in the federal court. The manager never testified at the trial against this defendant. Several motions were filed in the case that created new local caselaw. After the jury returned a guilty verdict, I granted a judgment of acquittal notwithstanding the jury verdict. I believe this was a first in the CNMI's history. This case is pending on appeal. Opinion supplied.

Counsel for the prosecution was Assistant Attorney General Joseph LG. Taijeron, Jr., now with the Northern Marianas Legislature, Legislative Bureau – House Legal Counsel, P.O. Box 500586, Saipan, Northern Mariana Islands, 96950; (670) 664-8846/8934. Counsel for the defendant was Richard C. Miller, Assistant Public Defender, Office of the Public Defender, Commonwealth of the Northern Mariana Islands, P.O. Box 10007, Saipan, Northern Marianas Islands 96950; (670) 234-6215.

4. *Commonwealth v. Aguilar*, Crim. No. 03-0252C (N.M.I. Super. Ct. Nov. 9, 2004). This criminal case involved a heinous murder arising out of domestic violence. It was my first murder sentence as a judge, and I handed down one of the most severe sentences in the Commonwealth's history, *i.e.*, fifty years without the possibility of parole. This case started my practice of issuing a written sentence decision with the details of my findings and rationale for the sentence. Opinion supplied.

Counsel for the prosecution was former Chief Prosecutor David Watson Hutton, now with International Legal Consulting (I.L.C.), Fort Worth, Texas. Counsel for defendant was former Chief Public Defender Masood Karimipour, now with the United Nations Office on Drugs and Crime, 30a Abdulla Kahhor St., 100100 Tashkent, Uzbekistan; Tel. (+ 998 71) 120 80 50; Fax (+ 998 71) 120 62 90 (Time zone: GMT + 5 hours).

5. *Olopai v. Fitial, et al.*, Civ. No. 90-289 (N.M.I. Super. Ct. April 4, 2007). In this land dispute case, I issued a temporary restraining order against the sitting governor (in his personal capacity) and his family members. The case became complicated because it was brought back to court seventeen years after the case was first filed and an injunction issued. I subsequently denied the issuance of a preliminary injunction against the defendants. Before a hearing on the merits was decided, the parties settled the case. Opinion supplied.

The plaintiff's attorney was Michael W. Dotts, Esq., O'Connor, Berman, Dotts & Banes, P.O. Box 501969 C.K., Saipan, Northern Marianas Islands 96950; (670) 234-5684. Counsel for defendants was Douglas W. Cushnie, Esq., Law Offices of Douglas W. Cushnie, P.O. Box 500949, Saipan, Northern Mariana Islands 96950; (670) 234-6830.

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6. *Tan v. Younis Art Studio, Inc.*, Civ. No. 01-0624, and *Fitial v. Younis Art Studio, Inc.*, Civ. No. 03-0116, consolidated cases (N.M.I. Super. Ct. Feb.2, 2004), *aff'd*, 2007 MP 11. A prominent businessman and a local politician in the community filed separate suits against a local newspaper company for defamation. The newspaper company filed a third party complaint for indemnification, contribution, and negligence against the local congressman who placed the newspaper ads containing his statements about the two individuals. The case was significant because the plaintiff politician was running for governor. I granted summary judgment in favor of the newspaper company and against the two plaintiffs. The CNMI Supreme Court affirmed my decision. Opinion supplied.

Counsel for plaintiffs were Steven Pixley, Esq., P.O. Box 7757 SVRB, Saipan, Northern Mariana Islands, 96950; (670) 233-2898; and Matthew T. Gregory, Esq., PMB 193 PPP, P.O. Box 10000, Saipan, Northern Mariana Islands 96950; (670) 234-9005/6. Counsel for Defendant was G. Anthony Long, Esq., P.O. Box 504970, Second Floor, Lim's Building, San Jose, Saipan, Northern Mariana Islands 96950; (670) 235-4802. Counsel for the third-party defendant was Robert T. Torres, Esq., Plata Drive, Whispering Palms, P.O. Box 503758, Saipan, Northern Mariana Islands 96950; (670) 234-7859.

7. *Commonwealth v. Faisao, et al.*, Crim. No. 07-0107 (N.M.I. Super. Ct. July 31, 2009). In this criminal case, defendants were charged for their concerted act of defrauding the public utilities corporation. Numerous motions were filed, and the information had to be amended several times. One by one, the prosecution negotiated plea agreements to seek restitution, a permanent bar from government employment, and jail sentences. Four of the five defendants entered guilty pleas, and one was convicted after a trial. The defendant appealed his conviction, but subsequently stipulated to a dismissal of the appeal. Opinion supplied.

The prosecutors were Mike Nisperos, Jr., Assistant Attorney General, now with the Guam Public Defender's Service Corp., 2nd Floor Judiciary Annex, 110 West O'Brien Drive, Hagatña, Guam 96910; (671) 475-3100; and William Downer, Assistant Attorney General, Office of the Attorney General – Criminal Division, Caller Box 10007, Saipan, Northern Mariana Islands 96950; (670) 664-2336.

Two of the defendants' attorneys were Edward C. Arriola, Esq., Sablan Building, Suite1-F, San Jose, P.O. Box 501788, Saipan, Northern Mariana Islands 96950; (670) 233-5505; and Richard C. Miller, Assistant Public Defender, Office of the Public Defender, Commonwealth of the Northern Mariana Islands, P.O. Box 10007, Saipan, Northern Marianas Islands 96950; (670) 234-6215.

8. *Tinian Casino Gambling Control Comm'n v. Babauta, et al.*, Civ. No. 04-0326 (N.M.I. Super. Ct. Oct. 18, 2004). Plaintiff argued that the local law introduced and passed by the Tinian legislative delegation and signed into law by the governor was unconstitutional and/or otherwise legally invalid, and that the Respondents went beyond the scope of their authority in enacting this local law. It was a case of first

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impression for the CNMI. I concluded that the Tinian municipal delegation and the governor were immune from suit for their legislative acts and granted the Respondents' motion to dismiss. An appeal was not filed. Opinion supplied.

Plaintiff's counsel was Elliot A. Sattler, Tinian Casino Gaming Control Commission, P. O. Box 143, Tinian, Northern Mariana Islands 96952; (670) 433-9288. Defendant's counsel was Assistant Attorney General Michael L. Ernest, Office of the Attorney General, 2nd Floor, Juan A. Sablan Building, Capital Hill, Caller Box 10000, Saipan, Northern Mariana Islands 96950; (670) 664-2361.

9. *Commonwealth v. Palma*, Crim. No. 04-0262 (N.M.I. Super. Ct. Apr. 15, 2005). Defendant was charged with various criminal offenses including involuntary manslaughter. At the jury trial, defendant's expert witness, forensic pathologist Dr. Daniel Spitz, son of renowned forensic pathologist Dr. Werner Spitz, testified live from Michigan despite the major time zone difference and distance. The jurors returned a verdict of not guilty. Opinion supplied.

Counsel for the prosecution was John Heberling Eaton, former Assistant Attorney General, Cowlitz County Public Defender, 7107 Topeka Lane, Vancouver, Washington 98664; 360-578-7430. Counsel for defendant were former Chief Public Defender Masood Karimipour, now with United Nations Office on Drugs and Crime, 30a Abdulla Kahhor St., 100100 Tashkent, Uzbekistan; Tel. (+ 998 71) 120 80 50; Fax (+ 998 71) 120 62 90. Time zone: GMT + 5 hours; and Charlotte ("Sherry") Tenorio, former Assistant Public Defender.

10. *Waibel, et al., v. Farber, et al.*, Civ. No. 01-0236 (N.M.I. Super. Ct. Nov. 28, 2003). This civil action stems from the largest Saipan probate case of *In re the Estate of Larry Hillblom*, the co-founder of the courier service DHL. His estate involved millions of dollars in assets located at various parts of the world. Plaintiffs were the heirs of Hillblom, through their trustee, Waibel, whose assets were frozen by the U.S. District Court when Defendant Farber and his two attorneys filed a federal breach of contract claim against one of the heirs' attorney, Lujan. Farber's attorney, Perkin, then filed a third-party complaint against Lujan, and Lujan filed a counterclaim against Perkin and fourth-party complaint against Perkin's insurance company. This action was removed to the federal court, and the federal action proceeded to a conclusion. The federal court remanded certain claims to the NMI trial court. After reviewing the extensive record, I granted the insurance company's motion to dismiss Lujan's claim, and granted Perkin's motion for summary judgment against Lujan. Both decisions were appealed by Lujan, and the CNMI Supreme Court affirmed both decisions (one on different grounds). Opinion supplied.

Counsel for Third-Party Plaintiff Perkin and Fourth-party Defendant St. Paul Fire & Marine Insurance Co. was Vicente T. Salas, Esq., Law Offices of Vicente T. Salas 2nd Floor, MIC Building, Chalan Monsignor Guerrero, San Jose Village, P.O. Box 501309, Saipan, Northern Mariana Islands 96950; (670) 234-7455. Counsel for

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Third-Party Defendant Lujan was Edward Arriola, Esq., Sablan Bldg., Suite1-F, San Jose, P.O. Box 501788, Saipan, Northern Mariana Islands 96950; (670) 233-5505.

d. For each of the 10 most significant opinions you have written, provide: (1) citations for those decisions that were published; (2) a copy of those decisions that were not published; and (3) the names and contact information for the attorneys who played a significant role in the case.

1. *Pangelinan v. NMI Retirement Fund*, Civ. No. 04-0578 (N.M.I. Super. Ct. Mar. 1, 2006) (Order Granting in Part and Denying in Part Plaintiff's and Defendant's Cross-Motions for Summary Judgment), *aff'd*, 2009 MP 12. Opinion supplied.

Counsel for the Plaintiff was Robert T. Torres, Esq., Plata Drive, Whispering Palms Chalan Kiya, P.O. Box 503758, Saipan, Northern Mariana Islands 96950; (670) 234-7859. Counsel for the Defendant was James Holman, Esq., NMI Retirement Fund P.O. Box 5818 CHRB, Saipan, Northern Marianas Islands 96950; (670) 322-3863.

2. *Commonwealth v. Castillo*, Crim. No. 07-0148D (N.M.I. Super. Ct. Nov. 5, 2008) (Decision Denying Defendant's Motion to Vacate Conviction). Opinion supplied.

Counsel for the prosecution was Jeffrey L. Warfield, Sr., former Chief Prosecutor, now with the Guam Alternate Public Defender's Service Corporation, Suite 902, DNA Building, 238 AFC Flores Street, Hagatna, Guam 96910; (671) 475-3234. Counsel for Defendant was former Assistant Public Defender Malik K. Edwards, now with the Federal Public Defender-Northern Division, 100 South Charles Street, Tower II, Ninth Floor, Baltimore, Maryland 21201; (410) 962-3962.

3. *Bank of Guam v. Farnsworth*, Civ. No. 95-0811 (N.M.I. Super. Ct. Oct. 29, 2003) (Order Denying Plaintiffs' Proposed Order for Defendant's Commitment). Opinion supplied.

Counsel for Plaintiff was Michael A. White, Esq., The Law Offices of Michael A. White, LLC, P.O. Box 5222, Saipan, Northern Mariana Islands 96950; (670) 234-6547.

4. *Commonwealth v. Olaitiman*, Crim. No. 04-0252C (N.M.I. Super. Ct. Feb. 8, 2005) (Order Denying Defendant's Demand for Jury Trial as to All Counts). Opinion supplied.

Counsel for the prosecution was former Chief Prosecutor Jeffrey L. Warfield, Sr., now at Guam Alternate Public Defender's Service Corporation, Suite 902, DNA Building; 238 AFC Flores Street, Hagatna, Guam 96910 USA; (671) 475-3234. Counsel for defendant was former Assistant Public Defender Angela Marie Krueger, now Deputy Public Defender at Tulare County Public Defender, Courthouse Room G-35, 221 South Mooney Boulevard, Visalia, California 93291; (559) 636-4500.

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5. *Judicial Council of Guam v. Department of Law, Government of Guam*, Civ. No. CV0766-04 (Guam Super. Ct. Oct. 14, 2004) (Decision and Order Denying Defendant's Request for the Disqualification of the Honorable Michael J. Bordallo). Opinion supplied.

Counsel for plaintiff was Kevin J. Fowler, Esq., Dooley Roberts & Fowler LLP, Suite 201, Orlean Pacific Plaza, 865 South Marine Drive, Tamuning, Guam 96913; (671) 646-1222. Counsel for defendant was Philip D. Isaac, Assistant Attorney General, Office of the Attorney General, Civil Division, Guam Judicial Center, Suite 2-200E, 120 West O'Brien Drive, Hagatna, Guam 96910; (671) 475-3324, ext. 145.

6. *CNMI Dept. of Public Health & Environmental Services v. Castillon*, Civ. No. 05-0517 (N.M.I. Super. Ct. July 24, 2006) (Order Granting Motion to Stay and to Compel Binding Arbitration). Opinion supplied.

Counsel for Plaintiff was David Lochabay, Assistant Attorney General, Office of the Attorney General, 2nd Floor, Juan A. Sablan Administration Building, Capital Hill, Caller Box 10007 CHRB, Saipan, Northern Mariana Islands 96950; (670) 664-2341. Counsel for Defendant was Michael W. Dotts, Esq., O'Connor Berman Dotts & Banes, P.O. Box 501969 C.K., Saipan, Northern Marianas Islands 96950; (670) 234-5684.

7. *Commonwealth v. Macabalo*, Crim. No. 06-0110 (N.M.I. Super. Ct. Dec. 27, 2007) (Order Denying Defendant's Motion to Include Non-citizens in the Jury Array). Opinion supplied.

Counsel for the prosecution was Assistant Attorney General Joseph LG. Taijeron, Jr., now with the Northern Marianas Legislature, Legislative Bureau – House Legal Counsel, P.O. Box 500586, Saipan, Northern Mariana Islands 96950; (670) 664-8846/8934. Counsel for the defendant was Richard C. Miller, Assistant Public Defender, Office of the Public Defender, Commonwealth of the Northern Mariana Islands, P.O. Box 10007, Saipan, Northern Marianas Islands 96950; (670) 234-6215.

8. *Dotts & Banes v. Oh*, Civ. No. 03-0312 (N.M.I. Super. Ct. June 5, 2008) (Order Granting Def's Mot for Relief from Order, Default Judgment, and Entry of Default). Opinion supplied.

Counsel for plaintiff was George Hasselback, Esq., now Assistant Attorney General, Office of the Attorney General – Criminal Division, Caller Box 10007, Saipan, Northern Marianas Islands 96950; (670) 664-2336. Counsel for Defendant was Richard Pierce, Esq., Richard W. Pierce Law Office, LLC, 2nd Floor Alexander Building, San Jose, P.O. Box 503514 CK, Saipan, Northern Marianas Islands 96950; (670) 235-3425.

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9. *Pacific Financial Corp. v. Sablan, et al.*, Civ. No. 02-0031 (N.M.I. Super. Ct. Jan. 4, 2008) (Order Granting Petition for Exercise of Redemption Rights). Opinion supplied.

Counsel for Purchasers was F. Matthew Smith, Esq., Law Office of F. Matthew Smith, LLC, P.O. Box 501127, Saipan, Northern Marianas Islands 96950; (670) 234-7455. Counsel for Redemptioner was Victorino DLG. Torres, Esq., Torres Brothers, LLC, Attorneys at Law, P.O. Box 501856, Middle Road, Garapan, Saipan, Northern Marianas Islands 96950; (670) 233-5504.

10. *Stephanson v. Teregeyo, et al.*, Civ. No. 01-0497 (N.M.I. Super. Ct. March 16, 2004) (Decision and Final Order), *aff'd in part, rev'd in part*, 2008 MP 13. Opinion supplied.

Counsel for plaintiff was S. Joshua Berger, Esq., Law Offices of S. Joshua Berger, D'Torres Building, Garapan, P.O. Box 504340, Saipan, Northern Marianas Islands 96950; (670) 235-8060. Counsel for defendant was Ray Yana, Esq., Yana Law Office, P.O. Box 500052, Saipan, Northern Marianas Islands 96950; (670) 234-6529.

e. Provide a list of all cases in which certiorari was requested or granted.

None.

f. Provide a brief summary of and citations for all of your opinions where your decisions were reversed by a reviewing court or where your judgment was affirmed with significant criticism of your substantive or procedural rulings. If any of the opinions listed were not officially reported, provide copies of the opinions.

1. *APLUS Co., Ltd. v. Niizeki Int'l Saipan, Co., Ltd.*, Civ. No. 99-0532 (N.M.I. Super. Ct. May 25, 2004) (Order Granting Plaintiff's Motion for Summary Judgment and Dismissing Defendant's Counterclaims), *rev'd*, 2006 MP 13.
Plaintiff filed suit for one billion yen for unpaid loans secured by lease mortgages. A concurrent lawsuit was filed in Tokyo, Japan. My decision to grant Plaintiff's motion for summary judgment based on an interpretation of the written agreement was reversed. The CNMI Supreme Court concluded there was a material fact in dispute regarding whether or not there was a third party beneficiary in the contract agreement between Plaintiff and Defendant. After the remand, the parties settled and the case was dismissed with prejudice. Opinion supplied.

2. *Waibel, et al., v. Farber, et al.*, Civ. No. 01-0236 (N.M.I. Super. Ct. Nov. 28, 2003) (Order Granting Fourth-Party Defendant St. Paul's Motion to Dismiss David J. Lujan's Third Party ("Fourth-Party") Complaint Pursuant to Com. R. Civ. P. Rule 12(b)(6)), *aff'd on different grounds*, 2006 MP 15.
Insurance company, St. Paul, moved for dismissal for lack of personal jurisdiction and, in the alternative, argued that Lujan's claim was barred by the statute of limitations. I concluded that personal jurisdiction was proper, but found that Lujan's

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claim was indeed barred by the statute of limitation. On appeal, the CNMI Supreme Court concluded that there was no personal jurisdiction and on this ground affirmed the dismissal. Opinion supplied.

3. *Stephanson v. Teregeyo, et al.*, Civ. No. 01-0497 (N.M.I. Super. Ct. Mar. 16, 2004) (Decision and Final Order), *aff'd in part, rev'd in part*, 2008 MP 13.
This was a contract dispute concerning the unique land alienation provision of the CNMI's Constitution, which restricts longterm leasehold interests held by persons of non-NMI descent. Plaintiff was the last assignee of a land interest from an initial lessee; plaintiff also had a separate and direct assignment agreement with lessor, arguably in violation of the NMI's Constitution. I concluded that Plaintiff validly held the first assigned leasehold interest, but ruled that separate assignment agreement violated the NMI's land alienation provisions. I also addressed the issue of attorneys fees pursuant to the lease agreement. On appeal, the CNMI Supreme Court affirmed my decision on the assignments, but reversed the award of attorneys fees to require the inclusion of the fees incurred from the appeal process. Opinion supplied.

4. *In re Estate of Roberto*, Civ. No. 98-983D (N.M.I. Super. Ct. Jan. 25, 2007) (Order Granting Partial Removal of Non-estate Assets), *aff'd in part, rev'd in part*, 2010 MP 7 (Torres, J., dissenting)
In this probate action, another judge's decision was appealed to the CNMI Supreme Court. The appellate court (*Roberto I*) remanded the matter to the trial court for action on various estate assets. The decision was appealed to the U.S. Court of Appeals for the Ninth Circuit, and the U.S. Supreme Court denied the writ of certiorari. On remand, I issued the removal order to implement the mandate. On appeal, the *Roberto II* CNMI Supreme Court affirmed in part my removal order as to certain assets, and reversed in part as to two assets. It concluded that one asset requires a specific finding of fact, and the other a specific distribution of the asset that was comingled with other funds in an account. Opinion supplied.

g. Provide a description of the number and percentage of your decisions in which you issued an unpublished opinion and the manner in which those unpublished opinions are filed and/or stored.

Currently, none of the Commonwealth Superior Court opinions are being published in print form in the Commonwealth Reporter. The last print form publication predates my joining the bench. My published opinions, however, are available online at the Commonwealth Law Revision Commission's website, www.cnmilaw.org. Commonwealth law dictates when an opinion must be published. 1 CMC § 3404. When a decision determines a substantial question of procedure or substantive law, it must be set forth in written opinions with reasons for the decision stated. The issuance of a published opinion for other reasons is discretionary. I estimate that I have issued about four hundred unpublished decisions, or ninety percent of all my decisions. The decisions are frequently announced on the record from the bench, and the taped recordings of these rulings are stored. A short written order memorializing

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a given decision is also maintained. There are occasions wherein a decision is announced on the record, and is followed by a written opinion with the reasoning.

h. Provide 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, provide copies of the opinions.

1. *Tan v. Younis Art Studio, Inc.*, Civ. No. 01-0624 and *Fitial v. Younis Art Studio, Inc.*, Civ. No. 03-0116, consolidated cases (N.M.I. Super. Ct. Feb. 2, 2004) (Order Granting Younis Art Studio, Inc.'s Motion for Summary Judgment), *aff'd*, 2007 MP 11 (First amendment freedom of the press). Opinion supplied in response to 13(c).

2. *Commonwealth v. Olaitiman*, Crim. No. 04-0252 (N.M.I. Super. Ct. Feb. 8, 2005) (Order Denying Defendant's Demand for Jury Trial as to All Counts). No appeal was filed. (Jury trial rights.) Opinion supplied in response to 13(d).

3. *Pangelinan v. NMI Retirement Fund*, Civ. No. 04-0578 (N.M.I. Super. Ct. Mar. 1, 2006) (Order Granting in Part and Denying in Part Plaintiff's and Defendant's Cross-Motions for Summary Judgment), *aff'd*, 2009 MP 12 (Due process). Opinion supplied in response to 13(d).

4. *Commonwealth v. Vaughn*, Crim. No. 06-0222 (N.M.I. Super. Ct. June 11, 2007) (Order Denying Defendant's Motion to Suppress Evidence Seized Pursuant to Eavesdropping Warrant). No appeal was filed. (Fourth amendment search and seizure.) Opinion supplied.

5. *Commonwealth v. Macabalo*, Crim. No. 06-0110 (N.M.I. Super. Ct. Dec. 27, 2007) (Order Denying Defendant's Motion to Include Non-citizens in the Jury Array), App. No. 2008-SCC-0004-CRM. (Jury trial right.) Case is pending on appeal by the prosecution on another issue. Opinion supplied in response to 13(d).

6. *Commonwealth v. Castillo*, Crim. No. 07-0148 (N.M.I. Super. Ct. Nov. 5, 2008) (Decision Denying Defendant's Motion to Vacate Conviction). No appeal was filed. (Double jeopardy and right to a fair trial.) Opinion supplied in response to 13(d).

7. *Commonwealth v. Faisao, et al.*, Crim. No. 07-0107 (N.M.I. Super. Ct., Nov. 10, 2008) (Order Denying Defendant Rita I. Tarope's Motion to Suppress Statements as made in violation of *Garrity* Rule and Motion to Suppress Statements as Involuntary and/or Taken in Violation of *Miranda* Rights). No appeal was filed. (Fifth Amendment Right Against Self-Incrimination.) Opinion supplied.

8. *Commonwealth v. Aguon*, Crim. No. 01-0063 (N.M.I. Super. Ct., Dec. 31, 2010) (Order Denying Defendant's Motion to Dismiss for Lack of Jurisdiction) (Governor's commutation power.) Opinion supplied.

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i. Provide citations to all cases in which you sat by designation on a federal court of appeals, including a brief summary of any opinions you authored, whether majority, dissenting, or concurring, and any dissenting opinions you joined.

I have not sat by designation on any federal court of appeals.

14. **Recusal:** If you are or have been a judge, identify the basis by which you have assessed the necessity or propriety of recusal (If your court employs an "automatic" recusal system by which you may be recused without your knowledge, please include a general description of that system.) Provide a list of any cases, motions or matters that have come before you in which a litigant or party has requested that you recuse yourself due to an asserted conflict of interest or in which you have recused yourself sua sponte. Identify each such case, and for each provide the following information:

a. whether your recusal was requested by a motion or other suggestion by a litigant or a party to the proceeding or by any other person or interested party; or if you recused yourself sua sponte;

b. a brief description of the asserted conflict of interest or other ground for recusal;

c. the procedure you followed in determining whether or not to recuse yourself;

d. your reason for recusing or declining to recuse yourself, including any action taken to remove the real, apparent or asserted conflict of interest or to cure any other ground for recusal.

In the Northern Marianas Islands, the Code of Judicial Conduct and Section 3308 of Title 1 of the Commonwealth Code govern the disqualification of judges. Section 3308 substantially mirrors the Federal statute at 28 U.S.C. § 455. Procedurally, once a formal motion to disqualify is filed in an action, the judge presiding must cease all actions and another judge is assigned to hear the motion and decide it without the opportunity for the target judge to decide the matter first, or to answer to the allegation.

Once a case is assigned to me, I review the file and determine if I am subject to either a mandatory basis or a waivable basis for disqualification. If I find a mandatory basis, I enter a self-recusal order, and the case is sent back to the presiding judge for reassignment. If there may be a basis for disqualification that can be waived by the parties, I schedule a status conference hearing to discuss the issue with the parties and have a waiver entered on the record. I have recused myself *sua sponte* in matters that involve individuals who have a close relationship with me but do not fall under the mandatory recusal statutory basis, without taking any action to remove the apparent or asserted conflict of interest or to cure any other grounds for recusal, because of the closeness of the relationship.

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When I first became a judge, all the trial court judges and I agreed that I would not handle any of the criminal cases that were filed while I was Attorney General pursuant to the mandatory provisions of the statute. In exchange, I was assigned more civil cases, and I was assigned my equal share of newly charged criminal cases thereafter. Furthermore, I have recused myself from handling a case in which my husband participated on the appellate panel and the case was remanded to the trial court.

During the past seven and a half years, out of the approximately 8,000 cases I handled, I recused myself from 55 cases.

i. Litigant or party requested recusal.

Tan v. Younis Art Studio, Inc., Civ. No. 01-0624, and *Fitial v. Younis Art Studio, Inc.*, Civ. No. 03-0116, consolidated cases (N.M.I. Super. Ct. Feb. 2, 2004), *aff'd*, 2007 MP 11.

Initially, the parties informally and jointly sought my recusal because the third party defendant, a congressman, alleged that in my former capacity as Attorney General, he engaged me in various communications in his official capacity that I may have perceived as being offensive. In a written response, I denied all the parties' informal request to disqualify myself. I asserted that all the communications that occurred were in a professional capacity and that there was no basis to conclude that there was any personal adversity that would affect my impartiality. When the motion for disqualification was subsequently filed, another judge heard the motion and denied it. I handled the cases thereafter, and issued a ruling which was appealed. The CNMI Supreme Court affirmed my decision. The issue of disqualification was not appealed.

ii. *Sua sponte* recusals based on the appearance of impartiality under 1 CMC § 3308(a).

1. *Commonwealth v. Furey*, Traff. No. 07-00348 (N.M.I. Super. Ct. Nov. 5, 2008). Defendant is married to a close, longtime family friend.
2. *Commonwealth v. Ada*, Civ. No. 08-0261 (N.M.I. Super. Ct. Oct. 1, 2008). Defendant is a close, longtime family friend.
3. *Manglona v. Cepeda, et al.*, Civ. No. 08-0075C (N.M.I. Super. Ct. Sept. 9, 2009). Plaintiff is a close uncle of my husband.
4. *In Re The Estate of Angel Malite* (on remand), Civ. No. 97-0369 (N.M.I. Super. Ct. Apr. 11, 2007). My husband was a member of the panel on appeal that decided the case and remanded the case to the trial court.
5. *Fusco, et al. v. Matsumoto*, Civ. No. 06-0080 (N.M.I. Super. Ct. June 4, 2007). Defendant is married to a close, first cousin of my husband.
6. *UIU Micronesia v. Manglona, et al.*, Civ. No. 06-0335C (N.M.I. Super. Ct. Sept. 5, 2006). Defendants are my husband's close uncle and aunt.
7. *Fleming v. Castro*, Civ. No. 07-0405T (N.M.I. Super. Ct. Nov. 12, 2007). Defendant is my sister-in-law's mother.

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8. *Hwang v. Woo Young Lee and Eastern Hope Corp.*, Civ. No. 08-0007E (N.M.I. Super. Ct. Aug. 24, 2009). Defendant's son is a very close friend of my son.
9. *Commonwealth v. Camacho*, Crim. No. 07-0053C (N.M.I. Super. Ct. July 25, 2007). Defendant is married to my first cousin.
10. *Commonwealth v. Sablan*, Crim. No. 09-0186C (N.M.I. Super. Ct. Nov. 27, 2009). Defendant is my husband's uncle.
11. *In Re Estate of Elias Sablan v. Sablan*, Civ. No. 04-0250 (N.M.I. Super. Ct. Mar. 29, 2007). Defendant is my Godsister.
12. *Joeten Motor Co., Inc. v. Camacho*, Civ. No. 04-0303 (N.M.I. Super. Ct. Feb. 19, 2005). Defendant is a close family friend.
13. *MPLT v. APLE 501, et al.*, Civ. No. 06-0366C (N.M.I. Super. Ct. Aug. 31, 2006). A co-defendant is a close first cousin of my husband.
14. *Ada, et al. v. Nakamoto*, Civ. No. 08-0029 (N.M.I. Super. Ct. June 13, 2008). Plaintiff is a close, longtime personal friend.
15. *Estate of Ponciano Rasa*, Civ. No. 08-0049 (N.M.I. Super. Ct. June 13, 2008). Decedent's wife is my first cousin.
16. *Guerrero v. Islam, et al.*, Civ. No. 08-0222 (N.M.I. Super. Ct. June 16, 2008). Plaintiff is a close personal friend.
17. *Commonwealth v. Ada*, Civ. No. 08-0261 (N.M.I. Super. Ct. Oct. 1, 2008). Defendant is a longtime family friend.
18. *Century Insurance v. Manglona dba UR Food Deli*, Small Claims No. 06-0300 (N.M.I. Super. Ct. June 1, 2006). Defendant is a close aunt of my husband.
19. *Grand Market v. Manglona dba Tasi Mobil Station*, Small Claims No. 06-0854 (N.M.I. Super. Ct. Dec. 14, 2006). Defendant is a close uncle of my husband.
20. *UPCA v. Guerrero*, Small Claims No. 06-0556 (N.M.I. Super. Ct. Aug. 22, 2007). Defendant is a childhood friend.
21. *Heng Da Corp. v. Mendiola*, Small Claims No. 06-0644 (N.M.I. Super. Ct. Dec. 4, 2006). Defendant is a longtime family friend.
22. *National Collection Services Inc. v. Manzanares*, Small Claims No. 06-0732 (N.M.I. Super. Ct. Mar. 28, 2007). Defendant is a close family friend.
23. *United Pacific Collections Agency v. Sanchez*, Small Claims No. 06-0750 (N.M.I. Super. Ct. Feb. 27, 2007). Plaintiff's claim is for my regular car service provider.
24. *Friendly Finance Co., Inc. v. Yobech*, Small Claims No. 06-1096 (N.M.I. Super. Ct. June 4, 2008). Defendant is a childhood friend.
25. *ToothWorks v. Ayuyu*, Small Claims No. 06-1159 (N.M.I. Super. Ct. Sept. 25, 2007). Defendant is a close personal and family friend.
26. *Auto Glass Pro v. Iginoef*, Small Claims No. 07-0069 (N.M.I. Super. Ct. Apr. 13, 2007). Defendant is a close niece.
27. *NMC Bookstore v. Manglona*, Small Claims No. 07-0318 (N.M.I. Super. Ct. Oct. 18, 2007). Defendant is a close niece.

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28. *TJ Enterprises v. Manglona*, Small Claims No. 06-0408 (N.M.I. Super. Ct. Mar. 8, 2007). Defendant is a close niece.
29. *Quimsing, et al. v. Mesa, et al.*, Small Claims No. 07-0430 (N.M.I. Super. Ct. June 10, 2008). Defendant is a close first cousin of my husband.
30. *Sister Remedios Early Childhood Dev. Center v. Santos, et al.*, Small Claims No. 07-0922 (N.M.I. Super. Ct. June 4, 2008). Defendant is an old childhood friend.
31. *Bank of Saipan v. Attao*, Small Claims No. 07-0996 (N.M.I. Super. Ct. June 12, 2008). Defendant is a personal friend.
32. *Commonwealth Treasury v. Torres*, Small Claims No. 08-0114 (N.M.I. Super. Ct. June 6, 2008). Defendant is a close niece.
33. *Commonwealth Treasury v. Niro*, Small Claims N. 08-0133 (N.M.I. Super. Ct. June 6, 2008). Defendant is my first cousin.
34. *Commonwealth v. Fleming*, Traff. No. 10-01564 (N.M.I. Super. Ct. Oct. 21, 2010). In this traffic case, Defendant was my daughter's close friend.

iii. *Sua sponte* self-recusal based on mandatory basis per 1 CMC § 3308(b).

1. *Commonwealth v. Villagomez*, Traff. No. 09-00314 (N.M.I. Super. Ct. Apr. 1, 2009). Defendant is my brother.
2. *Commonwealth v. Apas*, Traff. No. 04-05064 (N.M.I. Super. Ct. Nov. 13, 2009). One of plaintiff's witnesses is my brother.
3. *Marianas Ins. Co. v. Commonwealth Ports Auth.*, Civ. No. 01-0269D (N.M.I. Super. Ct. Sept. 8, 2008). My brother is a member of the Defendant's board of directors.
4. *Bank of Saipan v. Fennel*, Civ. No. 04-0449A (N.M.I. Super. Ct. Dec. 12, 2006). I was involved in the underlying receivership case as a government attorney.
5. *New Shintani Corp. v. Manglona*, Civ. No. 06-0418R (N.M.I. Super. Ct. Sept. 5, 2006). Brother-in-law is a shareholder of the Plaintiff corporation.
6. *UMDA v. G.E.T., et al.*, Civ. No. 07-0152 (N.M.I. Super. Ct. May 21, 2007). Father is a shareholder.
7. *JWS Airconditioning and Refrigeration, Ltd. v. PB Properties*, Civ. No. 04-0540C (N.M.I. Super. Ct. Oct. 31, 2005). Father-in-law owns Defendant corporation.
8. *NMI Retirement Fund v. NMI Gov. Fitial, et al.*, Civ. No. 06-0367D (N.M.I. Super. Ct. Aug. 12, 2008). Brother had a pending civil action against plaintiff that relates to the same basis of this action.
9. *Torres Refrigeration v. Dela Cruz*, Small Claims No. 06-0311 (N.M.I. Super. Ct. June 21, 2006). Defendant is my brother-in-law's sister.
10. *Haugh v. CNMI Travel Agency, et al.*, Small Claims No. 06-0390 (N.M.I. Super. Ct. Sept. 12, 2006). My sister was a witness to the matter.
11. *BankPacific v. Castro, et al.*, Small Claims No. 05-0283 (N.M.I. Super. Ct. Jan. 4, 2006). Defendants are my sister-in-law's parents.

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12. *Teregeyo v. Iguel*, Small Claims No. 05-897 (N.M.I. Super. Ct. Dec. 12, 2005). Plaintiff was my courtroom clerk.
13. *Pangelinan v. Guerrero*, Small Claims No. 05-0965 and 4 consolidated cases (N.M.I. Super. Ct. Sept. 18, 2006). Defendant is a longtime, close personal friend.
14. *Townhouse v. Pangelinan*, Small Claims No. 06-0013 and 06-0081 (N.M.I. Super. Ct. Mar. 2, 2006). Defendant is my first cousin.
15. *Commonwealth Dept. of Treasury v. Pacific Resort Dev., Inc., et al.*, Small Claims No. 08-0277 (N.M.I. Super. Ct. May 15, 2008). Co-Defendant is my father.
16. *JCT Enterprises v. Villagomez, et al.*, Small Claims No. 94-1779 (N.M.I. Super. Ct. Apr. 26, 2007). One of the defendants is my brother.
17. *Isla Financial v. Villagomez, et al.*, Small Claims No. 07-0028 (N.M.I. Super. Ct. Mar. 7, 2007). Defendant is my niece.
18. *Commonwealth v. Camacho*, Crim. No. 07-0117C (N.M.I. Super. Ct. Sept. 6, 2007). The victim is my nephew.
19. *Atalig v. OKP, et al.*, Civ. No. 06-0119R (N.M.I. Super. Ct. Aug. 28, 2006). My brother-in-law is the resident director and potential witness of a co-defendant corporation.
20. *In re the Estate of Roberto*, Civ. No. 98-983D (N.M.I. Super. Ct. Dec. 27, 2010). I became a co-trustee of a family trust which has a long-term leasehold agreement with a claimant in the case.
21. *Songsong, et al. v. Property Management, Inc., et al.*, Civ. No. 10-0329C (N.M.I. Super. Ct. Dec. 27, 2010). One of the potential witnesses is my sister.

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

a. List chronologically any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. If appointed, please include the name of the individual who appointed you. Also, state chronologically any unsuccessful candidacies you have had for elective office or unsuccessful nominations for appointed office.

Library Council Member, 1991-1994 (appointed by Governor Lorenzo Guerrero)
Attorney General, 2002-2003 (appointed by Governor Juan Babauta)

I have not had any unsuccessful candidacies for elective office or unsuccessful nominations for appointed office.

b. List all memberships and offices held in and services rendered, whether compensated or not, to any political party or election committee. If you have ever held a position or played a role in a political campaign, identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

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In 1991, I served as the unpaid Treasurer for the Committee to elect Thomas P. Villagomez to the CNMI House of Representatives. I received and dispensed funds for campaign expenses for the election of this candidate, my brother.

16. **Legal Career:** Answer each part separately.

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

i. 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 served as a law clerk to the Hon. Virginia Sablan-Onerheim, CNMI Superior Court, from March 1997 to October 1997. Thereafter, from October 1997 to January 1998, I served as a law clerk to the Hon. Alexandro C. Castro, Presiding Judge of the CNMI Superior Court.

ii. whether you practiced alone, and if so, the addresses and dates;

I have never been in private practice.

iii. 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.

1998 – 2003
CNMI Office of the Attorney General
Juan A. Sablan Bldg., Capital Hill
P. O. Box 10007
Saipan, Northern Mariana Islands 96590
Attorney General (2002 – 2003)
Deputy Attorney General (2002)
Assistant Attorney General, Civil Division (2001 – 2002)
Assistant Attorney General, Criminal Division (1998 – 2001)

iv. whether you served as a mediator or arbitrator in alternative dispute resolution proceedings and, if so, a description of the 10 most significant matters with which you were involved in that capacity.

I never served as a mediator or arbitrator.

b. Describe:

i. the general character of your law practice and indicate by date when its character has changed over the years.

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I have never engaged in the private practice of law. All my legal practice has been in public service for the Commonwealth of the Northern Mariana Islands. As Attorney General, I supervised all the government attorneys, investigation unit, and support staff, and provided legal advice to the Governor, Lt. Governor, and department heads until I joined the judiciary in 2003.

ii. your typical clients and the areas at each period of your legal career, if any, in which you have specialized.

After my judicial clerkships, I became a prosecutor and handled traffic, juvenile, misdemeanor and felony criminal cases. I prosecuted all my cases in the trial level and the appellate level.

I transferred from the Criminal Division to the Civil Division of the Attorney General's Office, and became a litigator as well as legal counsel for various government agencies.

c. Describe the percentage of your practice that has been in litigation and whether you appeared in court frequently, occasionally, or not at all. If the frequency of your appearances in court varied, describe such variance, providing dates.

About 90% of my practice was as a prosecutor, and 10% was as a civil litigator. I appeared in court frequently.

i. Indicate the percentage of your practice in:
1. federal courts: 00.1%
2. state courts of record: 95.9%
3. other courts:
4. administrative agencies: 4%

ii. Indicate the percentage of your practice in:
1. civil proceedings: 10%;
2. criminal proceedings: 90%

b. State the number of cases in courts of record, including cases before administrative law judges, you tried to verdict, judgment or final decision (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

I tried two civil jury trials in U.S. District Court for the NMI, one as chief counsel, and the other as associate counsel. I tried five criminal jury trials in NMI Superior Court, serving as sole counsel in two cases, chief counsel in one case, and associate counsel in two cases.

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I tried approximately 50 bench trials in traffic court and misdemeanor criminal cases as sole counsel.

i. What percentage of these trials were:
   1. Jury: 10%
   2. non-jury: 90%

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

I have not practiced before the Supreme Court of the United States.

17. **Litigation**: Describe the ten (10) most significant litigated matters which you personally handled, whether or not you were the attorney of record. 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. *Cabrera, et al. v. CNMI Dept. of Public Safety, et al.*, Civ. No. 00-0022 (D.N.M.I. Dec. 18, 2001) (Hon. Alex R. Munson)

I successfully defended three police officers in a Section 1983 lawsuit for alleged police brutality filed by a family arrested by the officers. After plaintiffs' case in chief, I had most of the counts dismissed on a Fed. R. Civ. P. Rule 50(a) motion. The jury granted judgment in favor of our clients for all remaining counts.

My co-counsel was Clyde Lemons, Jr., currently with the Alternate Public Defender's Office, Government of Guam, 158 East Nandez, #B65, Dededo, Guam 96929; (671) 687-2033. Plaintiffs' counsel was Joseph A. Arriola, Esq. who is currently in federal custody.

2. *Commonwealth v. Manila*, Crim. No. 00-0509 (N.M.I. Super. Ct. Oct. 21, 2001) (Hon. Virginia Sablan-Onerheim), *aff'd*, 2005 MP 17.

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I prosecuted this first shaken baby syndrome murder case in the Northern Mariana Islands. My involvement included the investigation of the case, which began when the baby was still in the hospital before her death. The case required the testimony of several medical experts to distinguish the different injuries and establish the cause of death. The jury convicted the defendant who was sentenced to sixty years imprisonment.

My co-counsel was Clyde Lemons, Jr., currently with the Alternate Public Defender's Office, Government of Guam, 158 East Nandez, #B65, Dededo, Guam 96929; (671) 687-2033. Defendant's counsel were Jeffrey A. Moots, now with Cunliffe & Cook, P.O. Box 4876, Hagatna, Guam, 96932; (671) 472-1824; and Diane Cabrera, now a special assistant prosecutor for the U.S. Attorney's Office in Montana for the Crow Tribe, 400 North Main Street, #181, Butte, Montana 59701; (406) 723-6611.

3. *Commonwealth v. Martinez*, Traff. No. 97-6830 (N.M.I. Super. Ct. Mar. 31, 1998) (Hon. Miguel S. Demapan, now Chief Justice of the CNMI Supreme Court), *aff'd in part, rev'd in part*, 2000 MP 5.

I prosecuted this traffic DUI case against an off-duty police officer that resulted in a conviction for DUI, and other violations. I also defended the conviction on appeal. The CNMI Supreme Court affirmed the DUI and one violation, but reversed the conviction for the other violation. This caselaw is frequently cited in traffic cases.

Opposing counsel at trial and on appeal was Bruce Berline, Esq., Beach Road, Garapan, P.O. Box 5682 CHRB, Saipan, Northern Mariana Islands 96950; (670) 233-3663.

4. *Commonwealth v. Cabrera, et al.*, Crim. No. 97-0447 (N.M.I. Super. Ct. Feb. 2, 1999) (Hon. Edward Manibusan).

I was co-counsel for the prosecution in a murder case against two defendants. I participated in the trial as well as witness preparation, including securing the key witness' presence from Washington State. The jury returned a not guilty verdict on the murder charge, but the trial judge returned a guilty verdict on the misdemeanor charge of assault and battery on another victim, and sentenced both defendants to the maximum term of imprisonment.

Lead counsel was Robert J. Steinborn, now at Bendinelli Law Office, Plaza North, Suite 10, 11184 Huron Street, Denver, Colorado 80234; (303) 940-9900. Opposing counsel were Perry B. Inos, now the Honorable Perry B. Inos, Associate Judge, CNMI Superior Court, P.O. Box 500307, Saipan, Northern Mariana Islands 96950; (670) 236-9753; and Antonio M. Atalig, Esq., P.O. Box 5135 CHRB, Saipan, Northern Mariana Islands 96950; (670) 234-2189.

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5. *Commonwealth v. Scragg*, Traff. No. 98-03872 (N.M.I. Super. Ct. Oct. 1, 1998) (Hon. Edward Manibusan), *aff'd*, 2000 MP 4

I prosecuted this traffic case in a bench trial that resulted in a conviction for DUI and refusal to submit to a breath test. I also defended the conviction on appeal before the CNMI Supreme Court. The conviction was affirmed, and this caselaw is frequently cited in traffic cases.

Defendant's counsel at trial and on appeal was Bruce Berline, Esq., Law Office of Bruce Berline, Beach Road, Garapan, P.O. Box 5682 CHRB, Saipan, Northern Mariana Islands 96950; (670) 233-3663.

6. *Commonwealth v. Nekaifes, et al.*, Crim. No. 97-0372 (N.M.I. Super. Ct. Apr. 15, 1999) (Hon. Timothy H. Bellas)

I prosecuted this criminal case against two women who robbed a gas station. I tried the first defendant, an elderly woman, before a jury in the NMI Superior Court. The jury returned a guilty verdict. This is a very unusual case in Saipan because it was the first time an elderly woman was convicted for robbery by a jury. She was sentenced to serve a short prison term. Her co-defendant, the principal in the robbery, was subsequently charged with two additional criminal cases. She entered a guilty plea to a felony charge and was sentenced to serve a term of imprisonment.

Defendant Nekaifes was represented by former Assistant Public Defender Robert T. Torres, Plata Drive, Whispering Palms Chalan Kiya, P.O. Box 503758, Saipan, MP 96950; (670) 234-7859. Defendant Omar was represented by court-appointed counsel William C. Campbell, Esq. His current address is unknown.

7. *Commonwealth v. Pangelinan*, Crim. No. 98-0485 (N.M.I. Super. Ct. Mar. 21, 2000) (Hon. Virginia Sablan-Onerheim)

This criminal domestic violence case involved a police officer who had previously investigated domestic violence cases. Prior to the bench trial, the defendant married the complaining witness. The complaining witness nevertheless wanted to proceed with the trial because she was insistent that the hitting did in fact occur. During the trial, however, she recanted her story and I had to treat her as a hostile witness. The court returned a not guilty verdict.

Defendant's court-appointed counsel was Douglas F. Cushnie, P.O. Box 500949, Saipan, Northern Mariana Islands 96950; (670) 234-6830.

8. *Commonwealth v. Santos*, Crim. No. 99-0494 and three consolidated cases (CR99-0495, CR00-0076 and CR00-0135) (N.M.I. Super. Ct. Aug. 17, 2000) (Hon. Edward Manibusan)

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Defendant, a repeat offender with a long history of criminal cases, committed a series of serious offenses within weeks after being released from serving a prison term. I prosecuted the CNMI cases, and had the four cases set for a jury trial. While the cases were awaiting trial, defendant was charged in federal court for a federal criminal offense based on the same facts as one of the CNMI cases. Defendant's attorney for the federal case and the attorney for the CNMI cases recommended a joint disposition to me and the Assistant U.S. Attorney. Defendant entered a guilty plea in two of the CNMI cases and the federal case. He received a long prison sentence to serve in the federal penal system.

Opposing counsel was Assistant Public Defender Douglas Hartig, CNMI Office of the Public Defender, P.O. Box 10007, Saipan, Northern Mariana Islands 96950; (670) 234-6215. The Assistant U.S. Attorney was David Wood. His current contact information is unknown.

9. *Commonwealth v. Cabrera, et al.*, Crim. No. 00-0381 (N.M.I. Super. Ct. July 27, 2001) (Hon. David A. Wiseman)

A father and his three sons were charged for attacking their neighbor and the neighbor's guest, and causing extensive damage to the residence in the presence of the victim's family. I assisted in the prosecution of the case wherein all four defendants were convicted by the jury.

Lead counsel Clyde Lemons, Jr. is currently with the Alternate Public Defender's Office, Government of Guam, 158 East Nandez, #B65, Dededo, Guam 96929; (671) 687-2033. Defendants were represented by counsel Joseph A. Arriola, who is currently in federal custody.

10. *Commonwealth v. Teigita, et al.*, Crim. No. 00-0273 and three consolidated cases (CR97-0199; CR99-0580; and CR00-0306) (N.M.I. Super. Ct. Oct. 31, 2000) (Hon. Edward Manibusan)

Defendant had three pending criminal cases in the CNMI court when he was charged with two individuals for committing a poker room robbery. He and his co-defendants were indicted in federal court for the same incident. A global disposition for all four CNMI cases and one federal case was reached. Within nine months after the incident occurred, Defendant entered a guilty plea in two of the four CNMI cases and the federal case, and received a sentence to serve in a federal penitentiary. This prompt resolution served to deter the rampant poker room robbery cases that were occurring on island at the time.

Defense counsel was Douglas Hartig, CNMI Office of the Public Defender, P.O. Box 10007, Saipan, Northern Mariana Islands 96950; (670) 234-6215.

18. **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

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involve litigation. Describe fully the nature of your participation in these activities. List any client(s) or organization(s) for whom you performed lobbying activities and describe the lobbying activities you performed on behalf of such client(s) or organizations(s). (Note: As to any facts requested in this question, please omit any information protected by the attorney-client privilege.)

I represented the CNMI government agency in an arbitration case of a private company's suit against the CNMI Government for a breach of contract claim after the company performed a major renovation of an island marina. During arbitration, the parties pursued settlement that incorporated creative terms requiring legislative approval. This brought both parties before a senate legislative hearing. The legislature's failure to approve the settlement caused the matter to return to arbitration. Another attorney handled the renewed arbitration hearing. The company prevailed, and obtained a judgment against the government that was significantly more than the terms of the proposed settlement amount.

19. **Teaching**: What courses have you taught? For each course, state the title, the institution at which you taught the course, the years in which you taught the course, and describe briefly the subject matter of the course and the major topics taught. If you have a syllabus of each course, provide four (4) copies to the committee.

    I have not taught any courses at any institution.

20. **Deferred Income/ Future Benefits**: List the 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. Describe the arrangements you have made to be compensated in the future for any financial or business interest.

    I have an interest in the Northern Mariana Islands Retirement Fund system which vested after my tenth year of government service.

21. **Outside Commitments During Court Service**: 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, I have no plans, commitments, or agreements to pursue outside employment, with or without compensation, during my service with the court.

22. **Sources of Income**: 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, licensing fees, 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).

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See attached Financial Disclosure Report.

23. **Statement of Net Worth**: Please complete the attached financial net worth statement in detail (add schedules as called for).

See attached Net Worth Statement.

24. **Potential Conflicts of Interest**:

a. Identify the family members or other persons, parties, categories of litigation, and financial arrangements that are likely to present potential conflicts-of-interest when you first assume the position to which you have been nominated. Explain how you would address any such conflict if it were to arise.

Parties that are likely to present potential conflicts of interest during the initial service in the position to which I have been nominated would include my family members and close friends. My spouse is a justice on the Commonwealth Supreme Court. A filing in federal court that may call on a certified question to the Commonwealth Supreme Court will cause my spouse, rather than me, to disqualify himself.

b. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern.

I will handle all matters involving actual or potential conflicts of interest through the careful and diligent application of the Code of Conduct for United States Judges, 28 U.S.C. § 455, as well as other relevant Canons and statutory provisions. In the event of my disqualification, a designated judge from the courts of record of the Northern Mariana Islands, or District Court of Guam, or a circuit or district judge of any of the circuits, may be assigned to serve as a judge. 48 U.S.C. § 1821(b)(2).

25. **Pro Bono Work**: 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.

Due to the fact that I have been a government attorney throughout my legal career, I have been unable to provide free legal service to people in general because my work contract prohibits me from engaging in legal work outside of my public employment.

I have, however, participated in public forum conferences as a guest speaker, and have volunteered in various school competitions involving the law. I have been a guest speaker to mock trial high school and junior high school teams, as well as served as an attorney coach.

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Over the years, I would welcome school children to my courtroom and speak to them about the judicial system. I also visited schools as part of the Northern Marianas judiciary's "Courts in the Classroom" program.

I devote a substantial amount of time spearheading the Criminal Justice Information System for the entire Northern Mariana Islands, including the planning, procurement and utilization of the law enforcement executive departments' communications infrastructure.

Recently, I served as a coach for the Northern Marianas high school team for the "We the People" national competition in Washington, D.C. on April 23-26, 2010. This program enlightens students on the U.S. Constitution.

26. **Selection Process**:

a. Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and the interviews in which you participated). Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, please include that process in your description, as well as whether the commission recommended your nomination. List the dates of all interviews or communications you had with the White House staff or the Justice Department regarding this nomination. Do not include any contacts with Federal Bureau of Investigation personnel concerning your nomination.

There is no selection commission in the Northern Marianas to recommend judicial candidates for the U.S. District Court of the Northern Mariana Islands.

On July 13, 2009, U.S. Congressman Gregorio Kilili Sablan from the Northern Mariana Islands called and informed me that he was considering the possibility of recommending me for the U.S. District Court judge position in the event Chief Judge Alex R. Munson retired. I met U.S. Congressman Sablan on August 29, 2009, and he personally informed me that he would recommend my nomination to the federal bench.

On September 2, 2009, I received an e-mail from the CNMI Lieutenant Governor's legal counsel informing me that Governor Benigno R. Fitial intended to recommend me to the President to replace Judge Alex Munson. On October 22, 2009, Governor Fitial wrote a letter to President Barack Obama recommending me as the next judge for the United States District Court for the Northern Mariana Islands. On December 31, 2009, a similar letter was written by U.S. Congressman Sablan.

Since January 7, 2010, I have been in communications with pre-nominations staff in the Department of Justice. I interviewed in Washington, D.C. with attorneys from the White House Counsel's Office and Department of Justice on March 10,

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2010. The President submitted my nomination to the United States Senate on January 26, 2011.

b. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any currently pending or specific case, legal issue or question in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning your position on such case, issue, or question? If so, explain fully.

No.

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AO 10
Rev. 1/2006

NOMINATION FILING

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
Manglona, Ramona V	U.S. Dist. Ct., N. Marianas	01/26/2011
4. Title (Article III judges indicate active or senior status; magistrate judges indicate full- or part-time)	**5a. Report Type (check appropriate type)**	**6. Reporting Period**
U.S. District Judge	[X] Nomination, Date 01/26/2011 [ ] Initial [ ] Annual [ ] Final 5b. [ ] Amended Report	01/01/2010 to 12/31/2010
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.**	
Guma Hustisia/House of Justice P.O. Box 500307 Saipan, MP 96950	Reviewing Officer_____ Date_____	

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

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

[ ] NONE *(No reportable positions.)*

	POSITION	NAME OF ORGANIZATION/ENTITY
1.	Co-trustee	Family trust
2.		
3.		
4.		
5.		

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

[X] NONE *(No reportable agreements.)*

	DATE	PARTIES AND TERMS
1.		
2.		
3.		

FINANCIAL DISCLOSURE REPORT Page 2 of 8	Mangiona, Ramona V	01/26/2011

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

A. Filer's Non-Investment Income

☐ NONE *(No reportable non-investment income.)*

	DATE	SOURCE AND TYPE	INCOME (yours, not spouse's)
1.	2010	Salary - Associate Judge, Superior Court, Northern Mariana Islands	$ 120,000
2.	2009	Salary - Associate Judge, Superior Court, Northern Mariana Islands	$ 120,000
3.			
4.			
5.			

B. Spouse's Non-Investment Income - *If you were married during any portion of the reporting year, complete this section.*
(Dollar amount not required except for honoraria.)

☐ NONE *(No reportable non-investment income.)*

	DATE	SOURCE AND TYPE
1.	2010	Spouse's salary - Supreme Court, Northern Mariana Islands
2.		
3.		
4.		
5.		

IV. REIMBURSEMENTS -- *transportation, lodging, food, entertainment.*
(Includes those to spouse and dependent children. See pp. 25-27 of instructions.)

☐ NONE *(No reportable reimbursements.)*

	SOURCE	DESCRIPTION
1.		EXEMPT
2.		
3.		
4.		
5.		

V. GIFTS. *(Includes those to spouse and dependent children. See pp. 28-31 of instructions.)*

☐ NONE *(No reportable gifts.)*

SOURCE	DESCRIPTION	VALUE
1.	EXEMPT	
2.		
3.		
4.		
5.		

VI. LIABILITIES. *(Includes those of spouse and dependent children. See pp. 32-34 of instructions.)*

☐ NONE *(No reportable liabilities.)*

CREDITOR	DESCRIPTION	VALUE CODE
1. Bank of Guam	Personal loan (secured by CD)	L
2. M.S.Villagomez, Inc. (family corp.)	Account payable for house maintenance and improvements	K
3.		
4.		
5.		

VII. INVESTMENTS and TRUSTS – *income, value, transactions (includes those of the spouse and dependent children. See pp. 34-57 of filing instructions)*

☐ NONE *(No reportable income, assets, or transactions.)*

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A-H)	B. (2) Type (e.g. div., rent, or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g. buy, sell, merger, redemption)	If not exempt from disclosure (2) Date Month - Day	(3) Value Code 2 (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)
1. Bank of Guam - cash account	B	Interest	L	T	Exempt				
2. Bank of Saipan - cash account	A	Interest	K	T	Exempt				
3. Sunset Life Insurance (Universal)		None	J	T	Exempt				
4. Rental Property -DFS Saipan (Parcel 1)	D	Rent	N	W	Exempt				
5. Family Trust	G	Distribution	P2	W	Exempt				
6. -Navy Hill 1					Exempt				
7. -Navy Hill 2					Exempt				
8. -Chalan Kanoa 1					Exempt				
9. -Chalan Kanoa 2					Exempt				
10. -DanDan 1					Exempt				
11. -DanDan 2					Exempt				
12. -Tuturam 1					Exempt				
13. -Tuturam 2					Exempt				
14. -Tuturam 3					Exempt				
15. -Papago 1					Exempt				
16. -Papago 2					Exempt				
17. -Papago 3					Exempt				

1. Income Gain Codes: (See Columns B1 and D4)	A =$1,000 or less	B =$1,001 - $2,500	C =$2,501 - $5,000	D =$5,001 - $15,000	E =$15,001 - $50,000
2. Value Codes (See Columns C1 and D3)	F =$50,001 - $100,000	G =$100,001 - $1,000,000	H1 =$1,000,001 - $5,000,000	H2 =More than $5,000,000	
	J =$15,000 or less	K =$15,001 - $50,000	L =$50,001 - $100,000	M =$100,001 - $250,000	
	N =$250,001 - $500,000	O =$500,001 - $1,000,000	P1 =$1,000,001 - $5,000,000	P2 =$5,000,001 - $25,000,000	
3. Value Method Codes (See Column C2)	P3 =$25,000,001 - $50,000,000	R =Cost (Real Estate Only)	P4 =More than $50,000,000	T =Cash Market	
	Q =Appraisal	V =Other	S =Assessment		
	U =Book Value		W =Estimated		

VII. INVESTMENTS and TRUSTS – *income, value, transactions (includes those of the spouse and dependent children. See pp. 34-57 of filing instructions)*

☐ NONE *(No reportable income, assets, or transactions.)*

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A-H)	B. (2) Type (e.g. div., rent, or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g. buy, sell, merger, redemption)	If not exempt from disclosure (2) Date Month - Day	(3) Value Code 2 (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)
18. -Papago 4					Exempt				
19. -Papago 5					Exempt				
20. -As Perdido 1					Exempt				
21. -As Perdido 2					Exempt				
22. -As Perdido 3					Exempt				
23. -As Perdido 4					Exempt				
24. -Chalan Kiya 1					Exempt				
25. -Chalan Kiya 2					Exempt				
26. -San Roque 1					Exempt				
27. -Fina Sisu Parcels 1 to 13					Exempt				
28. -Puerto Rico Village 1					Exempt				
29. -Tanapag 1					Exempt				
30. -San Jose Village 1					Exempt				
31. -Garapan Leased property 1					Exempt				
32. -San Jose Leased property 1					Exempt				
33. -Rota property 1					Exempt				
34. -Rota property 2					Exempt				

1. Income Gain Codes: (See Columns B1 and D4)
A =$1,000 or less
B =$1,001 - $2,500
C =$2,501 - $5,000
D =$5,001 - $15,000
E =$15,001 - $50,000
F =$50,001 - $100,000
G =$100,001 - $1,000,000
H1 =$1,000,001 - $5,000,000
H2 =More than $5,000,000

2. Value Codes (See Columns C1 and D3)
J =$15,000 or less
K =$15,001 - $50,000
L =$50,001 - $100,000
M =$100,001 - $250,000
N =$250,001 - $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
R =Cost (Real Estate Only)
P4 =More than $50,000,000
T =Cash Market

3. Value Method Codes (See Column C2)
Q =Appraisal
S =Assessment
U =Book Value
V =Other
W =Estimated

VII. INVESTMENTS and TRUSTS – *income, value, transactions (includes those of the spouse and dependent children. See pp. 34-37 of filing instructions)*

☐ NONE *(No reportable income, assets, or transactions.)*

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A-H)	B. (2) Type (e.g. div., rent, or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g. buy, sell, merger, redemption)	If not exempt from disclosure (2) Date Month - Day	(3) Value Code 2 (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)
35. -Bank of Guam cash account					Exempt				
36. -First Hawaiian Bank cash account					Exempt				
37. -Bank of Saipan cash account					Exempt				
38. -Bank of Guam Prime Vest cash account					Exempt				
39. -Bank of Guam stock					Exempt				
40. -Saipan Shipping Co. stock					Exempt				
41. -Saipan Stevedore Co., Inc. stock					Exempt				
42. -Duty Free Shoppers Ltd. stock					Exempt				
43. -Pacific Sky Travel stock					Exempt				
44. -San Roque Beach Dev. Corp. stock					Exempt				
45. -M.S. Villagomez Inc. stock					Exempt				

1. Income Gain Codes: (See Columns B1 and D4)	A =$1,000 or less	B =$1,001 - $2,500	C =$2,501 - $5,000	D =$5,001 - $15,000	E =$15,001 - $50,000
2. Value Codes (See Columns C1 and D3)	F =$50,001 - $100,000	G =$100,001 - $1,000,000	H1 =$1,000,001 - $5,000,000	H2 =More than $5,000,000	
	J =$15,000 or less	K =$15,001 - $50,000	L =$50,001 - $100,000	M =$100,001 - $250,000	
	N =$250,001 - $500,000	O =$500,001 - $1,000,000	P1 =$1,000,001 - $5,000,000	P2 =$5,000,001 - $25,000,000	
3. Value Method Codes (See Column C2)	P3 =$25,000,001 - $50,000,000	R =Cost (Real Estate Only)	P4 =More than $50,000,000	T =Cash Market	
	Q =Appraisal	V =Other	S =Assessment		
	U =Book Value		W =Estimated		

FINANCIAL DISCLOSURE REPORT Page 7 of 8	Name of Person Reporting Manglona, Ramona V	Date of Report 01/26/2011

VIII. ADDITIONAL INFORMATION OR EXPLANATIONS. *(Indicate part of Report.)*

All parcels of real property listed in Part VII, lines 6 to 34, owned by the family trust, are located in the villages in the Northern Mariana Islands.

FINANCIAL DISCLOSURE REPORT Page 8 of 8	Name of Person Reporting Manglona, Ramona V	Date of Report 01/26/2011

IX. CERTIFICATION.

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

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

Signature R Manglona Date January 26, 2011

NOTE: ANY INDIVIDUAL WHO KNOWINGLY AND WILFULLY FALSIFIES OR FAILS TO FILE THIS REPORT MAY BE SUBJECT TO CIVIL AND CRIMINAL SANCTIONS (5 U.S.C. app. § 104)

FILING INSTRUCTIONS

Mail signed original and 3 additional copies to:

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

Ramona Manglona

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		102	100	Notes payable to banks-secured		70	600
U.S. Government securities				Notes payable to banks-unsecured			
Listed securities				Notes payable to relatives			
Unlisted securities				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			
Real estate owned – add schedule		690	000	Chattel mortgages and other liens payable			
Real estate mortgages receivable				Other debts-itemize:			
Autos and other personal property		33	000	- M.S. Villagomez Inc. (family corporation)		22	000
Cash value-life insurance		4	100	- automobile loan		21	000
Other assets itemize:							
- Family Trust (1/12 interest) (estimated)	1	000	000				
- CNMI Retirement Plan Contributions		215	000				
				Total liabilities		113	600
				Net Worth	1	920	600
Total Assets	2	044	200	Total liabilities and net worth	2	044	200
CONTINGENT LIABILITIES				GENERAL INFORMATION			
As endorser, comaker or guarantor				Are any assets pledged? (Add schedule)	No		
On leases or contracts				Are you defendant in any suits or legal actions?	No		
Legal Claims				Have you ever taken bankruptcy?	No		
Provision for Federal Income Tax							
Other special debt							

FINANCIAL STATEMENT

NET WORTH SCHEDULES

Real Estate Owned	
Personal residence	$500,000
Leased property (1/12th interest)	100,000
Undeveloped residential lot	5,000
Undeveloped commercial lot #1	15,000
Undeveloped commercial lot #2	20,000
Agricultural lot	50,000
Total Real Estate Owned	$690,000

AFFIDAVIT

I, Ramona Villagomez Manglona, do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

January 24, 2011
(DATE)

Ramona Villagomez Manglona
(NAME)

NOTARY PUBLIC
STATE OF NEVADA
County of Clark
DONNA NITTA
No: 03-7770-1
My Appointment Expires Dec. 14, 2011

(NOTARY)

Now I have a question for each of you, the same question for all three. I have always believed that moderation and judicial modesty are two qualities very important in a potential judge. What do these concepts mean to you? And in your opinion, what are the most important qualities in a judge? Mr. Oetken.

Mr. OETKEN. I also agree, Senator, that moderation and judicial modesty are crucial characteristics of a judge. In my view, the notion of judicial modesty I guess has two parts to it. I think one is the idea of following precedent, stare decisis. Judges do not write on a blank slate. There are learned opinions that have been decided before judges and, in particular, opinions of the Second Circuit and the Supreme Court govern all decisions of the district court in the Southern District. If I were a judge, I would follow those.

The second piece of judicial modesty, in my view, really is the idea of deciding the case or controversy before a judge and not going beyond the case or controversy to address issues that are not presented in that case.

Senator SCHUMER. Great. Thank you.

Mr. Engelmayer.

Mr. ENGELMAYER. Thank you, Senator, for that question. I agree with everything that Mr. Oetken has said. Judicial modesty is of vital importance. I think it means resolving questions in accord solely with the rule of law. It means resolving questions as narrowly as possible. I think it also speaks to the proper judicial temperament. A judge is not the center of attraction. Nobody comes to court to see the judge. It is the parties who are there to have their controversy resolved, and it is very important for the court to instill a sense of dignity, to listen carefully, to treat the parties as the most important people in the room. And that is something that I have seen in each of the different contexts in which I have litigated, that parties and their lawyers rightly expect cases to be resolved in accordance with the rule of law by a neutral and independent decider, you know, with projecting a sense of dignity for all people in the room, and always with a vigorous review of the record.

Senator SCHUMER. Thank you.

Judge Manglona.

Judge MANGLONA. Yes, thank you, Mr. Chairman. I agree with my two panel members here, with their statements. I would also like to add in regards to judicial modesty, I believe it also means that it is a recognition that as a judge there is so much power entrusted by the people and that to exercise that power by being compliant to the rule of law is something of significance, to recognize that any decision to be rendered has to be pursuant to what is the fact before the judge and what law applies.

Thank you.

Senator SCHUMER. Thank you. I thank you all three.

Now I have an individual question for each of you. First to Mr. Engelmayer, the Southern District—no, sorry. You spent a significant amount of time litigating pro bono matters, and you have been involved in highly contentious cases, such as the New York State same-sex marriage case. Can you give the Committee assurance

that you understand the difference between being an advocate and being a judge?

Mr. ENGELMAYER. Thank you, Senator, for that question. There is an enormous difference between being an advocate and a judge, and I understand it. An advocate's responsibility is to zealously advance the interests of his or her client, making all responsible arguments that are in the client's strategic interest. That is what an advocate does, and an advocate is the one who sets the table by bringing the lawsuit or defending it, as the case may be.

A judge stands in an entirely different situation. A judge is a passive recipient of cases brought by other people, and his or her responsibility is to resolve those cases as narrowly as possible in accord with the rule of law, checking all of his or her personal opinions at the courthouse door and being rigorously neutral and independent.

Senator SCHUMER. Thank you.

Now for Judge Manglona. You have been a judge on the Northern Mariana Islands Superior Court since 2003 as well as the Guam Supreme Court. How will this experience help you as a Federal judge in the NMI? And what are the differences between the Federal docket and the Commonwealth docket in the NMI?

Judge MANGLONA. Thank you, Mr. Chairman. I believe that my 8 years of trial court experience as a trial court judge is going to be very beneficial for my role, if so confirmed by the Senate, as a U.S. district court judge. And having also sat as a panel member in the appellate level for the Guam Supreme Court, I also have that perspective of recognizing what a review is going to look for. So rather than waiting for the review process, that insight guides me to handle a case, again, pursuant to the rule of law. So I believe the difference in regards to the case law that I would handle—of course, we understand the difference of State laws and the Federal laws, but basically the same rules apply, which is the rule of law.

Senator SCHUMER. Thank you.

My time has expired, but I have one question for Mr. Oetken. With Senator Coons' permission I will ask it and then we will move on to him.

Mr. Oetken, you have worked at Cablevision in New York for 7 years as in-house counsel, and you now manage the company's extensive litigation portfolio. That is a fairly unusual background for a Federal judge. What do you think you will bring to the table from your experience working inside a Fortune 500 companies and one of the largest television and radio providers in the country?

Mr. OETKEN. Thank you for the question, Senator Schumer. I actually think it has been an amazing experience to be the head of litigation at Cablevision because it is a company—it is an extremely well run company, but it is also a company that has a really wide array of legal issues ranging from regulatory issues and then in the litigation area, everything from complex commercial cases and contract cases to securities, patent, copyright, employment cases, antitrust cases. It is a really wide range of cases in a wide range of courts, mostly in the New York-New Jersey-Connecticut area, but also in other courts in some situations.

I also think that that experience, in addition to exposing me to many different legal issues and cases, it has allowed me to see

from the inside of a corporation what legal life is like, what a corporation faces in the legal arena, what boards of directors face in the legal arena. And I think that is a very valuable insight, particularly in the Southern District.

Senator SCHUMER. Thank you. I thank all three of you. I think in my judgment each of you will make fine judges on the courts to which you are nominated.

Senator Coons.

Senator COONS. Thank you, Senator Schumer, and thank you for the opportunity to join you in welcoming this distinguished panel of nominees. If you will forgive me, I wanted to pay particular attention and deference to Mr. Oetken, who was my classmate in law school. I do have a question for all three of you, but if you will forgive me for extemporizing for a moment.

Since we knew each other at Yale Law School, I have followed your career with interest. You are, in my view, a shockingly bright person who has exactly the sort of varied career in the private sector with several major law firms, if I remember correctly, Jenner & Block, Debevoise & Plimpton as well as Cablevision, and a number of admirable clerkships—Oberdorfer on the district court and then to Cudahy on the circuit court and then Justice Blackmun on the Supreme Court. My impression of you has always been that you are someone with a searching intellect and a broad range of capabilities. And forgive me, to all three of our distinguished applicants, the shared experience of cramming for exams such as they were in our school compelled me to come here and speak on his behalf.

Senator SCHUMER. The pass/fail system at Yale Law School.

[Laughter.]

Senator COONS. An important secret.

I do think, if I might then conclude, that, Mr. Oetken, you would provide a unique combination of perspectives, and you present an exceptional series of qualifications. I think it is important for us to continue to advocate in the Senate and in the country for the proposition that it is your professional qualifications and skills that should be considered, and those alone, as we weigh whether or not you are appropriate for the bench. And I would be thrilled to speak on the floor in support of your nomination as well. I think it would do all of us proud to have you join the Article III judiciary of this Nation.

If you would then, all three of you, answer, if you could, just a simple question, not that dissimilar from those asked by my colleague, but each of you has unique, important personal experiences, both professional and personal, that you would bring to the bench, and they are part of why it would be good to have you on the bench. Help me understand, if you would, in series, how those personal and professional experiences will inform your deliberations as a judge yet not deter you from applying the law as it is found? It is important, I think, for us to promote and sustain a judiciary that is broadly reflective of the diversity of the American people, yet to continue to reinforce the principle that you are bound by precedent, that you are compelled to find the law as you find it in front of you, and that your own personal experience does not unduly inform your deliberations as a judge. If you might, ma'am.

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Judge MANGLONA. Thank you, Senator Coons. From my personal and professional experience, having served the Commonwealth of the Northern Mariana Islands during the entire period, previously as a prosecutor and then as a litigator, before serving on the bench, I believe bringing this experience over to the Federal court would assist me as a Federal judge to recognize the distinctions between the State issues as well as the Federal issues. And, personally, all the efforts that I have tried to assist those that are interested in the area of law, when I reach out with the kids and the children in schools and high schools trying to have them recognize that what they are learning are really issues that are actually being litigated and are affecting our community, both in the State level as well as the Federal. I believe that is how things would——

Senator COONS. Thank you.

Mr. Engelmayer.

Mr. ENGELMAYER. Thank you, Senator Coons. I have had the extraordinary fortune to have a very diverse background prior to coming here today. I have been a prosecutor or a Government lawyer for over a decade and in private practice for over a decade. I have had extensive criminal and civil experience, trial and appellate experience, and I have represented institutions as well as individuals.

But if there is one thing that comes out from all of those things, it is this: that litigants, clients, parties cherish it when a judge is locked in on the facts, is a hard worker, has mastered the record, has gone beyond the briefs, and really is dedicated to getting things right. And contrary-wise, it is dispiriting when a judge comes unprepared. And in addition to the judicial values that I addressed earlier in response to Senator Schumer's question of independence, neutrality, fidelity to the rule of law, simply a heroic work ethic and willing to dig into the fact is something that I have learned is what litigants expect and deserve.

Senator COONS. Very well. Thank you, sir.

Mr. Oetken.

Mr. OETKEN. Thank you, Senator Coons. First I want to thank you for those extraordinarily kind and generous remarks. I remember very fondly our days in law school, and I would just point out that I think just about all of us in law school are not surprised to see you in the U.S. Senate and very pleased that you are in the U.S. Senate. I never expected that I would be on this side of the table from you, though.

To answer the question, I have also been fortunate enough to have a pretty wide variety of experience that includes some years in the judicial branch, some years in the executive branch, and also several years of private practice. And I think the sort of common thread in terms of qualities that I have, I think, that I think would serve me well on the Federal bench are, in particular, my ability to listen carefully to the parties and to different arguments and not to give short shrift to those arguments but to really try to understand them in their best light, to analyze difficult legal issues carefully and rigorously, to write well, and at the end of the day to rule on the basis of the law and precedent in the facts of a particular case before me.

Senator COONS. Thank you. Thank you very much. I know your family and your friends are justifiably proud of all of you, and it is my hope that we will move swiftly to your consideration and confirmation by this body.

Thank you very much for being with us today.

Senator SCHUMER. Thank you, Senator Coons, and I want to thank our panel for their excellent answers and for being here. We share a little bit of the joy on this great occasions that your family and friends have, and that is a very nice thing that is part of this.

With that, if Senator Coons has no further questions—I do not, but before I close the hearing, I want to ask unanimous consent that the statement of our Chairman, who really takes a great interest in the process here, the nomination process, as well as trying to fill the many vacancies we have on the bench, he has a statement which I would ask unanimous consent to be read into the record, without objection.

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

Senator SCHUMER. The record will stay open for 7 days, and the hearing is adjourned.

[Whereupon, at 3:13 p.m., the Committee was adjourned.]

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

QUESTIONS AND ANSWERS

Responses of Bernice B. Donald
Nominee to be United States Circuit Judge for the Sixth Circuit
to the Written Questions of Senator Chuck Grassley

1. **In 2008, the American Bar Foundation newsletter reported on a panel you participated in regarding employment discrimination. According to the newsletter, you commented as follows:**

> **Judge Donald "shared with the audience how, as an African American woman sitting on an appellate court composed of white men, she had a 'vastly different' view of what evidence supports summary judgment, a difference she ascribed to the men having never experienced discrimination. Though judges try to 'objectively evaluate the facts and apply the law,' Donald said, they 'are viewing things through the lens of culture, through their experience, and that may impact how...much weight [they] accord to different things.'"**

a. Do you continue to hold that view?

Response: I have never held a vastly different view of the summary judgment standard. The statement was erroneously attributed to me.

Before my hearing, I made a good faith effort to be responsive in my answers to the Senate Judiciary Questionnaire and to provide all requested materials. After conducting a diligent search and making an exhaustive inquiry of persons and entities involved, I was advised by the American Bar Foundation ("ABF") that there was no transcript or tape of this panel discussion. Although I did not recall making this statement because it is not something that I have ever believed, I assumed that the writer misinterpreted my remarks. It did not occur to me that the article might have misattributed another speaker's remarks to me. Rather, I assumed that the statement must have been in reference to a specific case that I heard while sitting by designation. That is why I answered as I did during my hearing before the Senate Judiciary Committee. Then as now, I maintained that I adhere to Supreme Court and Sixth Circuit precedent in analyzing summary judgment motions in all cases.

After my hearing, in preparing my responses to subsequent written questions, I conducted a search to find any case to which I might have been referring and determined that I sat by designation in three cases involving review of summary judgment in discrimination cases: *Still v. Wilkinson*, 194 F.3d 1314 (Table), 1999 WL 801577 (6th Cir. 1999) (affirming the district court's grant of summary judgment to defendants in a religious discrimination case); *Hatcher v. General Electric*, 208 F.3d 213 (Table), No. 98-6304, 2000 WL 245515 (6th Cir. 2000) (affirming the district court's grant of summary judgment to defendants in an age discrimination case); and *E.E.O.C. v. Watkins Motor Lines, Inc.*, 463 F.3d 436 (6th Cir. 2006) (affirming the district court's grant of summary judgment to defendant as to a claim under the Americans with Disabilities Act).

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The week of March 24, 2011, I again contacted the ABF and requested that they explore all sources to try and find a transcript or tape. On Monday April 4, 2011, a representative of the ABF advised that, after checking with the office of the ABF Fellows, she had located a tape recording of the panel discussion as well as a transcript. After reviewing this information, the ABF representative has concluded, and I have confirmed, that the "vastly different standard" statement was made by the appellate court judge on the panel, not by me.

The misattributed quote appears on page 53 of the transcript and reads as follows:

> I have to comment on one area of the summary judgments. I joined an appellate court of all white men and I have to say that our view of what evidence supports summary judgment, of what . . . what evidence is needed, was vastly different. Most . . . they hadn't experienced discrimination, but some of these situations that came up, I mean, I felt clearly that they should go forward and it was like, no, this was not something that should be litigated at all.

This statement was made by Judge Miriam Shearing, a former justice on the Supreme Court of Nevada and the first woman to join that court. Unfortunately, the contract transcriber to whom the tape was sent misattributed the quote to me and, because the author of the article was working from the transcript, the error was perpetuated.

I am including, for the benefit of the Committee, the original tape recording of the panel discussion, a CD to which I have transferred the tape recording, and the unofficial, original transcript. Katharine Hannaford, Senior Writer and Grants Officer of the ABF, has listened to the recording and corrected the relevant pages. I have also attached the corrected pages 53 and 54 for the Committee's benefit.

Ms. Hannaford has informed me that a correction will be posted on the *Researching Law* section of the ABF website and also printed in the next hard copy issue of *Researching Law*.

b. Can you explain in what ways your view of a summary judgment motion could be "vastly different" based on your culture and experiences?

Response: Not applicable.

c. Could you give me an example of a case where your life experiences impacted your view and influenced a judicial decision?

Response: I cannot give such an example. I try to apply existing precedent and leave my life experiences and personal views outside the courthouse door.

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i. **What about *Woodruff v. Ohman*? In that case, after a bench trial, you found the defendants were liable for gender discrimination under Title VII. But, the Sixth Circuit reversed your decision and said your opinion "wholly failed to provide a sufficient basis for its finding of gender discrimination." Do you believe your life experiences influenced your decision in that case?**

Response: No.

ii. **In that same case, you ordered the defendant to issue a written apology. The Sixth Circuit found that you had exceeded your equitable power when you issued that order. The Sixth Circuit wrote: "As the Ninth Circuit noted when faced with a similar situation, 'we are not commissioned to run around getting apologies.'" On what basis did you believe you had the authority to order the defendant to issue a written apology?**

Response: That was an error on my part. At the time, I believed it to be an appropriate equitable remedy. It has been my experience that, in mediation, an apology can sometimes be an effective tool to resolve cases.

2. **At your hearing for your nomination to the District Court, then Chairman Hatch asked you about your view of the role of a judge. You responded, "[a]s a trial judge, I believe that the role of a judge, of course, is to apply and interpret the law, being bound by precedent interpreting statutes to apply to the facts that come before them." Do you believe you have faithfully lived up to your prior testimony regarding the role of a judge?**

Response: I believe that I have faithfully adhered to the role of a judge as I described it in 1995. That continues to be my view of the appropriate role of a judge today.

a. **How does your statement at your first hearing square with your comments that you have a "vastly different" view of summary judgment motions based on your personal experiences?**

Response: Not applicable.

b. **Is there an example you can share with us where you reached a difficult decision based on the law and facts, even though that decision conflicted with your personal views?**

Response: No, there is not.

3. **In *Robinson v. Shelby County Board of Education*, all of the parties filed a joint motion to grant the school system unitary status and end decades of court supervised desegregation orders. You denied the motion even though the**

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Department of Justice supported it. You implied that school children are constitutionally entitled to "educational guidance which includes teachers of the student's own race." You wrote this was the "unarticulated principal" behind past Supreme Court decisions emphasizing faculty integration. When the Department of Justice appealed your order, it argued your reasoning would result in "bizarre" and "racially discriminatory hiring and firing" of faculty. A divided panel of the Sixth Circuit agreed and held that if faculty assignments were carried out as you ordered, it "would effectively turn the purpose of the desegregation remedy on its head through the discriminatory hiring and recruitment of faculty."

a. **When you issued that order, were you strictly applying the law to the facts?**

Response: I did my best to strictly apply Supreme Court law to the facts of the case to determine whether the school system was in substantial compliance with the desegregation consent decree.

b. **In a 1983 decision by the Sixth Circuit, *Oliver v. Kalamazoo Board of Education*, the Court struck down a similar faculty hiring plan. The Circuit held, "students ... do not have a constitutional right to attend a school with a teaching staff of any particular racial composition." How was your reasoning concerning faculty composition consistent with the Sixth Circuit's decision in *Kalamazoo*?**

Response: I relied on Supreme Court precedent and the requirements of the consent decree in deciding the issues in the case. I determined that *Oliver v. Kalamazoo Board of Education* was not applicable because it dealt with a rigid racial quota, as opposed to a flexible goal, as in the *Robinson* case.

c. **I recognize that the dissent did not agree that *Kalamazoo* controlled, but your opinion did not even address that case. Can you explain why your opinion did not even consider a case that was so similar, if not controlling?**

Response: Please see answer to 3b.

4. **In *Oakley v. City of Memphis*, several officers of mixed races and gender brought suit against the City of Memphis for discrimination. Each of the officers qualified for promotion to Major based on a written examination. However, the City refused to certify the exam results. The City believed the results would have a disparate impact on minority and female applicants. The plaintiffs argued that they had direct evidence of discrimination, based on statements by a city official. That official, according to the plaintiffs, had said the City cancelled the promotional process because "not enough minority officers scored well enough to be promoted." Despite that evidence, you granted the city's summary judgment motion, and held that the plaintiffs were unable to establish discriminatory intent.**

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a. Was this a case where your view of a Summary Judgment Motion was "vastly different" based on your experiences?

Response: No. There is no case where I have employed a different standard for summary judgment. My decision in the above case was based on existing Supreme Court and Sixth Circuit precedent regarding "disparate impact" cases. My ruling in the *Oakley* case was unanimously affirmed by the Sixth Circuit.

b. The Sixth Circuit affirmed your decision. But in 2009, the Supreme Court vacated and remanded your decision when it considered and reversed the Second Circuit's decision in *Ricci*. We discussed the *Ricci* decision at length during Justice Sotomayor's confirmation hearings. That was the case where the City refused to certify the test results for firefighters because "too many whites and not enough minorities would be promoted." The Supreme Court held that "[w]ithout some other justification, this express, race-based decision making violates Title VII's command that employers cannot take adverse employment actions because of an individual's race." Given your comments regarding how your view of summary judgment motions is "vastly different" based on your experiences, can you understand why one might be concerned that you will not strictly apply the law to facts?

Response: I do not apply a "vastly different" standard in deciding summary judgment motions. I applied existing Sixth Circuit precedent in this pre-*Ricci* case.

5. You published an article in 2008 entitled, "*Immigrants and other Cultural Minorities as Non-Traditional Plaintiffs: Culture as a Factor in Determining Tort Damages*." The article discussed the use of culture in determining tort damages. As I understand the argument, it is that the amount of harm a plaintiff suffers may be more severe because of deeply held religious beliefs or customs. Therefore, the plaintiff should be entitled to a larger award to compensate for the greater damages. Is my understanding accurate?

Response: That article was written to draw attention to issues that judges will face in a complex multicultural society. I highlighted select cases to discuss the ways in which courts across the country have applied existing tort law to the measurement of damages and the determination of whether a plaintiff had stated a cause of action, when the plaintiff's culture is raised as a factor. I do not believe that the meaning of the law varies depending on a person's race, gender, ethnicity, religion, or culture.

a. Some of your statements in the article suggest you are sympathetic to this view. For instance, you wrote, to "disallow consideration of culture in tort cases would risk the denial of true justice to entire segments of a pluralistic society." Do you believe it is appropriate for judges to consider culture when assessing damages in tort actions?

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Response: No, except as may be required by existing Supreme Court and Sixth Circuit case law.

b. As a Judge, have you ever considered the culture of the plaintiff in determining the amount of damages awarded to a plaintiff in a civil action? If so, could you provide an example?

Response: No. I have not.

c. The use of cultural evidence in criminal cases has been the subject of much criticism. Many have argued that the use of cultural evidence as a defense is at odds with the American ideal that we are all equal before the law. As Duke University Law Professor Doriane Coleman put it,

"[t]olerance of the use of immigrant cultural evidence in criminal proceedings fundamentally conflicts with the principle that the protections given by the laws of the United States shall be equal in respect to life and liberty for all persons."

Do you agree with Professor Coleman? Why or why not?

Response: I believe that the law must be applied equally to all persons without regard to culture.

6. In *U.S. v. Elkin,* you suppressed certain evidence related to the search of the defendant's commercial building that contained a marijuana growing operation. There are several aspects of that case that I find troubling, but I want to focus on one part of it. In that case, a guard led the police officers to a commercial building owned by the defendant. While standing outside of the building, the officers looked through a hole in the wall and could see marijuana inside the building. You held that the officers did not have sufficient probable cause to look through the hole in the wall, and therefore the officers violated the defendants' reasonable expectation of privacy.

a. The Sixth Circuit reversed your decision because the officer made the observations from a lawful standing point, and the evidence was in plain view. The Sixth Circuit criticized your analysis as being "somewhat opaque."
Here is what I find troubling. The Plain View doctrine is well settled law. But, your opinion did not even address the issue. Can you explain why you didn't consider the doctrine?

Response: Yes, the Plain View doctrine is well settled law, and I have applied it in many cases. The Plain View doctrine provides that objects perceptible by an officer who is rightfully in a position to observe them, without aids, enhancements, or extra effort, may seize them without a warrant. *See Arizona v.*

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Hicks, 480 U.S. 321 (1987). In this case, I determined that the officers lacked probable cause to lawfully be on the premises and therefore found that the Plain View doctrine did not apply.

This case arose from the search and seizure of hydroponic marijuana growing in several buildings owned by Defendants. I addressed two issues. I first addressed the sufficiency and validity of search warrants as to certain buildings which were based on a tip from a citizen characterized as a "confidential informant." Next, I addressed the warrantless search of another building where the officers 1) used thermal imaging to measure the waste heat radiating from the building, 2) went onto the property, disregarding a "no trespassing" sign, and 3) looked through an inch-wide hole around a protruding PVC pipe to see into the building and observe the growing marijuana.

I found that the officers had entered into the "curtilage" of the building around which there existed a zone of privacy. Moreover, I found that the officers' use of thermal imaging, used to gain probable cause, constituted an impermissible search in violation of the Fourth Amendment. Although the Sixth Circuit did not address this issue, the Supreme Court later agreed, ruling in *Kyllo v. United States*, 533 U.S. 27 (2001), that thermal imaging does constitute a search under the Fourth Amendment.

7. **In U.S. v. Saucedo (2000), the Sixth Circuit found you abused your discretion in departing downward from the Federal Sentencing Guidelines in regard to one of four defendants who was arrested on drug charges. The Sixth Circuit rejected your reasoning stating that there was nothing in the record that would remove the case outside of the "heartland" of cases contemplated by the Guidelines and that each of your stated reasons for departure were adequately discussed in the Guidelines:**

   a. **Do you agree with the Sixth Circuit's analysis and conclusion in that case?**

      Response: I agree.

   b. **Now that the sentencing guidelines are advisory, rather than mandatory, how much deference do you afford them?**

      Response: I consider and analyze the Guidelines in each case and give them great deference. I also consider the required factors that Congress set forth in 18 U.S.C. § 3553.

   c. **Should you be confirmed, what will be your approach to reviewing sentencing issues in the District Courts of the Sixth Circuit?**

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Response: I would follow the precedent of the Sixth Circuit and the U.S. Supreme Court.

d. Do you agree that the sentence that a particular defendant receives should not depend on the judge he or she happens to draw?

Response: Yes, the judge selection/draw should be irrelevant to the sentence.

e. How do you now, and how will you in the future, ensure consistency in your judicial rulings when different criminals commit the same offenses?

Response: I look to the sentencing scheme set forth in the Guidelines, plus the statutory factors set forth in 18 U.S.C. § 3553. The Guidelines serve a valuable role in promoting consistency and avoiding disparity in sentencing. If I am confirmed, I will be guided by the precedents of the Sixth Circuit and the U.S. Supreme Court.

8. I have long been a strong proponent of allowing cameras in the federal courthouse. I believe it would open the courts to the public and bring about greater accountability. I am a sponsor of the Sunshine in the Courtroom Act, which would give judges the discretion to allow media coverage of federal court proceedings. In 1989, in the American Bar Association Journal, you argued against permitting cameras in the Supreme Court as well as at trial and appellate courts.

a. Have you had any firsthand experience with cameras in the courtroom either as a judge or as an attorney? If so, how do you feel it affected the courtroom environment?

Response: As a judge in a county criminal court, I have had firsthand experience with cameras in the courtroom. I was very comfortable with cameras and thought that a useful educational service was provided to the public. There have been no adverse effects and trials have not been prolonged.

b. What is your view on allowing television access to Federal Courts of Appeal and Federal District Courts?

Response: I support cameras in courts. This was an expository article written for a point-counterpoint piece in the ABA Journal. I defended the position assigned to me as the Chair of the ABA's Judicial Administration Division Committee on Media and Fair Trials. The piece does not reflect my personal view.

c. What are your thoughts on giving federal judges the discretion to allow the televising and broadcasting of cases?

Response: I support giving federal judges such discretion.

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9. Do you believe that our federal government is one of limited and enumerated powers?

Response: Yes, I believe that the powers of the federal government are limited and defined or enumerated, and the powers of the states are numerous and unlimited as set forth in the Tenth Amendment.

10. What does the concept of separation of powers mean for the federal courts? If confirmed, will this be a governing principle which you will follow?

Response: The concept espouses the genius of the framers in setting out three separate and coequal branches of the government. I will follow the guiding principle that it is the role and duty of 1) Congress to make the law; 2) the judicial branch to interpret the law; and 3) the executive branch to enforce the law.

11. Do you believe it is proper for a judge, consistent with governing precedent, to strike down an act of Congress that it deems unconstitutional? If so, under what circumstances, and applying what factors?

Response: A court should strike down an act of Congress, consistent with governing precedent, only where the act exceeds Congress's authority to act. I would examine the Constitution and Supreme Court precedent.

12. What is the most important attribute of a judge, and do you possess it?

Response: I espouse the view of Socrates that "[f]our things belong to a Judge: to hear courteously, to answer wisely, to consider soberly, and to decide impartially." I believe that impartiality and fairness are the most important attributes of a judge, but a judge must also have integrity, a solid work ethic, and competence. Yes, I do possess these attributes.

13. Please explain your view of the appropriate temperament of a judge. What elements of judicial temperament do you consider the most important, and do you meet that standard?

Response: A judge must be patient and dignified and must treat lawyers, litigants, and the public with dignity and respect. Yes, I do meet that standard.

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

Response: I am committed to following precedents of higher courts and will continue to abide by established precedent of the Supreme Court and the Sixth Circuit, if confirmed.

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15. At times, judges are faced with cases of first impression. If there were no controlling precedent that dispositively concluded an issue with which you were presented, to what sources would you turn for persuasive authority? What principles will guide you, or what methods will you employ, in deciding cases of first impression?

Response: I would look to any applicable statutes, legislative history, persuasive authority from other circuits, and Supreme Court or Sixth Circuit cases which might provide guidance.

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

Response: I would adhere to existing precedent. If the Supreme Court erred, Congress would have to act to correct the error legislatively. If the Sixth Circuit erred, the Supreme Court would have to address the issue. I would not substitute my judgment.

17. Under what circumstances, if any, do you believe an appellate court should overturn precedent within the circuit? What factors would you consider in reaching this decision?

Response: If there is conflicting precedent between panels within the Circuit, the Circuit, sitting en banc, should resolve the conflict, which may mean overturning Circuit precedent. This should not be done lightly as the principle of *stare decisis* is fundamental to promoting stability and predictability in the law.

18. Please describe with particularity the process by which these questions were answered.

Response: I drafted the answers to these questions. I discussed my answers with a staff member of the U.S. Department of Justice. I prepared my final answers.

19. Do these answers reflect your true and personal views?

Response: They do.

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Responses of Bernice B. Donald
Nominee to be United States Circuit Judge for the Sixth Circuit
to the Written Questions of Senator Tom Coburn, M.D.

1. **Some people refer to the Constitution as a "living" document that is constantly evolving as society interprets it. Do you agree with this perspective of constitutional interpretation?**

   Response: I do not.

2. **Justice William Brennan once said: "Our Constitution was not intended to preserve a preexisting society but to make a new one, to put in place new principles that the prior political community had not sufficiently recognized." Do you agree with him that constitutional interpretation today must take into account this supposed transformative purpose of the Constitution?**

   Response: I am not certain what Justice Brennan meant, but I believe that the Constitution must be interpreted according to its text and the precedent established by the U.S. Supreme Court.

3. **Do you believe judicial doctrine rightly incorporates the evolving understandings of the Constitution forged through social movements, legislation, and historical practice?**

   Response: I believe that judicial doctrine must be confined to the text of the U.S. Constitution and its Amendments, as well as precedent established by the U.S. Supreme Court.

4. **Do you believe empathy is an essential ingredient for arriving at just decisions and outcomes and should play a role in a judge's consideration of a case?**

   Response: Empathy is not an appropriate factor for a judge to incorporate in the decision making process. A judge should shed personal views and feelings at the courthouse door.

5. **Is any transaction involving the exchange of money subject to Congress's Commerce Clause power?**

   Response: I would look to Supreme Court precedent to answer the question. The Supreme Court has held that an activity must fall within one of three categories to be subject to regulation by Congress. Specifically, in *United States v. Lopez*, 514 U.S. 549, 558 (1995), the Supreme Court held that the Commerce Clause allows Congress to regulate (1) "the channels of interstate commerce"; (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities"; and (3) "those activities that substantially affeet interstate commerce." This holding was reiterated in *United States v. Morrison*, 529 U.S. 598, 608-09 (2000), and *Gonzales v. Raich*, 545 U.S. 1, 16-17 (2005). The Supreme Court did not state in *Lopez*, *Morrison*, or *Raich* that the test for determining whether an activity lies within the ambit of Congress' Commerce Clause power to be whether it involves an exchange of money.

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6. **The U.S. Supreme Court held in *District of Columbia v. Heller*, 554 U.S. 570 (2008), that the Second Amendment of the United States Constitution "protects an individual right to possess a firearm unconnected to service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home." As Justice Scalia's opinion in *Heller* pointed out, Sir William Blackstone, the preeminent authority on English law for the Founders, cited the right to bear arms as one of the fundamental rights of Englishmen. Leaving aside the *McDonald v. Chicago* decision, do you personally believe the right to bear arms is a fundamental right?**

   Response: The Second Amendment of the U.S. Constitution establishes that right. The Supreme Court has affirmed that right. This is the law of the land.

   a. **Do you believe that explicitly guaranteed substantive rights, such as those guaranteed in the Bill of Rights, are also fundamental rights? Please explain why or why not.**

      Response: I have no personal view on this question and have not had occasion to address such an issue during my judicial career. I would follow Supreme Court precedent on this issue.

   b. **Is it your understanding of Supreme Court precedent that those provisions of the Bill of Rights that embody fundamental rights are deemed to apply against the States? Please explain why or why not.**

      Response: Please see response to 6a.

   c. **The *Heller* Court further stated that "it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right." Do you believe that the Second Amendment, like the First and Fourth Amendments, codified a pre-existing right? Please explain why or why not.**

      Response: Yes, the Supreme Court has made this determination.

7. **Some have criticized the Supreme Court's decision in *Heller* saying it "discovered a constitutional right to own guns that the Court had not previously noticed in 220 years." Do you believe that *Heller* "discovered" a new right, or merely applied a fair reading of the plain text of the Second Amendment?**

   Response: I do not have an opinion about this issue, but if it comes before the court I will apply the precedent established by the Supreme Court and the Sixth Circuit.

   a. **Similarly, during his State of the Union address, the President said the Supreme Court's decision in *Citizens United v. FEC*, 558 U.S. ___ (2010), "reversed a century of law" and others have stated that it abandoned "100 years of precedent." Do you agree that the Court reversed a century of law or 100 years of precedent in the *Citizens United* decision? Please explain why or why not.**

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Response: I do not have an opinion on this issue. Should the issue come before the court, I will apply established Supreme Court and Sixth Circuit precedent.

8. What limitations remain on the individual Second Amendment right now that it has been incorporated against the States?

Response: In *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 561 U.S. ___, 130 S. Ct. 3020 (2010), the U.S. Supreme Court clarified that the Second Amendment established an individual's right to bear arms throughout the United States. In *Heller*, the Court explained that "nothing in [the Court's] opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." I will follow relevant Supreme Court and Sixth Circuit precedent.

a. In *McDonald v. Chicago*, the majority wrote: "We made it clear in *Heller* that our holding did not cast doubt on such longstanding regulatory measures as 'prohibitions on the possession of firearms by felons and the mentally ill,' 'laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.'"

What if a state passed a law imposing a $2,000 registration fee as a condition for the commercial sale of a firearm? Without stating how you would rule in such a case, please explain how you would conduct your analysis to determine whether the fee violated the Second Amendment right to keep arms?

Response: The Supreme Court has recognized that the Second Amendment guarantees an individual's right to own a firearm and that this right is incorporated against encroachment by state and local governments. Although the Supreme Court has not expressly articulated a standard for reviewing laws that burden firearms ownership, the constitutionally-protected status of the right to keep and bear arms necessitates a heightened level of scrutiny for any such law that would seek to burden the right to bear arms. I would look to Supreme Court and Sixth Circuit precedent for guidance.

i. To what cases or authorities would you refer? Please be specific.

Response: I would look to *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 561 U.S. ___, 130 S. Ct. 3020 (2010), and any other Supreme Court and Sixth Circuit precedent.

b. What if a state outlawed the carrying and possession of firearms on the grounds of hospitals that have psychiatric wards, regardless of whether they are private? Without stating how you would rule in such a case, please explain how you would conduct your analysis to determine whether that

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regulation complied with the Second Amendment's guarantee of the right to bear arms.

Response: The Supreme Court has recognized that the Second Amendment guarantees an individual's right to own a firearm and that this right is incorporated against encroachment by state and local governments. Although the Supreme Court has not expressly articulated a standard for reviewing laws that burden firearms ownership, the constitutionally-protected status of the right to keep and bear arms necessitates a heightened level of scrutiny for any such law. I would look to Supreme Court and Sixth Circuit precedent for guidance.

i. **Could a hospital qualify as a "sensitive place?"**

Response: I would examine Supreme Court and Sixth Circuit precedent in examining such an issue.

ii. **To what cases or authorities would you refer? Please be specific.**

Response: I would examine Supreme Court and Sixth Circuit precedent in examining such an issue. Specifically, I would look to *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 561 U.S. ___, 130 S. Ct. 3020 (2010), as well as any other Supreme Court or Sixth Circuit precedent.

c. **Is the Second Amendment limited only to possession of a handgun for self-defense in the home, since both *Heller* and *McDonald* involved cases of handgun possession for self-defense in the home?**

Response: The Supreme Court did not specify such limits. I would look to the Supreme Court and Sixth Circuit precedent to answer this question.

9. **In *Roper v. Simmons*, 543 U.S. 551 (2005), Justice Kennedy relied in part on the "evolving standards of decency" to hold that capital punishment for any murderer under age 18 was unconstitutional. I understand that the Supreme Court has ruled on this matter, but do you agree with Justice Kennedy's analysis?**

Response: As a lower court judge, I am bound by the precedent of the Supreme Court and the Sixth Circuit in evaluating issues of capital punishment as well as any other issues that come before the court.

a. **Do you agree that the Constitution's prohibition on cruel and unusual punishment "embodies a principle whose application is appropriately informed by our society's understanding of cruelty and by what punishments have become unusual?"**

Response: As a lower court judge, I am bound by the precedent of the Supreme Court and the Sixth Circuit in evaluating issues of capital punishment as well as any other issues coming before the court.

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b. How would you determine what the evolving standards of decency are?

Response: I would look to Supreme Court and Sixth Circuit precedent if I were required to address this issue.

c. Do you think that a judge could ever find that the "evolving standards of decency" dictated that the death penalty is unconstitutional in all cases?

Response: No, the Supreme Court has held that the death penalty is Constitutional.

d. What factors do you believe would be relevant to the judge's analysis?

Response: Not applicable.

e. When determining what the "evolving standards of decency" are, justices have looked to different standards. Some justices have justified their decision by looking to the laws of various American states,[1] in addition to foreign law, and in other cases have looked solely to the laws and traditions of foreign countries.[2] Do you believe either standard has merit when interpreting the text of the Constitution?

Response: As an intermediate appellate court judge, if I am confirmed, the only appropriate role for me would be to follow the precedent of the Supreme Court and the Sixth Circuit.

i. If so, do you believe one standard more meritorious than the other? Please explain why or why not.

Response: Not applicable.

10. In your view, is it ever proper for judges to rely on foreign or international laws or decisions in determining the meaning of the Constitution?

Response: No.

a. Is it appropriate for judges to look for foreign countries for "wise solutions" and "good ideas" to legal and constitutional problems?

Response: No.

b. If so, under what circumstances would you consider foreign law when interpreting the Constitution?

Response: I would not consider foreign laws except as required by the Supreme Court.

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[1] *Roper v. Simmons*, 543 U.S. 551, 564-65.
[2] *Graham v. Florida*, 130 S.Ct. 2011, 2033-34.

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c. Do you believe foreign nations have ideas and solutions to legal problems that could contribute to the proper interpretation of our laws?

Response: I would not consider foreign laws except as required by the Supreme Court.

d. Would you consider foreign law when interpreting the Eighth Amendment? Other amendments?

Response: No, unless required by the Supreme Court.

11. During your hearing, Senator Schumer asked you about a statement you made in a 2008 panel discussion on employment discrimination as reported by the American Bar Foundation newsletter. According to the newsletter, you commented as follows:

"[Judge Donald] shared with the audience how, as an African American woman sitting on an appellate court composed of white men, she had a 'vastly different' view of what evidence supports summary judgment, a difference she ascribed to the men having never experienced discrimination. Though judges try to 'objectively evaluate the facts and apply the law,' Donald said, they 'are viewing things through the lens of culture, through their experience, and that may impact how…much weight [they] accord to different things.'"

This statement is very similar to Justice Sotomayor's assertion that "[p]ersonal experiences affect the facts that judges choose to see."

a. You told Senator Schumer that your statement was taken out of context. Can you explain how it was taken out of context and by whom?

Response: I have never held a vastly different view of the summary judgment standard. The statement was erroneously attributed to me.

Before my hearing, I made a good faith effort to be responsive in my answers to the Senate Judiciary Questionnaire and to provide all requested materials. After conducting a diligent search and making an exhaustive inquiry of persons and entities involved, I was advised by the American Bar Foundation ("ABF") that there was no transcript or tape of this panel discussion. Although I did not recall making this statement because it is not something that I have ever believed, I assumed that the writer misinterpreted my remarks. It did not occur to me that the article might have misattributed another speaker's remarks to me. Rather, I assumed that the statement must have been in reference to a specific case that I heard while sitting by designation. That is why I answered as I did during my hearing before the Senate Judiciary Committee. Then as now, I maintained that I adhere to Supreme Court and Sixth Circuit precedent in analyzing summary judgment motions in all cases.

After my hearing, in preparing my responses to subsequent written questions, I conducted a search to find any case to which I might have been referring and

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determined that I sat by designation in three cases involving review of summary judgment in discrimination cases: *Still v. Wilkinson*, 194 F.3d 1314 (Table), 1999 WL 801577 (6th Cir. 1999) (affirming the district court's grant of summary judgment to defendants in a religious discrimination case); *Hatcher v. General Electric*, 208 F.3d 213 (Table), No. 98-6304, 2000 WL 245515 (6th Cir. 2000) (affirming the district court's grant of summary judgment to defendants in an age discrimination case); and *E.E.O.C. v. Watkins Motor Lines, Inc.*, 463 F.3d 436 (6th Cir. 2006) (affirming the district court's grant of summary judgment to defendant as to a claim under the Americans with Disabilities Act).

The week of March 24, 2011, I again contacted the ABF and requested that they explore all sources to try and find a transcript or tape. On Monday April 4, 2011, a representative of the ABF advised that, after checking with the office of the ABF Fellows, she had located a tape recording of the panel discussion as well as a transcript. After reviewing this information, the ABF representative has concluded, and I have confirmed, that the "vastly different standard" statement was made by the appellate court judge on the panel, not by me.

The misattributed quote appears on page 53 of the transcript and reads as follows:

> I have to comment on one area of the summary judgments. I joined an appellate court of all white men and I have to say that our view of what evidence supports summary judgment, of what . . . what evidence is needed, was vastly different. Most . . . they hadn't experienced discrimination, but some of these situations that came up, I mean, I felt clearly that they should go forward and it was like, no, this was not something that should be litigated at all.

This statement was made by Judge Miriam Shearing, a former justice on the Supreme Court of Nevada and the first woman to join that court. Unfortunately, the contract transcriber to whom the tape was sent misattributed the quote to me and, because the author of the article was working from the transcript, the error was perpetuated.

I am including, for the benefit of the Committee, the original tape recording of the panel discussion, a CD to which I have transferred the tape recording, and the unofficial, original transcript. Katharine Hannaford, Senior Writer and Grants Officer of the ABF, has listened to the recording and corrected the relevant pages. I have also attached the corrected pages 53 and 54 for the Committee's benefit.

Ms. Hannaford has informed me that a correction will be posted on the *Researching Law* section of the ABF website and also printed in the next hard copy issue of *Researching Law*.

i. Please provide a transcript or recording of the statements you made on that panel.

Response: I have attached the transcript and recording.

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b. If your statement was accurately reflected in that article, please explain in what ways your view of a summary judgment motion could be "vastly different" based on your culture and experiences.

Response: Not applicable.

c. Other than discrimination cases, in what types of cases do you think you have a "vastly different" view of what evidence supports summary judgment?

Response: Not Applicable.

d. Please give me an example of a case where your life experiences impacted your view and influenced your judicial decision, and explain why you reached the conclusion you did. Please provide the case name and citation.

Response: My decisions are based on an impartial application of the law to the facts. My life experiences do not affect my decisions.

e. During your hearing in response to a question from Senator Schumer, you said: "I was speaking to how my experience allowed me to bring a different and diverse perspective to an assessment of the facts in that case." How did your experience affect your assessment of the facts of the case? Please be specific.

Response: Please see answer to 11a.

f. Are there any other cases where your experiences affected your assessment of the facts in a case?

Response: There are no cases that I am aware of where my experiences affected the outcome of a case.

a. If so, please list the cases, the citations, and a brief description of your ruling and any subsequent judicial rulings.

Response: Not applicable.

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Responses of Bernice B. Donald
Nominee to be United States Circuit Judge for the Sixth Circuit
to the Written Questions of Senator Jeff Sessions

1. **During your tenure as Chair of the American Bar Association's Commission on Opportunities for Minorities in the Profession, you signed a number of resolutions sponsored by the Commission, including a resolution to the ABA's constitution endorsing affirmative action, specifically to "endorse legal remedies and voluntary actions that take into account as a factor race, national origin or gender to eliminate or prevent discrimination or otherwise serve a compelling interest."**

   a. **Please list the "legal remedies" and "voluntary actions" referenced by the resolution.**

   Response: The resolution was authored and submitted by the Section of Individual Rights and Responsibilities. The Commission was a co-sponsor. I did not sign the resolution, nor cast a vote. The Chair of the Commission does not vote on resolutions, except in case of a tie. Support of Resolution #127 reflected the majority vote of the members of the Commission, a diverse entity. The phrases "endorse legal remedies" and "voluntary actions that take into account as a factor race, national origin, or gender to eliminate or prevent discrimination" refer to the Supreme Court precedent of *Adarand v. Pena*, 515 U.S. 200 (1995), and other precedents listed in the body of the report which accompanies the resolution.

   Resolution #127 did not amend the ABA's Constitution. Amendment 11-4 amended the Association's Constitution to institutionalize diversity by providing dedicated seats for minorities and women on the ABA's Nominating Committee and Board of Governors. This action was prompted by the Report of the ABA's Governance Committee.

   b. **Please list the other "compelling interest[s]" referenced by the resolution.**

   Response: I did not draft the resolution, and therefore cannot speak for the drafters. The text of the resolution does not contain the words "compelling interests."

2. **Also during your tenure as Chair, you signed a resolution adopted by the Commission that stated "that the American Bar Association opposes efforts (i) to restrict or deny any child in the United States equal access to public education, health care, foster care, or social services on the basis of the child's citizenship or immigration status or the immigration or citizenship status of the child's parents and (ii) to require that persons providing such services verify immigration status."**

   a. **Please explain the basis for your opposition to any effort to assure that persons illegally present in the United States do not force American**

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taxpayers to pay for their education, health care, foster care or social services.

Response: I do not believe the Supreme Court has addressed all of these issues. I will follow Supreme Court and Sixth Circuit precedent. That resolution reflected the position of the Commission, a diverse entity which takes action by majority vote. The Chair of the Commission does not vote on resolutions except in case of a tie, but ABA policy requires submission of resolutions under the name of the Chair.

b. **Do you believe that illegal immigrants have a right, whether based on the Constitution or on some other legal principle, to access these government benefits on an equal footing with United States citizens or aliens lawfully present in the United States?**

Response: The Supreme Court has not addressed all of these issues. As with all matters, I will follow Sixth Circuit and Supreme Court precedent.

3. **At your hearing, Senator Schumer asked you about remarks you made while on a panel at the American Bar Foundation Fellows Research Seminar in 2008. You testified that your "statement" as reported by the American Bar Foundation was taken out of context and "was related to a particular case that [you] worked on when [you] sat by designation at the court of appeals."**

a. **Which statement was taken out of context?**

Response: I have never held a vastly different view of the summary judgment standard. The statement was erroneously attributed to me.

Before my hearing, I made a good faith effort to be responsive in my answers to the Senate Judiciary Questionnaire and to provide all requested materials. After conducting a diligent search and making an exhaustive inquiry of persons and entities involved, I was advised by the American Bar Foundation ("ABF") that there was no transcript or tape of this panel discussion. Although I did not recall making this statement because it is not something that I have ever believed, I assumed that the writer misinterpreted my remarks. It did not occur to me that the article might have misattributed another speaker's remarks to me. Rather, I assumed that the statement must have been in reference to a specific case that I heard while sitting by designation. That is why I answered as I did during my hearing before the Senate Judiciary Committee. Then as now, I maintained that I adhere to Supreme Court and Sixth Circuit precedent in analyzing summary judgment motions in all cases.

After my hearing, in preparing my responses to subsequent written questions, I conducted a search to find any case to which I might have been referring and determined that I sat by designation in three cases involving review of summary

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judgment in discrimination cases: *Still v. Wilkinson*, 194 F.3d 1314 (Table), 1999 WL 801577 (6th Cir. 1999) (affirming the district court's grant of summary judgment to defendants in a religious discrimination case); *Hatcher v. General Electric*, 208 F.3d 213 (Table), No. 98-6304, 2000 WL 245515 (6th Cir. 2000) (affirming the district court's grant of summary judgment to defendants in an age discrimination case); and *E.E.O.C. v. Watkins Motor Lines, Inc.*, 463 F.3d 436 (6th Cir. 2006) (affirming the district court's grant of summary judgment to defendant as to a claim under the Americans with Disabilities Act).

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Ms. Hannaford has informed me that a correction will be posted on the *Researching Law* section of the ABF website and also printed in the next hard copy issue of *Researching Law*.

b. Please provide the citation to the case to which you referred and copies of any and all opinions rendered by the court of appeals in that case.

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Response: Not Applicable.

c. Please provide a transcript of the panel discussion.

Response: Please see attached.

4. You co-authored an article entitled, "Immigrants and other Cultural Minorities as Non-Traditional Plaintiffs: Culture as a Factor in Determining Tort Damages," in which you suggest that courts should consider the plaintiff's culture in tort suits. You quote from the book, *The Culture Defense*, which argues that courts should consider a plaintiff's cultural background in tort suits, because that background may cause a plaintiff to be "more adversely affected by the error [or harm was magnified] [and] hence is entitled to a larger award." You also wrote that "to disallow consideration of culture in tort cases would risk the denial of true justice to entire segments of a pluralistic society" and that tort law "may serve, perhaps unexpectedly, as a force for greater cultural sensitivity and inclusion in the nation." You conclude that, "[i]t is certain that, as society becomes more globalized, more pluralistic, and more complex, courts hearing tort cases will increasingly find themselves on the front lines of public policy, cultural anthropology and the law."

a. Please explain how "to disallow consideration of culture in tort cases would risk the denial of true justice to entire segments of a pluralistic society."

Response: That article was written to draw attention to issues that judges will face in a complex multicultural society. I highlighted select cases to discuss the ways in which courts across the country have applied existing tort law to the measurement of damages and the determination of whether a plaintiff had stated a cause of action, when the plaintiff's culture might have been raised as a factor. I do not believe that the meaning of the law varies depending on a person's race, gender, ethnicity, or culture.

b. Please define the term "true justice" as you use it in the article.

Response: I understand that term simply to mean impartially applying the law to the facts and determining the appropriate relief, if any, that is reasonable, consistent with the law, and appropriate to the facts of the case. Both plaintiffs and defendants are entitled to justice by the same legal standards.

c. Please explain how tort law "may serve . . . as a force for greater cultural sensitivity and inclusion in the nation."

Response: A properly functioning legal system produces benefits for society at large, including assimilation of diverse populations under the same legal standards.

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d. Please explain the role of a court "on the front lines of public policy."

Response: Courts should not engage in making public policy since policy issues are reserved to the legislative and executive branches. However, Courts are on the front lines of public policy in that they must apply and interpret law made by policy makers.

e. Please explain the role of a court "on the front lines" of "cultural anthropology."

Response: Sometimes individuals from unfamiliar cultures interact with the legal system. For example, in assessing credibility, eye contact is frequently a key component for the fact finder to consider in determining truthfulness. In some cultures, however, avoiding eye contact with an authority figure is a sign of respect.

5. Please provide a brief summary of and citations for each death penalty case in which you participated as a judge, and, to the extent available, copies of opinions issued in those cases.

Response: Listed below are summaries of death penalty prosecutions in which I have participated as a judge.

Federal Death Penalty-Eligible Prosecutions:

1. ***United States v. Bryan Lakeith Wilson et al.*** (2:01-cr-20041):

The United States indicted four defendants on federal bank robbery, firearms, and murder charges. The indictments arose out of an armed robbery in Lakeland, Tennessee on September 18, 2000. During the course of the robbery, one of the defendants shot and killed a bank customer. The United States filed a notice of intent to seek the death penalty, and the Court issued orders on various constitutional issues.

Outcome: The United States ultimately negotiated pleas with each defendant as follows: Wilson, life plus twenty five years; Shorter, life plus five years; Villery, forty years. The Government made a 5k1.1 motion for five years as to Guss, the lookout man.

2. ***United States v. Aaron Haynes et al.*** (2:01-cr-20247) (reported decision available at 269 F. Supp. 2d 970 (W.D. Tenn. 2003); *see also United States v. Haynes*, 265 F. Supp. 2d 914 (W.D. Tenn. 2003); *United States v. Haynes*, 242 F. Supp. 2d 540 (W.D. Tenn. 2003)):

This was a death penalty prosecution of individuals for a murder that resulted in the course of a bank robbery. The Court ruled on various motions in the case, including whether to declare the death penalty constitutional.

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Outcome: The lead defendant, Haynes, proceeded to trial as a capital case. The jury found Haynes guilty on all counts. At the penalty phase, the jury was unable to reach a unanimous verdict on a sentence of death. The Court imposed a sentence of life imprisonment plus ten years. Maxwell and Johnson negotiated pleas and are now serving life sentences plus a term of years thereafter. In an appeal by Terance Johnson, the Sixth Circuit affirmed his sentence. *United States v. Johnson*, 416 F.3d 464 (6th Cir. 2005), *cert. denied*, 546 U.S. 1191 (2006). Johnson subsequently filed a pro se habeas petition, which the Court denied on October 30, 2009 and which is now on appeal. *See Terance Johnson v. United States of America*, Case No. 2:07-cv-02014 (W.D. Tenn.).

3. ***United States v. Sonny Shields et al.*** (2:04-cr-20254):

The United States indicted four defendants—Sonny Shields, Shannon Shields, and two other individuals—for federal crimes arising out of a carjacking, kidnapping, and murder. The Government elected to pursue the death penalty as to Shannon and Sonny Shields only. After an evidentiary hearing, based on Supreme Court precedent, the Court found Shannon Shields ineligible for the death penalty because of mental retardation. *See* 18 U.S.C. § 3596(c); *Atkins v. Virginia*, 36 U.S. 304 (2002).

Outcome: Shannon Shields was convicted following a jury trial in 2009 and sentenced in January 2010 to life plus fifteen years in prison. His appeal to the Sixth Circuit is currently pending. One non-capital co-defendant previously pled guilty, offered testimony against Shannon Shields at trial, and is awaiting sentencing. The matter of *USA v. Sonny Shields* is still a "death eligible" case. The other non-capital defendant is awaiting trial to follow disposition of *USA v. Sonny Shields*.

4. ***United States v. Danny Winberry*** (2:04-cr-20281):

The defendant in this case was indicted on nine counts relating to a contract murder of an elderly woman. Count 1 charged him with conspiring to use interstate commerce facilities in the commission of murder for hire in violation of 18 U.S.C. § 1958. Count 2 alleged arson in contravention of 18 U.S.C. § 844(i). Although the case was a death eligible case, the government negotiated a non-capital disposition. In addition, the government moved for a reduction in the defendant's sentence pursuant to § 5k1.1 of the United States Sentencing Guidelines and 18 U.S.C. § 3553(e).

Outcome: The Court held a sentencing hearing on June 23, 2009 and determined that the defendant had an advisory Guideline range of 360 months to life imprisonment. However, because Count 1 carried a statutorily mandated sentence of death or life imprisonment, the Court found that the defendant's Guideline sentence was life imprisonment. The government subsequently moved for a downward departure pursuant to § 5k1.1 of the United States Sentencing Guidelines and 18 U.S.C. § 3553(e), which the Court granted. The defendant was sentenced to 360 months in prison. The sentence was affirmed on appeal.

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5. ***United States v. Dale Mardis*** (2:08-cr-20021) (reported decision at 670 F. Supp. 2d 696 (W.D. Tenn. 2009):

This case is a civil rights prosecution of a Caucasian defendant for the race-based murder and dismemberment of an African-American code enforcement officer. The defendant pled nolo contendere in state court to second degree murder. The United States filed a notice of intent to seek the death penalty. Subsequently, the Department of Justice allowed the case to be resolved as a non-capital case. The case involved a number of constitutional questions, including 1) whether the prosecution was untimely, 2) whether the Dual Sovereignty Exception to the Double Jeopardy Clause applied and thus permitted the federal prosecution, and 3) whether the Constitution's separation of powers clause was violated by a Congressman allegedly contacting the Department of Justice to advocate for the initiation of federal charges.

Outcome: This defendant pled guilty on the eve of trial and is awaiting sentencing. On an interlocutory appeal filed by the defendant, the Sixth Circuit affirmed the Court's finding that the Double Jeopardy Clause does not bar this prosecution. *United States v. Mardis*, 600 F.3d 693 (6th Cir. 2010), *cert. denied*, __ S. Ct. __, 2010 WL 3321494 (Oct. 4, 2010). No appellate opinions have yet been issued addressing the Court's other rulings.

6. Please provide a brief summary of and citations for each case in which you sentenced a defendant to a sentence below that which was called for by the U.S. Sentencing Guidelines. Please include the sentencing range called for under the guidelines and the sentence that you issued.

Response: The U.S. District Court, Western District of Tennessee statistical division reports that as of March 24, 2011, I have sentenced or otherwise disposed of 2307 defendants. I contacted the United States Sentencing Commission ("USSC") and requested sentencing data on all defendants sentenced by me since my entry on duty, January 21, 1996. The Sentencing Commission reports that they are unable to retrieve data prior to October 1998. From October 1998 to the present, I have determined that there have been non-government sponsored, non-guideline sentences imposed as to 149 defendants. The requested summary is attached.

7. Please provide a brief summary of and citations for each case in which you suppressed evidence found during a search by law enforcement officers.

Response: To answer your question, the Court's information technology staff executed a search of all criminal cases assigned to me and identified 380 cases in which motions to suppress were filed. The Court granted motions to suppress in 29 of those 380 cases. The United States appealed only 3 of these 29 orders. Summaries of and citations to those 29 cases are included below.

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1. ***United States v. James Elkins and Carol Elkins*** (2:96-cr-20152), 95 F. Supp. 2d 796 (W.D. Tenn. 2000), *aff'd in part, rev'd in part*, 300 F.3d 638 (6th Cir. 2002):

This case arose from the search and seizure of hydroponic marijuana growing in several buildings owned by Defendants. The district court addressed two issues. The Court first addressed the sufficiency and validity of search warrants as to certain buildings which were based on a tip from a citizen characterized as a "confidential informant." Next, the Court addressed the warrantless search of another building where the officers 1) used thermal imaging to measure the waste heat radiating from the building, 2) went onto the property, disregarding a "no trespassing" sign, and 3) looked through an inch-wide hole around a protruding PVC pipe to see into the building and observe the growing marijuana.

I found that the officers had entered into the "curtilage" of the building around which there existed a zone of privacy. Moreover, I found that the officers' use of thermal imaging to gain probable cause, constituted an impermissible search in violation of the Fourth Amendment. While the Sixth Circuit did not address this issue, the Supreme Court later ruled in *Kyllo v. United States*, 533 U.S. 27 (2001), that thermal imaging does constitute a search under the Fourth Amendment.

2. ***United States v. Baljinder Singh*** (2:98-cr-20146):

This case involved the search of a vehicle in which the defendant was a passenger. The Court held that the defendant had standing to challenge the search based on a reasonable expectation of privacy and that the search did not fall within any of the exceptions to the warrant requirement. The Court specifically examined the U.S. Supreme Court's decision in *Knowles v. Iowa*, 119 S. Ct. 484 (1998), clarifying the rationale for the search incident to arrest exception to the warrant requirement.

3. ***United States v. Darren Burnett*** (2:00-cr-20245):

The Court denied in part and granted in part the defendant's motion to suppress as to the December 7, 2000 search of his home. The Court held that the search of defendant's home did not meet any of the exceptions to the warrant requirement. Evidence in plain view was admissible at trial.

4. ***United States v. Prater*** (2:00-cr-20191):

Officers conducting a drug investigation in a high crime neighborhood observed the defendant sitting on the front porch. Ten to twelve officers approached. Officers testified that the defendant appeared fidgety but did not attempt to flee. Officers testified that they observed a "bulge" in the defendant's upper shirt pocket and did a pat down for officer safety. They extracted four folded checks. The Court suppressed evidence based on Supreme Court and Sixth Circuit precedent.

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5. ***United States v. Riddick*** (1:01-cr-10005) (W.D. Tenn. 2004), *rev'd*, 134 F. App'x 813 (6th Cir. 2005):

After a *Franks* hearing, the Court found that the confidential informant provided false information to obtain search warrants. The Court granted the defendant's motion to suppress. The Court of Appeals reversed finding the confidential informant credible.

6. ***United States v. Cuauhtemoc Pinon Hernandez*** (2:02-cr-20117):

The Court granted the defendant's motion to suppress evidence seized as a result of a search of his vehicle. The search was not supported by valid consent or the search incident to arrest exception to the warrant requirement.

7. ***United States v. Rodney Eaton*** (2:02-cr-20107):

The United States moved that the defendant's motion to suppress be granted as the evidence was obtained in violation of the Fourth Amendment.

8. ***United States v. Charles A. Davis*** (2:02-cr-20377):

Officers searched the defendant and others on private property without probable cause or reasonable suspicion in violation of *Terry*. The search violated the Fourth Amendment.

9. ***United States v. Scowden et al.*** (2:02-cr-20030):

This case involved evidence secured at a Days Inn motel in Memphis, Tennessee. The Court found that the voluntary consent to search the room given by defendant Hyatt did not extend to defendant Murphy's personal containers or effects. The Court concluded, however, that the evidence in plain view or in the common areas was properly seized. The motion to suppress was denied in part and granted in part.

10. ***United States v. Eddie Hayes McMullen*** (2:02-cr-20129):

The Court granted the defendant's motion to suppress a firearm and ammunition secured from his person. The search was not constitutionally permissible under *Terry*. The case was dismissed on motion of the United States.

11. ***United States v. Marvin King*** (2:02-cr-20196):

The stop and search of the defendant's vehicle violated the defendant's Fourth Amendment rights resulting in the motion to suppress being granted. The Court found that the officer's testimony was not credible.

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12. ***United States v. James Herndon*** (2:03-cr-20207):

The Court denied the defendant's motion to suppress evidence seized from the defendant's vehicle and granted the motion as to statements made by the defendant subsequent to his arrest. The defendant's statements were made in response to questions posed by officers while the defendant was in custody and without being advised of the *Miranda* warnings.

13. ***United States v. Margaret Lacey Monger et al*** (2:03-cr-20085):

The Court held that the officer's affidavit and the search warrant based on that affidavit were invalid because the affidavit did not contain the date of the officer's observations and thus could not satisfy recency or staleness issues.

14. ***Untied States v. Bradis Merkson*** (2:04-cr-20012):

The Court granted the defendant's motion to suppress evidence derived from an officer's search of the defendant's person in a public area. The government failed to prove that the officer's pat-down of the defendant was supported by probable cause or reasonable suspicion as required for a *Terry* frisk.

15. ***Untied States v. Melvin Baptist*** (2:04-cr-20174):

The Court issued its findings orally on the record that the search violated the Fourth Amendment. I have no independent recollection of the facts. The files have been sent to the archives. The Government did not appeal the order and moved to dismiss the indictment.

16. ***United States v. Jerome Reed*** (2:04-cr-20127):

The Court granted a motion to suppress evidence derived from the search of a vehicle because the officers did not have probable cause for the initial stop.

17. ***United States v. Donnie Johnson*** (2:04-cr-20299):

The Court granted a motion to suppress evidence derived from officers' search of a room at a rooming house rented by the defendant's uncle. The officers first conducted a search of the defendant without probable cause or reasonable suspicion. This search exceeded the limits of *Terry*. Even though the search of the defendant found no weapons or contraband, the officers then moved from the public area and searched the room (Defendant's home) at the rooming house without cause, without a search warrant, and without valid consent, in violation of the Fourth Amendment.

18. ***United States v. Larry Walls*** (2:04-cr-20370):

The Court granted the defendant's motion to suppress evidence found as a result of a warrantless search of the defendant's home. The officers' search of the home was based on

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the purported consent of the defendant's intoxicated girlfriend, who was present, but did not live in the home and who did not have standing to consent. Even if there was standing, the girlfriend's degree of intoxication rendered her incapable of giving knowing and voluntary consent.

19. ***United States v. Patrick Williams*** (2:04-cr-20454):

The Court granted the defendant's motion to suppress evidence and statements resulting from the search of the defendant's home. Officers had an arrest warrant for the defendant. Officers went to the home armed with a photo of the defendant and encountered the defendant outside of his residence. Officers used a ruse to get the defendant to reenter his home and then searched the premises. The officers' search under the mattress exceeded the justifiable scope of a search incident to arrest, and no other Fourth Amendment exception applied. Officers also engaged in a custodial interrogation of the defendant without advising him of his *Miranda* rights.

20. ***United States v. Derrico Bobbitt*** (2:05-cr-20283):

The Court orally granted the motion to suppress with respect to ammunition officers uncovered but denied the motion with respect to a firearm. The Court stated reasons on the record at the hearing. I do not have access to a transcript of the hearing, and I have no independent recollection of the case or legal basis for the ruling. The Government did not appeal the order and subsequently moved to dismiss the indictment.

21. ***United States v. Anthony Siggers*** (2:06-cr-20176):

Officer encountered the defendant seated in his car at a car wash. There was no reasonable suspicion of criminal activity. The officer searched the defendant and his vehicle and found a firearm. The officer's encounter and pat down of the defendant was not supported by probable cause or reasonable suspicion as required by Fourth Amendment jurisprudence.

22. ***United States v. Vincent Halliburton and Vikita Parrett*** (2:07-cr-20004):

The Court granted in part and denied in part the defendants' motions to suppress evidence derived from a warrantless search of a home. The Court suppressed a small quantity of drugs found in a washing machine when officers, without cause, exceeded the scope of the initial consent to search. The Court *denied* the motion as to the rest of the evidence—including narcotics, drug paraphernalia, a firearm, and ammunition—because these items were found subject to a valid consent to search, or in plain view.

23. ***United States v. Marcus Parker*** (2:07-cr-20119):

Officers observed the defendant standing in front of an apartment building in a high crime area. The Court held that the ensuing search of the defendant's person was not permissible under *Terry*, nor would the evidence have been inevitably discovered incident to

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a lawful arrest. Being in a high crime area without more does not form a basis for a search. The search was in violation of the Fourth Amendment and the motion to suppress was granted.

24. ***United States v. Ulric Brooks*** (2:08-cr-20248):

The Court granted the defendant's motion to suppress evidence obtained from a search of the defendant's vehicle. Although the officers lawfully arrested the defendant, the arrest occurred away from his vehicle. The officers then obtained the defendant's vehicle keys and searched the vehicle, which was lawfully parked on private property. Therefore, the search was invalid under Supreme Court precedent. *See Arizona v. Gant*, 129 S. Ct. 1710 (2009). The inevitable discovery doctrine did not apply.

25. ***United States v. Tavrenteze Evans*** (2:08-cr-20253):

Officers seized the defendant by blocking his vehicle without probable cause and impermissibly searching the defendant on a public street. Officers' actions constituted a seizure and search without probable cause. The Court granted the motion to suppress and the government later moved to dismiss the indictment.

26. ***United States v. Eugene Richmond*** (2:08-cr-20418):

The defendant moved to suppress a bullet found on the defendant during a search of his person. Because the defendant was searched without a warrant and without probable cause, the motion was granted.

27. ***United States v. Larry Wilborn*** (2:09-cr-20144):

The defendant's motion to suppress was granted where the search was conducted without probable cause. The fact that the area was characterized as a "high crime area" was not sufficient to provide probable cause to search the vehicle. The case turned on credibility.

28. ***United States v. Brandon Person*** (2:09-cr-20279):

The Court granted the defendant's motion to suppress evidence because the officers' search was without a warrant and without probable cause and did not come within any exception to the Fourth Amendment. Officers had a search warrant for 1484 Oaklawn Street, Memphis, TN. Officers proceeded to search 1484 and the separate, independent address of 1482 Oaklawn as well as all persons on the porch at both sides of the duplex. The Court granted the motion as to evidence obtained from 1482 Oaklawn.

29. ***United States v. Rico Rice*** (2:10-cr-20051):

The Court orally granted the defendant's motion to suppress, finding that the officers had no probable cause to conduct a traffic stop of the defendant's vehicle. The search of the vehicle was without probable cause and thus violated the Fourth Amendment.

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Cases Sentenced Below the Sentencing Guideline Range
Judge Bernice B. Donald
Fiscal Year 1998-2010

SENTENCE DATE	OFFENSE	GLMIN	GLMAX	SENTENCE	REASON(S)
1/13/1998	Fraud	10	16	6.03	General mitigating circumstances (§5K2.0); Acceptance of responsibility
2/22/1998	Drugs - Trafficking	97	121	84.00	Other
2/30/1998	Environmental/Wildlife	41	51	19.82	General mitigating circumstances (§5K2.0)
/25/1999	Drugs - Trafficking	37	46	30.00	Other
/14/1999	Robbery	152	175	80.00	Criminal history over represents defendant's involvement
/2/1999	Murder	120	120	70.00	
/3/2000	Auto Theft	24	30	6.00	Other; Currently receiving punishment under state or federal jurisdiction
/9/2000	Drugs - Trafficking	151	188	125.00	Criminal history over represents defendant's involvement
/5/2000	Administration of Justice Offenses	18	24	14.00	Criminal history over represents defendant's involvement
/15/2000	Forgery/Counterfeiting	8	14	6.00	Criminal history over represents defendant's involvement
/27/2000	Tax	12	18	4.00	Family ties and responsibilities (§5H1.6); Not representative of the heartland
/27/2000	Fraud	8	14	1.00	Offense behavior was an isolated incident
/22/2001	Drugs - Trafficking	97	121	60.00	Drug dependence/alcohol abuse (§5H1.4)
2/12/2001	Fraud	24	30	9.00	General mitigating circumstances (§5K2.0)
2/19/2001	Drugs - Trafficking	37	46	21.00	Offense behevior was an isolated incident
/9/2002	Forgery/Counterfeiting	12	18	5.00	Offense behavior was an isolated incident
/25/2002	Fraud	6	12	0.00	Cooperation without motion (not §5K1.1)
0/16/2002	Fraud	30	37	24.00	General mitigating circumstances (§5K2.0); Acceptance of responsibility
1/15/2002	Forgery/Counterfeiting	12	18	6.00	Family ties and responsibilities (§5H1.6)
2/5/2002	Fraud	15	21	6.00	General mitigating circumstances (§5K2.0)
/29/2003	Child Pornography	30	37	18.00	Offense behavior was an isolated incident
/26/2003	Drugs - Trafficking	84	105	72.00	Family ties and responsibilities (§5H1.6); Rehabilitation; General mitigating circumstances (§5K2.0)
/12/2004	Firearms	110	120	92.00	General mitigating circumstances (§5K2.0)
/23/2004	Firearms	18	24	12.00	Other
/9/2004	Larceny	18	24	12.03	Criminal history over represents defendant's involvement; Physical condition (§5H1.4)
0/25/2004	Fraud	8	14	0.03	Aberrant behavior (§5K2.20)
2/2/2004	Larceny	10	16	6.00	General mitigating circumstances (§5K2.0); Family ties and responsibilities (§5H1.6); Mental and emotional conditions (§5H1.3)
/4/2005	Fraud	4	10	0.03	Aberrant behavior (§5K2.20)
/11/2005	Drugs - Trafficking	46	57	27.00	Aberrant behavior (§5K2.20); Family ties and responsibilities (§5H1.6)
/27/2005	Fraud	6	12	0.00	Insufficient documentation provided on SOR to determine reason
/28/2005	Firearms	37	46	27.00	Criminal history issues; Physical condition (§5H1.4); Criminal history issues
/10/2005	Larceny	15	21	12.03	Reasonableness
/18/2005	Firearms	27	33	21.00	Age or health of sex offenders (§5K2.22)
/31/2005	Drugs - Trafficking	78	97	48.00	Other
/31/2005	Tax	33	41	10.00	Adequate to meet purposes of sentencing
/31/2005	Tax	41	51	21.00	Adequate to meet purposes of sentencing
/14/2005	Drugs - Trafficking	188	235	105.00	Aberrant behavior (§5K2.20); Excerpt from 18 U.S.C. § 3553(a)
/20/2005	Fraud	6	12	0.03	Insufficient documentation provided on SOR to determine reason
/30/2005	Immigration	77	96	63.00	Judge specifies presence of variance; Advisory nature of guidelines
/28/2005	Fraud	6	12	0.00	Advisory nature of guidelines
/21/2005	Firearms	57	71	8.10	Advisory nature of guidelines
0/11/2005	Firearms	27	33	14.00	Judge specifies presence of variance
1/1/2005	Firearms	46	57	30.00	Advisory nature of guidelines
1/18/2005	Forgery/Counterfeiting	12	18	4.00	Nature and circumstance of offense/history of defendant; Cooperation without motion (not §5K1.1); Criminal history issues

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Cases Sentenced Below the Sentencing Guideline Range
Judge Bernice B. Donald
Fiscal Year 1999-2010

/25/2005	Fraud	6	12	0.00	Insufficient documentation provided on SOR to determine reason
/7/2005	Robbery	37	46	30.00	Nature and circumstance of offense/history of defendant
18/2006	Firearms	15	21	12.03	Lesser harm (§5K2.11)
26/2006	Embezzlement	4	10	0.03	Totality of circumstances/combination of factors; Low likelihood of recidivism/not a risk to community; Remorse
1/2006	Firearms	84	105	72.00	Nature and circumstance of offense/history of defendant
3/2006	Drugs - Trafficking	262	327	198.00	Nature and circumstance of offense/history of defendant; Reflect seriousness of offense/promotes respect for law/just punishment; Afford adequate deterrence to criminal conduct
14/2006	Drugs - Trafficking	200	Life	180.00	Insufficient documentation provided on SOR to determine reason
22/2006	Fraud	37	46	24.00	Nature and circumstance of offense/history of defendant
23/2006	Firearms	1992	3804		Nature and circumstance of offense/history of defendant; Reflect seriousness of offense/promotes respect for law/just punishment; Afford adequate deterrence to criminal conduct
27/2006	Racketeering/Extortion	168	564	144.00	Nature and circumstance of offense/history of defendant; Reflect seriousness of offense/promotes respect for law/just punishment; Afford adequate deterrence to criminal conduct
10/2006	Firearms	77	96	70.00	Cooperation/Attempted Cooperation (not 5K, not with prosecution, per se); 18 U.S.C. § 3553(a)
8/2006	Drugs - Trafficking	87	108	72.00	Nature and circumstance of offense/history of defendant
24/2006	Fraud	6	12	0.00	Judge specifies presence of variance
12/2006	Firearms	18	24	12.03	Nature and circumstance of offense/history of defendant
28/2006	Fraud	33	41	24.00	Nature and circumstance of offense/history of defendant; Afford adequate deterrence to criminal conduct
17/2006	Firearms	120	120	103.00	Discharged terms of imprisonment (§5K2.23)
/15/2006	Firearms	30	37	10.00	Family ties and responsibilities (§5H1.6); Physical condition (§5H1.4)
1/3/2006	Fraud	21	27	18.00	Nature and circumstance of offense/history of defendant
1/17/2006	Administration of Justice Offenses	188	235	120.00	Nature and circumstance of offense/history of defendant; Provide defendant with educational or vocational training/medical care; Mental and emotional conditions (§5H1.3)
1/20/2006	Firearms	24	30	18.00	Criminal history issues; Age (§5H1.1); Nature and circumstance of offense/history of defendant
1/27/2006	Firearms	70	87	57.00	General mitigating circumstances (§5K2.0)
2/8/2006	Firearms	84	105	66.00	Criminal history issues; Avoid unwarranted sentencing disparity among defendants
2/15/2006	Auto Theft	4	10	0.00	Advisory nature of guidelines
8/2007	Fraud	12	18	8.00	Insufficient documentation provided on SOR to determine reason
9/2007	Fraud	12	18	6.00	Nature and circumstance of offense/history of defendant
30/2007	Child Pornography	87	108	60.00	Nature and circumstance of offense/history of defendant; Age (§5H1.1); Criminal history issues
13/2007	Racketeering/Extortion	135	168	2.46	Nature and circumstance of offense/history of defendant; Avoid unwarranted sentencing disparity among defendants
1/2007	Fraud	18	24	16.00	Totality of circumstances/combination of factors
23/2007	Firearms	37	46	15.00	Avoid unwarranted sentencing disparity among defendants
12/2007	Child Pornography	30	37	6.00	Nature and circumstance of offense/history of defendant
15/2007	Firearms	33	41	21.00	Nature and circumstance of offense/history of defendant; Previous employment record (§5H1.5); Mitigating factors regarding firearms
24/2007	Fraud	24	30	4.00	Nature and circumstance of offense/history of defendant; Reflect seriousness of offense/promotes respect for law/just punishment; Afford adequate deterrence to criminal conduct
16/2007	Drugs - Trafficking	100	125	84.00	Party motion/agreement/consent (reason unspecified)

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Cases Sentenced Below the Sentencing Guideline Range
Judge Bernice B. Donald
Fiscal Year 1999-2010

18/2007	Drugs - Trafficking	21	27	13.00	Totality of circumstances/combination of factors
21/2007	Firearms	100	120	60.00	Totality of circumstances/combination of factors; 18 U.S.C. § 3553(a)
22/2007	Firearms	235	293	180.00	Age (§5H1.1); Physical condition (§5H1.4)
29/2007	Immigration	77	96	60.00	Nature and circumstance of offense/history of defendant; Reflect seriousness of offense/promotes respect for law/just punishment; Afford adequate deterrence to criminal conduct
19/2007	Firearms	41	51	36.00	Nature and circumstance of offense/history of defendant; Rehabilitation; Lack of youthful guidance/tragic or troubled childhood
1/16/2007	Immigration	57	71	46.00	Criminal history issues
1/27/2007	Drugs - Trafficking	57	71	51.00	Avoid unwarranted sentencing disparity among defendants
2/6/2007	Fraud	1	7	0.00	Insufficient documentation provided on SOR to determine reason
10/2008	Firearms	57	71	37.00	Nature and circumstance of offense/history of defendant; Afford adequate deterrence to criminal conduct; Rehabilitation
16/2008	Firearms	92	115	65.00	Nature and circumstance of offense/history of defendant; Reflect seriousness of offense/promotes respect for law/just punishment; Afford adequate deterrence to criminal conduct
14/2008	Assault	12	12	0.00	Totality of circumstances/combination of factors; 18 U.S.C. § 3553(a)
20/2008	Firearms	57	71	24.00	Totality of circumstances/combination of factors
1/2008	Drugs - Trafficking	120	135	107.00	Insufficient documentation provided on SOR to determine reason
5/2008	Fraud	51	57	39.00	Reflect seriousness of offense/promotes respect for law/just punishment; Protect public from further crimes; Provide defendant with educational or vocational training/medical care
12/2008	Firearms	21	27	8.00	Family ties and responsibilities (§5H1.6)
21/2008	Child Pornography	51	63	12.03	Nature and circumstance of offense/history of defendant
29/2008	Embezzlement	8	14	0.00	Nature and circumstance of offense/history of defendant; Mental and emotional conditions (§5H1.3); Previous employment record (§5H1.5)
1/2008	Firearms	46	57	36.00	Nature and circumstance of offense/history of defendant; Protect public from further crimes; Provide defendant with educational or vocational training/medical care
21/2008	Firearms	41	51	34.00	Family ties and responsibilities (§5H1.6)
22/2008	Firearms	140	175	84.00	Afford adequate deterrence to criminal conduct; Protect public from further crimes; Provide defendant with educational or vocational training/medical care
23/2008	Firearms	235	293	179.00	Reflect seriousness of offense/promotes respect for law/just punishment; Provide defendant with educational or vocational training/medical care; General guideline adequacy issues
9/7/2008	Firearms	360	Life	245.00	Nature and circumstance of offense/history of defendant; Reflect seriousness of offense/promotes respect for law/just punishment
0/22/2008	Firearms	219	252	204.00	Nature and circumstance of offense/history of defendant; Drug dependence/alcohol abuse (§5H1.4); Family ties and responsibilities (§5H1.6)
1/5/2008	Firearms	12	18	6.00	Nature and circumstance of offense/history of defendant; Family ties and responsibilities (§5H1.6); Criminal history issues
1/29/2008	Firearms	37	46	30.00	Totality of circumstances/combination of factors
2/2/2008	Fraud	15	21	8.10	Provide defendant with educational or vocational training/medical care; Training/treatment opportunities; Restitution
2/8/2008	Firearms	70	87	57.00	Nature and circumstance of offense/history of defendant
23/2009	Fraud	48	54	39.00	Totality of circumstances/combination of factors; 18 U.S.C. § 3553(a)
23/2009	Child Pornography	78	97	46.00	Totality of circumstances/combination of factors
25/2009	Drugs - Trafficking	70	87	35.00	Nature and circumstance of offense/history of defendant; Protect public from further crimes; Drug dependence/alcohol abuse (§5H1.4)

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Cases Sentenced Below the Sentencing Guideline Range
Judge Bernice B. Donald
Fiscal Year 1999-2010

		114	121	102.00	Nature and circumstance of offense/history of defendant; Reflect seriousness of offense/promotes respect for law/just punishment; Afford adequate deterrence to criminal conduct
4/2009	Firearms				
18/2009	Drugs - Trafficking	121	151	120.00	Party motion/agreement/consent (reason unspecified)
20/2009	Firearms	63	78	60.00	Totality of circumstances/combination of factors
		100	125	84.00	Reflect seriousness of offense/promotes respect for law/just punishment; Afford adequate deterrence to criminal conduct; Provide defendant with educational or vocational training/medical care
28/2009	Drugs - Trafficking				
		78	97	46.00	Nature and circumstance of offense/history of defendant; Reflect seriousness of offense/promotes respect for law/just punishment; Avoid unwarranted sentencing disparity among defendants
4/2009	Child Pornography				
20/2009	Drugs - Trafficking	6	12	0.00	Previous employment record (§5H1.5); Cooperation (motion unknown)
26/2009	Firearms	70	87	57.00	18 U.S.C. § 3553(a)
		8	14	2.00	Nature and circumstance of offense/history of defendant; Afford adequate deterrence to criminal conduct; Provide restitution to any victims
27/2009	Fraud				
		151	188	60.00	Nature and circumstance of offense/history of defendant; Family ties and responsibilities (§5H1.6); Drug quantity
28/2009	Drugs - Trafficking				
		37	46	14.00	Nature and circumstance of offense/history of defendant; Previous employment record (§5H1.5); Rehabilitation
17/2009	Firearms				
		188	235	96.00	offense/promotes respect for law/just punishment; Afford adequate deterrence to criminal conduct
23/2009	Child Pornography				
		30	37	27.00	Nature and circumstance of offense/history of defendant; Criminal history issues
29/2009	Drugs - Trafficking				
		30	37	13.00	Nature and circumstance of offense/history of defendant; Mental and emotional conditions (§5H1.3); Family ties and responsibilities (§5H1.6)
30/2009	Firearms				
8/2009	Administration of Justice Offenses	15	21	0.00	Nature and circumstance of offense/history of defendant
		63	78	50.00	Nature and circumstance of offense/history of defendant; Family ties and responsibilities (§5H1.6); Training/treatment opportunities
31/2009	Firearms				
		51	63	42.00	Nature and circumstance of offense/history of defendant; Provide defendant with educational or vocational training/medical care
25/2009	Firearms				
1/26/2009	Firearms	198	217	180.00	Totality of circumstances/combination of factors; Criminal history issues
1/28/2009	Money Laundering	37	46	16.00	Criminal history issues
6/2010	Firearms	70	87	60.00	Totality of circumstances/combination of factors
6/2010	Fraud	6	12	0.00	Nature and circumstance of offense/history of defendant
10/2010	Firearms	37	46	33.00	Nature and circumstance of offense/history of defendant; Other
		30	37	0.16	Nature and circumstance of offense/history of defendant; Previous employment record (§5H1.5); Family ties and responsibilities (§5H1.6)
11/2010	Firearms				
11/2010	Drugs - Trafficking	12	18	0.00	Totality of circumstances/combination of factors
		51	63	48.00	Nature and circumstance of offense/history of defendant; Family ties and responsibilities (§5H1.6); Rehabilitation
23/2010	Fraud				
		15	21	2.26	Nature and circumstance of offense/history of defendant; Reflect seriousness of offense/promotes respect for law/just punishment; Afford adequate deterrence to criminal conduct
16/2010	Administration of Justice Offenses				
24/2010	Money Laundering	27	33	12.33	Totality of circumstances/combination of factors
25/2010	Firearms	120	120	102.00	Acceptance of responsibility
		87	108	60.00	Discharged terms of imprisonment (§5K2.23); Natura and circumstance of offense/history of defendant; Protect public from further crimes
1/2010	Drugs - Trafficking				
		33	41	22.00	Nature and circumstance of offense/history of defendant; Reflect seriousness of offense/promotes respect for law/just punishment; Afford adequate deterrence to criminal conduct
5/2010	Firearms				

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Cases Sentenced Below the Sentencing Guideline Range
Judge Bernice B. Donald
Fiscal Year 1999-2010

12/2010	Firearms	27	33	0.20	Nature and circumstance of offense/history of defendant; Criminal history issues; Criminal history issues
19/2010	Firearms	130	162	108.00	Nature and circumstance of offense/history of defendant; Criminal history issues
19/2010	Firearms	51	63	46.00	Nature and circumstance of offense/history of defendant; Drug dependence/alcohol abuse (§5H1.4)
26/2010	Drugs - Trafficking	33	41	21.00	Nature and circumstance of offense/history of defendant; Physical condition (§5H1.4); Family ties and responsibilities (§5H1.6)
26/2010	Robbery	30	37	13.00	Acceptance of responsibility; Remorse; Mental and emotional conditions (§5H1.3)
22/2010	Fraud	18	24	13.00	Nature and circumstance of offense/history of defendant; Previous employment record (§5H1.5); Family ties and responsibilities (§5H1.6)
1/2010	Money Laundering	18	24	8.07	18 U.S.C. § 3553(a)
28/2010	Fraud	15	21	8.03	Nature and circumstance of offense/history of defendant; Educational and vocational skills (§5H1.2); Previous employment record (§5H1.5)
2/2010	Fraud	21	27	10.00	Nature and circumstance of offense/history of defendant
23/2010	Kidnapping/Hostage-Taking	Life	Life	300.00	Nature and circumstance of offense/history of defendant; Rehabilitation
27/2010	Firearms	77	96	63.00	Criminal history issues
27/2010	Fraud	12	18	8.03	Nature and circumstance of offense/history of defendant; Protect public from further crimes; Family ties and responsibilities (§5H1.6)
29/2010	Drugs - Trafficking	151	188	84.00	Nature and circumstance of offense/history of defendant; Protect public from further crimes; Family ties and responsibilities (§5H1.6)

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Responses of Paul A. Engelmayer
Nominee to be United States District Judge for the Southern District of New York
to the Written Questions of Senator Tom Coburn, M.D.

1. **Some people refer to the Constitution as a "living" document that is constantly evolving as society interprets it. Do you agree with this perspective of constitutional interpretation?**

   Response: I do not. The Constitution's text and principles are fixed. The Constitution can be altered only by amendment.

2. **Justice William Brennan once said: "Our Constitution was not intended to preserve a preexisting society but to make a new one, to put in place new principles that the prior political community had not sufficiently recognized." Do you agree with him that constitutional interpretation today must take into account this supposed transformative purpose of the Constitution?**

   Response: No.

3. **Do you believe judicial doctrine rightly incorporates the evolving understandings of the Constitution forged through social movements, legislation, and historical practice?**

   Response: No. Considerations such as legislative norms or historical practices are for legislators to take into account in fashioning legislation, should they so wish. They are not for judges to consult in ascertaining the meaning or application of the Constitution, except in those limited contexts in which binding Supreme Court precedent instructs otherwise.

4. **Do you believe empathy is an essential ingredient for arriving at just decisions and outcomes and should play a role in a judge's consideration of a case?**

   Response: No. I do believe a judge must show dignity to all parties and counsel in his or her courtroom, and must be a good listener. Those traits, however, are quite distinct from empathy.

5. **Is any transaction involving the exchange of money subject to Congress's Commerce Clause power?**

   Response: No, because that is not the test that the Supreme Court has used to determine the scope of Congress's power under the Commerce Clause. Rather, in *United States v. Lopez*, 514 U.S. 549 (1995) and *United States v. Morrison*, 529 U.S. 598 (2000), the Court ruled that that power, while broad, is not unlimited, and identified three distinct categories of activity that are covered by the Commerce Clause. These are activities involving the channels of interstate commerce; instrumentalities of, or persons or things, in interstate commerce; and activities having a substantial relationship to interstate commerce. Under those precedents, the issue as to a transaction involving the exchange

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of money would appear to be whether that transaction involved one of these three categories of activity.

6. **The U.S. Supreme Court held in *District of Columbia v. Heller*, 554 U.S. 570 (2008), that the Second Amendment of the United States Constitution "protects an individual right to possess a firearm unconnected to service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home." As Justice Scalia's opinion in *Heller* pointed out, Sir William Blackstone, the preeminent authority on English law for the Founders, cited the right to bear arms as one of the fundamental rights of Englishmen. Leaving aside the *McDonald v. Chicago* decision, do you personally believe the right to bear arms is a fundamental right?**

   Response: As noted, the Supreme Court held in *Heller* that the Second Amendment confers an individual with the right to possess a firearm unconnected to service in a militia, and the Court more recently held in *McDonald* that that constitutional right is also applicable against the states. If confirmed as a United States District Judge, I will faithfully follow these (and any future) Supreme Court precedents in this area, as well as any applicable precedents of the United States Court of Appeals for the Second Circuit. I do not have any personal beliefs that would interfere with my following these precedents.

   a. **Do you believe that explicitly guaranteed substantive rights, such as those guaranteed in the Bill of Rights, are also fundamental rights? Please explain why or why not.**

      Response: I do not have a personal view about the circumstances under which substantive rights that are explicitly protected from intrusion by the federal government are also fundamental rights applicable as against the states. I have not read significantly in this area since law school. If confirmed as a United States District Judge, and if a case presenting the question whether a particular substantive right guaranteed in the Constitution was also a fundamental right protected against intrusion by the states, I will follow Supreme Court (and Second Circuit) precedent in the area, and if no precedent were controlling, I would carefully apply the methodology used by the Supreme Court to consider questions of this nature.

   b. **Is it your understanding of Supreme Court precedent that those provisions of the Bill of Rights that embody fundamental rights are deemed to apply against the States? Please explain why or why not.**

      Response: Same answer as to 6(a), above. I do not have a view about this subject.

   c. **The *Heller* Court further stated that "it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right." Do you believe that the Second Amendment, like the**

First and Fourth Amendments, codified a pre-existing right? Please explain why or why not.

Response: I do not have a view on this subject.

7. **Some have criticized the Supreme Court's decision in *Heller* saying it "discovered a constitutional right to own guns that the Court had not previously noticed in 220 years." Do you believe that *Heller* "discovered" a new right, or merely applied a fair reading of the plain text of the Second Amendment?**

Response: The Supreme Court's decision in *Heller* states clearly that it is applying the text of the Second Amendment, as informed / confirmed by historical practices and understandings.

   a. **Similarly, during his State of the Union address, the President said the Supreme Court's decision in *Citizens United v. FEC*, 558 U.S. ___ (2010), "reversed a century of law" and others have stated that it abandoned "100 years of precedent." Do you agree that the Court reversed a century of law or 100 years of precedent in the *Citizens United* decision? Please explain why or why not.**

   Response: I do not have a view on this issue. If confirmed as a United States District Judge, I would be bound by, and would faithfully follow, the Court's decision in *Citizens United.*

8. **What limitations remain on the individual Second Amendment right now that it has been incorporated against the States?**

Response: *Heller* and *McDonald* recognize that there are limitations on the constitutional right to individual gun possession, but they do not resolve what those limitations are, or settle the legality of the various potential restrictions that units of government may seek to impose on such possession. Those issues are currently being litigated across the country. If confirmed, I would closely study *Heller* and *McDonald* (which I have not done, beyond reading each decision once, shortly after it was handed down) and follow applicable precedent in determining the legality of any restrictions challenged in a case before me.

   a. **In *McDonald v. Chicago*, the majority wrote: "We made it clear in *Heller* that our holding did not cast doubt on such longstanding regulatory measures as 'prohibitions on the possession of firearms by felons and the mentally ill,' 'laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.'"**

   What if a state passed a law imposing a $2,000 registration fee as a condition for the commercial sale of a firearm? Without stating how you would rule in such a case, please explain how you would conduct your analysis to

determine whether the fee violated the Second Amendment right to keep arms?

Response: Such a law would present, among others, the question whether a state-imposed fee of this nature upon firearm transactions is tantamount to a ban on gun possession, and as such is inconsistent with the decisions in *Heller* and *McDonald*. I would review those two precedents (and any other Supreme Court decisions, or Second Circuit decisions, that by then had been issued in this area) for guidance. I would also review, for guidance, any post-*Heller* decisions by other federal courts in the area of the Second Amendment. More generally, I expect that I would review Supreme Court and Second Circuit doctrine bearing on the circumstances under which monetary fees, when attached to the exercise of a constitutional right, impermissibly infringe upon that right. If such doctrine made such an inquiry relevant, it might be relevant to inquire as to the basis or justification for the fee in question, and whether there was adequate justification, under the applicable doctrine, for imposing such a fee on the acquisition of a gun.

i. To what cases or authorities would you refer? Please be specific.

Response: See discussion immediately above.

b. What if a state outlawed the carrying and possession of firearms on the grounds of hospitals that have psychiatric wards, regardless of whether they are private? Without stating how you would rule in such a case, please explain how you would conduct your analysis to determine whether that regulation complied with the Second Amendment's guarantee of the right to bear arms.

Response: Such a law would present, among others, the question whether a law that prohibited the carrying and possession of firearms in hospitals as a whole – and did not confine such a prohibitions to the psychiatric wards within such hospitals – is consistent with the Second Amendment right. Here, too, I would review the decisions in *Heller* and *McDonald*, and any post-*Heller* decisions in the Supreme Court or the Second Circuit, and, if those decisions were not decisive on this question, other post-*Heller* Second Amendment decisions in the federal courts, for guidance as to the applicable legal doctrine and the scope of the Second Amendment right. One relevant question would be whether there is an absolute right to carry and possess firearms outside of such sensitive areas, or, alternatively, whether a legislature potentially retains latitude to restrict access to firearms in places that are not themselves sensitive but from which there may be ready access to a sensitive area. Depending on the answer to that legal question, it might then be relevant to inquire as to the basis or justification for banning the carrying or possession of a gun in the hospital as a whole, and whether there was adequate justification, under the applicable doctrine, for doing so rather than more narrowly drawing the area within the hospital in which possession was forbidden.

i. Could a hospital qualify as a "sensitive place?"

Response: I do not know and would need to do legal research to form an opinion on this question.

ii. To what cases or authorities would you refer? Please be specific.

Response: I would consult the same authorities as discussed in my responses to questions 8(a) and (b).

c. Is the Second Amendment limited only to possession of a handgun for self-defense in the home, since both *Heller* and *McDonald* involved cases of handgun possession for self-defense in the home?

Response: As noted, *Heller* and *McDonald* hold that there is an individual right to gun possession, but that there are also permissible limitations on individual gun possession. The scope of that right, and the related question of the extent to which that right applies outside the context at issue in those cases, is the subject of pending cases around the country. If confirmed as a United States District Judge, I would faithfully apply the applicable precedents in this area from the Supreme Court and the United States Court of Appeals for the Second Circuit.

9. In *Roper v. Simmons*, 543 U.S. 551 (2005), Justice Kennedy relied in part on the "evolving standards of decency" to hold that capital punishment for any murderer under age 18 was unconstitutional. I understand that the Supreme Court has ruled on this matter, but do you agree with Justice Kennedy's analysis?

Response: If confirmed as a United States District Judge, I would be required to follow the law as set forth by the Supreme Court, under the doctrine of *stare decisis*. Justice Kennedy's analysis in *Roper* is binding precedent, and I would therefore follow it.

a. Do you agree that the Constitution's prohibition on cruel and unusual punishment "embodies a principle whose application is appropriately informed by our society's understanding of cruelty and by what punishments have become unusual?"

Response: If confirmed as a United States District Judge, I would be required to follow the Supreme Court's precedent. In deciding a case under the Eighth Amendment, I would be required to, and would, adhere to the analytic framework set out in the Court's decisions analyzing what constitutes "cruel and unusual punishment," including *Roper v. Simmons*.

b. How would you determine what the evolving standards of decency are?

Response: If confirmed as a United States District Judge and required under Eighth Amendment precedent to make any such determination, I would follow the analytic approach used by the Supreme Court in this area.

c. Do you think that a judge could ever find that the "evolving standards of decency" dictated that the death penalty is unconstitutional in all cases?

Response: The Supreme Court has clearly held that the death penalty is constitutional, except in discrete circumstances. As a District Judge, I therefore could not so rule.

d. What factors do you believe would be relevant to the judge's analysis?

Response: In light of governing Supreme Court precedent, a District Judge could not, consistent with the rule of law and the principle of *stare decisis*, properly engage in any inquiry as to whether the death penalty is unconstitutional in all cases. I would not engage in any such inquiry.

e. When determining what the "evolving standards of decency" are, justices have looked to different standards. Some justices have justified their decision by looking to the laws of various American states,[1] in addition to foreign law, and in other cases have looked solely to the laws and traditions of foreign countries.[2] Do you believe either standard has merit when interpreting the text of the Constitution?

Response: I do not believe it is proper for a judge to rely on foreign or international law when interpreting the text of the United States Constitution.

i. If so, do you believe one standard more meritorious than the other? Please explain why or why not.

Response: Not applicable.

10. In your view, is it ever proper for judges to rely on foreign or international laws or decisions in determining the meaning of the Constitution?

Response: No. I do not believe it is ever proper for judges to rely on foreign or international law or decisions in determining the meaning of the United States Constitution.

a. Is it appropriate for judges to look for foreign countries for "wise solutions" and "good ideas" to legal and constitutional problems?

Response: I cannot think of a situation in which a foreign nation's "solutions" or "ideas" would inform interpretation of our laws.

b. If so, under what circumstances would you consider foreign law when interpreting the Constitution?

Response: I would not consider foreign law when interpreting the Constitution, unless a Supreme Court decision directed federal judges to do so.

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[1] *Roper v. Simmons*, 543 U.S. 551, 564-65.
[2] *Graham v. Florida*, 130 S.Ct. 2011, 2033-34.

c. Do you believe foreign nations have ideas and solutions to legal problems that could contribute to the proper interpretation of our laws?

Response: Foreign or international law may be relevant to the interpretation of our laws only in very narrow circumstances, such as where a domestic law has been enacted to implement an obligation under an international treaty, or where domestic law incorporates a foreign law by reference.

d. Would you consider foreign law when interpreting the Eighth Amendment? Other amendments?

Response: No.

Responses of Paul A. Engelmayer
Nominee to be United States District Judge for the Southern District of New York
to the Written Questions of Senator Chuck Grassley

1. **You have been involved with the Brennan Center for Justice for a number of years. The Center has been a leading advocate for a number of liberal initiatives. Of course, involvement with an organization that takes public policy positions is not a bar to serving as a federal judge. But I want to make sure you are fully committed to transitioning from advocate to impartial jurist.**

   a. **Are you confident that will be able to make that transition?**

      Response: I am confident I will be able to make that transition. As I testified before the Committee, I understand the fundamental difference between the role of an advocate and the role of an impartial jurist.

   b. **Is there any particular aspect of your record that would ease any concerns we may have about your ability to make the transition to impartial jurist?**

      Response: Yes. First, I believe my colleagues in each of the jobs I have held as an attorney would attest to my objectivity, punctiliousness, and fairness; and that my consistent practice is to undertake a close, clinical assessment of the merits of potential legal positions in light of governing precedent. Second, I have had a wide-ranging career as an advocate, in which I have represented diverse interests and positions that I do not believe are readily classified as reflecting a common political philosophy. I have served for more than a decade as a government lawyer, working as a federal prosecutor in Manhattan for more than eight years, where I vigorously prosecuted white-collar (and other criminals) as a member of the Official Corruption Unit and as Chief of the Major Crimes Unit, and as an Assistant to the Solicitor General of the United States for two years, where I was the author of the government's briefs in, among other cases, the important criminal-law cases of *Whren v. United States*, 517 U.S. 806 (1996) (upholding constitutionality of so-called "pretext" traffic stops under Fourth Amendment, and holding that officer's subjective motivation is irrelevant where objective basis exists for the stop), and *Wilson v. Arkansas*, 514 U.S. 927 (1995) (common-law "knock and announce" principle informs but is not rigidly required for police entry of home to comport with Fourth Amendment). I have also worked in private practice at WilmerHale, a corporate law firm, where I have represented, among others, banks, broker-dealers, pharmaceutical companies, and numerous corporate executives. Indeed, my most recent amicus brief to the Supreme Court was in *Morrison v. National Australia Bank Ltd.*, 547 F.3d 167 (2010), in which I was lead counsel for the Institute of International Banks, and on whose behalf I advocated for (and the Supreme Court accepted) a significant territorial limitation for the Securities Exchange Act of 1934. Third, I have been promoted to positions of responsibility within both the United States Attorney's Office and

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WilmerHale, promotions which, I believe, reflect my supervisors' and colleagues' confidence in my objectivity and fairness.

c. Please describe the particular initiatives you were involved with and summarize the position you took on behalf of the Brennan Center.

Response: As reflected in my Senate Judiciary Committee, I have participated in the following cases, either as counsel to the Brennan Center for Justice or as counsel to an amicus in support of the Brennan Center.

1. In *Johnson v. Bush,* 353 F.3d 1287 (11th Cir. 2003), I submitted an amicus brief to the United States Court of Appeals for the Eleventh Circuit, in support of the Brennan Center, which had brought a lawsuit seeking to invalidate Florida's constitutional provision providing for lifetime disenfranchisement of felons. Our brief was on behalf of a large group of former prosecutors, headed by former Deputy Attorney General (now Attorney General) Eric Holder. The brief argued that a policy of permanent felon-disenfranchisement does not further a valid law-enforcement interest.

2. In *Kansas Judicial Review v. Stout*, 519 F.3d 1109 (10th Cir. 2008), I submitted an amicus brief on behalf of the Brennan Center. The brief argued for reversal of a lower-court decision which had invalidated, under the First Amendment, several of Kansas's judicial canons, including Kansas Supreme Court Rule 601A, which prohibited judicial candidates from "mak[ing] pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office … [or] statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court."

3. In *New York State Board of Elections v. Lopez Torres*, 552 U.S. ___ (2008), I submitted an amicus brief in the Supreme Court, in support of the Brennan Center, which was arguing for affirmance of a Second Circuit decision upholding its claim that the process by which state supreme court judges are chosen in New York State violated the First Amendment. Our brief was on behalf of Brooklyn District Attorney Charles Hynes. It largely consisted of Mr. Hynes's account of documented instances of corruption created by the political party-dominated judicial selection process.

4. In *Kirk v. Carpeneti,* 623 F.3d 889 (9th Cir. 2010), I submitted an amicus brief on behalf of the Brennan Center. The brief sought affirmance of a lower court decision which had rejected a separation-of-powers challenge to Alaska's merit-selection process for selecting state court judges.

2. You submitted a brief in the Supreme Court case of *United States v. Fanfan* (2005), which of course addressed the constitutionality of the sentencing guidelines.

a. Now that the sentencing guidelines are advisory, rather than mandatory, how much deference will you afford them, should you be confirmed?

Response: If confirmed as a United States District Judge, I will accord the Sentencing Guidelines substantial deference.

b. Do you agree that the sentence that a particular defendant receives should not depend on the judge he or she happens to draw?

Response: Yes. My experience as a federal prosecutor demonstrated to me the valuable role served by the Guidelines, in helping to ensure that like offenders are treated alike in the federal criminal justice system.

c. How would you ensure consistency in your judicial rulings when different criminals commit the same offenses?

Response: I will accord the Sentencing Guidelines substantial deference, which will help ensure such consistency. I will be vigilant, in individual cases, to ensure that like offenders are treated alike, and that differences in sentences accorded to offenders are based on relevant factual differences between them.

3. Do you believe that our federal government is one of limited and enumerated powers? If so, please explain how that will guide you, if you are confirmed as a U.S. District Judge

Response: Yes. That principle is expressly set out in the 10th Amendment to the U.S. Constitution. If confirmed as a United States District Judge, and if a case raising these considerations came before me, I would faithfully apply the decisions of the United States Supreme Court, and of the United States Court of Appeals for the Second Circuit, setting out the limits on Congress's enumerated powers, such as its Commerce Clause powers. *See, e.g., United States v. Lopez*, 514 U.S. 549 (1995); *United States v. Morrison*, 529 U.S. 598, 608-09 (2000).

4. What is your view of the constitutional principle of separation of powers? Do you still subscribe to the notion you raised in a review of *The Brandeis Frankfurter Connection*, that "there is a place for informal judicial involvement in America's policy-making apparatus so long as judges steer clear of entanglement that could prejudice their decisions?"

Response: I believe that the principles of separation of powers, and of the balance of powers, are fundamental principles underlying our constitutional structure. If confirmed as a United States District Judge, and if a case raising these considerations came before me, I would faithfully apply the precedents of the United States Supreme Court, and of the United States Court of Appeals for the Second Circuit, in the relevant area. I do not agree with the statement I made, in a 1982 book review for my college newspaper, that

there is a place for "informal judicial involvement in America's policy making apparatus so long as judges steer clear of entanglement that could prejudice their decisions."

a. What is the limit on judicial involvement in policy-making?

Response: I do not believe there is an appropriate role for federal judges in policy making, except in connection with the administration of the federal judiciary.

b. If there is judicial involvement in policy-making, how can judges steer clear of entanglement that could prejudice their decisions?

Response: I do not believe judicial involvement in policy making is appropriate, and any such involvement would make it difficult for a judge to steer clear of entanglements that could prejudice their decisions.

5. You have been involved in fundraising and other political activity. What can you tell the Committee to assure us that politics will have no place in your courtroom, if you are confirmed? Why would parties appearing before you have confidence that they will be treated fairly, regardless of their political affiliation?

Response: If confirmed as a United States District Judge, I would faithfully apply the rule of law. I would not decide cases based on politics or the political affiliation(s) of the parties. I have also represented a diverse array of parties and interests, which, I hope, would provide parties with confidence that I am not beholden to any point of view or political affiliation. *See also* Response to Question 1(b). I am confident that my rulings and comportment as a United States District Judge will give litigants confidence in my impartiality and my commitment to the rule of law. Needless to say, if confirmed as a judge, I would not engage in any fundraising or other political activity.

6. Do you believe it is proper for a judge, consistent with governing precedent, to strike down an act of Congress that it deems unconstitutional? If so, under what circumstances, and applying what factors?

Response: Yes. A judge must always be mindful that ours is a democracy and that there is a heavy presumption that laws enacted by Congress are constitutional. If, however, Congress enacts a law that exceeds its limited, enumerated powers under the Constitution, or if Congress enacts a law that is inconsistent with an individual right provided by the Constitution, it is proper for a judge to strike down that statute, or to hold that its application in the particular case is unconstitutional. If confirmed as a United States District Judge, and if a case calling into question the constitutionality of an act of Congress were to come before me, I would faithfully apply the precedents of the United States Supreme Court, and of the United States Court of Appeals for the Second Circuit, in the relevant area.

7. What is the most important attribute of a judge, and do you possess it?

Response: I believe the most important attributes of a judge are fidelity to the rule of law; independence, objectivity, and neutrality; a commitment to treat litigants with dignity and respect; and a recognition that a judge must do the hard work of mastering the applicable facts and law in order to rule correctly. I do believe I have these attributes.

8. **Please explain your view of the appropriate temperament of a judge. What elements of judicial temperament do you consider the most important, and do you meet that standard?**

Response: I believe a judge must always be respectful of parties and their counsel and must treat everyone in the courtroom with utmost dignity. A judge must also be a good listener, open minded, and willing to acknowledge error. A judge must always be mindful that for the parties, the case at bar is vitally important, and that the case belongs to the parties, not the judge. A judge must always remember that the parties and their counsel are looking to the judge to treat the case as the important matter it is, and to carry out his or her role with objectivity, neutrality, care, and analytic rigor. I believe that, if confirmed as a United States District Judge, my conduct will meet that standard.

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

Response: Yes.

10. **At times, judges are faced with cases of first impression. If there were no controlling precedent that dispositively concluded an issue with which you were presented, to what sources would you turn for persuasive authority? What principles will guide you, or what methods will you employ, in deciding cases of first impression?**

Response: If there were no dispositive controlling precedent of either the United States Supreme Court or the United States Court of Appeals for the Second Circuit, I would look to prior decisions of those courts for relevant reasoning and guidance. I would also look to decisions by other federal courts, including federal courts of appeal other than the Second Circuit, for guidance. In handling statutory questions of first impression, I would, of course, look first to the text of the statute.

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

Response: As a United States District Judge, I would be bound by the decisions of the United States Supreme Court and the United States Court of Appeals for the Second Circuit, and would apply those decisions. I would not substitute my own judgment for binding precedents of superior courts.

12. As you know, the federal courts are facing enormous pressures as their caseload mounts. If confirmed, how do you intend to manage your caseload?

Response: First and foremost, if confirmed as a United States District Judge, I would seek guidance from my fellow district judges as to best practices for managing a busy caseload in the Southern District of New York. I am mindful that there is much to be gained from their experience. I also expect I would seek to manage my caseload by means including (a) setting and adhering to firm deadlines; (b) working hard to resolve pending motions on a timely basis and in a way that affords clear guidance to litigants as to the question or issue presented; and (c) making intelligent use of the fine Magistrate Judges in the district.

13. Do you believe that judges have a role in controlling the pace and conduct of litigation and, if confirmed, what specific steps would you take to control your docket?

Response: Yes. Parties reasonably expect judges both to resolve pending motions on a timely basis, and I would work diligently (and expect my law clerks to do the same) to achieve that goal. Parties also reasonably expect judges to keep litigation moving forward with dispatch, so to ensure that justice is not needlessly delayed, and I would set and enforce deadlines suitable to that goal. Most of all, I expect to work very hard as a federal district judge, and hope that my active engagement in the case, including with the details of pending motions such as discovery motions, helps speed the process by which a lawsuit is decided or settled.

14. Please describe with particularity the process by which these questions were answered.

Response: I received the questions on March 23, 2011. I prepared responses over the following two days. I then reviewed my responses with representatives of the Department of Justice, after which I finalized my responses. I then authorized their transmittal to the Committee.

15. Do these answers reflect your true and personal views?

Response: Yes.

Responses of Paul A. Engelmayer
Nominee to be United States District Judge for the Southern District of New York
to the Written Questions of Senator Jeff Sessions

1. **You served as law clerk to Justice Thurgood Marshall, who was viewed as having a judicial philosophy far out of the mainstream and far to the left of the Court. For example, Justice Marshall believed that the death penalty was unconstitutional in every case.**

   a. **Do you identify yourself with the judicial philosophy of Justice Marshall? If so, what aspects of his judicial philosophy do you most identify with? Please explain your answer.**

   Response: I have enormous admiration for Thurgood Marshall. His achievement in bringing, and winning, the series of litigations that led to *Brown v. Board of Education* is a signal achievement in American law. I also have great admiration for the physical courage he showed in his career, including in defending criminal cases in late 1930s and 1940s under circumstances under which both he and his client were at risk of lynching or other physical retaliation. I also respect Justice Marshall for his long tenure in public service – as a judge on the United States Court of Appeals for the Second Circuit, as Solicitor General of the United States, and, finally, as an Associate Justice of the United States Supreme Court. I will also always be grateful to him for the extraordinary honor he gave me in asking me to serve as his law clerk, and for the unforgettable experience of so serving. That said, I do not identify myself with Justice Marshall's judicial philosophy, and I agree that, in various areas of doctrine, his opinions are out of step with the governing precedents of the United States Supreme Court and the United States Court of Appeals for the Second Circuit. As I have testified, if confirmed, I would faithfully follow those precedents.

   b. **Do you believe the death penalty is constitutional?**

   Response: Yes. The Supreme Court has held that, except in certain discrete circumstances, the death penalty is constitutional. If confirmed as a United States District Judge, I would faithfully apply the Supreme Court's precedents, and those of the United States Court of Appeals for the Second Circuit, relating to the death penalty.

   c. **If confirmed, would you have any philosophical or legal views that would prevent you from applying the death penalty?**

   Response: No. I do not have any philosophical or legal views that would prevent me from applying the death penalty.

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2. **Please provide copies of any briefs you submitted or participated in drafting at any stage of the proceedings in *Shields v. Madigan*, *Hernandez v. Robles*, and *Johnson v. Bush*.**

Response: I have attached copies of briefs that I submitted or participated in drafting in *Shields v. Madigan* and *Johnson v. Bush*. I did not submit or participate in drafting any briefs in *Hernandez v. Robles*.

3. **Now that the U.S. Sentencing Guidelines are advisory rather than mandatory, a judge may impose any sentence ranging from probation to the statutory maximum.**

a. What are your views of the guidelines?

Response: I believe that the U.S. Sentencing Guidelines play a valuable role in ensuring that the sentence that a defendant receives for a particular crime does not depend on the judge he or she happens to draw. The Guidelines thereby help avoid the unacceptable injustice that comes when like defendants are sentenced differently. As a federal prosecutor in the years when the Guidelines were mandatory, I saw firsthand the constructive role that the Guidelines played in this respect.

b. If confirmed, how much deference will you afford the guidelines?

Response: If confirmed as a United States District Judge, I will accord the Sentencing Guidelines substantial deference.

c. Do you agree that the sentence a defendant receives for a particular crime should not depend on the judge he or she happens to draw?

Response: Yes.

d. Under what circumstances do you believe it appropriate for a district court judge to depart downward from the guidelines?

Response: The Guidelines themselves provide the standards applicable for various departure bases. For example, under Section 5H1.4 of the Guidelines, a departure for a physical impairment may be made only where the impairment is "extraordinary," and there is, by now, a substantial body of precedent applying that standard to various factual situations These precedents would bind me (if from the Second Circuit) or guide me (if from other federal courts) in applying these departure bases to the facts at hand. Following the decision in *United States v. Booker*, 543 U.S. 220 (2005), the district court, after calculating the applicable guideline range and determining whether a ground for departure is lawfully available and if so whether to depart on that ground, must also, in fashioning a sentence, take into account the other sentencing factors set forth in

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18 U.S.C. § 3553(a). If confirmed as a United States District Judge, I would faithfully apply the precedents in this area.

e. **According to an October 28, 2010 article in the *Legal Intelligencer*, there is a recent trend among federal judges to reject the federal sentencing guidelines for child pornography crimes as "too harsh." What are your views with respect to these particular guidelines?**

Response: I do not have any views with respect to these guidelines, as I have not had any experience handling child pornography cases, either as a prosecutor or in private practice, and am not familiar with this guidelines.

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NO. 02-14469C

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

THOMAS JOHNSON, et al.,

Plaintiffs-Appellants,

v.

JEB BUSH, GOVERNOR OF FLORIDA, et al.,

Defendants-Appellees.

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
NOV 01 2002
THOMAS K. KAHN
CLERK

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA (MIAMI), NO. 00-3543-CIV-KING

BRIEF OF ERIC H. HOLDER, JR., ZACHARY W. CARTER, KENDALL COFFEY, JANICE MCKENZIE COLE, VERONICA COLEMAN, WALTER C. HOLTON, JR., G. DOUGLAS JONES, SCOTT LASSAR, WILMA A. LEWIS, J. BRAD PICOTT, JAMES K. ROBINSON, PAUL SHECHTMAN, HOWARD M. SHAPIRO, SETH P. WAXMAN, AND WILLIAM D. WILMOTH AS *AMICI CURIAE*, IN SUPPORT OF PLAINTIFFS-APPELLANTS AND FOR REVERSAL OF THE DISTRICT COURT'S GRANT OF SUMMARY JUDGMENT TO THE DEFENDANTS ON PLAINTIFFS-APPELLANTS' VOTING RIGHTS ACT CLAIM

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CERTIFICATE OF INTERESTED PERSONS IN
THOMAS JOHNSON, et al. v. JEB BUSH, GOVERNOR OF FLORIDA, et al.,
No. 02-14469C

The undersigned counsel of record certifies that the following listed persons have or may have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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A certified class of all Florida citizens who have been convicted of felonies and fully completed the periods of incarceration and/or supervision to which they were sentenced, but nonetheless remain ineligible to register or vote because a felony conviction results in permanent disenfranchisement under Florida's Constitution and statutes.

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Preliminary Statement and Summary of Argument

At issue in this case is the legality under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, of a provision of the Florida Constitution that permanently bars from voting any person residing in the State of Florida who has a prior felony conviction. That law today disenfranchises more than 600,000 people, or more than 5% of Florida's voting age population. Significantly for purposes of analysis under the Voting Rights Act, this exclusion falls disproportionately on black citizens. Approximately 10.5% of black citizens of voting age (approximately 167,000 persons) -- and more than 16% of black male citizens of voting age -- are deprived of the right to vote by virtue of being ex-felons. By contrast, only 4.4% of all other Florida citizens are disenfranchised as ex-felons. Furthermore, while Florida law contains a procedure under which the State's governor may, at his discretion, restore voting rights for particular ex-felons, in that clemency process, too, black ex-offenders have been significantly less likely than others to have their voting rights restored.[1]

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[1] *See generally* Brief for Plaintiff-Appellants ("App. Br.") at 13, 17-19 (setting out evidence of disproportionate racial impact of disenfranchisement law). Including incarcerated felons, fully 27.7% of the State's black male citizens are currently disenfranchised. *See* Defendants' Memorandum of Law In Support Of Motion for Summary Judgment, Document 122, Page 509.

Amici are former law enforcement officials with decades of experience as prosecutors and law enforcement executives. We understand that the instant litigation (and this appeal) involve challenges to the disenfranchisement law based not only on the Voting Rights Act, but on various constitutional grounds as well. We direct this amicus brief solely to the Voting Rights Act challenge. We do so because, we submit, our collective insights and experience are directly relevant to the doctrinal analysis of the validity of Florida's felon-disenfranchisement law under Section 2 of the Voting Rights Act.

As we explain in this brief, Section 2 prohibits all state practices which deny or abridge the right to vote on account of race or color. As amended in 1982, Section 2 focuses on results, not intent: "practices and procedures that result in the denial or abridgment of the right to vote are forbidden" even without proof of discriminatory intent.[2] In evaluating whether a given practice violates Section 2, courts are directed to inquire whether, "'based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State ... are not equally open to participation by members of a [protected] class.'"[3] In this balance, courts are directed to closely scrutinize a variety of objective

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[2] *Chisom v. Roemer*, 501 U.S. 380, 383 (1991).

[3] *Burton v. City of Belle Glade*, 178 F.3d 1175, 1196 (11th Cir. 1999) (quoting 42 U.S.C. § 1973(b)).

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factors, including the asserted state interest furthered by the practice in question. Where that practice only tenuously advances legitimate state interests, the practice may not stand, particularly where, as here, the practice demonstrably results in disproportionately excluding members of a minority racial group from the electorate.

For its policy of permanent disenfranchisement of ex-felons to be sustained, Florida must therefore, at a minimum, be able to advance a significant state interest for that policy. In this litigation, Florida has defended permanent disenfranchisement with the general statement that it serves the State's "penal goals."[4] But that asserted policy rationale is in conflict with the history of such laws. Felon disenfranchisement schemes trace their roots to a feudal time, when a felony was said to result in the "civil death" of the offender. To shame the offender, he was stripped of all civil rights (including the right to remain married: divorce was automatic upon conviction of a felony). More recently, disenfranchisement schemes were enacted in various southern States during and after Reconstruction, for the specific purpose of diminishing the electoral strength

[4] *See* Defendant's Memorandum of Law In Support Of Motion for Summary Judgment, at 20.

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of the newly freed slaves.[5] Plaintiff-Appellants have marshaled compelling evidence that Florida's disenfranchisement law, enacted in 1868 as part of Florida Reconstruction, was such a law. Its proponents asserted that disenfranchisement would keep Florida from becoming -- in the words of one proponent -- "niggerized."[6] Florida's present felon disenfranchisement provision, enacted in 1968, is substantively identical to the 1868 provision law[7]; there is no legislative history explaining the re-enactment.[8] Significantly, there is today no more sweeping felon-disenfranchisement law in the Nation. Almost every other State that disenfranchises felons ends this exclusion upon the conclusion of either the felon's term of incarceration or his term of post-incarceration supervision.[9]

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[5] *See, e.g., Hunter v. Underwood*, 471 U.S. 222, 229 (1985) (describing "movement that swept the post-Reconstruction South to disenfranchise blacks").

[6] *See* App. Br. at 9.

[7] The 1868 law provided, in pertinent part: "[N]or shall any person convicted of a felony be qualified to vote at any election unless restored to civil rights." Fla. Const. art. XIV § 2 (1868). The present law provides: "No person convicted of a felony or adjudicated in this or any other state to be mentally incompetent, shall be qualified to vote or hold office until restoration of civil rights or removal of disability." Fla. Const. art. VI § 4. *See* App. Br. at 12.

[8] *See* App. Br. at 11-12.

[9] Only eight of the 48 States that disenfranchise convicted felons do so permanently, and the number has steadily diminished. Thirty-five States (and the District of Columbia) restore voting rights automatically upon the completion of either incarceration, parole or probation. *See Developments in the Law VI: One Person, No Vote: The Laws of Felon Disenfranchisement*, 115 Harv. L. Rev. 1939,

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Amici devote this brief to critically analyzing Florida's present claim that permanently stripping all ex-felons of voting rights materially advances a State's "penal interests." We can well understand the State's reluctance to justify this practice based on the anachronistic notion that a felon ought to suffer "civil death." We further appreciate that these laws can hardly be sustained based solely on the metaphoric formulations that from time to time have been articulated in their defense (*e.g.*, the Lockean syllogism that the offender has "broken the social compact" and must thereby be stripped of voting rights, or the often-quoted assertion that exclusion of felons is necessary to maintain "the purity of the ballot box"). Rather, under the Voting Rights Act, it is incumbent upon a state to explain specifically how such a law restricting suffrage advances legitimate policy interests. As *amici* demonstrate in this brief, notwithstanding the defense that Florida mounts for this law, the permanent exclusion of persons from the political community does not advance any accepted goal of the criminal justice system, such as prevention, specific and general deterrence, and retribution. And any such

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1942-49 (2002). And while Florida law provides for the possibility of the restoration of voting rights, the number of restorations each year is small (only 927 restorations in the year 2000), *see id.* at 1945, and is subject to the Governor's "unfettered discretion" to deny clemency and thus the right to vote to anyone "at any time, for any reason." Fla. R. Exec. Clem. 4. *See also* Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 Stan. L. & Pol'y Rev. 153, 153 (1999) (hereinafter, "Demleitner") ("In most states ex-offenders eventually regain the right to vote.")

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lifetime exclusion from voting gravely disserves the State's overwhelming interest in rehabilitating the offender and re-integrating him into civil society. *Amici* base these conclusions on our collective experience in law enforcement, on the assembled case law, on work in the area of criminology, and on what we submit is sound and commonsensical reasoning.

Amici therefore respectfully submit this brief in support of Plaintiff-Appellants' claim that Florida's permanent disenfranchisement of ex-felons violates Section 2 of the Voting Rights Act, and their argument on appeal that the district court erred in dismissing that claim.[10]

Statement of Interest

As noted, *amici* are former law enforcement officials with extensive experience as prosecutors and law-enforcement executives. *Amici* have dedicated their careers to ensuring that law enforcement is effective and just. Throughout their careers, *amici* have given long and hard consideration to questions concerning the goals of law enforcement, as well as the most effective strategies to achieve those goals. As officers of the law, *amici* are also committed to effective enforcement of the Voting Rights Act.

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[10] *Amici*'s discussion in this brief is limited to Florida's blanket permanent disenfranchisement of ex-felons. *Amici* express no opinion about laws in other States that, in other ways, may burden the voting rights of ex-felons.

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In light of the skewed impact that Florida's felon disenfranchisement law has on African American suffrage, and in light of the vital importance that the right to vote has in the health and future of this Nation, *amici* believe it is vital that any asserted justification for Florida's felon disenfranchisement law be rigorously analyzed. To the extent that law is said to be justified by penal considerations, *amici* believe it is vital to inquire whether that law actually advances the accepted penal goals of a modern, civilized society. As explained herein, *amici*'s considered opinion is that permanent disenfranchisement does not materially advance any such goals.

The following is brief description of the individual *amici*:

Eric H. Holder, Jr. served as Deputy Attorney General of the United States between 1997 and 2001. He served as United States Attorney for the District of Columbia between 1993 and 1997. Prior to being United States Attorney, Mr. Holder served as an Associate Judge of the Superior Court of the District of Columbia, where he presided over hundreds of civil and criminal trials and matters.

Zachary W. Carter served as United States Attorney for the Eastern District of New York between 1993 and 1999.

Kendall Coffey served as United States Attorney for the Southern District of Florida between 1993 and 1996.

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Janice McKenzie Cole served as United States Attorney for the Eastern District of North Carolina between 1994 and 2001.

Veronica Coleman served as United States Attorney for the Western District of Tennessee between 1993 and 2001.

Walter C. Holton, Jr. served as United States Attorney for the Middle District of North Carolina between 1994 and 2001.

G. Douglas Jones served as United States Attorney for the Northern District of Alabama between 1997 and 2001.

Scott Lassar served as United States Attorney for the Northern District of Illinois between 1997 and 2001.

Wilma A. Lewis served as United States Attorney for the District of Columbia between 1998 and 2001. Between 1995 and 1998, she served as Inspector General for the U.S. Department of Interior.

J. Brad Pigott served as United States Attorney for the Southern District of Mississippi between 1994 and 2001.

James K. Robinson served as Assistant Attorney General in charge of the Criminal Division of the U.S. Department of Justice between 1998 and 2001.

Paul Shechtman served as Director of Criminal Justice for New York State between 1995 and 1997. He served as Chief of the Criminal Division at the United

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States Attorney's Office for the Southern District of New York between 1993 and 1995.

Howard M. Shapiro served as General Counsel of the Federal Bureau of Investigation between 1993 and 1997.

Seth P. Waxman served as Solicitor General of the United States between 1997 and 2001.

William D. Wilmoth served as United States Attorney for the Northern District of West Virginia between 1993 and 1999.

ARGUMENT

THE PERMANENT DISENFRANCHISEMENT OF EX-FELONS DOES NOT MATERIALLY ADVANCE ANY VALID PENAL INTEREST.

A. Under Section 2 Of The Voting Rights Act, Voting Practices That Have The Effect Of Denying Protected Groups Equal Access To The Ballot Must Be Justified By A Significant, Non-Tenuous State Interest.

A violation of Section 2 of the Voting Rights Act will be found if, "'based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State ... are not equally open to participation by members of [a protected class] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect

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representatives of their choice.'"[11] This analysis entails "weighing both the state's interest in maintaining its election system and the plaintiff's interest in the adoption of his suggested remedial plan."[12]

To guide courts in investigating claims based on Section 2, the Supreme Court has identified a number of objective factors which may, under the totality of the circumstances, support a claim of vote dilution or vote denial.[13] These factors (known as the "Senate factors") are derived from the Senate Report accompanying the 1982 amendments to Section 2. They include (1) a history of official discrimination touching on the right to vote, (2) racially polarized voting, (3) practices that may enhance the opportunity for discrimination, (4) whether members of minority groups bear the effects of past discrimination, (5) racial appeals in campaigns, (6) the extent to which members of minority groups have been elected to public office, and, most significantly here, (7) "whether the policy

[11] *Burton*, 178 F.3d at 1196 (quoting 42 U.S.C. § 1973(b)).

[12] *Davis v. Chiles*, 139 F.3d 1414, 1419-20 (11th Cir. 1998) (citing *Houston Lawyers' Ass'n v. Attorney Gen. of Tex.*, 501 U.S. 419, 426 (1991)).

[13] *See Nipper v. Smith*, 39 F.3d 1494, 1511 (11th Cir. 1994) (en banc) (citing *Thornburg v. Gingles*, 478 U.S. 30, 36-37 (1986)).

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underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous."[14]

An inquiry into whether the State's interest in the voting practice in question is tenuous is a central component of the Section 2 inquiry. The greater the disparate impact a practice has on a protected group, the greater is the burden on the State or political subdivision to persuasively justify that practice. Where a practice has a racially disparate impact, an inquiry into the State's interest may "show whether a state's policy [is] pre-textual,"[15] "indicate that the policy is unfair,"[16] or serve as "circumstantial evidence that the system is motivated by discriminatory purposes and has a discriminatory result."[17]

Even a practice that serves a state interest that is more than tenuous may be invalid under Section 2, where the practice significantly impedes a protected

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[14] *Nipper*, 39 F.3d at 1511 (quoting *Gingles*, 478 U.S. at 37). Plaintiff-Appellants have closely analyzed each of the Senate factors, and have persuasively shown that those factors favor invalidation of Florida's felon-disenfranchisement law. *See* App. Br. at 44-49. In light of *amici*'s distinct experience as members of the law-enforcement community, we focus our discussion exclusively on factor (7) -- the tenuousness of the State's purported law-enforcement interest in permanent disenfranchisement.

[15] *Cousin v. McWherter*, 46 F.3d 568, 576 (6th Cir. 1995).

[16] *United States v. Marengo County Comm'n*, 731 F.2d 1546, 1571 (11th Cir. 1984).

[17] *McMillan v. Escambia County, Fla.*, 748 F.2d 1037, 1045 (5th Cir. 1984).

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group's access to voting rights. As this Court has noted, "even a consistently applied practice premised on a racially neutral policy would not negate a plaintiff's showing through other factors that the challenged practice denies minorities fair access to the process."[18] Thus, for example, courts have concluded that redistricting plans or election systems may have been enacted in good faith and for good reasons, but have nonetheless held that the resulting dilution of the black vote was nevertheless enough to overcome the state's interest in its system.[19]

In this case, Florida similarly bears a substantial burden of justification. The statistics set out at the start of this brief, and others identified by Plaintiff-Appellants, demonstrate that the State's permanent disenfranchisement of felons law lopsidedly blocks black citizens from voting. In addition, there is compelling evidence that the motivations behind that law, as originally enacted, were to diminish the size and influence of the black electorate.[20] Plaintiff-Appellants have

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[18] *Marengo County*, 731 F.2d at 1571 (internal quotation marks and citation omitted).

[19] *See, e.g., Clark v. Calhoun County, Miss.*, 88 F.3d 1393, 1401 (5th Cir. 1996) (finding violation of § 2 in redistricting plan despite upholding district court's finding that "attempting to maintain districts with equal road mileage is nontenuous."); *Collins v. City of Norfolk, Va.*, 883 F.2d 1232, 1236 n.3 (4th Cir. 1989) (at-large election system violated § 2 despite lack of dispute by plaintiffs of findings by lower court, *see Collins v. City of Norfolk, Va.*, 605 F. Supp. 377, 399 (E.D. Va. 1984), that the "policy is by no means tenuous.").

[20] *See* App. Br. at 8-10. As Plaintiff-Appellants have explained, the State's disenfranchisement law was propounded by a so-called "Moderate Republican"

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further demonstrated that the other Senate factors are overwhelmingly suggestive of vote denial and dilution.[21] Further heightening the State's burden of justification is the utter absence of any legislative (or other) history corroborating the State's present claim that disenfranchisement was intended to advance the State's "penal goals."

B. Historically, Felon Disenfranchisement Laws Have Not Been Justified As A Means Of Advancing A State's "Penal Goals."

The history of felon disenfranchisement laws reveals that they have never been justified as a component of a law-enforcement program. Rather, such laws were originally adopted as part of a system of ostracism or banishment, beginning with the ancient Roman notion of "infamia," a pronouncement of moral censure

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faction, the leader of which stated that disenfranchisement would prevent Florida from becoming, in his words, "niggerized." To this end, the "Moderates" exponentially increased the number of crimes triggering disenfranchisement so as to include those crimes that blacks were believed more "prone" to commit. That strategy worked: A leader of the "Radical Republican" faction testified at the time that the disenfranchisement provision "disfranchises thousands of the colored voters." App. Br. at 4-6. Other southern States enacted criminal disenfranchisement constitutions following Reconstruction for the same purpose. *See* Andrew L. Shapiro, *Challenging Criminal Disenfranchisement Under the Voting Rights Act: A New Strategy*, 103 Yale L.J. 537, 537-542 (1993) (collecting evidence of discriminatory intent in the constitutions of Alabama, Virginia, Mississippi, South Carolina and Louisiana).

[21] *See* App. Br. at 44-49.

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which was imposed on citizens who committed immoral or criminal acts.[22] In the Middle Ages, Germanic tribes employed the practice of "outlawry" to expel an offender from the community, causing him to be deprived both of civil rights and of society's protection. The outlaw's property was confiscated, and the offender could be killed with impunity by anyone.[23] Following the Middle Ages, in continental Europe, outlawry was transformed by statutory enactment into "civil death," which signaled the termination of the offender's legal existence. Dishonor and incapacity were also often imposed on the offender's descendants.[24]

In England, the method of imposing civil disabilities under the common law was called "attainder." Upon conviction for a felony or treason, the offender was pronounced "attainted" and was subject to numerous penalties, including forfeiture (the confiscation of chattel and other goods) and corruption of the blood, which left the attainted person unable to inherit or devise real property and escheated all property to the lord of the estate. The offender also lost his civil rights, including the right to vote as well as the right to bring suit, appear as a witness in court, or

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[22] *See* Howard Itzkowitz & Lauren Oldak, *Restoring The Ex-Offender's Right to Vote: Background and Developments*, 11 Am. Crim. L. Rev. 721, 721-22 (1973) (hereinafter, "Itzkowitz & Oldak").

[23] *See id.* at 722-23.

[24] *See id. at* 723 & n.15.

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perform any other legal function.[25] These penalties were based on "the fiction that the criminal's act was evidence that he and his entire family were corrupt and therefore unworthy of being feudal tenants."[26]

In America, of course, corruption of blood was banned by the Constitution except under limited circumstances related to treason,[27] and the notion of "civil death" was firmly rejected as part of American common law.[28] But felon disenfranchisement statutes nevertheless derive from this lineage of laws intended to symbolically shame the offender. Indeed, *amici* are not aware of any instance in which a State or other political entity has enacted a felon disenfranchisement law based on a considered judgment that such a law was needed to advance the entity's penal objectives.

C. The Permanent Disenfranchisement Of Felons Does Not Materially Advance Any Legitimate Penal Interest Of The State.

Florida asserts that permanently disenfranchising felons "further[s] the state's penal goals." However, closely analyzed, the lifetime exclusion of a citizen from the electorate does not materially advance any of the recognized goals

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[25] *See id.* at 724.

[26] *See* Note, *The Disenfranchisement of Ex-Felons: Citizenship, Criminality and "The Purity of the Ballot Box,"* 102 Harv. L. Rev. 1300, 1302 (1989).

[27] *See* U.S. Const., art. III, § 3, cl. 2.

[28] *See* Itzkowitz & Oldak, *supra*, at 725.

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of punishment (including prevention, deterrence, and retribution), and it positively disserves the State's interest in rehabilitation of the offender.

1. ***Incapacitation/Prevention***

The incapacitation rationale for punishment is that a person who has committed a crime is likely to do so again, and that punishment is therefore necessary to prevent the offender from breaking the law again. Typically, such punishment takes the form of physically incarcerating the offender. In this case, Florida has articulated one such preventive rationale: it asserted below, without elaboration, that permanent disenfranchisement of all ex-felons is necessary to "insure the integrity of elections" in the State.[29]

This justification is unpersuasive. Florida permanently disenfranchises all ex-felons. But the State has not identified any evidence that ex-offenders who have completed their terms of incarceration and supervision -- a broad class, indeed -- are prone to commit offenses affecting the integrity of elections. *Amici* are unaware of any such evidence. Notably, Florida has not limited its permanent ban on voting to those felons who have previously committed election-related offenses -- the sole class of persons as to whom it conceivably might be reasonable

[29] Defendants' Memorandum Of Law in Support of Motion for Summary Judgment, at 20.

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to assume a proclivity to commit election fraud.[30] Permanently disenfranchising all ex-felons is thus a wildly overbroad response to the State's asserted concern. Moreover, one need not be a voter to commit an offense affecting the integrity of elections.[31]

Florida also articulates a preventive rationale when it claims that ex-felons are "unlikely to exercise [the right to vote] responsibly,"[32] presumably by voting against pro-law-enforcement candidates or initiatives. But this asserted concern about "the purity of the ballot box" is not a valid basis for permanent disenfranchisement. First, there is no evidence that, in the many States in which the law permits ex-offenders to vote, they have done so homogeneously or systematically, let alone in a socially disruptive manner. Moreover, excluding a group from the electorate based on predictions about how they would vote is

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[30] *See* Itzkowitz & Oldak, *supra*, at 739 (possibility that election offense may be committed by class of ex-criminals is negligible).

[31] A non-voter can equally bribe election officials, tamper with election machinery, commit absentee-ballot fraud, or submit a falsified petition. *See* Craig C. Donsanto & Nancy S. Stewart, *Federal Prosecution of Election Offenses*, 1270 PLI/Corp. 1019, 1108-09 (Laura A. Ingersoll ed., 2001). ("The most frequently encountered election frauds are absentee ballot fraud (which involves "bribery, forgery, intimidation, and voter impersonation") and ballot box stuffing (which "necessarily involve poll officials, since access to voting documents is essential to this type of fraud").)

[32] Defendant's Reply Brief in Support of Motion for Summary Judgment, at 13.

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unconstitutional. In *Carrington v. Rash*,[33] the Supreme Court considered a Texas state constitutional provision prohibiting military personnel who moved to Texas from ever voting while in the armed services. Texas claimed a "legitimate interest in immunizing its elections from the concentrated balloting of military personnel, whose collective voice may overwhelm a small local civilian community."[34] The Supreme Court struck down the law, holding, in language relevant here, that

> "Fencing out" from the franchise a sector of the population because of the way they may vote is constitutionally impermissible. "(T)he exercise of right so vital to the maintenance of democratic institutions," cannot constitutionally be obliterated because of a fear of the political views of a particular group of bona fide residents.[35]

Indeed, the Voting Rights Act pointedly prohibits states from conditioning the right to vote on any demonstration of knowledge, aptitude, or character.[36]

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[33] 380 U.S. 89 (1965).

[34] *Id.* at 93.

[35] *Id.* at 94 (citations omitted).

[36] *See Oregon v. Mitchell*, 400 U.S. 112, 144-45 & n.9 (1970) (upholding provision of Voting Rights Act prohibiting any test requiring "knowledge of any particular subject," or test of "good moral character" as prerequisite to voting); *see also Dillenburg v. Kramer*, 469 F.2d 1222, 1224 (9th Cir. 1972) (describing "purity of the ballot box" as a "quasi-metaphysical invocation").

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2. Deterrence

Perhaps the most commonly asserted goal of punishment is to deter future criminal conduct, whether by the particular offender (specific deterrence) or potential future offenders (general deterrence). There is, however, no basis whatsoever to conclude that permanently disenfranchising ex-felons serves to deter them from committing new crimes, or to deter others from committing felonies and joining their ranks. Notably, Florida, while asserting that this policy serves its penal goals, has not claimed that disenfranchisement has value as a deterrent.

Of critical importance, the other penal consequences of a felony conviction are far away the most significant deterrent to crime. These include a lengthy term of incarceration (a felony, by definition, carries a potential prison sentence of more than a year), significant fines, and humiliation in the eyes of the offender's family and community. If these consequences are not sufficient to deter the potential offender, it is not credible to suggest that the loss of voting rights upon the conclusion of post-incarceration supervision would be.

In *amici*'s collective years of experience in law enforcement, we have participated in innumerable discussions of deterrence. These discussions have included strategy sessions among prosecutors and law-enforcement agents attempting to design efficacious crime-fighting strategies, meetings with defense counsel about appropriate punishments in particular cases that would serve to deter

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would-be offenders, and colloquies with judges about the same subject. *Amici* are not aware of *any* instance in which the deprivation of an offender's voting rights post-supervision ever entered into these discussions, or was regarded by any participant as a material component of the law's deterrent package.

Amici's experiential conclusion that permanent disenfranchisement is not a meaningful deterrent is supported by research in the area of criminology, which makes clear that distant collateral consequences of a conviction have limited deterrent impact. Studies on crime and deterrence consistently suggest that "punishment deters best when it is fast and certain"; relative to the certainty of punishment and the speed with which it is administered, the "severity of punishment is relatively unimportant."[37] Further, to the extent that links can be drawn between law enforcement practices and crime rates, the greatest deterrent effect is not the time served in prison, but the perceived risks of apprehension, conviction and imprisonment.[38] If extra time in prison is only a relatively marginal deterrent, the denial of the right to vote following the offender's release from prison and the termination of his state supervision would be an even more attenuated deterrent, if it is any deterrent at all.

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[37] *See* William Spelman, *What Recent Studies Do (and Don't) Tell Us About Imprisonment and Crime*, 27 Crime & Just. 419, 472 (2000).

[38] *See id.*

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The law, in fact, clearly presupposes that the loss of voting rights is not the sort of consequence that is of great significance to offenders in deciding whether to commit an offense or in deciding whether to accede to punishment. When accepting a plea of guilty, a judge is not even legally required to apprise the defendant of the collateral consequences of the conviction, including the loss of the right to vote, and failure to do so does not vitiate the guilty plea.[39] Nor is it a breach of the defendant's Sixth Amendment right to the effective assistance of counsel for his counsel to fail to inform him that a guilty plea will deprive him of civil rights.[40] In sum, the connection between the crime and the distant penalty of

[39] *See Pesovic v. Singletary*, No. 95-162-Civ.-T-17A, 1998 WL 173189, at *6 & n.5 (M.D. Fla. Mar. 27, 1998) (citing *United States v. Dayton*, 604 F.2d 931, 937 (5th Cir. 1979), *cert. denied*, 445 U.S. 904 (1980)); *see also United States v. Osiemi*, 980 F.2d 344, 349 (5th Cir. 1993), *United States v. Smith*, 440 F.2d 521, 530 n.6 (7th Cir. 1971), *Brady v. United States*, 397 U.S. 742, 755 (1970) (standard for voluntariness of guilty plea is based on full awareness of the "direct consequences" of the plea).

[40] *See Major v. State*, 814 So. 2d 424, 427 (Fla. 2002); s*ee also United States v. Gonzalez*, 202 F.3d 20, 25 (1st Cir. 2000), *United States v. Banda*, 1 F.3d 354, 355 (5th Cir. 1993) (defendants have no due process right to be informed even of "harsh collateral consequences, such as loss of the right to vote"); *United States v. Del Rosario*, 902 F.2d 55, 59 (D.C. Cir. 1990) (failure to notify defendant of collateral consequences of conviction cannot rise to level of constitutionally ineffective assistance).

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disenfranchisement is too attenuated relative to more immediate penal sanctions to render that penalty a material deterrent.[41]

3. *Retribution*

Punishment may also be justified as a form of moral desert. There is no question that the ancient notion of "civil death" -- in which the offender was stripped of his civil rights as a consequence of his offense -- was understood as such a form of retribution. During ancient times, apart from being disenfranchised, an offender was stripped of his chattel and other goods, deemed unfit to marry or to inherit property, and forbidden or to possess or divide his estate for his heirs.[42]

We live in a very different era. For one thing, the Constitution imposes limits on the scope of retributive punishment, such as the Eighth Amendment's prohibitions on "cruel and unusual" punishments and on bills of attainder. More generally, it is commonly recognized (in the law enforcement community and in society at large) that for a punishment to be morally justified as retribution, it must bear some proportion to the crime in question, whether in severity or duration.[43]

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[41] *See Trop v. Dulles*, 356 U.S. 86, 109 (1958) (Brennan J., concurring) (even a criminal penalty of expatriation would have little effect as a deterrent).

[42] *See* Itzkowitz & Oldak, *supra*, at 723, 736.

[43] The penological principle of proportionality holds that "the severity of the criminal sanction should be limited by the seriousness of the offense and the relevant attributes of the offender." Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, in *Invisible Punishment: The Collateral*

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Would anyone seriously assert, for example, that permanently stripping all ex-felons of the rights to marry, procreate, or inherit -- as occurred during the vengeful era when a felony conviction resulted in "civil death" -- would be a justifiable form of retribution?

In the context of the right to vote, *amici* believe that disenfranchisement is unjustifiable as a form of proportionate retribution, at least to the extent that the ex-felon remains disenfranchised after he has served his term of imprisonment and any subsequent period of official supervision. Once the state has relinquished any further claim to be otherwise punishing, reforming, or monitoring the legal compliance of the ex-offender, there is no justification (let alone a non-tenuous one) for stripping him of his right to participate in the electoral process. Such exclusion instead appears more akin to the types of denunciatory "shaming" and branding of offenders that have long been discredited as archaic.[44]

The Supreme Court's decision in *Richardson v. Ramirez*,[45] holding that a State's felon-disenfranchisement law did not violate the Fourteenth Amendment's

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Consequences of Mass Imprisonment 35 (Marc Mauer & Meda Chesney-Lind eds., 2002).

[44] *See* Demleitner, *supra*, at 160-161 (collateral consequences like disenfranchisement are often disproportionate and "run counter to the adage that 'after the sentence is served, the offender has paid his or her debt to society'").

[45] 418 U.S. 24 (1974).

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guarantee of equal protection, is entirely consistent with this view. In *Richardson*, the Court upheld that law not because it had a perceived penal benefit, but instead, based on the affirmative sanction for disenfranchisement that appears in Section 2 of the Amendment.[46] The Court pointedly did not reject the criticisms that had been leveled at disenfranchisement, to wit, that the historic rationales for disenfranchisement "are outmoded, and that the more modern view is that it is essential to the process of rehabilitating the ex-felon that he be returned to his role in society as a fully participating citizen when he has completed the serving of his term."[47] To the contrary, the *Richardson* Court stated: "We would by no means discount these arguments if addressed to the legislative forum which may properly weigh and balance them."[48] Plaintiff-Appellants' challenge to Florida's permanent disenfranchisement law under the Voting Rights Act, by contrast to the constitutional challenge brought in *Richardson, does* supply an appropriate context for an assessment of the utility and effect of such an enactment, because the Senate factors expressly call for such an analysis.

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[46] *See* 418 U.S. at 54-55.

[47] *Id.* at 55.

[48] *Id.* at 55.

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The Supreme Court's decision in *Trop v. Dulles*[49] reinforces the conclusion that, analyzed on its merits, a permanent disenfranchisement provision is not justifiable as proportionate retribution. The Court in *Trop* struck down a law requiring the denationalization of convicted military deserters in wartime. Far from asserting that denationalization is proportionate punishment or advances valid penal goals, the Court described it as "destruction of the individual's status in organized society...a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development."[50] To a very considerable degree, the same may be said of laws mandating the permanent denial of voting rights, for this sanction permanently destroys the offender's most direct form of participation in the central process of self-government, and renders the group of ex-felons invisible to elected officials. As one court has put the point, disenfranchisement imposes on a significant segment of the population

> the harshest civil sanction imposed by a democratic society. When brought beneath its axe, the disenfranchised is severed from the body politic and condemned to the lowest form of citizenship, where voiceless at the ballot box the disenfranchised, the disinherited must sit idly by while others elect his civic leaders and while others choose

[49] 356 U.S. 86 (1958).

[50] *Id.* at 101.

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> the fiscal and governmental policies which will govern him and his family.[51]

Amici submit that permanent disenfranchisement is unjustifiably disproportionate for a second reason. At common law, and at the time of the drafting of the Constitution, only a relatively narrow class of offenses were deemed felonies, mostly involving violence or forceful invasions of property.[52] Today, however, federal and state felony statutes apply to a broad range of activity, including a wide array of regulatory offenses, as reflected in the proliferation of the number of Florida citizens to whom the State's disenfranchisement law applies.[53] Permanently banning voting by this large class of offenders sweeps far beyond the original retributive logic of denying the franchise to a still-incarcerated violent felon.

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[51] *McLaughlin v. City of Canton, Miss.*, 947 F. Supp. 954, 971 (S.D. Miss. 1995).

[52] Historically, a felony was narrowly regarded as a crime so "conspicuously heinous" as to require serious punishment, *see* Jeremy Travis, *supra*, at 35, justifying forfeiture of the defendant's lands or goods or both. Black's Law Dictionary 633 (7th ed. 1999).

[53] For example, it is a felony in Florida to intentionally sell malt beverages without first allowing such beverages to come to "rest at the licensed premises of an alcoholic beverage wholesaler in this state before being sold to a vendor by the wholesaler." Fla. Stat. ch. 561.5101. While such economic regulation may well serve a valid purpose, *amici* submit that it is disproportionate for the perpetrator to thereby permanently lose his civil rights.

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Amici therefore submit that permanent disenfranchisement, like the other ostracizing civil disabilities that were long ago attached to felonies in the era of "civil death," today may only be viewed as archaic, not as a proportionate form of retribution. In fact, respected authorities on criminal justice, including the American Bar Association, share this view. They have with one voice condemned the disenfranchisement of criminals past the period of their sentence and post-release supervision.[54] *Amici* therefore submit that, under Voting Rights Act analysis, the State's retributive interest in this penalty is no more than tenuous.

4. Rehabilitation

A final goal of punishment is the rehabilitation of the offender and the reintegration of him into mainstream society. Society does not have any interest in

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[54] *See* American Bar Association, *Standards for Criminal Justice 23-8.4: Voting Rights* (2d ed. 1983) ("Persons convicted of any offense should not be deprived of the right to vote"); Model Penal Code § 306.3 (permitting disenfranchisement only while "under a sentence of imprisonment"). In addition, the United Nations Human Rights Committee, which reviews adherence to the International Covenant on Civil and Political Rights (ICCPR), to which the United States is a signatory, has recognized the problem with the automatic imposition of lifetime disenfranchisement. While acknowledging the existence of criminal disenfranchisement laws, the Committee has stated that "[i]f conviction for an offence is the basis for suspending the right to vote, the period of such suspension should be proportionate to the offence and the sentence." General Comment Adopted by the Human Rights Committee under Article 40, Paragraph 4 of the ICCPR, CCPR/C/21/Rev.1/Add.7, August 27, 1996, Annex V (1), *quoted in* Jamie Fellner & Marc Mauer, *Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States* 21 (1998).

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creating a permanent underclass of ex-offenders who are blocked or inhibited by virtue of their prior offenses from contributing productively to the Nation, the economy, or their communities. However, as *amici* know from their experiences as law enforcement officers, reintegrating an offender into society is a daunting challenge under the best of circumstances.[55]

The denial of the right to vote can only add a further barrier to successful reintegration, particularly where (as in Florida today) this denial falls disproportionately on members of a minority group. As a past president of the American Society of Criminology observes,

> denying large segments of the minority population the right to vote is likely to cause further alienation. Disillusionment with the political process also erodes citizens' feeling of engagement and makes them less willing to participate in local political activities and to exert informal social control in their community.[56]

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[55] *See* Joan Petersilia, *When Prisoners Return to the Community: Political, Economic, and Social Consequences*, in National Institute of Justice's *Sentencing & Corrections: Issues for the 21st Century* 5 (Nov. 2000) (canvassing the numerous obstacles to successful reintegration of parolees).

[56] *See id. See also United States v. K.*, 160 F. Supp. 2d 421, 434 (E.D.N.Y. 2001) (reviewing literature demonstrating that civil disabilities such as felon disenfranchisement laws have "frustrated the released felon's attempt to integrate himself or herself into society" and "serve to further estrange released offenders from mainstream society.") The American Bar Association and the American Law Institute for decades have opposed the imposition of collateral disabilities such as disenfranchisement, based on the findings of criminologists that "the stigma of exclusion might actually deter rehabilitation and increase the likelihood of

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Amici submit that it far better serves the State's rehabilitative interest for ex-offenders who have fully completed their terms of incarceration and supervision to be afforded this central political right. If the ex-felon is instead treated as shameful by the state, he will be less likely to fully join mainstream society. Justice Brennan's observations about the deleterious effect of the loss of citizenship on the offender's rehabilitation are apposite here:

> It is perfectly obvious that it constitutes the very antithesis of rehabilitation, for instead of guiding the offender back into the useful paths of society it excommunicates him and makes him, literally, an outcast. I can think of no more certain way in which to make a man in whom, perhaps, rest the seeds of serious antisocial behavior more likely to pursue further a career of unlawful activity than to place on him the stigma of the derelict, uncertain of many of his basic rights.[57]

Amici's view that disenfranchisement impedes rehabilitation is shared by many law enforcement officials around the country. The current President of the National District Attorneys Association, for example, has voiced concern about creating a "subclass of citizens who, even after doing what they were ordered to by a judge, are ... disenfranchised from the vote and continually labeled as criminals.

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recidivism." *See* Andrew L. Shapiro, *The Disenfranchised*, The American Prospect (Nov. 1997).

[57] *Trop*, 356 U.S. at 111 (Brennan J., concurring).

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To no one's surprise, they may believe they have no recourse but to continue to live outside the law."[58]

CONCLUSION

For the foregoing reasons, the Court should reinstate Plaintiff-Appellants' claim that Florida's permanent disenfranchisement of felons violates Section 2 of the Voting Rights Act.

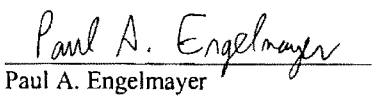
[58] *See* Robert M.A. Johnson, *Message from the President - Collateral Consequences*, National District Attorneys Association, *available at* http://www.ndaa-apri.org/ndaa/about/president_ message_may_june_2001.html (May/June 2001); *see also* Demleitner, *supra*, at 157-158.

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CERTIFICATE OF COMPLIANCE

Pursuant to the Fed. R. App. P. 32, the undersigned certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 32 & 29(d).

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2. The brief has been prepared in proportionally spaced typeface using Word 2000 in Times New Roman 14-point type for text and footnotes.

3. The undersigned understands that a material misrepresentation completing this certificate, or circumvention of the type-volume limits, may result in the Court's striking the brief and imposing sanctions against the person signing the brief.

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I hereby certify that on the 15th of October, 2002, I mailed to the Court, by Federal Express next-day delivery, an original and seven copies of the **Brief of Eric H. Holder, Jr., Zachary W. Carter, Kendall Coffey, Janice McKenzie Cole, Veronica Coleman, Walter C. Holton, Jr., G. Douglas Jones, Scott Lassar, Wilma A. Lewis, Brad Pigott, James K. Robinson, Paul Shechtman, Howard M. Shapiro, Seth P. Waxman and William D. Wilmoth, as *Amici Curiae*, in Support of Plaintiffs-Appellants and for Reversal of the District Court's Grant of Summary Judgment to the Defendants on Plaintiffs-Appellants' Voting Rights Act Claim**.

I further certify that on the 15th of October, 2002, I served two copies of the **Brief of Eric H. Holder, Jr., Zachary W. Carter, Kendall Coffey, Janice McKenzie Cole, Veronica Coleman, Walter C. Holton, Jr., G. Douglas Jones, Scott Lassar, Wilma A. Lewis, Brad Pigott, James K. Robinson, Paul Shechtman, Howard M. Shapiro, Seth P. Waxman and William D. Wilmoth, as *Amici Curiae*, in Support of Plaintiffs-Appellants and for Reversal of the District Court's Grant of Summary Judgment to the Defendants to the Defendants on Plaintiffs-Appellants' Voting Rights Act Claim** on the attached service list by depositing said document enclosed in a first class postpaid wrapper in an official depository under the exclusive care and custody of the United States Postal Service within New York.

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(Time Requested: 30 Minutes)

File - Myade

New York Supreme Court

Appellate Division—Second Department

In the Matter of the Application of:

Docket No.: 2004-10100

JOHN SHIELDS, ROBERT MICHAEL STREAMS, JACQUELINE AXT-OHANNESYAN, LISA AXT-OHANNESYAN, JOHN ADE, JOHNNIE FARMER, ELIZABETH INSON, THERESA APUZZO, JOE HICKEY, ROBERT BRAY, CHRISTINA LOMBARDI, RACHEL McGREGOR RAWLINGS, ABIGAIL MILLER, MELANIE SUCHET, CLAIRE BONDE, TONI BONDE, GEORGE DELANCEY, JOEL EALY, DEIRDRE BERNARD-PEARL and LISA BERNARD-PEARL,

Petitioners-Appellants,

For a Judgment Pursuant to Article 78 of the CPLR and other relief,

– against –

CHARLOTTE MADIGAN, Town Clerk, Town of Orangetown, New York, and STATE OF NEW YORK DEPARTMENT OF HEALTH,

Respondents-Respondents.

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Rockland County Clerk's Index No. 1458/04

STATEMENT PURSUANT TO CPLR § 5531

New York Supreme Court

Appellate Division—Second Department

In the Matter of the Application of:

JOHN SHIELDS, ROBERT MICHAEL STREAMS, JACQUELINE AXT-OHANNESYAN, LISA AXT-OHANNESYAN, JOHN ADE, JOHNNIE FARMER, ELIZABETH INSON, THERESA APUZZO, JOE HICKEY, ROBERT BRAY, CHRISTINA LOMBARDI, RACHEL McGREGOR RAWLINGS, ABIGAIL MILLER, MELANIE SUCHET, CLAIRE BONDE, TONI BONDE, GEORGE DELANCEY, JOEL EALY, DEIRDRE BERNARD-PEARL and LISA BERNARD-PEARL,

Petitioners-Appellants,

For a Judgment Pursuant to Article 78 of the CPLR and other relief,

– against –

CHARLOTTE MADIGAN, Town Clerk, Town of Orangetown, New York, and STATE OF NEW YORK DEPARTMENT OF HEALTH,

Respondents-Respondents.

1. The index number of the case in the court below is 1458/04.

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2. The full names of the original parties are as set forth above.

3. The action was commenced in Supreme Court, Rockland County.

4. Petitioners commenced this action on or about March 12, 2004 by filing and serving the Verified Petition and contemporaneously filing and serving an Order to Show Cause relating to this action. Thereafter, the issue was joined on or about May 24, 2004 when Respondent New York State Department of Health served and filed a Verified Answer. Co-Respondent Charlotte Madigan, Town Clerk, Town of Orangetown, New York, neither appeared nor opposed the Petition.

5. The nature and object of the action involves, *inter alia*, the refusal of Respondents to issue and recognize marriage licenses to same-sex couples.

6. This appeal is from the Decision and Order of the Honorable Alfred J. Weiner, dated October 18, 2004 and entered on October 20, 2004, which denied the Petition in its entirety, and for which Notice of Entry was served on Petitioners' counsel on October 27, 2004.

7. This appeal is on the full reproduced record.

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INTRODUCTION

In 1967, the Supreme Court of the United States was called upon to determine whether a Virginia statute that prohibited interracial marriage violated the U.S. Constitution. This prohibition had been in effect in Virginia for over two hundred years, and the Virginia Supreme Court had steadfastly rejected challenges to it, explaining that "from time immemorial," the institution of marriage had been regulated "in accordance with established tradition and culture[.]" *Naim v. Naim*, 87 S.E.2d 749, 756 (Va. 1955). "'Laws forbidding the intermarriage of the two races,'" that Court stated, "'have been universally recognized as within the police power of the state.'" *Id.* at 754 (quoting *Plessy v. Ferguson*, 163 U.S. 537, 545 (1896)). It was argued that for the U.S. Supreme Court to disturb the longstanding practice of Virginia (and many other states) with respect to interracial marriage "'would be judicial legislation in the rawest sense of that term.'" Brief of Appellees in *Loving v. Virginia*, 1967 WL 93641, at *7 (quoting *Loving v. Commonwealth*, 147 S.E.2d 78, 82 (1966)). These paeans to tradition and legislative supremacy notwithstanding, the Supreme Court reaffirmed that "[t]he freedom to marry [is] one of the vital personal rights essential to the orderly pursuit of happiness by free men," and struck

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down Virginia's anti-miscegenation law. *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

This case, like *Loving*, raises the question whether certain couples may lawfully be excluded from the institution of marriage. Specifically, it raises the question whether the Constitution and laws of the State of New York countenance denying same-sex couples the right to marry. The arguments set forth in favor of denying marriage licenses to same-sex couples echo those advanced in connection with the debate over interracial marriage nearly forty years ago. Thus, the State has argued that "[t]hroughout history and across cultures the law has protected opposite-sex marriages," and it has trumpeted its "legitimate interests in preserving th[e] historic legal and cultural understanding of marriage." Memorandum of Law in Support of the Answer of the New York State Department of Health in *Shields v. Madigan*, No. 1458/04 (N.Y. Sup. Ct. Rockland County 2004) ("DOH Mem.") at 25, 26. The State has argued, moreover, that courts should "defer to the Legislature's determination[,]" and that the questions presented here "should be left in the political arena." *Id.* at 13, 37. Hence, like the State of Virginia years ago, New York has taken the position that its interest in perpetuating tradition is sufficient to justify state-sponsored

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discrimination in connection with marriage rights as well as a dramatic intrusion into one of the most intimate, personal decisions an individual can make. Moreover, New York has argued (as Virginia did in defending its prohibition on interracial marriage) that the judiciary has no role to play in assuring that statutory rules governing access to marriage remain within constitutional bounds. The trial court agreed. It held that "this State's issuance of marriage licenses only to heterosexual couples is rationally related to legitimate interests in preserving the traditional and legal concept of marriage" and is therefore constitutionally permitted. *Shields v. Madigan*, 5 Misc. 3d 901, 908 (N.Y. Sup. Ct. Rockland County 2004).

Petitioners ask this Court to follow the path taken by the Supreme Court in its landmark decision in *Loving* and to reverse the decision below. They ask this Court to hold that, just as "the freedom to marry or not marry[] a person of another race resides with the individual and cannot be infringed by the State," *Loving*, 388 U.S. at 12, so too the freedom to marry or not marry a person of the same sex falls within the sphere of liberty protected by the New York Constitution. We ask this Court to resist the attempted ouster of the judiciary from its historic role as a protector of constitutional rights—particularly the rights of disfavored minorities—and to confirm that

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legislative decisions governing access to the institution of marriage are not immune from judicial review.

The New York Court of Appeals declared more than ten years ago that "[o]ne of the most important purposes to be served by the [New York Constitution] is to ensure that 'public sensibilities' grounded in prejudice and unexamined stereotypes do not become enshrined as part of the official policy of the government." *People v. Santorelli*, 80 N.Y.2d 875, 881 (1992). And the United States Supreme Court recently reminded us that "times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom." *Lawrence v. Texas*, 539 U.S. 558, 579 (2003). This Court should confirm that the commands of liberty and equality enshrined in New York's Constitution trump the supposed interest in preserving tradition for its own sake, and it should hold that gay and lesbian New Yorkers are entitled to share equally with heterosexual New Yorkers in the rights and obligations of marriage.

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STATEMENT OF FACTS

A. The Parties

In March 2004, Petitioners, ten same-sex couples, sought to obtain civil marriage licenses and then to have their marriages solemnized in accordance with New York's Domestic Relations Law ("DRL"). (R. 24, Verified Petition ¶ 26.) Despite the fact that Petitioners were in loving, committed relationships, were legally competent to marry, and were over the age of 18, they were advised by the Town Clerk that they would not be given an application for a marriage license. The Town Clerk gave each of these couples a letter stating: "Based on the opinions of the NYS Attorney General and the Department of Health, I am not legally authorized as Town Clerk to issue marriage licenses to same sex couples." (R. 31, Letter of Mar. 4, 2004.)

Petitioners reflect the common elements and the variety that married New Yorkers would recognize in their own relationships. They include doctors, a deli manager, business people, a retiree, stay-at-home moms, a Yoga instructor, writers, a graduate student, a union worker, and others. Some of the couples have shared their lives with each other for many years, while others met only two years ago. Four of the couples have young

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children. Toni and Claire Bonde, for example, have six-year-old twin boys, Collin and Charlie. Claire is a stay-at-home mom and co-chair of the PTA fund-raising committee. (R. 68, 69, Affidavit of Claire and Toni Bonde ¶¶ 7, 12.) Deirdre and Lisa Bernard-Pearl, both practicing physicians, have two children. And they, like so many parents, struggle to balance their busy careers with their desire to participate equally and actively in raising their children. (R. 86, Affidavit of Lisa and Deirdre Bernard-Pearl ¶ 5.) Some of the couples plan to have children in the future; others do not.

All of the Petitioners found someone with whom they shared emotional and financial interdependence. They established homes together, supported each other in school and jobs, nursed each other in sickness, and shared everyday joys. They intended to spend their lives together and wanted to share in the benefits and responsibilities of civil marriage, so they applied for marriage licenses.

Each of the Petitioners has been harmed by the Town Clerk's refusal to issue them marriage licenses. This harm includes the denial of significant rights, benefits, and responsibilities that are automatically accorded to married couples. The statutory benefits conferred by civil marriage in New York include: parental rights and responsibilities, community property rights

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and obligations, evidentiary privileges available to spouses, the ability to file income taxes jointly, death benefits for surviving spouses, joint assessment of income for determining eligibility for state government assistance programs, social security survivor benefits, the right to take leave from work to care for a sick partner, decision-making authority for funeral arrangements and disposition of remains, and access to family courts in the event of dissolution. *See generally* New York State Bar Association, Report and Recommendations of the Special Committee to Study Issues Affecting Same-Sex Couples (Oct. 2004), available at http://www.nysba.org/Content ContentGroups/Reports3/Same-Sex_Marriage_Report/Same-Sex Issues Report 2004.pdf <visited May 13, 2005>.

In addition to the denial of tangible benefits, prohibiting two people in a loving, committed relationship from marrying denies the couple the opportunity to express their commitment in the way most deeply meaningful in this society; it prevents them from entering into a relationship that is universally respected and recognized as a symbol of love and commitment. By prohibiting gay men and lesbians from marrying their same-sex partners, the state brands them with the stigma of inferiority.

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B. Proceedings Below

On March 11, 2004, Petitioners initiated this Article 78 Proceeding in the Rockland County Supreme Court, seeking an order requiring the Town Clerk of Orangetown to issue them marriage licenses and ordering the Department of Health to recognize those licenses as valid. (R. 28, Verified Petition at 13.) They further sought a declaration that refusal to issue marriage licenses to same-sex couples violates the Due Process and Equal Protection Clauses of the New York Constitution. (*Id.*) Petitioners argued, in particular, that (1) the applicable provisions of the DRL permit same-sex couples to marry, *see* Petitioners' Memorandum of Law in Support of Petition in *Shields v. Madigan*, No. 1458/04 (N.Y. Sup. Ct. Rockland County 2004) ("Petrs Mem.") at 9-19; (2) denial of marriage licenses to same-sex couples invades the fundamental right to marry, which is protected by Article I, § 6 of the New York Constitution, *see id.* at 43-48; (3) as construed by Respondents, the DRL entails classification on the basis of both sex and sexual orientation, and is therefore subject to heightened scrutiny under the Equal Protection Clause of Article I, § 11 of the New York Constitution (a standard of review that cannot be satisfied here), *see id.* at 32-43; and (4) even under the permissive rational basis standard,

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Respondents' construction of the DRL could not pass constitutional muster because the denial of marriage rights to same-sex couples is not rationally related to a legitimate government interest, *see id.* at 20-31

The trial court denied Petitioners' claims for relief. Although the court acknowledged that the DRL "does not state that only persons of the opposite sex may enter a marriage contract," *Shields*, 5 Misc. 3d at 904, it concluded, nonetheless, that "the existing marriage statutes do not authorize . . . issu[ance] of marriage licenses to same-sex couples," *id.* at 905-906. The court then rejected Petitioners' claim that the denial of marriage rights to same-sex couples merits heightened scrutiny, *id.* at 906-907, and, applying the rational basis test, held that "preserving the institution of marriage for opposite sex couples serves the valid public purpose of preserving the historic institution of marriage as a union of man and woman, which, in turn, uniquely fosters procreation." *Id.* at 907. Finally, the court determined that denial of marriage rights to same-sex couples does not burden the fundamental right to marry and that "no due process violation results from application of [the DRL] to preclude same-sex marriages." *Id.* at 907-908. This appeal followed.

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SUMMARY OF ARGUMENT

The denial of marriage licenses to Petitioners is neither justified under the applicable components of New York's Domestic Relations Law nor permissible as a matter of New York constitutional law. The core provisions of the DRL relating to marriage—those that identify the persons to whom marriage licenses may be issued—are couched in gender-neutral terms. They do not, explicitly or otherwise, provide that only heterosexual couples are eligible to receive marriage licenses. Moreover, under well-established principles of statutory construction, any doubt as to the eligibility of same-sex couples to marry under the DRL must be resolved in a manner that avoids raising questions as to the constitutionality of the statutory scheme. The trial court's conclusion that "the existing marriage statutes do not authorize . . . issu[ance] [of] marriage licenses to same-sex couples," *id.* at 905-906, flatly ignores this binding interpretive principle.

Denying same-sex couples the right to marry violates the New York Constitution. It does so, first, by intruding into one of the most intimate, personal decisions an individual can make—the decision whether and whom to marry. As precedents from the New York Court of Appeals and the U.S. Supreme Court make clear, private decisions relating to marriage, *including*

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same-sex couples is constitutionally prohibited because it is not rationally related to any legitimate government interest.

The trial court was wrong to conclude that the State's marriage ban is supported by an interest in preserving the "traditional" institution of marriage as between a man and a woman. The fact that New York has long refused to allow same-sex couples to marry cannot foreclose inquiry into whether this practice is forbidden by the Due Process and Equal Protection Clauses of the New York Constitution. Indeed, both the New York Court of Appeals and the U.S. Supreme Court have indicated that the mere desire to perpetuate "tradition" cannot serve as a legitimate basis for discriminatory state action.

Moreover, as three Justices of the Supreme Court have acknowledged, "preserving the 'traditional institution of marriage' is just a kinder way of describing the State's *moral disapproval* of same-sex couples." *Lawrence*, 539 U.S. at 601 (Scalia, J., dissenting). And the New York Court of Appeals and the Supreme Court have squarely held that a desire to express moral disapproval of a group is not a constitutionally legitimate basis for state-sponsored discrimination. *See, e.g., People v. Onofre*, 51 N.Y.2d 476, 490 (1980); *Lawrence*, 539 U.S. at 577.

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the decision whom to marry, are largely insulated from government interference. Government action that encumbers the fundamental right to marry invades the sphere of constitutionally protected individual autonomy and is therefore subject to the strictest judicial scrutiny. Denial of marriage rights to same-sex couples manifestly cannot meet this exacting standard of review.

The exclusion of same-sex couples from the institution of marriage also violates the guarantee of equal protection. Article I, Section 11 of the New York Constitution "imposes a clear duty on the State and its subdivisions to ensure that all persons in the same circumstances receive the same treatment." *Brown v. State*, 89 N.Y.2d 172, 190 (1996). Statutory classifications that deny individuals equal treatment therefore must be invalidated. Insofar as the DRL is construed to exclude same-sex couples from the institution of marriage, it classifies on the basis of both sexual orientation and sex and is therefore constitutionally suspect. But the level of judicial scrutiny does not determine the outcome of this case. Whether examined under the microscope of heightened scrutiny or reviewed pursuant to the more permissive rational basis standard, denial of marriage licenses to

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Finally, New York's "traditions" relating to the legal treatment of same-sex couples are themselves rapidly evolving. The State increasingly recognizes and protects same-sex couples and their families. In particular, the New York Court of Appeals has acknowledged that the law of this State poses no obstacle to same-sex couples raising children. As these elements of New York law change, the denial of marriage rights to same-sex couples, far from serving legitimate government interests, serves only to undermine New York's enduring interest in promoting the stability of families and protecting the welfare of children.

ARGUMENT

I. NEW YORK'S DOMESTIC RELATIONS LAW ALLOWS SAME-SEX COUPLES TO MARRY

Same-sex couples are permitted to marry under New York's Domestic Relations Law. The marriage-licensing provisions of the DRL are overwhelmingly gender-neutral, and the DRL poses no barrier to the solemnization of same-sex marriages. Indeed, the DRL explicitly enumerates certain prohibited marriages, and a union of persons of the same sex is not among them. To the extent that certain secondary provisions of the DRL use terms traditionally associated with gender—"husband and wife," "bride and groom"—such usage does not alter the result. Those

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gendered references are not central to the statute's main purpose. Further, New York courts have repeatedly recognized the necessity of construing statutes in such a way as to remove doubts as to its constitutionality; hence the construction advanced by the trial court is strongly disfavored.

A. Under the Plain Text of the Applicable Provisions of the DRL, Same-Sex Couples Are Permitted to Marry

1. The DRL Overwhelmingly Uses Gender-Neutral Terms

As the trial court acknowledged, the DRL contains no express requirement that married couples be of the opposite sex. 5 Misc. 3d at 904 ("[T]he statute does not state that only persons of the opposite sex may enter a marriage contract."). (*See also* R. 94, Op. Att'y. Gen. Mar. 3, 2004, at 6 (similar)). Indeed, far from indicating that same-sex couples are prohibited from marrying, the core provisions of the DRL—those that control who does and does not have access to marriage rights—overwhelmingly use gender-neutral terms and thereby indicate that New York law does not require that the parties to a marriage be of the opposite sex.

The basic qualifications for marriage—the consent and minimum-age requirements—do not in any way suggest that only opposite-sex couples may marry. *See* DRL §§ 10, 15-a; *see also Hernandez v. Robles*, No. 103434/04, 2005 WL 363778, at *6 (N.Y. Sup. Ct. N.Y. County) (the

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definition of "jural marriage" in DRL § 10 is "without any reference to the sex of the parties to a marriage"). These core provisions refer to the members of a married couple (or individuals seeking to get married) as "parties" or "persons." *See also* DRL §§ 7, 8, 11(4), 11(5), 13 ("parties"); DRL § 11-a(1)(b), 13 ("persons"). Further, the DRL does not include same-sex pairings in the statutory definition of void and voidable marriages. Thus, the DRL provides that incestuous and bigamous marriages are void from their inception, even when the requirements of DRL §§ 10 and 15-a are satisfied. *See id.* at §§ 5, 6.[1] Certain other types of marriages, meanwhile, are voidable by a court of competent jurisdiction. *See id.* at §§ 7(1), 7(2), 7(3); 7(4); § 7(5). But the marriage of a same-sex couple is not included in either of these statutory categories.

2. Inclusion of Gender-Specific Language in Ancillary Portions of the Marriage Provisions of the DRL Does Not Restrict Marriage to Opposite-Sex Couples

Although the Domestic Relations Law overwhelmingly uses gender-neutral language, the trial court's decision relies, in part, on the fact that

[1] The appearance of gender-specific terminology in connection with the anti-incest and bigamy rules codified at DRL §§ 5 and 6 reflects the legislature's attention to more prevalent forms of the regulated conduct, *not* an affirmative intent to define the contours of marriage as between a man and a woman only.

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some provisions of the DRL also use the gender-specific terms "husband," "wife," "bride," and "groom." The trial court was wrong to conclude that these provisions demonstrate the legislature's intention to authorize only opposite-sex marriages.

First, the trial court overstated the centrality of these provisions to the DRL's scheme of regulating marriage in New York. As noted above, the DRL provisions regulating *access* to the institution of marriage overwhelmingly use gender-neutral language. The gender-specific provisions relied upon by the trial court appear largely in ancillary provisions of the DRL. These provisions—such as the ministerial instruction to clerks as to the taking of certain identifying information from the "bride" and "groom" before issuing a license, DRL § 15(1)(a)—cannot override the general provision that a license is to be issued to "any parties" meeting the requirements, *id.* § 14. *Cf.* N.Y. Stat. § 174 ("[F]ailure to comply with statutory provisions governing matters of practice which are not of the essence will not vitiate the proceedings.").

Second, the terms "husband," "wife," "bride," and "groom" as used in the DRL are best understood as historical descriptors, rather than limitations on the reach of the DRL. When the DRL was drafted in 1896, likely the

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only couples seeking to be married were opposite-sex couples. In describing couples who entered into marriage, the Assembly thus occasionally invoked gendered terms such as "husband" and "wife." This usage does not, however, reflect a legislative determination that marriage must, for all times, be limited to opposite-sex couples. Indeed, many New York statutes contain examples of anachronistic gender-specific language that, if given permanent effect, would have widespread ramifications. *See* DRL § 20-b (using terms "him" and "he" to refer to Commissioner of Health); N.Y. Exec. Law § 61 (using terms "him" and "his" in referring to Solicitor General); N.Y. Pub. Off. Law § 9 (similar re: "deputy, assistant, or other subordinate officer[s]").[2]

Third, the conclusion that occasional gender-based references in the DRL somehow trump the pervasive gender-neutral language in that statute does not inexorably flow from the principle of statutory construction that the trial court points to—that a statute should be read as a consistent whole and construed together. The same principle can be applied to construe the few

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[2] A reading of these terms as historical descriptors is consistent with the *Hernandez* court's conclusion that the legislature "assum[ed]" that parties would be a man and a woman, 2005 WL 363778, at *7, *8, and the New York Attorney General's view that the legislature lacked experience with same-sex marriage, (R. 95-99, Op. Att'y Gen. Mar. 3, 2004, at 7-11).

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arguably gender-specific aspects of the DRL's marriage provisions in light of the statute's overriding neutrality. Moreover, while the court must "harmonize conflicting provisions of a statute if possible," if the conflict between gender-specific and gender-neutral terms were deemed irreconcilable, "the court must preserve the paramount intention although this may lead to the rejection of some subordinate and secondary provision." N.Y. Stat. § 98(b). Here, the core provisions are couched in gender-neutral terms; the gender-based references are in "subordinate and secondary provisions" that would have to give way.

3. The Trial Court Cited No Authoritative Precedent Construing the DRL to Prohibit Same-Sex Couples from Marrying

In reaching the conclusion that the DRL does not authorize the issuance of marriage licenses to same-sex couples, the trial court stated that "[n]umerous courts in this state that have had occasion to consider the scope of the right to marry under the DRL's provisions have similarly concluded that the right to marry is limited to couples of the opposite sex." *Shields*, 5 Misc. 3d at 905. However, most of the cases relied upon by the court in support of this proposition did not require the courts to decide whether same-sex couples are permitted to marry. *See In re Estate of Cooper*, 187

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A.D.2d 128 (2d Dep't 1993) (considering whether "spousal-type" relationships create a right of election against a decedent's will); *In re Adoption of Robert Paul P.*, 63 N.Y.2d 233 (1984) (considering whether a 57-year-old man may adopt his 50-year-old male partner); *Raum v. Restaurant Assocs., Inc.*, 252 A.D.2d 369 (1st Dep't 1998) (considering whether same-sex surviving partner was entitled to bring wrongful death action).[3]

In *Anonymous v. Anonymous*, 67 Misc. 2d 982, 984 (N.Y. Sup. Ct. Queens County 1971), the Queens County Supreme Court did void a marriage between two men, one of whom was under the mistaken impression, at the time the couple was married, that the other was a woman. As the Attorney General has noted, however, "*Anonymous* . . . [is] not dispositive of the question presented" because it "rest[s] in part on the assumption that marriage exists for the purposes of fostering procreation" even though "physical incapacity, for the purposes of voiding marriage under DRL section 7(3), does not include the 'inability to bear children.'"

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[3] *See also Hernandez*, 2005 WL 363778, at *8 (noting that *Cooper* did "not present[] [the issue] . . . whether a bar on same-sex couple entering into a civil marriage violates the State Constitution."); (R. 102, Op. Att'y Gen. Mar. 3, 2004, at 14 (explaining that "*Raum* and *Cooper* are of limited utility . . . , because the . . . same-sex partners in those cases did not claim any statutory right to marry under the DRL")).

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(R. 100, Op. Att'y Gen. Mar. 3, 2004, at 12.) Notably, all of these cases predate recent developments in the recognition of committed same-sex partnerships and legal protections for gay and lesbian persons. *See* Part IV.B.3, *infra* (citing cases).

The trial court also cited *Langan v. St. Vincent's Hosp.*, 196 Misc. 2d 440 (N.Y. Sup. Ct. Nassau County 2003), in support of the conclusion that the right to marry is limited to couples of the opposite sex, but, if anything, that case supports the opposite conclusion. The *Langan* court held that the term "spouse" as used in the Estates, Powers and Trusts Law must be read to include the surviving same-sex spouse of a deceased New York resident where the couple had entered into a valid civil union in the state of Vermont. *See id.* This was so even though "surviving spouse" was defined by the statute to signify a "husband or wife." *Id.* at 452-53 (citing, *inter alia*, principles of averting constitutional infirmities and construing a statute to avoid discrimination).[4] For all of these reasons, the DRL is best understood to permit same-sex couples to marry.

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[4] The other two cases cited by the court below are demonstrably lacking in precedential authority. First, the court relies on a dissenting opinion from *Levin v. Yeshiva University*, 96 N.Y.2d 484, 503 (2001), which, of course, lacks precedential effect. *Storrs v. Holcomb*, 168 Misc. 2d 898 (1996), *action dismissed*, 245 A.D.2d 943

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B. The Trial Court Ignored Its Duty to Interpret the Domestic Relations Law in a Manner That Avoids Difficult Constitutional Questions

The canon of "constitutional avoidance" has long guided statutory interpretation in the New York courts: "[A] statute should be construed when possible in a manner which would remove doubt of its constitutionality." *People v. Barber*, 289 N.Y. 378, 385 (1943). And as New York's Attorney General has acknowledged, "the exclusion of same-sex couples from eligibility for marriage . . . presents serious constitutional concerns." (R. 94, Op. Att'y Gen., Mar. 3, 2004, at 6.) In their submissions to the trial court, Petitioners offered an interpretation of the DRL that would avoid such concerns. Under these circumstances, the trial court was required to reject the constitutionally problematic construction advanced by Respondents. It did not. Instead, without persuasive explanation, the trial court ignored the avoidance canon entirely.

The Court of Appeals has repeatedly construed gender-specific provisions of New York law as gender-neutral, particularly where an alternative reading would raise constitutional concerns. For example, in

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(1997), meanwhile, was dismissed by an appellate panel on procedural grounds and is therefore not binding on this court.

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People v. Liberta, 64 N.Y.2d 152, *cert. denied*, 471 U.S. 1020 (1985), the Court of Appeals construed New York's forcible rape and sodomy statutes, which by their terms applied only to men, in gender-neutral terms to avoid an equal protection violation. Similarly, in *Goodell v. Goodell*, 77 A.D.2d 684, 685 (3d Dep't 1980), the Court avoided a constitutional problem by construing an alimony statute, which imposed financial obligations only against the husband, to apply to either spouse. *See also Rachelle L. v. Bruce M.*, 89 A.D.2d 765 (3d Dep't 1982) (Family Court Act § 532); *Lisa M. UU. v. Mario D. VV.*, 78 A.D.2d 711 (3d Dep't 1980) (Family Court Act § 514). Hence, such a construction of the marriage provisions of the DRL would be solidly in line with contemporary New York jurisprudence.

The New York Court of Appeals has also recognized that our state statutory law should be construed to reflect and protect contemporary understandings of family life. In *Braschi v. Stahl Assocs. Co.*, 74 N.Y.2d 201 (1989), for example, faced with an argument that succession rights granted to "family members" of a deceased tenant should pass only to those in "traditionally" recognized family relationships and not to surviving same-sex life partners, the Court concluded that "the term family . . . should not be rigidly restricted to those people who have formalized their relationship by

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obtaining, for instance, a marriage certificate or an adoption order," but instead "[i]n the context of eviction, a more realistic, and certainly equally valid, view of a family includes two adult lifetime partners whose relationship is long term and characterized by an emotional and financial commitment and interdependence." 74 N.Y.2d at 211.[5]

None of the reasons given by the trial court overcomes these principles of constitutional avoidance and statutory construction. The court reasoned that "the term marriage has traditionally referred to opposite-sex unions, and the statute contains no other expression indicating that same-sex unions were contemplated." *Shields*, 5 Misc. 3d at 904. But, of course, the "traditional" meaning of the term "male" is not "any person," and yet this did not prevent the Court of Appeals, in *Liberta*, from construing it as such in order to avoid an equal protection violation. *Liberta*, 64 N.Y.2d at 170.

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[5] Even the terms "husband" and "wife," on which so much of the trial court's holding and the Department's argument rest, have undergone dramatic changes over time. *Compare, e.g., Robinson v. Rivers*, 9 Abb. Pr. (N.S.) 144 (N.Y. Ct. Common Pleas 1870) (noting that a wife's "inability to contract . . . remains as it stood at the common law . . . [h]er husband is the only one answerable upon [her] contracts[]"), *with Phillips v. Phillips*, 1 A.D.2d 393, 395 (1st Dep't) ("The position of the wife has changed . . . . 'From her old position as an identity merged in [her husband's] and not separable from him, she has advanced to a position of independence in most respects fully equal with his.'"), *aff'd*, 2 N.Y.2d 742 (1956). Far from being static, the concept of what it means to be a husband or a wife under New York law has evolved to meet developing social mores and understandings.

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Similarly, in *Goodell*, 77 A.D.2d at 685, the Court construed both the term "husband" and the term "wife" to refer to "either spouse," though this is surely not the "traditional" definition of these terms.

The trial court also justified its conclusion that the DRL does not authorize the grant of marriage licenses to same-sex couples by noting that the DRL does not contain any such authorization "in unambiguous terms." *Shields*, 5 Misc. 3d at 905. But the lack of an unambiguous expression of legislative intent in this regard cannot trump the avoidance requirement. When presented with alternative possible readings, one of which raises serious constitutional doubts, the court must construe a statute "in a manner which would remove doubt of its constitutionality." *People v. Barber*, 289 N.Y. at 385.[6]

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[6] The trial court also concluded that the Department's directive to municipal clerks not to issue marriage licenses to same-sex couples should be reviewed under an arbitrary and capricious standard, and that the Department's interpretation was due great deference because the agency interpreted the statute under which it functions. Even if deference were appropriate, it could not overcome the requirement of constitutional avoidance. Moreover, no deference is appropriate in this instance because no special expertise is required to interpret the statute. *See Claim of Gruber*, 89 N.Y.2d 225, 231 (1996) (where statutory interpretation "involves knowledge and understanding of underlying operational practices or entails an evaluation of factual data and inferences to be drawn therefrom," deference is appropriate; but "where the question is one of pure statutory reading and analysis, depending only on accurate apprehension of legislative intent[,]" deference is not in order (internal quotation marks omitted)). *See also Dworman v. New York State Div. of Hous. & Cmty. Renewal*, 94 N.Y.2d 359, 371 (1999); *Beekman Hill Ass'n v. Chin*, 274 A.D.2d 161, 167 (1st Dep't 2000). Interpretation of the DRL provisions governing

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II. DENYING SAME-SEX COUPLES THE RIGHT TO MARRY DEPRIVES THEM OF A FUNDAMENTAL RIGHT PROTECTED BY THE DUE PROCESS CLAUSE OF ARTICLE I, § 6 OF THE NEW YORK CONSTITUTION

To the extent it is construed to prohibit same-sex couples from marrying, the DRL invades Petitioners' liberty, which is safeguarded by the Due Process Clause of Article I, § 6 of the New York Constitution. Specifically, it infringes Petitioners' fundamental right to marry by depriving them of the freedom to choose whom they will marry. As this Part demonstrates, the New York Court of Appeals has explicitly recognized that the New York Constitution protects this choice, and there is nothing in the law, nor anything about the nature of Petitioners' relationships, that merits depriving them of these constitutional safeguards.

In assessing the constitutionality of the trial court's construction of the DRL (under both the Due Process Clause and the Equal Protection Clause, *see infra*, Parts III- IV), it must be remembered that "our State Constitution can afford a broader scope of protection with regard to individual rights and liberties than its federal counterpart." *People v. Hansen*, 99 N.Y.2d 339, 345 n.4 (2003). *See also People v. P.J. Video, Inc.*, 68 N.Y.2d 296, 303

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who may and may not marry requires no special expertise; accordingly, the Department's interpretation does not merit deference.

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(1986) (similar). The Court of Appeals has "not hesitated" to grant relief under the New York Constitution when it "concluded that the Federal Constitution . . . fell short of adequate protections for our citizens." *Cooper v. Morin*, 49 N.Y.2d 69, 79 (1979). Federal caselaw remains relevant to the analysis because the federal Equal Protection and Due Process Clauses establish a constitutional floor; those federal provisions describe the bare minimum protections to which Petitioners are independently entitled under New York's Constitution.

A. Choices Relating to Marriage, Including the Choice of Whom to Marry, Are Constitutionally Protected

The New York Court of Appeals has long recognized that the right to marry is fundamental and is a central component of the constitutionally-protected right to privacy. "[A]mong the decisions that an individual may make without unjustified government interference," the Court of Appeals has explained, "are personal decisions relating to marriage." *People v. Onofre*, 51 N.Y.2d 476, 486 (1980) (internal quotation marks omitted). *See also Doe v. Coughlin*, 71 N.Y.2d 48, 52 (1987) ("Among the decisions protected by the right to privacy are those relating to marriage."). The U.S. Supreme Court has likewise held that "the right to marry . . . is a central part of the liberty protected by the Due Process Clause." *Zablocki v. Redhail*,

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434 U.S. 374, 384 (1978) (internal quotation marks omitted). Decisions relating to marriage thus fall within the realm of "the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, [which] are central to the liberty protected by the [Constitution]." *Planned Parenthood v. Casey*, 505 U.S. 833, 923-924 (1992) (internal quotation marks omitted).

Crucially, the Court of Appeals has held specifically that "matters relating to the decision of *whom* one will marry" are "clearly . . . within [the] scope" of the constitutionally protected right to privacy. *Crosby v. State*, 57 N.Y.2d 305, 312 (1982) (emphasis added). And it has explained, accordingly, that "the government [is] prevented from interfering with an individual's decision about *whom to marry*." *People v. Shepard*, 50 N.Y.2d 640, 644 (1980) (emphasis added). *See also Hernandez*, 2005 WL 363778, at *13 ("The second aspect of the fundamental right to marry . . . is the right to choose whom one marries"). The Supreme Court, and courts in other jurisdictions, have likewise acknowledged that the essence of the right to marry is the right of spousal choice. *See, e.g., Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-640 (1974) (noting that "the freedom of *personal choice* in matters of marriage and family life is one of the liberties

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protected by the Due Process Clause") (emphasis added); *Goodridge v. Department of Public Health*, 798 N.E.2d 941, 958 (Mass. 2003) ("the right to marry means little if it does not include the right to marry the person of one's choice"); *Perez v. Lippold*, 198 P.2d 17, 19 (Cal. 1948) ("the right to marry is the right to join in marriage with the person of one's choice").

As construed by the trial court, the DRL indisputably interferes with Petitioners' right of spousal choice, and the fundamental right to marry is therefore implicated. The question, then, is whether there is constitutionally sufficient reason to deny Petitioners this fundamental right.

B. Petitioners' Relationships Bear All the Hallmarks of the Relationships Protected by the Fundamental Right to Marry

In its briefing to the trial court, Respondent Department of Health acknowledged that "petitioners and their families are entitled to dignity and respect, that children raised in those families can thrive, and that same-sex couples can be as committed, stable, loving and nurturing as opposite-sex couples." DOH Mem. at 1. Furthermore, the Department did not "dispute the descriptions of petitioners and their relationships set forth in the petition[,]" *id.*—that the couples intended to spend their lives together, were financially interdependent, shared in parenting and childcare responsibilities,

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and provided emotional support for one another. (R. 17, 19-24, Verified Petition ¶¶ 3, 14-25). These concessions are sufficient to demonstrate that Petitioners' relationships fall within the ambit of the constitutional right to marry; for a long line of cases from this State and myriad other jurisdictions confirms that the above-mentioned characteristics of Petitioners' relationships *are* the very fundaments of marriage "deeply rooted in this Nation's history," *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (internal quotation marks omitted).

The New York courts have long recognized that the essence of marriage and, as a corollary, of the constitutional right to marry, is the existence of an enduring partnership based on mutual love, trust, and intimacy:

> Marriage is the cornerstone of the family. It is a recognized fundamental right and a relationship favored in the law. . . . It is also more—much more. "[It] is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions."

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People v. De Stefano, 121 Misc. 2d 113, 121 (N.Y. County Ct. Suffolk County 1983) (internal citations and emphasis omitted) (quoting *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965)). *See also Tomasino v. New York State Employees' Ret. Sys.*, 87 A.D.2d 675, 676 (3d Dep't) (characterizing as an "ideal marriage" a relationship in which the parties were "interdependent and deeply devoted each to the other and real partners"), *aff'd*, 57 N.Y.2d 753 (1982).

The U.S. Supreme Court has likewise explained that "marriages . . . are expressions of emotional support and public commitment" and that "[t]hese elements are an important and significant aspect of the marital relationship." *Turner v. Safley*, 482 U.S. 78, 95-96 (1987). And other jurisdictions have described that which is fundamental about marriage with reference to the character of the relationships at issue, rather than the sex of the parties to the relationships. *See, e.g., Goodridge*, 798 N.E.2d at 954-955 (emphasizing that civil marriage "fulfills yearnings for security, safe haven, and connection that express our common humanity" and is "at once a deeply personal commitment to another human being and a highly public celebration of the ideals of mutuality, companionship, intimacy, fidelity, and family."); *Mendillo v. Board of Educ.*, 717 A.2d 1177, 1195 (Conn. 1998)

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("[T]he spousal relationship is based on notions of commitment between adults. [T]he formal marriage relation forms the necessary touchstone to determine the strength of commitment between the two individuals.") (internal quotation marks omitted) (second alteration in original).

These cases and many others like them undermine the trial court's claim that "[t]he institution of marriage is a fundamental right *founded on the distinction of sex* and the potential for procreation." *Shields*, 5 Misc. 3d at 907 (emphasis added). They demonstrate that the institution of marriage is founded on the quality of married couples' relationships, not in the gender or sexual orientation of those who choose to marry, nor in a couple's intention to procreate.[7] What is celebrated about marriage—in our culture and in our casebooks—is the love and commitment reflected in a couple's decision to join together. And such love and commitment are not the unique province of opposite-sex relationships. Once it is conceded—as it has been in this case—that committed same-sex relationships bear all of the emotional and interpersonal hallmarks our society associates with the unions we label

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[7] As explained *infra*, p.55-56, neither the ability nor the intention to procreate is a prerequisite for receiving a marriage license under New York law.

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"marriages," the justifications for excluding same-sex couples from this vital institution collapse.

C. The Approach Toward Fundamental Rights Analysis Employed by the Trial Court Is Foreclosed by Precedent

Notwithstanding the sizable body of case law detailing the scope of the right to marry and highlighting the importance of the freedom to choose whom to marry, the trial court determined that the State may prevent Petitioners from marrying the spouses of their choice. It held that the right of spousal choice is limited to those who would choose to marry persons of the opposite sex, 5 Misc. 3d at 906-907, and it concluded that "no due process violation results" from denial of marriage rights to same-sex couples, *id.* at 908. The Court explained:

> [S]ame-sex marriage is not a fundamental right protected by the due process clause of the New York State Constitution (Article 1 Sec. 6).... [F]undamental rights are ... defined as those "deeply rooted in this Nation's history and tradition." ... [T]his court declines petitioners' request to include in those rights, considered fundamental to our concept of ordered liberty, the right to marry a person of the same sex.

Id. at 907 (citations omitted).

As this passage makes clear, rather than inquiring whether the New York Constitution protects the right of consenting adults to express their

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commitment to one another through marriage, the court inquired whether there was a longstanding tradition recognizing the right of same-sex couples to marry. This approach toward fundamental rights analysis is foreclosed by precedent.

"New York courts have analyzed the liberty interest at issue [in fundamental rights cases] in terms that recognize and embrace the broader principles at stake." *Hernandez*, 2005 WL 363778, at *12. Thus, in *People v. Onofre*, 51 N.Y.2d 476, 486 (1980), in the course of deeming unconstitutional New York's prohibition of consensual sodomy, the Court did not inquire whether there is a fundamental right for two males to engage in particular sexual acts; it inquired, instead, whether the parties in that case were protected by the "fundamental right of personal decision" in connection with matters of sexual intimacy. Similarly, in *Cooper v. Morin*, 49 N.Y.2d 69 (1979), in striking down a prohibition on contact visits for pretrial detainees, the Court did not assess whether there is a fundamental right to "contact visits for accused felons while incarcerated." It inquired, rather, whether the State had infringed "the fundamental right to marriage and family life" that detainees, like all citizens, enjoy. *Id.* at 80.

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Similarly, the Supreme Court did not inquire, in *Loving v. Virginia*, whether "interracial marriage" is a right so rooted in the Nation's history and tradition as to be fundamental. Surely it was not.[8] Instead, the Court assessed whether the "freedom to marry[,]" *Loving*, 388 U.S. at 12, is fundamental and whether there was adequate justification for denying this freedom to the couple before it. More recently, in *Lawrence v. Texas*, 539 U.S. 558 (2003), the Supreme Court expressly rejected the notion that a challenge to a Texas statute criminalizing homosexual sodomy raised the question "'whether the Federal constitution confers a fundamental right upon homosexuals to engage in sodomy.'" *Id.* at 566 (quoting *Bowers v. Hardwick*, 478 U.S. 186, 190 (1986)). Rather, the Court explained, the relevant question weas "whether the petitioners were free as adults to engage in . . . private [sexual] conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution." *Id.* at 564. *See also id.* at 573-574 (assessing whether Petitioners' conduct was covered by the "constitutional protection [afforded] to personal decisions

[8] At the time the decision in *Loving* was rendered, sixteen states prohibited interracial marriage and, only fifteen years earlier, the laws of thirty states included such a prohibition. *See Loving*, 388 U.S. at 6 n.5.

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relating to marriage, procreation, contraception, family relationships, child rearing, and education").

* * *

It is clear, under the authorities discussed in this Part, that the right claimed by Petitioners is a fundamental one. And it is well established that a statutory scheme that constrains the exercise of a fundamental right is subject to the most searching judicial scrutiny. Such a scheme may be upheld only if it furthers a "a compelling state interest" and is "narrowly tailored" to serve that interest. *See, e.g., Golden v. Clark*, 76 N.Y.2d 618, 623 (1990).

As is described in Part IV, *infra*, the State's denial of marriage rights to same-sex couples cannot satisfy even the permissive rational-basis standard. That is, such denial is not rationally related to serving a legitimate government interest. It follows, *a fortiori*, that the statutory scheme envisioned by the trial court and by Respondents cannot satisfy the exacting standard for review of legislation that burdens fundamental rights.

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III. DENIAL OF MARRIAGE RIGHTS TO SAME-SEX COUPLES CANNOT SURVIVE THE HEIGHTENED SCRUTINY APPLICABLE TO DISCRIMINATION BASED ON SEXUAL ORIENTATION OR GENDER UNDER THE EQUAL PROTECTION CLAUSE OF THE NEW YORK CONSTITUTION

The Equal Protection Clause of the New York Constitution guarantees that "[n]o person shall be denied the equal protection of the laws of this state or any subdivision thereof." N.Y. Const. art. 1, § 11. The clause "imposes a clear duty on the State . . . to ensure that all persons in the same circumstances receive the same treatment." *Brown v. New York*, 89 N.Y.2d 172, 190 (1996). New York courts, like their federal counterparts, have recognized that certain groups of people are particularly likely to be subject to unequal treatment. They treat legislation relying on such classifications with suspicion, not deference. Thus, "[e]qual protection analysis demands that when a 'suspect' classification is involved[,] . . . the challenged classification is subject to 'strict scrutiny.'" *Werner v. Middle Country Cent. School Dist. No. 11*, 89 A.D.2d 967, 967 (2d Dep't 1982). The interpretation of the DRL advanced by the State and embraced by the trial court invokes two suspect classifications—sexual orientation and sex—and accordingly is subject to heightened scrutiny.

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A. If Construed to Deny Same-Sex Couples the Right to Marry, the DRL Entails Classification on the Basis of Sexual Orientation and Therefore Merits Heightened Scrutiny

The New York Court of Appeals has expressly reserved the question of whether to accord heightened scrutiny to classifications based upon sexual orientation. *See Under 21 v. City of N.Y.*, 65 N.Y.2d 344, 364 (1985). The Appellate Division, First Department, meanwhile, has held that such scrutiny is warranted. *See Under 21 v. City of N.Y.*, 108 A.D.2d 250, 253-258 (1st Dep't), *aff'd as modified*, 65 N.Y.2d 344 (1985). This Court should do the same.

The courts have looked to several factors in order to identify classifications that are to be subjected to heightened scrutiny. First, they determine whether the class has been subjected to a history of purposeful unequal treatment. *See, e.g., Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 441 (1985). Second, they assess whether the trait used to define the class is relevant to its members' ability to function in and contribute to society. *See id.* at 440–441. Third, they inquire whether members of the class in question are able to protect themselves from discrimination through

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the political process. *See id.* at 441.[9]

Sexual orientation satisfies all three bases for suspect classification.[10] *First*, the New York Legislature itself has recognized the long history of discrimination faced by gay men and lesbians in this State:

> The legislature . . . finds that many residents of this state have encountered prejudice on account of their sexual orientation, and that this prejudice has severely limited or actually prevented access to employment, housing and other basic necessities of life, leading to deprivation and suffering. The legislature further recognizes that this prejudice has fostered a general climate of hostility and distrust, leading in some instances to physical violence against those perceived to be homosexual or bisexual.

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[9] These factors do not constitute rigid prerequisites, each of which must be satisfied prior to the application of heightened scrutiny. Rather, the Supreme Court has provided "several formulations" that "might explain its treatment of certain classifications as 'suspect.'" *Plyler v. Doe*, 457 U.S. 202, 217 n.14 (1982). In any event, as noted above, statutes that classify on the basis of sexual orientation are suspect for all three of these reasons.

[10] To the extent that "immutability" matters in the identification of suspect classifications, that point favors recognizing sexual orientation as such a classification. Although there is not consensus among researchers with respect to the "cause" of sexual orientation, all reputable scholarly studies have concluded that sexual orientation—whether homosexual or heterosexual—is not experienced as a matter of choice. As the U.S. Surgeon General has said, "there is no valid scientific evidence that sexual orientation can be changed." *The Surgeon General's Call to Action to Promote Sexual Health and Responsible Sexual Behavior* (June 2001), *available at* http://www.surgeon general.gov/library/sexualhealth/call.htm; *see also* Am. Psychol. Ass'n, *Resolution on Appropriate Therapeutic Responses to Sexual Orientation* (1997); Am. Psychiatric Ass'n, *Position Statement: Psychiatric Treatment and Sexual Orientation* (1998).

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2002 N.Y. Laws ch. 2, §1. As a recent report from the United States Surgeon General acknowledged, "our culture often stigmatizes homosexual behavior, identity and relationships." *The Surgeon General's Call to Action to Promote Sexual Health and Responsible Sexual Behavior* (June 2001), *available at* http://www.surgeongeneral.gov/library/sexualhealth/call.htm. A recent study suggests that 54% of gay men and lesbians in New York experienced, in a five-year period, discrimination in employment, housing, or in a public accommodation. *See* Empire State Pride Agenda, *Anti-Gay/Lesbian Discrimination in New York State* (May 2001), *available at* http://www.pride agenda.org/pride/survey.pdf.

Second, like race or gender, and unlike mental disability or age, *Cleburne*, 473 U.S. at 441, sexual orientation plainly has no relevance to a person's ability to perform in or contribute to society. The American Psychiatric Association recognizes that gay men and lesbians exhibit "no impairment in judgment, stability, reliability or general social or vocational capabilities." Am. Psychiatric Ass'n, *Fact Sheet: Homosexual and Bisexual Issues* (February 2000), *available at* http://www.psych.org/public_info/homosexual12.pdf. Indeed, the New York Court of Appeals has recognized that same-sex couples, like opposite-sex couples, form committed, long-

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term, and often lifelong relationships, *see Braschi v. Stahl Assocs. Co.*, 74 N.Y.2d 201, 211 (1989), and it has held that New York law poses no barrier to same-sex couples raising children, *see In re Jacob*, 86 N.Y.2d 651, 655 (1995).

Third, the Department was wrong to argue in the proceedings below that the recent passage of laws designed to prevent discrimination on the basis of sexual orientation fatally undermines any argument that sexual orientation is a constitutionally suspect classification. Racial minorities were explicitly protected from certain forms of discrimination through the Civil Rights Acts of 1866 and 1870, yet it was not until sometime after Justice Stone authored the famous footnote in *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938), that the Supreme Court began applying strict scrutiny to government classifications on the basis of race. Women, similarly, already enjoyed the protections of the Equal Pay Act of 1963 and the Civil Rights Act of 1964 when the Supreme Court determined, in *Frontiero v. Richardson*, 411 U.S. 677, 687-688 (1973), that "classifications based upon sex . . . are inherently suspect." Gay men and lesbians, like women and racial minorities, are subject to continuing

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prejudice and antipathy likely to create a disadvantage in the political process.

Although the Department insisted during the proceedings below that "the overwhelming majority of federal and state courts have declined to recognize sexual orientation as a suspect classification," DOH Mem. at 19, every one of the cases upon which it relied is grounded squarely in the Supreme Court's discredited decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986).[11] These courts reasoned that if, per *Bowers*, homosexual sex could permissibly be criminalized, then *a fortiori*, statutes that classify on the basis of sexual orientation cannot be constitutionally suspect. These decisions predate the Supreme Court's 2003 ruling in *Lawrence v. Texas*, 539 U.S. 558 (2003), which invalidated a Texas law establishing criminal penalties for homosexual sodomy and expressly overruled *Bowers*, holding that "*Bowers* was not correct when it was decided, and it is not correct today."

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[11] *See Schroeder v. Hamilton Sch. Dist.*, 282 F.3d 946, 950-951 (7th Cir. 2002); *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289, 292-293 (6th Cir. 1997); *Baker v. State*, 744 A.2d 864, 878 n.10 (Vt. 1999) (citing, *inter alia*, *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989); *Equality Found.*, 128 F.3d at 292-293; *High Tech Gays v. Defense Industrial Security Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990), all of which rely on *Bowers*).

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Id. at 578. The overruling of *Bowers* drains these cases entirely of their precedential value.[12]

In holding that heightened scrutiny is not appropriate for sexual-orientation-based classifications, the trial court in this case relied exclusively on *In re Estate of Cooper*, 187 A.D.2d 128 (2d Dep't 1993). That case is inapposite. It addressed the issue of whether "spousal-type" relationships create a right of election against a decedent's will. *Id.* at 134-135. In light of the opinion's limited scope, New York's Attorney General has correctly noted that "*Cooper* [is] of limited utility here, because the . . . same-sex partners in [that] case[] did not claim any statutory right to marry under the DRL." (R. 102, Op. Att'y Gen., Mar. 3, 2004, at 14.) Indeed, in the course of considering precisely the same issues presented here, another New York court deemed *Cooper* inapposite. *See Hernandez*, 2005 WL 363778, at *8.

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[12] Other courts, meanwhile, have determined that statutes that classify on the basis of sexual orientation are constitutionally suspect, and these cases remain on solid precedential ground. *See, e.g., Tanner v. Oregon Health Sciences Univ.*, 971 P.2d 435, 447 (Or. Ct. App. 1998); *Children's Hosp. & Med. Ctr. v. Bonta*, 118 Cal. Rptr. 2d 629, 650 (Ct. App. 2002), *cert. denied*, 537 U.S. 1160 (2003); *Gay Law Students Ass'n v. Pacific Tel. & Tel. Co.*, 595 P.2d 592, 599-603 (Cal. 1979).

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B. Denying Same-Sex Couples the Right to Marry Entails Classification on the Basis of Sex and Is Therefore Subject to Heightened Scrutiny

There is no dispute that sex-based classifications are subject to heightened scrutiny. Statutes that classify on this basis will pass constitutional muster only if the classification is "substantially related" to an "important governmental interest." *E.g.*, *People v. Santorelli*, 80 N.Y.2d 875, 876 (1992). "To meet their burden of showing that a gender-based law is substantially related to an important governmental objective the People must set forth an 'exceedingly persuasive justification' for the classification." *People v. Liberta*, 64 N.Y.2d 152, 170 (1984) (citing *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982); *Kirchberg v. Feenstra*, 450 U.S. 455, 461 (1981)).

The Supreme Court's decision in *Loving* compels the conclusion that the construction of the DRL endorsed by the court below—"only opposite-sex unions are contemplated by this statutory scheme," 5 Misc. 3d at 904—classifies on the basis of sex. The parallel to the race classification held unconstitutional in *Loving* is exact. The Virginia anti-miscegenation statute permitted whites to marry and African-Americans to marry, but it prohibited whites and African-Americans from marrying someone not of their own

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race. The DRL permits women to marry and men to marry, but it prohibits men and women from marrying someone of their own gender. Recognizing, as the Supreme Court did in *Loving*, that the former involves a race-based classification requires recognizing that the latter involves a gender-based classification.

The parallel to the objectionable classification identified in *Loving* is made even more apparent by replacing the gender-related terminology employed in the Department's submission to the trial court with racial terminology:

> The applicable sections of the D.R.L. do not deprive one [race] of a right that is given to the other, or confer on one [race] a benefit that the other is denied, or restrict one [race's] conduct but not the other's. Both [whites] and [African-Americans] have the same right: to obtain a license to marry someone of [the same race]. Both [whites] and [African-Americans] are subject to the same restriction. Neither a [white] nor [an African-American] can obtain a license to marry someone [not] of his or her own [race].

DOH Mem. at 15.

The trial court held that "the classification at issue here is not one based upon gender because both males and females are similarly situated under the challenged statute in that they are authorized to marry only

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persons of the opposite sex." 5 Misc. 3d at 906. This conclusion is utterly inconsistent with *Loving*. The State had argued in that case that "because its miscegenation statutes punish equally both the white and the Negro participants in an interracial marriage, these statutes, despite their reliance on racial classifications do not constitute an invidious discrimination based upon race." *Loving v. Virginia*, 388 U.S. 1, 8 (1967). The Court, however, "reject[ed] the notion that the mere 'equal application' of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discriminations." *Id.* Instead, the Court held that "[t]here can be no question but that Virginia's miscegenation statutes rest solely upon distinctions drawn according to race." *Id.* at 11. This, in turn, was sufficient to trigger strict scrutiny under the Fourteenth Amendment's Equal Protection Clause.[13]

The Department also argued, in its submission to the trial court, that the statute at issue in *Loving* was enacted with discriminatory intent, and that

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[13] Other jurisdictions to have considered whether state laws limiting marriage to same-sex couples classify on the basis of sex have concluded that they do, and have applied heightened scrutiny accordingly. *See Baehr v. Lewin*, 852 P.2d 44, 60 (Haw. 1993); *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743, at *6 (Alaska Super. Ct. Feb. 27, 1998).

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that is sufficient to distinguish it from the DRL provisions at issue here. *See* DOH Mem. at 16-17. However, it cited no authority whatever for the proposition that classifications that are explicitly written into state laws are subject to heightened scrutiny only upon a showing of discriminatory intent. This gloss on the Supreme Court's opinion is baseless.

Moreover, even if an intent to discriminate were an element of the equal protection analysis, the denial of marriage rights to same-sex couples would still be constitutionally defective. Courts have repeatedly recognized that discrimination on the basis of a person's failure to act in accordance with gender stereotypes constitutes sex discrimination. *See, e.g., Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (relief available under Title VII to woman who was denied partnership because her conduct was believed to be too "masculine"); *E.E.O.C. v. Grief Bros. Corp.*, No. 02-CV-468S, 2004 WL 2202641, at *14 (W.D.N.Y. Sept. 30, 2004) (taking note of several cases "recognizing failure to conform to gender stereotypes as a basis for [a] sex discrimination [claim]"). And the denial of marriage rights to same-sex couples is very much rooted in stereotypes relating to "proper" sex roles: Men are supposed to marry women, women to marry men. These attitudes reinforce the historical disparity between the male and female roles. *See*

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William N. Eskridge, Jr., *Multivocal Prejudices and Homo Equality*, 74 Ind. L.J. 1085, 1110 (1999) ("[A]ntihomosexual attitudes are connected with attitudes sequestering women in traditional gender roles.").

* * *

As described in Part IV, *infra*, denying same-sex couples the right to marry cannot satisfy even rational-basis review because it is not rationally related to a legitimate government interest. It follows, *a fortiori*, that the State's denial of this important right cannot survive the heightened judicial scrutiny applicable to these suspect classifications.

IV. DENYING SAME-SEX COUPLES THE RIGHT TO MARRY IS NOT RATIONALLY RELATED TO A LEGITIMATE GOVERNMENT INTEREST AND THE MARRIAGE BAN MUST FALL UNDER ANY STANDARD OF REVIEW

A. Rational-Basis Review Requires that State Action Bear a Rational Relationship to a Legitimate Government Interest

The fundamental tenet of equal protection law in New York, as elsewhere, is that *all* statutory classifications "which result[] in unequal treatment [must] rationally further some legitimate, articulated state purpose." *Doe v. Coughlin*, 71 N.Y.2d 48, 56 (1987) (internal quotation marks omitted). This "rational basis" test requires that a court "ascertain both the basis of the classification involved and the governmental objective

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purportedly advanced by the classification. The classification must then be compared to the objective to determine whether the classification rests upon some ground of difference having a fair and substantial relation to the object for which it is proposed." *Abrams v. Bronstein*, 33 N.Y.2d 488, 492-493 (1974) (internal quotation marks omitted).

The State's denial of marriage rights to same-sex couples cannot satisfy even this low threshold for constitutionality. As we demonstrate below, the exclusion of same-sex couples from the institution of marriage is not predicated on any state interest that might qualify as "legitimate." And even if the interests at stake could justifiably be labeled as such, denial of marriage licenses to same-sex couples violates the New York Constitution because that action bears no connection—rational or otherwise—to asserted interests.[14]

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[14] The fact that the statutory scheme, as construed by the trial court, is not supported by a rational basis means not only that the scheme violates the New York Constitution's Equal Protection Clause, but also, of course, that it fails the heightened scrutiny applicable to statutes that constrain the fundamental right to marry, *see supra* Part II, or rely on suspect classifications, *see supra* Part III. Indeed, Respondents did not even argue to the trial court, nor did the trial court find, that the denial of marriage rights to same-sex couples could meet the standards of review applicable to government action that burdens fundamental rights or invokes a suspect classification.

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B. Exclusion of Same-Sex Couples From the Institution of Marriage Cannot be Justified by an Interest in Preserving the "Traditional" Definition of Marriage

The trial court concluded that "the State's issuance of marriage licenses only to heterosexual couples is rationally related to legitimate interests in preserving the traditional and legal concept of marriage." *Shields*, 5 Misc. 3d at 908.[15] But the court offered no analysis of whether the "traditional" practice at issue is independently legitimate as a constitutional matter, nor did it attempt to explain why the supposed interest in perpetuating (even a discriminatory) tradition for its own sake is constitutionally cognizable. Instead, the court appears to have assumed that longstanding practices relating to marriage, whether or not they are discriminatory, are necessarily constitutionally sound.

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[15] The trial court declined to address the alternative justification offered by the State for New York's denial of marriage rights to same-sex couples. The Department took the position that New York may deny same-sex couples marriage licenses without running afoul of the Constitution because a significant majority of states as well as the federal government explicitly prohibit same-sex couples from marrying, *see* DOH Mem. at 23-24, and New York has an interest in harmonizing its law with the law of these other jurisdictions. The New York Court of Appeals has expressly held that this "uniformity" interest is an insufficient basis upon which to support government intrusion on individual rights. *See People v. P.J. Video, Inc.*, 68 N.Y.2d 296, 304 (1986) ("When weighed against the ability to protect fundamental constitutional rights, the practical need for uniformity can seldom be a decisive factor.") Hence, if this Court determines that the exclusion of same-sex couples from the institution of marriage represents a denial of Equal Protection or Due Process within the meaning of the New York Constitution, the fact that other jurisdictions countenance such denial cannot cure the constitutional defect.

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This analysis is deeply flawed. It proceeds from the dubious premise that New York recognizes a doctrine of constitutional adverse possession under which intrusion on a constitutional right, if practiced for long enough, is sufficient to dissolve the right itself. Not only does this reasoning fail as a matter of precedent, it misunderstands the very nature of constitutional rights and turns the process of judicial review on its head. The essence of a constitutional right is that it stands as a bulwark against the oppressive practices of the majority. *See* The Federalist No. 78, at 469 (Alexander Hamilton) (Clinton Rossiter ed. 1961) (emphasizing that it is the role of judges "to guard the Constitution and the rights of individuals from the effects of those ill humors which . . . sometimes disseminate among the people themselves, and which . . . have a tendency . . . to occasion . . . serious oppressions of the minor party in the community"). To acknowledge that this State has a long tradition of denying particular benefits to a disfavored minority is to beg the question of whether constitutional protection is available, not to answer it. The challenge for a court addressing a question of constitutional right is not simply to identify that which *is*; it is to determine whether that which is, is *constitutionally permissible*. And the court below offered nothing in the way of an

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independent justification of the constitutional permissibility of barring same-sex couples from marrying.

1. The Supposed Interest in Preserving Tradition Is Not Constitutionally Legitimate

The New York courts have long refused to uphold even longstanding "traditional" practices when those practices were deemed to conflict with the constitutional values of liberty and equality. In *Liberta*, 64 N.Y.2d at 164, for example, the Court of Appeals determined that the "marital exemption" from the criminal prohibition against rape was not supported by a rational basis. In reaching this conclusion, the Court of Appeals rejected justifications for the exemption that were grounded in traditional views relating to the subservient role of a woman relative to her husband. Rather than allow the invocation of traditional gender roles to foreclose the constitutional inquiry, the Court independently assessed the justifications for the policy at issue, determined that they "no longer have any validity," and invalidated the marital rape exemption. *Id.* This holding cannot be reconciled with the notion—apparently embraced by the trial court—that discriminatory state action may be justified by simple virtue of the fact that such discrimination is reflective of traditional views. *See also People v. Santorelli*, 80 N.Y.2d 875, 881 (1992) (distinguishing statutes that are "a

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reflection of archaic prejudice" from those that "manifest[] . . . a legitimate government objective"); *Foss v. City of Rochester*, 65 N.Y.2d 247, 260 (1985) ("Perpetuation of the status quo is not a legitimate end of government, however, if the status quo has been judicially found wanting.").

Courts in other states, meanwhile, have specifically concluded that an appeal to tradition or history cannot, on its own, suffice to justify denial of the right to marry to same-sex couples. In *Goodridge v. Department of Pub. Health*, 798 N.E.2d 941, 953 (Mass. 2003), for example, the Supreme Judicial Court of Massachusetts acknowledged "the long-standing statutory understanding, derived from the common law, that 'marriage' means the lawful union of a woman and a man." That Court emphasized, however, that "history cannot and does not foreclose the constitutional question," *id.*, and it ultimately concluded that the state lacked a legitimate interest in denying marriage rights to same-sex couples. *See also id.* at 973 (Greaney, J., concurring) ("[A]s a matter of constitutional law, neither the mantra of tradition, nor individual conviction, can justify the perpetuation of a hierarchy in which couples of the same sex and their families are deemed less worthy of social and legal recognition than couples of the opposite sex and their families."). Similarly, in *Baehr v. Lewin*, 852 P.2d 44, 61 (Haw.

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1993), the Hawaii Supreme Court deemed "circular and unpersuasive" the contention that "the right of persons of the same sex to marry one another does not exist because marriage, by definition and usage, means a special relationship between a man and a woman." *See also Perez v. Lippold*, 198 P.2d 17, 27 (Cal. 1948) ("Certainly the fact alone that . . . discrimination has been sanctioned by the state for many years does not supply such justification."). Each of these decisions indicates that the passage of time cannot legitimate a practice of denying equal protection of the laws.

The refusal of these courts to treat "tradition" as a sufficient basis on which to sustain a discriminatory classification is resoundingly supported by the Supreme Court's landmark decision in *Lawrence v. Texas*, 539 U.S. 558 (2003). That decision makes clear that the mere fact that a particular rule or social construct has deep historical roots cannot save it from a declaration of unconstitutionality if no independent and constitutionally legitimate justification for that rule exists. Specifically, while the Supreme Court noted that "*for centuries* there have been powerful voices to condemn homosexual conduct as immoral [in part out of] respect for the *traditional* family," *Lawrence*, 539 U.S. at 571 (emphases added), it nonetheless concluded that Texas's anti-sodomy law was unsupported by any "legitimate state interest,"

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id. at 578. *See also id.* at 577-578 ("'[N]either history nor tradition could save a law prohibiting miscegenation from constitutional attack'" (quoting *Bowers*, 478 U.S. at 216 (Stevens, J., dissenting)).

Lawrence properly connects tradition-based rationales that have been proffered in support of statutory classifications to the discredited strategy of defending state-sponsored discrimination on the basis of moral disapproval of individuals or groups. "[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral," that Court explained, "is not a sufficient reason for upholding a law prohibiting the practice." *Id.* at 577 (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)). *See also id.* at 582 (O'Connor, J., concurring) ("Moral disapproval of [gays and lesbians], like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause."). Similarly, the *Goodridge* court acknowledged that Massachusetts's long tradition of limiting marriage to opposite-sex couples was rooted, in part, in the fact that "[m]any people hold deep-seated religious, moral, and ethical convictions that marriage should be limited to the union of one man and one woman, and that homosexual conduct is immoral." *Goodridge*, 798 N.E.2d at 948. That court concluded,

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nonetheless, that the State's denial of marriage rights to same-sex couples did not "serve a legitimate purpose in a rational way." *Id.* at 960 (internal quotation marks omitted). The New York Court of Appeals has likewise acknowledged that "disapproval by a majority of the populace . . . may not substitute for the required demonstration of a valid basis for intrusion by the State in an area of important personal decision protected under the right of privacy." *People v. Onofre*, 51 N.Y.2d 476, 490 (1980).

While the trial court insisted that its "denial of [Petitioners'] constitutional claims is not to be equated with moral disapproval of homosexuality," 5 Misc. 3d at 908, such equation is unavoidable. "[P]reserving the 'traditional institution of marriage' is just a kinder way of describing the State's *moral disapproval* of same-sex couples." *Lawrence*, 539 U.S. at 601 (Scalia, J., dissenting) (internal quotation marks and citation omitted) (emphasis in original). The trial court offered no account of what the "traditional" prohibition against same-sex marriage is if not an expression of moral disapproval of such unions. And the desire to express such moral disapproval is not a constitutionally legitimate basis for legislation.

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2. Linking the Interest in Preserving the "Traditional" Institution of Marriage to the Goal of Fostering Procreation Does Not Alter the Constitutional Analysis

The trial court intimated that the tradition-based justification for excluding same-sex couples from the institution of marriage lies, in part, in the State's interest in encouraging procreation. Thus, the court stated that "preserving the institution of marriage for opposite sex couples serves the valid public purpose of preserving the historic institution of marriage as a union of man and woman, which, in turn, uniquely fosters procreation." *Shields*, 5 Misc. 3d at 907. This conclusion is both legally and factually flawed. It is legally flawed because, under New York's Domestic Relations Law, neither the ability to procreate nor procreative intent is a prerequisite for marriage. The DRL does not endeavor to limit access to the institution of marriage for either infertile couples or couples who simply do not wish to have a child.[16] As Justice Scalia explained in his dissenting opinion in *Lawrence*, 539 U.S. at 605, "the encouragement of procreation" provides no justification for prohibiting same-sex couples to marry "since the sterile and

[16] While the DRL deems voidable a marriage in which either party "[i]s incapable of entering into the married state from physical cause," DRL § 7(3), New York courts have long interpreted that provision to refer to the capacity to consummate a marriage, *not* the capacity to procreate. *See, e.g.*, *Lapides v. Lapides*, 254 N.Y. 73, 80 (1930) ("The inability to bear children is not such a physical incapacity as justifies an annulment.").

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the elderly are allowed to marry." The court's reasoning is factually flawed because, like opposite-sex couples, many members of same-sex couples have biological children through artificial insemination, surrogacy, and prior relationships. Hence the notion that opposite-sex marriages are "unique[]" in their fostering of procreation is unsupported.

More fundamentally, neither the trial court nor the State offered any explanation of the supposed nexus between the exclusion of same-sex couples from the institution of marriage and the encouragement of procreation. And there is none. There is simply no reason to believe (and none has been offered) that allowing same-sex couples to marry will have any effect on the quantity of couples, same-sex or different-sex, that choose to procreate.

It is true that a scheme of regulation need not be tailored with perfect precision to an asserted government interest in order to survive rational-basis review, *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 316 (1976), and the fact that a statutory scheme is over- or under-inclusive does not, on its own, suffice to render that scheme violative of the Equal Protection Clause. But the statutory scheme at issue here is not a marginally over- and under-inclusive means of serving the asserted state interest in

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procreation; it is an arbitrary means of doing so. And the New York courts have long held that while New York's "equal protection clause does not mandate absolute equality of treatment[,]" it does prohibit classifications that are "so disparate as to be deemed arbitrary []or invidiously discriminatory." *People v. Pacheco*, 73 A.D.2d 370, 372-373 (2d Dep't 1980), *aff'd*, 53 N.Y.2d 663 (1981). Because the exclusion of same-sex couples from marriage has no discernable effect on the possibility of procreation (again, whether by same-sex or different-sex couples), the interest in fostering procreation cannot serve to justify the exclusion.

Notably, the high courts of Massachusetts and Vermont resoundingly rejected such procreation-based rationales in the course of determining that denying same-sex couples either the right to marry (Massachusetts) or the rights and benefits of married persons (Vermont) is not rationally related to any legitimate government interest. The *Goodridge* court explained: "[Massachusetts law] contains no requirement that the applicants for a marriage license attest to their ability or intention to conceive children by coitus. . . . [I]t is the exclusive and permanent commitment of the marriage partners to one another, not the begetting of children, that is the sine qua non

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of civil marriage." 798 N.E.2d at 961. And the Vermont court, likewise, reasoned:

> It is . . . undisputed that many *opposite-sex* couples marry for reasons unrelated to procreation, that some of these couples never intend to have children, and that others are incapable of having children. . . . The law extends the benefits and protections of marriage to many persons with no logical connection to the stated governmental goal.

Baker v. State, 744 A.2d 864, 881 (Vt. 1999) (internal quotation marks omitted) (emphasis added)). This Court should embrace the reasoning employed in *Goodridge* and *Baker* and reject the "procreation" rationale as a justification for New York's denial of marriage rights to same-sex couples.

3. New York's "Traditions" Relating to the Treatment of Gays and Lesbians Are Rapidly Evolving

a) New York Increasingly Recognizes and Protects Same-Sex Relationships

Increasingly, New York's "traditions" concerning the treatment of gay and lesbian individuals and of same-sex couples have been modified or replaced by the values of equal protection and non-discrimination. The State of New York has, through both its statutory and decisional law, taken significant steps toward recognizing the legitimacy of committed same-sex relationships. As noted above, *see supra* Part I.B, in *Braschi v. Stahl*, 74

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N.Y.2d 201 (1989), the Court of Appeals determined that "lifetime partners whose relationship is long term and characterized by an emotional and financial commitment and interdependence" qualify as "family members" for purposes of state housing law. *Id.* at 211-213. And, in *Langan v. St. Vincent's Hospital*, 196 Misc. 2d 440 (Sup. Ct. Nassau County 2003), a trial court held that the term "spouse" as used in the EPTL includes the surviving same-sex spouse of a deceased New York resident where the couple had entered into a valid civil union in the state of Vermont. *Id.* at 454.

The State Legislature, moreover, has enacted numerous provisions prohibiting discrimination on the basis of sexual orientation and enhancing penalties for hate crimes involving animus against gay men and lesbians. *See* N.Y. Civ. Rts. Law § 40-c(2); N.Y. Exec. Law § 296; N.Y. Educ. Law § 313; N.Y. Ins. Law § 2701(a); N.Y. Penal Law §§ 240.30(3), 485.05(1). As New York's Attorney General has explained, these developments "draw[] into question the State's interest in maintaining the historical understanding of marriage as confined to opposite-sex partners." (R. 107, Op. Att'y Gen., Mar. 3, 2004, at 19.) And as one New York court has noted, "[r]ecognition that the right to choice in marriage applies to all people, including gays and lesbians, is consistent . . . with New York's evolving history of respect for,

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and protection of, same-sex relationships." *Hernandez*, 2005 WL 363778, at *21.

b) New York's Evolving Traditions Relating to the Parental Rights of Same-Sex Couples, Together With Its "Overwhelming" Interest in Promoting the Welfare of Children, Militate Against Prohibiting Same-Sex Couples from Marrying

A particularly important facet of New York's evolving respect for same-sex relationships is its recognition and protection of the parental rights of same-sex couples. As noted earlier, *see supra*, Part III.A, the Court of Appeals has construed § 117 of the DRL to permit the same-sex partner of a biological parent to become the child's second parent by means of adoption. *See In re Jacob*, 86 N.Y.2d 651 (1995). Hence the decisional law of this State explicitly contemplates the raising of children by same-sex couples, and it is undisputed that many same-sex couples in New York are, in fact, raising children.

This court has repeatedly emphasized the "overwhelming State interest in protecting and promoting the best interests and safety of children." *In re Smith*, 128 A.D.2d 784, 786 (2d Dep't 1987). And once it is conceded (as it must be) that same-sex couples may raise children in New York, there can be little doubt that the exclusion of same-sex couples from

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the institution of marriage seriously undermines this "overwhelming" interest. It does by depriving same-sex couples with children of the tangible benefits of marriage, and by branding such couples and the children they raise as a lesser form of family. As one New York trial court explained, in addition to the tangible benefits they are denied, "[same-sex] couples and their children suffer numerous intangible burdens as a result of being relegated to a caste-determined status that is different from that of families in which the adult couple has been allowed to marry." *Hernandez*, 2005 WL 363778, at *6.

Indeed, the Supreme Judicial Court of Massachusetts emphasized the perversity of the notion that denying same-sex couples the right to marry would improve, rather than undermine, the welfare of children. That Court stated:

> Excluding same-sex couples from civil marriage will not make children of opposite-sex marriages more secure, but it does prevent children of same-sex couples from enjoying the immeasurable advantages that flow from the assurance of a stable family structure in which children will be reared, educated, and socialized.

Goodridge, 798 N.E.2d at 963-964 (internal quotation marks and citations omitted). The Vermont Supreme Court has likewise acknowledged that "the

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exclusion of same-sex couples from the legal protections incident to marriage exposes *their* children to the precise risks that the State argues the marriage laws are designed to secure against." *Baker*, 744 A.2d at 882 (emphasis in original).

These very concerns motivated the Court of Appeals' decision in *In re Jacob*. The Court explained that allowing the same-sex partner of a biological parent to adopt his or her partner's child advances New York's policy of promoting the best interests of children. "The advantages which would result from such an adoption," the Court noted, "include Social Security and life insurance benefits in the event of a parent's death or disability, the right to sue for the wrongful death of a parent, the right to inherit under rules of intestacy and eligibility for coverage under both parents' health insurance policies." *In re Jacob*, 86 N.Y.2d at 658. "Even more important, however, is the emotional security of knowing that in the event of the biological parent's death or disability, the other parent will have presumptive custody." *Id.* at 659.

In short, as other aspects of New York's traditions relating to the treatment of same-sex couples have evolved—most notably New York's traditions relating to same-sex couples who raise children—the denial of

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marriage rights to such couples has come to undermine New York's enduring interest in promoting the stability of families and protecting the welfare of children.

CONCLUSION

For all of these reasons, the trial court's judgment should be reversed.

Dated: New York, New York
May 16, 2005

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND
----------X

In the Matter of the Application of:

JOHN SHIELDS, ROBERT MICHAEL STREAMS, JACQUELINE AXT-OHANNESYAN, LISA AXT-OHANNESYAN, JOHN ADE, JOHNNIE FARMER, ELIZABETH INSON, THERESA APUZZO, JOE HICKEY, ROBERT BRAY, CHRISTINA LOMBARDI, RACHEL McGREGOR RAWLINGS, ABIGAIL MILLER, MELANIE SUCHET, CLAIRE BONDE, TONI BONDE, GEORGE DELANCEY, JOEL EALY, DEIRDRE BERNARD-PEARL and LISA BERNARD-PEARL,

Petitioners,

Index No.
1458/2004
(J. Wiener)

For a Judgment Pursuant to Article 78 of the CPLR and other relief,

-against-

CHARLOTTE MADIGAN, Town Clerk, Town of Orangetown, New York, and STATE OF NEW YORK DEPARTMENT OF HEALTH,

Respondents.
----------X

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PETITIONERS' MEMORANDUM OF LAW IN OPPOSITION TO MOTION TO INTERVENE OF PARTY-RESPONDENTS

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INTRODUCTION

In this action, Petitioners, all of whom are in committed gay or lesbian relationships, challenge the conduct of State and Town officials who refused to issue them marriage licenses. At issue in this case are *Petitioners'* state statutory and constitutional rights. Petitioners argue, first, that New York's Domestic Relations Law ("DRL") permits the issuance of marriage licenses to otherwise qualified same-sex couples. In the alternative, Petitioners argue that if the DRL is interpreted to prohibit their marriages, it is unconstitutional as applied to them. Named as Respondents in the case are the Town Clerk of Orangetown, who refused to issue licenses to Petitioners, and the State of New York Department of Health—the state agency that regulates the issuance of marriage licenses and that directed town clerks not to issue licenses to gay and lesbian couples.

On April 15, 2004, two N.Y. State Senators, a N.Y. State Assemblyman, a business owner, and a non-profit organization (collectively "Movants" or "Proposed Intervenors") filed a Motion to Intervene ("Motion") in this suit. At best the Motion justifies the Movants' participation in this litigation as *amicus curiae*; as justification for their intervention as *parties*, it lacks merit and should be denied.

Though the applicable New York statutes and case law articulate a liberal standard under which requests to intervene are to be adjudicated, these authorities do not stand for the proposition that any individual or organization who cares about the outcome of litigation is entitled to intervene. The Movants fail to demonstrate anything more than basic concern as to the outcome of this suit and, hence, they do not meet even the liberal intervention standard applicable under New York law. Indeed, it is clear that the intervention provision cannot be stretched to the point contemplated by Movants, for the reasoning underlying their Motion could

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be employed to justify the intervention of (1) any state legislator in any case in which the constitutionality of a state law is in question, (2) any business owner in any suit that might affect his or her financial interests and in which his or her religious or moral beliefs are potentially implicated, and (3) any interest group or nonprofit organization in a suit that calls for adjudication of issues pertinent to the organization's mission.

Finally, Movants' claim that their interests in this litigation cannot adequately be protected by the named Respondents lacks foundation. Hence, in addition to proceeding on the basis of a theory that would entail a dramatic expansion of the bounds of permissible intervention, Movants offer no compelling reason that they should be permitted to participate in this case as parties. Accordingly, Petitioners respectfully request that the Motion be denied.

I. MOVANTS SHOULD NOT BE ALLOWED TO INTERVENE BECAUSE THEY ARE NOT "INTERESTED PARTIES"

Section 7802(d) of the CPLR provides that, in an article 78 proceeding,[1] the court "may allow . . . interested persons to intervene." As the plain text of the statute signals, intervention is

[1] Movants ask this court "to convert the case [from an article 78 proceeding] into a 'regular' action for declaratory judgment." Proposed Intervenors' Memorandum of Law (hereinafter "Intervenors' Mem.") at n.1. They claim that an article 78 proceeding is not an appropriate vehicle to "challenge the constitutionality of the Domestic Relations Laws." *Id.* This argument misconstrues the case law governing article 78 proceedings. *See Kovarsky v. Housing & Dev. Admin.*, 31 N.Y.2d 184, 191, 335 N.Y.S.2d 383, 387 (1972) ("[A]n article 78 proceeding *is* generally the proper vehicle to determine whether a statute, ordinance, or regulation has been applied in an unconstitutional manner") (emphasis added); *Board of Educ. of Belmont Cent. Sch. Dist. v. Gootnick*, 49 N.Y.2d 683, 687, 427 N.Y.S.2d 777, 778 (1980) ("[A]n article 78 proceeding may not be used to test the constitutionality of a legislative enactment, *as distinct from the constitutionality of its application*") (emphasis added). Because Petitioners' challenge to the relevant provisions of the DRL is an as-applied challenge, an article 78 proceeding is entirely appropriate. Movants also ignore the fact that, in addition to their constitutional claims, Petitioners have presented a purely statutory argument, *see* Petitioners' Memorandum of Law, Part I, which is indisputably appropriate for an article 78 proceeding.

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a matter of judicial discretion—not of right. *See Doe v. Westchester County*, 45 A.D.2d 308, 312, 358 N.Y.S.2d 471, 476 (2d Dep't 1974); *Darlington v. City of Ithaca, Bd. of Zoning Appeals*, 202 A.D.2d 831, 834, 609 N.Y.S.2d 378, 380 (3d Dep't 1994). The statutory language also dictates that intervention is permissible only with respect to "interested parties." This does not mean that *any* individual or organization with some generalized interest in the *result* of litigation should be granted party status upon timely filing of a motion. *See New York Times Co. v. City of New York Fire Dep't*, 195 Misc. 2d 119, 122-23, 754 N.Y.S.2d 517, 521 (Sup. Ct. N.Y. County 2003) ("interested' [for purposes of § 7802(d)] means more than generally interested in the result of an article 78 proceeding"). To the contrary, "to be an 'interested' party, one must have a legally cognizable claim to intervene pursuant to CPLR 7802(d), rather than just a general interest in the result of the article 78." *New York State Senator Kruger v. Bloomberg*, 1 Misc. 3d 192, 196, 768 N.Y.S.2d 76, 80 (Sup. Ct. N.Y. County 2003).

As a threshold matter, the Motion should be summarily denied because the Movants seek to intervene as *Respondents*. Yet, they have no role in the issuing of marriage licenses or the defense of New York State law. Had the Petitioners named any of these individuals or organizations as Respondents originally, they would be dismissed as improper parties.

Moreover, the Motion should be denied because none of the Movants asserts anything more than broad, generalized interests in the result of this article 78 proceeding.

A. The Legislators

More fundamentally, however, Movants are in no position to ask this Court to convert this proceeding into a "regular" declaratory judgment action. Petitioners have filed this suit (cont.) under the rubric of article 78 and no party to this case has asked this Court to convert it. For purposes of their Motion to Intervene, then, Movants must proceed from the premise that the rules relevant to article 78 proceedings govern.

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Movants Diaz, Meier, and Hooker, members of the New York Legislature (collectively, "the Legislators"), argue that they have "a substantial interest in the subject of this litigation" because *they*, and not the courts, are "vested with the authority to define and regulate marriage." Intervenors' Mem. at 7. But Petitioners do not ask this Court to "define and regulate marriage." Instead, the Verified Petition asks this Court to perform its quintessential judicial function: interpret the meaning of a statute and determine whether the statute is constitutional as applied to Petitioners. In other words, Petitioners ask this Court "to say what the law is" under a New York statute and the New York Constitution. *Campaign for Fiscal Equity, Inc. v. State*, 187 Misc. 2d 1, 12, 719 N.Y.S.2d 475, 484 (Sup. Ct. 2001) (citing *Marbury v. Madison,* 1 Cranch [5 U.S.] 137, 177, 2 L.Ed. 60 (1803); *Schieffelin v. Komfort,* 212 N.Y. 520, 530-31, 106 N.E. 675 (1914)), *rev'd on other grounds*, 295 A.D.2d 1, 744 N.Y.S. 130 (1st Dep't 2002). Hence, the Legislators' claim that they have some distinct interest in this suit because it somehow calls for an arrogation of legislative authority by the courts simply ignores the venerable tradition of judicial review that is fundamental to our system of governmental checks and balances.

Moreover, the Legislators' claim that regulation of marriage is "solely within the sound discretion of the Legislature," Intervenors' Mem. at 10, puts the cart before the horse; that is, it asks this Court to reach the merits of this litigation—by deciding that the New York Constitution places no limits on the Legislature's authority to define the contours of marriage—in the course of deciding whether they are entitled to intervene. Any such determination would be premature.

Even if it were appropriate for this Court to address this question at this preliminary stage, the fragments of caselaw upon which the Legislators rely are inapposite. While it is true, for example, that the Court of Appeals has stated that "the Legislature in dealing with the subject of marriage has plenary power[,]" *Fearon v. Treanor*, 272 N.Y. 268, 271 (1936) (quoted in

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Intervenors' Mem. at 7), this cannot possibly support the broad proposition that there is no role at all for the New York courts to play in reviewing statutes pertaining to marriage for constitutional infirmities. If it did, then judicial review of an anti-miscegenation law or a law requiring all couples to solemnize marriages by swearing an oath on the Christian Bible would be unavailable. In addition, the *Fearon* Court did state, as Movants point out, that "the Legislature 'must determine what is for the best interest of the people of the State as a whole [and that] [i]f the subject is one within its jurisdiction, courts may not pass upon the wisdom of its action and substitute their judgment for that of the law making body.'" *Fearon*, 272 N.Y. at 273-74 (quoted in Intervenors' Mem. at 7). But Petitioners do not ask this Court to assess the "wisdom" of the applicable provisions of the DRL, rather they ask this Court to consider the *constitutionality* of these provisions as applied to same-sex couples.

The Legislators further insist that "[t]he interest of . . . state Legislators is distinctly different than that of any of the governmental entities currently involved in the litigation[]" because "a decision by this Court in Petitioners' favor will bind the Legislature from defining and regulating marriage to expressly exclude same-sex marriage." *Id.* at 2. Thus, the Legislators' asserted "distinct[]" interest in this suit, *id.*, is no more than in protecting their governmental turf from meaningful judicial review.

This reasoning carries the potential to underwrite the intervention of a legislator *in any case* in which the constitutionality of a legislative enactment is challenged. Any time a court determines that the Constitution prohibits a particular regulatory action or scheme, it "bind[s] the legislature" and "strip[s] the Legislature of . . . power" in precisely the same way as would a judgment in Petitioners' favor with respect to the constitutional claims in this suit. *Id.* It is widely recognized that this sort of "legislators' interest" does not provide an adequate basis for

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participation in a suit as a party. *See, e.g., Raines v. Byrd*, 521 U.S. 811, 821, 830 (1997) (holding that "individual members of Congress do not have a sufficient 'personal stake' in this dispute [over the constitutionality of the Line Item Veto Act] and have not alleged a sufficiently concrete injury" notwithstanding their claim that "the Act causes a type of institutional injury (the diminution of legislative power), which necessarily damages all Members of Congress and both Houses of Congress"); *Tarnsey v. O'Keefe*, 225 F.3d 929, 939 (8th Cir. 2000) (noting that the "general rule is that when a court declares an act of the state legislature to be unconstitutional, individual legislators who voted for the enactment [have no standing to] intervene."). If the Legislators' claim is to have any purchase, then, this Court must be willing to sanction the intervention of a New York legislator whenever the constitutionality of a New York statute is at stake (and, by the same token, of any federal legislator any time a federal statute is challenged in a New York court) (internal quotation marks and citation omitted).

It is no answer to say that the Legislators' arguments in favor of intervention would apply only in cases where legislators claim that the legislature has *plenary* power over a particular substantive area of the law. *See* Intervenors' Mem. at 7-10. The "distinct[]" interest asserted by the Legislators in this case, *id.* at 2, relates to their capacity as legislators, and this interest is undermined any time a court finds legislative authority to be lacking for constitutional reasons. This is equally true whether the claim of legislative authority advanced by the potential legislator-intervenor is grounded (as it is here) in sweeping notions of separation of powers and plenary legislative authority or is rooted, instead, in narrower assertions as to the proper construction of a particular constitutional clause.

Finally, the Legislators' claim that they have a "distinct[]" interest in defending the constitutionality of the relevant provisions of the DRL is actually undermined by New York law.

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which recognizes the New York Attorney General—not members of the State Legislature, nor even the Legislature as a whole—as possessing a unique interest in defending the constitutionality of New York laws. Thus, CPLR § 1012(b) provides that "[w]hen the constitutionality of a statute of the state is involved in an action to which the state is not a party, the court shall notify the attorney-general, who shall be permitted to intervene in support of its constitutionality." And, Executive Law § 71 states:

> Whenever the constitutionality of a statute is brought into question . . . in any court of record . . . the party desiring to raise such question [shall] serve notice thereof on the attorney-general, and . . . the attorney-general [shall] be permitted to appear at any such trial or hearing in support of the constitutionality of such statute . . . .

Movants effectively ask this Court to read a parallel provision into New York law authorizing *legislators* to intervene in any suit in which the constitutionality of a state law is brought into question. But the Legislature has demonstrably chosen to vest authority for defending the constitutionality of its enactments not with its individual members, but with the New York Attorney General, and there is simply no warrant for disturbing this legislative judgment.

B. Business Owner Michael Long

Movant Michael Long claims to have an interest in this litigation in his capacity as the owner of a New York business. Long asserts that "[i]f current marriage laws were to be declared invalid in New York, business owners in the State would be forced to provide healthcare and other employment benefits to same-sex partners against their sincerely-held religious and moral beliefs and against their financial interests." Intervenors' Mem. at 10-11. Accordingly, Long argues that he has "substantial interests that are distinct from that of the current parties to the litigation." *Id.* at 11.

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Long's claimed interest—the possibility of increased business costs in the future—is far too attenuated for consideration as a valid interest for intervention purposes. As the Second Department has explained, the mere fact that the outcome of litigation "may impose an extreme financial burden on [a party] does not confer on [that party] a legally cognizable real and substantial interest for which it may maintain a lawsuit against the State." *Love v. Parales*, 222 A.D.2d 661, 662, 636 N.Y.S.2d 93, 94-95 (2d Dep't 1995) (rejecting intervention of County Executive, Commissioner of County Department of Social Services, and County); *see also Rios v. Enterprise Ass'n Steamfitters Local Union No. 638 of U.A.*, 520 F.2d 352, 358 (2d Cir. 1975) (holding that white members of union had insufficient interest to intervene in litigation of affirmative action plan, despite contention that policy would relegate them to less desirable hiring branch). Movant Long's approach toward intervention suggests that an individual may intervene as a party in any case in which his or her financial interests are at stake and religious or moral sensibilities are potentially implicated. In the very least, this approach would permit every business owner and every employee in New York State who claims to be morally opposed to—or in favor of—same-sex marriage to intervene in this case. In short, Michael Long is indistinguishable from perhaps millions of New Yorkers who have strongly-held views on the subject of same-sex marriage. If he can intervene, anyone can; and under settled Second Department precedent, he cannot.

C. The New York Family Policy Council

Finally, the New York Family Policy Council ("the FPC") contends that it has an interest sufficient to merit intervention because (1) its mission is "to reaffirm and promote the traditional family unit," (2) it has worked in New York and with New Yorkers to accomplish this goal, and

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(3) this suit has clear ramifications for preservation of the so-called "traditional" family unit. Intervenors' Mem. at 11-12. These asserted interests are broadly general "public" interests. Mere disagreement with the possible policy outcome of a case, however, is insufficient to substantiate an interest for purposes of intervention. *See Kruger*, 1 Misc. 3d at 195, 768 N.Y.S.2d at 80; *Town of Irondequoit v. Monroe County*, 171 Misc. 125, 130, 11 N.Y.S.2d 933, 939 (Sup. Ct. Monroe County 1939) (holding that under statute authorizing intervention by a party having an "interest" in the subject of the action, the intervenor's interest "must be individual and not public, direct and not indirect, present and not remote. Interest in the result or outcome of the action will not suffice"). *Cf. Society of the Plastics Indus., Inc. v. County of Suffolk*, 77 N.Y.2d 761, 769, 570 N.Y.S.2d 778, 782 (1991) ("That an issue may be one of 'vital public concern' does not entitle a party to standing."); *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 617 (1989) ("[T]he psychological consequence presumably produced by observation of conduct with which one disagrees . . . do not provide the kind of particular, direct, and concrete injury that is necessary to confer standing to sue in the federal courts") (citation omitted).

Once again, moreover, the Movants sweep far too broadly. The FPC's conception of "interest" would permit any interest group to intervene as a party—as opposed to as an *amicus*—in a lawsuit in which its mission is implicated. The National Rifle Association would be a proper party in any suit involving gun control legislation; the Sierra Club would be a proper party in any suit involving environmental legislation; and the U.S. Chamber of Commerce could intervene as a party in any suit involving a law that might affect U.S. businesses.[2] On the facts of this case

[2] It is, of course, perfectly ordinary for organizations to participate as parties to litigation affecting their mission. Such participation, however, is premised on "associational standing" doctrine, which, under both New York and federal law, requires that a member of the organization have standing to sue in his or her own right in order for the organization itself to

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alone Movants' theory would allow any organization with a presence in New York that is committed to promoting or opposing gay rights to participate in this litigation not just as *amici* but as parties.

II. MOVANTS' CLAIM THAT THEIR INTERESTS MAY NOT ADEQUATELY BE SERVED BY THE NAMED RESPONDENTS LACKS MERIT

Movants acknowledge that the named Respondents in this case have a "general interest in upholding existing law." Intervenors' Mem. at 13. They assert, however, that while they "share respondent's [sic] broad goal associated with law enforcement . . . [,] general agreement . . . does not necessarily ensure agreement in all particular respects about what the law requires." *Id.* Movants conclude, therefore, that the named Respondents "have interests distinct from the Proposed Legislator Intervenors and the [New York Family Policy Council]" and that intervention is appropriate. *Id.*

This argument is a non-sequitur. Even assuming, *arguendo*, that Movants "have interests distinct from" those of the named Respondents, this is a far cry from claiming, much less demonstrating, that the named Respondents and Movants differ "as to what the law requires." In fact, Movants fail to specify any point, general or particular, with respect to which they disagree with named Respondents as to what the applicable provisions of the DRL or the New York Constitution require.

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have standing. *See Society of the Plastics Indus., Inc. v. County of Suffolk*, 77 N.Y.2d 761, 775, 570 N.Y.S. 2d 778, 786 (1991) ("[I]f an association or organization is the petitioner, the key determination to be made is whether one or more of its members would have standing to sue; standing cannot be achieved merely by multiplying the persons a group purports to represent."); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 181 (2000). FPC has not alleged that any of its individual members have standing to intervene as a Respondent in this litigation.

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Movants also assert that neither of the named Respondents can adequately represent the interests of Michael Long because "only a business owner can adequately present to this Court the economic impact to businesses throughout the State of New York" of a ruling that would permit same-sex couples to marry. This is wrong. It is difficult to imagine a case in which the Attorney General of New York would be called upon to defend the constitutionality of a statute in which the Court's decision would not have some targeted effect on a specific individual or class of New Yorkers, be they business owners, employees, parents, children, taxpayers, or property owners. Movants effectively declare the Attorney General, who is explicitly authorized under New York law to defend the constitutionality of New York statutes in any case in which they are under attack, *see* CPLR § 1012(b), presumptively incompetent to represent and protect the interests of New Yorkers who might be affected by the ruling in that case. It should go without saying that nothing in the statutory or decisional law of this State supports such a presumption.

Movants state, finally, that the Attorney General is unable to protect their interests because of "his lack of neutrality on the issue." To support this charge, Movants note that an informal Opinion Letter issued by the Attorney General's Office "states that it is a close question whether a court would uphold the constitutionality of the state marriage laws." Intervenors' Mem. at 14. This acknowledgement does not support the claim that the Attorney General lacks neutrality. Nowhere in the opinion letter does the Attorney General take any position on the constitutionality of a construction of the DRL that would deny same-sex couples the right to marry. And the notion that the Attorney General lacks neutrality because he has conceded the obvious—that this case presents a difficult question—cannot be countenanced. The mere fact that the Attorney General does not think it a foregone conclusion that the New York courts will

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reject Petitioners' claims does not render him biased. This is especially clear when one considers that the highest courts of Massachusetts, Vermont, and Hawaii have, in recent years, upheld challenges similar to that brought by Petitioners. *See Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003); *Baker v. State*, 744 A.2d 864 (Vt. 1999); *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).

III. THE MOTION SHOULD BE DENIED BECAUSE MOVANTS DO NOT MEET THE MORE RIGOROUS INTERVENTION STANDARDS OF CPLR §§ 1012 AND 1013

As stated above, *see supra* n.1, because Petitioners challenge the constitutionality of the DRL on an as-applied basis only, it is entirely appropriate that their claims be addressed in the context of an article 78 proceeding. Assuming, *arguendo*, that CPLR §§1012 and 1013 apply, the standards governing intervention would then militate even more strongly in favor of denying the Motion. *See Greater New York Healthcare Facilities v. DeBuono*, 91 N.Y.2d 716, 720, 674 N.Y.S.2d 634, 636 (1998) ("[§ 7802(d)] grants the court broader authority to allow intervention in an article 78 proceeding than is provided pursuant to [the CPLR provisions governing intervention in other contexts].").

CPLR § 1012(a)(2) permits intervention as of right "when the representation of the person's interest by the parties is or may by inadequate and the person is or may be bound by the judgment" and CPLR § 1013 provides that "any person may be permitted to intervene in any action . . . when the person's claim or defense and the main action have a common question of law or fact." To begin with, to the extent that Movants claim authority to intervene as of right under § 1012(a)(2), the patent weakness of their claim that the named Respondents cannot adequately represent this interest, *see supra* Part II, is prohibitive of their intervention. More generally, New York courts have consistently held that the question of whether intervention is

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appropriate (under either § 1012 or § 1013)[3] turns on whether the party seeking to intervene has a "*direct* and substantial interest" in the outcome of the litigation. *E.g.*, *Rent Stabilization Ass'n of New York City v. New York State Div. of Housing & Cmty Renewal*, 252 A.D.2d 111, 116, 681 N.Y.S.2d 679, 682 (3d Dep't 1998) (emphasis added); *Pier v. Board of Assessment Review of Town of Niskayuna*, 209 A.D.2d 788, 789, 617 N.Y.S.2d 1004 (3d Dep't 1994).

We have already demonstrated that Movants cannot even claim to have an "interest" in this litigation that is sufficient to justify intervention under the more lenient standards applicable to article 78 proceedings. It follows, *a fortiori*, that they cannot lay claim to a "direct and substantial interest" within the meaning of the case law interpreting §§ 1012 and 1013—for New York courts have repeatedly held that the "direct and substantial interest" requirement entails something more than the undifferentiated interest in the outcome of litigation that Movants press before this Court. *E.g.*, *Sieger v. Sieger*, 297 A.D.2d 33, 36, 747 N.Y.S.2d 102, 104 (2d Dep't 2002) (denying motion to intervene noting that the proposed intervenor failed to demonstrate "that he had an ownership interest in [the property at issue in the litigation]"); *Romonoff Rest. & Cabaret, Inc. v. World Wide Asset Mgmt Corp.*, 273 A.D.2d 292, 293, 710 N.Y.S.2d 542, 543 (2d Dep't 2000) (denying motion to intervene on the ground that movant "failed to meet his burden of demonstrating that he had a real and substantial interest in the outcome of the proceeding in which he sought to intervene . . . such as a secured interest in the subject chattels") (citations omitted). It bears repeating that the suggestion in cases such as *Sieger* and *Romonoff Restaurant* that, under some circumstances, a party's ownership interest may suffice to render

[3] *Sieger v. Sieger*, 297 A.D.2d 33, 35-36, 747 N.Y.S.2d 102, 104 (2d Dep't 2002) ("[I]t has been held under liberal rules of construction that whether intervention is sought as a matter of right under CPLR 1012(a), or as a matter of discretion under CPLR 1013 is of little practical significance.") (internal quotation marks omitted).

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intervention appropriate by no means signals that this is always (or even often) the case. As noted earlier, *see supra* p.7, the New York courts have squarely held that the fact that the mere fact that the outcome of litigation "may impose an extreme financial burden" on a party "does not confer on [that party] a legally cognizable real and substantial interest for which it may maintain a lawsuit against the State." *Love v. Perales*, 222 A.D.2d 661, 662, 636 N.Y.S.2d 93, 94-95 (2d Dep't 1995). *Sieger* and *Romonoff Restaurant* thus confirm that something more than an undifferentiated interest in the outcome of litigation is necessary for intervention to be permissible, and further demonstrate that where ownership of a piece of real or tangible property is at issue, a party's ability to demonstrate a direct ownership interest in that property may be sufficient to justify his or her intervention. Movants do not—and cannot—claim to have a property interest of this sort in this litigation.

Finally, there are reasons of judicial efficiency that militate strongly against permissive intervention. Allowing Movants to intervene *as parties* would complicate the logistics of moving this proceeding along expeditiously, for "[o]nce let in, the intervenor becomes a party for all purposes . . . [and] obtains the rights of a party, including the right to counterclaim, cross-claim, implead, appeal, etc.'" *Kruger*, 1 Misc. 3d at 195, 768 N.Y.S.2d at 80 (citing Siegel N.Y. Prac § 178 at 295 [3d ed.]; *Incorporated Vill. of Island Park v. Island Park-Long Beach, Inc.*, 81 N.Y.S.2d 407 (Sup. Ct. Nassau County), *aff'd*, 274 A.D. 930, 83 N.Y.S.2d 542 (2d Dep't 1948)). As a discretionary matter, the Court should deny intervention based on the likelihood that new parties will needlessly complicate and delay the litigation.

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IV. THE PROPER ROLE FOR MOVANTS IN THIS LITIGATION IS AS *AMICI CURIAE*

That interest-groups and non-profits, local business owners and legislators might participate helpfully in lawsuits pertaining to their missions and areas of expertise or to their financial, moral, or regulatory interests is not doubted. Indeed, Petitioners welcome a robust airing of all of the legal perspectives and policy concerns implicated by this suit as well as the participation of parties who wish to offer such perspective and communicate such concerns to the Court. But the proper vehicle for such participation is as *amici curiae*. Allowing intervention by Movants, who (as we have demonstrated above) have only attenuated interests in this litigation, will result only in delay and inefficiency. And, given the ability of the Movants to present their views to this Court as *amici*, it would do so needlessly.

Indeed, the interests that the Proposed Intervenors seek to protect in this case are paradigmatic of those typically presented not by intervening parties, but by *amici curiae*. *See Colmes v. Fisher*, 151 Misc. 222, 223, 271 N.Y.S. 379, 381 (Sup. Ct. Erie County 1934) ("In cases involving questions of important public interest leave is generally granted to file a brief as *amicus curiae*."). And "[u]nlike the typical intervenor, *amici* are quite often large organizations or associations that represent a particular interest group." *Kruger*, 1 Misc. 3d at 196, 768 N.Y.S.2d at 81 (internal quotation marks omitted). Hence, the denial of intervention does not necessarily preclude the Movants from communicating their views to this Court—a party denied intervenor status may, under appropriate circumstances, be permitted to appear as *amicus curiae*. *See id.*; *Finkelstein, Mauriello, Kaplan & Levine, PC v. McGuirk*, 90 Misc. 2d 649, 650-51, 395 N.Y.S.2d 377 (Sup. Ct. Orange County 1977); *Ladue v. Goodhead*, 181 Misc. 807, 811, 44 N.Y.S.2d 783, 787 (Erie County Ct. 1943) (stating that where the movant "begs leave of the

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Court to intervene as a party" but "asserts no right against anyone, nor claims no duty owning by anyone," the movant may nevertheless "be of assistance to the court as amicus curiae").

CONCLUSION

Movants have failed to demonstrate that they have standing or an interest in this litigation sufficient to justify intervention as a Respondent under § 7802(d) or as a Defendant under CPLR §§ 1012 or 1013. They have also failed to distinguish themselves from the millions of New York citizens who have a generalized interest in the outcome of this litigation. Finally, Movants' claims that their interest cannot adequately be represented by the named Respondents in this case are groundless. Accordingly, we respectfully ask that their Motion be denied.

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Dated: New York, New York
April 28, 2004

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STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

FILED BH
JUN 04 2004
ROCKLAND COUNTY
CLERK'S OFFICE

BERNADETTE JORDAN, being duly sworn, says: I am not a party to the action, am over 18 years of age and reside at New York, New York.

On April 28, 2004, I served the annexed PETITIONER'S MEMORANDUM OF LAW IN OPPOSITION TO MOTION TO INTERVENE OF PARTY-RESPONDENTS, upon the offices of LIBERTY COUNSEL, Attorneys for Intervenors, located at 210 East Palmetto Avenue, Longwood, Florida 32750 (Telecopier No. (407) 875-0770, Attn: Rena Lindevaldsen, Esq.); and AMERICAN FAMILY ASSOCIATION, CENTER FOR LAW & POLICY; Attorneys for Intervenors, located at 100 Parkgate Dr., Suite 2B, Tupelo, MS 38803 (Telecopier No. 662-844-4234, Attn: Steven Crampton, Esq.), OFFICE OF THE ORANGETOWN TOWN ATTORNEY, Attorneys for Intervenors, located at Town Hall - 26 Orangburg Road, Orangeburg, NY 10962 (Telecopier No. (845) 359-2715, Attn: Dennis Michaels, Esq.); and OFFICE OF THE ATTORNEY GENERAL, Attorney for Respondent New York State Department of Health, located at The Capitol, Albany, NY 12224 (Telecopier No. (518) 473-1572, Attn: James McGowan, OAG), by transmitting the papers by electronic means to Telecopier Numbers listed above, which numbers were designated by the attorneys for such purpose. I received a signal from the equipment of the attorneys served indicating that the transmission was received, and via Federal Express.

Bernadette Jordan
BERNADETTE JORDAN

Sworn to before me this
28th day of April, 2004

Eileen A. Lutz
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JANET C. NESCHIS
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STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

BERNADETTE JORDAN, being duly sworn, says: I am not a party to the action, am over 18 years of age and reside at New York, New York.

On April 28, 2004, I served the annexed PETITIONER'S MEMORANDUM OF LAW IN OPPOSITION TO MOTION TO INTERVENE OF PARTY-RESPONDENTS, upon the offices of THOMAS MORE LAW CENTER, Attorneys for Intervenors, located at 3475 Plymouth Road, Suite 100, Ann Arbor, MI 48105 (Attn: Patrick Gillen, Esq.), via Federal Express.

Bernadette Jordan
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Sworn to before me this
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CLERK'S OFFICE

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

----------X

In the Matter of the Application of:

JOHN SHIELDS, ROBERT MICHAEL STREAMS, JACQUELINE AXT-OHANNESYAN, LISA AXT-OHANNESYAN, JOHN ADE, JOHNNIE FARMER, ELIZABETH INSON, THERESA APUZZO, JOE HICKEY, ROBERT BRAY, CHRISTINA LOMBARDI, RACHEL McGREGOR RAWLINGS, ABIGAIL MILLER, MELANIE SUCHET, CLAIRE BONDE, TONI BONDE, GEORGE DELANCEY, JOEL EALY, DEIRDRE BERNARD-PEARL and LISA BERNARD-PEARL,

Index No.

Petitioners,

For a Judgment Pursuant to Article 78 of the CPLR and other relief,

-against-

CHARLOTTE MADIGAN, Town Clerk, Town of Orangetown, New York, and STATE OF NEW YORK DEPARTMENT OF HEALTH,

Respondents.

----------X

PETITIONERS' MEMORANDUM OF LAW IN SUPPORT OF PETITION

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INTRODUCTION

The 20 Petitioners in this action are the members of 10 committed couples who intend to spend their lives together and who want to join in the benefits and responsibilities of civil marriage. Taken together, these couples reflect the common elements and the variety that married New Yorkers would recognize in their own relationships. Some of the couples have shared their lives with each other for many years while others met only a year ago. Some have children today; some would like to have children in the future; and some do not intend to become parents. But all of the Petitioners have found someone with whom they share emotional and financial interdependence. They have established homes together, supported each other in school and jobs, nursed each other in sickness, and shared everyday joys. Nevertheless, all of the Petitioners have been denied the right to marry the person they love because that person is someone of the same sex.

Petitioners applied to the Town Clerk of Orangetown for marriage licenses and were denied even an application because the Clerk believed that she "was not legally authorized as Town Clerk to issue marriage licenses to same sex couples." The Clerk based this judgment, in part, on an advisory opinion from the Attorney General and a letter from the Department of Health instructing city and town clerks that "New York's law does not authorize the issuance of marriage licenses to persons of the same sex" and warning that violating this directive would make a town clerk guilty of a misdemeanor.

The refusal of the Town Clerk to issue marriage licenses to Petitioners, as well as the directive issued by the Department of Health (hereinafter "DOH") and the Advisory Opinion from the Attorney General's Office, rests on an incorrect reading of New York's Domestic Relations Law, which does not prohibit the issuance of marriage licenses to same-sex couples.

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The denial of marriage licenses to Petitioners also violated core principles of the New York Constitution: the guarantee of equal protection and the fundamental right to marry. This case is about extending marriage rights to gay and lesbian citizens so that they may share equally in the civil institution of marriage, which has been called "one of the vital personal rights essential to the orderly pursuit of happiness by free men," *Loving v. Virginia*, 388 U.S. 1, 12 (1967), and has been characterized by the New York Court of Appeals as "an institution involving the highest interests of society," *Fearon v. Treanor*, 272 N.Y. 268, 272, 5 N.E.2d 815, 816 (1936).

The Supreme Court's holding in *Loving*, which invalidated Virginia's anti-miscegenation law, is of particular relevance here, not only because it decisively affirmed a fundamental right of persons to marry the partner of their choosing, but also because of the historical context in which that decision was rendered. The Supreme Court decided *Loving* at a time when the opposition of many Americans to interracial marriage was no less virulent than that expressed by opponents of same-sex marriage today. Then, as now, it was argued that the "traditional" character of marriage was under attack. Then, as now, it was argued that the institution of marriage would suffer irreparable harm if "traditional" rules governing the selection of marriage partners were invalidated in the name of equality. The Supreme Court, however, declined to attach talismanic significance to claims about the "essential" character of marriage and focused its attention instead on the principles of equality and liberty enshrined in the U.S. Constitution. This Court should follow that example in interpreting this State's law.

More than ten years ago, the New York Court of Appeals declared that "[o]ne of the most important purposes to be served by the [Constitution] is to ensure that 'public sensibilities' grounded in prejudice and unexamined stereotypes do not become enshrined as part of the official policy of the government." *People v. Santorelli*, 80 N.Y.2d 875, 881, 600 N.E.2d 232,

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236, 587 N.Y.S.2d 601, 605 (1992). And just this past Term, the United States Supreme Court reminded us that the Framers of the U.S. Constitution "knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom." *Lawrence v. Texas*, 123 S. Ct. 2472, 2484 (2003). The Court should confirm the equal citizenship and freedom of gay and lesbian New Yorkers and direct the Town Clerk to issue the marriage licenses to which Petitioners are entitled.

STATEMENT OF FACTS

On March 4, 2004, Mayor John Shields and Robert Michael Streams; Jacqueline and Lisa Axt-Ohannesyan; John Ade and Johnnie Farmer; Joe Hickey and Robert Bray; Christina Lombardi and Rachel McGregor Rawlings; Claire and Toni Bonde; George Delancey and Joel Ealy, went to the Office of the Town Clerk in Orangetown, New York to request a license to marry. The same was done by Elizabeth Inson and Theresa Apuzzo on March 5, 2004, by Abigail Miller and Melanie Suchet on March 8, 2004, and by Deirdre and Lisa Bernard-Pearl on March 10, 2004. Each couple intended to obtain a civil marriage license and then to have its marriage solemnized in accordance with New York's Domestic Relation Law.[1]

These 10 couples represent a diverse group of the gay and lesbian community. Among the Petitioners is the Mayor of Nyack, the Honorable John Shields, and his partner, Robert Michael Streams. Mayor Shields performs marriages, but was himself denied a license to marry. When he performs marriage ceremonies he often uses the following statement:

[1] Affidavits from the Petitioners are attached to the Order to Show Cause.

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> Love of one another is one of the highest experiences that we human beings can have, and it can add depth and meaning to our lives. Married love is one of life's greatest joys, and when combined with genuine giving and sharing, each is infinitely enhanced. Marriage symbolizes the intimate sharing of two lives . . . but again, while marriage is the ultimate sharing of two lives, it can yet enhance the differences and individuality of each partner.

This statement captures Mayor Shields's understanding of the meaning of marriage and describes the relationship he is building with Bob Streams.

In addition to the Mayor, the Petitioners include doctors, a deli manager, business people, a retiree, stay-at-home moms, a Yoga instructor, writers, a graduate student, a union worker, and others.

Many of the couples are religious. Abigail Miller and Melanie Suchet, for example, were married according to Jewish law and tradition and have signed a Ketubah, the Jewish marriage contract. Jacqueline and Lisa Axt-Ohannesyan are members of the Nauraushaun Presbyterian Church, where their son, Evan, was baptized. George Delancey and Joel Ealy are active in the Palisades Presbyterian Church.

Four of the couples have young children. Toni and Claire Bonde, for example, have five-year-old twin boys, Collin and Charlie. Toni is a stay-at-home mom and co-chair of the PTA fund-raising committee. Deirdre and Lisa Bernard-Pearl, both practicing physicians, have two children. And they, like so many parents, struggle to balance their busy careers and desire to participate equally and actively in raising their children.

Each of these couples went to the Office of the Town Clerk in Orangetown and asked to be issued an application for a marriage license. Despite the fact that Petitioners are in loving, committed relationships, they were advised that they would not be given an application. Petitioners are legally competent to marry and over the age of 18 years. They are gay men and

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lesbians who were denied marriage licenses by the Town Clerk because they intended to marry an individual of the same sex. Instead, they were handed a copy of a letter from the Town Clerk stating: "Based on the opinions of the NYS Attorney General and the Department of Health, I am not legally authorized as Town Clerk to issue marriage licenses to same sex couples."

Each of the Petitioners has been harmed by the Town Clerk's refusal to issue them marriage licenses. This harm includes the denial of significant rights, benefits, and responsibilities that are automatically accorded to married couples.

The statutory benefits conferred by civil marriage in New York include: parental rights and responsibilities, community property rights and obligations, evidentiary privileges available to spouses, the ability to file income taxes jointly, death benefits for surviving spouses, responsibility to disclose certain conflicts-of-interests, joint assessment of income for determining eligibility for state government assistance programs, social security survivor benefits, the right to take leave from work to care for a sick partner, decision-making authority for funeral arrangements and disposition of remains, and access to family courts in the event of dissolution.[2]

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[2] *See, e.g.*, (1) N.Y. TAX LAW § 1115(14) (exempting from sales and use tax the sale of motor vehicles "sold by a husband or wife to his or her spouse"), and N.Y. TAX LAW § 651(b)(2) (mandating, in certain cases, the joint filing of a state tax return by a married couple); (2) public assistance under N.Y. SOC. SERV. LAW § 169 (making eligible spouse of a veteran for veteran assistance); (3) the right to invoke the spousal communications privilege under N.Y. C.P.L.R. § 4502; (4) survivor benefits under N.Y. WORKERS' COMP. LAW § 33 (mandating payment of workers' compensation benefits by employer to surviving spouse), N.Y. WORKERS' COMP. LAW § 305(4)(b) (providing workers' compensation to a spouse in the event of the death of a civil service volunteer), N.Y. VOL. FIRE. BEN. LAW §§ 7, 18 (providing for payment of accrued and death benefits to surviving spouse), N.Y. RETIRE. & SOC. SEC. LAW §§ 61(d), 361(d) (mandating that the surviving spouse receive death benefits); N.Y. RETIRE. & SOC. SEC. LAW § 78(h) (allowing surviving spouse to receive supplemental retirement allowances), N.Y. RETIRE. & SOC. SEC. LAW § 162 (making eligible a surviving spouse for supplemental pensions), N.Y. EXEC. LAW § 227-a (mandating death benefits for a surviving spouse of a member of division of

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In addition to the denial of tangible benefits, prohibiting two people in a loving, committed relationship from marrying denies the couple the opportunity to express their commitment in the way most deeply meaningful in this society; it prevents them from entering into a relationship that is universally respected and recognized as a symbol of love and commitment. By prohibiting gay men and lesbians from marrying their same-sex partners, the state brands them with the stigma of inferiority.

Each of the Petitioners seeks to enter into a civil marriage recognized by the law of New York and they request that they be granted a marriage license.

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state police); (5) insurance benefits under N.Y. CIV. SERV. LAW § 164 (permitting state employee to extend health insurance coverage to spouse and dependent children), N.Y. INS. LAW § 4216(f) (allowing employee to include spouse in group life insurance coverage), N.Y. INS. LAW § 3212(b)(2) (giving conversion privilege to surviving spouse as to group or blanket accident and health insurance coverage); (6) property rights under N.Y. ABAND. PROP. LAW § 206(1)(b) (permitting surviving spouse to bring a petition for escheated lands), N.Y. ABAND. PROP. LAW § 208(2) (allowing conveyance of escheated land to surviving spouse without consideration), N.Y. REAL PROP. TAX LAW § 428 (exempting from tax property used for the care of surviving source of members); N.Y. REAL PROP. TAX LAW § 467 (extending property tax exemptions where one spouse is 65 or older); (7) inheritance rights under N.Y. EST. POWERS & TRUSTS LAW § 5-1.1(a) (extending the right of election to a surviving spouse under an executed will); N.Y. GEN. MUN. LAW § 146 (allowing surviving spouse to contest devise or bequest for more than one-half of testator's estate); (8) the right to bring a wrongful death action under N.Y. EST. POWERS & TRUSTS LAW § 5-4.1 (allowing spouse to bring wrongful death action); (9) the right to collect a crime victim's award under N.Y. EXEC. LAW § 624(b)(1) (deeming surviving spouse of crime victim eligible to receive monetary award); (10) post-divorce rights under N.Y. DOM. REL. LAW § 236 Part B(5) (providing for equitable disposition of marital property), N.Y. DOM. REL. LAW § 236 Part B(6) (providing for the possibility of maintenance/spousal support/alimony); (11) post-divorce child custody and support rights under N.Y. DOM. REL. LAW § 240 (providing for determination of child custody and support obligations after divorce); (11) the right to adopt under N.Y. DOM. REL. LAW § 110 (permitting specifically an adult married couple to adopt together); and (12) interment under N.Y. GEN. MUN. LAW § 163 (giving surviving spouse ownership and control rights over deceased spouse's cemetery lot).

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SUMMARY OF ARGUMENT

The denial of marriage licenses to Petitioners is neither justified under the applicable components of New York's Domestic Relations Law ("DRL") nor permissible as a matter of New York constitutional law. The core provisions of the DRL relating to marriage—those that identify the persons to whom marriage licenses may be issued—are couched in gender-neutral terms. They do not, explicitly or otherwise, provide that only heterosexual couples are eligible to receive marriage licenses. Indeed, throughout the DRL, married persons or those contemplating marriage are referred to primarily as "parties," a formulation not specific to persons of the opposite sex. Moreover, any doubt as to the eligibility of same-sex couples to marry under the DRL must, under well-established principles of statutory construction, be resolved in a manner that avoids raising questions as to the constitutionality of the statutory scheme. And, under the explicit command of the New York Legislature, such doubt must be resolved in a way that "produce[s] equal results and avoid[s] unjust discrimination."

Denying same-sex couples the right to marry violates the New York Constitution. For three different reasons, such denial triggers a form of heightened constitutional scrutiny that manifestly cannot be satisfied in this case. First, the application of the DRL advanced by Respondents entails an impermissible classification on the basis of sexual orientation and thereby violates the guarantee of equal protection in Article I, § 11 of the New York Constitution. Sexual orientation bears all the hallmarks of a suspect classification and statutes and government actions that discriminate on the basis of sexual orientation must therefore be subjected to heightened scrutiny. Second, Respondents' construction of the DRL provisions governing access to the institution of marriage classifies on the basis of sex. It dictates, for example, that an

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individual who intends to marry a woman is eligible for a marriage license only if that individual is a man (and also the converse, of course). As a matter of well-established New York and federal constitutional law, this sex-based classification requires heightened scrutiny. Third, denying marriage licenses to Petitioners infringes on their fundamental right to marry, protected by Article I, § 6 of the New York Constitution, and for that reason it is subject to the strictest constitutional scrutiny.

The level of judicial scrutiny does not determine the outcome of this case. Whether examined under the microscope of heightened scrutiny or reviewed pursuant to the more permissive rational basis standard, denial of marriage licenses to same-sex couples is constitutionally prohibited because it is not rationally related to a legitimate government interest. The United States Supreme Court's recent landmark decision in *Lawrence v. Texas*, 123 S. Ct. 2472 (2003), resoundingly confirms that moral disapproval of homosexuality does not even qualify as a legitimate interest under the rational basis test that would be sufficient to deprive gay men and lesbians of the basic benefits of marriage that all other individuals in our society understandably take for granted. That decision signals, moreover, that even a long tradition of such disapproval is inadequate to give rise to a constitutionally legitimate government interest. A construction of the DRL that limits the institution of marriage to heterosexual couples therefore cannot be justified by reference to an interest in preserving the "traditional" definition of marriage for its own sake. Traditions, however hoary, must yield to constitutional command.

None of the other justifications that have occasionally been proffered in support of statutory schemes excluding same-sex couples from the institution of marriage—including the tentative justifications advanced in the Opinion issued on March 3, 2004 by the Attorney General's Office—passes constitutional muster. As we describe below, any state interest in

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promoting procreation is served so haphazardly and arbitrarily by the DRL marriage provisions as to render the relationship between this interest and a ban on same-sex marriage entirely irrational. It is likewise clear that New York's potent interest in advancing the welfare of children is undermined, not furthered, by a prohibition on same-sex marriage. In short, a reading of the DRL that limits marriage rights to opposite-sex couples only—the reading given by Respondents in the letter Petitioners received from the Town Clerk when they were denied marriage licenses—must fail as a matter of New York constitutional law.

ARGUMENT

I. NEW YORK'S DOMESTIC RELATIONS LAW PERMITS SAME-SEX MARRIAGE

Same-sex marriage is permissible under New York's Domestic Relations Law. Because the marriage licensing provisions of the DRL are overwhelmingly gender-neutral, such licenses legally may be issued to either same-sex or opposite-sex couples who otherwise satisfy the enumerated eligibility requirements. Similarly, the DRL poses no barrier to the solemnization of same-sex marriages. Indeed, the DRL explicitly enumerates certain prohibited marriages and a union of persons of the same sex is not among them.

To the extent that certain secondary provisions of the DRL use terms traditionally associated with gender—"husband and wife," "bride and groom"—such usage does not alter the result. Those gendered references are not central to the statute's main purpose. Further, New York courts have recognized the necessity of construing similar statutes to reflect and support modern conceptions of family life, including the families formed by gay and lesbian couples. Terms like "spouse" and "family," therefore, traditionally associated only with heterosexual pairings, have been construed to encompass same-sex family relationships. Particularly because

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a statute must be construed in such a way as to remove doubts as to its constitutionality and to avoid discrimination, the few arguably gender-specific aspects of the DRL's marriage provisions should be construed in light of the statute's overriding and equitable gender-neutrality.

A. The Domestic Relations Law Permits Issuance of Marriage Licenses to Otherwise Qualified Persons of the Same Sex and Recognizes the Validity of Such Licenses

Marriage licenses legally may be issued in New York to partners of the same sex. According to the DRL, the sole statutory qualifications for marriage are for the parties to be of the requisite age, *see* DRL § 15-a, and as marriage is a civil contract, for those parties to give consent while possessing legal capacity to contract, *see id.* at § 10. Once those minimal qualifications are met, a town or city clerk is "empowered to issue marriage licenses to *any parties* applying for the same who may be entitled under the laws of the state to apply therefor and to contract matrimony." *Id.* at § 14 (emphasis added). Indeed, throughout the DRL married persons or those contemplating marriage are referred to primarily as the "parties," a decidedly gender-neutral term. *See* DRL §§ 7, 8, 11(4), 11(5), 13, 15-a; *see also* § 11-a(1)(b) (referring to the couple simply as "persons"). Nowhere does the DRL require that the parties to a marriage be of the opposite sex.

Indeed, the lack of any requirement in the DRL that married persons be of the opposite sex has been acknowledged by numerous authorities. The Attorney General has explained that "[t]he DRL includes no express requirement that married persons be of the opposite sex." Op. Atty. Gen. March 3, at 7. At least one New York court has likewise recognized that "Section 13 of the [DRL] has no requirement that applicants for a marriage license be of different sexes." *In re Petri*, N.Y.L.J. April 4, 1994 (Sur. Ct. N.Y. Co.) at 29; *see also* DRL Art. 2 General

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Commentary (McKinney 1999) ("The New York statutes do not explicitly state that marriage is limited to persons of the opposite sex.").[3]

Further, the DRL does not include same-sex pairings in the statutory definition of void and voidable marriages. Under Article 2, incestuous and bigamous marriages are void from their inception, even when the requirements of DRL §§ 10 and 15-a are satisfied. *See id.* at §§ 5, 6. Certain other types of marriages are voidable by a court of competent jurisdiction: those in which either party is under the age of eighteen, § 7(1); was incapable of consenting to the marriage "for want of understanding," § 7(2); cannot enter "into the married state from physical cause," § 7(3);[4] consented to the marriage "by reason of force, duress, or fraud," § 7(4);[5] or has been "incurably mentally ill for a period of five years or more," § 7(5). A court cannot declare a marriage void because the parties are of the same sex. The canon of statutory construction *expressio unius est exclusio alterius* dictates that "where a law expressly describes a particular act, thing or person to which it shall apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded." N.Y. Statutes § 240; *see also id.* at § 74 ("[T]he failure of the Legislature to include a matter within the scope of an act may be

[3] Nor may the court now read such a restriction into New York law. *See* N.Y. Statutes § 73 (courts should not correct supposed "omissions or defects in legislation").

[4] The New York courts have made clear that § 7(3), referring to "physical cause," is addressed only to situations in which, at the moment of marriage, either party is physically incapable of having sexual relations, for example, by reason of having a venereal disease. *See Lapides v. Lapides*, 254 N.Y. 73, 80, 171 N.E. 911, 913 (1930). Inability to bear or beget children will not warrant an annulment under this section, *see id.* (citing cases); and even in the face of actual physical sexual dysfunction the provision has not been consistently upheld, *see Hatch v. Hatch,* 58 Misc. 54, 54, 110 N.Y.S. 18, 18-19 (Sup. Ct. Special Term Erie County 1908) (though elderly spouse was incapable of sexual intercourse, marriage was valid).

[5] DRL §§ 7(1), 7(2), and 7(4), which address age and incapacity to consent (whether by reason of mental disability or duress), reinforce the importance of the minimum requirements established by DRL §§ 10 and 15-a.

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construed as an indication that its exclusion was intended."). Therefore, under the DRL, same-sex marriages are neither void nor voidable, underlining the permissibility of issuing licenses to such couples.

After licensing, the second step required to validate a marriage in New York is the celebration of some sort of public solemnization of the couple's commitment. The DRL provides that the parties to a marriage must take certain steps toward solemnization within sixty days of the issuance of the marriage license. *See* DRL § 13. Those couples choosing to have their marriages solemnized by an authorized clergy member or public official must present that officiant with their license within that time, *see id.*, and then must hold a solemnization ceremony, *see id.* at § 12, which may be either religious or secular in nature. Couples may also choose to, in effect, solemnize their own marriage by drawing up a contract, signing it before two witnesses, and both presenting their license to "a judge of a court of record of this state" within sixty days and acknowledging the contract before that judge "in the manner required for the acknowledgment of a conveyance of real estate to entitle the same to be recorded." *Id.* at § 11(4). Nothing in the statutes governing the solemnization process establishes a requirement that the married persons be of the opposite sex.

B. The Inclusion of Certain Gender-Specific Language in Portions of the Marriage Provisions of the Domestic Relations Law Does Not Restrict Marriage to Opposite-Sex Couples

Although the controlling provisions of the DRL concerning marriage licensing and solemnization are overwhelmingly gender-neutral, it is also true that certain terms with a particular gender connotation are used on occasion in the statute. For example, the solemnization requirement in § 12 states that while "[n]o particular form or ceremony is required when a marriage is solemnized as herein provided by a clergyman or magistrate . . . the parties

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must solemnly declare in the presence of a clergyman or magistrate and the attending witness or witnesses that they take each other as husband and wife." *Id.* at § 12; *see also id.* at §§ 6, 200, 221, 248 (also using terms "husband" and "wife").[6] It is in light of these passages that the Attorney General's opinion concludes, in part, that "the inclusion in the DRL of gender-specific terms to describe the parties to a marriage . . . indicates that the Legislature did not intend to authorizes same-sex marriages." Op. Atty. Gen. March 3, at 7.

For at least three reasons, none of these subsidiary gender-based references limits marriage to opposite-sex couples. *First*, DRL § 12 itself establishes an explicit exemption to the requirement that those having their marriages solemnized by clergy or magistrates must declare themselves to be husband and wife—an exemption not discussed in the Attorney General's opinion. That requirement does not apply to Quakers or to any other persons whose "respective societies or denominations" call for another form of solemnization, and the statute imposes no requirement that such other ceremonial processes incorporate any particular gender pairing. *Id.* at § 12; *see also* 1971 Op. Atty. Gen. Dec. 21 (applying that exception to tribal ceremonies between Native Americans). Thus, any couple whose religion recognizes solemnization of marriages between partners of the same sex would be entitled to state recognition of their marriage ceremony as a valid solemnization. And, in fact, many societies and religious denominations do recognize gay and lesbian marriages, including the Unitarian Universalist Association, congregations associated with the Jewish Reconstructionist Federation, and the Metropolitan Community Church.[7] Moreover, the DRL explicitly recognizes the validity of

[6] "Husband" is generally defined as "a male partner in a marriage," while "wife" is defined as "a female partner in a marriage." Merriam-Webster Dictionary Online, *available at* www.merriam-webster.com (last visited March 7, 2004).

[7] *See* www.uua.org; www.jrf.org; www.mccchurch.org (last visited on March 6, 2004).

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marriages that are duly solemnized even though the parties failed to obtain a marriage license. *See* DRL § 25; 2004 Op. Atty. Gen. March 3, at 5 (citing cases). Hence, assuming no statutory ground for voidance under Article 2 of the DRL exists, gay and lesbian couples married within such denominations—or otherwise in a manner recognized by their respective societies—are entitled to legal recognition of their marriages, even absent a license.

The statute also provides for a specific alternate method of effectuating a marriage that makes no reference to status as "husband and wife." Those who choose the marriage-by-contract process, referred to simply as "parties," need make no declaration of themselves as husband and wife; their contract need only set forth "the place of residence of each party and of each witness and must state the date and place of the marriage." *Id.* at § 11(4); *see also id.* at § 13. Far from requiring that all parties to a marriage declare themselves to be husband and wife, therefore, the solemnization statute provides in fact that such a declaration is not necessary.

Second, the scattered other invocations of gendered language in the marriage-related provisions of the DRL are similarly ancillary to the central provisions of the statute. They do not, as do the minimum-requirements and voidance provisions, control who is and is not generally entitled to participate in the enterprise. A ministerial instruction to clerks as to the taking of certain identifying information from the "bride" and "groom"[8] before issuing a license, DRL § 15(1)(a), for instance, cannot override the general provision that a license is to be issued to "any parties" meeting the requirements, *id.* at § 14. *Cf.* N.Y. Statutes § 174 ("[F]ailure to comply with statutory provisions governing matters of practice which are not of the essence will not vitiate the proceedings."). To the extent that occasionally gendered language may conflict

[8] A common definition of "bride" is "a woman just married or about to be married," while "bridegroom" is defined as "a man just married or about to be married." Merriam-Webster Online Dictionary, *available at* www.merriam-webster.com (last visited March 7, 2004).

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with the overall application of the DRL to all adult parties having the capacity to consent to a civil contract, assuming no statutory grounds making their union void, that language must yield. *See* N.Y. Statutes § 98(b) ("It is the duty of the court to harmonize conflicting provisions of a statute if possible, but if there is an irreconcilable conflict, the court must preserve the paramount intention although this may lead to the rejection of some subordinate and secondary provision.").

Third, the use of gendered terms such as "husband" and "wife" in the DRL must be understood in historical context rather than as express indications of legislative intent to exclude same-sex couples. As a historical matter, at the time the Assembly drafted the DRL in 1896, the only couples who sought to be married were likely opposite-sex couples. Thus, in describing couples entering into marriage, the Assembly occasionally invoked the gendered terms "husband" and "wife." While these terms may be historical descriptors, they do not reflect a legislative determination that marriage must, for all times, be limited to opposite-sex couples.

An analogy illustrates this statutory construction point. The DRL uses the masculine pronouns "he" and "him" to describe the State Commissioner of Health. Section 20-b, for example, states: "The state commissioner of health or person authorized by *him* shall, upon request, issue to any applicant a certification of any marriage registered under the provisions of this article, unless *he* is satisfied that the same does not appear to be necessary or required for judicial or other proper purposes" (emphasis added). It may be true as a historical matter that state commissioners at the time this provision was drafted were all male. In using the masculine pronoun, the Assembly was describing—accurately given the historical context—the gender of the commissioners. This textual usage does not, however, evidence a legislative intent to exclude women from holding the position of state commissioner. For the same reason, the use of

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the gendered terms "husband" and "wife" in ancillary provisions does not evidence a legislative intent to exclude same-sex couples from marrying.

In any event, as discussed below, the statute can be harmonized by construing the concept of husband and wife to include same-sex partners who willingly have entered into the stable, enduring commitment memorialized by a civil marriage contract. To construe the statute otherwise would be to assume that the legislature excluded same-sex couples. Pursuant to the canon of constitutional avoidance, such a statutory construction must be avoided.

C. In Order to Avoid Constitutional Doubts and to Avoid Unjust Discrimination, the Domestic Relations Law Should Be Construed to Permit Same-Sex Marriage

As discussed in Parts II-IV, *infra*, construing the DRL to deny marriage rights to same-sex couples would render that statute unconstitutional or, at a minimum, raise grave doubts as to its constitutionality—as the Attorney General himself has recognized. *See* 2004 Op. Atty. Gen. March 3, 2004, at 15 (construing the DRL to restrict marriage eligibility to opposite-sex couples "raises constitutional concerns"). It is well established under New York law that a "statute should be construed when possible in a manner which would remove doubt of its constitutionality." *People v. Barber*, 289 N.Y. 378, 385, 46 N.E.2d 329, 332 (1973); *see also Tauza v. Susquehanna Coal Co.*, 220 N.Y. 259, 267, 115 N.E. 915, 917 (1917).

In *In the Matter of Jacob*, 86 N.Y.2d 651, 660 N.E.2d 397, 636 N.Y.S.2d 716 (1995), for example, the Court of Appeals construed § 117 of the DRL to permit the same-sex partner of a biological parent to become the child's second parent by means of adoption. The Court's construction of the DRL was driven, in part, by the avoidance canon. "Where the language of a statute is susceptible of two constructions," the Court explained, "the courts will adopt that which avoids injustice, hardship, constitutional doubts or other objectionable results." *Id.* at 667,

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660 N.E.2d at 405, 636 N.Y.S.2d at 725 (internal quotation marks and citation omitted). The Court stated:

> Given that section 117 is open to two differing interpretations as to whether it automatically terminates parental rights in all cases, a construction of the section that would deny children . . . the opportunity of having their two de facto parents become their legal parents, based solely on their biological mother's sexual orientation or marital status, would not only be unjust under the circumstances, but also might raise constitutional concerns in light of the adoption statute's historically consistent purpose—the best interests of the child.

Id.

Of particular importance here, the New York courts have repeatedly read statutes as gender-neutral precisely to avoid potential constitutional infirmities. For example, in *People v. Liberta*, 64 N.Y.2d 152, 474 N.E.2d 567, 485 N.Y.S.2d 207, *cert. denied*, 471 U.S. 1020 (1985), the Court of Appeals construed New York's forcible rape and sodomy statutes, which by their terms applied only to men, in gender-neutral terms to avoid an equal protection violation. Similarly, in *Goodell v. Goodell*, 77 A.D.2d 684, 685, 429 N.Y.S.2d 789, 791-92 (3d Dep't 1980), the Court avoided a constitutional problem by construing an alimony statute, which imposed financial obligations only against the husband, to apply to either spouse. *See also Rachelle L. v. Bruce M.*, 89 A.D.2d 765, 453 N.Y.S.2d 936 (App. Div. 3d Dep't 1982) (Family Court Act § 532); *Lisa M. UU v. Mario D. VV*, 78 A.D.2d 711, 432 N.Y.S.2d 411 (3d Dep't 1980) (Family Court Act § 514). Such a construction of the marriage provisions of the DRL is both wise as a matter of constitutional avoidance and solidly in line with contemporary New York jurisprudence.

The New York Court of Appeals has also recognized that our state statutory law should be construed to reflect and protect contemporary understandings of family life. In *Braschi v.*

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Stahl Assocs. Co., 74 N.Y.2d 201, 543 N.E.2d 49, 544 N.Y.S.2d 784 (1989), faced with an argument that succession rights granted to "family members" of a deceased tenant should pass only to those in "traditionally" recognized family relationships and not to surviving same-sex life partners, the Court concluded otherwise:

> [W]e conclude that the term family ... should not be rigidly restricted to those people who have formalized their relationship by obtaining, for instance, a marriage certificate or an adoption order. The intended protection against sudden eviction should not rest on fictitious legal distinctions or genetic history, but instead should find its foundation in the reality of family life. In the context of eviction, a more realistic, and certainly equally valid, view of a family includes two adult lifetime partners whose relationship is long term and characterized by an emotional and financial commitment and interdependence. This view comports both with our society's traditional concept of "family" and with the expectations of individuals who live in such nuclear units.

74 N.Y.2d at 211, 543 N.E.2d at 53-54, 544 N.Y.S.2d at 788-89. As *Braschi* affirmed, courts should not "view society with blinders" in giving definition to statutory concepts, but instead should look to "'the reality of family life' in this day and age." *Gay Teachers Ass'n v. Board of Educ.*, N.Y.L.J., Aug. 23, 1991, at 22, col. 3 (Sup. Ct. N.Y. County), *aff'd* 183 A.D.2d 478 (1st Dep't 1992). In that case, the court looked beyond the labels of "spouse," "husband," and "wife" in order to vindicate the rights of same-sex partners of municipal employees to receive health benefits. *See id.* Moreover, the significant state interests in fostering stable family environments and ensuring legal protections for children have dictated that the DRL be interpreted to allow same-sex partners to adopt their partners' biological children, thus expanding traditional notions of the term "parent." *See Matter of Jacob*, 86 N.Y.2d 651, 660 N.E.2d 397, 636 N.Y.S.2d 716. Similarly, a trial court recently concluded that the term "spouse" as used in the Estates, Powers and Trusts Law must be read to include the surviving same-sex partner of a deceased New York resident where the couple had entered into a valid civil union in the state of Vermont. *See*

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Langan v. St. Vincent's Hosp., 196 Misc. 2d 440, 765 N.Y.S.2d 411 (Sup. Ct. Nassau County 2003).[9] This was so even though "surviving spouse" was defined by the statute to signify a "husband or wife." *Id.* at 452-53, 765 N.Y.S.2d at 420-21 (citing, *inter alia*, principles of averting constitutional infirmities and construing a statute to avoid discrimination).

As each of these cases recognizing gay and lesbian family rights reflects, New York law is to be interpreted, whenever possible, in a manner "which will produce equal results and avoid unjust discrimination." N.Y. Statutes § 147. Statutory construction which "tends to sacrifice or prejudice the public interests will be avoided," *id.* § 152; rather, a "statute should be construed in a manner which will not work hardship or injustice," *id.* § 146. In light of the modern realities of family life, these principles mandate that the DRL be interpreted as gender-neutral, a reading that is entirely consistent with the majority of its provisions and with its overriding purpose. Gay and lesbian couples exist, and many such couples have established or wish to establish committed, long-term, financially and emotionally interdependent unions. These unions, like heterosexual marriages, serve an important social function, both for regularizing legal relations between the adult parties and, where the parties so choose, for providing a stable foundation for the raising of children. Denying such couples access to the mutual rights and obligations of state-recognized marriage would work a substantial hardship for them and their families, and New York's marriage laws must be read within that context.

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[9] *But see Raum v. Restaurant Assoc., Inc.*, 252 A.D.2d 369, 675 N.Y.S.2d 343 (App. Div. 1st Dep't 1998) (same-sex surviving partner not entitled to bring wrongful death action); *In re Estate of Cooper*, 187 A.D.2d 128, 592 N.Y.S.2d 797 (2d Dep't 1993) (surviving same-sex partner not a "surviving spouse" under EPTL). In neither of those cases was the issue of a valid same-sex partnership officiated in another state involved; further, both cases pre-date recent developments in the societal recognition of stable, committed same-sex partnerships and the expansion of legal protections for gay and lesbian persons. *See* Part II.A, *infra*; *Langan*, 196 Misc. 2d at 445-47, 765 N.Y.S.2d at 415-17.

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II. DENIAL OF MARRIAGE LICENSES TO SAME-SEX COUPLES DISCRIMINATES ON THE BASIS OF SEXUAL ORIENTATION IN VIOLATION OF ARTICLE I, § 11 OF THE NEW YORK CONSTITUTION

Article I, § 11 of the New York Constitution provides that "[n]o person shall be denied the equal protection of the laws of this state or any subdivision thereof." N.Y. CONST. art. I, § 11. This section "imposes a clear duty on the State and its subdivisions to ensure that all persons in the same circumstances receive the same treatment," *Brown v. State*, 89 N.Y.2d 172, 190, 674 N.E.2d 1129, 1140, 652 N.Y.S.2d 223, 234 (1996), and it requires the invalidation of a statute or statutory scheme that deprives similarly situated persons of equal treatment. New York courts have further held that "discrimination on the basis of sexual orientation constitutes a violation of equal protection under the . . . Constitution[]," *Langan*, 196 Misc. 2d at 453, 765 N.Y.S.2d at 421, and that "homosexuality is a protected category under . . . the . . . Constitution," *Under 21 v. City of New York*, 126 Misc. 2d 629, 642, 481 N.Y.S.2d 632, 643 (Sup. Ct. 1984). Accordingly, to the extent that the relevant provisions of the DRL are construed by the Town Clerk and DOH to deny same-sex couples the right to marry (though for the reasons stated in Part I, *supra*, they should not be so construed), Respondents violate the New York Constitution's guarantee of equal protection.

In assessing the constitutionality of Respondents' application of the DRL to Petitioners, it is important to bear in mind the Court of Appeals' instruction that "our State Constitution can afford a broader scope of protection with regard to individual rights and liberties than its federal counterpart." *People v. Hansen*, 99 N.Y.2d 339, 345 n.4, 786 N.E.2d 21, 24, 756 N.Y.S.2d 122, 125 (2003). That court has "not hesitated" to grant relief under the New York Constitution when it "concluded that the Federal Constitution . . . fell short of adequate protections for our citizens."

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Cooper v. Morin, 49 N.Y.2d 69, 79, 399 N.E.2d 1188, 1193, 424 N.Y.S.2d 168, 174 (1979).[10] And while it is clear from the applicable precedents that New York law need reach no further than does the federal Constitution in order to require the invalidation of DRL provisions to the extent that they prohibit same-sex couples from marrying, it bears emphasis that the federal Equal Protection Clause establishes a constitutional floor; it describes the bare minimum protections to which Petitioners are independently entitled under New York's Constitution.

A. Denying Same-Sex Couples the Right to Marry is Not Rationally Related to a Legitimate State Interest

The fundamental tenet of equal protection law in New York, as elsewhere, is that *all* statutory classifications "which result[] in unequal treatment [must] rationally further some legitimate, articulated state purpose." *Doe v. Coughlin*, 71 N.Y.2d 48, 56, 518 N.E.2d 536, 541-42, 523 N.Y.S.2d 782, 788 (1987) (internal quotation marks omitted). Respondents cannot demonstrate that denying same-sex couples the right to marry meets even this low threshold for constitutionality. As we demonstrate below, the sexual orientation-based classification at the core of Respondents' construction of the DRL's marriage provisions is not predicated on any state interest that might qualify as "legitimate." And even if the interests at stake could justifiably be labeled as such, denial of marriage licenses to same-sex couples violates the New York Constitution because that action bears no connection—rational or otherwise—to asserted interests. The Attorney General's opinion says that "[s]everal state interests might be proffered

[10] *See also Brown*, 89 N.Y.2d at 190, 674 N.E.2d at 1140, 652 N.Y.S.2d at 234 (noting that the protections afforded by the Article I, § 11 of the New York Constitution are at least "as broad as" the protections afforded by the Equal Protection Clause of the Fourteenth Amendment); *People v. P.J. Video, Inc.*, 68 N.Y.2d 296, 303, 501 N.E.2d 556, 561, 508 N.Y.S.2d 907, 912 (1986) ("[W]e have frequently applied the State Constitution, in both civil and criminal matters, to define a broader scope of protection than that accorded by the Federal Constitution in cases concerning individual rights and liberties.").

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in support of a prohibition on same-sex marriage," Op. Atty. Gen. at 17, and we address each in turn.

1. Exclusion of Same-Sex Couples Cannot be Justified by an Interest in Preserving the "Traditional" Definition of Marriage

Increasingly, New York's "traditions" concerning the treatment of gay men and lesbians and of same-sex couples have been modified or replaced by the values of equal protection and non-discrimination. And, in other contexts, New York courts have refused to uphold practices that conflict with those values simply because they are "traditional." Preserving the "traditional" definition of marriage is not a constitutionally sufficient justification for the construction of the DRL advanced by Respondents.

The New York Court of Appeals has itself expressed skepticism of tradition-based arguments that operate to deny rights to a group of people. In *People v. Santorelli*, 80 N.Y.2d 875, 881, 600 N.E.2d 232, 236, 587 N.Y.S.2d 601, 605 (1992), the Court of Appeals explained:

> One of the most important purposes to be served by the Equal Protection Clause is to ensure that "public sensibilities" grounded in prejudice and unexamined stereotypes do not become enshrined as part of the official policy of government. Thus, where "public sensibilities" constitute the justification for a gender-based classification, the fundamental question is whether the particular "sensibility" to be protected is, in fact, a reflection of archaic prejudice or a manifestation of a legitimate government objective.

The State of New York has, through both its statutory and decisional law, taken significant steps toward recognizing the legitimacy of committed same-sex relationships. As noted above, *see supra* Part I.C, in *Braschi v. Stahl*, the Court of Appeals determined that "lifetime partners whose relationship is long term and characterized by an emotional and financial commitment and interdependence" qualify as "family members" for purposes of state housing law. *Braschi*, 74 N.Y.2d at 211-13, 543 N.E.2d at 53-55, 544 N.Y.S.2d at 788-90. And, in *Langan v. St. Vincent's*

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Hospital, a trial court held that the term "spouse" as used in the EPTL includes the surviving same-sex partner of a deceased New York resident where the couple had entered into a valid civil union in the state of Vermont. *Langan*, 196 Misc. 2d at 454, 765 N.Y.S.2d at 421-22. The State Legislature, moreover, has enacted numerous provisions prohibiting discrimination on the basis of sexual orientation and enhancing penalties for hate crimes involving animus against gay men and lesbians. *See* N.Y. CIV. RTS. LAW § 40-c(2); N.Y. EXEC. LAW § 296; N.Y. EDUC. LAW § 313; N.Y. INS. LAW § 2701(a); N.Y. PENAL LAW §§ 240.30(3), 485.05(1). As the Attorney General has explained, these developments "draw[] into question the State's interest in maintaining the historical understanding of marriage as confined to opposite-sex partners." Op. Atty. Gen., March 3, 2004 at 19.

The Vermont Supreme Court took note of precisely these sorts of developments in rejecting the contention, proffered by the State, that conferring the benefits of marriage on same-sex couples was inconsistent with that state's "long history of official intolerance of intimate same-sex relationships." *Baker v. State*, 744 A.2d 864, 885 (Vt. 1999). The Court explained:

> [R]ecent legislation plainly undermines [this] contention. . . . Vermont was one of the first states to enact statewide legislation prohibiting discrimination in employment, housing, and other services based on sexual orientation. . . . Sexual orientation is among the categories specifically protected against hate-motivated crimes in Vermont. . . . Furthermore, as noted earlier, recent enactments of the General Assembly have removed barriers to adoption by same-sex couples and have extended legal rights to such couples who dissolve their "domestic relationship."

Id. at 885-86. Similarly, in *Goodridge v. Department of Public Health*, the Supreme Judicial Court of Massachusetts emphasized that "[t]he department has offered purported justifications for the civil marriage restriction that are starkly at odds with the comprehensive network of

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rigorous gender-neutral laws promoting stable families and the best interests of children." 798 N.E.2d 941, 968 (Mass. 2003).

The development of New York law in this area is also consistent with recent decisions by he U.S. Supreme Court, which has invalidated laws based on disapproval of homosexuality. In *Jnited States Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973), the Supreme Court articulated a now-axiomatic principle of equal protection doctrine: "[I]f the constitutional conception of 'equal protection of the laws' means anything," the Court explained, "it must at he very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." This proposition was applied by the Supreme Court in *Romer v. Evans*, 517 U.S. 620 (1996). In that case, the Court struck down Amendment 2 to the Colorado Constitution which "prohibit[ed] all legislative, executive or judicial action at any level of state or local government designed to protect . . . gays and lesbians." *Id.* at 624. Applying ational basis review, the Court determined that the Amendment "lack[ed] a rational relationship o legitimate state interests." *Id.* at 632. The only interest served by Amendment 2's sexual orientation-based classification, in the Court's view, was an interest in "disadvantaging the group burdened by the law." *Id.* at 633. And this, the Court held, was not a "legitimate purpose or . . . objective." *Id.* at 635.

The majority and concurring opinions in *Lawrence v. Texas*, 123 S. Ct. 2472 (2003)—in vhich the Court invalidated a Texas law establishing criminal penalties for homosexual odomy—resoundingly confirm the impermissibility of relying on mere moral disapproval as the ustification for legislative classification. Justice Kennedy's opinion for the Court acknowledges hat:

> [F]or centuries there have been powerful voices to condemn homosexual conduct as immoral. The condemnation has been

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> shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family. For many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives.

Id. at 2480. But the depth and intensity of this moral disapproval proved insufficient to save the Texas statute from invalidation, for the Court concluded that such disapproval gave rise to "no legitimate state interest." *Id.* at 2484. The Court further explained that "'the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.'" *Id.* at 2483 (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)). Along these same lines, Justice O'Connor's concurring opinion, which relies heavily on *Romer*, declares: "Moral disapproval of [homosexuals], like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause." *Id.* at 2486 (O'Connor, J., concurring).[11]

Indeed, this was the conclusion of the Supreme Judicial Court of Massachusetts in *Goodridge*, which invalidated that State's ban on same-sex marriage. That Court acknowledged that "[m]any people hold deep-seated religious, moral, and ethical convictions that marriage should be limited to the union of one man and one woman, and that homosexual conduct is immoral," but concluded, nonetheless, that the prohibition on same-sex marriage did not "serve a legitimate purpose in a rational way." *Goodridge*, 798 N.E.2d at 948, 960 (internal quotation marks omitted); *see also id.* at 968 (noting that "the marriage restriction is rooted in persistent

[11] Though *Romer* and *Lawrence* delineate the contours of the equal protection standard applicable under the U.S. Constitution, these formulations apply with equal force as a matter of New York constitutional law. *See supra*, pp.20-21. Hence, something more than a bare desire to express disapproval of homosexuality will be required if Respondents' construction of the DRL is to withstand scrutiny under Article I, § 11.

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prejudices against persons who are (or who are believed to be) homosexual. . . . 'Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.'" (quoting *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984))).

Of particular importance here, the Supreme Court's decision in *Lawrence* further signals that the mere fact that a particular rule or social construct has deep historical roots cannot save it from a declaration of unconstitutionality if no independent and constitutionally legitimate justification for that rule exists. *See Lawrence*, 123 S. Ct. at 2480, 2484 (deeming Texas's anti-sodomy law to be unsupported by any "legitimate state interest" notwithstanding the fact that "*for centuries* there have been powerful voices to condemn homosexual conduct as immoral [in part out of] respect for the *traditional* family" (emphases added)); *id.* at 2483 ("'the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice'" (quoting *Bowers*, 478 U.S. at 216 (Stevens, J., dissenting))); *id.* at 2487-88 (O'Connor, J., concurring in the judgment) ("'neither history nor tradition could save a law prohibiting miscegenation from constitutional attack'" (quoting *Bowers*, 478 U.S. at 216 (Stevens, J., dissenting))). Even Justice Scalia's dissenting opinion acknowledges that "preserving the traditional institution of marriage' is just a kinder way of describing the State's *moral disapproval* of same-sex couples," and explains that because, under the Court's holding, "moral disapprobation of homosexual conduct is 'no legitimate state interest,'" there could be no "justification . . . for denying the benefits of marriage to homosexual couples." *Lawrence*, 123 S. Ct. at 2496, 2498 (Scalia, J., dissenting) (internal quotation marks and citation omitted); *see also Goodridge*, 798 N.E.2d at 973 (Greaney, J., concurring) ("[N]either the mantra of tradition, nor individual conviction, can justify the perpetuation of a hierarchy in which couples of the same sex and their families are

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deemed less worthy of social and legal recognition than couples of the opposite sex and their families.").

The Supreme Court of Hawaii, likewise, has held that an appeal to "tradition" or to the historical definition of "marriage" cannot, on its own, suffice to justify denial of the right to marry to same-sex couples. Thus, in *Baehr v. Lewin*, 852 P.2d 44, 61 (Haw. 1993), the Hawaii Supreme Court deemed "circular and unpersuasive" the contention that "the right of persons of the same sex to marry one another does not exist because marriage, by definition and usage, means a special relationship between a man and a woman." That Court further characterized the notion that "the nature of marriage itself" justifies the exclusion of same-sex couples as an "exercise in tortured and conclusory sophistry." *Id.* at 63.

These sources demonstrate that any state interest in expressing moral disapproval of homosexuality—through the particular device of denying same-sex couples the right to marry or otherwise—is not constitutionally cognizable. And this holds true even if this expression of disapproval might be characterized as "traditional." A constitutionally illegitimate justification with a long pedigree is no less constitutionally illegitimate.

2. Denying Same-Sex Couples the Right to Marry is Not Rationally Related to an Interest in Fostering Procreation

Respondents' construction of the applicable provisions of the DRL to deny marriage licenses to same-sex couples cannot be justified by reference to an interest in the promotion of biological procreation. The provisions of the DRL itself demonstrate that New York does not preclude many opposite-sex couples who either cannot or will not have children from marrying. And many members of same-sex couples have biological children. Therefore, the statute is significantly underinclusive as a means of serving the procreation interest and this demonstrates that the interest is not, in fact, the reason for preventing same-sex couples from marrying.

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Neither the ability to procreate nor procreative intent is a prerequisite for marriage in New York and the DRL does not endeavor to limit access to the institution of marriage for either infertile couples or couples who simply do not wish to have a child.[12] While the DRL deems voidable a marriage in which either party "[i]s incapable of entering into the married state from physical cause," DRL § 7(3), New York courts have long interpreted that provision to refer to the capacity to consummate a marriage, *not* the capacity to procreate. *See, e.g., Lapides v. Lapides*, 254 N.Y. 73, 80, 171 N.E. 911, 913 (1930) ("The inability to bear children is not such a physical incapacity as justifies an annulment."). Moreover, even if we assume that New York has some interest in promoting biological procreation within marriage, the fact is that many members of same-sex couples have biological children through artificial insemination, surrogacy, and prior relationships.

The Supreme Judicial Court of Massachusetts and the Vermont Supreme Court resoundingly rejected similar lines of reasoning in the course of determining that denying same-sex couples either the right to marry (Massachusetts) or the rights and benefits of married persons (Vermont) is not rationally related to any legitimate government interest. The Massachusetts Court explained:

> [Massachusetts law] contains no requirement that the applicants for a marriage license attest to their ability or intention to conceive children by coitus. Fertility is not a condition of marriage, nor is it grounds for divorce. People who have never consummated their marriage, and never plan to, may be and stay married . . . . While it is certainly true that many, perhaps most, married couples have children together (assisted or unassisted), it is the exclusive and permanent commitment of the marriage partners to one another,

[12] Indeed, a requirement of procreative intent or ability could not be reconciled with the "fundamental right of reproductive choice" protected under New York law. *Hope v. Perales*, 83 N.Y.2d 563, 575, 634 N.E.2d 183, 186, 611 N.Y.S.2d 811, 814 (1994).

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> not the begetting of children, that is the sine qua non of civil marriage.

Goodridge, 798 N.E.2d at 961; *see also Baker*, 744 A.2d at 881 ("It is . . . undisputed that many *opposite-sex* couples marry for reasons unrelated to procreation, that some of these couples never intend to have children, and that others are incapable of having children. Therefore, if the purpose of the statutory exclusion of same-sex couples is to further the link between procreation and child rearing, it is significantly underinclusive. The law extends the benefits and protections of marriage to many persons with no logical connection to the stated governmental goal" (internal quotation marks omitted)); *Lawrence*, 123 S. Ct. at 2498 (Scalia, J., dissenting) (acknowledging that "the encouragement of procreation" provides no justification for prohibiting same-sex couples to marry "since the sterile and the elderly are allowed to marry").

3. Denying Same-Sex Couples the Right to Marry Is Not Rationally Related to—Indeed It Is Tension With—an Interest in Promoting the Welfare of Children

The restriction of marriage to opposite-sex couples cannot be justified on the basis of the State's interest in promoting the welfare of children. Many members of same-sex couples are biological parents. And the DRL permits the same-sex partner of a child's biological parent, who is raising the child together with the biological parent, to become the child's second parent by means of adoption. DRL § 110; *Matter of Jacob*, 86 N.Y.2d at 655, 660 N.E.2d at 398, 636 N.Y.S.2d at 717. Many same-sex couples also adopt non-biological children. The Court of Appeals has further acknowledged that "adoptive parents stand in the same legal position as natural parents." *People* ex rel. *Sibley v. Sheppard*, 54 N.Y.2d 320, 327, 429 N.E.2d 1049, 1052, 445 N.Y.S.2d 420, 423 (1981). Hence, the decisional law of this State explicitly contemplates the raising of children by same-sex couples; it does not suggest that the state's interest in

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promoting the welfare of children includes an interest in prohibiting their being raised by such couples.

Once it is conceded (as it must be) that same-sex couples may raise children in New York State, the State's strong concern for "the best interest of . . . child[ren]," *Sheppard*, 54 N.Y.2d at 325, 429 N.E.2d at 1050, 445 N.Y.S.2d at 422, militates powerfully *against* depriving such couples and their children of the economic and social benefits that accompany entry into the institution of marriage. Here too, *Goodridge* and *Baker* are instructive. In *Goodridge*, the Massachusetts Department of Health attempted to justify denial of the right to marry to same-sex couples on the ground that "confining marriage to opposite-sex couples ensures that children are raised in the 'optimal' setting" *Goodridge*, 798 N.E.2d at 962. But the Supreme Judicial Court flatly rejected this argument, noting that "[r]estricting marriage to opposite-sex couples . . . cannot plausibly further this policy" and explaining that "the 'best interests of the child' standard does not turn on a parent's sexual orientation." *Id.* at 962, 963. The Court emphasized the perversity of the Commonwealth's claim that denying same-sex couples the right to marry would improve, rather than undermine, the welfare of children.

> [T]he task of child rearing for same-sex couples is made infinitely harder by their status as outliers to the marriage laws. . . . Given the wide range of public benefits reserved only for married couples, we do not credit the department's contention that the absence of access to civil marriage amounts to little more than an inconvenience to same-sex couples and their children. Excluding same-sex couples from civil marriage will not make children of opposite-sex marriages more secure, but it does prevent children of same-sex couples from enjoying the immeasurable advantages that flow from the assurance of a stable family structure in which children will be reared, educated, and socialized.

Id. at 963-64 (internal quotation marks and citations omitted). The Vermont Supreme Court similarly acknowledged that "the exclusion of same-sex couples from the legal protections

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incident to marriage exposes *their* children to the precise risks that the State argues the marriage laws are designed to secure against." *Baker*, 744 A.2d at 882.

These same concerns underlie the Court of Appeals' holding in *Matter of Jacob* relating to so-called "second parent adoption" by the same-sex partner of a child's biological parent. The Court of Appeals explained that allowing such adoptions advances New York's policy of promoting the best interests of children:

> This policy would certainly be advanced . . . by allowing the two adults who actually function as a child's parents to become the child's legal parents. The advantages which would result from such an adoption include Social Security and life insurance benefits in the event of a parent's death or disability, the right to sue for the wrongful death of a parent, the right to inherit under rules of intestacy and eligibility for coverage under both parents' health insurance policies. In addition, granting a second parent adoption further ensures that two adults are legally entitled to make medical decisions for the child in case of emergency and are under a legal obligation for the child's economic support.
>
> Even more important, however, is the emotional security of knowing that in the event of the biological parent's death or disability, the other parent will have presumptive custody . . . .

Matter of Jacob, 86 N.Y.2d at 658-59, 660 N.E.2d at 399, 636 N.Y.S.2d at 718 (citations omitted).

There is simply no rational relationship between a prohibition on same-sex marriage and promotion of the welfare of children. Indeed, the two operate at cross purposes, and Respondents' construction of the DRL to deny marriage licenses to Petitioners therefore cannot be justified on this basis.

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B. Statutory Classifications Based on Sexual Orientation Are Suspect and Therefore Merit Heightened Scrutiny

Even if this Court were to conclude that the construction of the DRL that has been proffered by Respondents satisfies rational basis review, Petitioners would still be entitled to the relief they seek. As we demonstrate below, statutory classifications on the basis of sexual orientation merit heightened scrutiny under New York law and Respondents' actions here cannot pass that constitutional test.

The Court of Appeals has held that when a governmental action "employs a 'suspect' classification, the strict scrutiny test has been applied." *Alevy v. Downstate Medical Ctr.*, 39 N.Y.2d 326, 332, 348 N.E.2d 537, 543, 384 N.Y.S.2d 82, 87 (1976). A suspect classification is one that traditionally has been deployed against a group that, among other factors, has been subjected to a history of purposeful discrimination. *See, e.g., Cleburne v. Cleburne Living Center*, 473 U.S. 432, 443 (1985). Heightened scrutiny is appropriate in such cases because "[t]hese [suspect] factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others." *Cleburne*, 473 U.S. at 440.

The New York Court of Appeals has expressly reserved the question of whether to accord heightened scrutiny to classifications based upon sexual orientation. *See Under 21 v. City of New York*, 65 N.Y.2d 344, 364, 482 N.E.2d 1, 10, 492 N.Y.S.2d 522, 531 (N.Y. 1985). The Appellate Division, First Department, has held that such scrutiny is warranted. *See Under 21 v. City of New York*, 108 A.D.2d 250, 253-58, 488 N.Y.S.2d 671, 672-76 (App. Div. 1st Dep't

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1985), *rev'd on other grounds*, 65 N.Y.2d 344, 482 N.E. 2d 1, 492 N.Y.S.2d 522 (N.Y. 1985).[13] Justices Brennan and Marshall agreed in their opinion in *Rowland v. Mad River Local Sch. Dist.*, 470 U.S. 1009, 1014 (1985) (Brennan, J., and Marshall, J., dissenting from denial of writ of certiorari):

> Because of the immediate and severe opprobrium often manifested against homosexuals once so identified publicly, members of this group are particularly powerless to pursue their rights openly in the political arena. Moreover, homosexuals have historically been the object of pernicious and sustained hostility, and it is fair to say that discrimination against homosexuals is likely . . . to reflect deep-seated prejudice rather than . . . rationality. State action taken against members of such groups based simply on their status as members of the group traditionally has been subjected to strict, or at least heightened, scrutiny by this Court.

(internal quotation marks, footnote and citation omitted); *see also* Laurence H. Tribe, *American Constitutional Law* 1616 (2d ed.) (1988) (arguing that sexual orientation meets the criteria applicable to suspect classes); John Hart Ely, *Democracy and Distrust* 162-164 (1980) (same). This Court should recognize sexual orientation as a suspect classification appropriate for heightened judicial scrutiny for these same basic reasons.

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[13] The United States Supreme Court has never considered whether sexual orientation constitutes a suspect classification under the Federal Constitution. And while certain federal courts of appeals have concluded that it does not, those decisions predate the Supreme Court's opinion in *Lawrence v. Texas*, in which, as noted above, the Court invalidated a Texas law establishing criminal penalties for homosexual sodomy and expressly overruled *Bowers v. Hardwick*, 478 U.S. 186 (1986), which had upheld Georgia's sodomy laws. In denying heightened scrutiny to statutory classifications based on sexual orientation, courts of appeals repeatedly relied on *Bowers* for support. If homosexual sex could permissibly be criminalized, these courts reasoned, then *a fortiori*, homosexuality could not constitute a suspect classification. *See, e.g.*, *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989) ("If homosexual conduct may constitutionally be criminalized, then homosexuals do not constitute a suspect or quasi-suspect class entitled to greater than rational basis scrutiny for equal protection purposes."). The overruling of *Bowers* deprives these cases of persuasive force. In light of *Lawrence*, all courts must consider anew the question of whether sexual orientation is a suspect classification.

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First, gay men and lesbians historically have been subjected to purposeful unequal treatment because of their sexual orientation. As the courts of New York have recognized, "[t]here is no question that gay people have historically been oppressed by the laws and the court system, and that anti-homosexual views, conscious or otherwise, have dominated the legal arena." *M.V.R. v. T.M.R.*, 115 Misc. 2d 674, 680, 454 N.Y.S.2d 779, 783 (Supreme Court, Trial Term, N.Y. County 1982).[14] Private discrimination against gay men and lesbians also remains widespread. As a recent report from the United States Surgeon General acknowledged, "our culture often stigmatizes homosexual behavior, identity and relationships." *The Surgeon General's Call to Action to Promote Sexual Health and Responsible Sexual Behavior* (June 2001), *available at* http://www.surgeongeneral.gov/library/sexualhealth/call.htm. A recent study suggests that 54% of New York homosexuals have experienced, in a five-year period, discrimination in employment, housing, or in a public accommodation. More than one-third experienced employment discrimination—including verbal or physical harassment, negative performance evaluations, and denial of promotions—and 8% were fired. Forty-nine percent experienced some form of discrimination or hostility in a public accommodation based on their sexual orientation. Not surprisingly, 68% concealed their sexual orientation in the workplace, on the street, or elsewhere to avoid harassment and discrimination. *See* Empire State Pride Agenda, *Anti-Gay/Lesbian Discrimination in New York State* (May 2001), *available at* http://www.prideagenda.org/pride/survey.pdf; *see also, e.g., Quinn v. Nassau County Police*

[14] New York's earliest sodomy law dates to 1787, when the state legislature enacted a law prescribing the death penalty for such conduct. *See* Jones & Varick, comp., Laws of New York 1777-1789 Vol. 2, (New York: Hugh Gaine, 1789), page 45, ch. XXI, enacted Feb. 14, 1787. In 1965, the law was amended to exclude sodomy among married, heterosexual persons. New York's sodomy law was not declared unconstitutional until 1980, *see People v. Onofre*, 51 N.Y.2d 476, 483, 415 N.E.2d 936, 937, 434 N.Y.S.2d 947, 948 (1980), and was not repealed by the legislature until 2000.

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Dep't., 53 F. Supp. 2d 347 (E.D.N.Y. 1999) (gay police officer sexually harassed because of his sexual orientation).

Second, like race or gender, and unlike mental disability or age, *Cleburne*, 473 U.S. at 441, sexual orientation plainly has no relevance to a person's ability to perform in or contribute to society.[15] Gay men and lesbians are, on average, as competent as heterosexuals as employees, as neighbors, and as family. The American Psychiatric Association recognizes that homosexuality connotes "no impairment in judgment, stability, reliability or general social and vocational capabilities." American Psychiatric Association, *Fact Sheet: Homosexual and Bisexual Issues* (February 2000), *available at* http://www.psych.org/public_info/homosexual12.pdf. The American Psychological Association has adopted the same statement. *See* American Psychological Association, *Lesbian, Gay and Bisexual Concerns Policy Statements*, *available at* http://www.apa.org/pi/lgbc/policy/statements.html. Moreover, as noted above, the New York courts have recognized that same-sex couples, like opposite-sex couples, form committed, long-term, and often lifetime relationships. The Court of Appeals has noted that "our society's traditional concept of 'family'" includes same-sex "lifetime partners whose relationship is long term and characterized by an emotional and financial commitment and interdependence."

[15] To the extent that "immutability" matters in the identification of suspect classifications, that point favors recognizing sexual orientation as such a classification. Although researchers have not achieved consensus about any specific cause or causes of sexual orientation, all reputable scholarly studies have concluded that sexual orientation—whether homosexual or heterosexual—is not experienced as a matter of choice. As the U.S. Surgeon General has said, "[t]here is no valid scientific evidence that sexual orientation can be changed." *Surgeon General's Call to Action*; *see also* Am. Psychol. Ass'n, *Resolution on Appropriate Therapeutic Responses to Sexual Orientation* (1998); Am. Psychiatric Ass'n, *Position Statement: Psychiatric Treatment and Sexual Orientation* (1998); Nat'l Ass'n of Social Workers, *Policy Statement: Lesbian, Gay, and Bisexual Issues* (1996); Am. Acad. Pediatrics, *Homosexuality and Adolescence* (1993); *Action by American Counseling Association Governing Council* (1999). These policy statements are available at http://www.apa.org/pi/lgbc/publications/justthefacts.html.

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Braschi, 74 N.Y.2d at 211, 543 N.E.2d at 53-54, 544 N.Y.S.2d at 788-89. Like opposite-sex couples, gays and lesbian may also choose to raise children, and the Court of Appeals has recognized that New York imposes no barrier to their doing so. *See Matter of Jacob*, 86 N.Y.2d at 655, 660 N.E.2d at 398, 636 N.Y.S.2d at 717 (construing the DRL to permit an individual to adopt her same-sex partner's child).

In short, there is an utter lack of any "distinguishing characteristics," *Cleburne*, 473 U.S. at 441, justifying treating gays and lesbians different from all other citizens. Accordingly, "discrimination against homosexuals is likely . . . to reflect deep-seated prejudice rather than . . . rationality." *Rowland*, 470 U.S. at 1014 (Brennan, J., and Marshall, J., dissenting from denial of certiorari) (internal quotation marks omitted); *see also Watkins v. United States Army*, 875 F.2d 699, 725 (9th Cir. 1989) (Norris, J., concurring in judgment; joined by Canby, J.) ("[The] irrelevance of sexual orientation to the quality of a person's contribution to society . . . suggests that classifications based on sexual orientation reflect prejudice and inaccurate stereotypes."). The fact that in 2002 New York passed the Sexual Orientation Non-Discrimination Act (SONDA)—a landmark law outlawing sexual discrimination in employment, housing, public accommodations, education, and the exercise of civil rights—indicates that such discrimination remains a significant problem in New York.[16]

[16] The passage of SONDA does not weigh against treating sexual orientation as a suspect classification. First, despite this recent progress, gay men and lesbians remain significantly disadvantaged in the political arena. Although they have recently become more politically visible in New York, continued discrimination and negative attitudes compels many gay men and lesbians to conceal their sexual orientation in the public sphere, which further reduces their ability to participate effectively in the political process. Second, discrimination on the basis of race and gender—both of which are reviewed under heightened scrutiny—are statutorily prohibited as well. In fact, laws discriminating on the basis of race were first held to warrant strict scrutiny *after* passage of the Civil Rights Acts in the 1870s. Likewise, sex discrimination was first found to warrant heightened scrutiny after passage of Title VII of the Civil Rights Act

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This Court should follow those of other States that have deemed classifications based on sexual orientation to be suspect. In *Tanner v. Oregon Health Sciences University*, 971 P.2d 435, 447 (Or. Ct. App. 1998), the Oregon Court of Appeals held that sexual orientation is a suspect classification. The *Tanner* court held that the Oregon Constitution requires a state university to extend health and life insurance benefits to the partners of gay and lesbian employees. *Id.* at 448. Applying a two-part test for defining suspect classes, the court found that (1) sexual orientation is immutable in the sense that it is a characteristic that has historically been regarded as defining a distinct, socially recognized group; and (2) gay people "have been and continue to be the subject of adverse social and political stereotyping." *Id.* at 446-47; *see also Baker v. State*, 744 A.2d 864, 891-93 (Vt. 1999) (Dooley, J., concurring) (adopting *Tanner* framework and concluding that homosexuality qualifies as suspect class). The courts of California have also referred to sexual orientation as a suspect class. *See Children's Hosp. & Med. Ctr. v. Bonta*, 118 Cal. Rptr. 2d 629, 650 (Ct. App. 2002), *cert. denied*, 537 U.S. 1160 (2003); *see also Gay Law Students Ass'n v. Pacific Tel. & Tel. Co.*, 595 P.2d 592, 599-603 (Cal. 1979) (holding that invidious discrimination against gays by state-established monopoly violates equal protection provision of California constitution). Furthermore, a California appellate court recently applied a similar analysis in holding that prosecutors may not exercise peremptory challenges to remove gay jurors because of their sexual orientation. *See People v. Garcia*, 92 Cal. Rptr. 2d 339 (Ct. App. 2000).

Under any form of heightened scrutiny, denial of marriage licenses to same-sex couples is unconstitutional. As described above in Part II.A, Respondents' actions preventing Petitioners

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of 1964 and the Equal Pay Act of 1963. *See Frontiero v. Richardson*, 411 U.S. 677, 687-88 (1973) (plurality opinion) (citing anti-discrimination legislation in *support* of conclusion that heightened scrutiny is warranted for sex-based classifications).

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from marrying a person of the same sex cannot satisfy even rational-basis review. It follows, *a fortiori*, that their application of the DRL to Petitioners cannot survive heightened scrutiny either. *See also infra* Part III.B (explaining why the ban cannot survive the heightened scrutiny accorded to sex-based classifications).

III. NEW YORK DOMESTIC RELATIONS LAW DISCRIMINATES ON THE BASIS OF SEX IN VIOLATION OF ARTICLE I, § 11 OF THE NEW YORK CONSTITUTION

Respondents' construction of the relevant DRL provisions entails classification not only on the basis of sexual orientation, but on the basis of sex as well. Accordingly, this construction must be subjected to the more exacting standard of review applicable to sex-based classifications.[17] The Court of Appeals has specified that a statutory scheme that classifies on the basis of sex "violates equal protection unless the classification is substantially related to the achievement of an important governmental objective." *People v. Liberta*, 64 N.Y.2d 152, 168, 474 N.E.2d 567, 576, 485 N.Y.S.2d 207, 215 (1984); *see also Santorelli*, 80 N.Y.2d at 876, 600 N.E.2d at 233, 587 N.Y.S.2d at 602; *Nev. Dept. of Human Res. v. Hibbs*, 123 S. Ct. 1972, 1978 (2003) (quoting *United States v. Virginia*, 518 U.S. 515, 533 (1996)). And it is well-established that the State bears the burden of proving that a challenged regulation satisfies this exacting standard of review. *Liberta*, 64 N.Y.2d at 168, 474 N.E.2d at 576, 485 N.Y.S.2d at 215.

The interpretation of the DRL advanced by Respondents in denying marriage licenses to Petitioners defines the class of persons who may marry under New York State law in sex-based terms. Yet this classification furthers no "important" government objective. Moreover, even if

[17] New York courts use the term "sex-based classification" and the term "gender-based classification" interchangeably in describing statutes that distinguish between men and women. This Memorandum employs the former formulation throughout.

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the objectives purportedly at stake qualified as "important," the classification under review is not substantially related to their achievement.

A. Respondents' Construction of the DRL Classifies on the Basis of Sex

The construction of the DRL employed by Respondents explicitly classifies on the basis of sex. For example, the recent Letter issued by Respondent Department of Health relating to the lawfulness of same-sex marriage asserts that "New York's law does not authorize the issuance of marriage licenses to persons of the same sex," and it argues that the relevant provisions of the DRL have been interpreted to limit marriage to "the voluntary union of one man . . . and one woman . . . ." Letter From the NY Dep't of Health dated March 3, 2004. Accordingly, a woman who is otherwise eligible to marry who seeks a license from the Town Clerk's Office authorizing her marriage to another woman cannot receive one, while a man seeking such a license would face no legal impediment to the receipt of state approval. Put otherwise, under Respondents' construction of the statutory scheme, the question of whether a given individual (otherwise competent to marry) is legally eligible to wed a woman turns exclusively on that individual's sex.[18]

The argument that prohibitions on same-sex marriage do not classify on the basis of sex because men and women are equally disabled from marrying a person of the same sex has no merit. This argument rests on the flawed premise that the Equal Protection Clause is exclusively

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[18] One court has illustrated this point as follows:

> [I]f twins, one male and one female, both wished to marry a woman and otherwise met all of the Code's requirements, only gender prevents the twin sister from marrying under the present law. Sex classification can hardly be more obvious.

Brause v. Bureau of Vital Statistics, No. 3AN-95-6562 CI, 1998 WL 88743, at *6 (Alaska Super. Ct. Feb. 27, 1998).

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concerned with state action that treats men and women differently from one another and has no application to statutes that rely on sex-based classifications to mete out burdens on the sexes equally. The United States Supreme Court pointedly rejected this line of reasoning in *Loving v. Virginia*, 388 U.S. 1 (1967), in the course of invalidating a State law prohibiting marriage between interracial couples. In that case, the State argued that "because its miscegenation statutes punish equally both the white and the Negro participants in an interracial marriage, these statutes, despite their reliance on racial classifications do not constitute an invidious discrimination based upon race." *Id.* at 8. The Court, however, "reject[ed] the notion that the mere 'equal application' of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discriminations." *Id.* Instead, the Court held that "[t]here can be no question but that Virginia's miscegenation statutes rest solely upon distinctions drawn according to race. The statutes proscribe generally accepted conduct if engaged in by members of different races." *Id.* at 11. And this, in turn, was sufficient to trigger strict scrutiny under the Fourteenth Amendment's Equal Protection Clause.

In these crucial respects, the construction of the DRL that has been advanced by Respondents is structurally identical to the statutory scheme under review in *Loving*. Though it could be argued that because the DRL punishes equally both men and women who wish to marry persons of the same sex, the relevant statutes do not constitute an invidious discrimination based on sex, the constitutionally-necessary rejoinder, in *Loving*'s terms, is that "the statutes proscribe generally accepted conduct if engaged in by members of the same [sex]," and therefore *does* include an invidious classification. Notably, other jurisdictions to have considered whether state laws limiting marriage to same-sex couples classify on the basis of sex have concluded that they

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do and have applied heightened scrutiny accordingly. *See Baehr v. Lewin*, 852 P.2d 44, 60 (Haw. 1993) (relying on *Loving* and holding that a Hawaii law that "denie[d] same-sex couples access to the marital status and its concomitant rights and benefits" constitutes "regulation of access to the status of married persons, on the basis of the applicants' sex"); *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743, at *6 (Alaska Super. Ct. Feb. 27, 1998) ("Were the right to choose one's life partner not fundamental, . . . the court would find that the specific prohibition of same-sex marriage does implicate the Constitution's prohibition of classifications based on sex or gender, and the state would then be required to meet the intermediate level of scrutiny generally applied to such classifications.").[19]

B. The Sex-Based Classification Inherent in Limiting Marriage to Opposite-Sex Couples is Not Substantially Related to an Important Government Interest

As noted, above, where a statute classifies on the basis of sex, "it is settled that the [State] then [has] the burden of proving that there is an important governmental interest at stake and that the gender classification is substantially related to that interest." *Santorelli*, 80 N.Y.2d at 876, 600 N.E.2d at 233, 587 N.Y.S.2d at 602; *see also United States v. Virginia*, 518 U.S. 515, 533 (1996). The State cannot meet this heavy burden.

We argued above, *see supra* Part II.A, that the myriad justifications that might be offered for denying same-sex couples the right to marry cannot survive even rational basis review. It

[19] Even if this Court were to conceptualize the classification at issue as one between same-sex and opposite-sex couples, the sex-based classification at the core of the statutory scheme would endure and necessitate heightened scrutiny. If a simple shift in characterization of the relevant unit addressed by the statute (from individuals to couples) were sufficient to remove the invidious classification from the statute altogether, this would have been adequate to salvage the statute struck down in *Loving*. *See also McLaughlin v. Florida*, 379 U.S. 184, 188 (1964) (striking down a criminal statute prohibiting unmarried interracial couples from occupying the same room at night, and explaining that the statute "treats the interracial couple made up of a white person and a Negro differently than it does any other couple.").

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logically follows that these justifications are inadequate to support Respondents' construction of the DRL under the more demanding standard applicable to sex-based classifications.

Two points merit special mention. First, even if the State's interest in preserving the traditional definition of marriage for its own sake could be characterized as legitimate (though for the reasons expressed in Part II.A, it cannot), it cannot qualify as "important," for purposes of equal protection review. For if it did qualify as such, then significant components of equal protection doctrine pertaining to sex-based discrimination would be dramatically altered. The denial of a wide array of rights and privileges to women (denials no longer tolerated under the Equal Protection Clause) was rooted in traditions no less venerable and passionately-held than those underlying the restriction of marriage to opposite-sex couples. *See, e.g., Nevada Dep't of Human Res.*, 123 S. Ct. 1978 (noting that "[i]n *Muller v. Oregon* . . . this Court approved a state law limiting the hours that women could work for wages" and explaining that "[s]uch laws were based on the related beliefs that (1) woman is, and should remain the center of home and family life, . . . and (2) a proper discharge of [a woman's] maternal functions—having in view not merely her own health, but the well-being of the race—justifies legislation to protect her from the greed as well as the passion of man" (internal quotation marks and citations omitted)). Hence the notion that an interest in preserving tradition counts as constitutionally "important" threatens to uproot broad swaths of modern equal protection doctrine.

Second, the stricter scrutiny applicable to sex-based classifications has particular bite insofar as it requires a closer fit between classificatory means and governmental ends in order for a regulatory scheme to pass muster. Hence, even if the radical under-inclusiveness of New York's rules pertaining to marriage as a tool for promoting procreation or securing the welfare of children, *see supra* Part II.A, were insufficient to render the statutory scheme defective under the

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rational basis standard, there can be little doubt that this under-inclusiveness is fatal to the relevant provisions under any form of heightened scrutiny.

IV. DENYING SAME-SEX COUPLES OF THE RIGHT TO MARRY DEPRIVES THEM OF A FUNDAMENTAL RIGHT PROTECTED UNDER THE DUE PROCESS CLAUSE OF ARTICLE I, § 6 OF THE NEW YORK CONSTITUTION

A. The New York Constitution Guarantees Certain Unenumerated Fundamental Rights

Since at least 1856, the New York Court of Appeals has recognized that the constitutional right to due process under the State's constitution guarantees not only fair process but also that fundamental rights—whether or not specifically enumerated in the State Constitution—are beyond "the power of legislative interference." *Wynehamer v. People*, 13 N.Y. 378, 418-21 (1856). In the century and a half since *Wynehamer*, New York courts have identified numerous fundamental rights protected from government intrusion by the Due Process Clause of the State Constitution. Together, these rights might be characterized as a right to "privacy[,] [which] is but a subcategory of liberty, which may not be denied without due process." *Rapp v. Carey*, 44 N.Y.2d 157, 161-62, 375 N.E.2d 745, 747, 404 N.Y.S.2D 565, 567 (1978). These include rights to marriage, family life, bearing and rearing children, reproductive freedom, and refusing medical care. *See Hope v. Perales*, 83 N.Y.2d 563, 575, 634 N.E.2d 183, 186, 611 N.Y.S.2d 811, 814 (1994); *Rivers v. Katz*, 67 N.Y.2d 485, 493, 495 N.E.2d 337, 341, 504 N.Y.S.2d 74, 78 (1986); *McMinn v. Town of Oyster Bay*, 66 N.Y.2d 544, 488 N.E.2d 1240, 498 N.Y.S.2d 128 (1985); *Cooper v. Morin*, 49 N.Y.2d 69, 80, 399 N.E.2d 1188, 1194, 424 N.Y.S.2d 168, 175 (1979).

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The thread common to these fundamental rights is plain: They all relate to the ordering of the most intimate personal relationships or to fundamental questions of life, death, and bodily integrity. *Cf., e.g., Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992) (noting that "matters[] involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the [substantive component of the Due Process Clause of the] Fourteenth Amendment."). The nature, scope, and identity of the liberty interests protected under the federal Due Process Clause has, of course, expanded over time. *See Lawrence*, 123 S. Ct. at 2484 ("As the Constitution endures, persons in every generation can invoke its principles in their own search for *greater* freedom" (emphasis added)). And that trend is fully consistent with New York constitutional law, under which "[t]he requirements of due process are not static [but instead] vary with the ambience in which they arise." *Wilkinson v. Skinner*, 34 N.Y.2d 53, 58, 312 N.E.2d 158, 161, 356 N.Y.S.2d 15, 21 (1974); *see also Walz v. Tax Comm'n of the City of N.Y.*, 397 U.S. 664, 678 (1970) ("[N]o one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it."). Thus, determining first whether the right to marry is a fundamental right and then whether the putative state interest in constraining that right is sufficiently weighty requires that the Court consider the present historical and legal context in which Petitioners' claim arises. *Cf. Lawrence*, 123 S. Ct. at 2479-80, 2483 (referring to contemporary legislative and judicial developments as evidence of an "emerging awareness" of privacy interest); *Baker*, 744 A.2d at 885-86 (reviewing state's recent statutory trend in favor of "same-sex relationships" to inform assessment of whether "a long history of official intolerance of intimate same-sex relationships can[] be reconciled with" a holding that state constitution compels that individuals in such

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relationships receive the same "benefits and protections" afforded heterosexuals in analogous relationships).[20]

B. Under New York Law, the Right to Marry Is Fundamental

The New York Court of Appeals has long acknowledged that the right to marry qualifies as fundamental.[21] Thus, in *People v. Shepard*, 50 N.Y.2d 640, 644, 409 N.E.2d 840, 842, 431 N.Y.S.2d 363, 365 (1980), the Court of Appeals acknowledged that "the government has been prevented from interfering with an individual's decision about whom to marry." And, in *Fearon v. Treanor*, 272 N.Y. 268, 272-73, 5 N.E.2d 815, 816 (1936), that Court explained that marriage "constitutes an institution involving the highest interests of society" and that "successful marriages constitute the fundamental basis of the general welfare of the people." *See also Cooper*, 49 N.Y.2d at 80, 399 N.E.2d at 1194, 424 N.Y.S.2d at 175 (discussing "the fundamental right to marriage and family life"); *Goodridge*, 798 N.E.2d at 957 ("[C]ivil marriage is central to the lives of individuals and the welfare of the community."); *Zablocki v. Redhail*, 434 U.S. 374, 384-86 (1978) (reviewing the Supreme Court decisions concerning marriage as a fundamental right); *Loving*, 388 U.S. at 12 ("The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."). Hence, the question before this Court is whether the State may deny Petitioners—each of whom is unquestionably competent and qualified to marry in every respect except for his or her choice of spouse—the opportunity to formalize their relationships in a manner that would enhance the State's "general welfare."

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[20] Recent legislative action in New York likewise protects the right of gay men and lesbians to equal treatment and freedom from discrimination. *See supra*, Part II.A.

[21] The Supreme Judicial Court of Massachusetts has aptly characterized the right as "the right to choose to marry." *Goodridge*, 798 N.E.2d at 957.

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In answering this question, moreover, it bears emphasis that Petitioners' relationships are entitled to the same protection as existing heterosexual marriages. Which is to say that, when the Court of Appeals noted that "the government [may not] . . . interfer[e] with an individual's decision about whom to marry," *Shepard*, 50 N.Y.2d at 644, it did not intend the term "individual" to refer only to heterosexuals.[22] *See Perez v. Lippold*, 198 P.2d 17, 21 (Cal. 1948) ("[T]he essence of the right to marry is freedom to join in marriage with the person of one's choice."). To the contrary, "central to personal freedom and security is the assurance that the laws will apply equally to persons in similar situations." *Goodridge*, 798 N.E.2d at 959. *Cf. Lawrence*, 123 S. Ct. at 2482 ("Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests.").

C. Respondents' Construction of the Relevant DRL Provisions Cannot Survive Strict Scrutiny

Because the right to marry is fundamental, the state may impose direct and substantial burdens on an individual's capacity to exercise that right only if it can identify compelling

[22] In *Storrs v. Holcomb*, 168 Misc. 2d 898, 900, 645 N.Y.S.2d 286, 288 (Sup. Ct. 1996), a Tompkins County Judge determined "that New York does not recognize or authorize same sex marriage and that the City Clerk correctly refused to issue [a] license [to a same sex couple who sought to get married]." However, that case was dismissed on appeal for failure to include a necessary party to the action (the Department of Health), and the decision of the Tompkins County court thus lacks precedential effect. *Storrs v. Holcomb*, 245 A.D.2d 943, 946, 666 N.Y.S.2d 835, 838 (App. Div. 3d Dep't 1997). *See Langan*, 196 Misc. 2d at 454-55, 765 N.Y.S.2d at 422 ("*Matter of Storrs v. Holcomb* . . . does not stand as authority for any proposition, as the Appellate Division affirmed the dismissal, but on the procedural grounds that a necessary party had not been joined.").

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reasons for doing so.[23] *See Rivers*, 67 N.Y.2d at 495, 495 N.E.2d at 341, 504 N.Y.S.2d at 79; *People* ex rel. *Abraham J. v. Sarkis*, 175 Misc. 2d 433, 439, 668 N.Y.S.2d 435, 440 (Sup. Ct. Kings County 1997) ("Rigorous due process safeguards and judicial scrutiny are brought to bear when individuals are subject to the loss of an individual liberty interest or fundamental right in the face of an asserted compelling State interest."). To satisfy that standard, the State must demonstrate that the limit it imposes on the exercise of the right is "not . . . arbitrary, discriminatory, capricious or unreasonable and [that it has] . . . a real and substantial relation to the object sought to be obtained, namely the health, safety, morals or general welfare of the public." *Defiance Milk Prods. Co. v. Du Mond*, 205 Misc. 813, 816, 133 N.Y.S.2d 216, 220 (Sup. Ct. Albany County 1954).

The Town Clerk—acting pursuant to instructions from the State Department of Health and an advisory opinion from the Attorney General—affirmatively denied petitioners the ability to marry. This denial is absolute and without exception, so long as petitioners seek to marry the spouses whom they have chosen. *See Goodridge*, 798 N.E.2d at 968 (characterizing a similar prohibition on same-sex marriages as a "marriage ban"); *Loving*, 388 U.S. at 12.

An insurmountable burden on petitioners' right to marry would be permissible only if there were a "compelling State interest" in permanently denying two people of the same gender a marriage license. *Rivers*, 67 N.Y.2d at 495, 495 N.E.2d at 341, 504 N.Y.S.2d at 79. We have already demonstrated that each potential rationale for upholding a prohibition on same-sex marriages cannot satisfy standards of review *lower* than that required to justify placing a

[23] The State may, of course, impose reasonable regulations on individuals' ability to marry. *See, e.g.*, DRL §§ 5-7. *Cf. Goodridge*, 798 N.E.2d. at 958 ("Unquestionably, the regulatory power of the Commonwealth over civil marriage is broad, as is the Commonwealth's discretion to award public benefits.").

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substantial burden on a fundamental right. *See supra* Part II.A. Suffice to say, therefore, that there is no "reasonable relationship between, on the one hand, an absolute disqualification of same-sex couples who wish to enter into civil marriage and, on the other, protection of public health, safety, or general welfare." *Goodridge*, 798 N.E.2d at 968. Indeed, it is impossible to reconcile the *Langan* decision discussed above (which recognizes *out of state* same-sex civil unions for purposes of New York trusts and estates law, *see* 196 Misc. 2d 440, 765 N.Y.S.2d 411) with the notion that same-sex marriages effected *in New York* would somehow undermine the public health, safety, or general welfare of the State's citizens. There is therefore no legitimate reason—let alone a compelling one—for barring petitioners from marrying. *See Defiance Milk*, 205 Misc. at 815, 133 N.Y.S.2d at 219 ("In order to sustain legislation under the police power the courts must be able to see that its operation tends in some degree to prevent some offense or evil or to preserve public health, morals, safety and welfare, and if a statute discloses no such purpose, has no real or substantial relation to these objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so hold and strike down the statute.").

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CONCLUSION

For all of these reasons, the Court should direct the Town Clerk to issue the marriage licenses to which Petitioners are entitled.

Dated: New York, New York
March 11, 2004

Respectfully submitted,

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JPREME COURT OF THE STATE OF NEW YORK
)UNTY OF ROCKLAND
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the Matter of the Application of:

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.CQUELINE AXT-OHANNESYAN, LISA
<T-OHANNESYAN, JOHN ADE, JOHNNIE FARMER,
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)NDE, TONI BONDE, GEORGE DELANCEY,
EL EALY, DEIRDRE BERNARD-PEARL and
SA BERNARD-PEARL,

Petitioners,

Index No.
1458/04

FILED - MK
JAN 12 2005
ROCKLAND COUNTY
CLERK'S OFFICE

r a Judgment Pursuant to Article 78
the CPLR and other relief,

-against-

[ARLOTTE MADIGAN, Town Clerk, Town of
angetown, New York, and STATE OF NEW YORK
:PARTMENT OF HEALTH,

Respondents.
----------X

PETITIONERS' REPLY MEMORANDUM OF LAW IN SUPPORT OF PETITION

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PRELIMINARY STATEMENT

"[T]he disagreement in this case is not about the value of same-sex relationships." So asserts the Memorandum of Law filed by Respondent Department of Health. *See* Memorandum of Law in Support of the Answer of the New York State Department of Health at 2.[1] "[P]etitioners and their families," the Department explains, "are entitled to dignity and respect, . . . children raised in those families can thrive, and . . . same-sex couples can be as committed, stable, loving and nurturing as opposite sex couples." *Id.* at 1. Yet the Department insists that the laws of this State deprive same-sex couples of access to its most fundamental social institution—the institution of marriage—and that New York's Constitution readily countenances their exclusion. It argues that the interests in harmonizing New York law with the practices of other jurisdictions—whether those practices are defensible or not—and in perpetuating tradition—whether that tradition is pernicious or not—trump its obligation to safeguard Petitioners' liberty and to secure their equal treatment. It should come as no surprise, then, that to Petitioners, the Department's proclamations regarding the high esteem in which New York holds its same-sex couples appear conspicuously hollow.

There is no escaping the effect of denying Petitioners and other same-sex couples access to the institution of marriage. It deprives them of the tangible rights and benefits that accrue to married couples; it stigmatizes their relationships by deeming them unworthy of the label our society attaches to a couple's deepest expression of commitment and love; and it thereby

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[1] Respondent Department of Health is referred to herein as "the Department," Respondent Charlotte Madigan, Town Clerk of Orangetown, is referred to as "the Town Clerk," and they are collectively referred to as "Respondents." The Department's Memorandum of Law will be cited as "DOH Mem.," the Town Clerk's Affirmation in Opposition to Article 78 Petition will be cited as "Clerk's Aff.," and Petitioners' Memorandum of Law in Support of Petition will be cited as "Mem."

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relegates Petitioners to a form of second-class citizenship. Accordingly, while Petitioners welcome debate, and join issue herein, on the question of whether a constitutionally adequate justification for the denial of marriage rights to same-sex couples exists, it must be established from the outset that this dispute emphatically *is* about the value of same-sex relationships. It pointedly and unavoidably requires this court to decide whether the state of New York, through its Constitution and laws, places the same value on the "committed, stable, loving and nurturing relationships" of its homosexual citizens as it does on the comparable relationships of heterosexual New Yorkers.

In this vein, Petitioners do not resist the Department's contention that this dispute is about "the Legislature's authority to define legal requirements for civil marriage in the State of New York." *Id.* at 2. In asking this Court to determine whether New York law does, or must, afford same-sex couples the same dignity and respect it affords opposite-sex couples, Petitioners necessarily ask this Court to delineate the metes and bounds of the legislature's authority, *within the limits set by the New York Constitution*, to regulate civil marriage. In other words, Petitioners ask this Court to exercise the centuries-old function of judicial review.

This brief makes four points in reply to Respondents' statutory and constitutional arguments:

First, Respondents entirely ignore the core of Petitioners' arguments relating to the proper construction of New York's Domestic Relations Law ("DRL"). They fail to grapple with the interpretive constraints animated by the canon of constitutional avoidance, decline to address the historical context in which the relevant DRL provisions were authored, and overstate the evidence that purportedly supports their preferred reading.

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Second, even if the DRL is construed to exclude same-sex couples from the institution of marriage, Respondents have failed to identify a constitutionally adequate justification for such exclusion. The justifications proffered by the Department—harmonizing New York law with the practice of other jurisdictions and maintaining a tradition of denying same-sex couples the right to marry—are transparently weak. The former justification is question-begging. It invites this Court to rest its interpretation of New York's Constitution on the law of other states without first inquiring whether that law can be reconciled with the dictates of the New York Constitution. The latter justification is similarly evasive; it encourages this Court to eschew the question of whether the New York Constitution requires that same-sex and opposite-sex couples be treated equally and to base its decision, instead, on the notion (recently rejected by the United States Supreme Court) that longstanding social practices are effectively immune from constitutional scrutiny.

Third, the Department dodges the question of whether the construction of the DRL it advances violates Petitioners' fundamental right to marry. The Department insists that its reading of the DRL does not infringe the fundamental right to marry because what Petitioners seek cannot be construed as "marriages." But whether Petitioners' relationships are constitutionally amenable to being labeled "marriages" is precisely the *question* before this Court, and the Department's assertion to the contrary is no answer.

Fourth, the Department's efforts to avoid the application of heightened scrutiny to the denial of marriage rights to same-sex couples are unpersuasive. The Department argues that statutes that classify on the basis of sexual orientation do not merit heightened scrutiny because homosexuals do not qualify as "politically powerless." This claim is both empirically and legally flawed. It disregards the substantial discrimination to which gay and lesbian New

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Yorkers continue to be subject and misconstrues decades of practice in the New York courts and the U.S. Supreme Court relating to suspect classifications. In addition, the Department's claim that its construction of the DRL does not entail classification on the basis of sex rests on a flawed reading of the Supreme Court's decision in *Loving v. Virginia*, 388 U.S. 1 (1967).

In sum, Respondents provide no sound basis upon which to deny Petitioners the liberty and equality to which they are entitled under New York law.

ARGUMENT

I. RESPONDENTS IGNORE THIS COURT'S DUTY TO AVOID A STATUTORY CONSTRUCTION THAT RAISES SERIOUS CONSTITUTIONAL QUESTIONS AND VASTLY OVERSTATE THE STATUTORY AND PRECEDENTIAL SUPPORT FOR THEIR READING OF THE DRL

A. Respondents Fail to Acknowledge this Court's Duty to Interpret the DRL in a Manner That Avoids Difficult Constitutional Questions

When a statute admits of multiple constructions, well-established principles of interpretation require that the Court select one that avoids raising constitutional concerns. Petitioners already have demonstrated that this canon of "constitutional avoidance" has long guided the interpretive practices of the New York courts (Mem. at 16-17). Petitioners have shown, moreover, that this rule of construction underlies Court of Appeals decisions which seek to avoid constitutional questions both by construing New York statutes so as to avoid discrimination on the basis of sexual orientation and by reading gender-specific provisions of New York law as gender-neutral. *See id.*

Respondents fail entirely to address the avoidance canon and its implications for this case. They do so notwithstanding the New York Attorney General's prior acknowledgment that "[t]he exclusion of same-sex couples from eligibility for marriage . . . presents serious constitutional concerns[,]" and that a court might wish to "construe the DRL to permit same-sex

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marriages in order to avoid declaring relevant portions of the statute unconstitutional." Op. Atty. Gen. March 3, 2004, at 6, 15. *See also id.* at 15 (noting that "[i]t is well-settled that a 'statute should be construed when possible in a manner which would remove doubt of its constitutionality'") (quoting *People v. Barber*, 289 N.Y. 378, 385, 46 N.E.2d 329, 332 (1973)). Hence, though Respondents decline to address this firmly embedded interpretive principle in their submissions to this Court, the applicable standard remains clear: once Petitioners have demonstrated that the DRL admits of a construction that elides the "serious constitutional concerns" deemed by the Attorney General to be implicit in the interpretation now advanced by Respondents, the Court should favor Petitioners' reading.[2]

B. Respondents Do Not Dispute the Core of Petitioners' Statutory Claims

Respondents do not dispute the central pieces of evidence presented by Petitioners in support of their claim that New York law permits same-sex couples to marry (Mem. at 10-12).

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[2] The Department urges the Court effectively to sidestep the avoidance protocol by asserting that "this Court's review of the Department's determination is limited to whether the determination is arbitrary and capricious, lacks a rational basis, or is otherwise affected by an error of law." DOH Mem. at 4. New York law, however, dictates that deference is appropriate only when the interpretation of a statute might be informed by the specialized expertise of an arm of the executive branch; deference is not called for in cases requiring routine statutory interpretation. *See Claim of David Gruber*, 89 N.Y.2d 225, 231, 674 N.E.2d 1354, 1358, 652 N.Y.S.2d 589, 593 (1996) (where statutory interpretation "involves knowledge and understanding of underlying operational practices or entails an evaluation of factual data and inferences to be drawn therefrom[,]" deference is appropriate; but "where the question is one of pure statutory reading and analysis, depending only on accurate apprehension of legislative intent[,]" deference is not in order (internal quotations omitted)). *See also Dworman v. New York State Div. of Hous. & Cmty. Renewal*, 94 N.Y.2d 359, 371, 725 N.E.2d 613, 619, 704 N.Y.S.2d 192, 198 (1999); *Beekman Hill Ass'n v. Chin*, 274 A.D.2d 161, 167, 712 N.Y.S.2d 471, 475 (1st Dep't 2000). Interpretation of DRL provisions governing who may and may not marry requires no special expertise; accordingly, the Department's interpretation does not merit deference under the applicable precedents. Moreover, the requirement of deference to executive branch interpretations cannot overcome the avoidance canon. The Department cites no authority for the proposition that deference to administrative judgment is appropriate even where such judgments give rise to significant constitutional concerns.

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Thus, Respondents concede that "the DRL includes no express requirement that married persons be of the opposite sex[,]" DOH Mem. at 5-6; Clerk's Aff. at ¶ 15, and Respondents do not deny that same-sex marriages are not expressly deemed void or voidable under New York law. Respondents likewise do not contradict Petitioners' claim that the core provisions of the DRL relating to marriage are littered with gender-neutral terminology.

Instead, Respondents cobble together scattered provisions of the DRL and a collage of other New York statutes in which arguably gender-specific language is employed to describe the parties to a marriage. They argue that these provisions—the vast majority of which are far attenuated from the core components of New York's scheme regulating access to the institution of marriage—signal that same-sex couples are not permitted to marry. Thus, Respondents ask this Court to read a prohibition against same-sex marriage into the DRL in light of laws addressing, among other things, evidentiary privileges, personal injury, and workers' compensation. *See* DOH Mem. at 6-9 (citing, *inter alia*, CPLR § 4502(b), General Obligations Law § 3-313, and Workers' Compensation Law § 16); *see also* Clerk's Aff. at ¶ 20 (citing, *inter alia*, amendments to New York's Debtor and Creditor Law, General Obligations Law, and Social Services Law). These provisions do not purport to define who is and is not entitled to marry, nor do they govern the process of securing official recognition of a marriage. And the provisions that do answer these fundamental questions contain scant use of gender-specific terminology (indeed they are replete with gender-*neutral* formulations).[3]

[3] Occasional uses of gender-specific terminology in connection with more central features of the DRL's marriage regime—for example, the anti-incest and bigamy rules codified at DRL §§ 5 and 6—provide only the thinnest of support for Respondents' construction of the applicable statutes. Such locutions reflect the legislature's attention to more prevalent forms of the regulated conduct, *not* an affirmative intent to define the contours of marriage as between a man and a woman only.

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Respondents seek to obscure the import of the DRL's repeated use of gender-neutral terms such as "parties" and "persons" when referring to married individuals (or individuals contemplating marriage) by pointing to a pair of DRL provisions in which the term "parties" is juxtaposed with gender-specific terminology. DOH Mem. at 7 (citing DRL § 170 which references "husband," "wife," "he or she," "party," and "parties" as well as DRL § 230(2) which references both "husband and wife" and "party"). Relying on these two provisions, Respondents claim that Petitioners "ignore[] the manner in which the word ["parties"] is used." *Id.* at 7; Clerk's Aff. at ¶ 19. The reverse is true. Petitioners do not deny that ancillary provisions of the DRL employ arguably gender-specific language to describe married couples (Mem. at 12-13), nor do they deny that gender-neutral terms such as "party" may be intermingled with traditionally gender-specific language in isolated fragments of the DRL. Petitioners' point, instead, is that the DRL frequently uses gender-neutral terminology to describe married couples, does so in the *core* provisions of the DRL regulating access to marriage rights, and, in these repeated instances, decidedly *does not* mix its use of gender-neutral language with gender-specific constructions. *See* DRL §§ 7, 8, 11-a(1)(b), 11(4), 11(5), 13, 14, 15-a. Hence, if one focuses on the core of the DRL's scheme for regulating marriage, rather than the far periphery (as Respondents do), it is apparent that Respondents, not Petitioners, "ignore" the manner in which gender-neutral terminology is employed by the State Legislature.

Respondents also fail to confront Petitioners' argument that those uses of gender-specific language that do appear in the DRL, when understood in historical context, cannot be construed as express indications of a legislative intent to exclude same-sex couples from marriage (Mem. at 15-16). These gendered formulations are best understood as historical descriptors—reflections of the expectations of individuals who lived in a world in which only opposite-sex couples

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sought officially sanctioned marriages—not as commands to interpret statutory language statically. Respondents offer no justification for giving permanent and overriding effect to such anachronistic uses of gender-specific language and fail to confront the ramifications of the interpretive technique they espouse. *See, e.g.*, N.Y. CLS Exec § 61 (2004) ("There shall be in the department of law a solicitor general . . . who shall performs such duties . . . as may lawfully be assigned to *him*. The attorney-general shall fix *his* compensation within the amounts appropriated therefore") (emphases added); N.Y. Pub. Off. Law § 9 ("Every deputy, assistant, or other subordinate officer . . . shall be appointed by *his* principal officer . . . . If there is but one deputy, *he* shall . . . possess the powers and perform the duties of *his* principal during the absence or inability to act of *his* principal") (emphases added).

The Department also concedes that "[w]hen the Legislature enacted the marriage licensing provision in 1907, it does not appear to have even considered the possibility of same-sex marriage[s]." DOH Mem. at 9. Under these conditions, *i.e.*, without any evidence that the drafters of the marriage laws confronted the question of same-sex marriage, the descriptors located in the DRL ought not to be wrenched out of historical context to support a statutory requirement that is otherwise lacking in express support in the text of the relevant statutes.[4]

[4] Indeed, the very terms "husband" and "wife"—to which the Department attaches so much significance, *see* DOH Mem. at 6-9—have undergone dramatic changes over time. *Compare, e.g., Robinson v. Rivers*, 9 Abb. Pr. (N.S.) 144 (N.Y. Ct. Common Pleas 1870) (noting that a wife's "inability to contract . . . remains as it stood at the common law . . . [h]er husband is the only one answerable upon [her] contracts[]"), *with Phillips v. Phillips*, 1 A.D.2d 393, 395, 150 N.Y.S.2d 646, 649 (1st Dep't) ("The position of the wife has changed . . . . 'From her old position as an identity merged in [her husband's] and not separable from him, she has advanced to a position of independence in most respects fully equal from him.'"), *aff'd*, 2 N.Y.2d 742, 138 N.E.2d 738, 157 N.Y.S.2d 378 (1956). Far from being static, the concept of what it means to be a husband or a wife under New York law has evolved to meet devcloping social mores and understandings. Similarly, the Court of Appeals has acknowledged that interpretation of the term "family" as used in a provision of the EPTL, must "find [a] foundation *in the reality of*

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Because Petitioners have shown that the DRL does not *require* a construction under which same-sex marriages are prohibited—and because Respondents do not contradict the core evidence presented by Petitioners in support of their statutory claims—the proper course, in light of the avoidance canon, is for the Court to embrace Petitioners' interpretation.

C. The Precedents Upon Which Respondents Rely Are Inapposite

The Department struggles to find support for its reading of the DRL by mining the decisional law of the New York courts. *See* DOH Mem. at 10-12. Yet it fails to identify even a single decision from any New York court holding that only opposite-sex couples may marry. Three of the cases upon which the Department relies are simply not on point. *See Matter of Cooper*, 187 A.D.2d 128, 592 N.Y.S.2d 797 (2d Dep't 1993) (considering whether "spousal-type" relationships create a right of election against a decedent's will); *Matter of Adoption of Robert Paul P.*, 63 N.Y.2d 233, 471 N.E.2d 424, 481 N.Y.S.2d 652 (1984) (considering whether a 57-year-old man may adopt his 50 year old male partner); *Frances B. v. Mark B.*, 78 Misc. 2d 112, 355 N.Y.S.2d 712 (Sup. Ct. Kings County 1974) (considering whether a marriage may be annulled on the ground that a party fraudulently misrepresented her gender). None of these cases required the courts to decide whether same-sex couples are permitted to marry.[5] Two other

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family life." *Braschi v. Stahl Assocs. Co.*, 74 N.Y.2d 201, 211, 543 N.E.2d 49, 53, 544 N.Y.S.2d 784, 789 (1989) (emphasis added). *See also Langan v. St. Vincent's Hosp.*, 196 Misc. 2d 440, 452-53, 765 N.Y.S.2d 411, 420-21 (Sup. Ct. Nassau County 2003) (holding that same-sex couples qualify as "spouses" under EPTL 4-1.1, while "acknowled[ing] that at the time the wrongful death statutes were written, the use of the term spouse did not envision inclusion of a same-sex marital partner.").

[5] The closest the Department comes to identifying square support for its reading of the DRL is *Anonymous v. Anonymous*, 67 Misc. 2d 982, 984, 325 N.Y.S.2d 499, 500-01 (Sup. Ct. Queens County 1971), in which the court deemed void a marriage between two men, one of whom was under the mistaken impression, at the time the couple was married, that the other was a woman. As the Attorney General has noted, however, "*Anonymous* . . . [is] not dispositive of the question presented" because it "rest[s] in part on the assumption that marriage exists for the purposes of

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passages relied upon by the Department to support the claim that New York law prohibits same sex marriage are found in *dissenting opinions* in cases in which the right of same-sex couples to marry was not at issue. *See* DOH Mem. at 10, 11 (citing *Raum v. Restaurant Assocs., Inc.*, 252 A.D.2d 369, 675 N.Y.S.2d 343 (1st Dep't 1998) (considering whether "spousal-type" same-sex couples have standing to bring wrongful death suits) (Rosenberger, J., dissenting); *Levin v. Yeshiva Univ.*, 96 N.Y.2d 484, 754 N.E.2d 1099, 730 N.Y.S.2d 15 (2001) (considering whether university housing policy favoring married couples discriminates on the basis of sexual orientation) (Kaye, C.J. dissenting in part)).[6]

Moreover, the Department's reliance on *Storrs v. Holcomb*, 168 Misc. 2d 898, 899, 645 N.Y.S.2d 286, 287 (Sup. Ct. Tompkins County 1996), *see* DOH Mem. at 10-11, is entirely inappropriate. An appellate division panel dismissed the *Storrs* case on appeal due to plaintiff's failure to join a necessary party, and the trial court decision therefore has no precedential effect. *See Langan v. St. Vincent's Hosp.*, 196 Misc. 2d 440, 454-55, 765 N.Y.S.2d 411, 422 (Sup. Ct. Nassau County 2003) ("With respect to *Matter of Storrs v. Holcomb* . . . the case does not stand as authority for any proposition, as the Appellate Division affirmed the dismissal, but on the procedural grounds that a necessary party had not been joined.").[7]

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fostering procreation" even though "physical incapacity, for the purposes of voiding marriage under DRL section 7(3), does not include the inability to bear children." Op. Atty. Gen. March 3, 2004, at 12.

[6] The Attorney General has likewise conceded that, for purposes of assessing the New York courts' approach toward same-sex marriage, "*Raum* and *Cooper* are of limited utility . . . , because the . . . same-sex partners in those cases did not claim any statutory right to marry under the DRL." Op. Atty. Gen. March 3, 2004, at 14.

[7] The non-binding nature of the trial court's decision in *Storrs* is rooted in elementary rules of appellate procedure. Having concluded that the case was subject to dismissal on procedural grounds, the appellate division had no occasion—indeed, it would have been inappropriate—to take up the merits of the trial court judgment. The only binding decision in *Storrs* comes from

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Taken together, these snippets of dicta, loose language from dissenting opinions in cases not squarely on point, and passages from a trial court opinion that has been uprooted by the appellate division, add little (if any) weight to Respondents' case. To the contrary, these cases serve only to highlight that no authoritative precedent construing the DRL to prohibit same-sex marriage exists.[8] And, in any event, to the extent that Respondents' arguments relating to the proper construction of the DRL suggest that *competing* interpretations of the applicable statutes are available—*i.e.*, that there is doubt as to whether New York law is best understood to authorize or prohibit same-sex marriage—the avoidance canon requires that Respondents' constitutionally troubling reading of the DRL be rejected.

II. RESPONDENTS FAIL TO DEMONSTRATE THAT DENYING SAME-SEX COUPLES THE RIGHT TO MARRY IS RATIONALLY RELATED TO A LEGITIMATE GOVERNMENT INTEREST

The Department offers two arguments to support its claim that the denial of marriage rights to same-sex couples is supported by a rational basis. First, it asserts an interest in harmonizing New York law with the practices of other states and the federal government, which do not recognize same-sex marriages. *See* DOH Mem. at 2, 23-25. Second, the Department claims that "[t]he State has legitimate interests in preserving th[e] historic and cultural understanding of marriage[,]" and emphasizes "the tradition of heterosexual marriage as a social institution in which procreation occurs." *Id.* at 25, 26; *see generally id.* at 25-28. Neither of

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the final court to have adjudicated the dispute—the Third Department. Hence the Department's contention that "*Storrs* has such value as this Court would give to a decision of any court of coordinate jurisdiction[,]" DOH Mem. at 11 n.3, is baseless.

[8] In contrast, at least one New York court has noted that "Section 13 of the [DRL] has no requirement that applicants for a marriage license be of different sexes." *In re Petri*, N.Y.L.J. April 4, 1994 at 29 (N.Y. Sup. Ct. N.Y. County Apr. 4, 1994).

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these claims withstands scrutiny. *See People v. West*, No. 04030054, Slip Op. at 2 (N.Y. Justice Court County of Ulster June 10, 2004) [attached hereto as Exhibit A] (dismissing prosecution against Mayor of New Paltz, New York for solemnizing same-sex marriages, concluding that the prohibition against same-sex marriages is unconstitutional, and noting that "none of the reasons stated in opposition to same-sex marriage is paramount to the equal protection guarantee enshrined in the [New York] and federal constitutions.").

A. The Content of New York Constitutional Law Cannot Be Held Hostage to the Statutory Regimes of Other Jurisdictions

The Department asks this Court to uphold the denial of marriage licenses to same-sex couples on the ground that the narrow construction of the term "marriage" it advances "reflects the reality that the legal status of same-sex couples differs from that of opposite-sex married couples." DOH Mem. at 25. This reality, the Department explains, is reflected in the fact that forty states as well as the federal government explicitly prohibit same-sex marriages and/or deny recognition to such marriages performed elsewhere. *See id.* at 23-24. The Department further insists that "[t]hese substantive differences in legal status make it rational to call the license issued to opposite-sex couples alone a 'marriage license.'" *Id.* at 25.

The Department cites no authority whatever to support its claim that the demands of the New York Constitution must bow to consistency with federal statutes or to the dictates of other states' constitutions and laws; and there is none. Indeed, the New York Court of Appeals has expressly held to the contrary. In *New York v. P.J. Video, Inc.*, 68 N.Y.2d 296, 304, 501 N.E.2d 556, 561, 508 N.Y.S.2d 907, 912 (1986), the Court of Appeals explained that "[w]hen weighed against the ability to protect fundamental constitutional rights, the practical need for uniformity can seldom be a decisive factor." And, in *People v. Scott*, 79 N.Y.2d 474, 490, 593 N.E.2d 1328, 1338, 583 N.Y.S.2d 920, 930 (1992), the Court of Appeals "decline[d] to adopt any rigid method

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of analysis which would, except in unusual circumstances, require us to interpret provisions of the State's Constitution in 'Lockstep' with the Supreme Court's interpretations of . . . the Federal Constitution."[9]

Furthermore, New York marriage law already is demonstrably not harmonized with the law of other jurisdictions. First, as the Attorney General has recognized (and as the only New York court to have addressed the issue has concluded), "New York law presumptively requires that parties to [same-sex] unions [celebrated outside of New York] must be treated as spouses for purposes of New York law." Op. Atty. Gen., March 3, 2004 at 28. *See also Langan*, 196 Misc. 2d at 455, 765 N.Y.S.2d at 421 (holding that parties to a Vermont civil union must be treated as "spouses" for purposes of New York law and that denial of such recognition would violate the New York Constitution's Equal Protection Clause). If New York had a genuine interest in harmonizing its practice with the practices of the majority of states—which do not currently recognize same-sex unions—New York would likewise refuse to give legal effect to such unions.

Similarly, New York permits first-cousins to marry notwithstanding the fact that such marriages are explicitly prohibited in thirty states, *see* DRL § 5 (excluding first-cousin marriages from the list of incestuous marriages), and "New York is the only jurisdiction which does not have a true no-fault divorce." *Melnick v. Melnick*, 146 A.D.2d 538, 542, 538 N.Y.S.2d 441, 443 (1st Dep't 1989) (Asch, J., concurring). *See also Scheu v. Vargas*, No. 210328, 2004 WL 1218979, at *1 (Sup. Ct. Rensselaer County May 28, 2004) (quoting *Schine v. Schine*, 31 N.Y.2d 113, 116, 286 N.E. 2d 449, 450, 335 N.Y.S.2d 58, 59 (1972)). It is simply impossible to

[9] *See also Goodridge v. Department of Pub. Health*, 798 N.E.2d 941, 967 (Mass. 2003) ("We would not presume to dictate how another State should respond to today's decision. But neither should considerations of comity prevent us from according Massachusetts residents that full measure of protection available under the Massachusetts Constitution.").

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reconcile these aspects of New York practice relating to marriage and divorce with the notion that the State has an overriding in interest in bringing the DRL in line with the laws of other jurisdictions. *See Baker v. State*, 744 A.2d 864, 885 (Vt. 1999) ("[T]he State's argument that [its] marriage laws serve a substantial governmental interest in maintaining uniformity with other jurisdictions cannot be reconciled with [its] recognition of unions . . . not uniformly sanctioned in other states. . . . [T]he State's claim that [its] marriage laws were adopted because the Legislature sought to conform to those of the other forty-nine states is . . . refuted by two relevant legislative choices which demonstrate that uniformity with other jurisdictions has not been a governmental purpose").[10]

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[10] The Department urges this Court to ignore decisions from other states that have determined that denying same-sex couples the right to marry (Massachusetts), or access to the same rights and benefits as married couples (Vermont), is unconstitutional. The Department argues, in this respect, that the protections of the Massachusetts and Vermont state constitutions are broader than the protections afforded under the federal constitution. *See* DOH Mem. at 30-32. But even assuming this assertion is correct, it is insufficient to distinguish those cases from this one.

First, as noted in Petitioners' principal brief (Mem. at 20-21 & n.10), the New York Court of Appeals has confirmed that *this State's Constitution*, including its Equal Protection and Due Process Clauses, has likewise been construed to afford greater protections than its federal counterpart. *See People v. Scott*, 79 N.Y.2d 474, 490, 593 N.E.2d 1328, 1338, 583 N.Y.S.2d 920, 930 (1992); *Sharrock v. Dell Buick-Cadillac, Inc.*, 45 N.Y.2d 152, 159-60, 379 N.E.2d 1169, 1174, 408 N.Y.S.2d 39, 43-44 (1978).

Second, the Department's claim that "[u]nder the Common Benefits Clause [of the Vermont Constitution], there is no presumption in favor of the constitutionality of [a] statute[,]" DOH Mem. at 30, is simply wrong. *See Baker*, 744 A.2d at 872 (noting that applicable standard of review "did not override the traditional deference accorded legislation having any reasonable relation to a legitimate public purpose").

Finally, even if it were not the case that New York, Vermont, and Massachusetts law were similarly protective of constitutional rights, the Department misunderstands Petitioners' reliance on extra-jurisdictional case law. Whatever form of words other jurisdictions rely upon to define the contours of the constitutional rights at stake and the applicable standard of review, cases from those jurisdictions robustly support the notion—common and crucial to analysis under the precedents of those states and New York case law—that the justifications that have been proffered in support of the denial of marriage rights (or the rights and benefits of married

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Finally, and most fundamentally, in addition to failing as a matter of precedent and practice, the Department's reasoning misunderstands the very nature of constitutional rights and turns the process of judicial review on its head. The essence of a constitutional right is that it stands as a bulwark against the oppressive practices of the majority. *See* The Federalist No. 78, at 469 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasizing that it is the role of judges "to guard the Constitution and the rights of individuals from the effects of those ill humors which . . . sometimes disseminate among the people themselves, and which . . . have a tendency . . . to occasion . . . serious oppressions of the minor party in the community."). To assert that a majority in this or other jurisdictions has chosen to deny benefits to a discrete group of persons is to beg the question of whether constitutional protection is available, not to answer it. The challenge for a court addressing a question of constitutional right is not simply to identify that which *is*; it is to determine whether that which is, is *constitutionally permissible*.

B. The Asserted Interest in Preserving the "Traditional" Definition of Marriage as Between a Man and a Woman Is Not a Constitutionally Adequate Justification for Denying Same-Sex Couples the Right to Marry

The Department attempts to justify the denial of marriage licenses to Petitioners by asserting that "[t]hroughout history and across cultures, the law has protected opposite-sex marriages because of the societal benefits they are recognized to provide[,]" and by arguing that "[t]he State has legitimate interests in preserving this historical legal and cultural understanding of marriage." DOH Mem. at 25, 26. This argument proceeds from the dubious premise that New York recognizes a doctrine of constitutional adverse possession under which intrusion on a constitutional right, if practiced for long enough, is sufficient to dissolve the right itself. This

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couples) to same-sex couples are not rational. *See Baker*, 744 A.2d at 881, 886; *Goodridge*, 798 N.E.2d at 968. The conclusion of irrationality is one of logic; it does not turn on the niceties of the legal formulae guiding the courts' analyses.

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premise is both unsupported by precedent and seriously undermined by the Supreme Court's recent landmark decision in *Lawrence v. Texas*, 123 S. Ct. 2472 (2003).

The Department contends that "New York judicial decisions have consistently recognized the significance of the tradition of heterosexual marriage . . . ." DOH Mem. at 25. But it musters only two cases from the entire history of the decisional law of this State to support its claim, and even the two cases upon which the Department relies provide scant support for the proposition it seeks to advance. *Storrs v. Holcomb*, as noted above, *see supra*, p.10, has no precedential effect whatever. *Matter of Cooper*, 187 A.D.2d 128, 592 N.Y.S.2d 797 (2d Dep't 1993), meanwhile, which concerned whether "spousal-type" relationships create a right of election against a decedent's will, does not address the question presented here. As the Attorney General has noted,..."*Cooper* [is] of limited utility here, because the . . . same-sex partners in [that] case[] did not claim any statutory right to marry under the DRL." Op. Atty. Gen., March 3, 2004, at 14.[11]

Notably, the Department says nothing about the body of New York case law cited in Petitioners' initial brief which (1) explicitly rejects the notion that traditional practices and sensibilities are somehow immune from constitutional challenge, and (2) demonstrates that the "traditional" definition of family has evolved dramatically over the years, including through recognition of the legitimacy of same-sex relationships (Mem. at 22-24). Nor does the Department acknowledge—as the Attorney General previously has—that the facets of New York law "recogniz[ing] the legitimacy of committed same-sex relationships . . . draw[] into question

[11] Of course, given that the party in *Cooper* did not even claim a right to marry under the DRL, the constitutional questions at stake here were not raised in that case.

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the State's interest in maintaining the historical understanding of marriage as confined to opposite-sex partners." Op. Atty. Gen. March 3, 2004, at 19.

Even if the New York courts had acknowledged an interest in preserving the "traditional" definition of marriage as limited to opposite-sex couples, the reasoning in the Supreme Court's recent decision in *Lawrence v. Texas* signals that any such interest is not constitutionally cognizable. *Lawrence* holds that "the fact that the governing majority in a State has *traditionally* viewed a particular practice as immoral *is not a sufficient reason for upholding a law prohibiting the practice.*" *Lawrence*, 123 S. Ct. at 2483 (internal quotation marks and citation omitted) (emphases added). *See also Perez v. Sharp*, 198 P.2d 17, 27 (Cal. 1948) ("Certainly the fact alone that . . . discrimination has been sanctioned by the state for many years does not supply justification."). In other words, the passage of time cannot legitimate a practice of denying a group equal protection of the laws.

The Department struggles to distinguish *Lawrence* by insisting that "the State's interest in preserving the traditional definition of 'marriage' cannot be equated with moral disapproval of homosexuality." DOH Mem. at 27-28. But the Department offers no account of what, exactly, the "traditional" prohibition against same-sex marriage is if not an expression of moral disapproval of such unions. As Justice Scalia explained in his dissenting opinion in *Lawrence*, "'preserving the traditional institution of marriage' is just a kinder way of describing the State's *moral disapproval* of same-sex couples[.]" *Lawrence*, 123 S. Ct. at 2496 (Scalia, J., dissenting) (emphasis in original).[12]

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[12] It bears repeating that *Lawrence* stands not only for the proposition that moral disapproval of a practice does not provide a rational basis for its prohibition; rather, *Lawrence* clearly states that "tradition" is a constitutionally insufficient foundation for any such prohibition. *Id.* at 2483. Hence, even if societal moral disapproval of a practice could be distinguished from a societal

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C. The Department's Claims Relating to the State's Interest in Procreation Are Unpersuasive

The Department also alludes to the notion (without squarely defending it) that the State's interest in fostering procreation provides a rational basis for the prohibition of same-sex marriages. *See* DOH Mem. at 25 (mentioning "the tradition of heterosexual marriage as a social institution in which procreation occurs."). That the Department advances this argument only half-heartedly is unsurprising for, as the Attorney General has already noted, it has long been held that "incapacity to bear children" is not a grounds for voiding a marriage under the DRL and, hence, the existence of a State interest in using the marriage laws as a lever for promoting procreation is highly questionable. Op. Atty. Gen. March 3, 2004, at 17. Indeed, save the inapposite decision in *Matter of Cooper*, the Department fails to cite even a single New York case supporting either the narrow claim that the procreation interest can justify a prohibition on same-sex marriage or the more general notion that New York's laws pertaining to marriage are at all related to an interest in promoting procreation.

Moreover, the Department does not dispute Petitioners' claim that New York's purported interest in promoting procreation through marriage cannot be reconciled with the fact that (1) under New York law, neither the elderly nor the infertile—neither of whom can beget children—are prohibited from marrying, and (2) many members of same-sex couples have biological children (Mem. at 27-28). Nor does the Department contradict Petitioners' claim that other state courts have rejected parallel arguments on precisely this ground (Mem. at 28-29 (citing *Goodridge*, 798 N.E.2d at 961; *Baker*, 744 A.2d at 881)).

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tradition of prohibiting that practice, this has no bearing on whether and how the reasoning in *Lawrence* applies to this case.

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Rather than confronting Petitioners' arguments directly, the Department insists that the radical over- and under-inclusiveness of the regulatory scheme it envisions "does not undermine its constitutionality." DOH Mem. at 29. "Where rationality is the test," the Department claims, "a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect." *Id.* (quoting *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 316 (1976). The Department further claims that "[a] classification does not fail rational-basis review because it is not made with mathematical nicety or because in practice it results in some inequality." *Id.* At 22-23 (quoting *Heller v. Doe*, 509 U.S 312, 321) (1993).

But the fact that a scheme of regulation need not be tailored with perfect precision to an asserted government interest in order to survive rational-basis review is of no help to Respondents. For the regulatory scheme they urge is not simply an "imperfect" means of serving the asserted state interest in procreation, nor does it reflect a mere failure to draw regulatory lines with "mathematical nicety." Instead, the regulatory regime the Department seeks to defend is entirely arbitrary as a means of fostering procreation. While imperfection and mathematical imprecision may be constitutionally tolerable, arbitrariness and invidious discrimination are not. *See, e.g., People v. Pacheco*, 73 A.D.2d 370, 372-73, 426 N.Y.S.2d 57, 59 (2d Dep't 1980) (noting that while New York's "equal protection clause does not mandate absolute equality of treatment[,]" it does prohibit classifications that are "so disparate as to be deemed arbitrary []or invidiously discriminatory."), *aff'd*, 53 N.Y.2d 663, 421 N.E.2d 114, 438 N.Y.S.2d 994 (1981); *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 83 (1988) ("[A]rbitrary and irrational discrimination violates the Equal Protection Clause under even our most deferential standard of review.").

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III. THE DEPARTMENT EVADES THE QUESTION OF WHETHER SAME-SEX COUPLES HAVE A FUNDAMENTAL RIGHT TO MARRY

The Department concedes that the right to marry is fundamental, DOH Mem. at 36, and that where a "statutory scheme . . . burdens a fundamental right, . . . strict scrutiny will apply[.]" *Id.* at 33. It concludes, nevertheless, that even if construed to prohibit Petitioners from marrying the partners of their choosing, the DRL does not infringe on any fundamental right (and, as a corollary, does not trigger heightened scrutiny) because "what [Petitioners] propose is not a marriage." *Id.* at 36 (quoting *Jones v. Hallahan*, 501 S.W.2d 588, 590 (Ky. 1973)). This reasoning is entirely circular; both the premise and the conclusion of the Department's argument is that same-sex couples are not permitted to marry. *See Baehr v. Lewin*, 852 P.2d 44, 61 (Haw. 1993) ("[Appellee] proposes that the right of persons of the same sex to marry one another does not exist because marriage, by definition and usage, means a special relationship between a man and a woman. We believe [appellee's] argument to be circular and unpersuasive") (internal quotation marks omitted); *Goodridge*, 798 N.E.2d at 961 n.23 ("[I]t is circular reasoning, not analysis, to maintain that marriage must remain a heterosexual institution because that is what it historically has been.").[13] Petitioners' claims cannot be disposed of through this exercise in definitional fiat; instead, they require this Court to consider whether Petitioners' relationships bear the hallmarks—the *fundaments*—of the long-recognized right to marry.

The Department recognizes "that petitioners and their families are entitled to dignity and respect, that children raised in those families can thrive, and that same-sex couples can be as committed, stable, loving and nurturing as opposite-sex couples." DOH Mem. at 1.

[13] *See also Goodridge*, 798 N.E.2d at 972-73 (Greaney, J., concurring) ("To define the institution of marriage by the characteristics of those to whom it always has been accessible, in order to justify the exclusion of those to whom it never has been accessible, is conclusory and bypasses the core question we are asked to decide.").

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Furthermore, the Department does not "dispute the descriptions of petitioners and their relationships set forth in the petition[,]" *id.*—that Petitioners are members of committed couples who intend to spend their lives together, are financially interdependent, share in parenting and childcare responsibilities, and provide emotional support for one another. Verified Petition at 2, 4-9. These concessions are sufficient to demonstrate that Petitioners' relationships fall within the ambit of the constitutional right to marry; for a long line of cases from this State and myriad other jurisdictions confirms that the above-mentioned characteristics of Petitioners' relationships *are* the very fundaments of marriage "deeply rooted in this Nation's history," *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997).

The New York courts have long recognized that the essence of marriage and, as a corollary, of the constitutional right to marry, is the existence of an enduring partnership based on mutual love, trust, and intimacy:

> Marriage is the cornerstone of the family. It is a recognized fundamental right and a relationship favored in the law. . . . It is also more—much more. "[It] is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions."

People v. De Stefano, 121 Misc. 2d 113, 121, 467 N.Y.S.2d 506, 513 (County Ct. Suffolk County 1983) (internal citations and emphasis omitted) (quoting *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965)). *See also Tomasino v. New York State Employees Ret. Sys.*, 87 A.D.2d 675, 676, 448 N.Y.S.2d 819, 821 (3d Dep't) (characterizing as an "ideal marriage" a relationship in which the parties were "interdependent and deeply devoted each to the other and real partners"), *aff'd*, 57 N.Y.2d 753, 440 N.E.2d 1330, 454 N.Y.S.2d 983 (1982); *People v. Suarez*, 148 Misc. 2d 95, 96, 560 N.Y.S.2d 68, 69 (Sup. Ct. N.Y. County 1990) (noting that one of "the

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goals of the institution of marriage" is "enabling couples to communicate deepest feelings to each other[.]"). The U.S. Supreme Court, moreover, has explained that "marriages . . . are expressions of emotional support and public commitment" and that "[t]hese elements are an important and significant aspect of the marital relationship." *Turner v. Safley*, 482 U.S. 78, 95-96 (1987). Other jurisdictions likewise describe that which is fundamental about marriage with reference to the nature of the relationships at issue. *See, e.g., Goodridge*, 798 N.E.2d at 954-55 (emphasizing that civil marriage "fulfills yearnings for security, safe haven, and connection that express our common humanity" and is "at once a deeply personal commitment to another human being and a highly public celebration of the ideals of mutuality, companionship, intimacy, fidelity, and family."); *Mendillo v. Board of Educ. of Town of East Haddam*, 717 A.2d 1177, 1195 (Conn. 1998) ("[T]he spousal relationship is based on notions of commitment between adults. [T]he formal marriage relation forms the necessary touchstone to determine the strength of commitment between the two individuals . . . ") (internal quotation marks omitted) (second alteration in original).

These cases and many others like them demonstrate that the essence of marriage rests in the character of a couple's relationship, not in the gender or sexual orientation of those who choose to marry. What is celebrated about marriage—in our culture and in our casebooks—is the love and commitment reflected in a couple's decision to join together. Such love and commitment are not the unique province of opposite-sex relationships. And once it is conceded—as it has been in this case—that committed same-sex relationships bear all of the emotional and interpersonal hallmarks our society associates with the unions we label "marriages," the justifications for excluding same-sex couples from this vital institution collapse. As the Attorney General has explained, "New York law has recognized the legitimacy of

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committed same-sex relationships in numerous ways, [and this draws] into question the State's interest in maintaining the historical understanding of marriage as confined to opposite-sex partners." Op. Atty. Gen. March 3, 2004, at 19.

The Department, however, rejects the notion that the fundamentality of marriage is rooted in the nature of the relationship rather than the gender of its members. They ask this Court to focus its fundamental rights analysis not on whether committed same-sex relationships are characterologically similar to traditional marriages, but on whether marriage, traditionally, has included same-sex couples. *See* DOH Mem. at 34 ("[P]etitioners cannot seriously contend that civil marriage of same-sex couples is a right so rooted in the Nation's history and tradition as to be fundamental.").

This approach to analyzing the fundamental right to marry is foreclosed by precedent. In *Loving v. Virginia*, 388 U.S. 1 (1967), in the course of deciding that Virginia's anti-miscegenation law violated appellants' fundamental right to marry, the Supreme Court did not inquire whether civil marriage of interracial couples is a right so rooted in the Nation's history and tradition as to be fundamental. Instead, the Court assessed whether the "freedom to marry[,]" *id.* at 12, is fundamental and whether there was adequate justification for denying this freedom to the couple before it. It is no answer to say that "what [Petitioners here] propose is not a marriage[,]" while the appellants in *Loving* sought to vindicate "a fundamental right to opposite-sex marriage that already existed." DOH Mem. at 36. This is an anachronistic reading of *Loving*. At the time the decision in *Loving* was rendered, sixteen states prohibited interracial marriage and, only fifteen years earlier, the laws of thirty states included such a prohibition. *See Loving*, 388 U.S. at 6 n.5. Hence, Virginia might easily have argued that "what [the Lovings] propose is not a marriage[,]" for what the Lovings sought unmistakably was *not* a marriage in the

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many states (including Virginia) in which interracial unions were forbidden and in which the very term "interracial marriage" was legally meaningless.[14]

Yet the lack of an established tradition of interracial marriage proved not to be dispositive in *Loving*, just as the lack of an established tradition of same-sex marriage cannot be dispositive here. The *Loving* Court declined the State's invitation to conceptualize the fundamental right at stake as anything narrower than the "freedom to marry." *Loving*, 388 U.S. at 12. Petitioners ask this Court to duplicate the analysis in that case—to recognize that it is the right of consenting adults to marry that is fundamental, not the right to marry someone of one's own race or of another gender. *See Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743, at *4 (Alaska Super. Ct. Feb. 27, 1998) ("The relevant question is not whether same-sex marriage is so rooted in our traditions that it is a fundamental right, but whether the freedom to choose one's own life partner is so rooted in our traditions.").[15]

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[14] Indeed, the intensity of opposition to the concept of interracial marriage is reflected in the opinion of the trial judge in the *Loving* case: "'Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. . . . The fact that he separated the races shows that he did not intend for the races to mix.'" *Loving*, 388 U.S. at 3.

[15] Respondents' argument gains no traction from their catalogue of several states' constitutional amendments limiting the right to marry. *See* DOH Mem. at 35. In fact, these amendments suggest, at minimum, ambiguity regarding the scope of the relevant states' constitutional protection of same-sex marriage rights absent such rights-restricting amendments.

Respondents' reliance on case law from other jurisdictions to support their narrow conception of the fundamental right to marry is also misguided. *See id.* at 34-35. In three of these cases, the contours of the States' fundamental right to marry is inextricably linked to the states' interests in fostering procreation. *See Dean v. District of Columbia*, 653 A.2d 307, 333 (D.C. Ct. App. 1995); *Singer v. Hara*, 522 P.2d 1187, 1195 (Wash. Ct. App. 1974); *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971). As discussed earlier, *see supra* pp. 18-19, the interest in procreation provides an inadequate foundation for limiting the fundamental right to marry opposite-sex couples.

Finally, reliance on cases from other jurisdictions to argue for a narrow conception of the right to marry is particularly inappropriate. As noted earlier, *see, supra*, n.10; the New York

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Finally, Respondents' suggestion that it is for the Legislature, and not the courts, to define the scope of the right to marry in New York is ill-considered. The Attorney General has already conceded that the constitutional questions at issue here are "best resolved by the courts of this State." Op. Atty. Gen. March 3 2004, at 27. More fundamentally, the Department's suggestion runs headlong into perhaps the most venerable principle of American constitutional law, namely that it "is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (Cranch) 137, 177 (1803) (emphasis added). While the Legislature is, of course, authorized to regulate marriage, it is this Court to assure that the Legislature does not overstep its constitutional bounds.

IV. THE DEPARTMENT'S EFFORTS TO AVOID HEIGHTENED SCRUTINY UNDER THE NEW YORK CONSTITUTION'S EQUAL PROTECTION CLAUSE ARE UNPERSUASIVE

A. Respondents Offer No Sound Basis for Rejecting Petitioners' Claim that Classifications based on Sexual Orientation Are Suspect

The Department presents two arguments in support of its claim that statutory classifications based on sexual orientation ought not to be subjected to heightened scrutiny. *First*, the Department asserts that "the overwhelming majority of federal and state courts have declined to recognize sexual orientation as a suspect classification." DOH Mem. at 19. But every one of the cases upon which the Department relies for this proposition is grounded squarely in the Supreme Court's discredited decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986). *See Schroeder v. Hamilton Sch. Dist.*, 282 F.3d 946, 950-51 (7th Cir. 2002) (citing *Bowers* for the proposition that "homosexuals do not enjoy any heightened protection under the

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courts have long recognized that the protections for individual rights and liberties provided under this State's Constitution are even broader than those provided under the federal Constitution.

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Constitution"); *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289, 292-93 (6th Cir. 1997) ("under *Bowers* . . . homosexuals did not constitute either a 'suspect class' or a 'quasi-suspect class' because the conduct which defined them as homosexuals was constitutionally proscribable"); *Baker v. State*, 744 A.2d 864, 878 n.10 (Vt. 1999) (relying on cases from the U.S. Courts of Appeals which, in turn, rely on *Bowers*, to support the proposition that the "overwhelming majority" of courts have refused to treat homosexuality as a suspect classification) (citing, *inter alia*, *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989); *Equality Found.*, 128 F.3d at 292-93; *High Tech Gays v. Defense Industrial Security Clearance Office*, 895 F.2d 563, 571 (9th Cir.1990)); *Lewis v. Harris*, No. MER-L-15-03, 2003 WL 23191114, at *7 (N.J. Super. Nov. 5, 2003) (similar).

The Supreme Court's decisive overruling of *Bowers* in *Lawrence v. Texas*, 123 S. Ct. 2472 (2003), drains these cases entirely of their precedential value. At present, then, the only case cited by the Department in connection with this question that remains on solid precedential ground is *Tanner v. Oregon Health Sciences University*, 971 P.2d 435, 447 (Or. Ct. App. 1998), in which the Oregon Court of Appeals concluded that statutory classifications on the basis of sexual orientation *are* suspect and, hence, subject to heightened scrutiny.

Second, the Department insists that recent legislation "creating and recognizing a broad array of rights for gay men and lesbians," indicates that homosexuals "cannot be viewed as politically powerless in New York." DOH Mem. at 29. This supposed political power, the Department argues, is sufficient to disqualify homosexuals from heightened scrutiny under New

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York's Equal Protection Clause.[16] The Department badly misapprehends the mechanics of suspect classification analysis.

The Department infers from the recent passage of laws designed to prevent discrimination on the basis of sexual orientation, that homosexuals cannot be deemed "politically powerless" in the constitutionally relevant sense. This is simply wrong; securing the passage of rights-protective legislation demonstrably does not disqualify a group from suspect-class status. This is evident from the fact that statutory classifications predicated on race or gender were first deemed by the U.S. Supreme Court to be suspect long *after* the passage of significant legislation safeguarding the civil rights of these groups. Thus, racial minorities were explicitly protected from certain forms of discrimination through the Civil Rights Acts of 1866 and 1870,[17] yet it was not until sometime after Justice Stone authored the famous footnote in *United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938), that the Supreme Court began applying strict scrutiny to government classifications on the basis of race. Women, similarly, already enjoyed the protections of the Equal Pay Act of 1963 and the Civil Rights Act of 1964 when the Supreme

[16] Notably, the Department does not challenge Petitioners' claims that (1) homosexuals have been subjected to a long history of purposeful unequal treatment because of their sexual orientation (Mem. at 34), (2) sexual orientation has no relevance to an individual's ability to function in or contribute to society, *id.* at 35, and (3) sexual orientation is an immutable characteristic, *id.* Thus, they effectively concede that all of the doctrinal prerequisites for suspect classification status—save political powerlessness—are satisfied in this case.

[17] *See* Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (1866) (providing that "citizens[] of every race and color . . . shall have the same right . . . to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens[.]"); Civil Rights Act of 1870, ch. 114, § 16, 16 Stat. 144 (1870) (similar).

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Court determined, in *Frontiero v. Richardson*, 411 U.S. 677, 687-88 (1973), that "classifications based upon sex . . . are inherently suspect."[18]

Hence, the relevant question, for constitutional purposes, is not whether homosexuals are entirely devoid (either formally or practically) of access to the political process (a standard which would surely disqualify both racial minorities and women from the protections of heightened scrutiny); rather, the question is whether homosexuals are sufficiently disadvantaged in the political process such that laws singling them out are likely to be predicated on prejudice, ignorance, or antipathy. *See City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440 (1985) (noting that "laws grounded in [suspect classifications] are deemed to reflect prejudice and antipathy"). Respondents cannot seriously argue that homosexuals are not subject to continuing prejudice and antipathy likely to create a disadvantage in the political process, and *this* is the touchstone of constitutionally cognizable "political powerlessness."[19]

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[18] Moreover, notwithstanding more recent progress by both racial minorities and women in securing increased political power and, with it, the passage of further legislation designed to eradicate race and sex discrimination, courts continue to apply heightened scrutiny to statutes that classify on either of these bases. *See, e.g., People v. Liberta*, 64 N.Y.2d 152, 167-73, 474 N.E.2d 567, 575-79, 485 N.Y.S.2d 207, 215-19 (1984) (applying heightened scrutiny to sex-based classification); *United States v. Virginia*, 518 U.S. 515, 531 (1996) (same); *Grutter v. Bollinger*, 539 U.S. 306, 326-27 (2003) (applying heightened scrutiny to race-based classification).

[19] The continued political powerlessness of gays is reflected by, among other things, the fact that New York voters have never elected an openly gay statewide official. Indeed, until 1990, no openly gay person had served in the New York Assembly, *see* Katherine Bishop, *Lesbians Clear Hurdles to Gain Posts of Power*, N.Y. Times, Dec. 30, 1990, § 1, at 12, and no openly gay person had served in the New York Senate until 1998, *see* Jodi Wilgoren, *In Albany, Openly Gay State Senator Tests Unfamiliar, Conservative Turf*, N.Y. Times, Jan. 10, 1999, § 1, at 22. At present, there is but one openly gay member of the New York State Senate and one openly gay member of the State Assembly. *See* Michael Slackman, *Same-Sex Marriage Blurs Lines on Both Sides of the Aisle*, N.Y. Times, Mar. 7, 2004, § 1, at 27 (one assemblywoman); Al Baker, *Looking to Courts, Albany Holds Its Peace on Same-Sex Marriage*, N.Y. Times, Feb. 22, 2004, at § 1, at 27 (one senator).

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B. The Department's Claim That Its Construction of the DRL Does Not Entail Classification on the Basis of Sex Cannot Be Reconciled with *Loving v. Virginia*

As emphasized in Petitioners principal brief (Mem. at 39-41), the Supreme Court has squarely held that a statute containing a suspect classification is not immune from heightened scrutiny simply because it burdens the relevant classes equally. *See Loving v. Virginia*, 388 U.S. at 8 ("[W]e reject the notion that the mere 'equal application' of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discriminations . . . . The mere fact of equal application does not mean that our analysis of these statutes should follow the approach we have taken in cases involving no racial discrimination . . . .").[20] Hence, the mere fact that, under Respondents' construction of the DRL, men and women are equally disabled from marrying a person of the same sex is insufficient to insulate the statutory scheme from heightened judicial scrutiny. Instead, because the question of whether an individual may marry a woman (under this reading of the DRL) turns entirely on whether that individual is male or female, heightened scrutiny is required.

Loving's clear instructions notwithstanding, the Department insists that there is no need for heightened scrutiny here because "[t]he applicable sections of the DRL do not deprive one gender of a right that is given to the other, or confer on one gender a benefit that the other is denied, or restrict one gender's conduct but not the other's[,]" there is no need for heightened

[20] *See also id.* at 9. ("In the case at bar, . . . we deal with statutes containing racial classifications, and the fact of equal application does not immunize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race.").

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scrutiny. DOH Mem. at 15.[21] The Department takes pains to persuade this Court to discard the methodology laid out by the *Loving* Court for determining whether a statute contains a suspect classification. It contends that (1) *Loving*'s analysis applies to race-based classifications only and not to other statutory classifications deemed suspect for purposes of equal protection analysis; (2) the fact that the statute at issue in *Loving* was enacted with discriminatory intent is sufficient to distinguish it from the DRL provisions at issue here; and (3) other state courts have rejected the analogy to *Loving* that Petitioners wish to draw. *Id.* at 16-17.

None of these arguments has merit. *First*, nothing in the text of the *Loving* opinion suggests that the methodology employed by the Court for determining whether the statute at issue contained a suspect classification is limited in its application to cases involving race. The passages upon which the Department relies, *see id.* at 16, reflect nothing more than the fact that, as an empirical matter, race—and not some other invidious classification— was at issue in that case.

Second, the Department cites no authority whatever (internal or external to *Loving*) for the proposition that classifications (racial or otherwise) that are explicitly written into state laws are subject to heightened scrutiny only upon a showing of discriminatory intent. This gloss on the Supreme Court's opinion is baseless.

Third, the Department vastly overstates the support for its reading of *Loving* that is purportedly provided by cases from other jurisdictions. Both *Lewis v. Harris*, No. MER-L-15-03, 2003 WL 23191114 (N.J. Super. Ct. Nov. 5, 2003), and *Morrison v. Sadler*, No. 49D13-0211-PL-001946, 2003 WL 23119998 (Ind. Super. Ct. May 7, 2003), are unpublished opinions;

[21] *See* DOH Mem. at 15 ("Both men and women have the same right: to obtain a license to marry someone of the other gender. Both men and women are subject to the same restriction. Neither a man nor a woman can obtain a license to marry someone of his or her own gender.").

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neither is binding precedent *even in its state of origin.*[22] And, the analysis of *Loving* in *Dean v. District of Columbia*, 653 A.2d 307 (D.C. Ct. App. 1995), upon which the Department misleadingly relies, is actually from a concurring opinion, *not* the opinion of the court. *See id.* at 363 n.2 (Steadman, J., concurring). Finally, the discussion in *Baker v. State*, 744 A.2d 864, 880 n.13 (Vt. 1999), of whether the state's exclusion of same-sex couples from the benefits of civil marriage constituted impermissible sex-based discrimination is dicta. That court ultimately held that there was no "reasonable and just basis for the continued exclusion of same-sex couples from the benefits incident to a civil marriage license under Vermont law[,]" and it determined that such couples were constitutionally entitled to these benefits. *Id.* at 886. Thus, the *Baker* court's analysis of the issue of sex-based classification was indisputably unnecessary to its decision.[23]

All that is left, then, of the Department's survey of case law exploring the applicability of *Loving*'s methodology to statutes restricting marriage rights to opposite-sex couples is a division of authority between *Singer v. Hara*, 522 P.2d 1187, 1191-92 (Wash. Ct. App. 1974) (concluding that such statutes do not merit heightened scrutiny), and *Baehr v. Lewin*, 852 P.2d 44, 64 (Haw. 1993) (deeming heightened scrutiny applicable to Hawaii's statutory scheme). And it is

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[22] *See* N.J. R. GEN. APPLICATION R. 1:36-3 (unpublished opinions lack precedential value); *Indiana High Sch. Athletic Ass'n v. Durham*, 748 N.E.2d 404 (Ind. Ct. App. 2001) (unpublished trial court opinions should not be cited as precedent).

[23] The Department also relies on the decision of Minnesota Supreme Court in *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971). However, as the Attorney General has already acknowledged, the decision in *Baker* "no longer carries any precedential value with respect to the federal Equal Protection Clause" because it predates the evolution of modern equal protection doctrine under which heightened scrutiny is applicable to sex-based classifications. Op. Atty. Gen. March 3. 2004, at 21.

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therefore hardly the case, that "the great weight of authority" supports the Department's reading of *Loving*. To the contrary, most of this "support" is no authority at all.

CONCLUSION

The Court should order the Town Clerk to issue the marriage licenses to which Petitioners are entitled.

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Dated: New York, New York
June 11, 2004

Respectfully submitted,

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JUSTICE COURT : TOWN OF NEW PALTZ
STATE OF NEW YORK : COUNTY OF ULSTER

People of the State of New York

-against-

DECISION AND ORDER
04030054

Jason West,

Defendant.

HON. JONATHAN D. KATZ

The Defendant is the mayor of the village of New Paltz charged with solemnizing marriages for individuals who had not obtained marriage licenses.

By Notice of Motion dated March 24, 2004, the defendant has moved to dismiss the Information charging him with multiple counts of the crime of solemnizing marriages without licenses in violation of sections 13 and 17 of New York's Domestic Relations Law (DRL). The essence of his argument is that the DRL licensing requirement is unconstitutional as applied because it has the effect of preventing same-sex marriages. If unconstitutional, then the Information charging under that section is defective within the meaning of Criminal Procedure Law (CPL) section 170.35 (1) (c), requiring its dismissal. CPL 170.30 (1) (a). In the alternative, the mayor asks for dismissal in the interests of justice, arguing that even if guilty there would be no just purpose served by his criminal conviction.

The People have expressly taken no position regarding same-sex marriage. The prosecution's principle argument is that this case presents only the simple question of whether the defendant violated DRL 13 and 17 by solemnizing marriages for people who had not been issued marriage licenses, a fact that is not in dispute. Nor is there a dispute

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over the fact that had they applied for licenses they would not have received them for the singular reason that the applicants were same-sex.

Town courts have jurisdiction to dismiss criminal charges on the grounds that the law defining the violation charged is unconstitutional. People v. Waterloo Stock Car Corp., 89 Misc.2d 922, 392 N.Y.S.2d 839 (1977); People v. Merksamer, 139 Misc.2d 987, 529 N.Y.S.2d 941. CPL 170.30 (1) (a); CPL 170.35 (1) (c). The defendant's dismissal motion is authorized by CPL170.30 (1) (a); CPL 170.35 (1) (c) as a way of challenging the constitutionality of DRL 17. The determination of the constitutionality of DRL 17 is both "necessary and unavoidable." People v. Furlong, 129 Misc.2d 938, 494 N.Y.S2d 653, later proceeding 70 N.Y.2d 756, 529 N.Y.S.2d 749 (1987).

Cultural and political attitudes about homosexual rights and same-sex marriage are evolving rapidly. No recent act of the legislature suggests a policy favoring any form of discrimination against homosexuals or same-sex partnerships. The New York Attorney General has questioned the constitutionality of current New York law which denies marriage to same-sex couples. See, NYS Attorney General, Informal Opinion Number 2004-1, dated March 3, 2004. Ulster County Supreme Court Justice E. Michael Kavanagh has acknowledges the constitutional implications of denying marriage licenses to individuals based on sexual preference in his as yet unpublished decision in Robert Hebel v. Jason West. In his June 7, 2004 decision, Judge Kavanagh issued a permanent injunction stopping the defendant from performing marriage ceremonies for people without marriage licenses, but did not reach the constitutional question. No New York court has addressed the constitutional implications of the denial of marriage licenses to same-sex couples in the context of criminal prosecution. However, recent court decisions

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and legislative enactments addressing related issues leave no doubt that New York policy favors ameliorating the discriminatory effect of current laws (or the lack thereof) on homosexuals. For example, the New York Court of Appeals has said that a "realistic and valid" view of family "includes two adult lifetime partners whose relationship is long term and characterized by an emotional and financial commitment and interdependence." Braschi v. Stahl Assoc. Co., 74 N.Y.2d 201, 211, 544 N.Y.S.2d 784, (same sex partner is a family member for purposes of rent controlled apartment). The Court of Appeals interprets our adoption laws to allow for the possibility of the biological parent's same-sex partner to adopt her child. Matter of Jacob, 86 N.Y.2d 651, 668, 636 N.Y.S. 716. The Appellate Division, 4th Department, has held that a lesbian couple has standing to adopt, notwithstanding the fact that DRL 110 lists only unmarried adults, or a husband and wife, as people that may adopt. Matter of Adoption of Carolyn B., CAF 03-01032, Appellate Division, 4th Department, March 24, 2004. The majority opinion held that the sexual orientation of the proposed adoptive parents to be irrelevant. A surviving spouse from a same-sex Vermont Civil Union is a "spouse" entitled to bring a wrongful death action under New York law. Langan v. St. Vincent's Hospital of New York, 196 Misc. 440, 765 N.Y.S.2d 411. Same sex partners are entitled to compensation resulting from the loss of their partners on September 11. The New York State legislature has adopted sweeping legislation directed to discrimination against homosexuals. Civil Rights Law 313; Insurance Law 2701; Penal Law 240.30(3), 485.05(1). While, perhaps not exhaustive, the foregoing establishes that the policy of New York is to outlaw discrimination based upon sexual preference. Courts in New York addressing the issues of whether a same sex partner is a spouse for the purpose of exercising his right of election against his partner's

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will, or a spouse for the purpose of bringing a wrongful death action, or whether a same-sex partner has the right to adopt children, acquire his partner's rights to a rent controlled apartment, or receive benefits available to those who lost a spouse on September 11, have acted to accord same-sex partners the same rights as if they were married. Even if the financial issues could be addressed in some comprehensive way short of allowing same-sex partners to marry, there would still be no emotional substitute for marriage. The equal protection issue raised by the defendant is real and must be addressed as a threshold issue to his prosecution.

This equal protection analysis is governed by the "rational basis standard". Cooper v. Kelly, 187 A.D.2d 128,133, 592 N.Y.S.2d 797,799-800 (Second Dept.1993). The question, therefore, is whether there is a legitimate state purpose in prohibiting same-sex marriage. The prosecution neither defends nor condones the discriminatory effect of the licensing requirement of the DRL. Its position is simply that the law-- on its face-- was violated obligating it to fulfill its mandate to prosecute. The net effect of the lack of proof is that this record contains no evidence tending to show that there is a legitimate state interest in refusing marriage to same-sex partners. Likewise, the Attorney General did not exercise its right to intervene in this case to defend the state's interest in a statute that has the effect of preventing same-sex couples from marrying. If the state had a legitimate governmental purpose in preventing same-sex couples from marrying either the chief law enforcement officer of Ulster County or of the State of New York could have taken this opportunity to articulate it. The defense has rebutted the presumption of constitutionality enjoyed by DRL 13 shifting the burden of proof on that issue to the People.

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I am familiar with the arguments raised in the cases from other states addressing this issue and I understand the historical, cultural and religious opposition to same-sex marriage, but find that none of the reasons stated in opposition to same-sex marriage is paramount to the equal protection guarantees enshrined in the state and federal constitutions. In dismissing the Information charging the mayor with violating DRL 13, 17 I heed the admonishment of Justice Brandeis that "We must be ever on our guard lest we erect our prejudices into legal principles". New York State Ice Company v. Liebmann, 285 U.S. 262, 311, 52 S. Ct. 371.) Based on the foregoing, the defendant's motion to dismiss is granted.

This constitutes the order and decision of the court.

Dated: New Paltz, New York
June 10, 2004.

Hon. Jonathan D. Katz

The following papers numbered 1 through 9, with attached exhibits, were read on the motion of the defendant to dismiss.

Notice of Motion, Affirmation and Memorandum of Law.....1-3
Opposition of the People.....4
Defendant's Reply Memorandum 5
Defendant's Supplemental Memorandum 6
Letter from the People Dated April 8, 2004, with Attachment 7
Reply by People to Defendant's Supplemental Memorandum 8
Letter to Attorney General Eliot Spitzer pursuant to CPLR 1012 (b).....9

TO: Donald A. Williams
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

----------X

In the Matter of the Application of:

JOHN SHIELDS, ROBERT MICHAEL STREAMS, JACQUELINE AXT-OHANNESYAN, LISA AXT-OHANNESYAN, JOHN ADE, JOHNNIE FARMER, ELIZABETH INSON, THERESA APUZZO, JOE HICKEY, ROBERT BRAY, CHRISTINA LOMBARDI, RACHEL McGREGOR RAWLINGS, ABIGAIL MILLER, MELANIE SUCHET, CLAIRE BONDE, TONI BONDE, GEORGE DELANCEY, JOEL EALY, DEIRDRE BERNARD-PEARL and LISA BERNARD-PEARL,

Index No 1458-04
(AJW)

Petitioners,

FILED - MK
JAN 12 2005
ROCKLAND COUNTY
CLERK'S OFFICE

For a Judgment Pursuant to Article 78 of the CPLR and other relief,

-against-

CHARLOTTE MADIGAN, Town Clerk, Town of Orangetown, New York, and STATE OF NEW YORK DEPARTMENT OF HEALTH,

Respondents.

----------X

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
:ss.:
COUNTY OF NEW YORK)

Adam C. Calkins, being duly sworn, deposes and says:

1. I am over 18 years of age and am employed by Wilmer Cutler Pickering Hale and Dorr LLP and am not a party to this action.

67905l.242

2. On June 17, 2004 I caused a true and correct copy of the attached PETITIONER'S REPLY MEMORANDUM OF LAW IN SUPPORT OF PETITION; to be served by facsimile and also by Federal Express, Priority Overnight Delivery, on the following party:

ELIOT SPITZER
Attorney General of the State of New York
Attorney for Respondent
New York State Department of Health
The Capitol
Albany, NY 12224

JAMES B. MCGOWAN
Assistant Attorney General
JULIE SHERIDAN
Assistant Solicitor General, of Counsel
Fax: (518) 473.1572

and also to be served by facsimile on the following party:

DENNIS MICHAELS, ESQ.
Deputy Town Attorney
Office of the Orangetown Town Attorney
Town Hall
26 Orangeburg Road
Orangeburg, NY 10962
Fax: (845) 359.2715

Adam C. Calkins

Sworn to before me this
17th day of June, 2004.

Notary Public

MATTHEW E. HOWARD
Notary Public, State of New York
No. 01HO5072639
Qualified in New York County
Certificate Filed in New York County
Commission Expires February 3, 2007

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1458/04

To be Argued by:
STEVEN J. HYMAN
(Time Requested: 30 Minutes)

New York Supreme Court

Appellate Division—Second Department

ORIGINAL
WITH PROOF OF
SERVICE

Docket No.:
2004-10100

In the Matter of the Application of:

JOHN SHIELDS, ROBERT MICHAEL STREAMS, JACQUELINE AXT-OHANNESYAN, LISA AXT-OHANNESYAN, JOHN ADE, JOHNNIE FARMER, ELIZABETH INSON, THERESA APUZZO, JOE HICKEY, ROBERT BRAY, CHRISTINA LOMBARDI, RACHEL McGREGOR RAWLINGS, ABIGAIL MILLER, MELANIE SUCHET, CLAIRE BONDE, TONI BONDE, GEORGE DELANCEY, JOEL EALY, DEIRDRE BERNARD-PEARL and LISA BERNARD-PEARL,

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Petitioners-Appellants,

For a Judgment Pursuant to Article 78 of the CPLR and other relief,

– against –

CHARLOTTE MADIGAN, Town Clerk, Town of Orangetown, New York, and STATE OF NEW YORK DEPARTMENT OF HEALTH,

Respondents-Respondents.

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PRELIMINARY STATEMENT

This case raises the question of whether, under New York State law, Petitioners, who applied for marriage licenses as members of committed same-sex couples but saw those applications denied, have the same right to join in the benefits and responsibilities of civil marriage as opposite-sex couples. Respondents do not dispute that Petitioners were denied marriage licenses even though their relationships reflected the common elements and the variety that married New Yorkers would recognize in their own relationships: they had established homes together, supported each other in schools and jobs, nursed each other in sickness, and shared everyday joys. Indeed, the Department of Health concedes that "petitioners and their families are entitled to dignity and respect, that children raised in those families can thrive, and that same-sex couples can be as committed, stable, loving and nurturing as opposite-sex couples." *See* Memorandum of Law in Support of the Answer of the New York State Department of Health at 1. Respondents excluded Petitioners from civil marriage simply because they sought to marry someone of the same sex.

Respondents bear the burden of coming forward with a sufficiently important governmental interest to justify this disparate treatment, and of showing that the denial of marriage licenses to same-sex couples is appropriately tailored to further that interest. Much of the Brief for Respondent Department of Health

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("DOH Brief") is devoted to the proposition that the denial of marriage licenses to Petitioners solely on account of their being members of same-sex couples should be subject only to the least exacting standard of judicial review. But although wrong, that argument is also beside the point. No legitimate purpose is served by depriving same-sex couples and their children of the protections, security, respect and sense of worth that come with civil marriage.

Respondents have built their entire argument on the proposition that prohibiting same-sex marriage is necessary for the preservation of national "uniformity" and "tradition." But, as the case law amply demonstrates in numerous contexts, these are not valid justifications for the selective denial of a fundamental right to millions of New York State residents, and the unjustified denial of such a right violates the New York State Constitution. These justifications are also based on false assumptions: that the hallmarks of civil marriage in New York were fixed at the framing of the State Constitution and have remained unchanged—and consistent with the marriage laws of other states—ever since. In fact, New York marriage law already differs in substantial ways from the laws of other jurisdictions. And the so-called "traditional" legal understandings of marriage and family, of husband and wife, have evolved dramatically in New York over the years. A myth of an unbending "tradition" provides no basis for denying

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New Yorkers the right to marry the person they love simply because that person is someone of the same sex.

This case is not about creating new types of marriages or families. It is about treating same-sex couples (to whom New York State law otherwise extends rights comparable to the rights it extends to opposite-sex unions) on an equal footing with other couples. Whether this result is reached by construing the State's marriage statute to encompass same-sex marriage (a construction Petitioners believe is merited, and which would also fulfill the canon of constitutional avoidance) or by holding that excluding same-sex couples from the marital franchise violates state constitutional norms (as is clearly the case under New York State case law), the law of this State can only be fairly construed to extend the right to marry to Petitioners and other members of same-sex unions.

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ARGUMENT

I. RESPONDENTS HAVE FAILED TO IDENTIFY ANY LEGITIMATE, MUCH LESS COMPELLING, STATE INTEREST TO JUSTIFY DENYING SAME-SEX COUPLES THE RIGHT TO MARRY

The Department does not dispute that its decision to deny marriage licenses to same-sex couples is subject to constitutional review. *See* DOH Brief at 26. Petitioners and Respondents disagree, however, on the standard of review that should apply. For the reasons given below and in the opening Brief of Petitioners-Appellants ("App. Brief"), this Court should apply heightened scrutiny in reviewing the denial of marriage licenses to Petitioners. But even if this Court were to consider Petitioners' due process and equal protection claims under a more lenient standard, the refusal to grant marriage licenses simply because the applicants are same-sex couples is unconstitutional. The proffered state interests do not qualify as "legitimate," and the denial of marriage licenses to same-sex couples bears no connection—rational or otherwise—to those claimed interests.

Even applying the lowest level of scrutiny, the ban on marriage by same-sex couples fails because it does not at least "rationally further some legitimate, articulated state purpose." *Doe v. Coughlin*, 71 N.Y.2d 48, 56 (1987) (citation omitted). The Department relies so heavily on the presumption of validity of a statute as to render constitutional scrutiny virtually meaningless. Rational review, though deferential, is no rubber-stamp. Consistent with the constitutional

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obligation to guard individual autonomy in matters of personal and family life against undue government interference, the courts' review of the fit between legislative purpose and classification is especially rigorous where, as here, laws "inhibit[] personal relationships." *Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O'Connor, J. concurring).

The Department offers two arguments to support its claim that the denial of marriage rights to same-sex couples is supported by a rational basis. First, it "avoids...issuing licenses that would give the misleading impression that same-sex couples would uniformly have the same rights as opposite-sex married couples" under federal law or under the laws of the majority of other states. DOH Brief at 40. Second, the Department claims that "the State has a legitimate interest in preserving the historic legal and cultural understanding of marriage[,]" and emphasizes "the tradition of heterosexual marriage as a social institution in which procreation occurs." *Id.* at 45-46. Neither of these claims withstands scrutiny.

A. Mimicking The Laws Of The Majority Of Other States Is Not A Legitimate State Interest

The Department advances the startling proposition that New York should deny same-sex couples equal access to marriage licenses because the majority of *other* states as well as the federal government explicitly prohibit same-sex marriages and/or deny recognition to such marriages performed elsewhere, and

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"[t]hese substantive differences in legal status make it rational to call the license issued to opposite-sex couples alone a 'marriage license.'" DOH Brief at 42-45.

The Department cites no authority whatsoever to support its suggestion that the demands of the New York Constitution must be held hostage to the statutory regimes of other jurisdictions, or that doing so represents a legitimate New York state interest; and there is none. Indeed, the Court of Appeals has concluded the opposite. In *New York v. P.J. Video, Inc.*, 68 N.Y.2d 296 (1986), the Court of Appeals explained that "[w]hen weighed against the ability to protect fundamental constitutional rights, the practical need for uniformity can seldom be a decisive factor." *Id.* at 304. And, in *People v. Scott*, 79 N.Y.2d 474 (1992), the Court of Appeals "decline[d] to adopt any rigid method of analysis which would, except in unusual circumstances, require us to interpret provisions of the State's Constitution in '[l]ockstep' with the Supreme Court's interpretations of . . . the Federal Constitution." *Id.* at 490. *See also Goodridge v. Department of Pub. Health*, 798 N.E.2d 941, 967 (Mass. 2003) ("We would not presume to dictate how another State should respond to today's decision. But neither should considerations of comity prevent us from according Massachusetts residents that full measure of protection available under the Massachusetts Constitution.").[1]

[1] Respondents urge this Court to ignore decisions from other states that have determined that denying same-sex couples the right to marry (Massachusetts), or access to the same rights and

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Furthermore, New York marriage law already is demonstrably not harmonized with the laws of other jurisdictions. First, as the Attorney General has recognized (and as the only New York court to have addressed the issue has concluded), "New York law presumptively requires that parties to [same-sex] unions [celebrated outside of New York] must be treated as spouses for purposes of New York law." Op. Att'y Gen., March 3, 2004 at 28. In *Langan v. St. Vincent's Hospital*, 196 Misc. 2d 440, 455 (Sup. Ct. Nassau County 2003) the court held that parties to a Vermont civil union must be treated as "spouses" for purposes of New York's wrongful death statue under the New York Constitution's Equal Protection Clause. If New York had a genuine interest in harmonizing its practice with the practices of the majority of states, New York would refuse to give legal effect to such unions.

Similarly, New York permits first cousins to marry notwithstanding the fact that such marriages are explicitly prohibited in thirty states, *see* DRL § 5 (excluding first-cousin marriages from the list of incestuous marriages), and "New

benefits as married couples (Vermont), is unconstitutional, arguing that the protections of the Massachusetts and Vermont state constitutions are broader than the protections afforded under the federal constitution. *See* DOH Brief at 52-54. Even if it were not the case that New York, Vermont, and Massachusetts law were similarly protective of constitutional rights, Respondents misunderstand Petitioners' reliance on extra-jurisdictional case law. These cases robustly support the notion—common and crucial to analysis under the precedents of those states and New York case law—that the justifications for denying marriage rights or benefits to same-sex couples are not rational. *See Baker v. State*, 744 A.2d 864, 881, 886 (Vt. 1999); *Goodridge*, 798 N.E.2d at 968. The conclusion of irrationality is one of logic; it does not turn on the niceties of the legal formulae guiding the courts' analyses.

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York is the only jurisdiction which does not have a true no-fault divorce," *Melnick v. Melnick*, 146 A.D.2d 538, 542 (1st Dep't 1989) (Asch, J., concurring). It is simply impossible to reconcile these aspects of New York practice with the notion that the State has an overriding interest in bringing the DRL in line with the laws of other jurisdictions. *See Baker v. State*, 744 A.2d 864, 885 (Vt. 1999) ("[T]he State's claim that [its] marriage laws were adopted because the Legislature sought to conform to those of the other forty-nine states is . . . refuted by two relevant legislative choices which demonstrate that uniformity with other jurisdictions has not been a governmental purpose").

B. The Asserted Interest in Preserving the "Traditional" Definition of Marriage Is Not a Constitutionally Adequate Justification for Denying Same-Sex Couples the Right to Marry

The Department also attempts to justify the denial of marriage licenses to Petitioners by asserting that "[o]pposite-sex marriages have been recognized to provide long-standing societal benefits." DOH Brief at 46. The Department, however, fails to identify a single societal benefit ***unique*** to opposite-sex marriage. As a result, the asserted interest boils down to promoting tradition for tradition's sake. This argument fails because: (1) New York has not in fact recognized preserving "traditional marriage" as a state interest; (2) "traditional marriage" is a red herring, since marriage in New York and across the country is a continually evolving concept; (3) the concept of marriage already encompasses the possibility

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of two spouses of the same sex; and (4) regardless, preserving "traditional marriage" is not a legitimate interest under the reasoning of *Lawrence v. Texas*.

First, the Department is wrong to contend that "New York judicial decisions have consistently recognized the significance of the tradition of heterosexual marriage . . . ." DOH Brief at 46. The Department musters only two cases from the entire history of the decisional law of this State to support its claim, and the two cases upon which it relies provide scant support for the proposition it seeks to advance. *Storrs v. Holcomb*, 168 Misc. 2d 898 (Sup. Ct. Tompkins County 1996), *action dismissed*, 245 A.D.2d 943 (3d Dep't 1997), was dismissed by an appellate panel on procedural grounds and therefore has no precedential effect whatsoever. And, as Petitioners have already explained, *Matter of Cooper*, 187 A.D.2d 128 (2d Dep't 1993), is inapposite, because the petitioner in *Cooper* did not claim the right to marry under the DRL. See App. Brief at 42; *see also*, Op. 102, Op. Att'y Gen., Mar. 3, 2004, at 14 (acknowledging that *Cooper* is of "limited utility," for that reason). The *Cooper* court's passing reference to the "institution of marriage as a union of man and woman" did not recognize a state interest—legitimate or not—in preserving a traditional view of marriage; rather, it was a simple observation—in dicta—of how marriage was popularly viewed at that time.

Notably, the Department says nothing about the body of New York case law cited in the Brief of Petitioners-Appellants which (1) explicitly rejects the notion

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that traditional practices and sensibilities are somehow immune from constitutional challenge, and (2) demonstrates that the "traditional" definition of family has evolved dramatically over the years, including through recognition of the legitimacy of same-sex relationships (App. Brief at 49-52). Nor does the Department acknowledge—as the Attorney General previously has—that the facets of New York law "recogniz[ing] the legitimacy of committed same-sex relationships . . . draw[] into question the State's interest in maintaining the historical understanding of marriage as confined to opposite-sex partners." Op. Att'y Gen. March 3, 2004, at 19.

Second, Respondents are wrong to suggest that New York has recognized a constant form of "traditional marriage" unchanged since the framing of the State Constitution. *See* DOH Brief at 40, 45-48. In fact, far from being static, the concept of what it means to be a husband or a wife under New York law has evolved to meet developing social mores and understandings. *See* App. Brief at 23, n. 5. Similarly, the Court of Appeals has acknowledged that interpretation of the term "family" as used in a provision of the EPTL, must "find [a] foundation *in the reality of family life*." *Braschi v. Stahl Assocs. Co.*, 74 N.Y.2d 201, 211 (1989) (emphasis added). *See also Langan,* 196 Misc. 2d at 452-453 (holding that same-sex couples qualify as "spouses" under EPTL 4-1.1, while "acknowled[ing] that at

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the time the wrongful death statutes were written, the use of the term spouse did not envision inclusion of a same-sex marital partner.");

Third, Respondents cling to the false notion that marriage is universally understood to be a union only between a man and a woman. DOH Brief at 10; Brief of Respondent Town Clerk for the Town of Orangetown ("Town Clerk Brief") at 14. They cite to the definition of "marriage" in the Seventh Edition of *Black's Law Dictionary* as the "[t]he legal union of a man and a woman as husband and wife." *Id.* at 986 (1999). Respondents fail to note that the Eighth Edition of *Black's Law Dictionary* specifically includes "same-sex marriage" under the "marriage" entry as "[t]he ceremonial union of two people of the same sex; a marriage or marriage-like relationship between two women or two men." *Id.* (8th ed. 2004). The entry notes the growing body of cases, such as *Goodridge*, recognizing same-sex marriage. Even the definition of the term "wife" as "a woman united to a man by marriage," which Respondents pulled from the 1979 Fifth Edition of *Black's Law Dictionary* (DOH Brief at 11; Town Clerk Brief at 14), has been given a new definition in the Eighth Edition as simply "a married woman." *Black's Law Dictionary* (8th ed. 2004).

Popularly-used English-language dictionaries consistently contain a definition of marriage which expressly includes marriages between same-sex spouses or is completely gender-neutral. *See, e.g., Merriam-Webster Online*

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Dictionary ("the state of being united to a person of the same sex in a relationship like that of traditional marriage"); *Oxford English Dictionary* (listing as a definition of marriage, "the relation between persons married to each other," and explicitly noting that "[t]he term is now sometimes used with reference to long-term relationships between partners of the same sex"); *MSN Encarta Dictionary* ("a legally recognized relationship...between two people who intend to live together as sexual and domestic partners"); and *The American Heritage Dictionary* (4th ed.) ("[a] union between two persons having the customary but usually not the legal force of marriage: *a same-sex marriage*"). The popular conceptualization of marriage therefore has evolved to include unions between same-sex spouses, and there is no factual support for Respondents' claim that marriage is universally understood to be limited to a man and woman. DOH Brief at 10.

Fourth, even if the New York courts had acknowledged an interest in preserving the "traditional" definition of marriage as limited to opposite-sex couples, the reasoning in the Supreme Court's recent decision in *Lawrence v. Texas* signals that any such interest is not constitutionally cognizable. *Lawrence* holds that "the fact that the governing majority in a State has *traditionally* viewed a particular practice as immoral *is not a sufficient reason for upholding a law prohibiting the practice*." 539 U.S. at 577 (citation omitted) (emphases added); *see also Perez v. Lippold*, 198 P.2d 17, 27 (Cal. 1948) ("Certainly the fact alone

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that . . . discrimination has been sanctioned by the state for many years does not supply justification."). The passage of time cannot legitimate a practice of denying a group equal protection of the laws.

The Department struggles to distinguish *Lawrence* by insisting that "[t]he State's interest in preserving the traditional definition of marriage cannot be equated with moral disapproval of homosexuality." DOH Brief at 48. But the Department offers no account of what, exactly, the "traditional" prohibition against same-sex marriage is if not an expression of moral disapproval of such unions. *See* App. Brief at 12, 54-55. Petitioners are not asking this Court to impair the ability of opposite-sex couples to marry. Those citizens for whom marriage holds a particular cultural or religious significance may continue to hold that view and to approach marriage in such a way that comports with their cultural or religious beliefs. But such traditions and religious and cultural beliefs are far from universal, and denying same-sex couples a marriage license only strips them of a fundamental right and runs roughshod over the equally-deserving traditions and religious and cultural beliefs of a large segment of the population of New York State.

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C. Existing New York Case Law Does Not Support A Link Between Marriage And Procreation, And Promoting Procreation Does Not Provide A Basis For Denying Same-Sex Couples The Right To Marry

The Department suggests, with understandable ambivalence and ambiguity, that perhaps opposite-sex marriage is uniquely linked to procreation. To the extent that the Department relies on this supposed "link," it belies an inaccurate view of both same-sex couples and of heterosexual marriage. First, New York case law has not tied marriage to procreation.[2] As the Attorney General has already noted, New York courts have held that "incapacity to bear children" is not a grounds for voiding a marriage under the DRL and, hence, the existence of a State interest in using the marriage laws as a lever for promoting procreation is highly questionable. Op. Att'y Gen. March 3, 2004, at 17. Indeed, save the inapposite decision in *Matter of Cooper*, the Department fails to cite even a single New York case supporting either the narrow claim that the procreation interest can justify a prohibition on same-sex marriage or the more general notion that New York's laws pertaining to marriage are at all related to an interest in promoting procreation. Second, same-sex couples are having children in abundance, sometimes by adoption, sometimes by birth. New York State law unambiguously recognizes joint adoption by same-sex couples as well as second-parent adoption, regardless

[2] The Department does not challenge Petitioners' claim that other state courts have rejected parallel arguments on precisely this ground (App. Brief at 58-59 (citing *Goodridge*, 798 N.E.2d at 961; *Baker*, 744 A.2d at 881)).

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of the sexual orientation of the adoptive parent. *See, e.g., Matter of Adoption of Carolyn B.*, 6 A.D.3d 67 (4th Dep't 2004); *Matter of Jacob*, 86 N.Y.2d 651, 668 (1995). These children are fortunate to be raised in two-parent households, but are bereft of the additional protections and stability they would enjoy if their legally-recognized parents were permitted to marry.

The Department suggests that even though procreation is frequently not an option or goal of opposite-sex marriages, this does not render "procreation" ineligible as a legitimate basis for denying same-sex couples their right to marry.[3] But the Department fails to point out any connection between the denial of marriage licenses to same-sex couples and furthering a procreation interest. The Department also fails to address the State's legitimate interest in considering the welfare of the children of same-sex couples and promoting the stability and legal predictability of marriage in such families. Even if this Court were to find that promoting "procreation" may possibly be a legitimate interest of the State, it cannot escape the fact that denying same-sex couples the right to marry does not further this interest and actually undermines it, and it certainly undermines the broader State interest in providing for the welfare of children in stable family units.

[3] The Department seems to acknowledge that, in practice, denying marriage rights to same-sex couples does not further a procreation interest: "[t]hat the State's generalization proves to be an inadequate proxy in any individual case is irrelevant." DOH Brief at 50. *See also* App. Brief at 57-58.

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* * * * *

Despite Respondents' protestations, their construction of the DRL serves only animus. Petitioners are not seeking to deprive opposite-sex couples of their opportunity to marry, or to place any restrictions thereon, or in any way to alter the marriage process for opposite-sex couples. All Petitioners are challenging is the denial of this fundamental right to the gay and lesbian citizens of this State. Respondents have failed to set forth any way in which the proper extension of this marriage right to same-sex couples would interfere with any legitimate state interest. The only conceivable reason for the denial of same-sex couples of their right to marry would seem to be a distaste or disapproval of these relationships, and that is not a legitimate state interest. *See Romer v. Evans*, 517 U.S. 620, 632-36 (1996); *Lawrence*, 539 U.S. at 580 ("When a law exhibits such a desire to harm a politically unpopular group, [the Court has] applied a more searching form of rational basis review to strike down such laws.") (O'Connor J., concurring) (citing cases).

II. THE DENIAL OF MARRIAGE LICENSES TO SAME-SEX COUPLES SHOULD BE SUBJECT TO HEIGHTENED CONSTITUTIONAL SCRUTINY

A. The Department Evades The Question Of Whether Same-Sex Couples Have A Fundamental Right To Marry

The Department concedes that the right to marry is fundamental, DOH Brief at 25, and that where a "statutory scheme . . . burdens a fundamental

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right, . . . strict scrutiny will apply[.]" *Id.* at 22. It seeks to escape the logical application of these propositions with a simple assertion: "what [Petitioners] propose is not a marriage." *Id.* at 26 (quoting *Jones v. Hallahan*, 501 S.W.2d 588, 590 (Ky. 1973)). This is both wrong, because common definitions of marriage include unions between same-sex couples, *see* pp. 11-12, *supra*, and entirely circular; both the premise and the conclusion of the Department's argument is that same-sex couples are not permitted to marry. *See Baehr v. Lewin*, 852 P.2d 44, 61 (Haw. 1993) ("[Appellee] proposes that the right of persons of the same sex to marry one another does not exist because marriage, by definition and usage, means a special relationship between a man and a woman. We believe [appellee's] argument to be circular and unpersuasive."); *Goodridge*, 798 N.E.2d at 961 n.23 ("[I]t is circular reasoning, not analysis, to maintain that marriage must remain a heterosexual institution because that is what it historically has been."). Petitioners' claims cannot be disposed of through this exercise in definitional fiat; instead, they require this Court to consider whether Petitioners' relationships bear the hallmarks—the *fundaments*—of the long-recognized right to marry. Petitioners' relationships do, indeed, bear these hallmarks. *See* App. Brief at 28-31.

The essence of marriage rests in the character of a couple's relationship, not in the gender or sexual orientation of those who choose to marry. And once it is conceded—as it has been in this case—that committed same-sex relationships bear

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all of the emotional and interpersonal hallmarks our society associates with the unions we label "marriages," the justifications for excluding same-sex couples from this vital institution collapse. As the Attorney General has explained, "New York law has recognized the legitimacy of committed same-sex relationships in numerous ways, [and this draws] into question the State's interest in maintaining the historical understanding of marriage as confined to opposite-sex partners." Op. Att'y Gen. March 3, 2004, at 19.

The Department, however, rejects the notion that the fundamentality of marriage is rooted in the nature of the relationship rather than the gender of its members. They ask this Court to focus its fundamental rights analysis not on whether committed same-sex relationships are qualitatively similar to traditional marriages, but on whether marriage, traditionally, has included same-sex couples. *See* DOH Brief at 23.

This approach to analyzing the fundamental right to marry is inconsistent with the Supreme Court's reasoning in *Loving v. Virginia*, 388 U.S. 1 (1967). In the course of deciding that Virginia's anti-miscegenation law violated appellants' fundamental right to marry, the Court did not inquire whether civil marriage of *interracial couples* is a right so rooted in the Nation's history and tradition as to be fundamental. Instead, the Court identified the "freedom to marry[,]" *id.* at 12, as fundamental and assessed whether there was adequate justification for denying this

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freedom to the couple before it. It is no answer to say that "what [Petitioners here] propose is not a marriage[,]" while the appellants in *Loving* sought to vindicate "a fundamental right to opposite-sex marriage that already existed." DOH Brief at 26. This is an anachronistic reading of *Loving*. At the time the decision in *Loving* was rendered, sixteen states prohibited interracial marriage and, only fifteen years earlier, the laws of thirty states included such a prohibition. *See Loving*, 388 U.S. at 6 n. 5. Hence, Virginia might easily have argued that "what [the Lovings] propose is not a marriage[,]" for what the Lovings sought unmistakably was *not* a marriage in the many states (including Virginia) in which interracial unions were forbidden and in which the very term "interracial marriage" was legally meaningless. Yet the lack of an established tradition of interracial marriage proved not to be dispositive in *Loving*, just as the lack of an established tradition of same-sex marriage cannot be dispositive here. *See also, Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743, at *4 (Alaska Super. Ct. Feb. 27, 1998) ("The relevant question is not whether same-sex marriage is so rooted in our traditions that it is a fundamental right, but whether the freedom to choose one's own life partner is so rooted in our traditions.").

Respondents' argument gains no traction from their catalogue of several states' constitutional amendments limiting the right to marry. *See* DOH Brief at 24-25. In fact, these amendments suggest, at a minimum, ambiguity regarding the

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scope of the relevant states' constitutional protection of same-sex marriage rights absent such rights-restricting amendments. Respondents' reliance on case law from other jurisdictions to support their narrow conception of the fundamental right to marry is also misguided. *See id.* at 25-26. In three of these cases, the contours of the States' fundamental right to marry is inextricably linked to the states' interests in fostering procreation. *See Dean v. District of Columbia*, 653 A.2d 307, 333 (D.C. Ct. App. 1995); *Singer v. Hara*, 522 P.2d 1187, 1195 (Wash. Ct. App. 1974); *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971). As discussed earlier, *see supra* pp. 14-16, the interest in procreation provides an inadequate foundation for limiting the fundamental right to marry to opposite-sex couples. Finally, reliance on cases from other jurisdictions to argue for a narrow conception of the right to marry is particularly inappropriate because New York courts have long recognized that the protections for individual rights and liberties provided under this State's Constitution are even broader than those provided under the federal Constitution. *See, supra,* n. 1.

Respondents are effectively trying to mirror the logic of the Supreme Court in the now-discredited *Bowers* decision: defining the alleged right so narrowly as to answer the question. In *Lawrence*, the Court said that it had been wrong in *Bowers* to define the liberty at stake as whether there was a fundamental right to engage in homosexual sodomy, and that doing so disclosed "the Court's own

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failure to appreciate the extent of the liberty at stake." 539 U.S. at *566-567*. Likewise, it would be wrong to redefine the fundamental right to marry as a fundamental right to marry only someone of the opposite sex.

B. The Department's Efforts To Avoid Heightened Scrutiny Under The New York Constitution's Equal Protection Clause Are Unpersuasive

1. Respondents Offer No Sound Basis for Rejecting Petitioners' Claim that Classifications based on Sexual Orientation Are Suspect

The Department presents two arguments in support of its claim that statutory classifications based on sexual orientation ought not to be subjected to heightened scrutiny. *First*, the Department asserts that "[t]he overwhelming majority of federal courts and courts in other states have...declined to accord suspect class status to homosexuals." DOH Brief at 32. But the published cases upon which the Department relies for this proposition were grounded squarely in the Supreme Court's discredited decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986). *See* App. Brief at 41-42. The Supreme Court's decisive overruling of *Bowers* in *Lawrence v. Texas* drains these cases entirely of their precedential value. At present, then, the only case cited by the Department in connection with this question that remains on solid precedential ground is *Tanner v. Oregon Health Sciences University*, 971 P.2d 435, 447 (Or. Ct. App. 1998), in which the Oregon Court of Appeals concluded that statutory classifications on the basis of sexual orientation *are* suspect and, hence, subject to heightened scrutiny.

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Second, the Department infers from the growing body of laws designed to prevent discrimination on the basis of sexual orientation, that homosexuals cannot be deemed "politically powerless" in the constitutionally relevant sense and therefore cannot qualify as a "suspect" class. DOH Brief at 34. This is simply wrong; securing the passage of rights-protective legislation does not disqualify a group from suspect-class status. Statutory classifications predicated on race or gender were first deemed by the U.S. Supreme Court to be suspect long *after* the passage of significant legislation safeguarding the civil rights of these groups. *See* App. Brief at 40-41. The Department does not challenge Petitioners' claims that (1) homosexuals have been subjected to a long history of purposeful unequal treatment because of their sexual orientation (App. Brief at 38-39), (2) sexual orientation has no relevance to an individual's ability to function in or contribute to society, *id.* at 39-40, and (3) sexual orientation is an immutable characteristic, *id.* Thus, the Department effectively concedes that all of the doctrinal prerequisites for suspect classification status—save political powerlessness—are satisfied in this case.

Moreover, notwithstanding more recent progress by both racial minorities and women in securing increased political power and, with it, the passage of further legislation designed to eradicate race and sex discrimination, courts continue to apply heightened scrutiny to statutes that classify on either of these

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bases. *See, e.g., People v. Liberta*, 64 N.Y.2d 152, 167-73, (1984) (applying heightened scrutiny to sex-based classification); *United States v. Virginia*, 518 U.S. 515, 531 (1996) (same); *Grutter v. Bollinger*, 539 U.S. 306, 326-27 (2003) (applying heightened scrutiny to race-based classification).

Hence, the relevant question, for constitutional purposes, is not whether homosexuals are entirely devoid of access to the political process (a standard which would surely disqualify both racial minorities and women from the protections of heightened scrutiny); rather, the question is whether homosexuals are sufficiently disadvantaged in the political process such that laws singling them out are likely to be predicated on prejudice, ignorance, or antipathy. *See Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) (noting that "laws grounded in [suspect classifications] are deemed to reflect prejudice and antipathy"). Respondents cannot seriously argue that homosexuals are not subject to continuing prejudice and antipathy likely to create a disadvantage in the political process, and *this* is the touchstone of constitutionally cognizable "political powerlessness."

2. The Department's Claim That Its Construction of the DRL Does Not Entail Classification on the Basis of Sex Cannot Be Reconciled with the Reasoning of *Loving v. Virginia*

The interpretation of the DRL advanced by Respondents and adopted by the trial court rests the permission of who may marry whom on a gender classification: only a man may marry a woman, and only a woman may marry a man.

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Respondents insist that this interpretation does not amount to a "discriminatory gender-based classification" because "both men and women are subject to the same restriction." Petitioners have demonstrated, Pet. Br. at 43-45, that this argument relies on the exact same fallacy as the one presented by Virginia authorities in their unsuccessful attempt to defend an antimiscegenation statute in *Loving v. Virginia*. But in this case, as in *Loving*, "the fact of equal application does not immunize the statute" from the mandates of equal protection. *Id.* at 8-9.

Respondents' only argument in reply is that *Loving* involved race, and this case does not. DOH Brief at 37-38.[4] That distinction is so weak as to approach a concession of the argument. Respondents, surely, do not suggest that racial discrimination violates equal protection but sex discrimination does not.[5] Certainly, race-based classifications are generally subject to stricter scrutiny than are sex-based classifications. But the function of the parallel to *Loving* is to

[4] Respondents no longer contest, as they attempted to do in the trial court, that the equal protection analysis does not require a showing of discriminatory intent. Nor do they contest Petitioners' argument that the denial of marriage rights to same-sex couples nevertheless exhibits discriminatory intent because it is rooted in stereotypes relating to "proper" sex roles. App. Brief at 46-47.

[5] Respondents do assert that "[t]he Fourteenth Amendment specifically prohibits racial discrimination." DOH Br. at 38. If they mean that the Fourteenth Amendment *specifically refers to* and forbids racial discrimination, they are incorrect: the Amendment nowhere mentions race. If they mean that the Fourteenth Amendment's Equal Protection Clause has been *interpreted* to prohibit racial discrimination, they are of course correct—but so has it been interpreted to prohibit sex discrimination. *E.g., United States v. Virginia*, 518 U.S. at 531-534.

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demonstrate that a discriminatory classification exists, despite the putative "equal application," not to fix the applicable standard of scrutiny.

Respondents vastly overstate the support for their reading of *Loving* that they claim is provided by cases from other jurisdictions. Both *Lewis v. Harris*, No. MER-L-15-03, 2003 WL 23191114 (N.J. Super. Ct. Nov. 5, 2003), and *Morrison v. Sadler*, No. 49D13-0211-PL-001946, 2003 WL 23119998 (Ind. Super. Ct. May 7, 2003), are unpublished opinions; neither is binding precedent *even in its state of origin*.[6] *Lewis v. Harris*, 875 A.2d 259 (N.J.Super.A.D. 2005), does not undermine Petitioners' reliance on *Loving* to demonstrate that the DRL classifies on the basis of sex, because no sex-discrimination-based objection was at issue in that case.[7] And, the analysis of *Loving* in *Dean v. District of Columbia*, 653 A.2d 307, upon which the Department misleadingly relies, is actually from a concurring opinion, *not* the opinion of the court. *See id.* at 363 n.2 (Steadman, J., concurring). Finally, the discussion in *Baker v. State*, 744 A.2d at 880 n.13, of whether the state's exclusion of same-sex couples from the benefits of civil marriage constituted

[6] *See* N.J. R. GEN. APPLICATION R. 1:36-3 (unpublished opinions lack precedential value); *Indiana High Sch. Athletic Ass'n v. Durham*, 748 N.E.2d 404 (Ind. Ct. App. 2001) (unpublished trial court opinions should not be cited as precedent).

[7] The *Lewis* plaintiffs brought an equal protection claim under the New Jersey Constitution, a claim that is analyzed not, like those under the U.S. and New York Constitutions, in terms of suspect classifications and levels of scrutiny, but through a "balancing test that considers 'the nature of the affected right, the extent to which the governmental restriction intrudes upon it, and the public need for the restriction.'" *Lewis*, 875 A.2d at 271 (citation omitted).

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impermissible sex-based discrimination is dicta. That court ultimately held that there was no "reasonable and just basis for the continued exclusion of same-sex couples from the benefits incident to a civil marriage license under Vermont law[,]" and it determined that such couples were constitutionally entitled to these benefits. *Id.* at 886. The Department also relies on the decision of Minnesota Supreme Court in *Baker v. Nelson*, 191 N.W.2d 185. However, as the Attorney General has already acknowledged, the decision in *Baker* "no longer carries any precedential value with respect to the federal Equal Protection Clause" because it predates the evolution of modern equal protection doctrine under which heightened scrutiny is applicable to sex-based classifications. Op. Att'y Gen. March 3, 2004, at 21.

All that is left, then, of the Department's survey of case law exploring the applicability of *Loving*'s methodology to statutes restricting marriage rights to opposite-sex couples is a division of authority between *Singer v. Hara*, 522 P.2d at 1191-92 (concluding that such statutes do not merit heightened scrutiny), and *Baehr v. Lewin*, 852 P.2d at 64 (deeming heightened scrutiny applicable to Hawaii's statutory scheme). And it is therefore hardly the case, that "the great weight of authority" supports the Department's reading of *Loving*. To the contrary, most of this "support" is no authority at all.

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III. RESPONDENTS IGNORE THIS COURT'S DUTY TO AVOID A STATUTORY CONSTRUCTION THAT RAISES SERIOUS CONSTITUTIONAL QUESTIONS AND VASTLY OVERSTATE THE STATUTORY AND PRECEDENTIAL SUPPORT FOR THEIR READING OF THE DRL

A. The DRL Does Not Prohibit Issuing Marriage Licenses to Same-Sex Couples

According to the Attorney General, "the text of the DRL does not expressly bar marriage of same-sex couples...." Op. Att'y Gen. March 3, 2004, at 4. The DRL sets forth only two qualifications for marriage, neither of which concerns the gender of either spouse. *See* DRL § 10 and § 15-a (requiring that parties to a marriage be capable of entering a contract at law and be over fourteen years of age, respectively). The DRL enumerates those relationships that constitute "void" or "voidable" marriages—and same-sex marriages are nowhere to be found on this list. According to the plain language of the DRL and the Attorney General's interpretation thereof, New York State would have no basis for denying recognition of same-sex marriages performed outside the state. As petitioners have noted, and respondents cannot dispute, the core provisions of the DRL regarding marriage are replete with gender-neutral language. Consequently, there is no statutory bar to granting same-sex couples their right to marry under the DRL as it is currently written.

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Respondents rely on allegedly "gender-specific" terms contained in peripheral sections of the DRL and various other statutes referencing marriage as the only basis for their position that the legislature did not contemplate same-sex couples when crafting the DRL a hundred years ago. *See* DOH Brief at 11-15. The fact remains, however, that the legislature made the choice *not* to define marriage in the statute. This enabled the concept of marriage to evolve over time, rather than locking subsequent generations of New York residents into an antiquated conceptualization of marriage in which, for example, a female spouse was little more than the property of her husband. Respondents cling to the idea that marriage is universally understood to be a union only between a man and a woman. DOH Brief at 10; Town Clerk Brief at 14. But that is no longer true. Evolution of both our legal language and our culture demonstrate that our conceptualization of marriage is no longer so confined. *See supra* pp. 11-12; *see also, e.g.*, Empire State Pride Agenda Press Release, April 6, 2005, http://www.prideagenda.org/pressreleases/pr-04-06-05.html ("poll found that 51 percent of [New York] state residents support marriage for same-sex couples").

B. The DRL Should Be Interpreted To Avoid Constitutional Concerns

When a statute admits of multiple constructions, well-established principles of interpretation require that the Court select one that avoids constitutional concerns. *See* App. Brief at 21-24.

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Respondents fail to address the avoidance canon and its implications for this case. They do so notwithstanding the New York Attorney General's prior acknowledgment that "[t]he exclusion of same-sex couples from eligibility for marriage . . . presents serious constitutional concerns[,]" and that a court might wish to "construe the DRL to permit same-sex marriages in order to avoid declaring relevant portions of the statute unconstitutional." Op. Att'y Gen. March 3, 2004, at 6, 15. *See also id.* at 15 ("It is well-settled that a 'statute should be construed when possible in a manner which would remove doubt of its constitutionality.'"). Hence, though Respondents decline to address this firmly embedded interpretive principle in their submissions to this Court, the applicable standard remains clear: once Petitioners have demonstrated that the DRL admits of a construction that elides the "serious constitutional concerns" deemed by the Attorney General to be implicit in the interpretation now advanced by Respondents, the Court should favor Petitioners' reading.

IV. THIS COURT CANNOT AVOID ITS MANDATE TO DECIDE CONSTITUTIONAL QUESTIONS

Respondents' suggestion that it is for the Legislature, and not the courts, to define the scope of the right to marry in New York is baseless. "Where the validity of a legislative act is challenged it is the duty of the courts to determine its constitutionality." *Defiance Milk Products Co. v. Du Mond*, 133 N.Y.S.2d 216, 218 (Sup. Ct. 1954); *see also* Op. Att'y Gen. March 3, 2004, at 27 (the

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constitutional questions at issue in this case are "best resolved by the courts of this State.") While the Legislature is authorized to regulate marriage, it is for this Court to assure that the Legislature does not overstep its constitutional bounds.

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CONCLUSION

The Court should order the Town Clerk to issue the marriage licenses to which Petitioners are entitled.

Dated: New York, New York
August 29, 2005

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE
Pursuant to 22 NYCRR § 670.10.3(f)

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I, , being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above or at

On AUG 29 2006

deponent served the within: **Reply Brief for Petitioners-Appellants**

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OCT 17 2006
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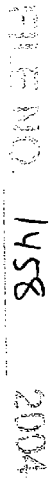
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Responses of J. Paul Oetken
Nominee to be United States District Judge for the Southern District of New York
to the Written Questions of Senator Tom Coburn, M.D.

1. **Some people refer to the Constitution as a "living" document that is constantly evolving as society interprets it. Do you agree with this perspective of constitutional interpretation?**

   Response: No, I do not agree with the proposition that the Constitution is constantly evolving as society interprets it. While courts may apply the Constitution to new contexts, the Constitution itself may be changed only through the amendment process set forth in Article V.

2. **Justice William Brennan once said: "Our Constitution was not intended to preserve a preexisting society but to make a new one, to put in place new principles that the prior political community had not sufficiently recognized." Do you agree with him that constitutional interpretation today must take into account this supposed transformative purpose of the Constitution?**

   Response: No.

3. **Do you believe judicial doctrine rightly incorporates the evolving understandings of the Constitution forged through social movements, legislation, and historical practice?**

   Response: I do not believe that the Constitution changes as a result of social movements, legislation, or historical practice. I believe that district judges are bound by the text of the Constitution and must follow the relevant precedents of the Supreme Court and their particular circuit in interpreting that text.

4. **Do you believe empathy is an essential ingredient for arriving at just decisions and outcomes and should play a role in a judge's consideration of a case?**

   Response: I believe that judges should decide cases on the basis of a faithful interpretation of the law and an impartial application of the law to the facts, not on the basis of sympathy for a particular party or outcome.

5. **Is any transaction involving the exchange of money subject to Congress's Commerce Clause power?**

   Response: In *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000), the Supreme Court held that Congress's power under the Commerce Clause is not unlimited, and the Court explained the limitations of that power. If confirmed as a district judge, I would apply those precedents and any other applicable precedents of the Supreme Court and the Second Circuit under the Commerce Clause.

6. **The U.S. Supreme Court held in *District of Columbia v. Heller*, 554 U.S. 570 (2008), that the Second Amendment of the United States Constitution "protects an**

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individual right to possess a firearm unconnected to service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home." As Justice Scalia's opinion in *Heller* pointed out, Sir William Blackstone, the preeminent authority on English law for the Founders, cited the right to bear arms as one of the fundamental rights of Englishmen. Leaving aside the *McDonald v. Chicago* decision, do you personally believe the right to bear arms is a fundamental right?

Response: In *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), the Supreme Court held that the Second Amendment right to keep and bear arms is applicable to the States through the Fourteenth Amendment. In reaching that decision, the Court concluded that the right to keep and bear arms is a fundamental right. If confirmed as a district judge, I would follow that precedent.

a. **Do you believe that explicitly guaranteed substantive rights, such as those guaranteed in the Bill of Rights, are also fundamental rights? Please explain why or why not.**

   Response: The Supreme Court explained in *McDonald v. City of Chicago*, 130 S. Ct. at 3036, that certain rights – including most (though not all) of the rights guaranteed in the Bill of Rights – have been determined by the Court to be "fundamental" to our Nation's "scheme of ordered liberty" or "deeply rooted in this Nation's history and tradition," and accordingly have been deemed to apply against the States.

b. **Is it your understanding of Supreme Court precedent that those provisions of the Bill of Rights that embody fundamental rights are deemed to apply against the States? Please explain why or why not.**

   Response: Please see Response to Question 6(a).

c. **The *Heller* Court further stated that "it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right." Do you believe that the Second Amendment, like the First and Fourth Amendments, codified a pre-existing right? Please explain why or why not.**

   Response: The Supreme Court in *Heller v. District of Columbia*, 554 U.S. 570 (2008), stated that "the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right." If confirmed as a district judge, I would follow the Court's decision in *Heller* as well as any other applicable precedents of the Supreme Court.

7. **Some have criticized the Supreme Court's decision in *Heller* saying it "discovered a constitutional right to own guns that the Court had not previously noticed in 220 years." Do you believe that *Heller* "discovered" a new right, or merely applied a fair reading of the plain text of the Second Amendment?**

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Response: The Supreme Court's decision in the *Heller* case was based on the text of the Second Amendment, and if confirmed as a district judge I would follow that decision as well as any other applicable precedents of the Supreme Court.

a. Similarly, during his State of the Union address, the President said the Supreme Court's decision in *Citizens United v. FEC*, 558 U.S. ___ (2010), "reversed a century of law" and others have stated that it abandoned "100 years of precedent." Do you agree that the Court reversed a century of law or 100 years of precedent in the *Citizens United* decision? Please explain why or why not.

Response: The Supreme Court's decision in *Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2010), was based on the First Amendment and the Court's application of a long line of precedents interpreting the First Amendment, some of which the Court described as conflicting lines of precedent. If confirmed as a district judge, I would follow that decision as well as any other applicable precedents of the Supreme Court.

8. What limitations remain on the individual Second Amendment right now that it has been incorporated against the States?

Response: In *McDonald*, the Supreme Court reiterated that its holding in *Heller* "did not cast doubt on such longstanding regulatory measures as 'prohibitions on the possession of firearms by felons and the mentally ill,' 'laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.'"

a. In *McDonald v. Chicago*, the majority wrote: "We made it clear in *Heller* that our holding did not cast doubt on such longstanding regulatory measures as 'prohibitions on the possession of firearms by felons and the mentally ill,' 'laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.'"

What if a state passed a law imposing a $2,000 registration fee as a condition for the commercial sale of a firearm? Without stating how you would rule in such a case, please explain how you would conduct your analysis to determine whether the fee violated the Second Amendment right to keep arms?

Response: As noted above, the Supreme Court in *Heller* and *McDonald* described certain types of laws that would not infringe the Second Amendment under those decisions, but the Court did not delineate the boundaries of the right to keep and bear arms in all circumstances. If confirmed as a district judge and if faced with a specific state law such as the one described in the question, I would follow the Supreme Court's decisions in *Heller* and *McDonald* as well as any

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other applicable precedents of the Supreme Court and the Second Circuit; I would apply those precedents to the facts of the case.

i. To what cases or authorities would you refer? Please be specific.

Response: Please see Response to Question 8(a).

b. What if a state outlawed the carrying and possession of firearms on the grounds of hospitals that have psychiatric wards, regardless of whether they are private? Without stating how you would rule in such a case, please explain how you would conduct your analysis to determine whether that regulation complied with the Second Amendment's guarantee of the right to bear arms.

Response: Please see Response to Question 8(a).

i. Could a hospital qualify as a "sensitive place?"

Response: Please see Response to Question 8(a).

ii. To what cases or authorities would you refer? Please be specific.

Response: Please see Response to Question 8(a).

c. Is the Second Amendment limited only to possession of a handgun for self-defense in the home, since both *Heller* and *McDonald* involved cases of handgun possession for self-defense in the home?

Response: Please see Response to Question 8(a).

9. In *Roper v. Simmons*, 543 U.S. 551 (2005), Justice Kennedy relied in part on the "evolving standards of decency" to hold that capital punishment for any murderer under age 18 was unconstitutional. I understand that the Supreme Court has ruled on this matter, but do you agree with Justice Kennedy's analysis?

Response: If confirmed as a district judge, I would be obligated to follow binding precedent of the Supreme Court, and I would apply the Court's decision in *Roper v. Simmons* as well as any other applicable precedent of the Court.

a. Do you agree that the Constitution's prohibition on cruel and unusual punishment "embodies a principle whose application is appropriately informed by our society's understanding of cruelty and by what punishments have become unusual?"

Response: The Supreme Court has held in several cases that "evolving standards of decency that mark the progress of a maturing society" are relevant in determining what constitutes "cruel and unusual punishments" under the Eighth

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Amendment. If confirmed as a district judge, I would follow those precedents as well as any other applicable precedents of the Court.

b. How would you determine what the evolving standards of decency are?

Response: I would follow the standards set forth in the relevant precedents of the Supreme Court, such as *Roper v. Simmons*, 543 U.S. 551 (2005).

c. Do you think that a judge could ever find that the "evolving standards of decency" dictated that the death penalty is unconstitutional in all cases?

Response: The Supreme Court has held that the death penalty is not unconstitutional in all cases. I do not believe that a lower court judge could hold otherwise.

d. What factors do you believe would be relevant to the judge's analysis?

Response: Because I do not believe that a lower court judge could hold the death penalty unconstitutional in all cases, I do not believe that any such analysis would be warranted.

e. When determining what the "evolving standards of decency" are, justices have looked to different standards. Some justices have justified their decision by looking to the laws of various American states,[1] in addition to foreign law, and in other cases have looked solely to the laws and traditions of foreign countries.[2] Do you believe either standard has merit when interpreting the text of the Constitution?

Response: If confirmed as a district judge, I would not consider the laws of the States or foreign law in interpreting the Constitution unless directed to do so by applicable precedent of the Supreme Court. In the specific context of the Eight Amendment, the Supreme Court has held that both State laws (*Roper*, 543 U.S. at 564), and foreign laws (*id.* at 575) are relevant in determining the "evolving standards of decency" that give meaning to the Cruel and Unusual Punishments Clause. However, the Court has also stated that foreign laws are not "controlling" because "the task of interpreting the Eighth Amendment remains our responsibility." *Id.*

i. If so, do you believe one standard more meritorious than the other? Please explain why or why not.

Response: Please see Response to Question 9(e).

10. In your view, is it ever proper for judges to rely on foreign or international laws or decisions in determining the meaning of the Constitution?

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[1] *Roper v. Simmons*, 543 U.S. 551, 564-65.
[2] *Graham v. Florida*, 130 S.Ct. 2011, 2033-34.

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Response: The United States Constitution is properly interpreted by reference to domestic legal sources, not foreign or international sources. If confirmed as a district judge, I would not interpret the Constitution by reference to foreign or international law unless directed to do so by applicable Supreme Court precedent.

a. Is it appropriate for judges to look for foreign countries for "wise solutions" and "good ideas" to legal and constitutional problems?

Response: I do not believe that district judges should look to foreign countries for wise solutions or good ideas unless directed to do so by applicable Supreme Court precedent.

b. If so, under what circumstances would you consider foreign law when interpreting the Constitution?

Response: If confirmed as a district judge, I would not consider foreign law in interpreting the Constitution unless directed to do so by applicable Supreme Court precedent.

c. Do you believe foreign nations have ideas and solutions to legal problems that could contribute to the proper interpretation of our laws?

Response: I believe that the Constitution and U.S. laws should be interpreted by reference to U.S. legal sources, not foreign sources.

d. Would you consider foreign law when interpreting the Eighth Amendment? Other amendments?

Response: If confirmed as a district judge, I would not consider foreign law in interpreting any amendment to the Constitution unless directed to do so by applicable Supreme Court precedent.

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Responses of J. Paul Oetken
Nominee to be United States District Judge for the Southern District of New York
to the Written Questions of Senator Chuck Grassley

1. **I am concerned with your limited courtroom experience in general, as well as your lack of experience in criminal law. As I'm sure you know, federal district court judges must rule on a host of different criminal matters. However, you have no experience in this area of the law.**

   a. **Is there anything you can share with us about your legal background to ease concerns about your lack of experience?**

      Response: While my legal experience has been focused primarily on civil matters, I have had experience in criminal law at several stages of my career. First, I worked on numerous criminal matters as a law clerk for three years to three federal judges, including a district judge on the United States District Court for the District of Columbia. In that position I worked closely with Judge Oberdorfer on all stages of criminal proceedings, including suppression hearings, jury instructions, trials, and sentencings pursuant to the Sentencing Guidelines. As a law clerk on the Seventh Circuit and the Supreme Court, I worked on several appeals in criminal cases, involving both substantive criminal law and criminal procedure issues. Second, as an attorney with the Federal Government, I worked on a number of legislative and other issues that involved criminal law. Third, while in private practice I have worked on a number of criminal investigations and government enforcement investigations; I have also worked on corporate compliance matters, developing and implementing policies to ensure compliance with criminal and other laws that apply to corporations and corporate executives (such as the Foreign Corrupt Practices Act). Finally, I believe that the breadth of my legal experience, including work in both the Federal Government and the private sector, together with my ability to learn quickly and my willingness to work hard, would serve me well in preparing me for the wide range of criminal matters as well as courtroom work generally that I would face if given the honor of serving as a district judge.

   b. **Do you feel your overall experience has prepared you for the criminal cases you will handle as a district court judge? Please explain.**

      Response: Yes. Please see Response to Question 1(a).

   c. **How do you plan to educate yourself with respect to federal criminal law and the Federal Sentencing Guidelines?**

      Response: I plan to take advantage of all the resources that are available to newly confirmed federal judges, including those of the Federal Judicial Center, judicial colleagues, and the local bar, to review relevant sources, including the Sentencing Guidelines and commentary regarding them, and to work hard to ensure that I am fully prepared to handle criminal matters if confirmed as a district judge.

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d. How much deference will you afford the Sentencing Guidelines?

Response: If confirmed as a district judge, I would afford the Sentencing Guidelines substantial deference. In *United States v. Booker*, 543 U.S. 220 (2005), the Supreme Court held that the Guidelines are advisory rather than mandatory. Although no longer mandatory, the Guidelines should be the starting point in sentencing and I would defer to them, both because they serve the important interest of reducing disparity in federal sentencing and because they represent the carefully considered judgment of experts in the area.

e. Do you agree that the sentence a defendant receives for a particular crime should not depend on the judge he or she happens to draw?

Response: Yes.

f. Under what circumstances do you believe it is appropriate for a district court judge to depart downward from the Sentencing Guidelines?

Response: If confirmed as a district judge, I would give substantial deference to the applicable sentencing range calculated pursuant to the Sentencing Guidelines, and I would consider a departure only as provided in the Guidelines and in accordance with applicable precedent of the Supreme Court and the Second Circuit.

2. In *Lawrence v. Texas*, a case in which you submitted an amicus brief on behalf of the National Gay and Lesbian Law Association, the Supreme Court relied on foreign law. Justice Kennedy cited decisions made by the European Court of Human Rights in concluding that prohibiting homosexual sodomy is at odds with current norms in Western civilization.

a. Do you believe it was appropriate of the Supreme Court to cite foreign law in *Lawrence*?

Response: I believe that the United States Constitution should be interpreted by reference to domestic legal sources, and I would not rely on foreign law unless directed to do so by applicable Supreme Court precedent.

b. Do you believe it is ever appropriate for American courts to cite foreign law?

Response: Please see Response to Question 2(a).

c. If foreign law is not binding, is it relevant at all?

Response: Please see Response to Question 2(a).

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3. **In your amicus brief to the Supreme Court in *Lawrence v. Texas*, you argued that classifications based on sexual orientation deserve heightened scrutiny. Justice Kennedy did not explicitly state which level of scrutiny should apply. In his dissent, Justice Scalia said, "Even if the Texas law *does* deny equal protection to 'homosexuals as a class,' that denial *still* does not need to be justified by anything more than a rational basis, which our cases show is satisfied by the enforcement of traditional notions of sexual morality."**

   a. **Do you personally believe that government classifications based on sexual orientation deserve a heightened level of scrutiny?**

      Response: I have not expressed a personal view on this subject. The arguments in the *amicus* brief that I co-authored in *Lawrence v. Texas* were arguments made on behalf of clients. Although I believed that there was a good faith basis in Supreme Court precedent for making those arguments, they do not necessarily reflect how I would approach these issues as a district judge. If confirmed as a district judge, I would apply the applicable precedents of the Supreme Court and the Second Circuit. The Supreme Court in *Lawrence v. Texas* did not decide that case under the Equal Protection Clause, but rather under the Due Process Clause, and it therefore did not decide the issues addressed in my *amicus* brief in that case.

   b. **On what precedent would you base your decision if faced with a similar case?**

      Response: Please see Response to Question 3(a).

   c. **Do you agree with Justice Scalia that the rational basis standard of review would be satisfied with "the enforcement of traditional notions of sexual morality"?**

      Response: If confirmed as a district judge and if faced with that question in a case that was properly before me, I would apply the applicable precedent of the Supreme Court and the Second Circuit.

4. **In your Senate Questionnaire you indicated your work in the White House Counsel's Office included providing advice on constitutional issues, including First Amendment and Appointments Clause issues. Did your work include providing advice on recess appointments? If so, please provide details of your involvement with such appointments.**

   Response: I recall only one situation during my work in the White House Counsel's Office in which I was involved in providing advice relating to recess appointments. In that situation, the question arose as to whether a possible recess appointee to the Federal Maritime Commission would be subject to displacement by a Senate-confirmed official.

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I presented that question to the Department of Justice Office of Legal Counsel (OLC), and OLC provided advice in the question consistent with past OLC advice on the subject.

5. **In your position at Cablevision, you have participated in or witnessed litigation regarding automated/remote DVR services, buffer copying, digital transmissions and other issues impacting copyright. Some legal commentators have suggested that these cases have not improved legal certainty in this policy area. Litigation has been costly to consumers, litigants, and society as a whole. Furthermore, the cases have created confusion among technology developers and entrepreneurs. I am not asking you to comment on the specifics of any particular litigation; instead, can you comment on a larger principle that perhaps the legislative branch, not the judiciary, is better suited to resolving such matters.**
Is it appropriate for a court step back and let the political process take the lead on cutting edge technological, social, or cultural issues?

Response: I believe that the proper role of a court, in copyright cases as in other cases, is to apply the law, based on a faithful reading of the text of the statute and applicable precedent, to the facts of a case that is properly before it. Where a case involves the application of a statute to new technology that may not have been contemplated by the drafters of the statute, it may present the court with a difficult interpretational issue. But that situation would not authorize a court either to revise the statute itself by reading into it a desired result, or to "step back" in the sense of refraining from deciding the case presented to it on the basis of the currently existing law.

6. **Do you believe that our federal government is one of limited and enumerated powers?**

Response: Yes. Pursuant to the Tenth Amendment to the Constitution, and as the Supreme Court has held in *United States v. Lopez*, 514 U.S. 549 (1995), and other cases, the federal government is one of limited and enumerated powers.

7. **What does the concept of separation of powers mean for the federal courts? If confirmed, will this be a governing principle which you will follow?**

Response: The doctrine of separation of powers is a doctrine at the core of the United States Constitution, as articulated in a long line of Supreme Court decisions, pursuant to which each of the three branches of government – Legislative, Executive, and Judicial – exercises its distinct powers without improper interference or encroachment by the other branches. If confirmed as a district judge, I would follow the Supreme Court's precedents regarding the separation of powers.

8. **Do you believe it is proper for a judge, consistent with governing precedent, to strike down an act of Congress that it deems unconstitutional? If so, under what circumstances, and applying what factors?**

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Response: Yes, it is proper for a judge to strike down an act of Congress when Congress has exceeded its authority under the Constitution as determined by binding Supreme Court precedent.

9. What is the most important attribute of a judge, and do you possess it?

Response: I believe that the most important attribute of a judge is the ability to impartially and objectively apply the law to the facts, with respect for the rule of law and without preference for a particular party or outcome. I believe that I possess that quality.

10. Please explain your view of the appropriate temperament of a judge. What elements of judicial temperament do you consider the most important, and do you meet that standard?

Response: I believe that the appropriate temperament of a judge includes the qualities of impartiality, even-handedness, patience, and respect for the law and the parties before the court. I believe that I meet this standard.

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

Response: Yes.

12. At times, judges are faced with cases of first impression. If there were no controlling precedent that dispositively concluded an issue with which you were presented, to what sources would you turn for persuasive authority? What principles will guide you, or what methods will you employ, in deciding cases of first impression?

Response: If confirmed as a district judge and if presented with an issue of first impression, I would start with the text of the relevant statute or other legal provision. I would also examine precedents of the Supreme Court and the Second Circuit in closely related or analogous areas of law, as well as persuasive authorities of other circuits, if applicable. I would do my best to decide the issue consistent with the best interpretation of the law based on the text and consistent with those precedents.

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

Response: If the Supreme Court or the Second Circuit had issued a binding decision on an issue that came before me as a district judge, I would apply that precedent regardless of my views of the decision.

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14. As you know, the federal courts are facing enormous pressures as their caseload mounts. If confirmed, how do you intend to manage your caseload?

Response: If confirmed as a district judge, I would manage my caseload by keeping careful track of the status of all cases, setting and enforcing firm deadlines for pretrial discovery, motions, and trials, and ruling on motions as promptly as possible. I would conduct trials efficiently and encourage mediation and settlement where possible.

15. Do you believe that judges have a role in controlling the pace and conduct of litigation and, if confirmed, what specific steps would you take to control your docket?

Response: Yes, I believe that judges have a significant role in controlling the pace and conduct of litigation. If confirmed as a district judge, I would take the steps outlined in response to Question 14 and I would ensure that I rule on motions promptly and resolve cases as efficiently as possible.

16. Please describe with particularity the process by which these questions were answered.

Response: I received a copy of these questions from the United States Department of Justice on March 23, 2011. I then prepared draft answers to the questions. I discussed my draft answers with DOJ staff. I then finalized my answers and sent them to DOJ staff for transmission to the Committee.

17. Do these answers reflect your true and personal views?

Response: Yes.

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Responses of J. Paul Oetken
Nominee to be United States District Judge for the Southern District of New York
to the Written Questions of Senator Jeff Sessions

1. **Supreme Court historian David J. Garrow wrote, "[i]n Blackmun's final term of 1993-94, his clerks were almost wholly responsible for his denunciation of capital punishment in his dissent, *Callins v. Callins*." In *Callins*, Justice Blackmun famously declared, "from this day forward, I shall no longer tinker with the machinery of death." You clerked for Justice Blackmun from 1993 to 1994, which was his final term on the bench, and when he issued that dissent.**

   a. **Do you believe Justice Blackmun was right to oppose the death penalty in spite of the language of the Constitution and the Court's precedents?**

      Response: Justice Blackmun's dissenting opinion in *Callins v. Collins* reflected his own position, not my personal view. The Supreme Court has held that the death penalty is constitutional, except in certain narrow circumstances, and if confirmed as a district judge I would apply those precedents.

   b. **Do you agree with the position Justice Blackmun took in the dissent in *Callins*?**

      Response: Please see Response to Question 1(a).

   c. **Do you believe the death penalty is constitutional?**

      Response: Yes, the Supreme Court has held that the death penalty is constitutional, except in certain narrow circumstances.

   d. **If appointed, would you have any philosophical or legal views that would prevent you from applying the death penalty?**

      Response: No.

2. **In a 2002 article regarding Oregon's physician-assisted suicide law, you argued that only Congress has the power to make law, and that the federal Controlled Substances Act did not prohibit Oregon doctors from prescribing lethal medication, as argued by then-Attorney General John Ashcroft. Specifically, you said the debate over physician-assisted suicide "should stay where it belongs, in the legislatures" because the states' "varied approaches to the issue may, over time, aid in forming a national consensus, making it possible for Congress to resolve it through national legislation."**

   In 2003, you co-authored an *amicus* brief, *pro bono*, on behalf of the National Gay and Lesbian Law Association in *Lawrence v. Texas*, which argued that the Court should apply a heightened level of scrutiny to government actions that classify persons according to their sexual orientation. While a plurality of the Court agreed

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with you, Justice Scalia dissented, concluding that the same thing "could be said of any law" and that under the plurality's reasoning, "judges can validate laws by characterizing them as 'preserving the traditions of society' (good); or invalidate them by characterizing them as 'expressing moral isapproval' (bad)."

Please take this opportunity to explain how your position that the physician-assisted suicide laws should be left to the judgment of the individual states and your position that Texas' anti-sodomy law was something that warranted federal intervention are consistent.

Response: First, the arguments in the *amicus* brief that I co-authored in *Lawrence v. Texas* were arguments made on behalf of clients. Although I believed that there was a good faith basis in Supreme Court precedent for making those arguments, they do not necessarily reflect how I would approach these issues as a district judge. If confirmed as a district judge, I would apply the applicable precedents of the Supreme Court and the Second Circuit. The Supreme Court in *Lawrence v. Texas* did not decide that case under the Equal Protection Clause, but rather under the Due Process Clause, and it therefore did not decide the issues addressed in my *amicus* brief in that case. Second, while *Lawrence v. Texas* involved a federal constitutional challenge to a state statute, the Oregon physician-assisted suicide matter did not involve any constitutional challenge. Rather, the issue was whether Congress had prohibited (or authorized the Attorney General to prohibit) physician-assisted suicide in the Controlled Substances Act, thereby preempting Oregon's law authorizing physician-assisted suicide. In my 2002 article, I argued that Congress had not done so – not that it lacked the power to do so. The Supreme Court subsequently agreed with my position in *Gonzales v. Oregon*, 546 U.S. 243 (2006). In suggesting that the issue should remain with the states, I was not making a constitutional point, but rather making the point that the state legislatures were the appropriate forums for legislation on the issue in the absence of federal legislation addressing it.

3. **You assisted Professors Louis Henkin and Harold Hongju Koh and Mr. Michael H. Posner, *pro bono*, in drafting their *amicus* brief to the Supreme Court in *Rumsfeld v. Padilla* in 2004. The *amicus* brief argued that the "indefinite executive detention" of Padilla "offend[ed] the rule of law and violat[ed] our constitutional traditions." The brief further maintained that the executive is constrained by the law, even in times of war, and that Padilla's detention was unconstitutional. The *amicus* brief also questioned the President's labeling of Padilla as an "enemy combatant," arguing that this is a "novel term not found international law," and that he should be tried in a civilian court.**

   a. **Setting aside the issue of military commissions, how do you reconcile your advocacy with both the history and the Supreme Court's ruling in *Ex parte Quirin*, in which Nazi saboteurs were arrested by the FBI, taken into military custody, tried and convicted by a military commission, and ultimately, executed?**

      Response: Although I assisted with a portion of this *amicus* brief in the *Rumsfeld v. Padilla* case, I am not an expert or a practitioner in this area of law. Section I.B

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of the *amicus* brief sets forth arguments as to why the Supreme Court's decision in *Ex parte Quirin* is consistent with the positions taken in that brief. However, that *amicus* brief does not necessarily reflect how I would approach these issues as a district judge. If confirmed as a district judge, I would apply the applicable precedents of the Supreme Court and the Second Circuit, including the Supreme Court's decisions in *Ex parte Quirin*, 317 U.S. 1 (1942), *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), and *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

b. Do you agree that *Quirin* is the last Supreme Court decision on the use of military commissions to try domestically arrested terrorists?

Response: Yes.

c. If confirmed, will you follow the holding in *Quirin*?

Response: Yes.

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Responses of Ramona V. Manglona
Nominee to be Judge for the District of the Northern Mariana Islands
to the Written Questions of Senator Chuck Grassley

1. **As a native of the Northern Mariana Islands, you are part of an extensive and prominent family in the community. Perhaps most notably your husband is an Associate Justice on the CNMI Supreme Court. While you can take pride in your family's accomplishments, this situation does raise a concern and possible conflicts of interest.**

   a. **Are you concerned about your ability to treat parties objectively given the many business and family associations you have within the Commonwealth's community? Please discuss fully.**

      Response: I am very confident of my ability to continue treating all parties objectively. In my eight years as a trial court judge in the Commonwealth Superior Court, I have presided over many cases involving individuals and entities. In each instance, I have treated all parties objectively by rendering decisions based solely on the facts of the case and the applicable law.

   b. **You have had to recuse yourself 55 times already as a trial judge. If confirmed as a Judge for the Federal District, do you think it will create too much of a burden on the legal system if you, as the only judge on the court, have to frequently recuse yourself? How will you handle such recusals and who will fill in for you when recusals are necessary?**

      Response: The majority of cases in which I recused myself were traffic or small claims cases. These types of cases are not within the federal court's jurisdiction. Upon an informal survey of actual cases filed in the federal court in the same period I served as a trial judge, I found that I would not have had to recuse myself as frequently. In the event my recusal is warranted under the Code of Conduct for United States Judges and 28 U.S.C. § 455, a designated judge from the courts of record of the Northern Mariana Islands, or District Court of Guam, or a circuit or district court judge or any of the circuits, may be assigned to serve as a judge under 48 U.S.C. § 1821(b)(2). Additionally, a combined Clerk of Court/Part-time Magistrate Judge position was authorized by the Judicial Conference for the Northern Mariana Islands District Court prior to the retirement of the former chief judge. The magistrate judge may preside over limited cases permissible by statute.

   c. **Do you have any concerns regarding what some might describe as a concentration of judicial power in one family?**

      Response: Maintaining the integrity of the judicial process is always my highest concern and priority. The constant application of the Code of Judicial Conduct and other statutes governing the activities of judges and justices have served well

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in ensuring that regardless of my personal relationship, justice is dispensed strictly on the rule of law.

d. If confirmed, what steps will you take to ensure the Federal District Court remains independent?

Response: If confirmed, I will apply the laws as interpreted by the United States Supreme Court and the Court of Appeals for the Ninth Circuit. If there is no applicable precedent, I will turn to other federal court decisions to consider their rationale as persuasive authority.

2. You have virtually no litigation or judicial experience in federal court. I am concerned about that lack of experience. In addition, you have limited experience in criminal law. As I'm sure you know, federal district court judges must rule on a host of different criminal matters.

a. Is there anything you can share with us about your legal background to ease concerns about your lack of experience?

Response: As a former prosecutor for the Northern Mariana Islands, I handled all types of criminal cases, ranging from misdemeanors to felonies, in jury trials as well as bench trials. During this period, I received constant formal trainings in the United States, including the Career Prosecutor's Training and Government Civil Practice Course sponsored by the National College of District Attorneys. As a general jurisdiction trial court judge for the past eight years, I have presided over a host of different criminal cases, and have presided over bench trials and jury trials. As a judge, I also received formal trainings from the National Judicial College in Nevada. These combined experiences and trainings have prepared me adequately for the position of federal district court judge.

b. Do you feel you are qualified to step into the position of Judge for the District Court? What specific steps will you do to prepare yourself for this position?

Response: I do feel qualified to step into the position of judge for the district court. Before assuming the position, I will review all the current federal court rules (rules of evidence, criminal procedure, civil procedure, etc.) and any applicable case law, as well as the federal criminal statutes. Most of the court rules used in the Commonwealth Superior Court mirror the federal rules, and so the review would be for any distinctions and/or exceptions.

c. Do you feel your overall experience has prepared you for the criminal cases you will handle as a district court judge? Please explain.

Response: Yes, I feel that my overall experience as a former prosecutor and a current trial court judge has prepared me for the criminal cases I will handle as a district court judge. Most of the criminal cases that are filed in the federal court

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historically involve drug cases, and I have presided over numerous drug cases as a trial court judge.

d. How do you plan to educate yourself with respect to federal criminal law and the Federal Sentencing Guidelines?

Response: I plan to read through the federal criminal law and the federal sentencing guidelines, including any applicable case law. I will utilize the numerous resources available at the Federal Judicial Center, including its online services. I also plan on attending all available courses tailored for district court judges.

e. How much deference will you afford the Sentencing Guidelines?

Response: I will afford the Sentencing Guidelines great deference.

f. Do you agree that the sentence a defendant receives for a particular crime should not depend on the judge he or she happens to draw?

Response: Yes.

g. Under what circumstances do you believe it is appropriate for a district court judge to depart downward from the Sentencing Guidelines?

Response: A downward departure (or upward departure) from the Sentencing Guidelines would be warranted if the facts of the particular case and the applicable law justify it.

3. Do you believe that your judicial decision-making will be affected by the fact that this position is term-limited?

Response: No, my judicial decision-making will not be affected by the fact that the position is term-limited.

4. Do you believe that our federal government is one of limited and enumerated powers?

Response: Yes, I do.

5. What does the concept of separation of powers mean for the federal courts? If confirmed, will this be a governing principle which you will follow?

Response: Separation of powers for the federal courts means federal courts also have limited powers under the U.S. Constitution. Its limited jurisdiction is to decide cases involving laws of the federal government and certain controversies involving diversity of citizenship, but does not include controversies limited to the states. If confirmed, I will follow this governing principle.

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6. Do you believe it is proper for a judge, consistent with governing precedent, to strike down an act of Congress that it deems unconstitutional? If so, under what circumstances, and applying what factors?

Response: Yes, it is proper for a judge, consistent with governing precedent, to strike down an act of Congress that it deems unconstitutional under the power of judicial review. When Congress exceeds its authority, the court has the obligation to strike down the act. The circumstances would be contingent on the particular Congressional power exercised and the infringed rights of the individual. The factors would be dictated by the applicable governing precedent.

7. What is the most important attribute of a judge, and do you possess it?

Response: The most important attribute of a judge is to be fair and impartial by according all parties due process and adhering to the rule of law. I believe I possess the fairness and impartiality that are crucial to being a judge.

8. Please explain your view of the appropriate temperament of a judge. What elements of judicial temperament do you consider the most important, and do you meet that standard?

Response: A judge has to be courteous and patient when considering the parties' arguments, and be firm in applying the law to the facts of the case. I have been adhering to this standard as a trial court judge and I will continue to do so if confirmed.

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

Response: Yes.

10. At times, judges are faced with cases of first impression. If there were no controlling precedent that dispositively concluded an issue with which you were presented, to what sources would you turn for persuasive authority? What principles will guide you, or what methods will you employ, in deciding cases of first impression?

Response: In the absence of controlling precedent, I would turn to decisions from the U.S. Supreme Court, the Ninth Circuit, and other federal courts that have addressed an analogous issue. In the absence of any case law, I would employ the rules of statutory construction.

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

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Response: Because I am bound by the precedents of the U.S. Supreme Court and the Ninth Circuit Court of Appeals, I will apply the holdings of their decision.

12. As you know, the federal courts are facing enormous pressures as their caseload mounts. If confirmed, how do you intend to manage your caseload?

Response: If confirmed, I intend to monitor the progress of cases by setting regular status conferences and setting stringent deadlines.

13. Do you believe that judges have a role in controlling the pace and conduct of litigation and, if confirmed, what specific steps would you take to control your docket?

Response: I believe that judges have a role in controlling the pace and conduct of litigation by scheduling hearings and setting deadlines. If confirmed, I would ensure that time sensitive cases, such as criminal cases with defendants who exercise their right to a speedy trial, be a priority of all counsel as well as the court. For civil matters, the civil procedure rules and case management plans will be enforced to ensure prompt and fair resolution of matters.

14. Please describe with particularity the process by which these questions were answered.

Response: I drafted my answers after a careful consideration of the questions. I then discussed some of my answers with a representative from the U.S. Department of Justice. I prepared my final responses to these questions thereafter.

15. Do these answers reflect your true and personal views?

Response: Yes.

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SUBMISSIONS FOR THE RECORD

STATEMENT OF CONGRESSWOMAN MADELEINE Z. BORDALLO
IN SUPPORT OF THE HONORABLE RAMONA VILLAGOMEZ MANGLONA
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
March 16, 2011

Chairman Leahy, Ranking Member Grassley, and distinguished members of this committee:

I am honored to provide testimony in support the Honorable Ramona Villagomez Manglona, who has been nominated by President Barack Obama to serve as the United States Judge for the District Court of the Northern Mariana Islands.

Judge Manglona is a proud and accomplished daughter of the Northern Mariana Islands. She graduated from the University of California at Berkeley in 1990 with a Bachelor of Arts in Economics and Japanese. In 1996, she earned her Juris Doctor from the University of New Mexico School of Law, where she graduated with honors after only two and a half years.

Following law school, Ms. Manglona served as a Judicial Extern for Judge C. Leroy Hansen in the U.S. District Court of New Mexico. She then returned to the CNMI and clerked for Judge Virginia Onerheim and Presiding Judge Alexandro Castro of the CNMI Superior Court.

In January of 1998, Ms. Manglona transferred to the Office of the Attorney General. In her capacity as an assistant attorney general, Ms. Manglona served in both the criminal and civil divisions. In 2002, she was nominated by former Governor Juan Babauta and confirmed by the CNMI Senate as the first female Attorney General of the Northern Mariana Islands. She served in this capacity until her appointment to the CNMI Superior Court in 2003.

As an associate judge of the CNMI Superior Court, Judge Manglona has presided over a variety of criminal and civil cases. She is admitted to practice law in the Court of Appeals for the Ninth Circuit, the U.S. District Court for the Northern Mariana Islands, the State of New Mexico, and the Commonwealth of Northern Mariana Islands. She has also served as a justice pro-tempore and judge pro-tempore for the Guam Supreme Court and Guam Superior Court.

Judge Manglona is a dedicated jurist who has served the people and judiciary of the CNMI well. I am confident that she will make an excellent addition to the Federal bench, and I join President Obama, Congressman Kilili Sablan, and the people of the Commonwealth of the Northern Mariana Islands in support of her nomination. I urge your expeditious and favorable consideration of her nomination. Thank you.

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March 8, 2011

The Honorable Patrick J. Leahy
Chairman, Senate Judiciary Committee
433 Russell Senate Office Building
United States Senate
Washington, D.C. 20510

Dear Senator Leahy:

We are pleased to inform you that the Committee on the Judiciary of the New York City Bar has found Paul Oetken, Esq., APPROVED for appointment to the United States District Court for the Southern District of New York.

Very truly yours,

Elizabeth Donoghue
Chair

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Statement of Senator Chuck Grassley
Ranking Member
Committee on the Judiciary
United States Senate

Before the Committee on the Judiciary

On the Nominations of:

Bernice Bouie Donald, to be United States Circuit Judge for the Sixth Circuit

J. Paul Oetken, to be United States District Judge for the Southern District of New York

Paul A. Engelmayer, to be United States District Judge for the Southern District of New York

Ramona Villagomez Manglona, to be Judge for the District Court for the Northern Mariana Islands

March 16, 2011

Mr. Chairman:

On today's agenda we have an interesting mix of nominations. We have a nominee for the Sixth Circuit, two nominees for the Southern District of New York, and a nominee for one of the territorial District Courts - the District Court for the Northern Mariana Islands. I join you in welcoming the nominees, their families and friends. I especially welcome of Mr. Oetken's family members who are here from Iowa. Mr. Oetken grew up in Iowa, and attended the University of Iowa.
I think, Mr. Chairman, that his Iowa background prepared him for his future success in New York.

Over the past few days, we have confirmed five more nominees to vacancies in the federal judiciary. In the short time we have been in session, we have confirmed 12 judicial nominees, more than in the same time period for any of the previous four Presidents. Nine of those confirmations were for seats designated judicial emergencies.

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This year we have reported 22 nominees out of Committee. With this hearing, our fourth, we will have heard from 17 judicial nominees this year. In total, we have taken positive action on 33 of the 58 judicial nominations submitted to the Senate during this Congress.

I would note that the seat on the Sixth Circuit to which Judge Donald has been nominated became vacant late last fall, during the lame-duck session of Congress. The other nominations before us today were submitted to the Senate a little over 40 days ago. That is far less than the average of 147 days between nomination and hearing set for President Bush's judicial nominees, and even less than the 68 days for the current President's nominees. So I think our quick action on these nominations demonstrates that we are working cooperatively with the Chairman on judicial nominations.

Mr. Chairman, I will not repeat the biographical information on our nominees. I commend them for their prior public service. I ask unanimous consent that the balance of my statement be entered into the record. I look forward to reviewing the testimony.

Judge Bernice Bouie Donald has been nominated to be a United States Circuit Judge for the Sixth Circuit. Judge Donald graduated from the University of Memphis in 1974 and then from the University of Memphis Cecil C. Humphreys School of Law in 1979. After a short period in private practice and with Memphis Area Legal Services, she served as an assistant public defender for Shelby County from 1980 to 1982. In 1982, she was elected to the Shelby County General Sessions Court as a General Sessions Judge in the criminal division. She served there until 1988 when she was appointed to be a United States Bankruptcy Judge for the Western District of Tennessee. In 1996, Judge Donald was confirmed by the Senate and appointed by President Clinton as United States District Judge for the Western District of Tennessee.

Mr. J. Paul Oetken is nominated to be United States District Judge for the Southern District of New York. Mr. Oetken graduated from the University of Iowa in 1988 and from Yale Law School in 1991. Mr. Oetken then spent three years clerking for federal judges, beginning with Judge Cudahy of the Seventh Circuit, then with Judge Oberdorfer of the D.C. Circuit, and then finally with Justice Harry Blackmun of the Supreme Court. Following his clerkships, Mr. Oetken

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entered private practice. In 1997, he became an attorney-advisor with the Department of Justice, Office of Legal Counsel. In 1999, Mr. Oetken joined the White House Counsel's Office as Associate Counsel to President Clinton. In 2001, he moved to New York and returned to private practice. In 2004, Mr. Oetken joined the legal department of Cablevision Systems Corporation. Currently, he is the Senior Vice President and Associate General Counsel at Cablevision.

Mr. Paul A. Engelmayer is nominated to be a United States District Court Judge for the Southern District of New York. Mr. Engelmayer graduated from Harvard College in 1983 and from Harvard Law School in 1987. Following law school, Mr. Engelmayer clerked for Judge Wald of the United States Court of Appeals for the District of Columbia. He then served as a clerk on the Supreme Court for Justice Thurgood Marshall from 1988 to 1989. After clerking, Mr. Englemayer served as an Assistant United States Attorney for the Southern District of New York from 1989 to 1994. From 1994 to 1996, Mr. Englemayer served in the Office of the Solicitor General of the United States as an Assistant to the Solicitor General. He returned to the United States Attorney's Office for the Southern District of New York in 1996, where he served as Chief of the Major Crimes Unit. Since 2000, Mr. Englemayer has served at Wilmer Cutler Pickering Hale and Dorr as a Partner. In 2005, he became the Partner in Charge of the New York Office.

Judge Ramona Villagomez Manglona is nominated to be a Judge for the District Court for the Northern Mariana Islands for a term of ten years. Judge Manglona graduated from the University of California at Berkeley in 1990 and from the University Of New Mexico School of Law in 1996. Following law school, she clerked for the Superior Court in the Commonwealth of the Northern Mariana Islands. From 1998 to 2003, she worked in the Office of the Attorney General, where she served in both the criminal and civil divisions. In 2002, the governor appointed her Deputy Attorney General and then Attorney General. In 2003, Judge Manglona was appointed to serve as an Associate Judge of the Superior Court, Commonwealth of Northern Mariana Islands. While on that court, she has also served as a Judge *Pro Tem* on the Guam Superior Court as well as a Justice *Pro Tem* on the Guam Superior Court.

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Statement of

The Honorable Patrick Leahy

United States Senator
Vermont
March 16, 2011

Statement Of Senator Patrick Leahy (D-Vt.)
Chairman, Senate Judiciary Committee
On Judicial Nominations
March 16, 2011

The Judiciary Committee today welcomes four of President Obama's outstanding nominees for appointments to the Federal bench. We will hear from Judge Bernice Donald of Tennessee, who has been nominated to the Sixth Circuit; two nominees to seats on the Southern District of New York, J. Paul Oetken and Paul A. Engelmayer; and Ramona Villagomez Manglona, who has been nominated to a 10-year term on the District Court for the Northern Mariana Islands.

I thank Senator Schumer for chairing this hearing and for his work to fill vacancies on the courts in New York. We had hoped to have an additional judicial nominee on this hearing today, but without blue slips from several Republican Senators, we were not able to include several nominees who are otherwise ready for hearings. I will continue to do as I have always done and respect the customary deference given to home state Senators by waiting to proceed on nominations from their states until both Senators have returned blue slips. This is meant to ensure that the home state Senators who know the needs of the courts in their state best are consulted and have the opportunity to make sure that the nominees are qualified. As Chairman, unlike certain of my Republican predecessors, I have not proceeded to hold a hearing on a single nominee without both blue slips having been returned. I hope that in return, that fairness is not abused simply to delay our ability to make progress filling vacancies.

I also repeat my thanks to our Ranking Republican on the Judiciary Committee, Senator Grassley, for his cooperation this year in helping us move nominations through the Committee process. Today is our fourth hearing this Congress. We have tried to hold hearings every two weeks the Senate is in session and I have tried to accommodate Senator Grassley by delaying from time to time the scheduling of nominees for hearings and Committee consideration.

I have worked to have the Senate return to regular order this year in the wake of the extraordinary refusal to consider nominations after last year's midterm election. So far the Senate has considered a dozen of the many judicial nominations reported by the Committee last year but returned to the President without final Senate action. We have several more yet to consider. These are nominations that could and should have been confirmed last year.

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There are currently 10 judicial nominees waiting for final Senate consideration having been reviewed and reported favorably by the Judiciary Committee. They are nominees to fill two judicial emergency vacancies in New York, a judicial emergency vacancy on the Second Circuit, a judicial emergency vacancy in California and vacancies on the Federal and D.C. Circuit, a vacancy in Oregon, and two vacancies in Virginia. I have urged the Senate leadership to proceed to debate and vote on them before the upcoming recess. We should be working to clear the calendar before the recess and not unnecessarily extend these vacancies. That is what a return to regular order entails.

Tomorrow I hope we will be able to report favorably another judicial nomination, that of Ed Chen to a judicial emergency vacancy in the Northern District of California. This will be the fourth time the Committee has reported the nomination of Judge Chen, who for nearly a decade has been a well-respected magistrate judge on the court to which he has been nominated. I hope we will be able finally to see the Senate debate and vote on his nomination. I also expect we will be able to report for the second time the nomination of Jim Cole to be Deputy Attorney General, the second highest ranking position at the Justice Department. The Senate was prevented last Congress from considering his nomination for over five months. The President proceeded to recess appoint him and renominate him to ensure that the Justice Department has the leadership it needs.

Federal judicial vacancies around the country still number too many, and they have persisted for too long. That is why Chief Justice Roberts, Attorney General Holder, White House Counsel Bob Bauer and many others—including the President of the United States—have spoken out and urged the Senate to act. Judicial vacancies first topped 90 in August 2009 and have remained above that level ever since, with more than 100 vacancies for most of that time. The unnecessary delays we have seen for the last two years in the consideration of judicial nominations mean that Federal judges are overburdened and the persistent vacancies threaten the ability of Americans to get a fair hearing in court. This is unacceptable.

Our failure to make progress filling vacancies during the first two years of President Obama's term stands in stark contrast to the progress we made during President Bush's first two years. When I became Chairman of the Judiciary Committee midway through President Bush's first tumultuous year in office, I worked hard to make sure Senate Democrats did not perpetuate the "judge wars" as tit-for-tat. During the first two years of President Bush's first term, the Democratically-controlled Senate confirmed 100 of his judicial nominations. Regrettably, this progress has not been duplicated, and the progress we made over the eight years from 2001 to 2009 to reduce judicial vacancies from 110 to a low of 34 has been reversed.

Even though President Obama started sending judicial nominations to the Senate two months earlier than President Bush, only 60 of his judicial nominations were allowed to be considered and confirmed during his first two years. Only 12 have been confirmed so far this Congress. Another 10 are ready for final Senate action. Nationally, Federal judicial vacancies continue to hover close to 100.

From his first judicial nomination over two years ago, President Obama has worked with Democratic and Republican home state Senators to identify superbly qualified, consensus

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nominations. The first nominee appearing before the Committee today, Judge Bernice Donald, continues this practice. Both of Tennessee's Republican Senators, Lamar Alexander and Bob Corker, have returned blue slips. The senior Senator from Tennessee, Senator Alexander, a member of Republican leadership, is here today to introduce Judge Donald to the Committee. I welcome him back.

For 16 years Judge Donald has been a district judge on the Western District of Tennessee, before that serving for seven years as a judge on the U.S. Bankruptcy Court for that district. She has also been a county judge in Shelby County, Tennessee, an Adjunct Professor at University of Memphis School of Law and Southwest Tennessee Community College, an Assistant Public Defender, a staff attorney with Memphis Area Legal Services and a sole practitioner.

Judge Donald's story has been a great American story. The sixth of 10 children raised on a sharecropper's farm in Mississippi, Judge Donald was one of the first students to integrate her high school and went on to earn her undergraduate and law degrees from the University of Memphis. Judge Donald was the first African-American woman elected to serve as a judge in Tennessee, the first in the Nation to serve as a Federal bankruptcy judge, and the first to be appointed to serve on the Federal district court in Tennessee. If confirmed, Judge Donald will be the first African-American woman to serve on the Sixth Circuit.

Both of the nominees to the Southern District of New York have the support of New York's two Senators, Senator Schumer and Senator Gillibrand. Both are superbly qualified.

Paul Oetken is currently Senior Vice President and Associate General Counsel at Cablevision Systems Corporation. Prior to that, Mr. Oetken was in private practice at Debevoise & Plimpton in New York and Jenner & Block in Washington, D.C., and served as an Associate Counsel to President Clinton and an Attorney-Advisor in the Office of Legal Counsel at the Justice Department. Born in Louisville, Kentucky, Mr. Oetken graduated with honors from the University of Iowa and received his law degree from Yale Law School. He then served as a law clerk at all three levels of the Federal judiciary, to Judge Louis F. Oberdorfer of the District Court for the District of Columbia, to Judge Richard D. Cudahy of the Seventh Circuit Court of Appeals, and to Supreme Court Justice Harry A. Blackmun.

Paul A. Engelmayer, currently a partner in the New York office of WilmerHale, previously served as an Assistant U.S. Attorney for the Southern District of New York and as an Assistant to the Solicitor General of the United States. Born in New York, New York, Mr. Engelmayer received his undergraduate and law degrees with honors from Harvard. After graduating from law school, Mr. Engelmeyer served as a law clerk to Judge Patricia Wald of U.S. Court of Appeals for the District of Columbia Circuit and then to Supreme Court Justice Thurgood Marshall.

Judge Manglona, currently an Associate Judge on the CNMI Superior Court also served as a Justice Pro Tempore on the Guam Supreme Court and a Judge Pro Tempore on the Guam Superior Court. Judge Manglona spent five years in the CNMI Office of the Attorney General in several capacities, including a year as Attorney General, and as a law clerk to several judges on the CNMI Superior Court. Born in Saipan, Northern Mariana Islands, Judge Manglona earned

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her B.A. from the University of California, Berkeley and her J.D. from the University of New Mexico. If confirmed, Judge Manglona would be the first indigenous person to serve as a U.S. District Court Judge in the Commonwealth of the Northern Mariana Islands.

I welcome all four of the nominees and their families to the Committee today.

# # # # #



March 16, 2011

BY HAND DELIVERY

The Honorable Patrick Leahy
Chairman, Committee on the Judiciary
United States Senate
Washington, D.C. 20510

The Honorable Charles Grassley
Ranking Minority Member, Committee on the Judiciary
United States Senate
Washington, D.C. 20510

RE: ***Support for the Nomination of the Honorable Bernice B. Donald to the U.S. Court of Appeals for the Sixth Circuit***

Dear Chairman Leahy and Ranking Member Grassley:

We write with enthusiasm on behalf of the National Employment Lawyers Association (NELA) to endorse the candidacy of U.S. District Judge Bernice B. Donald to be an Article III Judge on the U.S. Court of Appeals for Sixth Circuit.

NELA advances employee rights and serves lawyers who advocate for equality and justice in the workplace. It is the country's largest professional organization that is comprised exclusively of lawyers who represent employees in employment discrimination and other employment-related matters. NELA and its 68 state and local affiliates have more than 3,000 members around the country.

As part of achieving our mission, NELA endorses candidates for federal judgeships at both the appellate and district court levels. After an extensive review of a candidate's record, NELA endorses candidates who have not only excellent professional credentials but also an appreciation of the real world circumstances that employees face on the job and the need to provide a remedy for violations of their workplace rights.

Bernice Bouie Donald, currently a United States District Judge for the Western District of Tennessee in Memphis, has a well-rounded professional and judicial background and a stellar national reputation. She is highly qualified by experience, talent, and temperament for a seat on the Sixth Circuit Court of Appeals.

Judge Donald has served as a United States District Court judge since 1996. Before she was appointed to that bench, Judge Donald served eight years as the first African-American female Bankruptcy Judge and six years as a state court judge in the Shelby County General Sessions Criminal Court. She began her legal career at Memphis Area Legal Services as a Staff Attorney in the Employment Law & Economic Development Unit. She also served as an Assistant

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Public Defender for Shelby County for several years. It is this kind of professional diversity that makes her an exceptional choice for elevation to the Sixth Circuit.

Throughout her career, Judge Donald has been very active and involved in local and national civic and professional organizations. She is currently serving as Secretary of the American Bar Association, the first African-American woman to hold that office. She has also served as President of the National Association of Women Judges and Vice-President of the American Bar Foundation. Judge Donald has been very active in promoting diversity within the legal profession, and in 2008 she received the ABA Liberty Achievement Award for this work.

Judge Donald has served on numerous organizations and boards, including those of the United States Judicial Conference, the Federal Judicial Center, the American Bar Association, the American Bar Foundation, the National Conference of Women's Bar Associations, the National Association of Women Judges, the National Conference of Bankruptcy Judges, and the National Bankruptcy Conference. She has been involved in a number of public interest groups and given lectures and presentations on a wide range of topics.

If appointed and confirmed, Judge Donald would be the first African-American woman to sit on the Sixth Circuit, and she would be the first African-American from Tennessee on the Sixth Circuit.

She is well-respected by both the plaintiff and defense bars. NELA members who have practiced before her characterize her as friendly, but she demands a professional atmosphere in her courtroom. Most litigants feel that upon resolution of their cases that they have had a fair opportunity to make their cases, even if the case is not resolved in their favor.

In short, Judge Donald is an outstanding and qualified candidate, with an exceptional professional reputation. Her elevation to the Sixth Circuit would add not only much needed diversity to the Court, but also a very well respected judge with a stellar reputation for fairness.

Very truly yours,

Patricia Ann Barasch

Patricia A. Barasch
President, National Employment Lawyers Association

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February 17, 2011

Facsimile: (202) 224-9516

Hon. Patrick J. Leahy
Chairman, D-Vermont
United States Senate
Committee on the Judiciary
224 Dirkson Senate Office Building
Washington, D.C. 20510

Hon. Chuck Grassley
Ranking Member, R-Iowa
United States Senate
Committee on the Judiciary
224 Dirkson Senate Office Building
Washington, D.C. 20510

Re: Appointment of Ramona V. Manglona -- Commonwealth of the Northern Mariana Islands

Dear Senators Leahy and Grassley:

This letter is in support of the appointment of Ramona V. Manglona to the position of District Court judge for the Commonwealth of the Northern Marians Islands.

I have practiced law in the CNMI since December 1988, first with the Office of U.S. Attorney and then in private practice since 1992. Prior to that, I served as an AUSA in Roanoke, Virginia for over five years and prior to that, five years with the Antitrust Division of the Department of Justice. I have appeared before many judges in over 35 years of practice. CNMI Superior Court Judge Manglona is one of the better ones.

Judge Manglona is bright and studious and she writes her decisions in a logical, understandable manner. One day, you or your successors will consider her for the Ninth Circuit Court of Appeals.

Through a soft and professional demeanor in the court room, she commands respect from lawyers and laypersons. Her courtroom bears a strong imprint of justice and fairness. I have no qualms about her hearing any of my cases. I have won and I have lost before her, and I always felt that my client's position received fair and intelligent consideration.

I have heard from some in the community, mostly statesiders, that the Commonwealth needs an outsider to be a federal judge in order to insulate the court from the vagaries of local politics and families. Nonsense. Practically all state and federal judges at the trial court level in the United States are products of their local environment. The same goes for jurors who weigh life and death. Being local with knowledge of the community is considered positive, not negative. If conflicts arise under the law, the court and the litigants know how to handle the issue. I would trust Judge Manglona to give dignity and justice to all the individuals from this community that appeared before her, no matter

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their race or heritage or politics. She is not petty, and she is not isolated from the world beyond these tiny islands.

Both she and her husband John, who is a justice on the CNMI's Supreme Court, have stout character, moral uprightness and reputations for honesty and forthrightness. I partnered with John for a few years when I begin private practice, and I have the greatness respect for him. They have strong, supportive families and a good crop of children.

The Commonwealth needs a federal judge with roots in this community. Judge Manglona is the best choice, but she would be given high marks in any location, not just the CNMI. The CNMI is just the lucky recipient of her fine demeanor, character and mind.

I thank you for your time.

Sincerely yours,

Richard W. Pierce

cc allen_stayman@energy.senate.gov

02/18/2011 1:50AM

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Congressman Gregorio Kilili Camacho Sablan
Senate Judiciary Committee
Nomination Hearing for Judge Ramona V. Manglona
Wednesday, March 16, 2011

Chairman Schumer, Ranking Member Grassley, Members of the Senate Judiciary Committee:

Thank you for the opportunity to speak for a few minutes in support of Judge Ramona Villagomez Manglona, nominee for the U.S. District Court for the Northern Mariana Islands.

This is an historic moment for the people of the Northern Mariana Islands.

We have only been a part of the United States for 33 years. Judge Manglona, myself, and many of us became U.S. citizens by Executive Order of President Reagan in 1986. We have only been represented in the U.S. Congress for 27 months. And we have never had someone from our islands presiding on the U.S. District Court.

So to have Judge Ramona Manglona confirmed to the bench would truly be a milestone in our political maturity.

You will have ready access to Judge Manglona's academic credentials, her resume, her record on the Superior Court in the Northern Marianas.

Let me speak to her character, which was the basis for my decision to recommend her nomination to President Obama.

Opportunity for education has improved for the people of the Northern Marianas. But within my lifetime getting an education meant leaving home, often at an early age. I went off-island for high school at 11. Judge Manglona left home at age 12 to attend school in the mainland.

She is the eleventh of a dozen children. But her parents, Manuel and Luise Villagomez, recognized their daughter's intelligence and – in a family of hard workers – her capacity for achievement. Judge Manglona excelled at school, earning her undergraduate degree at Berkeley.

This may seem an ordinary accomplishment to you, but for someone from the islands, and especially for a woman from our islands, twenty years ago, this was not the norm.

Judge Manglona returned home, married, and started a family. Her husband, our Supreme Court Justice John Manglona, and their children, Dencio and Savana, are here today.

But Judge Manglona's hunger for education continued.

She made the extraordinary decision – with the support of her family – to leave home again to attend law school at the University of New Mexico.

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You can imagine how tough a choice that was and how difficult the time away from her family.

But she charged through law school in two and half years and returned home with another degree to her name.

Judge Manglona's mother and father were quite successful business people. Their daughter could easily have taken her place in the family's commercial enterprises.

Instead, she chose to employ her education and energy in public service. In the process she has been a groundbreaker for island women:

- the first to be confirmed as an Attorney General,
- the first to be confirmed to our local court,
- and, now, the first – woman or man from our islands – to be nominated to the federal bench.

I recommend Judge Manglona to you, not only as a person of talent and drive, not only as a trailblazing woman.

Most importantly, she is someone of integrity and impeccable character, who will serve with distinction as Judge on U.S. District Court for the Northern Mariana Islands.

Thank you for the privilege of introducing Judge Ramona Villagomez Manglona.

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FEB 25 '11 PM 3:00

February 10, 2011

Hon. Patrick J. Leahy, Chair
United States Senate
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Re: Nomination of Ramona V. Manglona

Dear Mr. Chairman:

I wish to express my strong support for the nomination of the Hon. Ramona V. Manglona as District Judge for the District of the Northern Mariana Islands.

I have practiced law in the Northern Mariana Islands for the past 40 years. I can truly say, without hestitation or reservation, that Judge Manglona is the finest judge before whom it has ever been my privilege to appear.

I was pleased to note that Judge Manglona received a "highly qualified" rating from the American Bar Association. That rating is fully consistent with my own assessment. Judge Manglona's qualifications are truly outstanding. Her legal ability and her professional ethics are unquestionable.

Judge Manglona has been a credit to the bench of the Commonwealth Superior Court, and I know that she will be an outstanding judge on the Federal bench. I respectfully urge the Committee to recommend her confirmation to the full Senate as quickly as possible.

If I can provide any additional information or assistance, I would be more than happy to do so. Thank you for considering my views.

Very truly yours,

MICHAEL A. WHITE, ESQ.
Attorney at Law

FEB 24 '11 PM 4:14